SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. EDGARDO SANCHEZ-FUENTES, **Defendant and Appellant.**	CAPITAL CASE Case No. S045423

Los Angeles County Superior Court Case No. LA011426
The Honorable Jacqueline A. Connor, Judge

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DEATH PENALTY

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CASES

STATUTES

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **EDGARDO SANCHEZ-FUENTES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S045423

STATEMENT OF THE CASE

Appellant and codefendants Jose Contreras and Benjamin Navarro were charged by the Los Angeles County District Attorney in a 40-count second-amended information filed on September 14, 1994, following a preliminary hearing, with crimes related to seven separate incidents that occurred, respectively, on December 31, 1991 (Outrigger Lounge), April 18, 1992 (El 7 Mares Restaurant), April 28, 1992 (Buenos Aires Mercado), May 4, 1992 (Woodley Market), May 17, 1992 (Restaurant Casa Gamino), May 22, 1992 (Ofelia's Restaurant), and May 29, 1992 (George's Market).[1] (7CT 2005-2042; 10CT 2986.)

The December 31, 1991 (Outrigger Lounge) charges were as follows: (1) second degree robbery (counts X [victim Margaret Tucker], XI [victim Eugene Engelsberger], XII [victim Praneet Gallegos], XIII [victim Jeanette Luettjohann], XIV [victim Marjorie Livesley], XV [victim Lois Skinner],

[1] Appellant and codefendants Contreras and Navarro were all charged with the same crimes, except that Navarro was not charged with counts VI through IX, and XXXVII through XL.

XVI [victim Robert Lehman], XVII [victim Walter DeWitt]; Pen. Code,[2] §§ 211, 12022, subd. (a)(1), & 12022.5, subd. (a)); and (2) assault great bodily injury and with deadly weapon (victim John Tucker) (count XVIII; §§ 245, subd. (a)(1), 12022, subd. (a)(1), 12022.5, subd. (a)).

The April 18, 1992 (El 7 Mares Restaurant), charges were for second degree robbery (counts XV (victim Nelson Hernandez), XVI (victim Lupe Guizar), & XVII (victim Rene Aguilar); §§ 211, 12022, subd. (a)(1), & 12022.5, subd. (a).)

The April 28, 1992 (Buenos Aires Mercado) charges were for second degree robbery (counts XIX [victim Paul Rodriguez], XX [victim Cecilia Rodriguez]; XXI [victim Arturo Flores], XXII [victim Dario De Luro], XXIII [victim Manuel Rodriguez] & XXIV [victim Magdalena Urrieta]; §§ 211, 12022, subd. (a)(1), & 12022.5, subd. (a).)

The May 4, 1992, charges (Woodley Market) were for special circumstances murder [victim Lee Chul Kim] (count VI; §§ 187, subd. (a), 12022, subd. (a)(1), 12022.5, subd. (a), & 190.2, subd. (a)(17)) and attempted second-degree robbery (counts VII [victim Lee Chul Kim], VIII [victim Guillermo Galvez], and IX [victim Eduardo Rivera]; §§ 664/211, 12022, subd. (a)(1), & 12022.5, subd. (a)(1).)

The May 17, 1992, charges (Restaurant Casa Gamino) were as follows: (1) assault with great bodily injury and with a deadly weapon (counts XXVIII [victim Armando Lopez], XXXI [victim Maricella M.]; §§ 245, subd. (a)(1), 12022.5, subd. (a), & 12022, subd. (a)(1); (2) second-degree robbery with firearm allegations (counts XXVIX [victim Armando Lopez], XXXII [victim Maricella M.], XXXIV [victim Javier Lopez],

[2] All further statutory references are to the Penal Code unless otherwise stated.

XXXV [victim Esequiel Flores],[3] & XXXVI [victim Arturo Lopez]; §§ 211, 12022, subd. (a)(1), 12022.5, subd. (a); and (3) assault with stun gun or Taser (victim Armando Lopez) (count XXX [victim Armando Lopez], & XXXIII [victim Maricella M.]; §§ 244.5, subd. (b), 12022, & 12022.5, subd. (a).)

The May 22, 1992, charges (Ofelia's Restaurant) were as follows: (1) assault great bodily injury and with a deadly weapon (counts XXXVII [victim Juan Saavedra], XL [victim Ofelia Saavedra]; §§ 245, subd. (a)(1), 12022.5, subd. (a), & 12022, subd. (a)(1)); (2) attempted second degree robbery (count XXXVIII [victim Juan Saavedra]; §§ 664/211, 12022, subd. (a)(1), & 12022.5, subd. (a)); (3) second degree robbery (count XXXIX [victim Obdulia Garcia]; §§ 211, 12022, subd. (a)(1), & 12022.5, subd. (a).)

The May 29, 1992, charges stemming from the George's Market incident were as follows: (1) the special-circumstances murder of a peace officer (victim Officer John A. Hoglund) with firearm allegations (count I;[4] § 187, subd. (a), 190.2, subds. (a)(3), (a)(5), (a)(7), & (a)(17), 12022, subd. (a)(1), & 12022.5, subd. (a)); (2) second-degree robbery with firearm allegations (counts II [victim Linda Park], III [victim Tom Park], IV [victim Gumersindo Salgado]; §§ 211, 12022, subd. (a)(1), 12022.5, subd. (a)); and (3) attempted willful, deliberate, premeditated murder

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[3] The information alleged the victim to be Esequiel Lopez. The prosecutor and trial court corrected the error during trial. (14RT 2219-2220, 2260; 15RT 2370.)

[4] Count I was alleged to have occurred on or about May 4, 1992. However, as set forth below in the statement of facts, the trial evidence showed that it occurred on May 29, 1992, and the court allowed mid-trial amendment of the information to reflect the correct date (9RT 1241).

(victim Enrique Medina) (count V; §§ 664/187, subd. (a), 12022, 12022.5, subd. (a)(1).

Appellant and his codefendants pleaded not guilty and denied all special allegations. (1RT 16-17; see also 9CT 2410-2411.) Their joint guilt-phase trial was by jury. (10CT 2997.) After all parties rested and on the People's motion, the court struck the allegation that the attempted murder in count V (victim Enrique Medina) was premeditated and deliberate. (11CT 3057.)

Appellant was convicted on all counts except counts VIII and IX. Personal firearm use allegations were found true against appellant on all remaining counts except XVIII, XIX, XXXV, XXXVI, XXXIX, and XL. (11CT 3159-3298; 12CT 3300-3406, 3408-3457.)[5]

A joint penalty-phase trial was held. The jury found the death penalty should be imposed upon appellant as to counts I and VI. (12CT 3508-3509.) The jury could not reach penalty verdicts as to codefendants Contreras and Navarro, as to whom the trial court declared a penalty-phase mistrial. (12CT 3494, 3518.) The trial court sentenced appellant to death on counts I and VI. (12CT 3598; see also 12CT 3613-3621 [Death Warrant].) The court imposed, as to the remaining counts, a total determinate term of 54 years and six months. (12CT 3598-3599.) Codefendants Contreras and Navarro were each sentenced to life in prison without the possibility of parole, plus determinate sentences of 50 years and 10 months (Contreras) and 44 years and eight months (Navarro). (12CT 3600-3603

[5] Codefendants Navarro and Contreras were also convicted as charged, with minor exceptions not relevant here.

STATEMENT OF FACTS

Appellant, codefendants Navarro and Contreras, and several other uncharged persons committed a series of violent gunpoint takeover robberies of markets, restaurants, and a bar over a five-month period during which customers and employees were robbed and assaulted, market-owner Lee Chul Kim was shot and killed, and Maywood Police Officer John Hoglund, who responded to a silent alarm during the George's Market Crimes, was shot and killed. Appellant and his codefendants were identified and captured within days of murdering Officer Hoglund.

A. Guilt Phase Prosecution Evidence – Case-in-Chief

1. The Outrigger Lounge Crimes of December 31, 1991 – Counts X Through XVIII

During 1991, the Outrigger Lounge, which was owned by Jeanette Luettjohan and her husband, was located on Laurel Canyon Boulevard near Sheldon Street in Sun Valley. On December 31, 1991, by around 8:15 p.m., the lounge was "pretty full," containing around 30 or more people, many of whom were regular customers. Among those present were Jeanette Luettjohan, Walter De Witt and his wife Janet De Witt and their neighbors "Art" and "Lisa," Anne Pickard and her boyfriend Dennis "Duke" Sorenson, Margaret Tucker and her husband John Tucker, Eugene[*sic*] Englesberger and his girlfriend Praneet "Patty" Gallegos, Marjorie Livesley and her friend Lois Skinner, bar waitress Barbara Salazar and her boyfriend Jose Rodriguez, and bartender Robert Lehman. (12RT 1933-1934, 1937; 13RT 1968-1969, 1973-1974, 2011-2013, 2033-2034, 2056-2057, 2074-2075, 2102-2104, 2123, 2133-2135; 16RT 2604-2605.) Pickard and Sorenson, the Tuckers, Englesberger and Gallegos, and Livesley and Skinner all sat at cocktail tables or at the bar, toward the front

portion of the lounge. (12RT 1902-1905, 1907, 1920; 13RT 2033-2034, 2056-2057, 2074-2075, 2123; 16RT 2605.)

a. The Crimes

Anne Pickard and Dennis Sorensen shared drinks while sitting at their barstools before Pickard walked to the restrooms that were located near the back of the lounge. (12RT 1905-1906.) Dennis Sorensen remained at their table by the front door. He saw a male enter the lounge, jump over the top of the bar, and "h[o]ld up the bartender," who was Robert Lehman. (13RT 2135.)[6] Sorensen saw a man holding a sawed-off shotgun pointed at Sorensen's torso. In English, the man demanded Sorensen's money – Sorensen complied and handed over around $300 and his wallet. (13RT 2133-2136.) The robbers demanded Sorensen's jewelry. Sorensen begged to keep his wedding ring, but the robber said, "You give it to me or I'll shoot your f**king finger off." (13RT 1975.) Sorensen complied, then lay underneath one of the tables. (13RT 2136.)

Marjorie Livesly, sitting with Lois Skinner, realized that a robbery had begun when a man ran into the Outrigger holding something, then two other men ran in behind him. Two of the men ran to the back of the bar. One of the three men yelled for everyone to lie down on the floor, and pounded on the bar with something that sounded metallic. Livesly and Skinner lay on the floor. A robber who had stayed in the front of the bar and was armed with a black revolver took Livesly's and Skinner's purses. (13RT 2075-2079.) He also yanked Livesly's bracelet from her wrist. Another robber walked up to them and grabbed a chain that Skinner had around her neck and demanded Livesley's money. She responded that it

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[6] Sorensen thought that man had a revolver, but understood he was wrong. (13RT 2135.)

was in her purse, which she had given to the robber who was by the front door. (13RT 2077-2078.)

Praneet Gallegos and her boyfriend, EugeneEnglesberger, were sitting at the bar when Gallegos observed two men with a rifle and a handgun, respectively, enter through the front door. Two other robbers were with them. (16RT 2604-2606.) Englesberger testified that he looked toward the front door of the lounge and saw a man with a full-sized shotgun. Englesberger saw a second man, armed with a handgun, jump over the bar. (13RT 2056-2057.) A third man, speaking broken English and armed with a "gray, chrome" automatic handgun, demanded Englesberger's wallet and jewelry. (13RT 2058-2059, 2061.) Englesberger handed over his wallet containing $40, and his diamond ring and watch, but was unable to unclasp his bracelet; the man ripped it from Englesberger's wrist. The same man took jewelry from Gallegos, who handed those items over pursuant to the gunman's demands. The robbers then told Englesberger and Gallegos to lay on the floor. (13RT 2059-2061; 16RT 2607-2608.)

Meanwhile, according to bartender Robert Lehman and owner Jeanette Luettjohan, a man holding what appeared to be a sawed-off shotgun with a pistol grip jumped over the bar and landed on Lehman, knocking him over. The gunman, speaking broken English with a Hispanic accent, ordered Lehman and Luettjohan to get on their hands and knees, and said the gunmen were "not kidding." Lehman and Luettjohan complied. (13RT 2011-2013, 2017, 2104-2106.)[7] Luettjohan could hear

[7] According to bar waitress Barbara Salazar, a man holding a "square" handgun jumped over the bar and said, "This is a holdup." The handgun looked like a black nine-millimeter handgun in evidence as People's Exhibit 282. (13RT 1970.) That robber was taller than the one with the rifle. The handgun robber said, "This is a holdup." (13RT 1969-1970, 1992-1993.)

glass breaking while lying on the floor. She heard one lady ask to be able to keep her car keys. (13RT 2106-2107.)

According to waitress Barbara Salazar, her boyfriend, Jose Rodriguez, did not speak English and did not understand the robbers' commands. One of the robbers threw Rodriguez and "Jeffrey" to the floor, and called Rodriguez mean names. (13RT 1973-1974.) Salazar heard the robbers tell Jeanette Luettjohan to lie down. (13RT 1977.) Elderly people sitting at a booth started to cry. The robbers said to "shut up." (13RT 1974.) One of the robbers used his gun to knock over glasses that were on the bar. (13RT 2062.)

John Tucker realized a robbery was occurring when a man jumped over the bar, "took over" the bartender, and someone yelled, "Hit the f**king floor." (13RT 2123-2124.) Margaret Tucker realized a robbery was occurring when, following an exclamation of, "What is this?" by John Tucker, she turned, and saw a man with a firearm pointed at her forehead at close range, around a foot and a half away. The man, speaking English, ordered Margaret to get on the floor. She complied, as did other customers who also were told to lay on the floor. (13RT 2034-2035, 2040.) John Tucker apparently did not respond quickly enough – one of the robbers struck him with the butt of a shotgun, breaking two ribs. (13RT 2124, 2127; 16RT 2607-2608.) John Tucker went to the floor, covered his wife to protect her, and said "a little prayer." (13RT 2036-2037, 2124, 2129.) He made it a point to not look around in order to keep them safe. (13RT 2129.)

Once on the floor, Margaret Tucker could see underneath the bar. She heard someone jump over the bar, then saw feet land on the floor and the bartender's feet placed before the cash register. Then Margaret Tucker saw feet moving, "going out toward the back, like they were going to the other room in the back." The robbers ordered the customers to remove

their jewelry. The ladies in the bar were upset; one became hysterical. Margaret heard the robbers ask John Tucker if he had any money. He said he did not have a wallet, and told the men to take Margaret Tucker's purse. (13RT 2036-2038.) Margaret Tucker's purse, which contained her wallet and $300, was on the bar stool next to her. It was gone when she got up. The men also took jewelry from her. (13RT 2038, 2124.) None of John Tucker's personal property was taken. (13RT 2124.)

Meanwhile, the gunman who had jumped over the bar took from bartender Robert Lehman at gunpoint his wallet (which contained $125), money clip, and wristwatch, ordered him to open the cash register, then told Lehman to lay down again, and for bar waitress Salazar to join him. (13RT 1970, 2013-2017.) According to Salazar, the robber with the rifle stood watch in front of the jukebox while the other robber was behind the bar. (13RT 1995-1996.) The man with the rifle used it to break some glasses at the end of the bar. (13RT 1971.)

The gunman behind the bar pulled the cash drawer from the register, removed around $410 in cash from it, then dropped the drawer on Lehman's head. (13RT 2014-2017.) Then the man, with his firearm touching Lehman's back, ordered Lehman to take him to the "rest of the money." (13RT 2017-2018.) They walked toward the office from the bar area. Lehman observed another man in the bar, standing at the office door by the pool table with what appeared to be a silver or chrome .45 automatic handgun. (13RT 2021, 2024.) That man, who appeared to speak English well, looked at Lehman and asked where he was going. The robber taking him to the office said that was where they were going. (13RT 2021-2022.) Lehman led the man to the floor safe there, opened it, and following the man's directions, handed him the contents of the safe, approximately $795. (13RT 2018-2019, 2022.) Waitress Salazar heard the robbers in the back room where the safe was kept, and the sound of coins rolling around.

(13RT 1977.) The robber ordered Lehman to return to the bar area, and to lie down in front of the pool table. When he did so, Lehman saw that everyone else was already on the floor. (13RT 2020-2022.)

Meanwhile, while playing pool with "Art," Walter DeWitt noticed a man standing by them holding a revolver, watching everyone. Walter heard "a whole bunch of ruckus," then other men were walking through the bar, demanding that people there hand over their valuables and lay on the floor. There appeared to be five robbers. They spoke mostly in English, with a Hispanic accent. One robber appeared to be Asian. One robber appeared to have a sawed-off shotgun. Walter mostly watched the gunman near the pool table since he was the one keeping an eye on the people in that area. The robbers were taking property from the people who were lying on the floor. The man by the pool table with the revolver took Walter's watch and wallet from him at gunpoint. Walter never got his property back. (12RT 1935-1939.)

Meanwhile, after using the restroom, Pickard walked around half of the way down the hallway that led back to the barroom area where she and Dennis Sorensen had a table, and saw that everyone in the lounge was lying on the floor. Then she noticed that a man was standing in the middle of the walkway between the bar stool area and some tables, holding what Pickard thought could be a shotgun, although she was not knowledgeable about firearms. Pickard froze for a minute, then heard a young woman say, "Please don't take my keys, you can have everything else." (12RT 1906-1909.) Pickard backed up and returned to the bathroom. (12RT 1909, 1917.)

The robbers eventually left the Outrigger Lounge. (13RT 2077, 2079.) Once he could no longer hear the robbers' voices, bartender Lehman stood up. Jeanette Luettjohan called the police. (13RT 2023, 2110-2111.) When the robbers left and he stood up, Sorensen realized that

Pickard was not at the bar. Sorensen called out for her before other customers told him to be quiet. (13RT 2107-2108, 2136.) Pickard heard Sorensen calling for her, left the bathroom, and saw that the people in the bar were getting up off the floor, talking, appearing "frantic." (12RT 1909-1910.)

The robbers stole the cash in the cash register, the day's receipts, and their backup cash. Jeanette thought they had lost around $1,600, roughly, but could not be sure because they did not have a count for the evening's take, and she did not know what the day shift had taken in. They also lost around $125 worth of prepared food that was intended for the patrons to eat that evening. (13RT 2108-2109.)

b. Witness Identifications

Margaret Tucker saw three men during the robbery – the one who held the gun to her head, the one who jumped over the bar, and "the other one that was the real quick one." She saw three men run out from the Outrigger after the robbery. According to Margaret Tucker, the man who jumped over the bar had a rifle of some sort, or a shotgun. The man who held a firearm to Margaret's head had a handgun. The third man also had a "long gun" of some kind. (13RT 2038-2040.) The man who pointed a gun at Margaret Tucker's head, with certainty, was codefendant Navarro. (13RT 2041; see also 13RT 2043-2050, 2052.) John Tucker thought that possibly four or five men were involved, and possibly a short woman with "shorter hair" who appeared to be half-Hispanic and half-Asian. (13RT 2125-2126, 2128-2131.) John Tucker could not identify anyone in the courtroom as being one of the robbers. (13RT 2125.)

Walter De Witt spoke to responding police officers after the robbers left, but did not give them a description of the men he saw. (12RT 1939, 1948.) According to De Witt, the robber who stood by the pool table with a

revolver and who took De Witt's watch and wallet from him was Contreras. (12RT 1939.) De Witt later identified Contreras by photograph, in a live lineup at the county jail, and at the preliminary hearing. (12RT 1939-1941.) De Witt was 100 percent certain, "absolutely positive," as he testified that Contreras was the robber he saw. (12RT 1942, 1951.) At trial, De Witt did not remember what the man with the shotgun looked like, and thus could not respond to the question by appellant's attorney whether appellant looked like that man. (12RT 1948.)

At trial, Barbara Salazar identified Navarro as one of robbers, the one with the rifle. He was taking jewelry and purses from the ladies, and ordering them to lie down. (13RT 1971-1972, 1987-1988.) Navarro was "actually ripping them off their necks." (13RT 1972.) Navarro was the robber who threw both Jose Rodriguez and "Jeffrey" to the floor, and called Rodriguez mean names. (13RT 1973-1974.) Salazar based her identification of Navarro on his height and facial features. (13RT 2008.) Navarro had the rifle, and he dangled stolen purses from the rifle while he acted as a lookout by the front door. (13RT 1980-1981, 1983.) Salazar identified Navarro in court as the robber with the rifle. (13RT 1980-1981.) On July 18, 1992, Salazar viewed a photographic lineup. (13RT 1978.) She identified a photograph of appellant as looking similar to one of the robbers. (13RT 1980, 1983.) Salazar did not know what appellant did during the robbery. (13RT 1984.) Salazar was unable to identify anyone at live lineups conducted at the county jail. (13RT 1980.) Salazar saw a total of four robbers leave as the robberies ended, but only saw two during the robberies. (13RT 1977, 1988.)

Eugene Englesberger spoke to police the night of the incident and told them what happened. He described the robbers as Hispanic, and said that one had a thin mustache. (13RT 2066-2067.) Englesberger was not certain enough to make an in-court identification of any of the robbers.

(13RT 2062-2063.) However, on June 29, 1992, Englesberger identified a photograph of a person as possibly depicting the robber who took his jewelry. (13RT 2064, 2069.) Englesberger was unable to identify any suspects during a live lineup at the county jail. If appellant, Navarro, and Contreras were the robbers, their appearances had changed after the robberies. Englesberger was not excluding appellant and his codefendants, but just saying that he could not identify anyone. (13RT 2070-2073.)

Jeanette Luettjohan later viewed photographs of appellant, Contreras, and Navarro, and did not select any of them as possible suspects. The only person whom she "saw best" was the person with the shotgun who jumped over the bar. Luettjohan did not think that appellant, Contreras, or Navarro were that person, but she could not be sure. (13RT 2114-2115.) Luettjohan was not able to identify anyone because she did not get a good look at the robbers. (13RT 2109-2110.)

The only robber Dennis Sorensen thought he might be able to recognize was the one who jumped over the bar, but Sorensen did not see anyone in the courtroom who looked like that person. (13RT 2136-2137.) However, on June 29, 1992, Sorensen viewed a photographic lineup and selected Contreras's photo as depicting the person who went over the bar. However, Sorensen testified at trial that he was not certain at the time, and that he indicated he would need to see that person in person to be certain. (13RT 2137-2139.) Sorensen, who had four or five drinks before the robbery, was not 100 percent certain, so he did not want to identify anyone in court. (13RT 2141-2142.)

Praneet Gallegos identified appellant at trial as the robber with the shotgun. (16RT 2608-2609.) Appellant was in the bar, pointing his gun at people, telling them to take out their jewelry. (16RT 2609.) Before trial, Gallegos identified appellant in a photographic lineup, although on one occasion she did so while indicating she was "not sure." (16RT 2609-

2613.) Gallegos did not know how to answer the question of whether she was certain appellant was one of the robbers, but she thought he was. (16RT 2614.) As she looked at appellant in the courtroom, Gallegos was "not sure" appellant was one of the robbers. (16RT 2617.)

The man Anne Pickard saw when she first exited the bathroom had a "Beatle style haircut," and wore jeans and a short jean jacket. (12RT 1910.) In the courtroom, Pickard identified appellant as the gunman whom she had seen holding a shotgun. (12RT 1910-1911; see 12RT 1906-1909.) The events were still fresh in Pickard's mind, and she had a clear, unobstructed, and well-lit view of appellant in the bar during the robberies. (12RT 1911.)

Pickard thought that she had given the police a description of the gunman she had seen. (12RT 1911-1912.) On June 29, 1992, Los Angeles Police Detective Ray Hernandez showed Pickard photographs in an effort to identify suspects. Pickard identified a photograph of appellant in position number four as the suspect she had seen in the lounge. She did not identify photos of Contreras (position number one) or Navarro (position number three) in the photographic lineup she viewed. (Peo. Exhs. 188-189; 12RT 1912-1913.) Pickard then attended a live lineup at the county jail where she viewed six men. Pickard again identified appellant. (12RT 1913-1914.) Pickard did not identify any other suspects, and had not seen any other robbers during the robbery. (12RT 1914.) Pickard also identified appellant at the preliminary hearing in this matter. She was "positive" in her trial identification of appellant. (12RT 1915.) Pickard thought that the entire robbery lasted just a few minutes. She did not hear anyone screaming or yelling during the robbery. (12RT 1916.)

On July 7,1992, Marjorie Livesley viewed a photographic lineup and made a tentative identification of a suspect, but found it hard to identify the robbers from the photos. She also made an identification at the live

lineup at the county jail, and identified suspects at the preliminary hearing. (13RT 2079-2080.) At trial, Livesly identified Contreras as the robber who entered the bar, ran to the back, then demanded her money after she had given her purse to another robber. (13RT 2081, 2096.) She also identified Contreras as the robber who ripped the necklace off of Skinner's neck. (13RT 2096.) Livesley also identified Contreras at the preliminary hearing. (13RT 2087.) She was "pretty certain" of her identification. (13RT 2098.) The person who had the shotgun was around five feet, eight or nine inches tall. She described the man with the shotgun as wearing a watch cap and a bulky jacket. (3RT 2090.)

When Livesly attended the live lineup at the county jail, she told the detectives that she recognized a piece of her jewelry that was recovered, a bracelet. (13RT 2084.) She identified a bracelet in court at trial as "similar" to her stolen bracelet. (Peo. Exh. 136B; 13RT 2088, 2091.) On a photographic lineup, Livesley selected photographs of Navarro and Contreras. (13RT 2084-1087.) She also picked Contreras during a live lineup. (13RT 2088.) When Livesly identified Contreras at the preliminary hearing, she did so with 35 percent certainty. (13RT 2095.)

2. The El 7 Mares Restaurant Crimes of April 18, 1992 – Counts XXIV Through XXVII

During April 1992, the El 7 Mares Restaurant was located on Whittier Boulevard in Los Angeles. Present there on the evening of April 18, 1992, among others, were manager Magdaleno Urrieta, security guard Rene Aguilar, waitress Lupe Guizar, and patrons Nelson Hernandez and his wife Cecilia. (5RT 2496; 16RT 2620-2621, 2667, 2572-2573.) According to waitress Lupe Guizar, there were probably around six or seven employees working that night, including the manager and security guard, and there

were between eight and 15 customers in the restaurant that evening. (16RT 2629.)

a. The Crimes

Around 8:00 p.m. on April 18, 1992, according to security guard Rene Aguilar, two men walked into the El 7 Mares Restaurant and were seated. One wore green pants and a flowered shirt. The other may have worn a black shirt and dark blue pants. Shortly thereafter, another two men entered and walked through the dining room, followed by another two men. (16RT 2572-2576.) Waitress Lupe Guizar, who was sweeping by the back door of the restaurant, also observed two men enter the restaurant and sit down as if they were customers intending to order food. Guizar observed other men enter who appeared suspicious because they wore long coats. (16RT 2620-2621.) Nelson Hernandez and his wife Cecilia entered the El 7 Mares Restaurant for dinner around the same time. (5RT 2496.) They were seated and given menus. (15RT 2497, 2501, 2518.)

In the front of the restaurant, one of the last two men who entered produced a shotgun and told the first two men who had entered to "Take care of the guard." (16RT 2576-2577.) Waitress Lupe Guizar saw the first two men who had entered stand up, walk to where the security guard was, and "g[e]t a hold of him" at gunpoint. (16RT 2575-2576, 2621-2623.) Nelson Hernandez also observed two men point guns at the security guard, whom they disarmed. One of the two men was wearing a black shirt with a polka dot design of some kind. (15RT 2497.) The robbers took security guard Aguilar to an area by the refrigerator, where they held a gun on him. When Aguilar turned around, one of the robbers, the one wearing the black shirt, hit Aguilar on the chest with a gun. The men took Aguilar's baton,

gun, and handcuffs,[8] then brought Aguilar to the kitchen, where he and others had to lay face down on the floor. (16RT 2577-2578.) The rest of the robbers "took care of" the other customers, making them raise their hands and walk to the kitchen. The robbers told the customers, "Don't move, don't turn around; otherwise, I'll kill you." (16RT 2577.)

According to waitress Lupe Guizar, the robbers took the other restaurant employees, including her, into the kitchen. (16RT 2626-2627.) Once in the kitchen, Guizar observed that they took money and jewelry, "anything . . . of value," from everyone. Around $290 was taken from Guizar and her purse. (16RT 2628.) Guizar also testified that another man had entered the office, where the restaurant manager was. (16RT 2623-2624.)

According to manager Magdaleno Urrieta, around 8:15 p.m., while in his office, he saw someone walk by in the parking lot, then approach the window to Urrieta's office. The man then entered Urrieta's office holding an automatic firearm. (16RT 2668.) The man was speaking, "Salvadorian, Honduran." Because Urrieta could hear other voices, he believed that gunman had accomplices. Urrieta handed over around $5,000 in cash and checks. The man then turned Urrieta toward the wall, frisked him, struck him once when Urrieta turned, then took Urrieta to the kitchen and told him to lie on the floor along with the other employees, and possibly customers as well. The robbers frisked the victims and took Urrieta's watch, chain, a wedding ring, and wallet containing around $80. (16RT 2668-2671.)

Meanwhile, aware that a robbery was taking place, Nelson Hernandez and his wife concentrated on each other, ignoring the robbers, hoping they would leave Nelson and Cecilia alone. However, two robbers approached

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[8] People's Exhibit 157 was Aguilar's handcuffs (he had scratched his initials on them). (16RT 2582.)

Nelson and Cecilia and told them to go to the middle of the restaurant with the other customers. Nelson identified Navarro in court as one of the two men and the person who ordered Nelson and Cecilia to sit in the middle aisle of the restaurant. They were taken back to the kitchen, along with other customers and employees and ordered to lay on the floor. One or two other gunmen there maintained control over the victims. (15RT 2598-2501, 2507.)

According to Nelson Hernandez, the robbers in the kitchen threatened to shoot, kick, and beat the victims if they did not hand over their valuables. The men instructed the victims to hold their valuables in their hands, to hold their hands up so the robbers could come around and collect the victims' property, and to not look at the robbers. The robbers took $200 from Nelson, and a wristwatch. They took cash and around $8,000 worth of jewelry from Cecilia, including her wedding band, her engagement ring, and a ring Nelson gave her for her birthday. (15RT 2502-2504.)

According to security guard Aguilar, manager Urrieta was also in the kitchen, on the floor. The robbers took chains and money from the people in the kitchen, including both restaurant staff and customers. (16RT 2579.) The robbers kept telling the victims to not turn around. The victims were kept in the kitchen for around 15 minutes. In the kitchen, Aguilar saw a black automatic gun. Each robber was armed. (16RT 2580-2581.)

According to security guard Aguilar, another robber went to the cash register to open it. (16RT 2577.) A man, wearing a long coat possibly armed with a shotgun, approached the waitress who was working at the cash register, and demanded at gunpoint that she open the register. (16RT 2624-2625.) He was accompanied by another man. The waitress opened the cash register and the man took the money that was in it. (16RT 2625.) After the men left, Urrieta saw that the restaurant's cash register had been opened and looted. (16RT 2672.)

The robbers spoke with Central American accents. (16RT 2580.) The entire robbery probably took around 15 to 20 minutes. According to Nelson, the robbers were not "real rushed," but rather, "methodical." (15RT 2518.)

b. Witness Identifications

Nelson Hernandez identified Navarro in photographs from the El 7 Mares Restaurant, and also from the George's Market crimes (which are discussed below) (15RT 2508-2509), and in a live lineup after first identifying a non-suspect, then correcting that misidentification (15RT 2509-2512). Nelson also had no difficulty identifying Navarro at the preliminary hearing. (15RT 2513.) Navarro was armed during the crimes with a black or dark-colored ".45 type or maybe nine-millimeter type" automatic firearm. (15RT 2499-2500.) Nelson saw one or two other robbers in the restaurant. (15RT 2500.) The robbers spoke with Central American accents. (15RT 2502.) Nelson did not recognize either appellant or Contreras. However, he did not get a clear enough look during the robbery to say whether appellant or Contreras was one of the robbers. (15RT 2515-2516.) People's Exhibit 50 looked like the shirt that Navarro wore during the robbery. People's Exhibit 169 was a watch like the one that was stolen from Nelson, and it fit when he tried it on. (15RT 2512-2513.)

At the preliminary hearing in this matter, security guard Aguilar was not sure whether appellant was one of the robbers. (16RT 2653.) However, at trial, Aguilar identified appellant, Navarro, and Contreras as having been among the robbers. Appellant was one of the first men to enter, and he held the gun to Aguilar's ribs. Navarro watched customers and staff during the robbery. Contreras was the person carrying the shotgun. (16RT 2581-2582.) Aguilar also identified appellant, Contreras,

and Navarro in a photographic lineup. (16RT 2583-2584.) Aguilar was most certain of his courtroom identification of appellant and Contreras. Aguilar was "positive about these three. I'm sure." (16RT 2654.) Aguilar did not want to look at appellant and Contreras and Navarro in court because of what they had done. Aguilar had seen six robbers in the restaurant, and only three were in court, which caused him concern. (16RT 2656.)[9] Aguilar was "absolutely certain" that appellant, Navarro, and Contreras participated in the robbery of the El 7 Mares Restaurant on April 18, 1992. (16RT 2662.)

Manager Magdaleno Urrieta did not identify anyone in court because during the robbery, his attention was on the gun, and the way the robber had his finger on the gun. (16RT 2672-2673.)

According to waitress Lupe Guizar, the men spoke Spanish with Central American accents as if they were from El Salvador. (16RT 2624.) Guizar recognized their accents when one of the men said a "bad word" to her in Spanish. (16RT 2627.) At trial, Guizar identified appellant as one of the first robbers in the restaurant, who sat down as if he was going to eat, and who drew a gun on the security guard, and Contreras as the robber with the large gun. (16RT 2629-2630.) Before trial, Guizar identified photographs of Navarro and Contreras as two of the robbers. (16RT 2631-2633.) Guizar did not identify anyone at live lineups conducted at the county jail. Guizar did not previously identify photographs of appellant as a suspect. Trial was the first time she identified him as a suspect. (16RT 2640-2642.) At trial, Guizar was 100 percent certain that appellant, Contreras, and Navarro were among the robbers. (16RT 2643-2644.)

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[9] The court instructed the jury there was no evidence of any threats from appellant, Navarro, or Contreras, and that the questions and answers on that point related only to witness credibility. (16RT 2662.)

3. The Mercado Buenos Aires Crimes of April 28, 1992 – Counts XIX Through XXIII

During April 1992, the Mercado Buenos Aires, owned by Manuel Rodriguez, was located at 7540 Sepulveda Boulevard in Van Nuys. (12RT 1796-1797.) Manuel Rodriguez's wife, Clelia Rodriguez, their sons Eduardo and Paul Rodriguez, and employees Arturo Flores and Dario De Lura worked there as well. (12RT 1796-1797, 1801, 1805, 1807, 1818, 1865.)

a. The Crimes

On April 28, 1992, around 5:25 p.m., Manuel Rodriguez, Paul Rodriguez, Clelia Rodriguez, Arturo Flores, and Dario De Lura were working at the Mercado Buenos Aires. (12RT 1797, 1799, 1865-1866.) Arturo Flores was working in the kitchen area. (12RT 1799.) Two men entered the store and asked Paul Rodriguez, who was working at the bakery counter, for directions toward Van Nuys Boulevard. The two men then left. One returned shortly, ordered some pastries, and placed some money on the counter. Paul told him to pay at the cash register. That person drew a gun that appeared to be a chrome automatic .45 caliber handgun, and told Paul to go toward the bakery area. (12RT 1866.)

Meanwhile, Manuel Rodriguez was working at the "meat table" when he heard a noise that caused him to look up and see two men armed with automatic weapons. They said, "This is a robbery. Hands up on your head." The men racked the slides on their weapons, which they pointed at Manuel Rodriguez and Dario De Luro. The gunmen, who spoke Spanish with Central American accents, forced De Luro and Manuel Rodriguez to go to the kitchen. (12RT 1797-1800.)

The gunmen also pointed weapons at Paul, pushed him with their weapons from behind, and forced him to go to the bakery where Clelia Rodriguez was working. Gunmen ordered them both to lie on the floor,

which they did for approximately 30 seconds before being directed to go to the kitchen, where Manuel Rodriguez, some employees, and a customer were being held. (12RT 1800-1801, 1866-1867.) Manuel Rodriguez saw that the two men escorting Paul held firearms in their hands. The robbers brought everyone, including a customer, to the kitchen, and made everyone kneel. (12RT 1800-1802.)

In the kitchen, the robbers made Manuel get on his knees "with Arturo [Flores] and the other employee." (12RT 1802.) According to Manuel, during the "incident," they did not "remove" his wallet, but "they took other people's wallets." (12RT 1810.) When asked if he had seen any property being taken from any of his employees or customers, Manuel said, "Wallets and watches." Manuel saw the robbers take a wallet and watch from Dario De Luro in the bathroom. He thought that "for the others," the robbers "did it before." Manuel understood that the men had taken wallets and watches from his employees, but only saw them do that to Dario De Luro – he thought the robbers had done that "before" to the others. (12RT 1811.)

One of the robbers told Paul to remove his chain and a ring and to hand them over. Paul complied. The men also took Manuel's watch, and a wallet from Dario De Luro. (12RT 1868.) People's Exhibit 136A looked like the chain the robbers took from Paul. A bracelet looked like Clelia's but Paul was not certain. (12RT 1869.) During the robbery, the men did not take Manuel's wallet, but they took other people's wallets, as well as Manuel's chain, Clelia's chain, Manuel's wedding ring, and Clelia's bracelet. (12RT 1810.) Manuel saw the robbers take a wallet and watch from Dario De Luro. (12RT 1811.) So did Paul. (12RT 1868.) Paul did not see any property being taken from any other employees.

In the kitchen, one of the gunmen asked for the owner of the market. (12RT 1867.) Thinking that a well-dressed customer was the owner, one of

the robbers grabbed and pulled him by the hair, placed a gun to his head, and said, "You're going to show us where the money is." The man screamed to be left alone. Manuel identified himself as the owner and told the robbers to leave the customer alone. (12RT 1802-1804, 1867.) The tallest and strongest of the robbers grabbed Manuel by the arm and took him to the office at gunpoint, then returned and got Clelia. (12RT 1804, 1867.) That robber was approximately five feet, seven or eight inches tall, and weighed around 190 to 200 pounds. (12RT 1817.)

A robber remained in the kitchen with Paul. That robber, armed with an automatic firearm, told Paul not to look at him. (12RT 1867-1868.) In the office, the man with Manuel demanded money. Manuel Rodriguez opened the money drawer and gave the tallest robber cash, checks, and food stamps, all of which was valued at around $3,000. The man asked for the rest of the money. Manuel said that his other son, Eduardo Rodriguez, had gone to the bank to make a deposit. (12RT 1805, 1810.)

Manuel asked the men to leave his wife Clelia alone because she was sick. (12RT 1806.) A shorter man brought Clelia to the office door, holding her by the hair with his fist behind her head while holding a gun to her head and neck area. The tallest robber told the other man to cut off Clelia's fingers "one by one" to force Manuel to say where the money was hidden. (12RT 1806-1807, 1813, 1843.) The men moved Clelia past the office door, and again demanded money from Manuel. The tall man said they would "kill the old woman" if no more money was forthcoming. Manuel insisted there was no more money, that he was insured, did not want any problems, and they could take everything they wanted. (12RT 1808.)

The shorter man wore a brown floral-patterned shirt, new-looking brown pants, and brown shoes. He was "nicely attired," "very well-dressed." (12RT 1809.) He told Manuel to face the wall. Manuel refused,

and explained that the robbers could take whatever they wanted, including other money in the safe in the front of the store. (12RT 1808-1809.) The robbers herded everyone in the store into a small bathroom, and instructed them to remain there. (12RT 1810, 1868.) Paul and the others remained in the bathroom until Eduardo Rodriguez returned to the market and opened the bathroom door. (12RT 1810, 1870.)

b. Witness Identifications

Manuel Rodriguez identified appellant as the robber who grabbed his wife by the hair and pointed a gun at her, and also grabbed customers by the hair in the kitchen. (12RT 1812.) Manuel also "recognized [appellant] in court" during the preliminary hearing. (12RT 1812.) The tall man told appellant to cut off Clelia's fingers if more money was not forthcoming. Manuel thought that appellant's firearm had a black grip, and a light steel barrel. Appellant was one of the first men to approach Manuel. The other man who approached him in the beginning with an automatic weapon was the tall man. Manuel thought that appellant's firearm and that belonging to the tall man were each nine-millimeter handguns. (12RT 1812-1814.)

Manuel also identified codefendant Navarro as the man who forced Manuel's son Paul from the bakery area at gunpoint. Manuel was about "sixty to seventy percent sure" that Navarro was that person. (12RT 1814.) The robber whom Manuel was 60-percent certain was Navarro stayed with Paul in the kitchen. (12RT 1842.) Manuel recalled identifying Navarro and appellant at the preliminary hearing. (12RT 1814.) Appellant was the robber who dressed well. (12RT 1815.)

The tallest man, who was with Manuel during most of the robbery and armed with an automatic firearm, and who was threatening Manuel the whole time, was codefendant Contreras. Contreras was the man who said to cut off Clelia's fingers. In the kitchen, appellant gave orders. In the

office, Contreras gave orders. Appellant and Contreras were the most active of the robbers. Contreras also took a grocery bag in which the robbers placed money they stole. Navarro remained in the kitchen, armed with a handgun. (12RT 1818-1819.)

Manuel was close enough to the three men during the robbery that he could get a good look at them. The lighting was sufficient to let Manuel see their faces clearly. (12RT 1858.) Manuel's identifications of appellant, Navarro, and Contreras was based solely upon his memory of the robbery events. (12RT 1859.) Manuel was 100 percent certain of two of his identifications in court – those of appellant and Contreras, and only 60 percent certain as to his identification of Navarro. However, Manuel would be 100 percent certain Navarro was one of the robbers if his hair was the same and he had a mustache. Navarro's facial features were the same as those of the man who participated in the robbery. However, Manuel remained 100 percent certain of his identifications of appellant and Contreras. (12RT 1834.)

After the incident was over, Manuel gave the police descriptions of the suspects, then on June 9, 1992, was shown photographs of possible suspects. (12RT 1820.) He identified photographs of appellant, codefendant Contreras, and one non-suspect whose photograph was included in the photographic lineup. (Peo. Exhs. 79, 84; 217-218; 12RT 1820-1823, 1858.) Manuel attended a live lineup at the county jail on September 30, 1992. Manuel identified appellant. (Peo. Exh. 219; 12RT 1823-1824.)[10] Then, at the preliminary hearing during April 1993, Manuel identified appellant and codefendant Contreras. (12RT 1824.)

[10] During the incident, appellant had a "light-colored" firearm. The barrel appeared to be chrome, and the handle was darker. Manuel might have said he thought appellant's firearm was .45 caliber, but he believed it was a nine-millimeter firearm. (12RT 1835.)

At the live lineup, Manuel also recognized a chain that was his son's, and a bracelet that might have belonged to Manuel's wife. (Peo. Exh. 136; 12RT 1825-1827.)

During the robbery, it appeared to Paul that the shortest of the robbers was the leader. That person wore a flower shirt, dress pants and dress shoes in pastel colors (Paul thought). He was also the person who grabbed the well-dressed customer thinking that person was the owner. (12RT 1870-1871.) The tallest robber carried money from the robbery in a bag. (12RT 1870.)

In court, Paul identified appellant with 100 percent certainty, and Contreras with 90 percent certainty, as two of the robbers. (12RT 1871-1872.) Appellant spoke with a Central American accent. Appellant had a chrome .45 firearm during the robbery, but Paul was guessing as to the caliber. Appellant was giving orders during the robbery, directing the victims toward the bakery, then toward the kitchen, telling them to lie down, and grabbing the customer by the hair. Paul stated that Contreras, the tallest of the robbers, held the money they stole in a brown bag. (12RT 1873.)

Paul viewed photographs shown to him by Los Angeles Police Detectives, then attended a live lineup at the county jail. (12RT 1874.) He identified a photograph of Contreras, and identified a photograph of appellant as the leader of the robbers who was armed with a chrome .45 caliber firearm. Paul also identified a photograph of a non-suspect, rather than selecting a photo of Navarro. (Peo. Exhs. 222, 223, 224, 225; 12RT 1874-1880.) Paul identified appellant at the preliminary hearing with 100 percent certainty. Paul was 100 percent certain of his courtroom identification of appellant at trial. (12RT 1880.) Paul did not identify Contreras at the preliminary hearing, because he was not certain enough to

do so then, but Paul identified him during trial with "like 90 percent" certainty. (12RT 1880-1881.)

According to Paul Rodriguez, appellant was the person giving orders to the other three robbers, and to the other people in the store. (12RT 1883.) Appellant was the person who forced Paul at gunpoint to go to the bakery area, then again to the kitchen. (12RT 1885-1886.) Navarro looked like the man who stayed with Paul in the kitchen during the robbery, but Paul was not formally identifying him as such. (12RT 1886-1887, 1897.) Paul was 100 percent certain in his identification of appellant. He was 90 percent certain in his identification of Contreras. (12RT 1892.)

4. The Woodley Market Crimes of May 4, 1992 – Counts VI Through IX

In 1992, Lee Chul Kim owned the Woodley Market, located at 7548 Woodley Avenue in Van Nuys. His employees during May 1992 included Victor Cuatle-Cisneros, butchers Eduardo Rivera[11] and Guillermo Galvez, and Galvez's wife Teresa Torres-Velazquez (who was eight months pregnant). (16RT 2682, 2684-2685; 17RT 2745-2746; 18RT 2930, 2933; 19RT 3259-3260.) The market sold meat and groceries and Mr. Kim would also cash checks for customers at a table by the meat department where there was a locked cash drawer. (16RT 2686-2687, 2721; 17RT 2747-2748; 19RT 3261.) Mr. Kim would generally bring the checks he had cashed to the bank around 9:00 a.m. each day and get more cash for that day's business. (16RT 2687-2688; 17RT 2748.) He would carry the checks and cash in a small brown valise. (16RT 2688; 17RT 1747; 19RT 3261-3262.)

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[11] Eduardo Rivera's testimony from the preliminary hearing was read into the record as he was unavailable at trial.

a. The Crimes

On the morning of May 4, 1992, Mr. Kim, Victor Cuatle-Cisneros, Eduardo Rivera, Guillermo Galvez and Galvez's wife Teresa Torres-Velasquez, were working at the store. (16RT 2685-2686.) Torres-Velasquez sat by the cashier station. Rivera was working in the meat area. (17RT 2753, 2774.)

Mr. Kim left the market to go to the bank around 9:00 a.m., exiting through the main entrance. (16RT 2689; 17RT 2747; 19RT 3262-3263.) Mr. Kim returned around 10:00 a.m., reentering through the main entrance. (16RT 2689; 19RT 3265-3270.) Several people were waiting for him in the check cashing area. (16RT 2689-2690.) Cuatle-Cisneros was about to throw some boxes away in the back of the restaurant when a man pointed a dark-colored revolver, probably .38 caliber, at Cuatle-Cisneros's forehead and told him to keep his head down, to go to the back of the store and to not look at anything, and that nothing would happen to him. The man spoke with an El Salvadoran accent. (16RT 2691-2692.) Once in the back, after lying down on the floor, Cuatle-Cisneros could hear Mr. Kim's voice greeting the people who were waiting for him by the check-cashing area. (16RT 2698-2701.)

Meanwhile, while Torres-Velazquez was working at the checkout stand, a man with a gun who appeared nervous approached her, pointed the gun at her, and asked if she had "touched anything," apparently referring to an alarm. He wore a white t-shirt, blue Levi's and a baseball cap. (18RT 2932-2933, 2946.) He told her not to touch anything, to remain by the checkout stand and to sit on a milk crate, and that nothing would happen to her. (18RT 2933-2934, 2946.) Torres-Velasquez's husband, Galvez, ran to her and stayed with her during the robbery to keep her safe. (18RT 2943.) Torres-Velasquez next saw the

man who had confronted her standing by the office, then running toward the meat "freezer." (18RT 2934, 2946.)

According to Galvez, when Mr. Kim returned through the front door, he was followed by appellant, who had a black automatic firearm. (17RT 2749-2752.) Appellant's firearm looked similar to People's Exhibit 282, which was a black nine-millimeter handgun. (17RT 2750-2751.) Appellant was running after Mr. Kim, pointing his gun toward him, while Mr. Kim ran from appellant. (17RT 2751-2752.) According to Galvez, as Mr. Kim ran, he dropped his leather valise and keys by the entrance to the store's office. (17RT 2753-2754.)

According to Eduardo Rivera, Mr. Kim ran to the meat freezer, being followed by a man (man number one) holding to his side a dark-colored "square" handgun. (19RT 3265-3270.) Mr. Kim ran into the meat freezer, leaving his keys outside of it, then closed its door, which could be locked only from outside. (19RT 3271-3272, 3278-3279.) According to Galvez, Mr. Kim ran inside of the meat refrigerator and held on to the door tightly. Appellant physically struggled with him in an effort to open the door. (17RT 2755.)

Cuatle-Cisneros could see two robbers in the store, one who was trying to open the door to the meat refrigerator, and the other, the taller one, who was aiming a firearm at Cuatle-Cisneros's fellow workers. (16RT 2694, 2705.) One of those men (man number two) was taller than the other, and he wore a cap. (16RT 2695.) The shorter one was the one trying to open the door to the meat freezer. (16RT 2695, 2716.) Man number two, the taller man with the cap, had come in through an employee door. (16RT 2704.) Another robber was with customers and the cashier. (17RT 2739.) Cuatle-Cisneros complied with orders to lay on the floor. (16RT 2693, 2705, 2717.) The gunman remained near him. (16RT 2697.)

According to Torres, another robber stayed by the checkout stand near the entrance throughout the incident. (18RT 2936.)

According to Galvez, appellant looked at the valise and keys on the floor, but left them there to continue going after Kim. (17RT 2777-2778.) Appellant eventually succeeded in opening the door to the meat freezer, where Mr. Kim was deep inside. (17RT 2756.)

A robber armed with a silver-colored automatic handgun that looked like People's Exhibit 283 entered the butcher area and told Galvez and Rivera to turn around. (17RT 2757.) This robber was taller and wore a white cap. (17RT 2758-2759.) He looked around in the office, checked the padlock on the cash box, picked up Mr. Kim's brown valise and dropped it, then returned to where Galvez and Rivera were. Galvez could hear Mr. Kim crying, begging appellant in English to not "do anything to him," stating the keys were "right here," and that Mr. Kim would "give them everything." Rivera told the men, "Please don't do anything to him," and said Mr. Kim was "already very nervous." (17RT 2760-2762.) Rivera gave the men the keys and the valise that Kim had dropped. The taller robber stayed with Galvez and Rivera. (17RT 2763-2764.)

According to Eduardo Rivera, one of the robbers, also armed with a gun, went into the area where the checks were cashed and tried unsuccessfully to open the cash box, which was locked. His gun looked like the first man's, except the second man's gun was burnished silver in color. (19RT 3276-3277, 3280.) It appeared to Rivera that the robbers did not see Mr. Kim's keys. (19RT 3280.) This second man then told man number one, in Spanish, to come and assist him in opening the cash box. (19RT 3277-3279.) Man number one insisted on trying to force Mr. Kim from the freezer. (19RT 3278.) Man number one forced open the meat freezer door. Mr. Kim was inside, crying, "terrorized," saying "Please, "please." Man number one tried to pull Mr. Kim outside of the freezer, and

struck Mr. Kim several times with the gun when Mr. Kim resisted, crying. (19RT 3272-3276, 3283-3284, 3287-3289.)

Galvez could see inside of the meat refrigerator where the shorter robber hit Mr. Kim, who continued to cry and beg, on the nape of his neck with his gun. (17RT 2763-2765.) Kim was partially bent over, his knees bent, his arms covering his head, waving one hand as if to say, "Don't do anything to me." (17RT 2765.) Cuatle-Cisneros heard a voice in Spanish with a Salvadoran accent from inside of the freezer demanding, "The keys, the keys." (16RT 2706.) According to Eduardo Rivera, Mr. Kim was yelling and appeared to be in fear. (19RT 3271.) Cuatle-Cisneros heard Mr. Kim's voice from inside of the meat refrigerator, saying "Okay, okay, please, please, okay," in a fearful tone. (16RT 2701, 2705.)

Torres-Velasquez could hear Mr. Kim saying, "Please, please," then heard gunshots from the area of the meat refrigerator. (18RT 2935.) She did not see the man in the baseball cap when she heard the shots. (18RT 2935-2936.) He was in the meat freezer. (18RT 2947.) Torres-Velasquez did not see Contreras again after he went into the meat refrigerator. (18RT 2949.) Rivera and Galvez heard gunshots from the meat freezer. (19RT 3284-3286, 3289.) More gunshots followed. It sounded to Rivera as if multiple guns were used. (19RT 3290-3292.) Rivera and Galvez tried to run outside through the back door, but a man with a handgun blocked them. (19RT 3290-3295, 3300, 3318-3319.)

Galvez watched as appellant shot Kim in the meat freezer. (17RT 2768.) The taller man also shot at Mr. Kim, the bullet striking Mr. Kim around the right eye, by the temple. (17RT 2769, 2792, 2817-2818.) Kim was on his knees when appellant shot him. (17RT 2771.) Galvez saw one bullet hit Kim by his eye, by the temple, while both appellant and the other man were firing. (17RT 2769, 2791, 2793, 2795, 2812.) When Galvez realized the men had shot Mr. Kim, Galvez ran.

(17RT 2772-2773.) Galvez later told police that he did not know how many gunshots were fired, or who was doing the shooting, but Galvez only said that because he was nervous. (7RT 2800, 2802.) Galvez did not see Mr. Kim holding a gun during the incident. (17RT 2772.)[12]

Cuatle-Cisneros, lying on the floor, heard eight or nine gunshots from inside of the meat refrigerator. It sounded to Cuatle-Cisneros like they all came from the same gun. (16RT 2706.) Galvez heard around 10 shots fired that sounded as if they were fired by two different guns of around the same caliber. (17RT 2770-2771.) Cuatle-Cisneros heard the sound of a gun being dropped to the floor, and looked toward that sound in the meat department. (16RT 2707.) He observed a chrome automatic handgun fall to the ground, and then saw someone pick up the handgun. (16RT 2708-2709.) The chrome automatic handgun that he saw looked similar to that depicted in People's Exhibit 283. (17RT 2737.)

Cuatle-Cisneros heard a voice say, "Let's go." (16RT 2708.) The taller robber was still holding the chrome automatic gun, and the shorter man was still holding the black automatic gun. (17RT 2771.) After the gunshots, men number one and two ran from the meat freezer to the back door of the store, where the other robbers followed. (16RT 2710; 18RT 2936-2937; 19RT 3297-3299.) 911 was called. (16RT 2674-2678, 2710-2711; 19RT 3306-3307.) Cuatle-Cisneros had seen four Hispanic robbers whom he believed, based on their accents, to be from El Salvador. (16RT 2682-2683.) A 911 recording was played for the jury in Spanish, and translated. (16RT 2679.) Cuatle-Cisneros never saw Mr. Kim's valise or keys again. (16RT 2722.)

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[12] Galvez did not see Mr. Kim fire the first shot. However, Galvez was not looking when the first shot was fired. (17RT 2805-2807.)

The next day, Rivera and other employees cleaned the freezer area where they observed bullet casings and a bullet in a box of lard. (17RT 2775-2776; 19RT 3308-3313.) The parties stipulated that the following items were recovered at the Woodley Market: a money bag, a box containing currency and coins, a cigar box with money, a bullet hole in a slab of meat, and a bullet hole in a box of lard. (17RT 2846-2853.) Kim was the registered owner of a .25 caliber semiautomatic handgun that was missing – only an empty holster was found in Kim's pocket. (17RT 2853.) Other items recovered at the market included a .25 caliber expended bullet, nine-millimeter shell casings, .25 caliber casings, .25 caliber expended bullet. (17RT 2853-2856.) Mr. Kim's wallet was found next to his body in the meat freezer. (Peo. Exhs. 71, 75, 76.) Mr. Kim's driver's license was People's Exhibit 321. (19RT 3359.)

Galvez did not see Rivera again after the incident. (17RT 2746.) Cuatle-Cisneros had not seen Rivera for seven or eight months before the trial, although they saw each other frequently before that time. (16RT 2686.)

b. Witness Identifications

Cuatle-Cisneros identified appellant and Contreras in court. Appellant was the shorter robber who was trying to open the door to the meat refrigerator to get to Mr. Kim. (16RT 2711-2712.) Contreras was the taller robber wearing the baseball cap who held the gun on the other employees. (16RT 2712.) Shortly after the incident, Cuatle-Cisneros viewed photographic lineups and identified a photo of Contreras as the person who was trying to open the meat refrigerator, and one of the four men who robbed and killed Mr. Kim. Cuatle-Cisneros also identified Contreras in a live lineup at the county jail (17RT 2731-2734) and at the preliminary hearing (17RT 2735). Cuatle-Cisneros was 100 percent

certain, both at the preliminary hearing and trial, that Contreras was the tall robber wearing the cap. (17RT 2736.)

Cuatle-Cisneros also identified appellant at the preliminary hearing, but not in the photographic or live lineups. (17RT 2735.) However, the lighting was bad in the store and appellant had blackheads. (17RT 2735-2736, 2738.) Cuatle-Cisneros was 95 to 100 percent certain in his preliminary hearing identification of appellant, and 100 percent certain in his trial identification of him. (17RT 2736.) Appellant was the shortest robber. (17RT 2743.)

According to Eduardo Rivera, man number one was the shortest of the robbers. Man number two was taller. (19RT 3301.) Rivera identified appellant in court at the preliminary hearing as man number one. (19RT 3302.) Rivera identified Contreras in court as man number two. (19RT 3302.) Rivera was 95 percent certain of his identifications. (19RT 3302-3303.) Rivera also identified appellant and Contreras in a live lineup at the county jail. (19RT 3303-3305.) Rivera was "positive" in his identifications of appellant and Contreras. (19RT 3354.)

According to Guillermo Galvez, appellant wore a brown striped shirt with a collar and buttons. The other man wore a cap and a white t-shirt. (17RT 2772.) After the shooting, Galvez went to the police station and described the shorter robber and the guns that were used. (17RT 2785.) On June 4, 1992, Galvez looked at some photos in a folder. (17RT 2785.) Galvez identified a photo of appellant as looking similar in the face, but different in the eyes and hair, and stated that appellant was not one of the robbers. (17RT 2787-2788.) Galvez later attended live lineups at the county jail. (17RT 2788.) He identified appellant with 100 percent certainty at a lineup, at the preliminary hearing, and at trial. (17RT 2788-2790, 2813, 2819.)

Teresa Torres-Velazquez identified Contreras at trial as the man wearing the cap. He was the only robber that Torres saw that day wearing a cap. (18RT 2937, 2951.) Contreras's gun looked similar to the nine-millimeter gun depicted in People's Exhibit 283. (18RT 2937-2938.) Torres later identified with certainty a photograph of Contreras from a photographic lineup as the gunman she encountered. Torres also identified Contreras with certainty during a live lineup at the county jail. Torres also identified Contreras with certainty during the preliminary hearing. (18RT 2938-2941.)

c. Deputy Medical Examiner Testimony

Los Angeles County Deputy Medical Examiner Stephen Sholtz performed the autopsy on Mr. Kim. (18RT 3059-3060.) Mr. Kim, 47 years of age, was killed by multiple gunshot wounds. (18RT 3062.) Mr. Kim's body bore bullet wounds to his head (No. 1), chest (Nos. 2, 4, 8), back (No. 3), abdomen (Nos. 5, 6, 9), torso (No. 7), and left shoulder (No. 10). (18RT 3068-3072.) In Dr. Sholtz's opinion, Mr. Kim was shot eight times – the other wounds were either ricochet or reentry wounds. (18RT 3072.) Six of the bullet wounds were fatal or potentially fatal. (18RT 3079.)

All of the bullet wounds were consistent with being caused by medium caliber bullets, such as nine-millimeter bullets. (18RT 3072.) Some of the wounds – those to the abdomen – had stippling, indicating that those shots were fired from within around two feet. (18RT 3073-3074.) The number and angle of wounds was consistent with Mr. Kim having been down on his knees, or lower than the gunman. Some of the wounds were also consistent with having been received while standing. (18RT 3086-3088.) Nothing "specifically" indicated a crossfire, but the wounds and defects in Mr. Kim's clothing were consistent with having been caught in a crossfire with a second gunman present. (18RT 3080, 3089-3091.)

However, the wounds were also consistent with their having been only one gunman armed with two firearms. (18RT 3092.) If there were only one gunman, different angles of bullet entry could result due to the movement of the decedent's body as he received the bullets. (18RT 3101.) The wound to Mr. Kim's head was consistent with him having been shot while in an upright position, falling forward, and more shots continuing. (18RT 3106.)

Only two bullets were recovered at the Coroner's office from Mr. Kim's body; all of the other bullets would have exited his body. (18RT 3091-3092.) Mr. Kim's hands were tested for gunshot residue – a positive test resulted. None of Mr. Kim's wounds were consistent with having been caused by a .25 caliber bullet. One of the wounds appeared to be caused by a larger caliber bullet, but in fact, Dr. Sholtz opined that wound was the reentry by an "unstable" bullet that was tumbling, thus causing a larger entry hole. (18RT 3096-3097.) Two nine-millimeter bullets were recovered by Dr. Sholtz from Mr. Kim's body. (Peo. Exhs. 117-118; 19RT 3359.)[13]

5. The Casa Gamino Crimes of May 17, 1992 – Counts XXVIII Through XXXVI

Armando Lopez was the manager of the Restaurant Casa Gamino, located at 8330 Alondra Boulevard in Paramount, during May 1992. Maricella M. was the hostess, Manuel De Leon the waiter, Esequiel Flores the bartender, and Javier Lopez and Arturo Lopez the busboys. (14RT 2223-2225, 2284.) Javier, Armando, and Arturo were brothers. (15RT 2419.)

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[13] A chart with ballistics evidence was marked as People's Exhibit No. 71. (19RT 3360.)

a. The Crimes

Armando Lopez, Maricella M., Esquiel Flores, Javier Lopez, and Arturo Lopez worked at the Casa Gamino Restaurant on the evening of Sunday, May 17, 1992. (14RT 2224-2225, 2256, 2284, 2298-2300; 15RT 2402.) Norman Busbey and his wife Charlene Busbey (with their baby son Steven), were among the customers dining at the restaurant, as was off-duty Compton Police Officer John Khounthavong and his family. (15RT 2434-2435, 2437, 2457-2460, 2530.) Lucia Lopez, Javier Lopez's wife, was also present. (14RT 2336.) Because it was a Sunday evening, all of the cash receipts from Friday, Saturday, and Sunday were in the restaurant. (14RT 2277.) There was approximately $20,000 in cash in the back office next to the safe that the "boss" would count before it would be placed in the restaurant's safe on Monday. (14RT 2229, 2233, 2265-2268.)

At approximately 9:30 p.m., while there were around 50 customers and 15 employees in the restaurant, three men entered. Maricella M. asked how many were in their party. They responded that they did not know and went to the restroom. They may have walked outside, then reentered around 10 minutes later, and said they needed a table for seven or eight people. (14RT 2225, 2242, 2284.) As Armando Lopez and Maricella M. prepared to seat them, one (the first man) drew a gun, placed it against Armando's stomach, and said, "Don't move. Don't do anything. Don't scream," and "Don't look." (14RT 2226-2227.) Armando identified appellant in court as the first man. (14RT 2228.) One of the other men, also armed with a firearm, grabbed Maricella M. by her hair or shoulders, and placed a black gun against her side. (14RT 2226-2227, 2284-2285.) The third man drew a firearm and held it against De Leon. (14RT 2226-2227.) Maricella M. saw six or seven men involved in the robbery, each armed with a gun. Maricella M was taken to the kitchen with

employees, where they were made to kneel with their heads down. (14RT 2284-2286, 2300.)

Norman Busbey saw a man (Contreras) with an automatic gun held behind his back stand next to Busbey's table. (15RT 2436.) That person was Contreras. (15RT 2438.) A waitress ran along the back of the restaurant, then the side before ducking under a table. Contreras followed her. (15RT 2436.)

Compton Police Officer John Khounthavong noticed Contreras with a gun, pacing around, saying something like, "Be quiet," or "Calm down." (15RT 2457-2460, [identifying Contreras].) (15RT 2462.) Khounthavong thought Contreras's gun was a "silver, stainless steel" nine-millimeter or .45 Sig Sauer semi-automatic handgun. (15RT 2461.) Some people got under their tables. (15RT 2460-2461.) Khounthavong stayed still and faced forward to the wall by where he was sitting. (15RT 2467.)

Five more people with guns entered the restaurant and spread out to different areas in it. One stood at the front door. Another went to the other side of the restaurant. Other customers in the restaurant ducked under their tables, as did Norman Busbey's wife, who grabbed their baby before doing so. (15RT 2437.) Norman did not get under the table, but remained in his seat during the robbery. (15RT 2451.) The gunmen were demanding that the people in the restaurant place their money, jewelry and valuables on their respective tables. (15RT 2440.)

Meanwhile, while in the restroom, Javier Lopez heard loud knocks on the back door. Javier left the restroom, intending to open the back door, but was stopped in the middle of the restaurant where he encountered a man aiming a gun at Armando Lopez. (15RT 2403.) Armando said that if the men wanted money, he would give them what was in the cash register. (14RT 2227.) The man with his gun to Armando's stomach declined that offer, and said they were, "Going to the back." (14RT 2227-2228;

15RT 2403-2404.) The gunmen grabbed Armando and at gunpoint, forced him to walk to the office in the back of the restaurant. (14RT 2298-2300.) The first man displayed an "electric" "kind of stick" or "club," and said he would kill Armando with it if Armando said anything. (14RT 2227-2228.) The first man also showed his firearm to an employee who was washing dishes and said to not "do anything." (14RT 2228.)

Another man aimed a gun at Javier from behind and made him go to the kitchen, where many of the employees were taken. (15RT 2404.) The robbers took the employees' belongings from them, then made them kneel down in the kitchen. (15RT 2404-2405.) They took jewelry from each employee. From Javier, the men took around $120, a bracelet, and a gold chain. (15RT 2410.) While taking Javier's property, one of the men (Contreras) demanded his chain. Because Javier did not remember that he was wearing the chain, Contreras punched him in the stomach. (15RT 2410-2411.) The parties stipulated that $130 was taken from Esequiel Flores, and that Flores identified a photograph of Navarro as one of the robbers. (15RT 2468-2469.) The parties also stipulated that $5 was taken from Raul Ramirez during the Casa Gamino robbery, and that he identified a photograph of Navarro as one of the robbers. (15RT 2469.) Arturo saw jewelry and money taken from Javier Lopez, Manuel De Leon, and Esequiel Flores. (14RT 2305-2306.) There were around seven people with Arturo in the kitchen. Items were taken from each. (14RT 2306.) The robbers took Arturo's wristwatch. (14RT 2305.)

In the office were appellant, Armando, and another man. A third robber remained outside of the office door. (14RT 2233.) In the office, appellant took from Armando his gold bracelet, ring, and watch. (14RT 2239-2240, 2270.)

Maricella M. could see through the office window that the men were beating Armando in the office, and could hear him explaining that he did

not know how to open the safe. (14RT 2285-2286.) Men took Maricella M. to the cash register in the front of the restaurant and told her to open it. She tried to do so, but was too nervous. One of the men slapped her on the right cheek. (14RT 2286.) The men took a watch and two chains from Maricella M., then returned her to the kitchen. (14RT 2287, 2297.)

In the office, appellant demanded that Armando give him money. Armando gave over $20,000 in various envelopes. Appellant handed the money to a man with curly hair. Appellant then told Armando to open the safe and give him the rest of the money. (14RT 2229.) Armando explained that he did not have the combination, but only the "boss" could open the safe. The "boss" was Cipriano Gamino. (14RT 2230.) Appellant responded by slapping Lopez on the mouth, then "hit" Armando with the "electric weapon" on the side two or three times, causing Armando to scream in pain. (14RT 2230-2232.).) Blue flames emitted from the device when it was applied to Armando, and it caused Armando to suffer a great deal of pain. (14RT 2231-2232.)[14] Armando was screaming that the men should not hit him and to leave him alone because he did not know the combination to the safe. (15RT 2405.)

After he applied the stun gun to Armando, appellant said, "Are you going to open the safe, idiot?" Armando responded that he was unable to open do so, and pleaded that he "had children." Appellant's response was to place the barrel of his gun in Armando's mouth and ask if Armando was "going to open it right now? Yes or no?" Armando again responded that he did not know how to open it. Appellant said, "If you don't open it, I'm going to kill you." Armando explained again that he could not open the

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[14] People's Exhibit 236, a stun gun, looked like the device that appellant used on Armando. (14RT 2230-2231.) It was activated in the courtroom; a blue flash went "up and down the device" when activated. (14RT 2231.)

safe. Appellant replaced the gun in Armando's mouth, counted "one, two, three," and said he would kill Armando if he did not open it, but did not fire the gun. (14RT 2232-2234.)

Through a window in the office, Javier Lopez could see the men hitting his brother Armando and giving him electric shocks. At first there were two men, then later only one. (15RT 2405.) Arturo Lopez could see through the office window the men in the office hitting Armando with a gun, and could hear Armando screaming. (14RT 2299-2301.) Arturo thought Armando screamed a lot more than 20 times, and it sounded as if he was suffering a great deal of pain. While beating him, the men told Armando to open the safe. Armando kept telling the men he did not know the combination. (14RT 2303-2304.) The men called Lopez "stupid," "as**ole," and a "f**king Mexican." (14RT 2257.)

The men brought Maricella M. into the office and threatened to kill her if Armando did not open the safe. (14RT 2234, 2287.) The men "began torturing" Maricella M. in the office to make Armando open the safe. (14RT 2287.) They "had a stun gun, and they were hitting [her] on [her] shoulders and [her] back." They also put a gun in Lopez's mouth, and said they would kill both him and Maricella M. if he did not open the safe. The robbers then told Maricella M. to open the safe. When she said she did not know how, one of them "grabbed the gun" and struck her with it on the left side of her head. (14RT 2287.) Appellant hit Maricella M. "with the gun or the hands" on her stomach, and possibly her head as well. (14RT 2234-2235.) The other man in the office kept his gun trained on Armando while appellant beat Maricella M. who screamed. (14RT 2235.) The men shocked Maricella M. with the stun gun around six times. (14RT 2288.) According to Armando, appellant used the stun gun on Maricella M. three or four times, applying it to her stomach, causing her to scream more. (14RT 2235-2236.) The stun gun looked like People's

Exhibit 236, and made blue "bolts" and a clicking noise like that one did. (14RT 2288.)[15] They used that same device on Armando, touching it to his shoulder. (14RT 2288-2289.) Three men were in the office while they tortured Maricella M. (14RT 2289.)

Maricella M. called for Armando Lopez to open the safe. (14RT 2236.) Arturo Lopez could hear the men telling Armando that they would kill Maricella M. if he did not open the safe. Arturo could hear Maricella M. screaming many times. (14RT 2305.) Khounthavong could hear a female screaming in the back, and voices speaking in Spanish. (15RT 2462.) Maricella M. received an injury to one of her ears from being hit with the gun. (14RT 2294.) Appellant held a gun to Maricella M.'s head. (14RT 2320-2323.) Javier Lopez could hear Maricella M. screaming many times, asking Armando to tell the men to leave her alone, and saying that she would rather be killed than to have to endure what the men were inflicting upon her. (15RT 2408-2409.)

Maricella M. was taken from the office to a place near the ice machine, where she continued screaming. Appellant remained in the office with Armando, and told him he should open the safe. (14RT 2236-2237, 2289.) The man who took Maricella M. from the office threatened to put her in some water, then shock her on her heart with the stun gun, killing her, if she did not scream loudly enough to scare Armando into opening the safe. She screamed that Armando should open the safe. The man hit her on the face, and told her not to scream so loudly. The man tried to forcibly kiss Maricella M. She pushed him away. He tore her skirt, threw her on the floor, got on top of her, and began to remove her stockings.

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[15] People's Exhibit 236 was not the same stun gun. The actual one was "a bit thinner." (14RT 2295.)

Maricella M. fought the man the whole time. He told her to "shut up" and that she "shouldn't scream." (14RT 2290-2291.)

Meanwhile, Lucia Lopez, whose husband Javier Lopez worked at the Casa Gamino Restaurant, arrived at the restaurant. She initially saw no employees, then someone from the back of the restaurant aimed a gun at her and told her to sit down. She sat down by the cash register. Another customer was sitting there as well. She saw approximately five armed men. Someone took from Lucia all of her necklaces, rings, and money. Lucia could hear Maricella M screaming in the back. (14RT 2336-2338.)

In the office, Armando heard someone say, "It's getting late. Let's go, Morro, Morro," or something similar. Armando thought that "Morro" was a nickname. Appellant responded when "Morro" was used by one of the robbers. (14RT 2236-2237.) The man who was assaulting Maricella M. stopped his sexual attack only when another robber said, "The Morro is coming." (14RT 2291-2292.)

Appellant left the office. Another robber, armed with a revolver entered, and struck Armando twice with the revolver. However, because Armando still did not know the combination, he still could not open the safe. Armando was brought to the front of the restaurant, by the cash register, and told to open it. He complied. The robber who brought Armando to the cash register was pointing his gun at Armando, and insisting that Armando not look. (14RT 2237-2238.) Around $300 to $400 was taken from the cash register. (14RT 2255-2256.)

The men forced Armando to go to the kitchen where they made him lay down on the floor, face down. There was a video camera in the restaurant, but it did not record. One of the robbers demanded the video tape, but Armando explained that it was not recording. One of the robbers other than appellant struck and kicked Armando. Then he stood on

Armando's back, saying to remain still and not do anything or else the man would kill Armando. (14RT 2238-2239.)

Javier Lopez heard a robber say to the others that "The Morro" had left, and that everyone else should leave too. (15RT 2409.) That robber then left through the back door. Another left through the back door, and a third apparently left through the front door. (14RT 2292.) As a result of the robbery and assault, Armando Lopez becomes frightened every time a customer comes in and begins to take out his wallet. (14RT 2278.)

b. Witness Identification

Armando Lopez was certain that appellant was the person who used the stun gun on him, applying it to his ribs and stomach. (14RT 2256.) The man who first approached Armando was the same man who used the stun gun on him. (14RT 2265.) Appellant's firearm was "something like a .45 or a .38," and was an automatic firearm. It could not have been a .380 caliber firearm. (14RT 2254, 2263.) Appellant's firearm looked like the one depicted in People's Exhibit 282. (14RT 2277.) Armando was "quite sure" of his identification of appellant. (14RT 2278.) Throughout the incident, appellant spoke to Armando in both Spanish (with a Central American accent) and English. (14RT 2240.) Armando attended live lineups at the county jail and made identifications there. (14RT 2252-2254.)

Armando recalled being shown photographs on June 4, 1992. He was able to identify Contreras and Navarro. He indicated that Contreras threatened to kill Armando, and that Navarro stayed with Maricella M. during the robbery. (14RT 2249-2250, 2251-2252.) Armando identified Contreras in court as the man who hit him in the in the dining room. (14RT 2249.) In court, Armando was not "completely sure" if Contreras was one of appellant's crime partner, but "fairly sure." (14RT 2254-2255,

2257.) Armando thought that the second man in the office with appellant also had an automatic gun. (14RT 2255.) A third man had a gold-colored revolver. (14RT 2255.) Contreras was the man who kicked Armando while he lay on the ground, and Contreras also hit him on the head with a gun and said he would kill Armando. (14RT 2278.)

Maricella M. identified Navarro in court as being one of the men who was "grabbing" Armando Lopez in the office, and pointing a gun at him, but she was "not very, very sure" of that identification. (14RT 2292-2293.) Maricella M. testified that the man who used the stun gun on Maricella M. was the same man who used it on Armando Lopez. (14RT 2296.)

According to Arturo Lopez, appellant was the person who took him to the back of the restaurant at gunpoint. (14RT 2301.) Appellant also beat Armando in the office. (14RT 2302.) Contreras was the person in the kitchen who, armed with a black automatic handgun, made the employees stay still. (14RT 2303.) Arturo testified that appellant was the person "dragging" Maricella M. by the hair while he held a gun to her head. (14RT 2304-2305, 2320-2323.) Arturo was shown photos by the police after the robbery. He identified a photo depicting appellant as the person who had a gun and told people not to move. (14RT 2307.) Arturo also made identifications at a live lineup. (14RT 2308-2309.) Arturo was "quite certain" of his identification of appellant, and certain of his identification of Contreras. (14RT 2309.)

Lucia Lopez identified appellant and Contreras as two of the robbers. (14RT 2339.) Lucia saw appellant force Armando Lopez to the cash register, at gunpoint. Appellant's gun was a black automatic gun. (14RT 2340.) Contreras told Lucia to keep her head down when she tried to look up. (14RT 2340.) Lucia later identified a photo of appellant as a

man who took money from the cash register and had a firearm. (14RT 2340-2343.)

Javier Lopez identified appellant as one of the men in the office as the same man who took Armando to the office. He wore a white shirt. (15RT 2406-2408.) Appellant was in the office while someone was applying the electric shock to Armando. (15RT 2407, 2414.) Appellant was the person administering the electric shocks to Armando. (15RT 2414-2415, 2429.) Javier saw appellant holding the stun gun. (15RT 2429.) Javier identified Contreras as the person who aimed a gun a Javier's head and forced him to go back to the kitchen. (15RT 2407-2408.) Contreras had a chrome revolver. (15RT 2409-2410.) Appellant was the person who took Armando to the office, then used an electric shock on him. (15RT 2409.) Appellant's gun was a black automatic gun. (15RT 2409.) Javier was later shown photographs of possible suspects. (15RT 2411.) He identified a photo of appellant as having taken a bracelet from someone, and having two guns. (15RT 2413.) Javier also attended a live lineup at which he identified appellant as one of the robbers. (15RT 2415-2416.) Javier was most sure of his identification of appellant, and testified he was the person who brought Armando to the kitchen at gunpoint. (15RT 2421.)

Norman Busbey identified Contreras as the man who held an automatic gun behind his back and stood next to Busbey's table. (15RT 2436, 2438.) Norman Busbey also recognized Navarro as one of the robbers. Near the end of the robbery, Navarro held Armando Lopez by the hair, held a gun to his head, kept yelling at him, and hit and kicked Armando when he fell to the ground. (15RT 2438-2439.) Norman later identified a photo of Navarro as one of the robbers, who was holding a gun at their table, and who tried to open a cash register. (15RT 2441-2443.) Norman later identified Contreras at a live lineup. (15RT 2443-2444.)

Charlene Busbey identified, in her prior testimony, Contreras and Navarro as having been involved in the robberies there. (15RT 2533-2554.) The parties stipulated that Esequiel Flores identified a photograph of Navarro as one of the robbers. (15RT 2468-2469.)

6. Ofelia's Restaurant Crimes of May 22, 1992 – Counts XXXVII Through LX[16]

Ofelia Saavedra owned "Ofelia's Restaurant" in South Gate with her husband Juan Saavedra, during May 1992. (15RT 2370, 2392.) Their daughter, Leticia Saavedra, was at the restaurant on the morning of May 22, 1992. She left to run an errand, then returned around 11:00 a.m. and parked behind the restaurant. (15RT 2371.) Ofelia was working in the kitchen with waitress Obdulia Garcia. (15RT 2392.)

a. The Crimes

Inside of her restaurant, Ofelia observed Juan walking toward the back door, followed by a man with a gun. (15RT 2392-2393.) The man told Juan to stop walking. Juan said he was going to open the back door to admit his daughter. Ofelia, who was holding and working with a knife, turned around and saw her husband struggling with the gunman, attempting to take his gun from him. (15RT 2393-2394.)

A second gunman appeared. Ofelia pointed her knife at him and followed him. He backed away from her. He said, "That old . . . idiot. She thinks I can't shoot a bullet at her." (15RT 2394-2395, 2400.) Ofelia dropped her knife, fearing she would be shot. The second gunman made Ofelia sit on a chair next to Obdulia Garcia, and took a chain from Obdulia. (15RT 2394-2395.) Ofelia could hear the sounds of her husband and the

[16] The crimes in these counts were charged only against appellant and Contreras. (15RT 2369.)

first gunman struggling, then a gunshot. The second gunman rifled through Ofelia's and Obdulia's purses. (15RT 2395.)

Meanwhile, as Leticia, who had returned from her errand, was about to reenter the restaurant through the back door, she heard the sounds of a struggle inside. She opened the door and saw her father struggling with a man who held a gun, holding the gunman's hands. The gun was a small, dark-colored automatic. The gunman kept telling Leticia's father he was going to kill him. Leticia's father kept telling the man to let go of the gun, and that if he did, he could just leave. The man said, "I can't." Leticia told the man "It's not worth it." The gunman fired two shots into the floor. Then, a larger robber came from inside of the restaurant and pushed everyone onto the floor. Leticia's father still held onto the gunman's hands. (15RT 2372-2374, 2386.) The bigger man repeatedly hit Leticia's father on the head with a gun until he let go of the other man. (15RT 2373-2374.) Leticia tried to protect her father by covering him. (15RT 2387.) The gunman was speaking Spanish. (15RT 2373.) The bigger man was going to hit Leticia, but the smaller man said, "No, no, no, the cops are coming," and they ran away. (15RT 2373, 2375, 2396.)

Leticia followed the men into the alley, and saw them leave in a red car and a blue car. (15RT 2375.) She followed the blue car, a Datsun 280ZX, until she was able to note its license plate number, then returned to the restaurant. (15RT 2375-2376, 2389.) The smaller of the two men left behind one black slip-on shoe. (15RT 2375.) That shoe was in the pair marked as People's Exhibit 268. Leticia was not aware that the second shoe had been left at the restaurant. The parties stipulated that the shoes belonged to appellant. (15RT 2377.)

b. Witness Identifications

Ofelia was later shown photographs of possible suspects by the police. She identified one of two photographs, that of codefendant Contreras, as depicting the second gunman. (15RT 2396-2399.) However, in court, Ofelia recognized only appellant, who was the first gunman, and the smaller of the two men. (15RT 2376, 2397.) Leticia also identified appellant in a live lineup at the county jail. (15RT 2377-2381.) Leticia was certain of her identification of appellant. (15RT 2382.) Leticia thought that appellant tried to "hit [her] father." (15RT 2389.)

Los Angeles County Sheriff's Detective Basil North was one of the investigating officers for the Casa Gamino Restaurant, the Siete Mares Restaurant, and the Ofelia's Restaurant robberies. (15RT 2470-2471.) Detective North showed photographic lineups to various witnesses. (15RT 2473.) Norman Busbey identified the number two position in the "C folder." (15RT 2473-2476.) Detective North identified on a map the relative locations of the Casa Gamino Restaurant, the Siete Mares Restaurant, and the Ofelia's Restaurant. (15RT 2477.)

7. "George's Market" Crimes of May 29, 1992 — Counts I Through V

During May 1992, Tony Park owned George's Market, located at 4045 52nd Street in Maywood, where his wife, Linda Park, and his son, Tom Park, also worked, and Gumercindo Salgado was the butcher. (9RT 1298-1299; 11RT 1649.)[17] The store had silent alarms that could be triggered, as well as two video cameras, and there was a firearm under the front counter. (9RT 1307-1308, 1393.)

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[17] Linda Park testified with the assistance of interpreter David Song. (9RT 1375-1376.)

a. The George's Market Crimes

On May 29, 1992, around 1:30 p.m., Ms. Park and Tom Park were working behind the store's counter by the cash register. Salgado was working in the butcher shop. (9RT 1299, 1376-1377.) Including customers and employees, 10 to 15 people were in the store. (9RT 1343.)

In a low voice, a person asked to purchase a money order. (9RT 1300.) Tom bent down to the machine that made money orders. Hearing Ms. Park gasp, Tom turned and saw that the person who had asked for a money order was pointing a gun at Tom and Ms. Park. Tom identified codefendant Contreras as that gunman. (9RT 1301.) His firearm was "dark, kind of blackish, semiautomatic." (9RT 1345.)

Tom saw another gunman enter the store. The second person went behind or jumped over the counter, pointed the gun at Tom and Ms. Park, told Ms. Park to "shut up," and "roughly" shoved both Tom and his mother. (9RT 1301-1302.) The second gunman who went behind the counter was appellant. (9RT 1302.) Both appellant and Contreras jumped over the counter. (9RT 1380.) Tom Park observed a third robber standing near the front entrance, wearing a black shirt with polka dots, and looking outside. (9RT 1304, 1349.) The shirt was People's Exhibit 50. (9RT 1349.) That person was codefendant Navarro. (9RT 1304.) Codefendant Navarro did not jump over the counter. (9RT 1382-1383.) Tom also observed a fourth robber in the store, drinking Gatorade and talking. (9RT 1304.)

One robber pointed a gun at Ms. Park and told her to be quiet. (9RT 1377-1380.) Appellant and codefendant Contreras then proceeded to ransack the counter area, including going through two cash registers; they found and took money and food stamps. (9RT 1302-1303.) Ms. Park remained sitting on a chair behind the counter. (9RT 1307.) All of the people in the store were "subdued or otherwise confronted" by the gunmen. (9RT 1344.) The men took around $1,500 from each cash register and

demanded more from Ms. Park, who said there was no more. The men demanded that she open the Lotto machine in the store. Ms. Park opened the Lotto machine, which did not contain any money. Contreras closed the machine. (9RT 1379, 1381.)

A gunman approached Gumercindo Salgado, who was speaking on the phone in his butcher shop by his assistant Roberto Ramirez, and directed Salgado to hang up the phone because they were robbing the store. Salgado hung up the phone and surreptitiously activated a silent alarm. (11RT 1649-1651.) The gunman ordered Salgado and Ramirez to go to the back of the store in the market's kitchen, where some store customers were being held, and made them all lie down. (11RT 1651-1652, 1654.) Codefendant Navarro was there, armed with a firearm. Navarro watched over Salgado, Ramirez, and the customers who were on the floor for a while. (11RT 1653.)

Elvira Acosta parked outside of George's Market, intending to cash her paycheck there. She got out of her car, and noticed a person standing by the phone. That person was wearing a white polka dot shirt and said "Hi," to Acosta as she walked past him. Acosta entered the store. The person wearing the polka dotted shirt followed her and said to go to the back of the store. Acosta responded, "F**k you. I'm going home." (9RT 1399-1402.) The man responded that he was serious, that it was a robbery with five well-armed robbers, and he drew a firearm from his waistband, from under his polka-dotted shirt. The man's accent sounded El Salvadoran. Another of the robbers then took Acosta to the back of the store and told her to turn toward the wall and not to look at him. She told him, "Don't believe you're so cute, a**hole." The man responded that she should be quiet. In addition to the man wearing polka dots, and the man who took her to the back of the store, Elvira Acosta saw a shorter man who

was removing items from the area under the cash registers. (9RT 1403-1405.)

While appellant and codefendant Contreras searched for money, appellant did most of the talking. Appellant kept demanding more money and asking Tom and Mrs. Park where the rest of the money was. After ransacking the counter area for two or three minutes, appellant, still holding his gun, grabbed Tom's arm and forced him to go to the back of the store, then held a gun to Tom's temple and said he would shoot if Tom did not tell him where the rest of the money was kept. (9RT 1305-1306.)[18] Appellant also took Ms. Park to the back of the store, pushing her with his body – she wanted to try to push a panic alarm, but appellant pushed her to prevent her from doing so. (9RT 1381, 1384-1385, 1406.)

Tom saw appellant bring Ms. Park to where Tom was being held. He was rough with her and told her to "shut up." Tom also saw someone bring Elvira Acosta back to where Tom was being held. (9RT 1309-1310.) Appellant pointed his finger at Tom and insisted that Tom knew where "the money" was hidden. (9RT 1310.) Appellant struck Tom in the face, knocking his glasses off. (9RT 1310, 1385; 1407.) Tom did not know where any other money was kept, and therefore could not comply with appellant's orders. (9RT 1306 Appellant racked the slide on his firearm and loaded a bullet into the chamber while pointing the gun at Tom's head, and continued demanding more money. (9RT 1306, 1345.)[19] Elvira Acosta argued with the long-haired robber. That person raised his shirt and showed Tom a gun tucked into the waistband of his pants, and said to not

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[18] While being held in the back of the store, Tom observed an individual who had long hair and a gun whom Tom believed to be involved in the robbery. (9RT 1309-1311.)

[19] Appellant's firearm was a semiautomatic handgun "like a policeman's gun, like dark gray, dark steel." (9RT 1344-1345.)

look at his face. (9RT 1310-1311, 1352.) The shorter man who had pushed Mrs. Park back toward the kitchen asked whether Acosta knew where there was more money. She responded that she did not know. He twisted her arm and placed his firearm against her left temple. (9RT 1406.) Store customers were led to the back of the store behind the kitchen area, near where Tom was being threatened and questioned. (9RT 1307, 1350.)

Someone asked who was the butcher. Salgado said he was. Someone took him to the cash register and ordered him to open it. Salgado complied, and opened the cash register, which contained $200 or $300. The robbers took that money. Salgado saw there were multiple robbers there. (11RT 1153-1155.) Salgado was returned to the kitchen. (11RT 1655.) One of the robbers, was in the back of the store arguing with "Alvaro," wearing "an electric light blue shirt," armed with a "very long silver gun" approximately 12 inches long, and sporting long hair. Another unidentified robber did not display a weapon that Tom saw. (9RT 1355-1356.)

The robbers took around $3,000 in cash, and $1,000 worth of food stamps. (9RT 1357, 1381-1382.) Contreras removed the video tape from one of the two security cameras in the store. (9RT 1383.) Appellant found the gun the Parks kept behind the counter of their store and took that firearm. (9RT 1310, 1350.)

At some point, appellant saw a police car pass by. (9RT 1385-1386.) Appellant told Tom and Ms. Park to remain where they were, then appellant and his companions left. (9RT 1310, 1345-1348; 1385-1386.) Then, three or four gunshots rang out. (9RT 1386; 10RT 1425-1426; 11RT 1655, 1659.) The gunshots sounded the same, as if from the same firearm. (11RT 1659.) When several of the victims went outside, they saw the body of a police officer in his patrol car. (9RT 1345-1348, 1387; 10RT 1426.)

b. The Murder of Maywood Police Officer John A. Hoglund and the Attempted Murder of Enrique Medina

As noted above, Salgado managed to activate a silent alarm near the start of the robbery. (11RT 1650-1651.) Maywood Police Officers Kenneth Meisels and John Hoglund were each working uniform patrol on May 29, 1992, driving separate patrol cars. Officer Meisels was partnered that day with Maywood Police Reserve Officer William Wallace.[20] Officers Hoglund and Meisels saw each other at several calls together that day, responded to one call (children "ditching" school) together, and ate lunch together that day. (10RT 1449-1452, 1475-1476.) Around 1:35 p.m., Officer Meisels responded to the silent alarm from George's Market. Officer Hoglund reported on the radio that he would also respond to George's Market. (10RT 1451-1453.) Officer Meisels directed Officer Hoglund to treat the matter like a silent robbery call. (10RT 1459-1460.)

Meanwhile, Luis Enrique Medina drove to George's Market with a friend and work colleague, Felipe Soto. Medina double-parked in front of the market (the street was relatively empty) while Soto went inside. (10RT 1488-1490, 1493.) While waiting in his car, Medina observed a person wearing a black and white shirt and an unusual white and chrome wristwatch standing in front of the market door. That man walked back and forth as if he was watching the store. (10RT 1490-1491.) Other men came outside when a helicopter flew by. They spoke with the man in the dotted

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[20] May 29, 1992, was Officer Wallace's first day with the police department. He and Sergeant Meisels responded to George's Market during Officer Wallace's first 20 minutes of duty. (10RT 1477.)

shirt, agreed the helicopter was not a police helicopter, then reentered the store. (10RT 1492.)[21]

Officer Hoglund reached the market first, and so informed Officer Meisels by radio. (10RT 1460.) Officer Meisels was nearby, driving northbound on Pine Street, near 53rd or 54th Street. According to Medina, Officer Hoglund's police car approached the market, and the person wearing the black and white shirt told the people inside of the market that the police were coming and they should leave. (10RT 1492, 1595.) Officer Hoglund activated the roof lights of his patrol car, parked, and began to exit his car. Medina opened his car door, thinking Officer Hoglund was going to tell him to move his vehicle. (10RT 1493, 1595, 1589, 1591.) Men exited George's Market and began running. (10RT 1493, 1590.) According to Medina, Codefendant Contreras fled the market carrying bags. (10RT 1556-1557.) Appellant and codefendant Navarro also ran from the store. (10RT 1557.) Appellant was the last to leave. (10RT 1557.) Officer Hoglund told the men to stop. Appellant, the last person to exit the market, ran by Medina's car, and drew a gun from his waistband. (10RT 1494; 11RT 1589, 1596, 1645.)[22]

Officer Hoglund began to draw his firearm and use his radio. Appellant said to Officer Hoglund, in substance, "You s**t cop, son of a b**ch," "You are a s**t and you are going to f**k your mother," "Officer, son of your f**king mother, s**t, son of a b**ch, you're going to die," "I believe that you're going to die. Son of a b**ch, you're going to die." Appellant "charged" his gun and began shooting Officer Hoglund.

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[21] Medina could hear the men's accents and believed they were from Central America. (10RT 1492.)

[22] Medina, who had been a police officer in Mexico, was familiar with firearms. (10RT 1546.) Medina believed appellant's firearm was a black nine-millimeter handgun. (Peo. Exh. 51/A; 10RT 1546.)

(10RT 1494.) The first shots were to Officer Hoglund's body, including his shoulder. Officer Hoglund fell. Appellant continued shooting as the officer fell, and shot him in the head. (10RT 1495; 11RT 1639, 1645-1646.) Appellant was the gunman who shot Officer Hoglund. (10RT 1544-1545.) The man in the black and white shirt and two or three others ran to a red car. (11RT 1595-1596.)

Erik Sanchez, driving with his girlfriend westbound on 52nd Street, stopped at the stop sign at the corner of 52nd Street and Gifford near George's Market. He saw Officer Hoglund's patrol car drive up and stop, double-parked. Sanchez remained at the stop sign. As Officer Hoglund exited his car, four or five gunshots rang out. The officer fell half-in and half-out of his car, his torso in the car, his legs on the ground. (10RT 1430-1431, 1434, 1440.)

Medina was approximately eight feet from appellant at the time of the shooting. (10RT 1542-1543.) Appellant stood around eight feet from Officer Hoglund when he shot the officer. (10RT 1543.) Appellant then pointed his gun at Medina, putting the "gun in [Medina's] face," who was still sitting in his car. (10RT 1494-1496; 11RT 1592, 1601, 1609, 1617-1618, 1639, 1645-1646.) Medina thought appellant aimed at him as if he wanted to kill him, but the firearm was out of bullets, as evidenced by its open slide. (10RT 1545-1546.) While pointing his gun at Medina, appellant tried to fire it by pulling the trigger, but there were no bullets left in the firearm. (11RT 1612-1614.)[23] Medina observed appellant make a gesture as if removing the empty clip from his gun, and thought appellant was trying to replace the clip, but stopped because his friends called to him

[23] Medina recalled testifying at the preliminary hearing that appellant "kept pulling," but the "gun didn't have any more bullets in it." (11RT 1602-1603.)

from a small red car,[24] telling him to flee. (10RT 1547; 11RT 1614-1615.) Appellant ran to the red car, which drove away. (10RT 1547-1548.)[25] According to Medina, only the last person to flee the market shot Officer Hoglund. (10RT 1597.)

According to Sanchez, he did not see who shot Officer Hoglund, but did notice four young men running from the direction of the market toward the police car, then past it to two separate cars. Two of the young men ran toward a red Mazda RX-7.[26] The other two men, running the other direction, ran toward what was possibly a blue Honda Accord that drove away. Sanchez was certain about the red Mazda, because it drove away eastbound, past him, but not about the Honda, which drove away westbound. Sanchez ducked down for his personal safety as the Mazda drove past him, but thought that a male Hispanic was driving it. He saw only one person in the Mazda as it drove away. The numbers on the license plate of the red Mazda were covered. (10RT 1431-1433, 1441-1443, 1447.)[27]

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[24] It appeared to Medina that the red car's license plate had been covered with tape. (10RT 1548-1549.)

[25] Medina and his friend, who returned from inside of the store, left. Medina came back an hour later to see if he could help the police. (10RT 1549.)

[26] People's Exhibit 143/A through 143/C depicted a vehicle that looked "exactly" like the Mazda RX-7 which Sanchez saw drive away from the shooting of the officer. It had a dark tinted window like the vehicle he had seen at the time of the shooting. (10RT 1437-1438.)

[27] Sanchez parked down the street, walked back to where Officer Hoglund had been shot and spoke to officers at the scene. (10RT 1434.)

Meanwhile, at 52nd Street, Sergeant Meisels and Officer Wallace observed the red Mazda[28] heading eastbound on 52nd Street, running through the stop sign at Pine and 52nd Streets at a "very high rate of speed." (10RT 1462-1463.) Aside from the driver, only one passenger could be seen, in the front passenger seat. (10RT 1462-1463, 1477.) The passenger was a male with dark hair. Sergeant Meisels unsuccessfully tried to reach Officer Hoglund on the radio, and pursued the red Mazda, which was traveling at a high rate of speed, between 60 and 80 miles per hour. (10RT 1463-1464, 1477-1478.)

Unable to keep up, Officer Meisels lost sight of the red Mazda, then drove to George's Market where he and Officer Wallace observed Officer Hoglund's vehicle and body. (10RT 1464, 1478-1479.) Officer Hoglund's vehicle was parked in the center of the street in front of the market, its driver's door open. Officer Hoglund's legs were dangling out of the driver's side of the car, his torso was in front of the driver's seat, and a large crowd stood around the vehicle. (10RT 1465, 1482.) It appeared as if Officer Hoglund had fallen back into the vehicle with his head pointed toward the gas and brake pedals. (10RT 1482-1483.)

Officer Wallace saw that Officer Hoglund was bleeding, immediately pulled him from the vehicle, and observed wounds to his head and shoulder.[29] The head wound was to the back of Officer Hoglund's head, behind the right ear. Officer Hoglund did not display any vital signs and did not respond to CPR that Officer Wallace administered. (10RT 1483-1484.) Officer Hoglund was in full uniform, his firearm in an "unsnapped"

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[28] The vehicle looked similar to the one depicted in People's Exhibit 143. (10RT 1467, 1478.)

[29] Photographs depicted the wounds to Officer Hoglund. (Peo. Exh. 42; 10RT 1466-1467.)

holster. (10RT 1465-1466, 1468, 1471-1472, 1484-1485.) The officers called for paramedics, then lifted Officer Hoglund from his patrol car and started performing CPR upon him. (10RT 1465-1466.) Paramedics responded around five to seven minutes later. (10RT 1467-1468.)

Expended shell casings were located behind Officer Hoglund's car. (Peo. Exh. 41; 10RT 1485-1486.) The parties stipulated that nine-millimeter shell casings and a .22-caliber shell casing were found outside of Officer Hoglund's car parked in front of George's Market, a nine-millimeter bullet was found on the ground outside of the market, and a spent bullet was found on the driver's side floorboard inside of Officer Hoglund's car. (Peo. Exhs. 56 [nine-millimeter casing], 57 [spent bullet], 58 [nine-millimeter shell casing], 59 [live bullet], 60 [nine-millimeter shell casing], 61 [.22-caliber shell casing] 293-298 [stipulations]; 12RT 1783-1789; see also 1817.)

c. Coroner Testimony

Eugene Carpenter, Jr., the Medical Examiner for the Los Angeles County Coroner, performed the autopsy on the physical remains of Maywood Police Officer John A. Hoglund. (10RT 1498-1500.) Officer Hoglund had been shot three times. There was a gunshot wound to the left upper back of his head at a downward angle, from left to right, and exited his body behind the right ear, causing wound number one. That bullet was not recovered. (10RT 1502-1505, 1511.) A second wound was to Officer Hoglund's left front shoulder. That bullet traveled through his torso, piercing his heart before exiting his body and reentering his arm where Medical Examiner Carpenter recovered it. (10RT 1505, 1511.) A third wound was to Officer Hoglund's left front chest. That bullet was recovered. (10RT 1506, 1512.) Each of the second and third gunshot wounds appeared to have been fired in a downward angle. (10RT 1506.)

Each of the three wounds was fatal. (10RT 1521-1523.) Officer Hoglund's body also bore abrasions to the right wrist, right hand, and over his nose. (10RT 1506-1507.)

The two spent nine-millimeter bullets recovered by the Coroner from Officer Hoglund's body (Peo. Exhs. 64, 65 [bullets], 200 [stipulation]) were given to Los Angeles County Sheriff's Detective Dolores Perales, one of the investigators, who attended Officer Hoglund's autopsy. She brought the bullets to the Sheriff's Crime Laboratory. (11RT 1699-1700.)

The wounds were consistent with having been caused by bullets of medium or large caliber, and were consistent with having been caused by nine-millimeter bullets. (10RT 1507-1508.) This opinion was based on the size of the bullet holes and the nature of the wounds. (10T 1525-1526.) Medical Examiner Carpenter did not know what happened to the bullet that caused Officer Hoglund's head wound. However, based on his examination of Officer Hoglund's body, it was consistent that the bullet exited the body. (10RT 1508-1509.)

The second and third wounds were fired from at least two to four feet away, given the absence of stippling, for all handguns, and for most handguns, a foot and a half away. Based on their angles, wounds two and three were fired close in time to each other. (10RT 1509-1510, 1530, 1538.)[30]

Officer Hoglund stood five feet, eight inches tall, before his death. (10RT 1501.) Assuming a gunman who was five feet, two inches tall and a victim who was five feet, eight inches tall, Officer Hoglund's wounds were not consistent with having been inflicted while Officer Hoglund was standing up. Rather, Officer Hoglund had to be on his knees, the gunman

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[30] Diagrams, photos, and a mannequin were used to illustrate Medical Examiner Carpenter's testimony. (10RT 1511-1517.)

had to be elevated, or they were at the same level but the gunman bent over toward Officer Hoglund, causing the angle of bullet entry and travel. With respect to Officer Hoglund's head wound, given the circumstances, Officer Hoglund's head must have been at the level of the gun, and angled. (10RT 1517-1520.) Officer Hoglund's head wound was consistent with him having been seated in his patrol car, slumping forward. (10RT 1521.) Wounds two and three were fired in a manner consistent with but not specific for rapid fire. Wound number one appeared to have been fired after a change in position. (10RT 1527.) The wounds were consistent with having been fired while Officer Hoglund was getting out of his patrol car. (10RT 1529-1530.)

d. The Police Investigation and Further Eyewitness Testimony Regarding the George's Market Crimes

Detective Perales and her partner responded to George's Market, where Officer Hoglund's patrol car was parked in front of the market and shell casings lay in the street. After viewing the entire crime scene, Deputy Perales and her partner walked through George's Market, then went to the Maywood Police Department, where they interviewed witnesses. (11RT 1681-1686.)

(1) Tom Park

After the George's Market robbery was over, Tom checked the VCR machines to retrieve the tapes. One of the machines was shut off and its videotape was gone. The other machine was still running and contained a videotape. (9RT 1308-1309.) Tom reviewed the videotape, which was played for the jury. (Peo. Exh. 1; 9RT 1311-1313.) The tape depicted the events of the crimes that took place inside of George's Market. (9RT 1312-1314.) At the police station after the robbery, Tom described the robbers to the police -- he saw five altogether. (9RT 1353-1354.)

Still photographs harvested from the video were shown by police to Tom Park. Photographs depicted appellant, codefendant Contreras, and codefendant Navarro during the robbery. (Peo. Exhs. 2-5; 9RT 1315-1320, 1334.)[31] Around ten days after the robbery, Tom identified a photograph of appellant as one of the robbers. (Peo. Exh. 16; 9RT 1334-1336.) He also identified photographs of codefendants Contreras and Navarro. (Peo. Exhs. 17-18; 9RT 1336-1338.) On September 30, 1992, Tom attended a lineup at the County Jail, where he identified appellant, codefendant Contreras, and codefendant Navarro as having been among the robbers. (Peo. Exhs. 20-23; 9RT 1338-1343.) Tom was "very sure" of his identifications of appellant, Contreras, and Navarro. (9RT 1343.)

(2) Linda Park

The police later showed Ms. Park photographic lineups. (9RT 1387-1388.) Ms. Park identified photographs of appellant and codefendant Contreras. (Peo. Exhs. 16-17; 9RT 1387-1389.) Ms. Park also identified appellant and codefendant Contreras in a physical lineup at the county jail. (Peo. Exhs. 30-31; 9RT 1389-1392.) Ms. Park reviewed the videotape of the robbery and testified about the events depicted in it. (9RT 1394.) Ms. Park was 100 percent certain of the identifications she made of appellant and Contreras. (9RT 1398.)

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[31] Tom looked at a map of Los Angeles County, pointed to the City of Maywood, and noted that it was close to the Santa Ana and Long Beach Freeways. Tom identified the location of George's Market on a map and in aerial photographs. (Peo. Exhs. 6-9; 9RT 1320-1324.) Tom discussed photographs of the market itself (both interior and exterior) and related them to his testimony regarding the events of the robbery. (Peo. Exhs. 10/A-10/F, 11/A-11/F, 12/A-12/F, 13/A-13/D, 14 [interior diagram]; 9RT 1324-1334.)

(3) Enrique Medina[32]

Detective Perales spoke with Enrique Medina at the Maywood Police Station. (11RT 1686.) According to Detective Perales, Medina told her the following information in a recorded interview. He had parked in front of George's Market while his friend went inside. There was a male in front of the store wearing a black and white shirt with polka dots on it and a wristwatch with a white leather band. (11RT 1686-1687.) While Medina waited, a police car pulled up in front of the market. The officer exited the car, then four or five males ran from the market. The last to leave the market ran between the officer and Medina, pivoted and drew a firearm from his waistband, fired multiple times at the officer, then tried to shoot Medina but could not as the gun was out of bullets (the slide was back on the handgun). The gunman jumped over the trunk of the police car, then ran toward a red sports car parked on the street. Medina said the gunman wore a striped shirt, white shorts, and tennis shoes. (11RT 1687-1688.) Medina told Detective Perales he thought the officer was shot in the head after falling to his knees upon first being shot. (11RT 1690.)

According to a transcript of the taped interview, Medina said the gunman pointed the firearm at Medina's face, causing Medina to duck. The firearm was a black nine-millimeter handgun that looked new. Medina said

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[32] According to Medina, subsequent to his meeting with Detective Perales and providing information about the incident, Medina received money and assistance finding a job. He received $300 approximately six months before trial, and on another occasion, $20. He also received some boxes from the market containing Thanksgiving food. (10RT 1557-1560.) According to Detective Perales, she had nothing to do with Medina receiving money – that resulted from his dealings with the Maywood Police Department, which informed Detective Perales around a year after the initial incident. (11RT 1745.)

that he knew the firearm was empty because it was "open." (11RT 1746-1747.)

Detective Perales further testified to the following. After learning that there was a video tape of the robbery, Detective Perales interviewed Medina again. Medina watched the videotape with Detective Perales and identified the gunman and the person who acted as lookout wearing the black-and-white shirt and white-banded wristwatch on the videotape. The videotape was played in court and Detective Perales related Medina's identifications to her to the jury. (11RT 1691-1696.) Medina identified, when speaking with Detective Perales, the person depicted in the photos of the robbery wearing a striped shirt as the gunman. (11RT 1744-1745.)

Medina testified to the following. Medina spoke with Detective Perales during the investigation and provided a recorded statement. (Peo. Exhs. 53-54; 10RT 1554-1556.) The tape recording was played for the jury. (10RT 1556.) Detective Perales showed Medina a store videotape that depicted the George's Market robbery. (10RT 1550.) In court, Medina viewed the videotape and identified appellant as the gunman who shot Officer Hoglund. (10RT 1550-1551.) During his police interview, a police artist made a sketch of the wristwatch which Medina had seen the man wearing a dotted shirt sporting. (10RT 1552.) A watch in evidence as People's Exhibit 51 was the watch Medina had seen. (10RT 1552.) People's Exhibit 50 was the shirt that the man standing outside of the market, wearing the unusual watch, had been wearing. (10RT 1554.) Navarro, wearing the black and white shirt and watch, did not have a gun. (11RT 1593-1594.)

Medina further testified to the following. Medina identified appellant as the gunman in court at trial, stating he was not "sure" because the shooting happened two years earlier, but he thought appellant was the gunman. (10RT 1544.) However, when his testimony resumed the next

day, Medina testified that he was certain that appellant was the gunman. He was uncertain the day before because appellant looked a little different during trial than he had previously looked, but after thinking about it, Medina was certain. Medina was confident that neither Contreras nor Navarro were the gunman. (10RT 1587-1588.) The fact that four or five men ran from the market, but only three were in court, caused Medina to fear for himself and his family. (11RT 1640.)

Detective Perales testified that on each occasion that Medina spoke with Detective Perales prior to the preliminary hearing, he expressed fear for the safety of his family, because not all of the robbery participants had been captured. (12RT 1780-1781.) Detective Perales was present at the preliminary hearing when Medina identified a different person as the gunman. The next day, before the preliminary hearing resumed, Medina approached the prosecutors and Detective Perales and told them he had made a mistake the day before. The prosecutors and Detective Perales would not permit Medina to review the videotape again before he resumed testifying, and told him simply that he needed to tell the truth. Medina spoke to his attorney,[33] then told one of the trial prosecutors and Detective Perales that he had made a mistake and would testify. Detective Perales was not aware of any promises being made regarding whether Medina would be prosecuted or of any conference taking place between Medina's attorney, Detective Perales, and the prosecutors. (11RT 1697-1699, 1747-1748, 1769-1770, 1774-1775.) Medina then retook the witness stand and made his in-court identification. (12RT 1770.) Medina never said he lied

[33] According to appellant's trial counsel, he accused Medina of committing perjury at the preliminary hearing, and counsel was appointed for Medina. (11RT 1755, 1769, 1773-1774.)

from fear, but rather that he was "completely confused and afraid and he made a mistake." (12RT 1791.)

Medina testified that he had identified a different person as the gunman during the preliminary hearing, but that was because he was afraid for himself and his family, nervous, and confused, all of which caused him to be "mixed up." No one told him to do anything other than tell the truth. (10RT 1561-1565.) Medina was afraid of appellant then. (11RT 1599-1600.) However, Medina's fear did not cause him to err in his preliminary hearing testify – that resulted only from confusion. (11RT 1647-1648; see also 11RT 1628-1632.)

(4) Gumercindo Salgado

One of the robbers who was not present in court had two handguns. (11RT 1660.) Salgado later attended a live lineup at the county jail. He was twice unable to make an identification, but in a third lineup he made one identification. (11RT 1655-1659.)

(5) Elvira Acosta

Elvira Acosta viewed photos of George's Market. (Peo. Exh. 11; 10RT 1420-1421.) She also viewed the videotape of the robbery, and testified about its contents. (10RT 1427-1428.) Acosta identified appellant in court, whom she said was the smallest of the robbers and the man who pushed Ms. Park during the crimes. (9RT 1407.) Codefendant Navarro was the man outside of George's Market wearing the shirt with polka dots who spoke to Acosta, then told her to go to the back of the store.

(9RT 1408; 10RT 1427.)[34] Codefendant Contreras was the man by the cash registers near the front entrance. (9RT 1408.)

Acosta attended live lineups at the County Jail, where she found that the only difference between codefendant Contreras's appearance at the jail and during the robbery was that he had long hair during the robbery. (10RT 1421-1424.) During the lineup, Acosta identified appellant as one of the robbers (10RT 1424-1425) as well as codefendant Navarro (10RT 1425, 1427).

(6) Identification Stipulation Regarding Roger Woodside

The parties stipulated in People's Exhibit 301 substantially as follows. Roger Woodside was a customer of George's Market who was present during the robbery on May 29, 1991. Woodside identified photos of suspects, then identified suspects in live lineups at the county jail. (11RT 1678-1682.)

(7) The Arrest of Appellant and Codefendants Contreras and Navarro

(a) Codefendant Contreras's Arrest

Codefendant Contreras was the first of the group to be arrested, on May 31, 1992, around 11:30 a.m., in a traffic stop of a brown "280ZX" on 122nd Street near Avalon, in the City of Carson. (11RT 1700-1701; 13RT 2167-2168.) Contreras was the sole person in that car. (13RT 2168-2169.)

Detective Perales filled out a booking slip for Contreras. (Peo. Exh. 124; 11RT 1701, 1713-1714.) The address he provided while being

[34] Acosta identified People's Exhibit 50 as the polka dotted shirt (white with dots) worn by codefendant Navarro. (10RT 1428-1429.)

booked was 256 East 120th Street, apartment number eight, in Los Angeles. Detective Perales also took a photograph of Contreras, which depicted him with hair that descended past his shoulder and was pulled back in a ponytail. Contreras said he was self-employed, and worked in construction. (11RT 1714-1715.) Contreras was in possession of $599.85 (Peo. Exh. 133; 11RT 1722) and jewelry (Peo. Exh. 134; 11RT 1722-1723).

(b) Codefendant Navarro's Arrest

On May 30, 1992, around 4:00 p.m., Los Angeles Police Detective Joe Callian of the Special Investigations Section responded to the Maywood Police station regarding the George's Market crimes. He was provided with photographs, the address belonging to suspect "Hector Reyna" of 128 West 99th Street, and the description and license plate of an orange Nissan. Detective Callian and other Special Investigations Section officers set up surveillance at 128 West 99th Street on May 30, 1992. During the early evening hours, the officers observed codefendant Navarro go to the orange Nissan, lock it and set its alarm, then return inside. Surveillance was terminated for the evening a while later. (13RT 2169-2173.)

The next morning, Detective Callian returned with his partner around 11:00 a.m., and observed the orange Nissan driving eastbound on 99th Street before turning southbound on Main Street. As the vehicle turned, Detective Callian recognized Navarro, or "Hector Reyna," as the driver. The passenger was a Hispanic female, Rosa Santana. They drove to a used car lot at 1631 West Venice Boulevard, picked up a heavyset Hispanic male, then drove to a swap meet at 45th Street and Alameda. Navarro, the heavyset person, and the female exited the vehicle. They went inside of the swap meet, then returned several minutes later with a large soft-sided

suitcase that they placed inside of the car before driving to a meat market, then to 128 West 99th Street. (13RT 2173-2175.)

Around an hour later, Detective Callian learned over the police radio that the orange Nissan was leaving its location. Subsequently, Detective Callian and his partner followed the Nissan. Navarro was driving. Rosa Santana was in the front seat. In the back seat were another Hispanic female and male. After following them for while, the officers were directed to stop the car and detain its occupants. (13RT 2175-2176.) Navarro was arrested around 2:45 p.m. (13RT 2179.)

A booking slip was prepared for Navarro. (Peo. Exh. 125; 11RT 1716-1717.) Navarro identified himself as "Hector Reyna" of 128 West 99th Street in Los Angeles. (11RT 1717.) A booking photograph of Navarro was taken the next day. Navarro was wearing a white leather-band wristwatch like the one Medina had described. (Peo. Exh. 51; 11RT 1717-1719.) Navarro was in possession of $118 in cash, and food coupons (known as "food stamps"). (Peo. Exh. 130; 11RT 1720-1721.) Other jewelry was recovered from Navarro and booked into custody. (Peo. Exh. 132; 11RT 1721.)

Detective Perales obtained the name "Hector Reyna" from a driver's license with Navarro's photo that was in Navarro's possession. Navarro did not tell Detective Perales that his name was "Benjamin Alberto Navarro" then. (12RT 1271-1272.) The driver's license was in the name of "Hector Reyna, Jr., at 128 West 99th Street. (12RT 1775.) Navarro personally told Detective Perales that his address was 128 West 99th Street, which she confirmed was his true address. (12RT 1272-1273.)[35]

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[35] Prior to the preliminary hearing in this matter, Navarro was using the name "Hector Reyna." (12RT 1775-1776.) Navarro's attorney stipulated that Navarro was booked under the name "Hector Reyna, Jr.," (continued...)

(c) Appellant's Arrest

Following Navarro's arrest, Detective Callian, Detective Perales, and Rosa Santana retraced their steps from the used car lot where Navarro had picked up the heavyset man. They drove to the area of 12th and Lake Streets in the Rampart area, then into the rear parking area of a multi-unit apartment building, possibly located at 1209 South Lake, where they observed a red Mazda with a large sticker on the back window that said "Dinora." (13RT 2177; see also 13RT 2179.) Aware that vehicle had been used in the crimes, Detective Callian dropped off Santana and Detective Perales. Detective Callian's team assumed a perimeter in the area, and surveillance over the location. They subsequently followed appellant's red Mazda around the block to 501 South Grandview, where it pulled over to the curb. Detective Callian's team arrested appellant, the vehicle's only occupant, around 7:35 p.m. (13RT 2178-2179.) Detective Callian recovered from appellant a white sock containing jewelry, including a "bunch of gold, small chains, rings," from his groin area, underneath his clothes. Those items were subsequently handed over to Detective Perales. (Peo. Exh. 136; 13RT 2180-2181.)

Appellant was booked under the name "Carlos Antonio Juarez," of 501 Grand View, in Los Angeles. (11RT 1725-1726; 12RT 1779 [by stipulation].) He stated that name in court during his initial court appearances. (12RT 1779 [by stipulation].)

Detective Perales went to a tow yard on the day of appellant's arrest, and viewed a red Mazda RX7. Writing on the back windshield spelled "Dinora." The license plate was "creased," which, if the license plate was

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(...continued)
and that name was used during initial court appearances. (12RT 1779-1280.)

folded in at those creases, obstructed "at least the first two and the last two numbers or letters on either side." (Peo. Exhs. 131, 143 [photos]; 11RT 1727-1728.)

(8) Execution of Search Warrants and Lineups at the County Jail

(a) Search Warrants

Detective Perales assisted in the preparation and execution on May 31, 1992, of search warrants. (11RT 1728-1729.) People's Exhibits 141, 145-153, 181, and 182, were recovered at 1209 South Lake Street. People's Exhibits 50, 154, 155, 157-166, were recovered from 128 West 99th Street. People's Exhibits 167-173 were recovered from 375 East Imperial Highway on May 31, 1992. People's Exhibits 174 through 180 were recovered from 256 East 120th Street, apartment 8. (13RT 2183–2214 [description of various exhibits, and objections].)[36]

(b) Lineups

Detective Perales was present during the lineups of appellant and codefendants Contreras and Navarro that were conducted on August 25, 26, and September 30, 1992. (11RT 1735.) (11RT 1737-1740.) According to Detective Perales, the appearances of appellant and codefendants Contreras

[36] Recovered at the Lake Street premises, in a camera, was undeveloped film, which Detective Perales had developed. (11RT 1729-1730.) Three photographs were developed from that film. (Peo. Exh. 142; 11RT 1731.) A Polaroid photo recovered pursuant to the search warrants depicted appellant and codefendants Navarro and Contreras "arm in arm." (Peo. Exhs. 155-156; 11RT 1731-1732.) Another photograph depicted two photographs recovered pursuant to the search warrant. (Peo. Exh. 144; 11RT 1732-1733.) People's Exhibit Seven appeared to be a map of the area around Maywood that was taken from a Thomas Guide. (11RT 1733.) People's Exhibit 144 appeared to be a hand-drawn diagram that corresponded to the map in People's Exhibit Seven. (11RT 1734-1735.)

and Navarro changed a little bit each time she saw them. (11RT 1739.) Detective Perales testified regarding the identity of persons – defendants and others not charged – depicted in photographs (with limiting instructions as to each defendant, and objections. (20RT 3515-3524.)

(9) Rosa Santana

(a) Detective Perales's Testimony Regarding Rosa Santana's Identification of Appellant, Navarro, and Contreras

Detective Perales testified as follows. Rosa Santana, then 13 years of age and not considered a suspect, was brought to the Carson Sheriff Station on Sunday, May 31, 1992, two days after Officer Hoglund's murder. (20RT 3527-3528, 3536-3537.) Santana gave a statement regarding Navarro's involvement in the murder of Officer Hoglund, and in response to questions, said she did not know how to get to "El Morro's" apartment, but knew where it was. Both Contreras and Navarro had been under surveillance prior to their arrests, but appellant's location had been unknown. (20RT 3528-3529.)

Santana accompanied the detectives to 1209 South Lake Street, where they observed appellant's red Mazda and a person leaning out of the window of the apartment that she indicated to them. (20RT 3534.) The detectives and Santana then returned to the Carson Sheriff's Station, where Santana gave a recorded statement. (Peo. Exh. 47; 20RT 3535.) A video was played for Santana. The vehicle in which Santana was detained with Navarro – a "papaya" colored Nissan four-door vehicle – was depicted in that video. Detective Perales was unaware that ballistics showed only one firearm was used to kill Officer Hoglund. (20RT 3535-3537.)

Santana testified at the preliminary hearing in this case. She was in custody on a burglary out of Pomona court. Santana was not held in

custody in the instant case then, but a "material witness bond" was posted. No promises were made to Santana, nor was immunity granted, prior to her testimony. (20RT 3537.) An attorney was appointed for her at the preliminary hearing, and Santana was granted immunity for "any violent crimes to do with this case." No promises were made to her regarding her outstanding case in Pomona, except that the prosecutor in that matter would tell her sentencing judge of her cooperation in this matter, and the dispositional hearing in that matter would be put over until after her testimony in this case. However, no promises were made as to any disposition in that matter. Santana was never charged with any crimes in this case, and Detective Perales was unaware of any evidence linking her to any of the instant crimes. (20RT 3540-3542.)

Santana was shown photographs prior to testifying at the preliminary hearing. She wrote the name "Hector" on the back of one (Peo. Exh. 44), and "El Morro" on another (Peo. Exh. 45), and also wrote "Ijole le di a el jura," which meant, "S**t, I did the cop." (20RT 3537-3539.) She wrote the name "Jose" on the back of another photograph. (Peo. Exh. 46; 20RT 3539-3540.) Santana identified the three individuals – "Hector," "El Morro," and "Jose" – as having been involved in the George's Market crimes, including the murder of officer Hoglund. (20RT 3540.) In her preliminary hearing testimony, Santana reaffirmed the statements she made during her interview with Detective Perales. (20RT 3542.)

Following her preliminary hearing testimony during April 1993, Santana was released from the material witness bond, but remained in custody, thought Detective Perales, until her release in the Pomona matter "within the week" (although Detective Perales was not certain). (20RT 3541-3542, 3554-3555.) However, a docket sheet dated August 19,

1994, showed that Santana was released under conditions that included "parent pending pick up," and electronic monitoring. (20RT 3543.)

With respect to obtaining Santana's presence at the preliminary hearing, Detective Perales testified as follows. Detective Perales began looking for Santana around three months prior to the preliminary hearing, once its date was known, and then learned that Santana was an "habitual runaway." Santana was known to be a "runaway" during May 1992, when Detective Perales first interviewed her. Santana was released, following her detention with Navarro, to her father, who had reported her missing. (20RT 3546-3547.)

Detective Perales began her search for Santana prior to the preliminary hearing with Santana's father, and learned she had run away again. (20RT 3547.) Detective Perales enlisted District Attorney's and Sheriff's personnel to search for Santana, who was located only because she was arrested on a new case, and was in adult custody at the Sybil Brand Institute under the name "Anna Solano," for burglary or robbery charges involving a firearm. A District Attorney investigator served Santana with a subpoena, and told her she had to testify at the preliminary hearing in this matter. Custody officers at Sybil Brand Institute were advised of Santana's true age, and she was placed in segregated housing until after she testified at the preliminary hearing, when she was transferred to juvenile custody. (20RT 3548-3550.)

Detective Perales later saw Santana during May 1994 (the instant trial took place during the Fall of 1994), and was aware a warrant had issued for Santana in her Pomona juvenile matter. Detective Perales did not cause Santana to be placed in custody on the warrant, but encouraged her to turn herself in on it. (20RT 3557-3559.) Detective Perales believed that Santana was then living with her aunt, and that Santana was having problems at her home. (20RT 3559.) Detective Perales did not know

precisely how the Pomona case had been resolved, except that Santana's boyfriend "took the rap for the crime" and was convicted in adult court. The juvenile petition against Santana was sustained for burglary based upon her admission of the allegations and Santana was released from juvenile custody to her parents' home on electronic monitoring. Final disposition in that matter was to be postponed until after she testified in the instant case. (20RT 3560-3562.)

Detective Perales did not discuss with either the prosecutor or the prosecutor whether Santana was a flight risk. However, before Santana testified at the preliminary hearing, Detective Perales told that judge, Judge Luros, that Santana was a flight risk and sought bail even though Santana had been cooperative with the investigation. However, Santana had always been cooperative. Moreover, Santana, at 14 years of age, had a baby, and in Detective Perales's opinion, it was better for her to stay at home with the baby and make arrangements to turn herself in to authorities. During May of 1994, Santana promised Detective Perales she would surrender, and Detective Perales relied on that promise. (20RT 3562-3563.) Also, Detective Perales did not want to remove the baby to foster care. Santana did not receive any special treatment – Detective Perales often dealt with people in such a manner. (20RT 3565-3566.) Santana eventually turned herself in to authorities closer to August 1994. The fact she turned herself in was an "indicia of not being a flight risk." (20RT 3563-3564.)

(b) Rosa Santana's Preliminary Hearing Testimony[37]

Santana, who was 14 years of age when she testified at the preliminary hearing, was "a little" frightened about testifying. (19RT 3365-3366.)[38] Santana had been staying with codefendant Navarro at his home, whom she knew as "Hector," for around two days before he was arrested. (19RT 3366-3367; 20RT 3396-3397.) "Hector" was Navarro. Appellant was "El Morro." (20RT 3396-3397.) Santana understood that appellant drove a small red car with his girlfriend's name on the back of it. (20RT 3404.)[39] Santana first saw appellant at his house the day before the George's Market crimes – likely a Thursday – with Navarro, an unidentified girl, "Jorge," and an unidentified male. (20RT 3439-3440.) Santana did not know that appellant, Navarro and the others were "up to bad stuff." (20RT 3443.)

The night before the George's Market crimes, Santana was with Navarro and some friends at Navarro's house. (20RT 3444.) On the day of the George's Market crimes, Santana and Navarro went to appellant's home around noon. (19RT 3367-3368; 20RT 3397, 3443, 3445-3446.) Appellant, Navarro and Contreras left, telling Santana they were going to buy some drugs, and were bringing guns in case "the Black guys" or the

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[37] Rosa Santana's prior testimony was read into the record at trial. (19RT 3361-3363.) At the preliminary hearing, she was advised by an attorney appointed for her to not testify. After Santana invoked the Fifth Amendment, she was granted immunity regarding "any nonviolent crimes," and was ordered to testify. She was in custody at the time, but released right after her testimony in this matter, but not the juvenile custody matter. (19RT 3364-3365.)

[38] The jury was admonished that there was no evidence of any threats or actions by or for appellant and his codefendants. (19RT 3366.)

[39] Appellant's car was depicted in People's Exhibit 43. (20RT 3405.)

police "would get in their way." They each put their gun in a small orange bag. (20RT 3445-3446, 3490-3491.)[40] Santana remained at appellant's home with a "girl and her baby," and "some other guy." Santana was not certain what time appellant, Navarro, Contreras, and others returned, but it was possibly around one hour later. (20RT 3447.)

Appellant and Navarro returned to appellant's home with a large amount of cash. A few minutes later, some "White guys" with handguns came over. There were "like six" of them in total. One of them was named "Jorge." (19RT 3368-3369; 20RT 3392, 3494.) In Santana's presence, the men split the cash into six shares. (20RT 3393-3394.) The men did not say exactly how they had obtained the money, but they played a videotape that one of them had – she thought Jorge – that depicted the men committing a robbery at a small market. Santana later saw another video of the same activities, but that was taken from farther away. (20RT 3393-3394.) The first video, which she viewed at appellant's home, depicted some of the same people who were at appellant's home while Santana was there, namely appellant, Contreras, and Navarro. Also depicted were "Jorge," and two other men whose names were unknown to Santana. (20RT 3394-3395.)[41] Santana saw Contreras with a handgun in the first video. Appellant was depicted holding a gun on a Chinese man or lady. Navarro also had a gun he held on that person too. (20RT 3395-3396.)

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[40] Navarro had an automatic firearm that was around six to seven inches long. "Everybody had one." Appellant had one like Navarro's, but his was black, while Navarro's gun was chrome. Santana was not certain what color Contreras's gun was but thought it was black with chrome. (20RT 3406-3407.)

[41] When Santana referred to "Jose" she meant Contreras. (20RT 3484-3485.)

At appellant's apartment, the men talked about what had happened during the robbery. One of them said that appellant had shot a police officer, and that the police were looking for them. (20RT 3397-3398.) Appellant actually said, "I shot a cop" (20RT 3399, 3410, 3489) because the officer had "gotten in his way" (20RT 3413). Santana thought Navarro told Santana that he had also fired his gun in self-defense during that robbery because a police officer was shooting at him. (20RT 3399-3400, 3413, 3473-3477, 3492, 3495-3496.) However, Navarro did not say he had shot anyone. (20RT 3473.) Appellant also said that he had killed eight or nine people in "his country." (20RT 3489.)

Santana saw the cars in which the men returned from the George's Market crimes. A blue two-door car was used, and a white one, and possibly Navarro's car. Santana was not certain if appellant's car or Navarro's car was used. (20RT 3485-3486, 3497.) However, Santana had told the police that appellant's red car was used as well. (20RT 3497-3499.)

Later, Navarro and Santana were driving alone together in a car, when Hector said that "El Morro" had shot a police officer. (20RT 3400.)[42] Navarro used some of the money he stole in the robbery to buy a stereo and some clothes for Santana so she would not look so much like a gangster, which was how she dressed when she met Navarro. (20RT 3400-3401, 3454-3455, 3477-3479.) He also said that he was going to take his family to El Salvador, where he was from, or would visit them there. (20RT 3403.) While driving alone with Navarro, he pointed to a store and

[42] The court admonished the jury that this testimony was not admissible as to appellant or Contreras, and was admissible only as to Navarro. (20RT 3401-3404.)

told Santana he had once committed robbery there. (20RT 3404, 3488.)[43] Navarro told Santana he had used some of that robbery's proceeds to send his parents to El Salvador for vacation, and to purchase his car. (20RT 3405-3406; see also 20RT 3479-3480.)

After the robbery and before appellant's arrest, Navarro and Santana were driving down the street and saw appellant driving. They all stopped and talked. Appellant said that "they already had [Contreras]." (20RT 3458.)

After Santana and Navarro were taken into custody, Santana gave a tape-recorded interview with the police and viewed a videotape. (Peo. Exhs. 47 [tape], 48 [transcript]; 20RT 3411, 3413.)[44] She told the police "basically" what she testified to during the preliminary hearing. She identified appellant, Navarro, and Contreras in the videotape. She also identified "Jorge and two other guys that were involved in" the robbery and told the police that one person had helped plan the robbery, based on statements by Navarro. (20RT 3411-3412.)

The day before she testified at the preliminary hearing, Santana viewed photographs with Detective Perales, and identified photos of appellant, Navarro, and Contreras. (Peo. Exhs. 44 [Navarro], 45 [appellant], & 46 [Contreras]; 20RT 3408-3410.) Santana testified that she was scared about testifying because all of "his friends" knew her, and

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[43] The court again admonished the jury that this testimony was admissible only as to Navarro. (20RT 3404.)

[44] The parties stipulated that the transcript of that tape-recorded interview was true and correct. (Peo. Exhs. 47, 48, 330; 20RT 3413-3414.) The tape recording of Santana's interview was played for the jury. The court instructed the jurors after that a reference in the recording to appellant stating he had killed eight or nine people in the past was not offered for its truth, but only as to "the declarant's state of mind" when the statement was made. (20RT 3414-3415.)

where she lived. (20RT 3416.) "Comments" made to Santana caused her to believe something might happen to her, but "Not no more."[45] Everything she had told the prosecutor, Detective Perales, and the prosecutor the previous day, and everything she said on the tape recording of the police interview, was true. No promises were made to her regarding the Pomona case by the prosecutor, the prosecutor, or Detective Perales. (20RT 3417-3418.) Santana lied to the police about her name and age when arrested in the Pomona matter because she did not want to be returned home. (20RT 3419-3420.) She was arrested for acting as a lookout in a robbery. (20RT 3427.) Santana's parents or other family members did not tell Santana that the police were looking for her in the instant matter. (20RT 3430.)

(10) Further Police Investigation

(a) Detective Ray Hernandez

Los Angeles Police Detective Ray Hernandez was one of the investigating officers as to the Outrigger Lounge robbery. (13RT 2146-2147.) Detective Hernandez spoke to Manuel Rodriguez, the owner of the Mercado Buenos Aires, approximately two weeks before Manuel testified at trial. (13RT 2147-2148.) Manuel told him he could identify an additional suspect whom he had seen at the preliminary hearing but failed to identify. (13RT 2149-2150.)[46] Manuel explained that the courtroom was

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[45] The court instructed the jury that the evidence of fear was relevant only to Santana's state of mind, and that there was otherwise no evidence that appellant, Contreras, or Navarro had threatened Santana. (20RT 3415-1416.)

[46] Manuel Rodriguez identified appellant and Contreras at the preliminary hearing. (12RT 1812, 1824; but see 12RT 1814 [identified appellant and Navarro at preliminary hearing].) Manuel testified at trial that he "couldn't see [Navarro] very well" at the preliminary hearing, and (continued...)

dark, that the individual was in the corner, and that he "just didn't get around to doing that." (13RT 2149-2150, 2163.)

Detective Hernandez showed 16-pack photographic lineups to "each and every witness" as to the Outrigger Lounge and Mercado Buenos Aires crimes. Detective Hernandez also was responsible for conducting the live lineups at the county jail in this case, on August 25th, August 26th, and September 30, 1992. (13RT 2152-2154.) Detective Hernandez explained the procedures for each process. (13RT 2150-2156.) Objects of jewelry that were recovered were displayed on a table for viewing by victims. Manuel Rodriguez and Marjorie Livesley identified some of the jewelry. (13RT 2156.) Detective Hernandez also pointed out on a map the relative locations of the Outrigger Lounge and the Mercado Buenos Aires. (13RT 2156-2157.)

(b) **Dwight Van Horn**

Los Angeles County Sheriff's Deputy Dwight Van Horn was a firearms examiner. (17RT 2858.) He examined evidence in this case related to the George's Market, the Woodley Market, and the Ofelia's Restaurant incidents. (17RT 2861.)[47]

(...continued)
that he did not discuss the matter with any police officers before trial. (12RT 1824-1825.)

[47] People's Exhibit 277, photograph A, was a nine-millimeter Sig Sauer automatic pistol. Photograph B was a .25 caliber semiautomatic pistol. (17RT 2862.) Photograph C was a Ruger .357 magnum revolver. Photograph D was a Baretta .22 caliber semiautomatic pistol. Photograph E was a Star semiautomatic .380 ACP caliber pistol. Photograph F was a Barreta .25 caliber pistol. Photograph G was three live rounds of nine-millimeter, .25 caliber, and .22 caliber ammunition, respectively, and the bullet portion of "that particular cartridge," which was removed from the cartridge without being fired. (17RT 2862-2863, 2868.) Photograph H (continued...)

People's Exhibit 280 depicted the relationship among the different crimes and the gun-related evidence. Deputy Van Horn concluded that a number of expended bullets recovered from the Woodley Market (three bullets, two of which came from the Coroner's office), George's Market (three bullets) and Ofelia's Restaurant (one bullet), were all fired by the same nine-millimeter firearm. Deputy Van Horn concluded that a number of nine-millimeter shell casings recovered from the Woodley Market (six bullets), George's Market (bullets), and Ofelia's Restaurant (one bullet) were all fired from the same nine-millimeter firearm. (17RT 2878-2881.)

Deputy Van Horn concluded that three nine-millimeter expended bullets recovered from the Woodley Market (including two that came from the Coroner's office) were fired by one firearm. Eight nine-millimeter shell casings were fired by one firearm. Eight .25 caliber shell casings were fired from the same .25 caliber semiautomatic firearm. (17RT 2882-2884.)[48]

At least two nine-millimeter handguns were "submitted" to Deputy Van Horn from the George's Market shooting. In his opinion, including the .22 caliber cartridge and the .25 caliber cartridge, a total of four guns were involved. The .22 caliber was only involved in the George's Market shooting, and the .25 caliber in the Woodley Market incident. Two nine-millimeter handguns were used at the Woodley Market, as was the .25 caliber semi-automatic. (17RT 2891.)

(...continued)
shows the head of a live round of nine-millimeter ammunition. (17RT 2863.)

[48] Deputy Van Horn was unable to match a nine-millimeter casing (Peo. Exh. 55), a nine-millimeter live bullet (Peo. Exh. 59), and a .22 caliber expended casing (Peo. Exh. 61), all recovered at George's market, or two nine-millimeter live bullets recovered from Ofelia's Restaurant. (17RT 2884-2886.) Deputy Van Horn also testified about the results of comparing four .25 caliber expended bullets. (17RT 2883.)

Two expended bullets from the Officer Hoglund shooting provided by the Coroner and one that was recovered from Officer Hoglund's patrol car appeared to have been fired by a gun different than the one used to kill Mr. Lee at the Woodley Market. (17RT 2892.) Two nine-millimeter guns were fired at the Woodley Market, and one .25 caliber semi-automatic handgun. (17RT 2892-2893.) There was evidence two nine-millimeter handguns were fired at George's Market, and one .22 casing. (17RT 2895-2896.) Photos depicted Contreras holding various guns that could include a nine-millimeter or .45 caliber. (17RT 2905-2906.)

(c) Stun Guns

Los Angeles Police Sergeant Richard Dedmon was an expert as to Tasers and stun guns. Sergeant Dedmon explained how each worked. Stun guns cause great pain and discomfort when applied to a person. Stun guns were sometimes used as offensive weapons during robberies. (18RT 2990-3008.)

(11) The Rod's Coffee Shop Uncharged Incident

Brian Wellmanwas a part-owner and the night manager of Rod's Coffee Shop, located at 41 West Huntington in Arcadia. On November 7, 1990, around 11:50 p.m., five Hispanic men entered the restaurant. Wellman offered to seat the men at a large booth in the corner of the restaurant, but they declined it, requesting instead to sit in a smaller booth, one of the men sitting on a small chair at the end of the table. The men were "tight lipped," and "kind of looking around." (18RT 3013-3016.) They kept looking at the doors, and appeared to be checking the number of people in the restaurant. (18RT 3023.) They seemed out of place, did not look like Wellman's average customers, and a couple of the men wore long coats and kept their hands in their pockets. (18RT 3015-3016.) The

shortest of the group was the only one who spoke and appeared to be their "leader." (18RT 3021-3022.)

Wellman told the men that the kitchen was closing in a few minutes, and asked if they were going to order food. Two of the men asked for coffee. Otherwise, the men just "kind of looked at each other," remained "pretty quiet," said they did not want to order anything, and stood up. (18RT 3016.) Wellman walked ahead of the men toward the front door. They followed him, paid their check, and left. (18RT 3016-3017.)

Wellman noticed that the back door to the restaurant was open while the dishwasher took out the trash, and saw the five men congregated outside. Wellman also saw there was a car parked facing the street in the driveway of the parking lot, rather than in any of the available parking spaces. The men were standing by the improperly parked car. Another car was parked nearby. Wellman told the dishwasher to return inside, then called the police and said he had just been "cased." (18RT 3017-3019.)

Arcadia Police Sergeant Randy Kirby responded to Rod's Coffee Shop. He saw two vehicles – an orange Datsun and a silver Honda – driving slowly through the restaurant's parking lot. Sergeant Kirby followed the vehicles, paralleling their movement while on the street. (18RT 3027-3029.) The suspect vehicles drove toward the parking lot exit, then entered the roadway ahead of Sergeant Kirby. Based on the Datsun driver's poor driving, Sergeant Kirby thought he might be intoxicated and activated his patrol car's roof lights. The Datsun pulled over down the street. The Honda drove away. The Datsun nearly collided with a hedge and a wall on the side of the driveway before the driver coasted backward toward Sergeant Kirby's vehicle, then stopped. Sergeant Kirby backed his vehicle up to avoid contact with the Datsun, while asking other units in the area to stop the Honda, which continued driving away. (18RT 3029-3031.)

Sergeant Kirby exited the patrol car. Three men exited the orange Datsun. (18RT 3030.) Sergeant Kirby remained by his car door because the men appeared nervous, were looking left and right, and he was not certain what was going on. Sergeant Kirby asked what the men were doing. The right front passenger ran away. Sergeant Kirby drew his sidearm, pointed it at the two remaining suspects, advised over his radio that a suspect had fled, and requested additional units. Sergeant Kirby then handcuffed the two remaining suspects and waited for additional police units to arrive. (18RT 3031.)

Sergeant Kirby requested identification from the driver, who indicated he did not speak English. Sergeant Kirby said, "Licencia." The driver motioned with his foot toward the glove box by the front passenger seat. As Sergeant Kirby entered the vehicle and opened the glove box, he could see the butt of a handgun under the right front passenger seat. As he recovered that handgun, a chrome two-inch Rohm .22 caliber revolver, he saw alongside it a black stun gun that he also recovered. The stun gun said, "Paralyzer" across it, and was the same type of stun gun that was depicted in People's Exhibit 236A.[49] There was a car stereo in the back seat. Sergeant Kirby sat down in the driver's seat and felt a hard object under the seat cover. He recovered a loaded .38 caliber Taurus two-inch revolver from under the seat cover, above the seat. (18RT 3032-3035.)

Arcadia Police Detective Robert Anderson heard Sergeant Kirby's radio announcement, then stopped the silver Honda around two blocks from

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[49] People's Exhibit 236A accurately portrayed the stun gun seized from the Datson, although Sergeant Kirby could not say whether it was the shorter or longer one in the picture. (18RT 3043-3044.) People's Exhibit 236A depicted a "paralyzing brand stun gun" that Detective Anderson booked into evidence that evening. The stun gun that Detective Anderson booked into evidence worked and was functional. (18RT 3049.)

Rod's. There were two Hispanic persons inside. (18RT 3046-3048, 3052.) Recovered from inside of the Honda, underneath the passenger's front seat, was a loaded Smith and Wesson .357 Magnum handgun. (18RT 3048, 3052.)

Officers drove Wellman to view the four detained men. (18RT 3019, 3036, 3042.) Wellman observed the vehicles he had seen in the parking lot of his restaurant. Wellman confirmed that the men were the ones who had concerned him inside of his restaurant. (18RT 3020.)

A photograph was taken of the Datsun driver during the booking process. (Peo. Exh. 273; 18RT 3034.) The photo appeared to be of appellant. The driver identified himself as "Edgardo Sanchez." (18RT 3034-3035.) Appellant was charged with the misdemeanor possession of a loaded weapon in a motor vehicle for the Rod's incident. (21RT 3663-3664.)

B. Appellant's Guilt Phase Defense Evidence[50]

Los Angeles County Sheriff's Deputy Nicholas Cabrera worked as a patrol deputy during 1992. Deputy Cabrera responded to the Casa Gamino restaurant for the robbery call where he interviewed various witness and assigned other deputies to assist him in taking statements. Deputy Cabrera recalled a description given for "suspect number one," as a Hispanic male, around five feet, four inches tall, weighing around 120 pounds, around 22 to 23 years of age, a "cholo type with hair slicked back." (20RT 3578-3582.) The manager, Lopez, described the events to Deputy Cabrera. Lopez thought that suspect number one was of Mexican descent and the other robbers were from Central American countries such as Nicaragua or

[50] Neither Contreras nor Navarro presented guilt-phase defense evidence. The prosecution did not present guilt-phase rebuttal. (20RT 3593.)

El Salvador. The person who yelled out "Where is Morro" was believed by Lopez to be from Mexico, while the others were from Central America. (20RT 3584-3586.) Lopez had burn marks on his stomach and lumps on his head. (20RT 3589-3590.)

C. Penalty Phase Prosecution Evidence

The People relied on the evidence presented during the guilt phase of the trial (24RT 4213), and appellant's prior criminality based on the Rod's Coffee Shop incident and a prior conviction in 1990 for sales of cocaine base under the alias "Jose Luis Solorzano" (24RT 4213-4214, 4218).

D. Appellant's Penalty Phase Defense Evidence

1. Francisco Sanchez-Fuentes

Francisco Sanchez-Fuentes, appellant's brother, testified as follows. Appellant was the youngest of 10 children. Their parents separated when Francisco was around 19 or 22 years of age, appellant was three. Francisco lived with his father following the separation. They moved to a "colonia" with appellant and three other siblings, and lived in a small, one-room cinderblock house. (25RT 4399-4402.) Appellant began selling newspapers for his family at six years of age, working from 4:00 a.m. until around 11:00 a.m. Appellant stopped going to school around 10 or 12 years of age, after receiving around three years of education. In their village, most children stopped going to school around age 13. (25RT 4403-4405, 4418-4419, 4442-4443.)

Their mother and father were loving and supportive. Francisco was raised in the "Evangelist" religion, and their mother was very religious. As a child, appellant attended church on a regular basis. Appellant practiced Catholicism before he went to jail. (25RT 4410-4413, 4415.) Francisco was not raised as a Catholic. (25RT 4426.) Their father was not a religious

man. Their mother was more religious, and would take the children to church, but they could choose to not go. She took appellant to church but only until he was three when their parents separated. Their father did not attend mass. (25RT 4427, 4442.) When their parents separated, their father was "fairly bitter," and restricted appellant from visiting his mother. (25RT 4442.)

When appellant was a child, their father placed him in "housing for teenagers, for minors" because their father could not care for him, but appellant never got in trouble in Honduras. (25RT 4420-4421.) Francisco did not recall appellant ever committing a crime or being placed in jail. Francisco and his other two brothers all worked for a living and were law-abiding citizens. (25RT 4424-4425.) Appellant came to the United States from Honduras at age 16. Francisco did not have contact with him from that time until appellant's arrest. (25RT 4415.) Appellant would sometimes send a little money and photos to their mother. (25RT 4420.)

Francisco did not know whether appellant practiced the Catholic faith after leaving Honduras. While in jail on this case, appellant told Francisco he had just recently found religion. Francisco understood that, before his arrest, appellant "did feel" the acknowledgement that Christ died on the cross for "us sinners," and that true repentance for one's sins occurs when one surrenders to Christ. However, before his arrest, appellant did not congregate in a church. (25RT 4416.) A photograph depicted appellant wearing a crucifix and a cross around his neck. However, Francisco believed that appellant would have worn the crucifix because of its ornamental value rather than for religious value. (25RT 4417-4418.)[51]

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[51] Religious ornamentation was not worn in the Evangelist religion, according to Francisco. (25RT 4413.)

Francisco had visited appellant three times in the jail, accompanied by a church pastor named Julio Ruiz and occasionally their mother. They would talk about religion and the Bible, which gave appellant a sense of comfort and encouragement. In Francisco's view, with respect to whether appellant should be executed, "we are all human and we are all under the mercy of God, as sinners, and we should also show the same mercy to one another." (25RT 4405-4407.) Appellant had actually accepted Christ before Francisco, and while in jail encouraged Francisco to accept Christ. Appellant also had greater knowledge of the Bible. (25RT 4443-4444.) When appellant would talk to Francisco about the Bible and his faith, he would express emotion and become animated. (25RT 4446.)

2. Jose Manuel Sanchez

Jose Manuel Sanchez, appellant's brother, testified as follows. He had not seen appellant in six years, and had not visited him in jail. When the family split up, Jose was around nine years of age, and went to live with his mother, while appellant went to live with his father. The children would visit their parents at their respective houses. Jose was in school for three years, starting at age six, but had to repeat the first grade, and so had completed only two years of school before he left school to work. Other families with more money could afford to keep their children in school longer, but appellant's family was very poor. When appellant was around 12, he moved back into his mother's home. (25RT 4447-4451.)

Appellant had more education than did Jose. Both appellant and Jose were taught that it was wrong to steal and murder. Their parents' separation and being poor with limited education did not make Jose want to steal or murder. Appellant did not send Jose money to come to the United States, and once Jose got here on his own, he did not visit appellant, even in jail. (25RT 4452-4454.)

Jose Manuel Sanchez pleaded for his brother's life:

> I would like to say to [the jury] first that maybe as a result of his origin, the condition of our countries, maybe we do not have the complete education – the education or background, and maybe as a result of that, as a result of being ignorant, we make mistakes, and that we are not perfect in this lifetime. We commit mistakes. [¶] And that this person, my brother, I feel that he has paid a high price for what he allegedly did. By being deprived of his freedom, that in itself is a high price. [¶] I would like to ask the jury to reflect upon that, that I believe as a family member, I feel and believe that he deserves an opportunity to demonstrate that he has – that he has changed.

(25RT 4451-4452.)

3. Melida Fuentes

Melida Fuentes, appellant's mother, testified as follows. She had 10 children, appellant being the youngest. She and her husband Transito Sanchez separated and, except for Jose Manuel, the children moved in with Transito. Appellant was three years of age at the time. While the older children were free to visit Melida if they wished, Transito imposed restrictions on appellant visiting her. Appellant moved in with his mother around age 11. Appellant did not complete the third grade at school, because to eat and clothe themselves, everyone had to work. (25RT 4455-4458.)

Melida would attend Catholic church. Transito did not really go to church. The children rarely accompanied her, preferring to "play." (25RT 4458.) Melida had tried to share her religious beliefs with appellant when he was young, but it was not until he was arrested that he finally listened to her about God and acknowledged Jesus. (25RT 4466.)

Melida currently lived in Santa Ana, California, with her granddaughter and her son Francisco. "Brother Julio" was her pastor, and was helping her spiritually. She visited appellant in jail every several

weeks. Melida would bring appellant's son "Josabad" to visit appellant in jail as well. They would talk about appellant's faith. He would tell her not to be upset because they were in the "hands of God." Appellant had always been a very loving child toward Melida, and even toward the pets they kept at home. They had a close bond. Their bond had strengthened through appellant's incarceration. With respect to the jury's task, Melida testified, "Well, as far as I am concerned, he should live. We are human, we make mistakes and no one is perfect in this life, only God." (25RT 4461-4464.)

4. Argentina Sanchez

Argentina Sanchez, appellant's sister, testified as follows. (27RT 4763-4764.) At some point, when the siblings were children, their parents separated. Argentina testified about their lives as children and about photos depicting their home, relatives, and acquaintances in Honduras. She completed six years of schooling, while appellant only completed three years because he had to work. Religious values were instilled in the children by their parents. Argentina asked the jury to spare appellant from the death penalty, to spare their mother from the pain that would result, because humans are fallible, and because appellant could help others in Jesus' name. (27RT 4764-4773.)

5. Julio Ruiz

Julio Ruiz was the pastor of the "House of Prayer" or "Casa De Oration" Church in Santa Ana, a Pentecostal church with a largely Spanish-speaking congregation. (25RT 4468, 4474.) He was not acquainted with appellant or his family before appellant's arrest. Ruiz had visited appellant in jail around 10 times, and would bring appellant's mother, niece, brother,

and two-year old son with him when he could. Ruiz had been visiting appellant for around one year as of trial. (25RT 4468-4470.)

Ruiz had observed appellant change a great deal with respect to his understanding of the Bible, and appellant "seem[ed] to be very deep into the will of God." Appellant would speak enthusiastically of the Bible and ask Ruiz questions about it. Appellant had "grown individually inside the jail." He and Ruiz would "share," rather than "discuss" the "word of God." Appellant was open to receiving the "word." (25RT 4470-4472.)

Ruiz believed that appellant was intelligent through his acceptance of the word of God, which gave adherents understanding and wisdom. Appellant appeared to always be in a good mood because "something had happened to him and he had much[,] much security now in God's hands, ... So every time I see him, it was very enthusiastic." Appellant would also join Ruiz in praying for other church members. Ruiz felt encouraged "to see a young man like [appellant] into the words [*sic*] of God." (25RT 4472-4474.)

Regardless of whether others may feign religious devotion for personal gain, Ruiz did not believe that appellant was motivated to do so here to avoid the death penalty. (25RT 4477.) In Ruiz's view, certain outside forces or events will cause a person to move toward God, but it has to come from God, and if it does, then they find a new way of living. Ruiz had read writings about religion that appellant had done. Appellant went very deep into "certain points in the word of God." Ruiz would not know if someone was faking their knowledge of the Bible because he would have to "be in their shoes or heart. I don't know." Ruiz would have to see the person's actions to know whether their words truthfully expressed what was in their hearts. (25RT 4486-4489.)

6. Appellant's Testimony

Appellant had been learning English since his arrest by speaking as best he could with English-speaking inmates, then practicing new words. Before his arrest, he "knew there was a God," and had "respect for God," but did not "live according to his will." He tried to follow the commandment to not kill, but he violated it. Within a few days of being arrested and placed in a cell, appellant felt that his life was over, that he would never be free again. He felt confused and sad, would think about his mother, his wife, and his child, and felt that his life no longer meant anything. However, his thoughts changed "thanks to the Grace of God." (26RT 4517-4519.)

One day, while lying on his bed, "looking into the sky" and believing that his life was over, he thought of taking his own life. He then heard a voice saying, "Do you really believe that your life has come to an end, but it's really the opposite. It is now when you shall begin to live." Appellant sat there, "hypnotized," before "coming to [his] senses," and he thought about God before feeling "a very unusual impulse," A "force beyond understanding, beyond [his] understanding." Appellant got out of bed, walked to the bathroom, knelt down, then asked Jesus to take charge of his life, to change him, and to make him live a new life. Appellant then experienced a change in his life and realized that he now had a reason to live – it was no longer up to him, but was up to Jesus. (26RT 4520-4521.)

Appellant asked God for wisdom, and continued to do that every day. Appellant then asked for a Bible, and began to study it. He spent entire days studying the Bible. His life "simply changed." He realized he was on a different path, was happy, had hope again, and realized that he could "do everything possible to help others experience the same thing. Appellant then "surrendered fully to the learning, to learn more about our Lord." That was how he spent the time he was in custody. Despite his

educational limitations, appellant wanted to "put others on the path that leads to Christ." (26RT 4520-4522.)

Appellant did not receive guidance from ministers or religious professionals, but from religious "cell companions." Other religious inmates gave appellant courage, strength, and encouragement. Some religious professionals did pass out literature in the area of the jail where appellant was being held. Appellant was later placed in a single cell in an area of the jail where he could meet and pray with chaplains and outside ministers too. In jail, he was working through a Bible correspondence school. (26RT 4521-4530.) "Mr. Talamante," who was in charge of the prison ministry, would communicate with appellant. Talamante would write treatises and letters to inmates who were "on the path." (26RT 4532-4533.)

Thanks to his study of religion, appellant's "everyday life" in custody became "easier to deal with." Otherwise, it would have been a "real terror." Appellant's wish would be that he be released because, if free, he could help others in religion by preaching. However, if the Lord wanted him to remain in prison, then appellant would "become the Lord's servant and . . . preach the word of the Lord in prison." (26RT 4533-4534.)

Appellant wrote five treatises in prison. He gave a copy of one such treatise to the defense. That treatise (Exhibit 505) was entitled, "Christ, God's Will In Action." Appellant explained that the treatise was not the product of the human mind, but rather, he spent a long time in prayer, fasting, and "really studying more profoundly the Word of God," seeking God's guidance through prayer before picking up his pencil and beginning to write. After finishing the treatise, appellant sent it to Talamante, who returned a typed copy to appellant. Appellant made corrections to that copy, and his attorney's secretary typed it again, with corrections. When

appellant wrote that treatise, he had in mind his incarcerated "brothers in Christ" and his family members who were free. (26RT 4534-4537.)

Appellant denied the Outrigger Lounge crimes. (26RT 4574.) While appellant admitted the Siete Mares crimes, he denied having beaten anyone. (26RT 4575.) While appellant may have felt remorse for some of his actions, he was not repentant, as he continued committing such crimes. While he may have felt some remorse, he did not "allow it to express itself fully." (26RT 4580.)

Appellant knew that robbery and murder were wrong before he did those crimes. When first arrested, appellant felt remorse that he did not show and felt badly for himself, that he had been caught. (26RT 4539.) However, with his acceptance of "the reality of [his] situation" and his acceptance of God," as well as his Bible studies, appellant had changed. He understood, based on Christ's dying on the Cross, that human life has infinite value, that appellant had done wrong by interfering in God's creation, and that he now had the "genuine desire" to "save a life, a human life," and to "rescue others from their mistakes." (26RT 4540.) Appellant testified,

> "But, again, I repeat, now human life has an infinite value to it, and I ask our Lord to grant me the opportunity to prove that to others so that they can once and for all abandon that path and to be saved by our Lord."

(26RT 4541.)

Appellant went to a birthday party the day after he shot Officer Hoglund. Photos depicted him as appearing to have a good time and smiling. Appellant was able to pretend that all was well. Appellant was depicted in a pre-arrest photograph wearing a cross. He did not remember whether or not he had bought the cross or stolen it. He wore the

cross because it was gold, not because of any religious significance. (26RT 4552-4555.)

Appellant was incarcerated once before. He lied multiple times to benefit himself in that case by giving a false name (Jose Luis Solórzano) and telling the probation officer that he came from Mexico. Appellant would use aliases when out of custody. Appellant deceived people before robbing them, as in the instant case. He wore a cross when it meant nothing to him. He did all these things to benefit himself. (26RT 4558-4560.)

However, appellant denied lying to benefit himself about having found religion. He did not know that his attorney would raise religion as a defense. He did not write his treatise with the objective that it be shown to the jury, but for his "brothers in the Faith." He did not ask his attorney to present religion as a defense. (26RT 4560-4561.)

While appellant was aware of God's Commandment not to kill before he murdered Mr. Kim and Officer Hoglund, he was unable to refrain from killing each of them, because he could not refrain from doing evil. The only reason he killed Mr. Kim was that Mr. Kim shot at him first, striking him, during the robbery at the Woodley Market. The only reason he killed Officer Hoglund was to avoid arrest. (26RT 4538-4539, 4561-4566.) Appellant saw Mr. Kim lock himself in the freezer. Concerned Mr. Kim had a cellular phone, appellant searched Mr. Kim after Mr. Kim went down on his knees. Mr. Kim shot appellant, so appellant shot him back. Appellant was taken to the Good Samaritan Hospital where he received medical attention. But, they did not remove the bullet. (26RT 4583-4586, 4591.) Appellant was certain he was not shot between December 31, 1991, and April 18, 1992. (26RT 4592, 4594.)

Appellant denied having had a stun gun during the Rod's Coffee Shop incident, or having brought one into the Casa Gamino Restaurant robbery.

(26RT 4596-4597.) However, appellant did use a stun gun on Armando Lopez during the Casa Gamino robbery. He applied it to Armando Lopez's stomach, and continued applying it even though Armando Lopez was screaming in pain. Appellant also thought he had placed a gun in Armando Lopez's mouth. He did those things because Mr. Lopez would not cooperate during the robbery. Appellant denied beating Armando Lopez with a gun. Armando Lopez was hysterical and screaming during the robbery. Appellant denied using the stun gun on Maricella M., denied trying to rape Marcella M, and insisted that none of them had tried to do so. (26RT 4596-4602.)

Appellant denied trying to shoot Juan Saavedra in the foot or leg during their struggle at Ofelia's Restaurant. Rather, appellant and his cohorts realized that the victims there were poor and had no money, and so they abandoned their robbery and were merely trying to leave but Mr. Saavedra chased him to the door, and he and his daughter tried to take appellant's gun from him, causing it to accidentally discharge. One of appellant's companions struck Mr. Saavedra over the head, causing him to let go of appellant's gun. (26RT 4603-4606.)

Appellant denied having shot Officer Hoglund in the back of the head while he was on his knees after being wounded. Appellant was trying to kill Officer Hoglund to avoid being arrested and just fired at him without trying to shoot him in the head. Appellant was not happy that he had killed Officer Hoglund, but later found peace through Christ. Appellant denied telling Rosa Santana that he had killed eight or nine other people. (26RT 4606-4609.)

No one helped appellant write his treatise, except the Lord. (26RT 4609-4612.) The two men in jail who helped appellant later with

religion were "Bodoy Aduarte"[52] and "Hernandez." (26RT 4610.) Based on appellant's religious awakening, "El Morro" was "dead." (26RT 4614.)

7. Arturo Talamante

Arturo Talamante was the Hispanic coordinator of the Ministry of Prisons, called the "Psalm Ministry." In the course of his duties working for Ministry over the past 25 years, Talamante visited and corresponded with many incarcerated young men, and held religious services. Talamante was contacted about appellant by a court interpreter named "Roberto" around 18 months prior to trial, sent appellant a Bible and a letter of introduction, then received from appellant a letter in which appellant wrote about God. Talamante and appellant conversed on the phone. Talamante believed that appellant had a very deep spirituality, a love of God, and a "desire to give himself over to the Lord." Appellant demonstrated that "we should love one another, that is, the two of us should prepare to be together with God some day." (26RT 4619-4622.) Talamante had been in prison himself, where he found God. He had been able to maintain his relationship with God since then. Talamante believed he could distinguish between genuine conversions and false conversions. (26RT 4647-4649.)

Appellant sent Talamante a 33-page treatise or Bible study that demonstrated "so much learning and so much spirituality within it," that Talamante typed it for appellant – without editing it – and used it in the church Talamante attended. The level of knowledge reflected in the document was that of an "official pastor. Other pastors "could not believe that it had been written by someone who was in jail. So the level is a theological basic level completely." (26RT 4622-4624.)

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[52] "Bodoy Aduarte" is also referred to as "Bedolla Duarte" in these proceedings.

Talamante believed there was good in everyone, no matter how bad their life had been, even in a mass murderer. (26RT 4625-4626.) Talamante had encountered only two other persons whom he felt had found the same "spirituality" that appellant had found. Bedolla Duarte was one of those persons. Talamante believed that Duarte and appellant were equally credible, equally devoted to God, and had the same good feeling about each. (26RT 4635-4636.) Talamante believed that once someone found God, the person would not "go out and commit vicious acts of murder." (26RT 4638.) Talamante observed appellant and Bedolla develop a close association. (26RT 4639.) Bedolla had "won over" around 70 young men in prison through his teaching. Forty five of them had been baptized. (26RT 4639-4640.) However, even after finding God, studying religion, and obtaining pastoral certificates, Bedolla was arrested for crimes that led to his conviction for three counts of first degree murder, five counts of attempted murder, two counts of attempted robbery, 10 counts of robbery, and 12 counts of assault with a firearm. (26RT 4642-4643.)

8. Pacifico Diaz

Pacifico Diaz, a retired priest, worked as a chaplain at the Los Angeles County Jail where he met and spoke with appellant eight to ten times regarding God and appellant's knowledge of the Bible. They would also pray together. (26RT 4652-4656.) Diaz believed appellant was sincere. (26RT 4676-4677.)

9. Dr. Earl Landau

Dr. Earl Landau worked for the Los Angeles County Sheriff's Department as "Chief Radiologist," and in that capacity, took an X-ray of appellant, under the name "Carlos Juarez," on October 26, 1994. The x-ray disclosed the presence of an "opaque foreign body" in the pelvic region of

the abdomen. The object appeared to be a bullet. Dr. Landau could not discern its caliber. (26RT 4690-4696.)

10. Luke Packel

Brother Luke Packel worked as a Catholic missionary under Mother Teresa, and oversaw "the Brothers here in Los Angeles." (27RT 4698.) Packel met with appellant on two occasions at the request of appellant's defense counsel, and read a document appellant had written. He found appellant to be intelligent and to have developed a very good vocabulary. (27RT 4701-4703.) When Packel counseled he would attempt to test the person's conversion. During the first session, Packel asked appellant many questions, which prevented appellant from getting "into his deeper experience" because Packel was "using the wrong language." (27RT 4705-4717.)

During the second session, Packel let appellant speak freely and listened "intensely." After speaking with appellant for over an hour and a half, Packel was convinced appellant's religious conversion was real. Appellant explained that once he ended up in jail, he felt his life was not worth living and considered killing himself. Appellant then underwent a religious conversion during which he "put forth everything that had gone wrong and asked God to forgive him." (27RT 4706-4713.) Packel believed appellant was "now" a credible person. (27RT 4730.)

E. Codefendant Contreras's Penalty Phase Evidence

Jose Danielo Contreras, codefendant Contreras's brother, testified as follows. Their family in Honduras was very poor because they had been abandoned by their father when the children were small. The children had to work while young to earn money for food. Contreras had to stop going to school at age seven or eight in order to work planting and picking corn,

milking cows, cutting grass, and fishing. Contreras felt his life would change if he came to the United States and he would be able to help his mother. If he received the death penalty, their "mother would die." Contreras was the "best among us." (24RT 4221-4226.)

Virginia Contreras, Contreras's mother, testified that life was very difficult in Honduras because her husband abandoned the family and they were very poor, and that Contreras was a very good son who would help her. (24RT 4230-4234.)

Dr. Michael Winkelman, an anthropologist, testified on Contreras's behalf. He interviewed approximately 50 to 70 people about Contreras in his home village, "El Conchal." El Conchal was very impoverished. Those people said that Contreras was very dedicated to his school work and to his family, and that he never caused problems for anyone. He had been abused by his father and had to leave school very early to begin working. Because his father essentially abandoned the family, Contreras and his brothers had to support it. Contreras was considered to be a fine person there who did not have problems with people. Contreras's family was extremely poor. (24RT 4290-4358.)

F. Codefendant Navarro's Penalty Phase Evidence

Benjamin Miranda-Lopez, Navarro's father, testified that he worked as a tailor in Santa Ana, El Salvador, where he met and married Navarro's mother and had eight children, including Navarro. The family was very poor. Miranda-Lopez had a very bad drinking problem, which left little money for the family. He once beat appellant because appellant did not have proper clothes to wear to church. (27RT 4794-4802.)

At some point, Miranda-Lopez and his wife left El Salvador and came to the United States to make a better life. Navarro later joined them, at around 15 years of age, during 1985 or 1986. Miranda-Lopez placed

Navarro in school, which Navarro attended for a few months. Navarro also worked for a short time. Miranda-Lopez did not have a drinking problem when he arrived in the United States and was going to church, but started drinking after Navarro arrived, and was therefore unable to properly supervise him. Miranda Lopez asked the jury to spare Navarro's life. (27RT 4802-4806.)

Aminta Rosa Rodriguez, codefendant Navarro's older sister, testified that the children lived with their father and mother until their parents went to the United States in 1978 and 1979, respectively. The children, upset, stayed with a relative, "Mama Yaya," who was around 72 years of age. Navarro began to chew on his nails, wet the bed, and grind his teeth while he slept, then suffered a fall and developed epilepsy. It was difficult to care for him. (27RT 4833-4836.) Navarro's sister Rosa also developed similar problems. (28RT 4907.) Navarro was unable to start school until he was nine years of age, rather than the usual five years of age, because the family could not take him to school, and because he did not have a birth certificate as their father never got one for him. (27RT 4833-4637.) Rodriguez was aware that Navarro had been raped by an uncle. Their aunt Alida was murdered by members of the armed forces because she was a teacher. She fled to avoid them "taking her." The soldiers then "stuck her legs inside of her . . . womb." Navarro saw her mutilated corpse. There were other bodies strewn across the streets nearby – "it was a time when they were after all the teachers." (27RT 4837-4840.) The children never received any form of counseling while living in El Salvador. (27RT 4844.)

Navarro and Rodriguez eventually joined their parents in Los Angeles, and lived together. Navarro only went to school for six or eight months from the time he arrived around age 15 to age 22 when he was arrested. He also held various jobs for short periods of time, and they moved a lot, living in rough and poor neighborhoods. Navarro dressed like

a gang member for a time, but after he was arrested for a robbery and incarcerated for six months, he stopped doing so. Rodriguez did not know Navarro to belong to a gang, or to hang out with members of Mara Salvatrucha. (27RT 4817, 4837-4844.) Rodriguez identified family members depicted in photographs, as well as photographs of their home in El Salvador. Rodriguez asked the jury to spare Navarro's life because the children were abandoned while very young; while he may have stolen, Rodriguez did not believe that Navarro had killed anyone, and Rodriguez (and her sister) had cared for Navarro as if he were their own child. (27RT 4845-4848.)

Maria Miranda, Navarro's mother, asked the jury, "[W]ith the help of God, please don't kill him." (28RT 4937-4938.)

Dr. Richard Cervantes, a clinical psychiatrist and psychologist, testified about traumatic events that occurred in Navarro's life, including the civil war in El Salvador, separation from his parents at a young age, a year-long period of sexual abuse as a child by a family friend, ridicule by other children who knew of the abuse, Navarro's father's alcoholism, and the negative impact of those events on him as he grew up. According to Dr. Cervantes, Navarro expressed remorse for his crimes. In Dr. Cervantes's opinion, there was insufficient data to conclude that Navarro was a "hard-core gang member." Further, it would be inconsistent for there to be Hondurans, such as appellant and Contreras, in an El Salvadoran gang like Mara Salvatrucha. (28RT 4936-4958, 4986-5000; 29RT 5110-5182.)

G. Penalty Phase Prosecution Rebuttal Evidence

Los Angeles Police Detective Robert Lopez testified as a gang expert about the Mara Salvatrucha gang. (29RT 5197-5216.) The court instructed

the jury that his testimony did not apply to appellant, but only to codefendants Contreras and Navarro. (29RT 5198.)

H. Stipulation

None of the defendants had addresses or phone numbers of any of the witnesses in this case; by law, the defendants are not allowed such information. (29RT 5259.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S TWO *BATSON-WHEELER*[53] MOTIONS

Appellant contends that the trial court erroneously denied his two *Batson-Wheeler* motions as to four prospective Hispanic jurors who were peremptorily challenged by the People – P.G., R.F.,[54] T.M.[55], and E.A. Specifically, he claims that based on numerical analysis, the facts the homicides were "interracial," appellant was the same race as the implicated prospective jurors, and Officer Hoglund was Caucasion as were most of the jurors, and because peremptory challenges permit discriminatory jury selection and because a comparative analysis demonstrated the People acted for discriminatory reasons, the trial court erroneously found no prima facie case of discriminatory jury selection. As a result, he claims violations of

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[53] *Batson v. Kentucky* (1986) 476 U.S. 79, 84–89 [106 S.Ct. 1712; 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277.

[54] R.F. never stated during written or oral voir dire that he was Hispanic. Appellant contends that R.F.'s last name is dispositive on this point. (See AOB 40, fn. 19.) Respondent does not concede that R.F. was Hispanic, but for the sake of argument, proceeds as if he was.

[55] In her juror questionnaire, T.M. stated that she was "Hispanic/ White." (See 5SuppIICT 1264.) Respondent does not concede that T.M. was "Hispanic," but for the sake of argument, proceeds as if she was.

his federal constitutional rights to a fair trial by an impartial jury drawn from a representative cross section of the community, due process of law, equal protection, and a reliable penalty verdict under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as under article 1, sections 1, 7, 13, 15, 16, and 17 of the California Constitution. (AOB 37-87.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

1. General Procedures

The trial court explained that they could fit 100 jurors in the courtroom at a time. Each group would first be screened for hardship using a one-page questionnaire, then the survivors would fill out 26-page juror questionnaires. (3RT 341-342, 348; 10CT 2975.) Each defendant would have 12 peremptory challenges, for a total of 36; the People had 36 as well. (3RT 358-359.) The potential jurors would be voir-dired in groups of 18. Challenges could be made to prospective jurors one through 12, so the attorneys would know who the replacements would be. Each time the group of 18 prospective jurors reached 11, the court would call another seven prospective jurors, and voir dire would continue. (3RT 353-354, 374.)

Based on a manual count, the record contains 130 filled-out juror questionnaires, with 17 individuals stating their ethnicity to be Hispanic, or bearing Hispanic names. (See 1-16SuppIICT.)[56] Thus, 13 percent of the hardship-screened prospective jurors were Hispanic.

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[56] Appellant, however, contends that based on the sequential numbers assigned to the questionnaires there are 146 of them and since five were left blank, there were 141 filled-out questionnaires. (AOB 37-38.) Respondent also note that volumes 13 and 14 contain the same materials.

2. A Summary of the Relevant Cause Challenges, Peremptory Challenges, and Appellant's Two *Batson/Wheeler* Motions

a. First Round of Voir Dire

Eighteen prospective jurors were seated for the first round of voir dire, including P.G. and E.S. (6RT 620-622.) P.G. indicated he was Mexican-American. (2SuppIICT 397.) E.S. indicated he was Mexican. (3SuppIICT 606.)

(1) The People's Cause Challenge to E.S.

The People challenged E.S. for cause because he stated he would "have problems with the age of the defendants," he had problems with the English language, he had difficulty filling out the questionnaire and completing the questions, he seemed to have a low IQ and limited education, and he had difficulty understanding the questions, especially those that sought to determine whether he could be fair. The prosecutor indicated that his views on the death penalty were not the problem, but rather, his ability to serve as a juror. The court denied the challenge, finding E.S. did not have a low IQ, but was just not well-educated and was a "working guy" with a lot of common sense. (7RT 832-833.)

(2) Peremptory Challenges

The People peremptorily challenged P.G. (7RT 837.) All defendants accepted the jury. The People also peremptorily challenged in the first round M.W. (Black), K.M. (Black), R.W. (Asian), R.R. (White), and D.K. (Black). (7RT 838-839.) Thus, at this point, the People had exercised six peremptory challenges, one of which, or 16.66 percent, was against an Hispanic prospective juror (P.G). One Hispanic prospective juror, E.S., remained on the panel. (6RT 621-622; see 5SuppIICT 607 [Mexican].)

Eleven[57] prospective jurors remained: R.G, R.H., A.W., E.S., H.S., R.R., T.W., T.T., J.R., M.B., and M.M. Eight more prospective jurors were called: (1) E.V.; (2) E.A.; (3) T.M.; (4) T.J.; (5) M.M.; (6) I.Z.; (7) S.F.B.; and (8) J.C.[58] (7RT 840-842.) According to their jury questionnaires, E.A. was Mexican-American (5SuppIICT 1238), T.M. was "Hispanic/White" (5SuppIICT 1264), and M.M. was Mexican-American (5SuppIICT 1368).[1] T.J. was also Hispanic. (5SuppIICT 1316 [Nicaraguan].) Thus, at the start of the second round of challenges, there were five Hispanic prospective jurors among the group of 18 – E.S., E.A., T.M., M.M., and T.J. – or 27.77 percent. When T.J. was dismissed due to her limited English, she was replaced by a non-Hispanic prospective juror. Thus, there were four prospective jurors among the 18, or 22.22 percent.

Including the numbers from the first round of voir dire, during which six prospective jurors were struck by peremptory challenge, 25 prospective jurors had been called for voir dire. Of those 25, six – or 24 percent – were Hispanic.

b. Second Round of Voir Dire – Appellant's First *Batson/Wheeler* Motion

(1) Peremptory Challenges

Appellant's counsel peremptorily struck E.V. E.A. took E.V.'s seat. The People struck A.W. T.M. was empanelled. Counsel for codefendant

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[57] Prospective juror C.R. was excused by stipulation based on his responses during voir dire. (6RT 641-645.)

[58] The court was calling only seven additional prospective jurors, but prospective juror T.J. informed the court that her English was "very bad," and asked to be excused. The parties stipulated to excuse her before questioning her; the court then called the eighth prospective juror. (7RT 840-841.)

Contreras struck R.R.. M.M. took R.R.'s seat. The People struck E.A. (7RT 943.) I.Z. took E.A.'s seat. (7RT 942-943.)

(2) Appellant's First *Wheeler/Batson* Motion

Appellant's counsel made a *Wheeler/Batson* motion. He argued,

> In looking at the responses of the questionnaires, there's relatively few Hispanics in the panel. There's many more prospective Black jurors and Caucasian jurors, but not too many Hispanic jurors in the first – the first batch of jurors anyway. [¶] There's two Hispanic jurors that are a substantial portion of the prospective Spanish jurors, and I think a prima facie case has been made out since they were both fair jurors.

(7RT 944.) The court found no prima facie case had been shown and asked the prosecutors to state their reasons as to E.A. and P.G. for the record, to preserve their position. (7RT 944-945.) The prosecutor explained,

> [E.A.] came from a very disturbed background and indicated she had recent surgery, was on medication. She was abused as a child, indicated she could probably set that aside, but she indicated she also had medical problems from the surgery. She was also very anti-death penalty on the questionnaire.

(7RT 945.) As to P.G., The prosecutor explained,

> [P.G.] was extremely against the death penalty on the questionnaire. Always, never, never on the questioning. [¶] And here in court he said he didn't like it. He ultimately equivocated, but he – his questionnaire showed he was extremely against it. We don't think he can be fair on the issue.

(7RT 945.) The court stated, "Is there anybody else that – I don't think anybody else was Hispanic at this point. [¶] Okay. The motion is denied." (7RT 945.)

(3) Further Peremptory Challenges[59]

Counsel for codefendant Navarro struck M.M. (who was Hispanic). (7RT 946.) S.F.B. took M.M.'s seat. The People accepted the panel with E.S., T.M. and M.M. – each of whom were Hispanic (7RT 840-842) – on it. (7RT 946.) Counsel for codefendant Contreras struck R.G. (7RT 946-947.) J.C. took R.G.'s seat. (7RT 947.) The People again accepted the panel (7RT 947), which contained Hispanic prospective jurors E.S., T.M., and M.M. Appellant's counsel struck J.C. (7RT 947.) Eleven remained.

The People thus used two more peremptory challenges during the second round of voir dire, including one against an Hispanic prospective juror, E.A., then accepted the panel with three Hispanic prospective jurors on it – E.S., T.M., and M.M. At this point, the People had exercised eight peremptory challenges, two of which, or 25 percent of their challenges, were against Hispanic prospective jurors. Out of six prospective Hispanic jurors, the People struck two, or 33 percent with the two challenges. There were 20 prospective jurors involved in round two. Seven, plus T.J., were struck, leaving 11 prospective jurors: since three of them were Hispanic, 27.27 percent of the remaining jurors were Hispanic.

The prospective jurors who survived were R.J., E.S. (Hispanic), H.S., T.W., T.T., J.R., M.B., T.M. (Hispanic), M.M. (Hispanic), I.Z., and S.F.B.. The court called seven more prospective jurors: (1) C.M.; (2) E.E., Jr.; (3) R.F. (Hispanic);[60] (4) C.G.; (5) D.C.; (6) M.L.; and (7) L.S. (7RT 947-948.)

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[59] The parties stipulated to excuse Jazan, whose English was very poor, before questioning her. (7RT 840-841.)

[60] As noted above, although R.F. did not identify his ethnic background, based on his surname respondent will proceed as if he was Hispanic without conceding the point.

c. Third Round of Voir Dire

Appellant's counsel challenged R.F. for cause because he said R.F. leaned toward the left. The court found it hoped somebody peremptorily struck him, but that R.F.'s situation did not rise to that required for a cause challenge. (7RT 1027.) E.E. was discharged by stipulation based on his anti-death penalty views. (7RT 960-962, 996-997, 1016, 1028.) The people, who had the next challenge, accepted the panel (of 12) with E.S., M.M., and T.M. on it. (7RT 1028.) Appellant's counsel struck C.M. (7RT 1028.) R.F. apparently took C.M.'s place in the panel of 12. (7RT 1028.)

The People struck R.F. (7RT 1028.) Appellant's counsel struck C.G. (7RT 1029.) The People accepted the panel. (7RT 1029.) Appellant's counsel struck D.C. The People again accepted the panel with Hispanic prospective jurors E.S., M.M., and T.M. on it. (7RT 1029.) Appellant's counsel struck M.M. (7RT 1029.) The People again accepted the panel, now with E.S. and T.M. on it. (7RT 1030-1031.) Appellant's counsel struck L.S. (7RT 1031.)

Counsel for codefendant Contreras made a challenge under "*Duren*" and "*Wheeler*" to the use of a peremptory challenge against R.R., who was the "only admittedly gay juror" on the panel. (8RT 1035.) Counsel for codefendant Contreras argued that the court had earlier found, in response to the People's cause challenge, that R.R. would have been an "excellent juror." (8RT 1035.) The prosecutor responded,

> I think there was more than adequate cause to excuse [R.R.]. We indicated on the record the reasons, for psychiatric illness, his biases, his problems about the police, his outstanding warrant in Illinois and undergoing current psychiatric treatment. He is on Pro[z]ac and some other antipsychotic medication.

(8RT 1036.) The court denied the motion. (8RT 1036.)

The prospective jurors who survived through this third round were R.H, E.S. (Hispanic), H.S., T.W., T.T., Jr., J.R., M.B., T.M. (Hispanic), I.Z., S.F.B, and M.L. Thus, at this point, the People had exercised nine peremptory challenges, three of which, or 33 percent, were against Hispanic prospective jurors. Thirty three prospective jurors had been called and voir dired. Six of the 33 (P.G., E.S., E.A., T.M., M.M., and T.J.) were Hispanic. Thus, 18.18 percent of the first 33 prospective jurors were Hispanic. The People had accepted the jury with T.M., M.M., and E.S. on it, then again with T.M. and E.S. on it.

The court called the next round of prospective jurors: (1) G.F.; (2) V.L.; (3) J.Y.; (4) M.T.; (5) W.W.; (6) R.J.; (7) and C.T. (7RT 1031-1032.) T.M and E.S. remained the only Hispanic prospective jurors on the panel.

d. Fourth Round of Voir Dire

Prospective juror F.F. was dismissed by stipulation because his wife was being prosecuted by the Los Angeles District Attorney's office. (8RT 1042.) Prospective juror M.T. was excused for cause, after the parties, except for appellant's counsel, stipulated, because she felt she could not make the decision to sentence someone to death. (8RT 1062-1064, 1096, 1104, 1125-1126.) Prospective juror R.J. was dismissed by stipulation because he could not hear. 8RT 1076-1077.) The court called another prospective juror, S.L. (8RT 1077.)

The People, who had the first peremptory, accepted the panel, again with T.M. and E.S. on it. (8RT 1134.) Appellant's counsel struck H.S., who was replaced by J.Y. (8RT 1134.) Then The prosecutor struck T.M. (8RT 1134.) T.M. was replaced by W.W. (8RT 1138.) Appellant's counsel made a *Wheeler* motion, as follows:

> It is a *Wheeler* motion, and the previous motion I made with the kicking off of [T.M.] further establishes the pattern that

> I felt was there. [¶] The prosecution has kicked [P.G., E.A., and R.F.] and now [T.M.]. They accepted the jury with [T.M.] on there a couple [of] times. [¶] I would like to also point out the prosecution has kicked off four Black jurors, [K.M.], [D.K.], [M.W.], and [A.W.]. They have kicked off one Asian person. The only White person who has been kicked off is [R.R.], who is a gay activist. [¶] And if we put him into a minority category, the prosecution has kicked off nothing but people of color and a gay activist. [¶] I think particularly with the Hispanics[,] an overall pattern shows an effort on the part of the prosecution to keep minorities off the jury.

(8RT 1135.)

The court found there was no prima facie case: "I see no pattern, [appellant's counsel], of any effort to keep minorities off." (8RT 1135-1136.) The court then asked if the prosecutor would like to make a record as to T.M. The prosecutor explained the reasons:

> She had some equivocation about the death penalty in her jury questionnaire. She indicated that: police are fair most of the time. Sometimes I get the impression they prejudice [*sic*] people on how they look. [¶] She had mixed feelings about the death penalty. On page 20: Could you see yourself rejecting life and choosing the death penalty instead? She wrote no. [¶][[61]] She does work for the Department of Children Services. I think she would tend to be more sympathetic to the problems of the defendants in the penalty phase. She seemed more in tune with the defense attorneys than she was when the prosecution voir dired her. She had some problems with immunized witnesses on her questionnaire.

(8RT 1136.)

Appellant's counsel argued that his motion "goes also to the overall pattern of kicking off only minorities, particularly R.W. and the four Black jurors and R.R. and no White jurors other than R.R." The court asked if the

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[61] The prosecutor was correct. (See 5SuppIICT 1283.)

prosecutors would like to make a record as to the Black potential jurors. The parties agreed to discuss the reasons later, after the prosecutors brought their notes down from their office. The prosecutor noted that there were two Black jurors on the panel, and apparently five all together. There was one Hispanic juror, and the prosecutor stated, "We have previously accepted the panel while there were Hispanics – more Hispanics than are on it now." (8RT 1136-1138.)[62]

Appellant's counsel struck M.B. (8RT 1139.) M.B. was replaced by C.T. (8RT 1139.) The People struck J.Y. (8RT 1139.) J.Y. was replaced by S.L. (8RT 1139.) Each defendant accepted the jury. (8RT 1139.) The People accepted the final jury with E.S. on it. (8RT 1140.)

e. The Composition of the Jury

The 12 people selected to try the case were as follows: (1) R.H. ("Black" [2SuppIICT 554-577]); (2) E.S. ("Mexican" [3SuppIICT 607-631]); (3) T.W. ("Black" [4SuppIICT 948-971]); (4) T.T., Jr. ("African-American" [4SuppIICT 974-993]); (5) J.R. ("Jewish" [4SuppIICT 1134-1152]); (6) I.Z. ("Born in New York City Jewish" [5SuppIICT 1394-1419]); (7) S.F.B. ("Afro-American" [5SuppIICT 1420-1445]); (8) M.L. ("Black" [6SuppIICT 1654-1679]); (9) V.L. ("English, Irish, Scottish, French, and 1/32 Chippewa Indian" [6SuppIICT 1733-1757]); (10) W.W. ("Caucasi[a]n" [7SuppIICT 1810-1835]); (11) C.T. ("Black" [7SuppIICT 1863-1889]); and (12) S.L. ("Caucasi[a]n" [7SuppIICT 1888-1913]). Thus, the jury here consisted of the following ethnic groups: (1) Black or African-American – six, or 50 percent; (2) Hispanic – one, or 8.33 percent;

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[62] It does not appear there was any further discussion regarding the Black prospective jurors. Appellant does not include allegations regarding any Black prospective jurors in his instant *Batson/Wheeler* claim, or the gay prospective juror.

(3) White or Caucasion – three, or 25 percent; and (4) Jewish – two, or around 16.66 percent.

B. General Principles of Applicable Law

Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias, such as race or ethnicity. (*Batson v. Kentucky, supra,* 476 U.S. at 89; *People v. Pearson* (2013) 56 Cal.4th 393, 421; *People v. Blacksher* (2011) 52 Cal.4th 769, 801; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277.) Excluding even a single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) The three-stages of a *Batson/Wheeler* inquiry are well-established. First, the defendant must establish a prima facie case of discriminatory jury selection by showing under the totality of the facts that there is an inference of discriminatory purpose in the prosecutor's exercise of a peremptory challenge or challenges. Second, once the defendant makes out a prima facie case, the state must explain its peremptory challenge by offering permissible race-neutral justifications. Third, the trial court must determine whether the defendant has proved purposeful racial discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410; 162 L.Ed.2d 129]; *People v. Williams* (2013) 56 Cal.4th 630, 650; *People v. Pearson, supra,* 56 Cal.4th at p. 421.)

It is presumed that prosecutors use their peremptory challenges in a constitutional manner. (*People v. Salcido* (2008) 44 Cal.4th 93, 136; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1104, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Boyette* (2002) 29 Cal.4th 381, 421.) The defendant bears the burden of proving a prima facie case. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1292.) A defendant shows a prima facie case by "'producing evidence sufficient to

permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Pearson, supra,* 56 Cal.4th at p. 421, quoting *Johnson v. California, supra,* 545 U.S. at p. 170.) As this Court stated in *Wheeler*,

> We shall not attempt a compendium of all the ways in which a party may seek to make such a showing. For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole.[63] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.

(*People v. Wheeler, supra,* 22 Cal.3d at pp. 280-281.) However, even though a prosecutor who excuses all members of a particular group may give rise to an inference of impropriety, especially where the defendant belongs to the same group, that inference is "not dispositive." (*People v. Crittenden* (1994) 9 Cal.4th 83, 119; cf. *People v. Guerra* (2006) 37 Cal.4th 1067, 1101, [no prima facie showing where the prosecutor excused the only Hispanic sitting in the jury box, with only two other Hispanics remaining

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[63] For example, in a case of alleged exclusion on the ground of race it may be significant if the persons challenged, although all Black, include both men and women and are of a variety of ages, occupations, and social or economic conditions. [This is footnote 27 in the original.]

on the entire panel], disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

As this Court has noted, where a trial court denies a *Batson/Wheeler* motion without finding a step-one prima facie case, the appellate court will review the voir-dire record for evidence to support the trial court's ruling, and will affirm the ruling if the record "suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (*People v. Pearson, supra,* 56 Cal.4th at p. 421, quoting *People v. Guerra, supra,* 37 Cal.4th at p. 1101.) The People are not required to disclose reasons for the challenged excusals, and the trial court is not required to evaluate them, unless a prima facie case was found to have been made. (*People v. Garcia* (2011) 52 Cal.4th 706, 746; *People v. Carasi, supra,* 44 Cal.4th at p. 1292; *People v. Zambrano, supra,* 41 Cal.4th at pp. 1104–1105 & fn. 3.)

Where the trial court finds no prima facie case, the court invites the prosecutor to state his or her reasons to preserve them for the record, the prosecutor states his or her reasons, and the trial court does not evaluate the reasons under step three, then the matter proceeds on appeal as a step-one *Batson* claim. (See *People v. Taylor* (2010) 48 Cal.4th 574, 616-617; *People v. Lewis* (2008) 43 Cal.4th 415, 470-471.) However, if the trial court, even after finding no prima facie case nevertheless made findings as to the validity of the reasons under step three, then it is moot whether or not a prima facie case was found under step one, and the matter proceeds on appeal as a "first stage/third stage *Batson* hybrid." (*People v. Riccardi* (2012) 54 Cal.4th 758, 786-787; *People v. Mills* (2010) 48 Cal.4th 158, 174; *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8.) In the instant case, the trial court's invitation to the prosecutors to state for the record their reasons for excusing the prospective jurors in question did not render moot the prima facie-step one question, since the court expressly found no prima

facie case, permitted the prosecutors to state their reasons for striking the implicated jurors to preserve them, and did not evaluate those reasons. (See (7RT 945; 8RT 1136.)

Where it is not clear whether the trial court applied the "reasonable inference" standard (*Johnson v. California, supra,* 545 U.S. at p. 170), or the previous California standard disapproved in *Johnson*, the reviewing court will apply independent review to determine whether the record supports an inference that the prosecutor excused a prospective juror on an improper basis. (*People v. Clark* (2011) 52 Cal.4th 856, 904; *People v. Garcia, supra,* 52 Cal.4th at pp. 746-747; *People v. Bonilla* (2007) 41 Cal.4th 313, 342.) In conducting this independent review, this Court has the benefit of "the entire record" created on voir dire. (*People v. Garcia, supra,* 52 Cal.4th at p. 747; *People v. Yeoman* (2003) 31 Cal.4th 93, 116.) Here, independent review of the record in this case demonstrates appellant failed to make a sufficient showing to establish an inference of a discriminatory purpose.[64]

C. The Record Demonstrates No Reasonable Inference of Discriminatory Purpose as to the People's Peremptory Challenges of P.G., R.F., T.M., or E.A.

Appellant claims that he showed a reasonable inference of discriminatory purpose with respect to the People's peremptory discharge of four prospective jurors: (1) P.G.; (2) R.F.; (3) T.M. and (4) E.A.. (AOB 37-87.) The record refutes these claims.

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[64] In *Johnson,* the United States Supreme Court defined "inference" as a "conclusion reached by considering other facts and deducing a logical consequence for them." (*Johnson v. California, supra,* 545 U.S. at pp. 168-169.)

1. P.G.'s Juror Questionnaire and Oral Voir Dire Demonstrate Non-Discriminatory Reasons for Any Prosecutor to Peremptorily Discharge Him

P.G. was Mexican-American. His juror questionnaire reflected that he had "never been in favor of the death penalty" because he did not believe that it "has been applied in a standard way to the diverse population of offenders," and that he had never held a different opinion. P.G. believed that the death penalty should "almost never" (the lowest choice offered on the questionnaire) be applied to "anyone who participates in a robbery" in which a police officer or store owner is murdered. He wrote that he believed the death penalty should be applied "almost always" to anyone who participates in a robbery in which more than one person was killed, but explained, "This statement coincides with the law, as I understand it." P.G. "disagree[d] somewhat" with the statements that anyone who intentionally killed another should "always" and should "never" get the death penalty, because "There are issues of mental abilities, degrees of intent, and of participation." P.G. did not have an opinion regarding the circumstances of a killing that would justify imposition of the death penalty because he had never thought about the issue. (2SuppIICT 410-413.) P.G. stated he could follow the law, that he had no moral, ethical, or religious beliefs that would prevent him from imposing death, and that he could impose life or death. He had a potential scheduling conflict related to his work. (2SuppIICT 413-422.)

During oral voir dire, P.G. further explained that he was against imposition of the death penalty because of its unfair imposition upon minorities and poor people. P.G. accepted that it was the law, and that he might have to "take it into account for this particular trial." If the bad outweighed the good a little, P.G. would not vote for death. He did not know what it would take for him to vote for death. (6RT 629-634.) P.G.

reiterated that he was against the death penalty, and he would vote for it to be rescinded, but he would follow the law although he had no idea how much the bad would have to outweigh the good to impose it. (6RT 635.) He could envision voting for life, even if the bad outweighed the good. (6RT 635-636.) P.G. also had projects at work that would be on his mind if he were seated. However, he could ignore them and focus on the case. (6RT 636-637.)

In response to the question of whether victim impact testimony would affect him, P.G. responded, "I am sure it would be very emotional and very dramatic and we would all grin and bear it." (6RT 759.) In response to the question of whether he would listen to and factor into his decision-making the victim impact evidence, P.G. responded, "Okay." (6RT 760.)

P.G. had been to Mexico City, and to Oaxaca, which was very close to Guatamala and Central America. (6RT 773.) With respect to whether he had studied much about "Central America, El Salvador, Honduras, Guatemala," Garcia replied, "I know the difficulties happening in Guatemala and El Salvador because I follow the news. They have been in the news since about 1979 on." (6RT 773.) It would not prejudice P.G. against defendants born and/or raised in El Salvador. (6RT 773-774.) In response to a general question addressed to the jury panel at large, P.G. said his preference would be to not serve for six weeks in a "difficult trial," but that if both sides felt he would be fair and impartial, he would serve. (7RT 791-792.)

In response to questioning by the prosecutor, P.G. said he had never thought he would be on a death penalty jury, but he "accepted the rules of the game." He was willing to make the judgment between life without parole, and death. (7RT 809-810.) In response to the question whether he would "agonize about it knowing [he] had some prior reservations against the death penalty, P.G. said, "I'm sure I am going to agonize about a lot of

things in a trial like this." (7RT 810.) In response to the prosecutor's question of whether there was any one way he was leaning at the moment, P.G. responded that "As of today, . . . I have not come to a verdict." (7RT 810.)

P.G.'s statements during voir dire demonstrated the inference that he was properly subject to a peremptory challenge by the People, not because of his Mexican heritage, but because he was against the death penalty as the prosecution stated. While he stated he could impose the death penalty, the People had to balance that against his anti-death penalty views, and his statement that the death penalty was unfairly imposed upon minorities and the poor. Here, appellant, Contreras, and Navarro were both among a minority group, and from exceedingly impoverished backgrounds, and each lacked any meaningful education. P.G. indicated that he would suffer through victim impact testimony, but not that it could sway him to impose death. P.G. also stated he was aware of the circumstances in El Salvador and Guatamala, thus implying he may have been overly sympathetic to appellant, Contreras, and Navarro in the penalty phase. Moreover, P.G. did not want to serve on this jury, as evidenced by the work-related excuses he gave, and his comments about suffering through aspects of the evidence to be presented in this trial. The only reasonable inference flowing from P.G.'s questionnaire and voir dire is that he was peremptorily discharged by the People because of his anti-death penalty views, his work-related issues, and because of his possible sympathy for the defendants based on Garcia's understanding of the circumstances in Central America, and because (with respect to the death penalty), each was a member of a minority group, from exceedingly poor backgrounds, and lacking in education. (See *People v. Stanley* (2006) 39 Cal.4th 913, 940 [finding sympathy for defendant a valid race-neutral reason for peremptory challenge]; *People v. Jenkins* (2000) 22 Cal.4th 900, 994 [the risk of detriment to the prospective juror's

employment if he was required to serve on a lengthy trial was a proper race-neutral ground for his excusal]; *People v. Bolin* (1998) 18 Cal.4th 297, 317 [the use of "peremptory challenges to excuse prospective jurors who expressed scruples about imposing the death penalty" is proper]; see also *People v. Blacksher, supra,* 52 Cal.4th at p. 802 [same].)

2. E.A.'s Juror Questionnaire and Oral Voir Dire Demonstrate Non-Discriminatory Reasons for Any Prosecutor to Peremptorily Discharge Her

a. Juror Questionnaire

E.A., who was Mexican-American, had been sexually abused as a child. The culprit was not caught or prosecuted. She had also witnessed a crime. Her brother was "arrested for disorder at his girlfriend family house/and knife attack [*sic*]." She visited her brother in jail. She had followed the Menendez brothers' case, not too closely, and felt that "more facts were not shown." (5SuppIICT 1237-1242.)

E.A. was recovering from a brain operation for a seizure disorder, and was under medication. Her doctor gave permission for her to serve as a juror. The nature of the crimes made her "feel reluctant to serve." With respect to the nature of the charges here, she said, "I do not feel good to be on a jury involving the death penalty." With respect to whether she had any religious or moral feelings that would make it difficult for her to be a juror here, she wrote, "Difficulty would be to judge in terms of the death penalty." (5SuppIICT 1243-1244.) E.A. would be reluctant to serve as a juror because the instant case involved crimes of violence, and she "grew up in a family where violence occur[red, and] it would be hard to see photographs." (5SuppIICT 1245-1250.)

With respect to her views on the death penalty, E.A. wrote,

> I feel sad that we have the death penalty, life is precious to me. Death penalty is necessary though because of the crime involved. I feel reluctant to be directly involved with a decision regarding the death penalty.

(5SuppIICT 1250.) She also felt that the death penalty was necessary "under extreme cases." When she was in high school, E.A. believed the death penalty was not necessary, but as she got older, she decided it was necessary after seeing "more and more violent crimes occurring." With respect to whether her feelings about the death penalty were strong, E.A. wrote, "I understand the penalty of death. I do not want to be in a position to make a decision on this penalty." E.A. would have to consider all of the facts before she could say whether anyone who participated in a robbery where a police officer, a store owner, or multiple victims were killed. With respect to whether anyone who intentionally killed should always get the death penalty, E.A. responded, "agree somewhat," and "disagree somewhat" because she would need all of the facts and circumstances." However, there were circumstances where one has no regard for life, and "other factors involved where death penalty should be considered." (5SuppIICT 1250-1253.)

E.A. could vote for life or death. However, her feelings about the death penalty were such that they would interfere with her ability to be objective during the guilt phase of the trial. Her religious "organization's" view was that no life should be taken from anyone, but she did not feel obligated to accept that view. E.A.'s "moral, ethical, or religious beliefs" would make it "difficult for [her] to vote for imposition of the death penalty "under any circumstances," but she would be "as fair and objective because of [her] juror position." She could set aside her own feelings in favor of the court's instructions, and could impose life without parole or death.

However, in response to the question whether there was anything that might affect her ability to sit as an impartial juror on a death penalty case, she responded, "It would be difficult for [her] to sit on a jury knowing that someone can die, but [she] would be willing to sit and be objective." And, in response to another question whether there was any reason why she would not be a fair and impartial juror for all sides, she responded, "I prefer not to serve because of the seriousness of the crime which involves the death penalty." (5SuppIICT 1254-1262.)

E.A.'s responses clearly show a juror who, just like with P.G., any prosecutor would be concerned could not fairly evaluate the evidence and impose the death penalty, if appropriate, due to her personal views against it, as the prosecutor noted. E.A. had suffered great tragedy in her life, and suffered from a medical problem that, despite clearance by her doctor, nevertheless would have concerned any prosecutor as to her ability to serve. Only one reasonable inference can arise from the People's peremptory discharge of E.A. – she was peremptorily discharged because of her expressed difficulty with the death penalty, her prior victimization, the issues with her brother, and her medical condition, and not for any discriminatory purpose.

3. R.F.'s Juror Questionnaire and Oral Voir Dire Demonstrate Non-Discriminatory Reasons for Any Prosecutor to Peremptorily Discharge Him (Indeed, *Appellant* Made an Unsuccessful *Cause Challenge* to Him and the Court Stated That It Hoped Someone Would Strike Him)

R.F., a college philosophy professor who was working on his Ph.D in philosophy, did not state his ethnic background. He stated the following in his juror questionnaire. He did not read newspapers often because there was "not much of importance" in them. The criminal justice system did an "okay" job, and was not always just. R.F. had once visited a jail or prison

with a church group. He felt there was no one cause for crime, but that it might be societal or genetic or a combination. (6SuppIICT 1525-1528.)

R.F. recognized that not all police were bad, but he had some experience with "arrogant police." He also had good experiences with police officers who were "kind and pleasant." He believed that police could be good or bad, like people in general. In response to the question of what he thought about the credibility of police officers, R.F. responded, "Based on what?" R.F. could fairly evaluate police officer testimony. In response to a question seeking R.F.'s opinion of non-citizens accused of committing crimes, he responded, "The question is too general." With respect to a question about his position on Proposition 187, R.F. responded that "both sides need to work on their facts." (6SuppIICT 1528-1531.)

Nothing about the facts of the case or his religious or moral feelings would make it difficult for R.F. to sit as a juror. However, "at this time" he did not know what his feelings would be sitting as a juror in a crime involving violence and graphic photographs. In response to a question about the fairness of the burden of proof in the guilt phase of a capital trial, R.F. responded that the "question is too general." (6SuppIICT 1531-1537.)

In response to a question seeking his general feelings about the death penalty, R.F. responded that "More time should be given to understanding this issue by the public and the court system" because "all important issues should be reexamined." R.F. felt that newspaper discussions about the death penalty lacked any real substance. R.F. responded to questions about when the death penalty should always or never be imposed in particular circumstances by stating that it would depend on the facts of each case. Killing in defense of one's life would never justify imposition of the death penalty. R.F. could be objective and would base his vote as a juror on all of the circumstances. In response to a question asking the view of his religious organization on the death penalty, R.F. responded, "Open

question." However, and without explanation, he felt "obligated to accept this view." R.F. had no beliefs that would make it difficult for him to impose the death penalty. R.F. could set aside any personal feelings and follow the law as given by the court. R.F. agreed with the law regarding aider and abettor liability. (6SuppIICT 1537-1549.)

R.F. stated the following during oral voir dire. R.F. felt that the police did an okay job, but one that is not always just. R.F. had both good and bad experiences with the police. R.F. believed that the trial system should be improved, and cited as an example a book he had read about a judge who did not understand the law very well. R.F. could participate as a juror and follow the court's instructions if he believed that "everyone is acting in good faith." If he believed people were acting in bad faith, R.F. had a duty to speak. (7RT 962-965.)

In response to the court's question of whether R.F. would reexamine and redesign the structure as a juror if he did not like the way the "structure" worked, he responded that if he felt that, he "wouldn't be here." With respect to the death penalty, R.F. stated on his questionnaire that "More time should be given to understanding this issue by the public and the court system." What he meant was that the arguments for and against the death penalty were "usually riddled with fallacies." However, R.F. could move beyond the philosophical arguments and actually vote for life or death, depending on the circumstances. (7RT 965.)

In response to the question whether R.F. could follow an instruction to review and consider all the circumstances surrounding a case before deciding the issue of penalty, R.F. responded "No." He was not sure why he felt that way, but thought it might be because if people were not acting in good faith, he would consider it his duty to say something. (7RT 966-967.) He could be fair to all sides. (7RT 968, 997.) In arguments with colleagues about the death penalty, R.F. tended to fall "a little to the left."

(7RT 1008.) However, R.F. would follow the evidence to reach a verdict. (7RT 1009.)

Here, no inference of discriminatory purpose arose from the voir dire of R.F., alone or in conjunction with the information relevant to P.G. and E.A. While P.G. and E.A. both clearly expressed their problematic death penalty views, R.F. stated he would lean toward the left during arguments with colleagues, presumably meaning he would lean against the death penalty, something that would concern any prosecutor in a death penalty case like this, as the prosecutor indicated. Moreover, R.F. stated that he felt obligated to accept the view of his religious organization concerning the death penalty, but when asked to describe that view, stated it was an "open question." (See 6SuppIICT 1542.) R.F. avoided stating his feelings about the death penalty, and avoided giving meaningful responses to questions from which his true feelings about the death penalty might be divined. Moreover, many of R.F.'s answers implied that he would be distracted from his task as a juror, be highly academic, or would even be disruptive in deliberations because he repeatedly challenged the manner in which questions were framed and reserved the right to determine whether others were acting in "good faith."

Remarkably, although appellant now claims that the voir dire demonstrates a reasonable inference the prosecution challenged R.F. for improper discriminatory reasons, appellant's counsel also wanted R.F. off the jury, but for cause.[65] The trial court denied that challenge, but stated, "*I hope somebody excuses him*, but I don't believe it rises to cause." (7RT 1027, italics added.) No discriminatory inference arises as to R.F.

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[65] "[T]he circumstance that a juror is not subject to exclusion for cause does not, on its own, support an inference that group bias motivated the peremptory challenge." (*People v. Hoyos, supra*, 41 Cal.4th at p. 902; see *People v. Cornwell, supra*, 37 Cal.4th at p. 70.)

He failed to honestly express his feelings about key issues during voir dire and displayed an attitude of intellectual superiority and aloofness that resulted in appellant, the People, and the trial court each wanting him off the jury. Under these circumstances, no prima facie case is shown as to R.F.

4. T.M.'s Juror Questionnaire and Oral Voir Dire Demonstrate Non-Discriminatory Reasons for Any Prosecutor to Peremptorily Discharge Her

T.M. was "Hispanic/White." Her juror questionnaire revealed the following. She felt that most of the time, law enforcement responded reasonably, and that the judicial system "seems to be fair." As part of her employment duties, T.M. would serve on incarcerated parents notices of hearings at the Department of Children's Services. (5SuppIICT 1264-1268.)

T.M. had neither good nor bad experiences with the police, and in fact, had no experience with police, but believed that, most of the time, police prejudged people based on how they looked. T.M. had no feelings about the nature of the charges in this case that would make it difficult for her to serve as a juror. She felt that storeowners could carry guns for protection against life-threatening situations. A storeowner could use deadly force if another weapon was exposed, and the store owner thought the other person would use it. (5SuppIICT 1268-1274.)

While, generally, it would be a "hard decision" to decide the death penalty, if her child had been killed, she might want the killer executed. T.M.'s feelings about the death penalty were not "very strong." She half felt that in some cases it would be fair and half did not believe in it for "somewhat religious reasons." T.M. felt that anyone who participated in a robbery in which a police officer, a store owner, or multiple victims were murdered should "almost always" get the death penalty, the exception

being for insanity. She strongly disagreed that anyone who intentionally murdered another should always, or should never, get the death penalty, because there were too many other factors to consider, such as abuse and insanity. She could vote for life or death, depending on the evidence. Her religious organization was against the death penalty. However, she did not "stand by" all of her church's views and would not feel obligated to accept its view. T.M.'s "moral, ethical or religious beliefs" would make it hard to impose the death penalty, but it would depend on the "overall crime." She could set aside her own feelings and follow the law. There was nothing that would affect her ability to be fair and impartial, and she could vote for life or death. There were no reasons why T.M. would prefer not to serve. (5SuppIICT 1277-1289.)

T.M. explained the following during oral voir dire. T.M. sometimes served notices of appearance to incarcerated parents and would deliver "court reports" to court. No problems resulted from that duty. (7RT 862-863.) T.M. indicated that imposing the death penalty would be a hard decision. With respect to whether she would be comfortable imposing the death penalty, she stated,

> Of course it would be a little uncomfortable, but the final decision after hearing everything, there is so much bad, I could make the decision without feeling that I made a wrong decision.

(7RT 863.) T.M. could vote for life or death, if she found one appropriate. (7RT 864-866.) T.M. could give all sides a fair trial. (7RT 866, 911.)

Although T.M. repeatedly said she could be fair and impose the death penalty, she also stated that imposing the death penalty would be a hard decision, and that her "moral, ethical or religious beliefs" would "make it difficult" for her to vote for death "under any circumstances." She also stated that she might want the death penalty if her child had been murdered, thus suggesting she would respond emotionally to the question of whether

to impose the death penalty in this case, rather than simply based on the evidence and instructions. And, she stated that she half believed in the death penalty, and half did not. (5SuppIICT 1277, 1282.)

Any prosecutor would have been concerned that T.M. would have had difficulty sentencing someone to death based on the equivocal nature of her voir dire responses, and the emotional basis of her justification for it (e.g., the murder of her child). That is, she had serious reservations about the death penalty (half for it, half against it), yet if her emotional trigger was pulled hard enough she might choose it for a defendant. This case, however, did not involved the murder of a small child. Moreover, her duties with the Department of Children's Services could have implied sympathy for children and/or parents who suffered from poverty and other difficult circumstances, which was a major component of the penalty-phase defense common here to appellant, Navarro, and Contreras. She also expressed the view that police sometimes targeted or prejudged people based on how they looked. (5SuppIICT 1269.) The only reasonable inference as to T.M. was that she was discharged because of her weak position as a pro-death penalty juror, because of her possible sympathy for the defendants given her employment, and because her of views about police prejudging people based on their appearance. (See *People v. Stanley, supra,* 39 Cal.4th at p. 940 [finding sympathy for defendant a valid race-neutral reason for peremptory challenge]; *People v. Avila* (2006) 38 Cal.4th 491, 544-545 [prospective juror's distrust of police valid race-neutral reason]; *People v. Guerra, supra,* 37 Cal.4th at p. 1102 [same]; *People v. Reynoso* (2003) 31 Cal.4th 903, 925, fn. 6 [noting that a prosecutor properly may excuse a prospective juror in the belief that his or her occupation renders him or her ill-suited to serve as a juror on the case]; *People v. Bolin, supra,* 18 Cal.4th at p. 317 [the use of "peremptory challenges to excuse prospective jurors who expressed scruples about

imposing the death penalty" is proper]; see also *People v. Blacksher, supra,* 52 Cal.4th at p. 802 [same].)

D. The Record of Voir Dire Demonstrates That Appellant Failed to Show a Reasonable Inference of Discriminatory Intent, and Thus, His *Batson/Wheeler* Claim Fails

As shown above, there were legitimate non-racial reasons unrelated to race that P.G., E.A., T.M. and R.F. were not suitable as jurors for this case from the prosecutors' perspective. As shown above, P.G. was anti-death penalty because it was enforced in a discriminatory manner against minorities and the poor, and appellant, Contreras, and Navarro were minority members, and from exceedingly impoverished backgrounds. He demonstrated at least the inference of sympathy toward the circumstances in El Salvador and Guatamala (which would have played directly into the penalty-phase defense). And, based on his work-related excuses, P.G. did not want to serve on this jury. E.A. also displayed an anti-death penalty bias.

While T.M. repeatedly said she could be fair and impose the death penalty, she stated it would be a hard decision for her, she was half in favor of the death penalty and half against it, and she also worked in the Department of Children's Services, which implied she might be more sympathetic to the penalty-phase defense based on difficult circumstances while growing up. Moreover, she displayed an anti-police bias with her statement that she believed police officers prejudged people based on how they looked. Any prosecutor would have been concerned that she would have difficulty sentencing someone to death based on the equivocal nature of her voir dire responses. The only reasonable inference as to T.M. was that she was discharged because of her weak position as a pro-death penalty juror, because she may have been sympathetic toward the defendants based

on their defense related to their childhood, and because of possible mistrust of the police.

One cannot say that R.F. was discharged based on his views of the death penalty because, despite the best efforts of the court and the attorneys, he never once said whether he believed in the death penalty or not, except to say he would lean toward the left, presumably meaning he would lean against the death penalty, something that would concern any prosecutor in a death penalty case. R.F.'s religious-based view on capital punishment was never stated, but he said he would feel bound to accept that view, and R.F. generally avoided giving any meaningful responses during voir dire. Appellant even sought to discharge R.F. for cause, yet now claims that when the People struck him, they acted from improper motives. Since the trial court and appellant felt R.F. should not serve on the jury, it seems odd for appellant to now fault the prosecutors for peremptorily challenging R.F. as well.

In addition, as shown above, the People repeatedly accepted the jury with three, two, and one Hispanic prospective jurors on it, then accepted the final jury with one Hispanic member, which further demonstrates that the trial court properly found there to be no prima facie case. (See *People v. Clark, supra,* 52 Cal.4th at p. 906; *People v. Cornwell* (2005) 37 Cal.4th 50, 69–70, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Moreover, the jury that was sworn included one Hispanic person, E.S. Although the circumstance that the jury included a member of the identified group is not dispositive, it indicates good faith on the part of the prosecutor and is an appropriate factor to consider in determining whether a prima facie case was shown under *Batson/Wheeler.* (*People v. Garcia, supra,* 52 Cal.4th at pp. 747-748; *People v. Clark, supra,* 52 Cal.4th at p. 906; *People v. Hartsch* (2010) 49 Cal.4th 472, 487;

People v. Ward (2005) 36 Cal.4th 186, 203; *People v. Turner* (1994) 8 Cal.4th 137, 168; *People v. Howard* (1992) 1 Cal.4th 1132, 1156.)

Further, when there is a lack of motive to exercise challenges based on group bias because race is not a factor in the case, courts have viewed this circumstance as a factor cutting against a prima facie finding of discrimination. There is a lack of motive to discriminate when the defendant and the victim are of the same race. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733-734.) Here, as shown above throughout the statement of facts, and above in the statement of the case (which itemizes the counts and the victims' names), many of appellant's victims were Hispanic. Even if one assumes that Officer Hoglund was White and Mr. Kim was Korean (see AOB 56), there were so many victims of varying ethnicity that no meaningful finding of a motive to discriminate can be found here based on the racial characteristic of the victims. Because appellant victimized so many different people of Hispanic background, and also other people of different ethnic and national backgrounds, his claim of a prima facie case is further diminished.

E. Statistical Analysis Does Not Establish a Reasonable Inference of Discriminatory Jury Selection

Despite the fact that each of the discharged jurors implicated by appellant's instant claim demonstrated characteristics that any prosecutor would have found undesirable in a case like this one, appellant claims that a statistical analysis demonstrates a prima facie case here. (AOB 46-56.) That is, appellant argues that the statistical information that can be gleaned from the voir dire in this case demonstrates the required inference under *Batson*. (AOB 46-56.)

Specifically, he argues that the prosecution used its peremptory challenges to exclude the "majority" of the Hispanic prospective jurors.

Appellant states that because, at the time of the first motion, the People had struck two of three Hispanic prospective jurors, and four of six at the time of the second motion, the elimination rate percentages of 66 and 67, respectively, are sufficient in and of themselves to establish a prima facie case. Appellant also argues that at the time of his first motion, there were three Hispanic prospective jurors among 21 available prospective jurors that had been questioned, or 12.4 percent, against the 66 percent (two of the three) whom the prosecution challenged. He also argues that at the time of the second motion, the People removed four of six, or 67 percent, when there were 32 potential jurors available, or 19 percent. (AOB 48-50.)

This claim fails first because the sample size presented is too small for meaningful analysis. (*People v. Garcia, supra,* 52 Cal.4th at p. 747.) In *Garcia*, 75 members of the jury pool completed their jury questionnaires, and 18 were called into the jury box for voir dire. Two were dismissed for cause. (*Ibid.* at p. 744.) During voir dire of the remaining 16, the prosecutor exercised peremptory challenges against three women. This Court found that the sample size was too small for meaningful statistical analysis under *Batson*. Citing *People v. Bonilla* (2007) 41 Cal.4th 313, 342-343, this Court found that it was "impossible, as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears." (*People v. Garcia, supra,* 52 Cal.4th at p. 747; see *People v. Bonilla, supra,* 41 Cal.4th at pp. 342-343 [upholding finding of no prima facie case where prosecutor excused two African-Americans, leaving none in the 78-person pool]; see also *People v. Bell* (2007) 40 Cal.4th 582, 597-598 [same result where prosecutor excused two of three African-American women in the 47-person pool].) The same principle should apply here, and this Court should conclude that the numbers involved render any attempt at a statistical analysis meaningless.

In any event, appellant's statistical claim also fails on its merits because, even if statistics demonstrated some measure of support for an argument of an inference of discriminatory motive in general, such an argument is not reasonable here. In *Bonilla,* Hispanic individuals comprised approximately 10.26 percent of the pool (eight of 78), the prosecution used 10 percent of its challenges on Hispanics (three of 30), and the final jury was 8.33 percent Hispanic (one of 12). Bonilla was a Hispanic male, but the prosecution used not a single strike against any Hispanic male, and a Hispanic man sat on the jury. (*People v. Bonilla, supra,* 41 Cal.4th at p. 344; see also *People v. Garcia, supra,* 52 Cal.4th at pp. 747-748.)

Here, Hispanic individuals comprised approximately 13.08 percent of the pool (17 of 130). This number compares to the analogous 12 percent number in *Bonilla*. Next, the prosecution used four of its peremptory challenges on Hispanic people (four of 10). This is a point of distinction from Bonilla, where, instead of a 40 percent strike rate, the *Bonilla* prosecutors had a strike rate of 10 percent (three out of 30 peremptory challenges used). However, the Bonilla prosecutors used three times as many peremptory challenges, so, again, with the small sample sizes involved it is difficult to obtain meaningful statistics. The final jury here was 8.33 percent Hispanic, like in *Bonilla*. Like in *Bonilla*, appellant was an Hispanic male, and an Hispanic male remained on the jury.

As this Court noted in *Bonilla*,

> As we have previously explained, "the ultimate issue to be addressed on a *Wheeler-Batson* motion 'is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias.' [Citation.] But in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group" – as Bonilla asks the court to do here – "a court finding a prima facie case is necessarily

> relying on an apparent pattern in the party's challenges." (*People v. Bell, supra*, 40 Cal.4th at p. 598, fn. 3.) Such a pattern will be difficult to discern when the number of challenges is extremely small.

(*People v. Bonilla, supra,* 41 Cal.4th at p. 343, fn. 12.) Here, as shown above, the record supports the reasonable inference that P.G., E.A., R.F., and T.M., were each peremptorily struck based on individual bias, not group bias. In addition to the solid and reasonable inferences the naturally flow from the voir dire of each implicated prospective juror, the above comparison to *Bonilla* demonstrates that the People's use of peremptory challenges did not give rise to an inference of discriminatory motive on a statistical basis. (See also *People v. Clark, supra,* 52 Cal.4th at pp. 905-906 [this Court rejected Clark's claim of a prima facie case where the prosecutor had used 20 percent of his total peremptory challenges (four of 20) to excuse 80 percent of the eligible African-Americans (four of five), even though African-Americans comprised only 5 percent of the jury panelists not excused for cause, since African-Americans made up nearly 10 percent of the final jury].)

Respondent submits that all of the relevant circumstances discussed above, including that *appellant* sought to remove one of the challenged prospective jurors for cause (R.F.), that the prosecution repeatedly accepted the jury with three, two, and then one Hispanic members on it, and that each of the implicated jurors were untenable for a prosecutor seeking the death penalty given their expressed views (or, in R.F.'s case, not expressing his views despite the parties' best efforts to suss them out), the trial court correctly found that appellant failed to make out a prima facie case. The circumstances here demonstrate more than available race-neutral reasons, and why any prosecutor would have kept the four prospective jurors in question off of this case. Appellant himself sought to discharge one of them – R.F. – for cause. The statistics here are merely suggestive of an

imbalance implicated by a small sample size rather than being definitive of a prima facie case; given all of the circumstances, the trial court's rulings finding no prima facie case should be affirmed.

F. A Comparative Analysis Is Not Warranted Under This Court's Precedent

Appellant contends that this Court should engage in a comparative juror analysis under the "totality-of-relevant-facts" standard. (AOB 62-85.) However, this Court has repeatedly held that comparative analysis is a *Batson* step-three tool and appellate courts need not employ it in a *Batson* step-one review. That is, a comparative jury analysis is required only if the defendant first makes a prima facie showing of discrimination. (*People v. Taylor, supra,* 48 Cal.4th at pp. 616-617; *People v. Lenix, supra,* 44 Cal.4th at p. 622-62 & fn. 15; *People v. Bonilla, supra,* 41 Cal.4th at p. 350.) Thus, a comparative juror analysis is not warranted in this case. This claim fails.[66]

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE

Appellant contends that the trial court improperly denied his motion to conduct individual sequestered death qualification voir dire. He argues that the trial court unreasonably and unequally applied controlling state law, and violated his federal and state constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict under the Sixth, Eighth, and Fourteenth

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[66] Appellant asserts that if this Court were to find a *Batson/Wheeler* violation, the convictions should be reversed and the sentences vacated. (AOB 86-87.) Respondent submits that if this Court were to find such a violation, the proper remedy is a limited remand for the purpose of holding a further *Batson/Wheeler* hearing. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1100-1104.)

Amendments to the United States Constitution, as well as articles Seven, Fifteen, and Sixteen of the California Constitution. He also asserts that the trial court's ruling violated appellant's right under California Code of Civil Procedure, section 223, to individual juror voir dire where group voir dire is not practicable. And, he asserts, the trial court's "failure to exercise the discretion to conduct individual voir dire" resulted in a miscarriage of justice under Article VI, Section 13, of the California Constitution. (AOB 88-99.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

Citing *Hovey v. Superior Court* (1980) 28 Cal.3d 1, appellant moved to have each potential juror subjected to "individualized, sequestered death qualification" voir dire that was conducted by counsel, rather than "group death qualification." (10CT 2980-2984.) Appellant's counsel argued *Hovey* recognized a problem with death qualification voir dire, and that Proposition 115 merely reinstated the old system which *Hovey* found was constitutionally unfair. Appellant's counsel asked the court to either conduct sequestered voir dire, or to impose another remedy to "relieve the unfairness which the California Supreme Court found to be constitutionally unfair." (4RT 447-448.) The trial court responded,

> I thought I already did that in the form of the questionnaire. It seems to me the real danger that *Hovey* addressed, we can't find out the individual opinions of jurors because they would be influenced by the other jurors in having the right answers. By having them write out the answers, we find out what their position is untainted by anybody else. And how we follow-up is a different issue. [¶] So I feel the problems of *Hovey* are met by the use of the questionnaire and I am satisfied that the sequestered *Hovey* is not practicable and we have resolved that at any rate.

(4RT 448.) Appellant's counsel argued that the questionnaire did not solve the problem because any follow-up on it took place before the other prospective jurors. (4RT 448.) The court responded,

> Okay. As anybody knows, rehabilitation is something that can be handled by even a somewhat experienced attorney will be able to turn a juror around. [*Sic*] I don't see that as being a test of whether or not we get the jurors' true opinions. [¶] The best we can do is try to get unadorned opinions before anybody tells them or triggers or somehow signals to them what the correct answer is, and I think we've done it.

(4RT 449.) The trial court denied appellant's motion. (4RT 449; see also 10CT 2986.)

The trial court told the prospective jurors that they could keep certain matters confidential, if they so indicated on their questionnaires. (5RT 533.) The court emphasized that the attorneys and the court need "your gut reactions, your honest responses" (5RT 534) and "complete and honest answers" (5RT 557). She instructed the prospective jurors to not "write down the proper things to say or politically correct things to say" (5RT 557-558), and that there were "no right or wrong answers, just your honest answers" (5RT 559; see also 6RT 616.) With respect to following up on the questionnaires, the court told the prospective jurors there were no right or wrong answers, "just your honest answers." No one would debate with the prospective jurors, or try to change their minds, but rather, the attorneys just wanted to find out what the prospective jurors' feelings were "so that both sides can be confident that they have 12 impartial jurors." (6RT 583.) The court instructed,

> So, please, if you have a strong feeling about something, don't try to hide it or change your answers so that you proceed with what everybody else is saying or what you think the attorneys want to hear. Please don't do that.

(6RT 584.) The court added, "So, again, please don't try to monitor your own responses, but just give us as honest a response as you can." (6RT 584.) If any prospective jurors wanted to speak in private, the court would hear confidential responses privately, and the record could be sealed if the prospective juror preferred. (6RT 585.)

During voir dire, appellant's counsel asked the court to reconsider its ruling on *Hovey* voir dire. He argued that prospective juror C.M. made a strong statement in her questionnaire supportive of the death penalty, then repeated answers given by other prospective jurors softening her position. The court found that the totality of the information should be considered, including the manner in which prospective jurors responded to questioning in court. (7RT 1016-1017.) The court found that prospective juror C.M. was thoughtful, credible, and intelligent, and responsive to the voir dire, in contrast to prospective juror E.E., who was given "every option to rehabilitate himself" and did not do so. That is, [E.E.] did not change his views at all from his questionnaire despite "sitting here two days." (7RT 1018-1019.)

Appellant's counsel renewed appellant's request for *Hovey* voir dire during jury selection, arguing that "the court's alternative to *Hovey* is not working." The court found that appellant's counsel's "timing is the worst it can be when you just got one for Mr. [E]." Appellant's counsel responded, "I didn't get one. The prosecution is getting one." (7RT 1025.) The court responded,

> As an example of someone who has not been swayed in spite of all of your efforts at certain points to do so. And the court has tried to push to see if I have any give. I don't think you disqualified this panel. This happens in any situation where we have the wrong data and you are to make a determination. Based on what they have been saying in court, I think we are getting a real read for some of these people. I don't think it

would be any better with all of you pushing in an individual setting than it would be now.

(7RT 1025-1026.) Appellant's counsel argued that the system implemented by the court was flawed because if the prospective jurors were "individually voir-dired, they would have the response of 46 jurors or however many have gone before for two days talking about the right answer." The court denied the renewed motion for sequestered voir dire. (7RT 1025-1027.) Appellant's counsel then pointed to three prospective jurors, asserted *Hovey* voir dire was required, and asked the court to strike the panel. (7RT 1019-1027.) The court found as follows:

> I stand on Mr. [E.'s] position. There are some people who feel the same way and there are some, having heard what the structure is, having thought about it for the first time – a lot of these are responses without having any thought given to them – that we are not necessarily getting duplicitous answers in the courtroom. And that is one of the calculations and determinations that I am considering, the forcefulness of their reply, whether they seem they're equivocating, whether they turn and twist when another question is asked. And I am confident none of these raise the issue under cause, and I don't believe that *Hovey* is appropriate, sequestered *Hovey* is appropriate. So the request is denied.

(7RT 1027.)

B. The Trial Court Properly Denied Appellant's Request for *Hovey* Voir Dire

This Court held in *Hovey v. Superior Court, supra,* 28 Cal.3d 1, pursuant to this Court's supervisory authority over California criminal procedure, that sequestered voir dire should be conducted in capital cases in order to promote candor and reduce the possibility that prospective jurors might be influenced by responses given during voir dire by other prospective jurors. (*Id.* at pp. 80–81.) Code of Civil Procedure section 223, adopted in 1990 as part of Proposition 115, abrogated this part of

Hovey's holding. (*People v. Watkins* (2012) 55 Cal.4th 999, 1011; *People v. Thomas* (2012) 53 Cal.4th 771, 789; *People v. McKinnon* (2011) 52 Cal.4th 610, 632-633.) This Court has clearly held that neither the California nor federal Constitutions mandate individual sequestration of all prospective jurors during the death qualification process. (*People v. Watkins, supra,* 55 Cal.4th at p. 1011; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1250; *People v. Thomas, supra,* 53 Cal.4th at p. 789.)

Appellant nevertheless claims the trial court abused its discretion in denying the motion for *Hovey* voir dire. (AOB 92-97.) Under Code of Civil Procedure section 223, the trial court retains discretion to order individual, sequestered voir dire. (*People v. Thomas, supra,* 53 Cal.4th at p. 789; *People v. McKinnon, supra,* 52 Cal.4th at p. 633; *People v. Tafoya* (2007) 42 Cal.4th 147,168.) Discretion is abused when the questioning process is not reasonably sufficient to test prospective jurors for bias or partiality. (*People v. Tafoya, supra,* 42 Cal.4th at p. 168.)

Appellant cannot show an abuse of discretion here. As set forth above, the trial court explained why, given the procedures used in this case, *Hovey* voir dire was not required. The court here utilized questionnaires that permitted the jurors the private expression of their views on the death penalty and the topics related to the justice system, then a procedure of follow-up voir dire in court. The trial court expressly told the prospective jurors they could also speak to the court and counsel in private and that the record could be sealed, thus ensuring the opportunity for prospective jurors to express their views without influence by other prospective jurors. In *Watkins*, each prospective juror filled out a 27-page questionnaire that each prospective juror was questioned on in open court by the court and then the attorneys, and the court made it clear that "counsel retained the opportunity for in camera questioning in appropriate circumstances,"

(*People v. Watkins, supra,* 55 Cal.4th at p. 1011.) This Court rejected the same claim made here by finding,

> Under these circumstances, we have no basis on which to conclude that the trial court failed to exercise, or abused, its discretion when it implicitly found that open court voir dire was "practicable" and denied the motion for individual sequestered voir dire.

(*Ibid.*) In *Thomas,* this Court rejected a similar abuse-of-discretion claim as follows:

> At trial, both defense counsel and the prosecutor requested sequestered voir dire, because both believed that if jurors were questioned individually they were more likely to be candid and less likely to be influenced by responses they heard from other jurors. Neither party, however, cited any particular circumstances of the present case that would justify conducting individual voir dire. Each juror filled out an extensive questionnaire, and was instructed to mark any question addressing sensitive or confidential matters to which he or she wished to respond in private. After the court questioned the jurors who were seated in the jury box, the attorneys were given the opportunity to inquire further. Under similar circumstances, we have held that the trial court did not abuse its discretion in denying individual sequestered voir dire.

(*People v. Thomas, supra*, 53 Cal.4th at 789.)

In *People v. Brasure* (2008) 42 Cal.4th 1037, 1051, this Court held,

> Nor do we agree the trial court abused its discretion in choosing collective voir dire with the possibility of questioning particular prospective jurors privately if needed. All prospective jurors filled out an extensive questionnaire that asked a series of questions probing the panelists' attitudes toward the death penalty. Each prospective juror was told to answer the questionnaire "by yourself, without help and/or assistance from any other person"; not to discuss its contents with anyone, including the other panelists; and to mark any answer that the prospective juror wanted to keep private with a "P," which would signal the court to ask about it outside the other jurors'

> presence. Each prospective juror was then examined on his or her attitudes and ability to fairly judge the case, with counsel, rather than the court, conducting the bulk of the examinations. Counsel thus had full opportunity, through questioning, to discover a prospective juror's biases, if any, regarding the death penalty and its application. Defendant points to nothing in the facts of this case as they were known to the trial court at the time of its ruling, or in the composition of the venire, that made collective death qualification impracticable in this case.

(*Ibid.* [fn. & citation omitted].)

Here, the trial court's stated reasons for not granting the motion for *Hovey* voir dire demonstrate it properly exercised its discretion and gave careful consideration of the issue like the trial courts did in *Box, Thomas,* and *Brasure*. In the context of the trial court's comments to the prospective jurors, it is apparent the trial court thoroughly considered the issue and determined group voir dire was adequate. This trial court properly exercised its discretion.

Finally, appellant claims that the trial court's exercise of discretion resulted in a miscarriage of justice under the United States Constitution. (AOB 97-99.) However, respondent submits that whether there was error in the manner which the trial court exercised its discretion under Code of Civil Procedure section 223, is measured under state law standards, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. This follows, because *Hovey's* sequestration rule was not constitutionally based:

> "In *Hovey* we clearly indicated that we adopted the rule pursuant to our supervisory authority over California criminal procedure and not under constitutional compulsion, and that we did so because the prejudicial effects associated with death-qualifying voir dire in open court had not been shown to be actual but only potential."

(*People v. Vieira* (2005) 35 Cal.4th 264, 288, quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1135.) Further, Code of Civil Procedure section

223 expressly requires a miscarriage of justice under Section 13 of Article VI of the California Constitution for reversal.

Here, appellant's ability to conduct meaningful voir dire was not limited at all. The prospective jurors' initial feelings and thoughts on the death penalty were expressed in the written questionnaires. Then, there was follow-up questioning in open court, with the opportunity for any prospective juror who wanted to speak in private to have it. The record before this Court does not show that a single prospective juror in fact was empanelled who "held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant" in appellant's shoes. (See AOD 90, citing *People v. Cash* (2002) 28 Cal.4th 703, 723.) Moreover, the same jury rejected the death penalty for Contreras and Navarro, and found death appropriate only for appellant, whose actions were qualitatively worse, despite the fact that all were tried together for the same crimes by the same jury. Appellant cannot demonstrate prejudice on this record. This claim fails.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S GUILTY VERDICT ON COUNT XXI, FOR THE ROBBERY OF ARTURO FLORES

Appellant contends that insufficient evidence supported the conviction on count XXI for the robbery of Arturo Flores, because there was insufficient evidence any property was taken from him. As a result, he claims a violation of his rights to due process, a fair jury trial, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under article I, sections One, Seven, 15, and 17 of the California Constitution. (AOB 99-101.) Respondent disagrees.

When a convicted defendant seeks relief based on insufficient evidence, the reviewing court reviews the evidence in the light most

favorable to the prosecution, and determines whether any rational trier of fact could have found substantial evidence of the essential elements of the crime. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781; 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The appellate court presumes in support of the judgment every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) An appellate court may not reverse a conviction on the ground of insufficient evidence unless it clearly appears, based on the whole record, "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

Appellate courts do not reweigh the evidence and will not reverse a judgment even if a different verdict could reasonably have been reached. (*People v. Proctor* (1992) 4 Cal.4th 499, 529.) The same standards apply where the jury's findings are based largely on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) That is, "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 504, quoting *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

Robbery is defined as the taking of personal property from another's possession, against that person's will, from the person or the person's immediate presence, by means of force or fear, with the specific intent to permanently deprive the person of the property. (*People v. Clark* (2011) 52 Cal.4th 856, 943; *People v. Lewis* (2008) 43 Cal.4th 415, 464; see also § 211.) The value of property stolen is not an element that must be proven. (*People v. Clark, supra*, 52 Cal.4th at p. 943; *People v. Tafoya, supra,* 42 Cal.4th at p. 170.)

Here, appellant was convicted at trial on count XXI for the second degree robbery of Arturo Flores during the crimes committed at the Mercado Buenos Aires. Arturo Flores was unavailable as a witness at trial, because he had moved to El Paso, Texas, then Mexico. He thus did not testify at trial, and because the People failed to show adequate due diligence in obtaining his appearance as a witness, the trial court would not permit Flores's preliminary hearing testimony to be read into the record. (19RT 3137-3141.) Arturo Flores's preliminary hearing testimony established, for purposes of the preliminary hearing, that one of the robbers took Flores's wallet from him by force. (See 5CT 1211.)

Appellant's claim fails, however, because Manuel Rodriguez's trial testimony inferentially provided substantial circumstantial evidence of the robbery of Arturo Flores of his personal property. Manuel Rodriguez testified that, once forced into the kitchen, the robbers made Manuel get on his knees "with Arturo [Flores] and the other employee." (12RT 1802.) According to Manuel, during the "incident," they did not "remove" his wallet, but "they took other people's wallets." (12RT 1810.) When asked if he had seen any property being taken from any of his employees or customers, Manuel said, "Wallets and watches." Manuel saw the robbers take the wallet and watch from Dario De Luro in the bathroom. (12RT 1811.) He thought that "for the others," the robbers "did it before." (12RT 1811.) Manuel understood that the men had taken wallets and watches from his employees, but only saw them do that to Dario De Luro – he thought the robbers had done that "before" to the others. (12RT 1811.) Substantial evidence thus supported the conviction on count XXI for the robbery of Arturo Flores.

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S GUILTY VERDICT ON COUNT V FOR THE ATTEMPTED MURDER OF LUIS ENRIQUE MEDINA

Appellant contends that insufficient evidence supported the jury's guilty verdict on count V for the attempted murder of Luis Enrique Medina, because there was insufficient evidence that appellant had the specific intent to kill Medina. He also contends that the trial court erroneously denied appellant's motion to strike evidence as to that count. He claims that as a result, he suffered violations of his rights to due process, a fair trial, and reliable guilt and penalty determinations under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under article One, sections One, Seven, 12, 15, 16, 17, and 31. (AOB 102-113.) Respondent disagrees.

As noted above, when faced with an appellate claim of insufficient evidence, the reviewing court reviews the evidence in the light most favorable to the prosecution, determines whether any rational trier of fact could have found substantial evidence of the essential elements of the crime (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319) and presumes in support of the judgment every fact the jury could reasonably deduce from the evidence (*People v. Kraft, supra,* 23 Cal.4th at p. 1053). Reversal for insufficient evidence may occur only if it clearly appears, based on the whole record, "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Cuevas, supra,* 12 Cal.4th at p. 261.) Appellate courts do not reweigh the evidence and reversal is not warranted merely because a different verdict could reasonably have been reached. (*People v. Proctor, supra,* 4 Cal.4th at p. 529.)

The same standards apply where the jury's findings are based largely on circumstantial evidence. (*People v. Lenart, supra,* 32 Cal.4th at p. 1125.) That is, "'Circumstantial evidence may be sufficient to connect a

defendant with the crime and to prove his guilt beyond a reasonable doubt.'" (*People v. Abilez, supra,* 41 Cal.4th at p. 504, quoting *People v. Stanley, supra,* 10 Cal.4th at pp. 792–793.)

The crime of attempted murder requires specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Intent to unlawfully kill and express malice are, in essence, "'one and the same.'" (*Ibid.*, quoting *People v. Sailler* (1991) 54 Cal.3d 1103, 1114.) Express malice requires a showing that the assailant either wanted to kill, or knew "to a substantial certainty" that death would occur. (*People v. Smith, supra*, 37 Cal.4th at p. 739.) Evidence of intent is usually circumstantial and must be inferred from the facts and circumstances surrounding the crime. (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) Thus, evidence of intent to kill is usually inferred from a defendant's acts and the circumstances of the crime; there is rarely direct evidence of a defendant's intent. (*People v. Smith, supra*, 37 Cal.4th at p. 741; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 557; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207–1208.) Although not required to establish intent to kill, evidence of motive may be probative of such intent. (*People v. Smith, supra*, 37 Cal.4th at p. 740-741.)

Here, substantial evidence of appellant's express malice, or intent to kill Enrique Luis Medina, as well as evidence of the commission of a direct but ineffectual act toward accomplishing the killing, supported the jury's verdict on count V. Medina testified at trial as follows. Medina was approximately eight feet from appellant when appellant shot and killed Officer Hoglund. Appellant was also around eight feet from Officer Hoglund when he shot the officer multiple times. (10RT 1542-1543.) Appellant then pointed his gun at Medina, who had just seen appellant murder Officer Hoglund while appellant and his crime partners affected their escape, putting the "gun in [Medina's] face," who was still sitting in

his car. (10RT 1494-1496; 11RT 1592, 1601, 1609, 1617-1618, 1639, 1645-1646.) Medina thought appellant aimed at him as if he wanted to kill him, but the firearm was out of bullets, as evidenced by its open slide. (10RT 1545-1546.) According to Medina, appellant pointed his gun at Medina and tried to fire it by pulling the trigger, but there were no bullets left in the firearm. (11RT 1612-1614.) Medina recalled testifying at the preliminary hearing that appellant "kept pulling," but the "gun didn't have any more bullets in it." (11RT 1602-1603.) Medina thought appellant was trying to replace a new clip in his firearm, but stopped because his friends called to him to flee. (11RT 1614-1615.)

Detective Perales testified that Medina said in a taped interview that appellant tried to shoot Medina but could not as he was out of bullets (the slide was back on the handgun). (11RT 1687-1688.) According to a transcript of the taped interview, Medina said that the gunman pointed the firearm at his face, causing Medina to duck. The firearm was a black nine-millimeter handgun that looked brand new. Medina said that he knew the firearm was empty because it was "open." (11RT 1746-1747.)

The foregoing evidence was sufficient to support the inference that appellant believed his firearm still contained at least one bullet, that he pointed the firearm at Medina and tried to shoot, and that the only reason it did not fire was that – unknown to appellant until he tried to pull the trigger – it was out of bullets. Here, appellant, in the middle of his escape from George's Market after committing a multitude of crimes inside, appellant encountered Officer Hoglund outside of the market, then shot and killed him mere feet from Medina, who instantly became a witness against appellant and his crime partners for a capital offense. Appellant then pointed his gun at Medina and tried to fire the gun by pulling the trigger, but because there were no bullets, the gun did not fire. Medina acknowledged during his trial testimony that he testified at the preliminary

hearing that appellant kept "pulling," but the gun did not fire because it was out of bullets. (11RT 1602-1603.)

The foregoing constituted substantial evidence that appellant attempted to murder Medina on count V. As noted above, attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith*, *supra*, 37 Cal.4th at p. 739.) That the gun did not fire does not preclude a conviction for attempted murder. (See *People v. Buskirk* (1952) 113 Cal.App.2d 789, 793 [attempted murder conviction where gun failed to fire due to defective mechanism].) There is no evidence here that appellant knew his gun, the one he had just used during the George's Market crimes and to murder Officer Hoglund, was out of bullets when he pulled the trigger while pointing the gun at Medina's face at close range. He would not have kept "pulling" the trigger otherwise. The jury was entitled to find that appellant, in the heat of the moment, simply did not realize when he first aimed at Medina that his firearm was empty. Appellant had strong motive to kill Medina, who was a witness to appellant's murder of a police officer while attempting to escape from the George's Market robbery, rather than simply trying to scare him by pointing an unloaded gun at him. The circumstances of appellant's attempt to shoot and kill Medina, especially his actions in pointing a gun directly at Medina at close range and pulling the trigger, constituted sufficient evidence of attempted murder. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

Appellant nevertheless argues that he knew the firearm was empty of bullets, and thus, that it would not fire. (AOB 107-107-110.) As set forth above, there was sufficient evidence upon which the jury could conclude appellant did attempt to murder Medina, despite appellant's protestations to the contrary (see AOB 109 ["This is not a factual impossibility case, ..."]), his argument essentially runs into the wall of

factual impossibility precedent, which clearly holds that factual impossibility is not a defense to attempt crimes. (*People v. Pham* (2011) 192 Cal.App.4th 552, 555, 560; *People v. Richardson* (2007) 151 Cal.App.4th 790, 805; *Hatch v. Superior* Court (2000) 80 Cal.App.4th 170, 185-186.) Thus, it does not matter that appellant's firearm was in fact out of bullets. The jury was reasonably entitled, on the above facts, to conclude that appellant believed there was at least one bullet remaining in his firearm and he tried to kill Medina by shooting him. Appellant's counsel essentially conceded before the jury that it could reach such a reasonable conclusion. (22RT 3847-3848.) The jury was entitled to reasonably conclude that, if appellant knew the gun was out of bullets, appellant would have joined his crime partners immediately after killing Officer Hoglund, or immediately tried to reload it, rather than bothering with the ineffective acts of pointing an unloaded gun at Medina and pulling the trigger.

Appellant devotes most of his instant claim to arguing that the conviction on count V had to be based on Medina's testimony that appellant tried to reload the gun, and that the court improperly permitted that testimony to stand because any such testimony was speculative. (AOB 105-113.) Generally speaking, inferences offered against claims of insufficient evidence may not be based on speculation (*People v. Watkins, supra,* 55 Cal.4th at pp. 1023-1024) and the abuse of discretion standard applies to any trial court ruling on the admissibility of evidence (*People v. Hoyos* (2007) 41 Cal.4th 872, 898).

However, the trial court did not abuse its discretion here. Medina testified at one point on direct examination that he could discern that appellant's firearm was out of bullets because the slide was back, but that Medina "believe[d] [appellant] wanted to put another clip inside." The court granted appellant's counsel's motion to strike as speculation. (10RT 1546-1547; see also 11RT 1601-1602.) Then, after his recollection

was refreshed with his preliminary hearing testimony, and Medina testified that appellant had his finger on the trigger and he was trying to "press the trigger," Medina testified that he "really could not know all of the things [appellant] did with his hands" and that it was "impossible to relate all the details." (11RT 1602-1603, 1613-1614.)[67] Medina was paying attention to whether appellant had his finger on the trigger of his gun. (11RT 1616.) In response to the question, "Is it true that you don't know that he was pulling the trigger or not pulling the trigger?" Medina testified,

> Yes, he was trying to shoot, but there were no bullets in the gun. So he tried to change the clip. Well, it seems logical if somebody is pressing the trigger and there [are] no bullets inside the gun, then one tries to load the gun again.

(11RT 1614.)

Appellant's counsel moved to strike that testimony as speculative. The court overruled that motion. (11RT 1614.) In response to the question of whether Medina saw appellant "drop the clip out of the gun and put a new clip in," Medina testified, "No, I didn't say that he changed it. I said that he wanted to do so. But then he took off running because they were calling him, telling him to get out of that place." (11RT 1614.) Appellant's counsel then asked, "Reading his mind, you knew that he was going to change that clip and put [in] a new clip; is that right?" Critically, Medina testified that appellant "made a gesture as to remove the clip that was there." (11RT 1614-1615.) Appellant was trying to remove the clip, but stopped to run away and escape after murdering Officer Hoglund.

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[67] Medina initially testified that he was "unable to notice whether he pressed the trigger," but believed he had done so. The court granted Appellant's counsel's motion to strike that testimony. (11RT 1601.)

(11RT 1614-1615.) Appellant's counsel's motion to strike was again denied. (11RT 1615-1616.)

Outside of the jury's presence, the trial court explained the basis of its ruling denying appellant's counsel's motion to strike. The court did so first because it determined that "we have a language problem," and the examination was not as "precise as we could ever get it with English." Second,

> [H]e did say that he – he did say specifically he tried to change the clip, and, secondly, he referred to a gesture. He did make reference yesterday to changing the clip. I don't recall how it was, but there was a reference. Nobody ever asked him what the gesture was, but nevertheless, I think it goes beyond mere speculation.

(11RT 1621.) The court did not "think it's clear," and felt it was something for the jury to figure out, not [for] me." (11RT 1621-1622.)

The trial court did not abuse its discretion in denying the motions to strike. Medina clearly testified that appellant made a gesture to remove and was trying to remove the empty clip but that he aborted the effort and ran away. He was cross-examined on this point by appellant's counsel, an extremely able and dedicated attorney. The trial court reasonably left it to the jury to determine whether to credit Medina's testimony that appellant was trying or tried to change the clip, and changed his mind and fled.

Moreover, the fact appellant tried to reload, then aborted the effort, is not necessary to, but further supports, respondent's argument that substantial evidence supported the conviction on count V. Appellant pointed the firearm he had just used in the George's Market crimes and that he had just used to kill Officer Hoglund at the only eyewitness to the murder of a police officer while escaping from armed robbery, tried to pull the trigger, and may have tried to reload the firearm before fleeing with his crime partners. The jury could reasonably find that appellant, in the stress

and excitement of the moment, did not initially realize his firearm was empty of bullets, and that he tried to shoot Medina. The fact appellant may have tried briefly to reload before fleeing supports that position, but is not necessary to sustain the conviction. (Evid. Code, § 353, subd. (b); *Chapman v. California* (1967) 386 U.S. 18, 26 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson, supra*, 46 Cal.2d at p. 836) This claim fails.

V. THE TRIAL COURT PROPERLY ADMITTED ROSA SANTANA'S PRELIMINARY HEARING TESTIMONY AT TRIAL

Appellant contends that the trial court improperly admitted the preliminary hearing testimony of Rosa Santana as to appellant's murder of Officer Hoglund, while implicating appellant in an uncharged robbery (see argument VI), and regarding appellant's admissions that he had shot eight or nine people in his country (see argument XV). Specifically, he claims the trial court erroneously found Santana to be unavailable because the People made an inadequate showing of due diligence in securing her appearance. As a result, he claims violations of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under article one, sections 15, 16, and 17 of the California Constitution. (AOB 113-131.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

Santana testified at the preliminary hearing during March 1993, while in custody in a juvenile matter and under a material witness bond. (2CT 350-351, 362; 19RT 3141.) Jury selection in the instant trial began on September 16, 1994. (5RT 516.) While trial was proceeding in October 1994, in discussing the next day's witnesses, the prosecutor told the court that they had not yet found Santana but were continuing to look for her. He noted that they were holding her "check." (15RT 1562.)

Appellant's counsel asserted that the prosecution had urged the juvenile court judge to release Santana from custody following the preliminary hearing, knowing she was a flight risk. (18RT 3107-3108.) Appellant's counsel also argued he was limited in his cross-examination of Santana by the preliminary hearing court because the operative standard there was only probable cause and there was no federal constitutional right to cross-examination or confrontation at a preliminary hearing. The trial court disagreed, found that the questions in issue during the preliminary hearing were irrelevant (as to which objections were apparently overruled), and that appellant was not deprived of his right to cross-examination at the preliminary hearing. (19RT 3133-3135.)

On October 13, 1994, the prosecutor noted that Detective Perales had served Santana with a "valid" subpoena during August of 1994, and that Santana had not appeared at trial as required. The court agreed that it had issued a warrant, or a "body attachment," for Santana due to her failure to appear. (19RT 3141.)

1. Assertions by the Prosecutors

On October 13, 1994, the prosecutor explained the following. Santana was in custody in Pomona on a juvenile matter during April 1993, at the time of the preliminary hearing, where she testified for the People. According to the prosecutor, she "has always been very cooperative in terms of testifying . . . and providing information," at least with respect to the prosecution. Santana was most recently in custody in 1994, and once the petition against her that caused her custody was sustained, she was released to her parents' custody during August 1994, "pending a pickup by the Community Detention Program." (19RT 3141-3142.) The prosecutor explained,

> We were in touch with the deputy D.A. handling her matter and he asked us what do you want to do with her. We, knowing that she had been cooperative with us and knowing that she now had an address that was different from the address that she had been running away from, that of her parents, we indicated that we don't have a problem with her release as long as there is electronic surveillance with her.
>
> Between the time she testified at the preliminary hearing and the time she was served with the subpoena, she had a baby. We believed this to lend her some stability. She also is collecting checks from, I believe, D.P.S.S., and we agreed to the release on the Community Detention Program, but there were no promises whatsoever made to Miss Santana in exchange for cooperation or anything like that.
>
> It turns out, as I see from the minute order from the juvenile court which sustained her petition, that she was released to her parents. Well, this is the place that she had been running away from. She was released to them pending the installation of the electronic surveillance device. The very night she was released to her parents, she left. We have not been able to find her since.
>
> The court in Pomona in which she was appearing on her case, also issued a warrant for her arrest.
>
> Since that time we have had D.A. Investigator Will Abram make numerous contacts at the locations that Miss Santana was known to frequent, with persons that she was believed to reside with or nearby. We have contacts starting August 31, September 1, three different contacts, four different contacts, five different contacts, September 7, two different contacts, September 8, 9, 12, 13, 15, two different contacts on the 20th of September, the one on the 21st, two on the 21st.

(19RT 3143-3144.) The contacts were with the individuals whom "she was believed to have been living with or that she was believed to have moved to." (19RT 3144.)

The prosecutor informed the court that his trial co-counsel had visited Santana at a location in Pomona during May, and served her with a

subpoena for a lineup of another suspect in crimes related to this case, and Santana appeared on that subpoena. She "exhibit[ed] cooperativeness" with the prosecutors such that they did not expect "to have difficulties finding her." (19RT 3151-3152.) The prosecutor explained that the only problem in contacting Santana was that she kept running away from her parents, and since she was being placed elsewhere, the prosecution did not expect to run into the same problem. Moreover, they believed she was to have been placed under "home surveillance," and there would thus be no difficulty ensuring her attendance in court to testify.

The prosecutor cited *People v. Watson* (1989) 213 Cal.App.3d 446, which indicated that when a witness fails to appear on a valid subpoena, that is due diligence, "especially in light of any other efforts that are made to procure her attendance."[68] Here, two warrants were issued for Santana, who failed to appear on a validly issued subpoena. "And we have made efforts, as you can see, to attempt to bring her before this jury." (19RT 3152.) The problem was that Santana did not get along with her new stepmother, and that was why she was running away. (19RT 3156.)

The co-prosecutor provided further detail. She told the court that upon the arrest of a fourth defendant in March 1994, the People became concerned that they would need Santana to testify at the preliminary hearing related to that defendant and so asked Detective Perales to attempt to relocate Santana. They finally located her at 292 East Olive Street in Pomona, where she lived with her baby, another young woman, and an older woman named Amelia Contreras. Santana was cooperative and friendly and provided the name of her social worker, her home phone number and her address. They told her that she would be needed to testify

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[68] The prosecutor was correct. (*People v. Watson, supra*, 213 Cal.App.3d at pp. 451-455.)

at the preliminary hearing against the fourth defendant, and in September against appellant, Contreras, and Navarro. Santana indicated she did not want to testify, but that she understood she had to do so, and would tell the truth and would be available. They served her at that time with a subpoena to attend the live lineup set for May 16th as to the fourth defendant, and with a subpoena to appear in court on September 7th for the instant trial. She appeared at the live lineup, but said she had not turned herself in on the outstanding warrant from Pomona. They told her she had to clear that up immediately, and she agreed to do so the next court day. (19RT 3157-3159.)

They spoke to Santana again in July 1994, when she was living on Bandera Street in Montclair. They indicated that the preliminary hearing for the fourth defendant and the instant trial were coming up. Santana again said she had not turned herself in on the warrant. Detective Perales said that she had to do so or she would be picked up on the warrants immediately. Santana agreed to do so. During August, Detective Perales learned from Harold, the Pomona deputy district attorney, that Santana had turned herself in, pleaded to burglary, a disposition was reached, and the matter was continued to October 14, 1994, for the actual disposition. (19RT 3158-3160.)

2. The Sworn Testimony of Investigator Abram

The trial court asked to hear from Investigator Abram, who was sworn as a witness (19RT 3144) and, on October 13, 1994, testified as follows. Abram first began looking for Santana in June 1994, because the prosecutors were having difficulty finding her. Once they contacted her, Abram did not look for her again until August 31st. Abram was not aware of whether anyone else in the District Attorney's office was assigned to keep track of Santana. (19RT 3153-3154.) Abram learned from Santana's

father that she was a consistent runaway since she was around 14 years of age, and she was 16 years of age at the time of the trial. (19RT 3156.) On August 31st, around 8:00 p.m., Abram went to 5150 Bandera Street in Montclair, where Santana was said by The prosecutor and Deputy Perales to be residing in apartment 14. Abram showed an enlarged photograph of Santana to the apartment manager, who said he had never seen her there before. (19RT 3144-3145.)

On September 1, Abram contacted the Department of Public Social Services; a clerk said "Ms. Hoang" was handling Santana's case, and was on vacation until the following Tuesday. Abram called the clerk in the Pomona Juvenile Court, who said she had no new information on Santana, and provided Abram with Santana's attorney's name. Abram called the attorney's office, but the phone number was disconnected and a new number was not provided. That same day, Abram also contacted the "Community Detention Program," a program which Santana was "allegedly on." "Teresa" said she would research the matter and call Abram back. (19RT 3145-3146.)

On September 7th, Abram spoke with Hoang at the Department of Public Social Services, who provided him with a new address for Santana of 1328 South San Antonio Avenue, apartment "I," in Pomona. Abram went to that apartment and spoke to Naomi Rojas, who said Santana did not reside there anymore, but would retrieve her county welfare check there. Rojas said she was related to Santana, and that her brother had been thought to be the father of Santana's baby, but that shortly after the baby was born, they learned someone else was the father, which was why Santana no longer lived there. Rojas said that Santana had last been there on the 1st, to pick up her county welfare check, but that she had moved out two months earlier. Rojas said that her mother, who also lived there, told Santana she

would have to change her address with the county. Rojas did not know where Santana lived. (19RT 3146-3147.)

Armed with the baby's name and birth date, Abram called Hoang the following day, September 8th. He told her that Santana no longer lived at the San Antonio Street address, to hold her county check, then to call Abram when Santana called in with a new address. Abram also called Deputy District Attorney Harold, the Pomona Juvenile Court prosecutor, and left him a message that Santana was not on "his home detention program or electronic surveillance." (19RT 3147-3148.)

Abram spoke to Harold the next day, September 9th – Harold said that Santana had inadvertently been left off of electronic home surveillance. Abram also spoke to probation officer Steven Chavera, who was assigned to Santana's case. Chavera said that through some "paper mishap," Santana was placed on informal probation, which was why she was not on the home detention program. Abram called Harold back again – Harold said that a juvenile court warrant had issued for Santana, and Abram could come by and pick up a copy if he wanted. (19RT 3148.)

On Monday, September 12th, Abram went to the Pomona District Attorney's office and obtained a copy of the warrant and a certified copy of a minute order dated August 19, 1994. The next day, September 13th, Abram informed the prosecutor of the difficulties he was encountering, and the status. On September 15th, Hoang called Abram and said that Santana had called and given a new address of 625 South Palomares, apartment two, in Pomona. Abram asked that Hoang hold Santana's check until he checked out the address. (19RT 3148-3149.)

On September 20th, Abram spoke with Mario Santana, Rosa's father, who said he picked Santana up from the juvenile hall on August 19th, and she ran away the next day. Mario made a missing persons report with law enforcement and did not know where Santana was. That same day, Abram

went to the South Palomares address, where he was told by resident Lucy Espinosa (also the manager of the building) that Santana had, at one time, lived in apartment number one with Amelia Contreras and Naomi Rojas. Espinosa said that Santana had called and left a message for her on September 17th, but had only left her name. Abram left his business card with Espinosa, and said Santana was not in trouble, but that Abram was trying to help her and needed her to come to court to testify. Espinosa said she cared for Santana, who was easily misled, and that she would assist Abram in any way she could. (19RT 3149-3150.)

On September 21st, Abram contacted the local Sheriff's station and obtained a copy of the missing person report filed by Santana's father. On September 22nd, Abram contacted the co-prosecutor and informed her of the problems he was having locating Santana. On September 27th, Abram contacted Hoang at D.P.S.S. and asked her to hold Santana's check, because she was not living at the Palomares address. Hoang said the check had been sent out. On October 1st, Abram went to the Palomares address, took the check from Espinosa, and left a 24-hour phone number for Santana to call to reach him. On October 3, he told the co-prosecutor that he had the check. Santana never called him and Espinosa told him on October 12th, that she had neither seen nor heard from Santana. Deputy District Attorney Harold said they would notify Abram if Santana was picked up because her sentencing had been delayed so she could first testify in the instant trial. (19RT 3150-3151.)

3. Further Argument and the Court's Ruling

Appellant's counsel asked the court to exclude any statements by Harold as hearsay and demanded a "full formal hearing" as to Santana. The trial court found that Harold and the prosecutor were officers of the court. Absent information to the contrary, the court would accept the prosecutor's

statements. Appellant's counsel had no contrary information. The court indicated it would accept the "offer of proof." (19RT 3160-3161.)

Appellant's counsel then stated that at the 1993 preliminary hearing where Santana testified, it was noted on the record that the District Attorney's office would agree to Santana's release. Santana was successfully using false identities to avoid arrest while a runaway, and was picked up only because she committed a new crime (auto burglary). Even then, she used a false identity and claimed to be an adult. The prosecutors learned she was in custody, had her transferred from Pomona to Van Nuys, represented she was a flight risk, and asked that bail be set. Bail was set at $20,000, given Santana's history of running away and evading authorities. (19RT 3161-3167.) Defense counsel implied that the People knew Santana would flee based on her history, and their plan was to use the beneficial portions of her preliminary hearing testimony at trial. (19RT 3165-3168.)

The trial court found due diligence:

> I think there is due diligence. I understand your version of the facts, [appellant's counsel], but in terms of what the People did and the way it ended up, resulting in the contact made in August, the fact she showed up on the warrant to attend the lineup, her cooperativeness other than the apparent problems she had with her father – I am assuming it's not her mother that we are talking about but a stepmother?

(19RT 3170.) The prosecutor clarified that, "She said to us once she was on her own out of the home of her father and stepmother, that she was cooperative." (19RT 3170.) The court continued,

> I don't know what else they could have done other than your saying she should have been kept in custody from August. In light of the way it was presented, I don't think the D.A.'s decision to let her go was unreasonable.

(19RT 3170-3171.)[69]

B. The Trial Court Properly Exercised Its Discretion and Found Santana to be an Unavailable Witness

The federal and state constitutions guarantee criminal defendants the right to confront testifying prosecution witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) An exception to this right exists for unavailable witnesses who have testified against the same defendant in a previous court proceeding where the witness was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made "a good-faith effort" to obtain the presence of the witness at trial. (*People v. Cromer* (2001) 24 Cal.4th 889, 892; see also *Crawford v. Washington* (2004) 541 U.S. 36, 53--54 [124 S.Ct. 1354; 158 L.Ed.2d 177].)

California Evidence Code section 1291, subdivision (a), permits the admission of former testimony if the unavailable witness testified against the defendant at a prior hearing where the defendant had the ability to cross-examine the witness with an interest and motive similar to that at the subsequent hearing. (See also, e.g., *People v. Williams* (2008) 43 Cal.4th 584, 626-627.) Where a defendant had the opportunity to cross-examine a witness during prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement. *California v. Green* (1970) 399 U.S. 149, 167–168 [26 L.Ed.2d 489, 90 S.Ct. 1930].)

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[69] The court further noted that any question about whether there was some deal for Santana to testify for the People was a separate issue. (19RT 3170-3171.)

The federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. (*United States v. Owens* (1988) 484 U.S. 554, 559 [98 L.Ed.2d 951, 108 S.Ct. 838].) Preliminary hearing testimony generally may be admissible under these rules. (*People v. Thomas* (2011) 51 Cal.4th 449, 499; *People v. Herrera* (2010) 49 Cal.4th 613, 621.)

A witness is unavailable if she is absent from the subsequent hearing, and the party seeking to present her prior testimony has unsuccessfully exercised reasonable diligence to secure her presence through judicial process. (Evid. Code, § 240, subd. (a)(5).) "Reasonableness" under the circumstances is the key determinant of the prosecution's duty with respect to due diligence, and the question is whether the witness is unavailable despite reasonable or good-faith efforts made prior to trial to locate and present the witness. (*People v. Herrera, supra,* 49 Cal.4th at pp. 622-623; *People v. Bunyard* (2009) 45 Cal.4th 836, 849; *People v. Cromer, supra,* 24 Cal.4th at p. 897.)

Due diligence is not capable of a "mechanical definition," but it connotes "persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Cogswell* (2010) 48 Cal.4th 467, 477; *People v. Cromer, supra,* 24 Cal.4th at p. 904; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 675.) Relevant considerations include the timeliness of the People's search, the importance of the witness's testimony, and whether leads were competently explored. (*People v. Wilson* (2005) 36 Cal.4th 309, 341; *People v. Fuiava, supra,* 53 Cal.4th at p. 675; *People v. Cromer, supra,* 24 Cal.4th at p. 904.) As this Court has noted, "'In this regard, California law and federal constitutional requirements are the same.'" (*People v. Herrera, supra,* 49 Cal.4th at p. 622, quoting *People v. Valencia* (2008) 43 Cal.4th 268, 291–292.) What constitutes due diligence depends on the facts of the particular case and

considers the totality of the proponent's efforts. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

There is no requirement that a prosecutor "keep periodic tabs on every material witness in a criminal case." (*People v. Friend* (2009) 47 Cal.4th 1, 68.) However, another factor relevant to the due diligence inquiry is whether the prosecution sought to detain the witness prior to trial under section 1332. (*People v. Hovey* (1988) 44 Cal.3d 543, 564.) The unjustified deprivation of a material witness's liberty is a violation of the due process clauses of the federal and state Constitutions. (*People v. Bunyard, supra,* 45 Cal.4th at pp. 849-851.) As this Court noted in *People v. Cogswell, supra,* 48 Cal.4th at pp. 477-478, confinement of a witness who has not committed a crime for even a few days "for the sole purpose of ensuring the witness's appearance at a trial, is a measure so drastic that it should be used sparingly." The length of detention is relevant to whether the failure to incarcerate the witness until trial demonstrates a lack of due diligence. (See, e.g., *People v. Hovey, supra,* 44 Cal.3d at p. 564 [prosecution's failure to invoke material witness provisions did not demonstrate lack of due diligence where the witness would had to have been detained over two years from the time of the preliminary hearing until trial and his testimony was largely cumulative of another witness's].)

In reviewing trial court rulings regarding due diligence and unavailable witnesses, appellate courts first determine the historical facts applying a deferential substantial evidence standard of review. (*People v. Cromer, supra,* 24 Cal.4th at pp. 894, 900.) The reviewing court then applies "an objective, constitutionally based legal test to the historical facts." That is, the reviewing court exercises independent review, giving deference to the lower court's fact finding. (*Id.* at p. 900.) Where the facts are undisputed, the reviewing court applies independent review to the question of unavailability. (*People v. Fuiava, supra,* 53 Cal.4th at p. 675.)

In the instant case, the trial court properly and reasonably concluded that the People had exercised due diligence with respect to obtaining Rosa Santana's presence at trial. The evidence before the court showed, first, that Santana was served with a subpoena to appear at trial:

> The prosecution served Salinas with a state court subpoena under circumstances where it had every reason to believe he would be available to testify. The prosecution made additional efforts to secure Salinas's attendance. This is sufficient to meet the reasonable diligence test.

(People v. Watson, supra, 213 Cal.App.3d at pp. 454-455.) Here, the prosecution outlined detailed efforts that they had made to locate Santana for trial. They had served her with two subpoenas, one of which she honored with respect to a lineup for a fourth person involved in the crimes, but she did not appear at trial on the other subpoena. The evidence before the trial court showed she was not hiding from the prosecution to avoid testifying in this case – she testified cooperatively at appellant's, Contreras's, and Navarro's preliminary hearing while in custody, then obeyed the subpoena to appear at the live lineup with respect to the fourth defendant. Through the sworn testimony of District Attorney Investigator Will Abram, as well as the other information presented to the trial court, the People's numerous efforts to locate Santana were disclosed. Under the totality of the circumstances presented above, therefore, the trial court properly found that the People had exercised due diligence.

C. Harmless Error

Even if the trial court abused its discretion and improperly admitted Santana's prior testimony, any error was harmless beyond a reasonable doubt. (*People v. Geier* (2007) 41 Cal.4th 555, 608; *People v. Ledesma* (2006) 39 Cal.4th 641, 709; *Chapman v. California, supra,* 386 U.S. at p. 24.) Alternatively, any state law error was harmless because it was not

reasonably probable appellant would have received a more favorable result absent any error. (Evid. Code, § 353, subd. (b); *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Here, the prosecution's case in the guilt phase as to appellant was overwhelming. As appellant's counsel conceded, "on the majority of the counts, the evidence as far as identification is going to be strong." (9RT 1233.)

As to the George's Market crimes, in trial testimony, Tom Park identified Contreras as the first gunman who asked Ms. Park for a money order (9RT 1301) and the second gunman as appellant (9RT 1301-1302), and testified that each jumped over the counter (9RT 1380). Tom Park identified Navarro as the third robber standing near the front entrance, wearing a black shirt with polka dots, and looking outside. (9RT 1304, 1349.) Medina provided testimony identifying appellant, Contreras, and Navarro as fleeing from George's Market just before the shooting of Officer Hoglund. (10RT 1557.) Medina testified that appellant was the gunman who shot Officer Hoglund. (10RT 1544-1545.)[70]

Tom Park provided to the police a videotape of the robbery events inside of George's Market that depicted appellant, Contreras, and Navarro. (Peo. Exh. 1-5; 9RT 1308-1309, 1311-1313, 1315-1320, 1334.) Tom Park identified still images of appellant, Contreras, and Navarro as having been among the robbers. (Peo. Exh. 16-18; 9RT 1334-1338.) Tom later

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[70] Medina identified appellant as the gunman in court at trial, stating he was not "sure" because the shooting happened two years earlier, but he thought appellant was the gunman. (10RT 1544.) However, when his testimony resumed the next day, Medina testified that he was certain that appellant was the gunman. He was uncertain the day before because appellant looked a little different during trial than he had previously looked, but after thinking about it, Medina was certain. Medina was confident that neither Contreras nor Navarro were the gunman. (10RT 1587-1588.)

attended a lineup at the County Jail, where he identified appellant, codefendant Contreras, and codefendant Navarro as having been among the robbers. (Peo. Exhs. 20-23; 9RT 1338-1343.) Tom was "very sure" of his identifications of appellant, Contreras, and Navarro. (9RT 1343.)

George's Market victim Ms. Park also identified photographs of appellant and codefendant Contreras (Peo. Exhs. 16-17; 9RT 1387-1389), and identified appellant and codefendant Contreras in a physical lineup at the county jail. (Peo. Exhs. 30-31; 9RT 1389-1392.) Ms. Park was 100 percent certain of the identifications she made of appellant and Contreras. (9RT 1398.)

Detective Perales further testified that she played the George's Market videotape for Medina, who identified the person inside of the market during the robbery whom Medina saw shoot Officer Hoglund. (11RT 1691-1696.) Medina identified, when speaking with Detective Perales, the person depicted in the photos of the robbery wearing a striped shirt as the gunman. (11RT 1744-1745.) That person was appellant. (10RT 1550-1551.) Medina also testified at trial that he identified appellant as the gunman who shot Officer Hoglund. (10RT 1550-1551.)[71]

George's Market victim Elvira Acosta identified appellant in court as the smallest of the robbers and the man who pushed Ms. Park during the crimes. (9RT 1407.) Acosta identified Navarro as the man outside of

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[71] Medina identified a different person as the gunman during the preliminary hearing, but that was because he was afraid for himself and his family, nervous, and confused, all of which caused him to be "mixed up." No one told him to do anything other than tell the truth. (10RT 1561-1565; (11RT 1697-1699, 1747-1748, 1769-1770, 1774-1775.) Medina then retook the witness stand and made his in-court identification. (12RT 1770.)

George's Market wearing the polka-dotted shirt (9RT 1408; 10RT 1427),[72] and Contreras as the man by the cash registers near the front entrance. (9RT 1408.) Acosta attended live lineups at the County Jail where she found that the only difference between codefendant Contreras's appearance at the jail and during the robbery was that he had long hair during the robbery. (10RT 1421-1424.) During the lineup, Acosta identified appellant as one of the robbers (10RT 1424-1425) as well as codefendant Navarro (10RT 1425, 1427).

The evidence that appellant was involved in the other crimes was also overwhelming. Appellant was identified as to the Outrigger Lounge crimes by Anne Pickard (Peo. Exhs. 188-189; 12RT 1910-1915; see 12RT 1906-1909), Praneet Gallegos[73] (16RT 2608-2613), and Barbara Salazar (13RT 1978, 1980, 1983). Although Outrigger victim Margaret Lively did not identify appellant, she testified that she recognized a piece of her jewelry that was recovered, a bracelet (13RT 2084), and she identified a bracelet in court at trial as "similar" to her stolen bracelet (Peo. Exh. 136B; 13RT 2088, 2091).[74]

As to the El Siete Mares crimes, security guard Aguilar identified appellant as having been among the robbers (16RT 2654, 2662, 2581-2582), as did Guizar (16RT 2629-2630, 2643-2644), and four witnesses

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[72] Acosta identified People's Exhibit 50 as the polka dotted shirt (white with dots) worn by codefendant Navarro. (10RT 1428-1429.)

[73] Gallegos did not know how to answer the question of whether she was certain appellant was one of the robbers, but she thought he was. (16RT 2614.) She also testified that as she looked at appellant in the courtroom, Gallegos was "not sure" appellant was one of the robbers. (16RT 2617.)

[74] That bracelet was among pieces of jewelry that were recovered in a sock from appellant when he was arrested. (Peo. Exh. 136; 13RT 2180-2181.)

testified that the robbers all spoke with Central American accents. (15RT 2502 [Nelson Hernandez], 2580 [Rene Aguilar]; 16RT 2624 [Lupe Guizar], 2670 [Magdelena Urrieta].)

As to the Mercado Buenos Aires crimes, appellant was identified by Manuel Rodriguez (Peo. Exhs. 79, 84; 217-219; 12RT 1812-1815, 1820-1824, 1858), and Paul Rodriguez (Peo. Exhs. 222, 223, 224, 225; 12RT 1870-1881, 1892). People's Exhibit 136A looked like the chain the robbers took from Paul Rodriguez. (12RT 1825-1827, 1869.) That item was among pieces of jewelry that were recovered in a sock from appellant when he was arrested. (Peo. Exh. 136; 13RT 2180-2181.)

As to the Woodley Market crimes, Cuatle-Cisneros (16RT 2711-2712, 2735-2736, 2743), Eduardo Rivera [75] (19RT 3301-3305, 3354), and Guillermo Galvez (17RT 2788-2790, 2813, 2819; but see 17RT 2785, 2787-2788) identified appellant. As to the Ofelia's Restaurant crimes, at least one of appellant's black slip-on shoes was left behind at Ofelia's. (Peo. Exh. 268; 15RT 2375, 2377), and Ofelia (15RT 2376, 2397) and Leticia (15RT 2377-2382) identified appellant.

As to the Casa Gamino crimes, Armando Lopez testified he was certain ("quite sure" [14RT 2278-2279]) that appellant was the first robber to approach him (14RT 2265), and the person who used the stun gun on him (14RT 2256). Marcella M testified that the man who used the stun gun on her was the same man who had used it on Armando Lopez (14RT 2296), but could not say whether appellant was one of the robbers because she did not "remember all the people very well" (14RT 2295-2296). Arturo Lopez (14RT 2301-2302, 2304-2305, 2307, 2309, 2320-2323), Lucia Lopez (14RT 2339-2343), and Javier Lopez (15RT 2406-2409, 2411, 2413-2416, 2421, 2429) identified appellant as one of the robbers.

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[75] Rivera did not testify at trial, as noted above.

Further, appellant's car generally met the description of one of the getaway cars used in the George's Market crimes. (13RT 2177; see also 13RT 2178-2179; see 10RT 1437; see also (20RT 3497-3499 [Santana told police that appellant's red car was used in the George's Market crimes].) As noted above, when he was arrested, appellant was in possession of some jewelry stolen during the robberies. (Peo. Exh. 136; 13RT 2180-2181.) Appellant used a false name to identify himself to the police. (11RT 1725-1726; 12RT 1779 [by stipulation].) And, appellant was arrested in the recent past for involvement in the Rod's Coffee Shop incident, which was similar to the instant crimes and involved the use of a stun gun (18RT 3013-3052; 21RT 3663-3664), like the Casa Gamino crimes here, and generally, like the other crimes here in that each involved takeover robberies by a group of organized, well-armed men.

Even assuming error, the properly-admitted evidence of appellant's guilt was overwhelming, and any improperly admitted evidence in this regard was largely cumulative. As this Court has noted,

> In determining whether improperly admitted evidence so prejudiced a defendant that reversal of the judgment of conviction is required, we have observed that "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless."

(*People v. Burney* (2009) 47 Cal.4th 203, 232, quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) Santana's testimony was largely cumulative of the testimony of other witnesses implicating appellant with respect to the guilt phase. And even without her testimony, the evidence against appellant was essentially indefensible. Any error in admitting her testimony was thus harmless.

VI. THE TRIAL COURT PROPERLY ADMITTED ROSA SANTANA'S TAPED STATEMENT

Appellant contends that, even if Rosa Santana was properly found to be an unavailable witness, the trial court erroneously admitted Santana's taped statement that codefendant Navarro told her appellant had received $14,000 from a prior robbery, and purchased a car with that money. He also claims that the trial court erroneously permitted into evidence a statement by Navarro that appellant had "shot a cop." Appellant argues that admission of these statements violated the principles set forth in *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] and *People v. Aranda* (1965) 63 Cal.2d 518, and that the admission of the statements and restriction on cross-examination violated his rights under the Sixth Amendment to the United States Constitution, article 1, section 15 of the California Constitution. Appellant also claims that the preliminary hearing court improperly restricted appellant's cross-examination of Santana regarding the pending accusations against her, and that since her preliminary hearing testimony carried over to trial, the errors did as well. (AOB 132-137.) Respondent disagrees.

A. The Trial Court Properly Admitted Santana's Prior Recorded Statement at Trial

Following Navarro's arrest, Santana gave a recorded statement to police. (Peo. Exh. 47; 20RT 3535.)

1. Relevant Portions of Santana's Recorded Statement to Police on May 31, 1992

In pertinent part, Santana said the following in the recorded statement. Santana told the police that appellant (El Morro) shot Officer Hoglund. She knew this because appellant himself told her, and that he said he did it because "the police officer got in his way." Navarro also told her that

appellant shot the officer. (2 6CT 214.) Santana told the police that appellant and Navarro stole around $14,000 in another store robbery they committed around three or four months earlier, and they each bought a car using the stolen money. (2 6CT 219-220.) Santana's source for the information about how appellant and Navarro purchased their cars was not stated in the record. Appellant asserts, citing to "Vol.2, 6SCT: 219-220," that Santana "learned" from Navarro "that appellant bought his car three to four months earlier with money from another robbery." (See AOB 132-133.) However, respondent cannot find any attribution to Navarro for this information.[76]

2. Relevant Portions of the Preliminary Hearing Transcript

During examination of Santana during the preliminary hearing, the prosecutor indicated he wanted to play the tape recording of Santana's statement to police. Appellant's counsel objected on the basis that Santana was neither uncooperative nor failing to remember. (2CT 423.) The preliminary hearing court agreed that the tape could be played subject to a motion to strike if proper foundation was not established. (2CT 425.) After further questioning of Santana, the court found that "there was previously prior inconsistent statements as to whether or not [Navarro] shot or not." After hearing the tape recording, the court stated it was admissible as a prior consistent statement and a prior inconsistent statement, and to refresh the witness's recollection. (2CT 426.)

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[76] Santana's source for this information was not stated in the record, and appellant does not provide a source in the opening brief, but asserts, citing to "Vol.2, 6SCT: 219-220," that Santana "learned" from Navarro "that appellant bought his car three to four months earlier with money from another robbery." (See AOB 132-133.) In fact, it is not stated in the record that Navarro told Santana appellant committed an earlier robbery – it is not clear how she learned that.

Appellant's counsel then moved to strike the entire tape recording as hearsay. "We would raise all *Aranda* pertinent objections." Appellant's counsel also argued there was a lack of foundation for some of Santana's statements on the tape. The preliminary hearing court ruled that each defendants' statements would be limited to him only. (2CT 427-428.)

3. Relevant Portions of the Trial Transcript

The parties and the trial court went over objections to portions of Santana's preliminary hearing testimony, concerning what would be read to the jury. (19RT 3171.)[77] The trial court expressly ruled that a statement by Navarro made outside of appellant's presence stating appellant said he had shot a police officer was not admissible. (19RT 3187.) The court also ruled that any admission by Navarro of committing other robberies was admissible only to Navarro. (19RT 3189-3190.) The court excluded any statement by Navarro to Santana while driving in a car outside of appellant's presence. However, the court found that the comment about appellant killing eight or nine people was not necessarily made in the car by Navarro. (19RT 3229-3230.) Rather, the court found that Santana's statement on the recorded interview tape that appellant had killed eight or nine persons was based on a statement by appellant, not a third person. (19RT 3225-3226.)

The prosecutor stated he wanted to play the tape recording of Santana's interview. He noted that the prior version of the transcript did contain some inaccuracies, but the parties would stipulate to the accuracy of the then-current recording. (19RT 3193.) The court asked whether the tape

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[77] Santana's preliminary hearing testimony is set forth in volume two of the clerk's transcript, starting at page 349. Pages referenced by the trial court and counsel in discussing the preliminary hearing testimony appear to begin at that page.

contained comments it had stricken from the preliminary hearing testimony, such as the reference to Navarro saying that appellant shot the police officer. The prosecutor said he did not believe so. The court asked, "Are you inferring . . . there is nothing in that tape that contravenes the rulings I have made?" The prosecutor noted that there was a statement about the involvement of a confederate in one of the robberies, but that statement took place while Contreras was not present, so it could not be used against him. (19RT 3196-3198; see 2 6CT 217.) The court expressed concern over appellant's statement to Santana that he had killed eight or nine people before, ruled it inadmissible, and ruled that the tape and transcript would have to be redacted. (19RT 3202-3203.) Appellant's counsel then said that he would "tactically rather have it come in now rather than at penalty phase." The court reiterated that the evidence would be excluded for the guilt phase under Evidence Code section 352, but not from the penalty phase. Appellant's counsel reiterated that he would rather have the evidence regarding the eight or nine prior murders be presented during the guilt phase. (19RT 3204-3206.)

The court ruled that appellant had the right to inquire about the fact that Santana had lied to police in her own case, and about the pending case to the extent it might affect her credibility at trial. (19RT 3213-3217.) The court also would admit questioning about whether Santana had a gun during the incident that led to her being charged. (19RT 3219-3220.)

The parties discussed statements in the preliminary hearing testimony about how appellant and Navarro purchased their cars. Appellant's counsel objected on the basis that it sounded like hearsay from Navarro. The court agreed. (19RT 3233-3234.) The parties discussed a reference in Santana's testimony to Navarro saying that he and his crime partners had also "done that store." It was agreed that testimony would be excluded. (19RT 3235-3238.)

The parties discussed Santana's testimony that appellant and his friends were going to get drugs before the George's Market crimes. Because the court indicated that would come in during the penalty phase, appellant's counsel asked that it come in during the guilt phase. (19RT 3239-3241.) The parties also again discussed appellant's statement that he had killed eight or nine other people. The court ruled that evidence would be admissible during the penalty phase only, but if appellant's counsel wanted it to come in, if at all, during the guilt phase, the court would so admit it with a limiting instruction. It would be relevant under factor (a) as to penalty. (19RT 3246.)

During discussions about which portions of Santana's preliminary hearing testimony would be admitted in the instant trial, appellant's counsel asked that he be permitted to renew his objections on "page 43, 44, 45" to the playing of the tape. (19RT 3195.)[78] Appellant's counsel also asked that he be permitted to "renew all the objections that were made at the preliminary hearing, and make them part of [his] objection to Miss Santana's testimony here. The Court granted that request. (19RT 3222.)

During the testimony by Detective Perales reading Santana's preliminary hearing testimony at trial (20RT 3361), the prosecutor marked for identification the cassette recording of Santana's police interview (Peo. Exh. 47) and the transcript (Peo. Exh. 48) (20RT 3362-3363). Appellant's counsel objected to admission of the tape recording of Santana's interview (Peo. Exh. 47) and of the transcript of that recording (Peo. Exh. 48). The basis of the objection was that "they are all hearsay" as previously stated. (19RT 3374-3375.) Appellant's counsel explained,

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[78] Appellant's counsel's references to pages 43, 44, and 45, appear to be to pages 423 through 425 of the second volume of the clerk's transcript.

> As far as the tape goes, it's not – there's no proper foundation even in the transcript at the time it was offered. [¶] It was being offered for a prior consistent statement or prior inconsistent statement before there were any that came in, and it is out-of-court hearsay, which is not subject to cross-examination and shouldn't come in.

(20RT 3375.) The court overruled the objections, finding that while the tape may have been played prematurely during the preliminary hearing, "the consistencies and inconsistencies become relevant by virtue of the later cross-examination." (19RT 3375-3376.)

Appellant's counsel asked the trial court to reconsider its ruling regarding the "circumstances of the crime being admissible" in the penalty phase with respect to Santana's taped statement. He argued that the transcript indicated it may not have been appellant who bragged about having committed eight or nine previous murders. The court found that the preliminary hearing transcript demonstrated Santana was talking about appellant. The court emphasized that evidence was admissible only for appellant's state of mind. Appellant's counsel argued that Santana's statement was unreliable. The court reaffirmed its prior ruling. (20RT 3387-3390.)

Appellant's counsel again asked the court to reconsider its ruling admitting the tape, arguing that it was not at all clear that appellant was the person who bragged about having committed eight or nine other murders. The court again found, "The prelim makes it clear she is talking about him." Moreover, the People were not trying to prove that appellant had killed eight or nine people, but it was relevant to appellant's state of mind, which was the only reason it was being admitted, and the court would so instruct the jury. The prosecutor offered the option of "cleaning that statement up" to be "I've killed before," as opposed to "I've killed

eight or nine." Appellant's counsel elected not to accept that suggestion. (20RT 3387-3390.)

During the reading of Santana's preliminary hearing testimony at trial, the following information, in pertinent part, was told to the jury. Following the george's Market crimes, one of the men in appellant's apartment said that appellant had shot a police officer, and that the police were looking for them. (20RT 3397-3398.) Appellant actually said, "I shot a cop" (20RT 3399; see 20RT 3489) because the officer had "gotten in his way" (20RT 3413). Santana had heard appellant say, "Sh**, I hit the cop." (20RT 3410.) Appellant also said that he had killed eight or nine people in "his country." (20RT 3489.)

Later, Navarro and Santana were driving alone together in a car when Navarro said that "El Morro" had shot a police officer. (20RT 3400.) At sidebar, the prosecutor apologized for presenting that statement, which occurred because he had mistakenly not redacted it from the preliminary hearing transcript. The court granted appellant's counsel's motion to strike the comment. The court admonished the jury that this testimony was not admissible as to appellant or Contreras, and was admissible only as to Navarro, because only Navarro and Santana were present. (20RT 3401-3404.)

Santana's prior testimony was elicited that Navarro had told her, while driving past a market, that he had committed a robbery there in the past. Navarro said he had used the proceeds to purchase a vacation to El Salvador for his parents, and to purchase a car. (20RT 3405-3406, 20RT 3487-3488.) The court instructed the jury to consider this only as to Navarro. (20RT 3404.)

The court permitted the prosecution to play People's Exhibit 47, the recording of Santana's police statement. The jury also received copies of the transcript of the tape recording, People's Exhibit 48. The parties

stipulated that the transcript was a true and correct transcription of the audio tape. The parties stipulated that the reporter did not have to report the tape's contents as played in court. (20RT 3413-3414.)

The trial court instructed the jury,

> The reference in the tape, ladies and gentlemen, to [appellant's] comments about having killed eight or nine people is not offered for the truth of the matter. There's no evidence to support that there were eight or nine people or anybody else killed. It is offered simply for your consideration as to the declarant's state of mind at the time the statement was made, not for the truth of that fact.

(20RT 3415.)

The jury also learned that Santana did not want to speak with the defense attorneys privately (20RT 3418), that she had lied to the police about her age and name when she was arrested, and that she had lied to the court about her identity as well, (20RT 3419-3421.) Santana claimed she was arrested for being a lookout in a robbery, that she was innocent of the charges against her, that she was not arrested with a gun, that the person arrested with her did not have a gun, and that she never had a gun. Santana understood she was alleged to have "put a gun on a lady." (20RT 3426-3428.) Santana was not seeking a benefit in her other case for testifying at the preliminary hearing. (20RT 3437-3438.)

After Santana's testimony was read into the record, appellant's counsel asked that he be permitted to renew all of the objections he had made during the preliminary hearing and at trial as if made during the presentation on the testimony. The court granted that request. (20RT 3504-3505.)

B. Appellant Has Not Shown Reversible Error With Respect to the Admission of Santana's Recorded Statement at Trial

Appellant claims that his state law and Sixth Amendment rights to confrontation were violated because Santana's tape-recorded statement played for the jury contained two improper statements by codefendant Navarro:

> The statements above, that Navarro said appellant had shot a cop, committed another robbery, received $14,000 and bought a car with the proceeds, directly implicated appellant. Appellant was unable to cross-examine the purported source of the statements, co-defendant Navarro, who did not testify. Under *Aranda* and *Bruton,* the admission of these statements violated appellant's Sixth Amendment right to confront the witnesses against him.

(AOB 133.) *People v. Aranda, supra,* 63 Cal.2d 518 and *Bruton v. United States, supra,* 391 U.S. 123, establish that if the prosecutor in a joint trial seeks to admit a nontestifying codefendant's extrajudicial statement, either the statement must be redacted to avoid implicating the defendant or the court must sever the trials. (*People v. Burney, supra,* 47 Cal.4th at pp. 230-232; *People v. Hoyos, supra,* 41 Cal.4th at p. 895.) In *Aranda,* this court held that a codefendant's confession may be introduced at the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. (*People v. Aranda, supra,* 63 Cal.2d at pp. 530–531.) It is generally considered that a limiting instruction will not cure a resulting Confrontation Clause violation. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120–1121.)

Appellant's *Aranda/Bruton* claim fails at the outset as to appellant's statement in Santana's presence that he had killed multiple times before, because that is not a statement by a nontestifying codefendant. As the trial court properly found, that statement was made by appellant, and therefore was a party admission. Appellant has not shown the contrary, then or now.

Appellant's claim that the trial court erroneously permitted into evidence Navarro's statement that he and appellant had committed a robbery yielding each $14,000, which they used to purchase their cars also fails, as the trial court expressly ruled this evidence was inadmissible. (19RT 3233-3234; see 2CT 512.)

In any event, any errors were harmless beyond a reasonable doubt. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1015–1016 [finding it unnecessary to examine a "complex constitutional question," because any error was harmless]; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [89 L.Ed.2d 674, 106 S.Ct. 1431] [an otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was harmless beyond a reasonable doubt]; *Harrington v. California* (1969) 395 U.S. 250, 253–254 [23 L. Ed. 2d 284, 89 S. Ct. 1726] [*Aranda-Bruton* error subject to harmless error analysis under the rule of *Chapman v. California, supra,* 386 U.S. 18.) Under *Chapman*, federal constitutional error is not reversible if it was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 26.)

Here, first, as to the statement, purportedly by Navarro, that appellant had shot Officer Hoglund, since appellant admitted the same thing in Santana's presence, and since the evidence set forth above in the statement of facts (including Medina's eyewitness identification), and discussed in the harmless error argument above in Argument V, overwhelmingly showed appellant was the gunman who shot and killed Officer Hoglund, and that he was guilty as to each count for which he was convicted, any error was harmless. The statement about appellant having committed a prior robbery with Navarro and using the proceeds to purchase vehicles, even if made by Navarro outside of appellant's presence, was also harmless as the jury heard so much overwhelming evidence of appellant's guilt on each of the

crimes for which he was convicted. Any errors were harmless, both in the guilt phase and in the penalty phase. (*People v. Burney*, *supra*, 47 Cal.4th at p. 232; *People v. Anderson, supra,* 43 Cal.3d at p. 1128.)

C. Appellant's Claims of Error by the Preliminary Hearing Court Fail on the Merits

Appellant claims that the preliminary hearing court erroneously restricted his cross-examination of Santana, and that those purported errors carried over to the trial. (AOB 134-137.)

1. The Relevant Preliminary Hearing Proceedings

During the preliminary hearing, under cross-examination by Appellant's counsel, Santana testified to the following. She was innocent in the case for which she had been arrested and was in custody. Appellant's counsel argued he should be able to ask whether Santana had told the police in that case whether she had a gun, to show Santana was willing to be involved in violent crime and thus, was not trustworthy. The court ruled that since Santana was not convicted yet, she was presumed innocent. The court indicated it would consider the "nature of the offense" as counsel had indicated. But the fact Santana had lied to the police about her true name was not relevant. (2CT 447-450.)

Santana testified she was innocent in her new case, and that she did not have a gun or any kind of weapon. The court noted that there was a "principal armed" allegation as to Santana. The prosecutor asserted that appellant's counsel was simply trying to intimidate Santana. (2CT 459-462.) The preliminary hearing court permitted appellant's counsel to ask more questions about guns. Santana denied having ever had a gun. However, the court, noting that it already knew Santana had lied to the police, sustained the prosecutor's objection to questions regarding whether Santana knew her codefendant had a gun. Because Santana was

presumed innocent in her case, and because "there [was] no indication that the issue went to bias or motive, the prosecutor's objection was sustained. (2CT 462-465.) Appellant's counsel asserted that because Santana testified differently than the police report, her testimony was a lie. The prosecutor noted that there was no gun recovered in Santana's case, and that the police report contained multiple layers of hearsay. (2CT 465-467.)

Appellant's counsel explained the questions he wanted to ask Santana about the allegations against her. The prosecutor objected as "beyond proper impeachment," and also for an undue consumption of time under Evidence Code section 352. The court found that because the proposed questioning went to "simply proving that the witness possesses a particular character trait," it was not a valid basis for impeachment. If appellant's counsel had some extrinsic evidence that Santana was falsely testifying, then that may be a different matter. However, under Evidence Code section 352, the probative value of the proposed questioning was outweighed by the undue consumption of time. Moreover, because Santana was charged only as an aider and abettor, the details of the purported robbery were irrelevant during appellant's preliminary hearing. (2CT 466-469.)

Appellant's counsel was permitted to elicit from Santana that she was arrested for acting as a lookout during a robbery, and that someone alleged she "had put a gun on a lady." The court sustained an objection to the question, "You found out that from who?" as collateral and irrelevant. When appellant's counsel explained he wanted to learn whether Santana "received any benefit" for testifying, the court ruled he could ask that question. The court recognized appellant had the right to so cross-examine Santana, but that under Evidence Code sections 352 and 787, "We're not going to go through and try that case." (2CT 470-471.)

Appellant's counsel was permitted to ask Santana whether she received any consideration for her testimony. He also explored the

circumstances of how Santana learned she had to testify in this case. She denied seeking a benefit in her pending case for her testimony in this case. She was not worried about what would happen in her other case because she was not guilty. (2CT 471-480.) The prosecutor finally objected that the preliminary hearing was not a discovery proceeding. The court agreed and sustained the objection, citing section 866. (2CT 480-481.) Appellant's counsel asserted a violation of appellant's federal constitutional rights based on the right of confrontation and cross-examination of [the] witness by the limitation of the cross-examination." (2CT 481.) The court overruled the objection:

> And the court reiterates its previous ruling under *Wright [v.] Ohio* and *Craig [v.] Maryland*, that a preliminary examination is unknown in federal constitutional law, and under the federal standards only applies to a proceeding where evidence to convict the defendant of the offense at trial is being introduced. This is not a trial. The evidence here is not for that purpose.

(2CT 481-482.)

2. Santana's Statement Was Properly Admitted at Trial

The trial court properly admitted Santana's statement and overruled appellant's objections as made during the preliminary hearing and renewed at trial. A defendant may show a violation of the Confrontation Clause by showing he was precluded from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or by presenting facts from which could be drawn inferences regarding that witness's credibility. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1251; see also *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680; *Davis v. Alaska* (1974) 415 U.S. 308, 318 [94 S.Ct. 1105; 39 L.Ed.2d 347].) To prevail on a Confrontation Clause claim where the court restricted

purported impeachment, the appellant must show that cross-examination would have produced a significantly different impression of the witness's credibility before the jury. (*People v. Pearson* (2013) 56 Cal.4th 393, 455-456; *People v. Dement* (2011) 53 Cal.4th 1, 52.)

It is well-established that the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Trial courts retain wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*People v. Virgil, supra,* 51 Cal.4th at p. 1251; *People v. Cornwell* (2005) 37 Cal.4th 50, 95, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, a trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207; *People v. Quartermain* (1997) 16 Cal.4th 600, 623.) This Court has cautioned,

> "[I]mpeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value."

(*People v. Dement, supra,* 53 Cal.4th at p. 51, quoting *People v. Wheeler* (1992) 4 Cal.4th 284, 296–297.) A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court "'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Ledesma, supra,* 39 Cal.4th at p. 705; quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Here, appellant has failed to meet his burden of showing an abuse of discretion or a Confrontation Clause or similar state law violation.

Santana's testimony was impeached by showing the circumstances that led to her being a witness in the instant matter, including her having been arrested in connection with another case. There is nothing in the record before this Court showing that proper impeachment evidence under the above authorities was excluded. The probative value of the proposed questioning was outweighed by the undue consumption of time, and the details of the purported robbery were irrelevant during the preliminary hearing. (2CT 466-469.) The trial court acted well within its discretionary authority under Evidence Code section 352 in precluding exploration of collateral matters. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 619 [the trial court did not abuse its discretion by excluding evidence that a witness had in other crimes admitted some blame but shifted the bulk of the responsibility to others, as it was time-consuming hearsay and character evidence that was not particularly probative].) Appellant was not precluded from attempting to demonstrate that Santana was not worthy of belief; rather, he was merely precluded from proving it with time-consuming and remote evidence that was not reasonably probative on the question. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 326–327 [126 S.Ct. 1727; 164 L. Ed.2d 503]; *People v. Jones* (1998) 17 Cal.4th 279, 305.)

Here, the additional impeachment value of the excluded evidence was minimal in relation to the major areas of impeachment already raised by the admitted evidence, and a reasonable jury would not have received a significantly different impression of Santana's credibility even if more such evidence had been admitted. And, significantly, Santana's testimony largely corroborated and was corroborated by testimony of the percipient witnesses implicating appellant as a robber, and the gunman who shot and killed Officer Hoglund, as set forth above in the statement of facts.

D. Any Errors Were Harmless, Whether Considered Discretely or Cumulatively

Appellant claims that the "errors" raised in this section were prejudicial, whether considered discretely or cumulatively. (AOB 137.) Any error in admitting evidence of the contested statement and in precluding more extensive impeachment of Santana on cross-examination was harmless as it was not reasonably probable appellant would have received a more favorable result absent any single error (Evid. Code, § 353, subd. (b); *People v. Watson, supra,* 46 Cal.2d at p. 836), because any single error was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 26), and because any errors were cumulatively harmless (*People v. Hill* (1998) 17 Cal.4th 800, 844). The evidence against appellant – as shown above – was overwhelming, Santana's testimony was largely cumulative, appellant was able to impeach her during the preliminary hearing under that court's rulings, and the jury learned of such impeachment, and therefore had before it adequate information upon which to assess her credibility. (See 20RT 3418-3438.) This claim fails.

VII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT UNDER EVIDENCE CODE SECTION 1101, SUBDIVISION (B)

Appellant claims the trial court abused its discretion in admitting evidence in the guilt phase trial, of the Rod's Coffee Shop incident under Evidence Code Section 1101, subdivision (b), because that incident was not similar to the charged offenses and was nothing more than criminal propensity evidence, thereby violating appellant's rights to a fair trial under the Sixth Amendment, to due process of law under the Fifth and Fourteenth Amendments, and to a reliable guilt and penalty determination under the Eighth Amendment. (AOB 138-157.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

1. Argument and Rulings Regarding the Rod's Coffee Shop Evidence

The People filed an in limine motion on September 9, 1994, seeking to present evidence concerning the Rod's Coffee Shop incident pursuant to Evidence Code section 1101, subd. (b), arguing the evidence was admissible to prove appellant's identity as the stun-gun-wielding perpetrator of the Casa Gamino Restaurant crimes, and to prove his guilt as one of the robbers in the "Casa Gamino Restaurant robbery, as well as the other charged crimes." (10CT 2919-2922.)[79] In part, the motion asserted,

> [Appellant's] prior crime involving Rod's Coffee Shop shares common marks with the currently charged offenses. Each of the robberies involved multiple perpetrators committing take-over style robberies. The perpetrators chose restaurants as their targets. And they were well armed with handguns.
>
> The most distinctive mark common to the prior offense and in particular the robbery of the Casa Gamino Restaurant is the use of an electric stun gun. The fact that [appellant] possessed an electric stun gun during the Rod's Coffee Shop incident corroborates evidence that the People will present identifying [appellant] as the suspect who assaulted two victims with an electric stun gun during the robbery of the Casa Gamino Restaurant. Perpetrators generally do not use electric stun guns to commit robberies because of the limited threat of the devices and because the devices usually must be in physical contact with the victim in order to be effective. Thus the use of the stun gun serves as the "single distinctive common mark" which along with other distinctive marks reasonably raises the inference that [appellant] committed the Casa Gamino Restaurant robbery, as well as the other charged crimes.

(10CT 2921-2922.)

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[79] Appellant apparently pled guilty or nolo contendere to a charge under section 12020, subdivision (a).

At the hearing on the motion, the prosecutor explained the details of the Rod's incident. Appellant and four other men, using two cars, arrived at Rod's Coffee Shop around 11:55 p.m. They declined a large booth in the back of the restaurant, instead preferring a table with "chairs on the outside." Based on their behavior, which included "looking all around" in a "very nervous manner," the fact they did not order food and only drank a little of the coffee they ordered, and the fact they left and congregated outside in the parking lot behind the restaurant, caused the manager to call the police, thinking a robbery was imminent. Appellant and his friends fled as the police arrived. Recovered from appellant's car was a firearm and a stun gun, and from the other car, firearms. (9RT 1227-1229.) The prosecutor explained,

> This is very similar to the modus operandi we see in this case with a robbery being done in large numbers, five, six people at a time, each of them being armed, they approach a location at a point in which that location would have, let's say, the most significant amount of money that they might have in the course of a day or week and they sat down in a manner very similar to the way they asked for a table at the Casa Gamino Robbery, very similar in the way to which they were seated at El Siete Mares robbery.
>
> And the most distinctive mark of all that occurred there was the finding of the stun gun. The stun gun is not the kind of apparatus that we normally think of in connection with robberies, and I think that is what lends that particular attempt robbery its most distinctive mark, and being that a stun gun was used at the Casa Gamino, it's the most, let's say sure position [*sic*] of identification evidence. So that we can show [appellant] was arrested at this location and in that car, besides the firearm was the stun gun.
>
> Later, when we go to prove the robbery at the Casa Gamino, the only thing we have to show [appellant] did that crime is the identification by witnesses. But showing that he was actually arrested – and we can show his booking photo from the Rod's incident in 1990 – is extremely corroborative of the

> eyewitness identification in the counts relating to the Casa Gamino as well as other counts in this case.

(9RT 1229-1230.)

Appellant's counsel objected[80] to admission of the evidence because it showed appellant to have been involved in a crime a year before the other alleged acts. The only charge filed against appellant was a misdemeanor, that incident did not involve Contreras or Navarro, there might have been a Fourth Amendment violation as to the recovery of the weapons in that matter, the statute of limitations had expired on the misdemeanor, appellant did not have a preliminary hearing as to any Rod's charges, and there was evidence that there were up to 50 similar robbery incidents and appellant was not charged in 43 of them. (9RT 1230-1233.) Appellant's counsel was willing to concede appellant's identity as to the Casa Gamino crimes to avoid admission of the Rod's evidence. He would also concede appellant's identity as to the George's Market crimes, would challenge identity as to the Outrigger crimes, and acknowledged that, "on the majority of the counts, the evidence as far as identification is going to be strong." (9RT 1233.)

The prosecutor further explained that the fact there was a stun gun was relevant to appellant's identification, and to,

> The type of force and fear that these individuals were using. The incident at Casa Gamino wasn't isolated and was, in fact, a premeditated use of that type of weapon. It didn't just happen to arrive in somebody's hands at that location, but rather was something [appellant] was involved in using at a previous time.

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[80] Contreras and Navarro did not object to admission of the Rod's evidence if it was clear they were each not involved in it. (9RT 1236-1237.)

(9RT 1234-1235.) In response to appellant's counsel's argument about 43 other similar robbery incidents in which appellant was not involved, the prosecutor stated he did not "think there [was] stun guns involved." (9RT 1236.)

The trial court stated,

> If I can give you an indicated, my inclination would be to allow it. A stun gun is highly unusual. But I think you are right, the only issue is I.D. The other issues about premeditated use, I don't think that is an issue in this case. [¶] Appellant's counsel, if you are willing to concede I.D. at Casa Gamino, I will disallow them from using it.

(9RT 1237.) Appellant's counsel agreed to do so in his opening statement. (9RT 1237-1239.) However, the court stated that the Rod's evidence would be admissible, in any event, during the penalty phase, if there was one. (9RT 1238.) With respect to whether the People could use the Rod's evidence to prove Contreras's and Navarro's identities as robbers in the crimes, the court found the Rod's evidence would be inadmissible under Evidence Code section 352, without identifying that section, because the prejudice would outweigh the probative value. (9RT 1240.) However, if it "turn[ed] out it's not being played the way appellant's counsel is suggesting," then the prosecutor should renew his request. (9RT 1240.)

At sidebar, during the presentation of the Casa Gamino evidence, appellant's counsel asked the court for a ruling whether the Rod's evidence would be admissible in the penalty phase – if it would be, then appellant's counsel intended to cross-examine Armando Lopez (who was then on the witness stand) regarding what appellant did during the Casa Gamino crimes. The court found the evidence was admissible in the penalty phase. (14RT 2258-2260.) In fact, during his cross-examination of Armando Lopez, appellant's counsel did inquire about the different suspects' actions.

(14RT 2262-2274; see also 15RT 2418-2433 [appellant's counsel's cross-examination of Javier Lopez].)

Before all of the Casa Gamino evidence had been presented, the parties revisited the Rod's issue. The prosecutor offered new argument, that the People sought to introduce a photograph of Navarro posing with guns with one of the persons arrested for the Rod's incident, which would tend to prove the use of the stun gun during the Casa Gamino crimes was a "reasonable and foreseeable consequence" of Navarro's and Contreras's actions by providing "the inference that they all knew about this stun gun" when they went to the Casa Gamino Restaurant. Further, even though Navarro was not charged in the Woodley Market crimes where Mr. Kim was murdered, based on the "quality and quantity of association" with appellant and Contreras and the other culprit from the Rod's incident, it would tend to show that Navarro knew participating in another robbery could have "fatal consequences for somebody at that location." (15RT 2360-2363.) At that point, Contreras and Navarro also objected to admission of the Rod's evidence. (15RT 2366-2367.)

The court subsequently found that appellant's counsel was challenging "quite strongly" the identification as to appellant's actions during the Casa Gamino crimes. (16RT 2566.) Appellant's counsel argued that the Rod's evidence did not address that issue, because it was not the same kind of stun gun used during the Casa Gamino crimes. The prosecutor argued, and the court found, that the stun guns necessarily had to be different because the police confiscated the one involved at Rod's. (16RT 2566.) The court then stated,

> My inclination is to allow the stun gun. I think that is so unique and so unusual. In fact, in all my years in the justice system, whichever side of the bench I was on, I have never seen an electrical device being used. Maybe you have, [appellant's counsel]. I don't know. [¶] I don't think it matters that it

> wasn't the same one, but it is so unique that I think under all the case law that permits 1101 evidence where it is material, there's no other rule that would not permit it, and under 352 I think the probative value far outweighs any prejudice or confusion that arises from it.

(16RT 2567.) However, the court would not allow admission of the Rod's evidence to connect Navarro to the instant crimes. (16RT 2568-2570.) Appellant's counsel then requested that evidence of the Navarro photo and of "this other person" come in because it was just as likely that person was the one using the stun gun. The court denied that request. (16RT 2570-2571.)

Before the Rod's evidence was presented and during the reading of the regular guilt phase instructions, the trial court instructed the jury with CALJIC No. 2.50, that evidence of an uncharged crime was presented as to only appellant, it could not be considered to prove appellant was of bad character or predisposed to commit crimes, and the evidence could be considered only if it:

> [T]ends to show: [¶] the identity of the person who committed the crime, if any, of which he is accused; [¶]that the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged; [¶] and the crime charged is a part of the larger continuing plan, scheme, or conspiracy.

(18RT 3011-3012; see also 11CT 3102-3103; 21RT 3681-3683.) The court also instructed the jury that the Rod's evidence could not be considered for any purpose unless the jury was satisfied "by a preponderance of the evidence" that the prosecution had proved the facts of the Rod's incident. (18RT 3012; see also 11CT 3103; 21RT 3681-3683.) The parties stipulated that appellant was charged with the misdemeanor possession of a loaded weapon in a motor vehicle over the Rod's incident. (21RT 3663-3664.)

2. The Prosecutor's Opening Argument

The prosecutor told the jury, in pertinent part, during opening argument,

> Now, we presented you some additional evidence regarding [appellant] from the Rod's Coffee Shop. We want to make sure you know we got the right guy here working with that stun gun. Here is the booking photo from Rod's. Remember, Officer – Sergeant Kirby, Officer Anderson told you about the stun gun seized out of the car that [appellant] was driving. He got charged with a misdemeanor in November 1990. Well, the D.A.'s in that case or whoever charged him, they didn't know what we know, ladies and gentlemen.
>
> Do you have any doubt in your mind what he was there to do was a robbery? It was a little late, it's only a coffee shop, not as nice as the Casa Gamino. Got some special attention from the manager, who definitely knew they were casing the place. Do you have any doubt in your mind what they were doing there? Do you think they all went in to drink that half a cup of coffee that only two of them ordered? It was [appellant] and [appellant] whose hands was [*sic*] was on the stun gun, the cattle prod.

(21RT 3781-3782.)

3. Appellant's Closing Argument

Appellant's counsel controverted that appellant was the person with the stun gun during the Casa Gamino Restaurant crimes. (22RT 3873-3877.) He argued that the Rod's incident did not show appellant to have been the person armed with the stun gun during the Casa Gamino crimes. (22RT 3875-3876.) Appellant's counsel argued to distinguish the Rod's incident from that at the Casa Gamino, and to minimize appellant's involvement. (22RT 3889-3892.)

B. The Trial Court Properly Admitted the Contested Evidence

In general, "all relevant evidence is admissible" unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Relevant evidence is evidence, including that relevant to witness credibility, "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Carter, supra*, 36 Cal.4th at p. 1166.) Generally speaking, trial courts have broad discretion in making such determinations. (*People v. Tully* (2012) 54 Cal.4th 952, 1010; *People v. Hoyos, supra,* 41 Cal.4th at p. 898.)

Evidence that a defendant committed misconduct other than the currently charged crimes is generally inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kelly* (2007) 42 Cal.4th 763, 782.) However, such evidence is admissible if it is relevant to prove, among other things, motive, opportunity, intent, knowledge, preparation, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Fuiava, supra,* 53 Cal.4th at p. 695; *People v. Catlin* (2001) 26 Cal.4th 81, 145.) The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) To prove intent, the least degree of similarity between the uncharged crime and the current crime are required. In contrast, where the uncharged crime evidence is offered to prove identity, then the greatest degree of similarity is required. (*People v. Scott* (2011) 52 Cal.4th 452, 470.) Questions regarding the admissibility of evidence under Evidence

Code section 1101 are reviewed for abuse of discretion. (*People v. Abilez, supra,* 41 Cal.4th at p. 500; *People v. Gray* (2005) 37 Cal.4th 168, 202.)

Evidence Code section 352 provides as follows:

> 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.

Whether a trial court has erred in admitting evidence under Evidence Code section 352 is also reviewed for an abuse of discretion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 808-809; *People v. Lewis, supra,* 25 Cal.4th at p. 637.) "Prejudice" under Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual with very little effect on the issues, and is not synonymous with "damaging." (*People v. Bolin* (1998) 18 Cal.4th 297, 320):

> Prejudice as contemplated by Evidence Code section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The Code speaks in terms of undue prejudice. Unless the dangers of undue prejudice, confusion, or time consumption substantially outweigh the probative value of relevant evidence, a section 352 objection should fail.

(*People v. Scott, supra,* 52 Cal.4th at p. 490-491, internal citation and quotations omitted.) That is, the prejudice that Evidence Code section 352 is intended to avoid is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*Id.* at p. 491, internal citation and quotations omitted.) In addition, the admission of evidence might violate federal constitutional due process if there were no

permissible inferences the jury might draw from the evidence. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) Its admission must render the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385].)

Here, the trial court did not err in permitting the prosecution to present evidence regarding the Rod's Coffee Shop crimes during the People's guilt phase presentation. The evidence was properly admissible to prove appellant's identity as the stun-gun wielding robber at the Casa Gamino, and indeed, as one of the robbers in each incident, under Evidence Code section 1101, subdivision (b). A criminal defendant places all material issues in dispute by pleading not guilty. (*People v. Tully, supra*, 54 Cal.4th at p. 1010; *People v. Bivert* (2011) 52 Cal.4th 96, 116–117.) The prosecution may not be compelled to accept a stipulation that would deprive the People's case of its "'persuasiveness and forcefulness.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 129, quoting *People v. Streeter* (2012) 54 Cal.4th 205, 238.)

Here, although appellant appeared initially to be vaguely willing to concede his identity as one of the participants in the Casa Gamino crimes, he did not admit to torturing Armando with the stun gun. As the trial court properly found in a reasonable exercise of its discretion, the contested evidence was relevant to prove appellant's identity as that person as the use of a stun gun during a takeover robbery is highly distinctive, as the trial court found. Moreover, the prosecution was required to prove appellant's identity and conduct with respect to each crime. As the prosecutor vigorously argued to the court, the evidence in question was relevant to prove appellant's identity as one of the robbers as to each count because of the common modus operandi – a group of well-armed men would pretend to simply be customers, then take over the establishment in question and commit various violent crimes. When appellant was arrested at Rod's

Coffee Shop, he was engaged in behavior almost identical to that involved in each of the charged crime incidents in their early stages. The evidence was thus properly admitted to prove appellant's identity. Moreover, since the evidence was admitted to prove a permissible inference, appellant's federal constitutional due process was not violated.[81] (*Estelle v. McGuire, supra,* 502 U.S. at p. 70; *McKinney v. Rees, supra,* 993 F.2d at p. 1384.)

C. Any Error Was Harmless

In any event, any error was harmless as it was not reasonably probable appellant would have received a more favorable result absent error (Evid. Code, § 353, subd. (b); *People v. Watson, supra,* 46 Cal.2d at p. 836), and any constitutional violation was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 26). Here, as shown above in the statement of facts, and as specifically set forth in the harmless error section of Argument V, appellant was identified by multiple eyewitnesses as to each crime as one of the participants and as the stun-gun wielding robber, and he was soundly identified as the killers of both Mr. Kim and Officer Hoglund. The circumstances of each crime were very similar to the circumstances of the Rod's incident. In each completed crime, appellant and his crime partners entered their target establishment, pretended to be ordinary customers, then used the element of surprise to take over each establishment. The only difference as to the Rod's incident is that attempt was frustrated by an alert staff member of the target establishment.

Moreover, even without the Rod's evidence, the evidence that appellant was also the stun-gun wielding robber who tortured both

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[81] The evidence was also properly admitted as to the penalty phase. Respondent addresses this point below, in Argument XVI.

Armando Lopez and Marcella M. was overwhelming. Armando Lopez testified that when he told appellant he could not open the safe, but only the "boss" could, appellant struck Armando on the mouth, then used the stun gun on him. (14RT 2229.) Armando explained to appellant that only the "boss" had the combination to the safe. (14RT 2230-2232.) Appellant placed the barrel of his gun in Armando's mouth and threatened to kill Armando if he did not open the safe. (14RT 2232-2234.)

Armando also testified that appellant was the robber who beat Marcella M. in trying to compel Armando to open the safe. Armando observed appellant use the stun gun on Marcella M. three or four times on her stomach. Armando testified that appellant hit Marcella M. "with the gun or the hands" on her stomach, and possibly her head as well. The other man in the office kept his gun trained on Armando while appellant beat Marcella M., who screamed. (14RT 2234-2236.) Armando Lopez was certain, "quite sure" of his identification, that appellant was the person who used the stun gun on him, applying it to his ribs and stomach. (14RT 2256, 2278.) Throughout the incident, appellant spoke to Armando in both Spanish (with a Central American accent) and English. (14RT 2240.) Armando attended live lineups at the county jail and made identifications there. (14RT 2252-2254.)

Arturo Lopez testified that appellant was the person who took him to the back of the restaurant at gunpoint (14RT 2301) and who beat Armando in the office (14RT 2302). Arturo testified that appellant was the person "dragging" Marcella M. by the hair while he held a gun to her head. (14RT 2304-2305, 2320-2323.) Arturo was shown photos by the police after the robbery. He identified a photo depicting appellant as the person who had a gun and told the victims not to move. (14RT 2307.) Arturo also made identifications at a live lineup. (14RT 2308-2309.) Arturo was "quite certain" of his identification of appellant. (14RT 2309.)

Lucia Lopez also identified appellant as one of the robbers. (14RT 2339.) Javier Lopez identified appellant as the person who took Armando to the office and administer the electric shock to Armando there. (15RT 2406-2409, 2414.) Javier saw appellant holding the stun gun. (15RT 2429.) Javier was most sure of his identification of appellant. (15RT 2421.)

Under these circumstances, at most the Rod's evidence was cumulative to the overwhelming evidence of appellant's guilt, and was not of such an extreme nature that appellant would have been prejudiced. Moreover, given the overwhelming evidence of appellant's guilt as to each of the crimes for which he was convicted, the admission of the Rod's evidence during the guilt phase likely worked to weaken its impact for the penalty phase.

Further, the instructions given limited any prejudicial impact that the Rod's evidence could have had. Here, as noted above, the jury was specifically instructed with CALJIC No. 2.50, that evidence of an uncharged crime was presented as to only appellant, it could not be considered to prove appellant was of bad character or predisposed to commit crimes, and the evidence could be considered only if it,

> [T]ends to show: [¶] the identity of the person who committed the crime, if any, of which he is accused; [¶] that the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged; [¶] and the crime charged is a part of the larger continuing plan, scheme, or conspiracy.

(18RT 3011-3012; see also 11CT 3102-3103; 21RT 3681-3683.) The court also instructed the jury that the Rod's evidence could not be considered for any purpose unless the jury was satisfied "by a preponderance of the evidence" that the prosecution had proved the facts of the Rod's incident. (18RT 3012; see also 11CT 3103; 21RT 3681-3683.) Under

these circumstances, any error in admitting the Rod's Coffee Shop evidence was harmless under any standard.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING ADMISSION OF EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT

Appellant contends that the trial court erred in failing to expressly instruct the jury to limit its consideration of the Rod's Coffee Shop evidence to the Restaurant Casa Gamino crimes. And, he claims, the court improperly instructed the jury that the prosecution's burden of proof was lessened by giving CALJIC Nos. 2.50 and 2.50.1. As a result, he claims that he was deprived of his right to a jury trial, a fair trial, due process, and a reliable penalty determination, and that the prosecution's burden of proof was lowered, in violation of the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution. (AOB 158-167.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

The proceedings relative to admission of the Rod's evidence is discussed above in the preceding argument section. The trial court instructed the jury with CALJIC No. 2.50 on the use of the Rod's Coffee Shop incident. The court also gave CALJIC Nos. 2.50.1, and 2.50.2, on the applicable preponderance of the evidence standard. (See 11CT 3103; 18RT 3012-3013; 21RT 3682-3683.)

The trial court also gave the following instructions: (1) CALJIC No. 1.00 (21RT 3665-3667; see 11CT 3097 [jury may not be influenced by prejudice, etc.]); (2) CALJIC No. 1.01 (21RT 3667-3668; see 11CT 3097-3098 [instructions must be considered as a whole and each in light of the others]); (3) CALJIC No. 1.03 (21RT 3669-3670; see 11CT 3098 [case must be decided only on the evidence]; (4) CALJIC No. 2.09

(21RT 3674; see 11CT 3100 [evidence admitted for a limited purpose may be considered only for that purpose]); (5) CALJIC No. 2.90 (21RT 3690-3691; see 11CT 3106 [on presumption of innocence and reasonable doubt standard]); (6) CALJIC No. 2.91 (21RT 3691-3692; see 11CT 3106 [on application of reasonable doubt standard to identity of appellant as person who committed the charged crime]); (7) CALJIC No. 3.02 (21RT 3710-3712; see 11CT 3108-3109 [reasonable doubt standard applied to aiding and abetting/natural and probable consequences theory]); (8) CALJIC No. 8.21 (21RT 3725-3726; see also 11CT 3116 [reasonable doubt standard applied to question whether killing occurred during commission of robbery or such attempt]); (9) CALJIC No. 8.80.1 (21RT 3727-3729; see also 11CT 3117-3118 [reasonable doubt standard applied to finding of special circumstances]); (10) CALJIC No. 17.10 (21RT 3746-3747; see also 11CT 3125 [reasonable doubt standard applied to lesser offenses]); and (11) CALJIC Nos. 17.15, 1719 (21RT 3747-3749; see also 11CT 3126-3127 [reasonable doubt standard applied to firearm-use allegations]).

B. The Trial Court Properly Instructed the Jury as to the Rod's Coffee Shop Evidence

Appellant first complains that the trial court failed to limit the Rod's Coffee Shop evidence to any particular counts. That is, it instructed the jury that it could use the Rod's evidence to show appellant's identity as the perpetrator of "the crime charged," as proof of a common scheme or plan and/or as proof that appellant possessed the means for the charged crime," but the court never told the jury to which of the charged crimes the evidence could apply. (AOB 160-161.)

1. This Claim Has Been Forfeited

This claim fails first because if appellant believed that the instructions were incomplete or needed elaboration, then it was his responsibility to request additional or clarifying instructions or language. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Maury* (2003) 30 Cal.4th 342, 426; *People v. Dennis* (1998) 17 Cal.4th 468, 514.) Because appellant "did not request such amplification or explanation, error cannot now be predicated upon the trial court's failure to give" such a clarification "on its own motion." (*People v. Anderson* (1966) 64 Cal.2d 633, 639.) Appellant thus forfeited the instant claim. (*People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Hart* (1999) 20 Cal.4th 546, 622.)

This claim also fails because, absent a request, the trial court has no responsibility to give an instruction limiting the purpose for which a jury may consider particular evidence. Where evidence is admissible for one purpose but not others, upon request the court shall instruct the jury on the limited scope of the evidence's admission. (Evid. Code § 355.) However, absent a request, a trial court generally is not required to instruct the jury as to the limited admissibility of particular evidence. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 590; *People v. Cowan* (2010) 50 Cal.4th 401, 479; *People v. Jones* (2003) 30 Cal.4th 1084; 1116.) This Court has recognized a narrow exception to this principle, "in the occasional extraordinary case" where the evidence in question was a "dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052.) Here, the uncharged crime evidence was not a dominant part of the evidence, nor highly prejudicial or minimally relevant to any legitimate purpose. Appellant was overwhelmingly identified with certainty by multiple trial witnesses as the stun-gun wielding perpetrator,

and overwhelmingly as to the other counts for which he was convicted. While respondent submits that the trial court did give all necessary instructions on this point, because appellant failed to request additional limiting instructions, this claim fails as forfeited without further analysis, especially since no limiting instruction was required in the first instance. No additional instruction was required and appellant cannot show error now given his failure to make such a request.

2. This Claim Fails on Its Merits

The prosecution's burden in a criminal case is to prove every element of a crime beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) However, evidence of other crimes as admitted pursuant to Evidence Code section 1101, subdivision (b), may be proved by a preponderance of the evidence. (*People v. Scott, supra,* 52 Cal. 4th at p. 470; *People v. Virgil, supra,* 51 Cal.4th at p. 1259.)

It is well established that the correctness of jury instructions is to be determined from the entire charge of the court, not from a particular instruction or consideration of parts of an instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 252; see also *People v. Osband* (1996) 13 Cal.4th 622, 679 [appellate court reviews claim of ambiguity in instruction by determining whether, in light of all the instructions given, "'there is a reasonable likelihood that the jury construed or applied the challenged instruction[s] in an objectionable fashion'"].) A federal due process violation occurs if there is a reasonable likelihood that the jury misunderstood and misapplied the instruction in a way that violated the Constitution and that this misapprehension affected the verdict. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72 & fn. 4.)

In *People v. Catlin, supra,* 26 Cal.4th at pp. 144-147, this Court rejected the claim that CALJIC No. 2.50 lowered the prosecution's burden

of proof as to guilt. *Catlin* explained that the instruction "directed the jury to consider 'if' the other-crimes evidence 'tends' to demonstrate cause of death and identity, and directed the jury to weigh the evidence in the same manner as it would weigh all other evidence in the case." (*People v. Catlin, supra*, at p. 147.) Here, as shown above, the court clearly, consistently, and repeatedly instructed the jury on the reasonable doubt standard and its application to the charges in this case. It is not at all likely under these circumstances that the jury applied the preponderance-of-the-evidence standard except precisely as directed, and as was proper.

Further, in addition to the fact that appellant forfeited any claim of error related to the trial court's failure to give a more extensive limiting instruction, appellant cannot show error in the court's failure to give a limiting instruction as to the Rod's evidence because it was relevant to each crime charged. All of the crimes involved similar takeover robberies as the prosecutor urged and as is set forth in the preceding argument section and the statement of facts. Each of the crimes in this case involved action by a group of perpetrators very similar to the nascent conduct that was demonstrated by appellant and his colleagues at Rod's Coffee Shop before it could blossom into a successful takeover robbery incident.

Here, CALJIC Nos. 2.50 and 2.50.1, when read in the context of the remaining instructions, did not reduce the prosecution's burden of proof. None of the instructions provide that the charged crimes may be proved by a preponderance of the evidence. CALJIC No. 2.50.1 expressly provided that only the uncharged crimes may be proved by a preponderance of the evidence. CALJIC No. 2.50 precludes any inference of criminal propensity. As noted above, the jury was instructed that it should read all the instructions as a whole and each in light of all other instructions. The instructions given overwhelmingly told the jury that guilt on the charged crimes may only be predicated on findings made beyond a

reasonable doubt. The jury was instructed that appellant was presumed innocent and was entitled to a not-guilty verdict unless the prosecution met its burden of proving him guilty beyond a reasonable doubt (CALJIC No. 2.90), and that the prosecution was required to prove beyond a reasonable doubt that appellant was the person who committed the charged crimes (CALJIC No. 2.91).

Reading the entire set of instructions as a whole, therefore, as the jury was required to do, it is not reasonably likely that the jury was either confused or believed it could leap from a finding based simply on the preponderance standard that appellant was involved in the Rod's incident, to a guilty verdict on the charged crimes. To do so, the jury would have to have ignored the many instructions on the application of the reasonable doubt standard. However, it is presumed that the jury followed the instructions it was given. (See, e.g. *People v. Tafoya, supra,* 42 Cal.4th at pp. 192-193; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Appellant also claims that the "interplay" of CALJIC Numbers 2.50 and 2.50.1 resulted in an evisceration of the reasonable doubt standard, such that the jury here could have convicted appellant under the preponderance of the evidence standard. (AOB 161-165.) Appellant recognizes that this Court has rejected this argument, but asks this Court to reconsider its rulings in this regard. This court has, in fact, regularly rejected this claim, and respondent submits there is no basis upon which to revisit the issue. (See *People v. Virgil, supra,* 51 Cal.4th 1210; *People v. Foster* (2010) 50 Cal.4th 1301, 1347-1348; *People v. Davis* (2009) 46 Cal.4th 539, 615-616; *People v. Lindberg* (2009) 45 Cal.4th 1, 35-36.)

People v. Key (1984) 153 Cal.App.3d 888, does not demonstrate error here. (AOB 160-161.) *Key* held that if the trial court does give a limiting instruction on uncharged acts, it must do so accurately and should limit the

issues upon which such evidence may be considered by striking from the instruction the issues upon which the evidence is not admissible. (*People v. Key* (1984) 153 Cal.App.3d 888, 899; see also *People v. Nottingham* (1985) 172 Cal.App.3d 484, 497.) In *Nottingham*, as in *Key*, the evidence of the defendant's other crimes had been expressly admitted only for limited purposes – intent and identity in *Nottingham* (*People v. Nottingham, supra*, at p. 496) and the victim's credibility on particular counts in *Key* (*People v. Key, supra,* at p. 898). But the trial court's instructions in each case permitted the jury to consider the evidence for additional, unauthorized purposes. Expanding the scope of the permissible use of the evidence constituted the instructional error. (See *People v. Nottingham, supra*, at p. 497; *People v. Key, supra*, at p. 899.) Here, there was no such problem as in *Key* because the Rod's evidence was relevant to prove appellant's identity as to all of the counts, as well as the fact that he specifically used the stun gun during the Casa Gamino incident. There was no error.

C. Any Error Was Harmless

In any event, any error was harmless as it was not reasonably probable appellant would have received a more favorable result absent error (Evid. Code, § 353, subd. (b); *People v. Watson, supra,* 46 Cal.2d at p. 836), and any constitutional violation was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 26). Here, as shown above, appellant was identified by eyewitnesses as to each crime as one of the participants as the gunman who killed Officer Hoglund and Mr. Kim, and as the stun-gun wielding robber. At most, the Rod's evidence was cumulative to the overwhelming evidence of appellant's guilt and the instructions given sufficiently limited its impact. Given the overwhelming evidence of appellant's guilt separate and apart from the Rod's Coffee Shop

incident, any purported inadequacy in instructing the jury as to the limitations of such evidence jury was harmless.

IX. THE TRIAL COURT PROPERLY RESPONDED TO ALLEGATIONS OF JUROR MISCONDUCT DURING THE GUILT PHASE

Appellant contends that the trial court prejudicially abused its discretion by denying his request to inquire into purported juror misconduct, thus violating his rights to a fair and impartial jury trial, due process, and a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 167-174.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

During the prosecutor's opening statement, he told the jury, in pertinent part, that they would hear the testimony of Rosa Santana relating that before appellant, Navarro, and Contreras left to commit the George's Market crimes, they said they were going out to "do a dope deal," and armed themselves with firearms "in case any [B]lacks or cops get in the way." (9RT 1286.) Then, during the People's case-in-chief, the jury heard Detective Perales read Rosa Santana's preliminary hearing testimony in which Santana said that shortly before the George's Market crimes, appellant and his crime-partners said they were going out to get drugs, and that they were bringing guns along in case "the [B]lack guys and the cops would get in their way." (20RT 3446.)

Appellant's counsel asked to approach. At sidebar, he said that during the People's opening statement, when the prosecutor referred to the guns being brought in case the police or "Blacks" got in the way, appellant's counsel observed Juror Number Three (Juror M.L.), make "a very adamant up and down motion with her head as if – " The court interjected, "During the opening statement?" (20RT 3449.) Appellant's counsel responded,

> During the opening statement. And at the time it worried me that she had made up her mind right then, and that is all she needed to hear [that there] was some kind of violence against Blacks. And her gesturing with her head appeared to be in response to that statement during the opening statement. [¶] Now . . . the same line was just read to the jury. [Juror M.L.] did the exact same thing, a very adamant up and down motion with her head. [¶] I don't have any doubt in my mind she has already made up her mind what she is going to do with the penalty phase and guilt phase because of the perception there is violence against Blacks. [¶] I don't know if anybody else noticed this head motion.

(20RT 3449.) Appellant's counsel emphasized that the juror's head motion demonstrated her mind was made up already, and that she had a "violent reaction." Counsel for codefendant Navarro said he noticed" this head motion" without specifying when. The prosecutor said he did not notice it during his opening statement. (20RT 3449-3450.)

The court said, "You don't know what she is thinking, [appellant's counsel]," and found, "We have no Blacks involved as witnesses, victims, or defendants in the case other than she is a Black juror." (20RT 3449-3440.) Appellant's counsel asked for a hearing about whether the juror had already made up her mind. (20RT 3450.) The court found,

> No, I am not going to have that hearing. I think you are working off of gross speculation. It seems to me you made some *Wheeler* motions when the D.A. tried to kick off some Blacks. I don't recall if this is one [such person] you objected to. There was no effort to excuse her. [¶] We are dealing with pure speculation. The motion is denied.

(20RT 3450.) The court added,

> [Appellant's counsel], I don't think anything is established by an adamant head shake. I see jurors nodding or sitting up or dozing or looking off. If I had to stop and have a hearing every time I saw a reaction by a juror, we would never get through a trial.

(20RT 3451.) The court ruled, "The record speaks for itself and I don't think it would at all be appropriate to have a hearing. The motion is denied." (20RT 3451.)

After more of Santana's testimony had been read and when court resumed following the lunch break, the prosecutor told the court that she "continued to observe" Juror M.L. after appellant's counsel made his objection. The court responded, "I think everybody was watching it." The prosecutor stated, "She was rocking, just like rocking back and forth. I did not see any nodding, just more of a nervous habit. She was rocking during the entire testimony." Counsel for codefendant Navarro asserted that behavior was different than what he and appellant's counsel had observed. Appellant's counsel asserted that John Gonzalez, his paralegal, also observed Juror M.L. react to the prosecutor's opening statement. (20RT 3501-3502.)

After the prosecutor had finished the People's closing argument, the trial court made the following findings:

> Okay. I would note, [appellant's counsel], I have been sensitive to [Juror M.L.'s] reactions to any reference to Blacks or cops getting in the way of the guns. And I noted the rest of that day where you had your concerns expressed she continued to rock in her chair. And every time she rocked, her head nodded. And I saw nodding throughout the rest of the afternoon.
>
> Yesterday, when the prosecutor twice in his argument mentioned that same statement, there was absolutely no reaction from her. And today there was absolutely no reaction from her. And she had continued to rock and nod.
>
> I am not saying there may not have been a reaction, but I'm not sure that we can assume her state of mind, and I want you to know that I have been watching it, that every specific time that issue came up I watched her and have seen absolutely no reaction.

(22RT 3964.)[82] The court further noted that "there was no reaction when the prosecutor mentioned twice the same issue yesterday, no reaction at all." (22RT 3965.)

B. The Trial Court Properly Exercised Its Discretion in Resolving Appellant's Claim of Juror Competence

A criminal defendant has a fundamental constitutional right to a fair trial by an impartial jury. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [88 S.Ct. 1444; 20 L.Ed.2d 491.) Thus, criminal defendants are constitutionally entitled to a trial by jurors who have not been improperly influenced, and who are ready and willing to decide the case solely on the trial evidence. (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) A juror's prejudgment of the case without hearing the evidence constitutes good cause to doubt his or her ability to perform the juror's duty and justifies discharge from the jury. (§ 1089; *People v. Avila* (2006) 38 Cal.4th 491, 603; *People v. Nesler* (1997) 16 Cal.4th 561, 583.) A verdict is not proper if even a single juror was improperly influenced. (*People v. Nesler, supra,* 16 Cal.4th at p. 578.) Section 1089 authorizes the trial court to discharge a sitting juror who has become unable to properly perform her duties. (*In re Hamilton, supra*, 20 Cal.4th at p. 294.)

When the trial court is put on notice that good cause to discharge a juror may exist, it must conduct an inquiry sufficient to determine the facts. (*People v. Lomax* (2010) 49 Cal.4th 530, 588; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051; *People v. Ledesma, supra,* 39 Cal.4th at p. 738.) If the trial court has good cause to doubt a juror's ability to

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[82] Appellant states that Appellant's counsel argued that the juror's behavior "had changed," citing to page 3965. (See AOB 168.) Respondent does not read the record the same way. (See 22RT 3965.)

perform his duties, the court's failure to conduct a hearing may constitute an abuse of discretion. (*People v. Cleveland, supra,* 25 Cal.4th at p. 478.) However, the court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.'" (*People v. Osband, supra,* 13 Cal.4th at p. 675, distinguished on another ground as stated in *People v. Lucero* (2000) 23 Cal.4th 692, 714.) Both the decision to investigate and the decision as to whether there was misconduct justifying discharge rest in the trial court's sound discretion. (*People v. Fuiava, supra,* 53 Cal.4th at p. 702; *People v. Virgil, supra,* 51 Cal.4th at p. 1284.) In reviewing the trial court's decision, an appellate court will consider the fact that the trial court is in the best position to observe the juror's demeanor. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1305.)

The court's inquiry into allegations of misconduct by a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. (*People v. Barnwell, supra,* 41 Cal.4th at p. 1054.) The trial court possesses broad discretion in deciding whether and how to conduct an inquiry to determine whether a juror should be discharged. (*People v. Clark, supra,* 52 Cal.4th at p. 971; *People v. Cleveland, supra*, 25 Cal.4th at p. 472.)

Here, Juror M.L.'s gesture or movement was at most ambiguous and appears to have been part of her normal body movements during trial and to have had nothing to do with this case. As the trial court noted, Juror M.L. repeatedly moved her body, causing her head to nod, while sitting as a juror. Therefore, appellant's counsel's claim of misconduct by Juror M.L. was purely speculative, as the trial court found. Here, the trial court paid careful attention to Juror M.L. after appellant's counsel raised the issue. The court found that Juror M.L. was not responding to the particular issue implicated by appellant's counsel's concerns when it was raised during

argument. (22RT 3964-3965.) Moreover, this case did not involve any racial issues, as the trial court found, such that any heightened scrutiny should have attached to appellant's counsel's concerns. As the trial court stated, "We have no Blacks involved as witnesses, victims, or defendants in the case other than she is a Black juror." (20RT 3449-3440.)

Even if appellant's counsel and codefendant's counsel were correct that Juror M.L. had nodded her head, the trial court's observations demonstrated that there was nothing significant about the juror's conduct with respect to suitability to decide the case as a juror.

This Court should defer to the trial court's exercise of discretion to determine whether to conduct a hearing or investigate the alleged misconduct further. (See *People v. Martinez* (2010) 47 Cal.4th 911, 941, 942.) On this record, the trial court properly exercised its discretion and determined that there was no good cause to conduct a hearing or investigate the alleged misconduct. This claim fails.

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.92 DURING THE GUILT PHASE

Appellant contends that the trial court erroneously instructed the jury with CALJIC No. 2.92. Specifically, he complains about the portion of the instruction stating the degree of certainty expressed by a witness as to his or her identification of a defendant is relevant in assessing the accuracy of that identification. (AOB 174-186.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

The trial court gave CALJIC No. 2.92, which told the jury, in pertinent part, as follows:

> Eyewitness testimony has been received in this trial for the purpose of identifying [appellant] as the perpetrator of the crimes charged. In determining the weight to be given

eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including but not limited, to any of the following:

The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The stress, if any, to which the witness was subjected at the time of the observation;

The witness's ability, following the observation, to provide a description of the perpetrator of the act;

The extent to which the defendant either fits or does not fit that description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness's capacity to make an identification;

Evidence relating to the witness's ability to identify other alleged perpetrators of the criminal act;

Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness's identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness's identification is in fact a product of his or her own recollection;

And any other evidence relating to the witness's ability to make an identification.

(21RT 3692-3693.)

B. The Trial Court Correctly Instructed the Jury With CALJIC No. 2.92.

Appellant's claim fails first because it was forfeited, as the trial court had no duty to either give or modify CALJIC No. 2.92 on its own motion. (See *People v. Cook* (2006) 39 Cal.4th 566, 599 [giving of CALJIC No. 2.92]; *People v. Alcala* (1992) 4 Cal.4th 742, 802–803 [same]; see *People v. Ward* (2005) 36 Cal.4th 186, 213–214 [court has no sua sponte obligation to modify or omit any factors, including certainty factor, listed in CALJIC No. 2.92, predecessor to CALCRIM No. 315].) Moreover,

> A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.

(*People v. Hart* (1999) 20 Cal.4th 546, 622; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023; *People v. Bolin, supra,* 18 Cal.4th at p. 328.) Here, because appellant failed to request that CALJIC No. 2.92 be modified as he now asserts it should have been, this claim has been forfeited.

In any event, the claim fails on its merits as it has been repeatedly rejected by this Court and by the California Court of Appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610, disapproved on another point by *People v. Williams* (2010) 49 Cal.4th 405, 459 [approving consideration of a witness' level of certainty in determining reliability of identification]; *People v. Arias* (1996) 13 Cal.4th 92, 168 [including "the level of certainty displayed by the witness at a suggestive confrontation," among "factors to be considered" in evaluating whether identification testimony should be suppressed], citing *Neil v. Biggers* (1972) 409 U.S. 188, 199-200 [93 S.Ct. 375; 34 L.Ed.2d 401]; see *People v. Johnson* (1992) 3 Cal.4th 1183, 1230–1231; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562; see also

People v. Clark (1992) 3 Cal.4th 41, 135 [the level of certainty expressed by witness of a pretrial voice identification procedure is a factor to be considered in determining admissibility of identification against claim it was unduly suggestive and unnecessary].)

C. Any Error Was Harmless

In any event, even if this Court were to conclude that CALJIC No. 2.92 was erroneously given due to the witness-certainty provision, any error was harmless under both the state and federal standards evaluating prejudice. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Carter* (2003) 30 Cal.4th 1166, 1221 [evidentiary instruction evaluated under state standard]; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

First, this factor was just one of many non-exclusive factors that the jury was told it could consider in determining eyewitness reliability. Second, the certainty factor could cut *against* crediting certain identifications admitted in the trial that were less than certain. Appellant's counsel thoroughly cross-examined the People's witnesses about their identifications of appellant and argued the lack of reliable identifications well in closing argument. (See *People v. Wright* (1988) 45 Cal.3dd 1126, 1143, fn. omitted [explanation of effect of any particular factor "is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate"].)

Third, there was little question at trial of appellant's identity as one of the robbers, as the person who use the stun gun, and as the person who shot and killed Mr. Kim and Officer Hoglund, based on the overwhelming evidence of his identity, as detailed in the statement of facts and in the harmless error section of Argument V. In act, as appellant's counsel conceded, "[O]n the majority of the counts, the evidence as far as identification is going to be strong." (9RT 1233.) Fourth, to the extent

appellant claims the consensus of more recent scientific evidence undermines the assumption that the more certain a witness is of the identity of a person, the more accurate the identification (see AOB 174-186), CALJIC No. 2.92 does not suggest otherwise. It states in a neutral manner that various multiple factors bear upon the accuracy of an identification, leaving it to counsel to put on evidence and argue how these factors operate in their respective clients' favor.

The issue here is not merely whether appellant's conviction turned on eyewitness identification, but whether the certainly/uncertainty factor caused prejudice under *Watson* or *Chapman*. However, the challenged language did not foreclose or limit appellant's ability to argue against the jury's acceptance of evidence of identification. Appellant remained free to argue the many eyewitness identification witnesses were wrong or uncertain. Additionally, CALJIC No. 2.92 itself identified other factors on which defense counsel could rely such as the witness's opportunity to observe the perpetrator of the act and the stress to which the witness was subjected at the time of the observation. Further, elimination of the certainty/uncertainty factor would not have prevented the prosecution from relying on the certainty of eyewitnesses. The instruction makes clear that the enumerated factors are not exclusive, and the jury may consider "[a]ny other evidence relating to the witness' ability to make an identification." The record does not reflect any jury confusion on the subject of identification. While defense counsel vigorously argued the weaknesses in the identifications, the jury nonetheless, and reasonably, believed the eyewitnesses. Moreover, in addition to the eyewitness identifications, appellant was also identified by the George's Market videotape, and his possession of stolen jewelry when arrested clearly shows appellant's connection to the instant crimes. This claim fails.

XI. VARIOUS GUILT-PHASE INSTRUCTIONS DID NOT UNDERMINE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant contends that the trial court undermined the requirement of proving his guilt beyond a reasonable doubt by giving CALJIC Nos. 2.01, 2.21.1, 2.21, 2.22, 2.27, and 8.83, thereby violating his federal and state constitutional rights to due process and trial by jury, and the requirement that capital case verdicts be reliable. Appellant recognizes that this Court has rejected "many of these claims," but urges this Court to reconsider those cases. He also asserts these claims to preserve federal review. (AOB 186-196.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

The trial court gave the following instructions implicated by appellant's instant claim: (1) CALJIC 2.01 (21RT 3671-3672; see also 11CT 3099 [use of circumstantial evidence]); (2) CALJIC No. 2.21.1 (21RT 3679; see also 11CT 3102 [discrepancies in a witness's testimony]); (3) CALJIC No. 2.21.2 (21RT 3679-3680; see also 11CT 3102 [witness willfully false]); (4) CALJIC No. 2.22 (21RT 3680; see also 11CT 3102 [number of witnesses]); (5) CALJIC No. 2.27 (21RT 3681; 11CT 3102 [testimony of single witness]); and (6) CALJIC No. 8.83 (21RT 3733-3734; see also 11CT 311-3120 [circumstantial evidence/special circumstance allegations]).

The trial court also instructed the jury with the following instructions: (1) CALJIC No. 1.01 (21RT 3667-3668; see 11CT 3097-3098 [instructions must be considered as a whole and each in light of the others]); (2) CALJIC No. 2.90 (21RT 3690-3691; see 11CT 3106 [on presumption of innocence and reasonable doubt standard]); (3) CALJIC No. 2.91 (21RT 3691-3692; see 11CT 3106 [on application of reasonable doubt standard to identity of appellant as person who committed the charged crime]); (4) CALJIC

No. 3.02 (21RT 3710-3712; see 11CT 3108-3109 [reasonable doubt standard applied to aiding and abetting/natural and probable consequences theory]); (5) CALJIC No. 8.21 (21RT 3725-3726; see also 11CT 3116 [reasonable doubt standard applied to question whether killing occurred during commission of robbery or such attempt]); (6) CALJIC No. 8.80.1 (21RT 3727-3729; see also 11CT 3117-3118 [reasonable doubt standard applied to finding of special circumstances]); (7) CALJIC No. 17.10 (21RT 3746-3747; see also 11CT 3125 [reasonable doubt standard applied to lesser offenses]); and (8) CALJIC NOs. 17.15, 1719 (21RT 3747-3749; see also 11CT 3126-3127 [reasonable doubt standard applied to firearm-use allegations]).

B. This Court Has Repeatedly Rejected These Claims and Should Do So Again

In *People v. Whalen* (2013) 56 Cal.4th 1, this Court addressed the claim that "10 standard jury instructions given in [this] case – CALJIC Nos. 1.00, 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 2.90, 8.83 and 8.83.1 – individually and collectively allowed the jury to convict Whalen based upon proof insufficient to satisfy the constitutionally required 'beyond a reasonable doubt" standard. (*People v. Whalen, supra*, 56 Cal.4th at p. 70.) This Court noted that it has "rejected this precise argument on occasions too numerous to recite." (*Ibid.*; see also *People v. Tate* (2010) 49 Cal.4th 635, 697–698; *People v. Kelly, supra,* 42 Cal.4th at p. 792.) As this court stated in *Whalen*, "'each of these instructions "is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof."' (*People v. Whalen, supra*, 56 Cal.4th at p. 70, quoting *People v. Nakahara* (2003) 30 Cal.4th 705, 715.)

The instant instructional claims thus fail here. (See also *People v. Watkins, supra,* 55 Cal.4th at p. 1030 [CALJIC Nos. 2.01, 2.21.1, 2.21.2; 2.22, 2.27, 8.83 not constitutionally infirm]; *People v. McKinnon, supra,* 52 Cal.4th at p. 677 [CALIC Nos. 2.21.2, 2.22 & 2.27]; *People v. Famalaro* (2011) 52 Cal.4th 1, 36 [CALJIC Nos. (CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27 & 8.83]; *People v. Brasure, supra,* 42 Cal.4th at pp. 1058-1059 & fn. 15 [CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 8.83].) This claim fails.

XII. THE TRIAL COURT PROPERLY ADMITTED EDUARDO RIVERA'S PRELIMINARY HEARING TESTIMONY DURING THE GUILT PHASE

Appellant next contends that the trial court improperly admitted Eduardo Rivera's preliminary hearing testimony at trial. He argues that although Rivera, a Mexican national, had returned permanently to Mexico and was not responding to telephonic attempts to reach him, the People were required to attempt to use international treaty provisions to try to obtain Rivera's live, in-court testimony. Appellant argues that admission of Rivera's preliminary hearing testimony violated his right to confront and cross-examine Rivera, and that admission of the testimony had "such a prejudicial impact at the penalty phase" that "reversal of appellant's sentences is required." (AOB 197-207.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

On October 13, 1994, during the People's case-in-chief, the prosecutor told the trial court the following regarding presenting Eduardo Rivera's preliminary hearing testimony in lieu of live testimony. After speaking with appellant's counsel "some weeks ago," the prosecutor "got the impression there was going to be a stipulation." As a result of that impression, the prosecution stopped looking for Rivera. However, "within

the last week or so," appellant's counsel indicated he would not stipulate to due diligence. (19RT 3126-3127.) The prosecutor explained,

> But what we will indicate to the court is Mr. Rivera is a Mexican national, that he indicated, following the murder of Lee Chul Kim, he was distraught and was having a lot of mental and psychiatric problems as a result of witnessing the killing and that he kept in touch with the witnesses at the market, namely Teresa Torres, Guillermo Galvez, and Mr. Cuautle, and they heard from him on a frequent basis. [¶] And sometime approximately eight to nine months ago, that he informed them that he was returning to Mexico to –

(19RT 3127.) The court interrupted to ask when. The prosecutor continued,

> Approximately January of 1994. [¶] He was returning to Mexico to buy a plot of land and was not planning to return. When we arrested the fourth defendant in this case . . . we attempted to look for Mr. Rivera in order to have him attend a live lineup in that case, which was, I believe, in April of 1994, if I am not mistaken.
>
> At that time my investigators, Detective Edwards and Detective Aparicio, attempted to locate Mr. Rivera and found the same information, that everyone told him he had left, he was no longer at his former address or former employment or former phone numbers.
>
> Before the commencement of this trial then we asked our investigator from the D.A.'s office, Will Abram, who is present in the courtroom, to corroborate this information. [¶] So what Mr. Abram did was again to check the local addresses, phone numbers and work locations for Mr. Rivera and determined he was not there, did the usual due diligence in searching for him in this community, could not locate him.

(19RT 3127-3128.)

The prosecutor explained that the prosecution's efforts had been "continuous since approximately April," and that around a month earlier, Will Abram inquired through Immigration and Naturalization, and learned

that Rivera was in fact a Mexican national. Abram finally was able to locate Mr. Rivera's brother, who lived in the San Francisco Bay area, and who said that Rivera was a Mexican national who had returned to Mexico with "no definite plans to return at this time." The prosecutor asserted that she had prepared a brief explaining that if a witness has returned to his country of origin and there is no existing treaty to force that witness to return, which there was none with Mexico, then the People have met their due diligence requirement, assuming the witness had testified at a prior hearing where he underwent cross-examination. (19RT 3128-3129.)

In response to the court's question of whether any effort was made to obtain a phone number, the prosecutor and Abram explained that Rivera's brother told them Rivera had no phone, but that an attempt was made to get a phone number. The prosecutor understood that Rivera lived in a small village near Guadalajara that had one telephone, and that Rivera's brother had attempted several times to leave messages there, for Rivera to call him, "to no avail." Abram explained that they had found Rivera's brother on September 23, 1994, and were in contact with him through October 4, 1994. On October 4, 1994, the brother reiterated that he had left messages for Rivera to call him, and had not heard back from Rivera. (19RT 3129-3130.) The prosecutor concluded,

> But even to do that, Your Honor, we feel it is beyond our requirements and particularly since we were under the impression that the due diligence was going to be stipulated to.

(19RT 3130.)

Appellant's counsel explained that he had only indicated to the People he would stipulate they could represent what their witnesses would say as to due diligence by way of an offer of proof, rather than requiring them to testify. However, he argued they had not shown due diligence because

appellant's counsel had flown to Honduras searching for witnesses to help the defense, but the People did not do the same seeking Rivera. (19RT 3130-3132.) The prosecutor responded,

> In contradiction, I think the cases cited in my brief show we need not show any due diligence because we have no reciprocal treaty with Mexico. Even if we were fortunate to locate Mr. Rivera, we have no means to force him to return. It would have to be completely voluntary and we would have to go through immigration in hopes they would allow him to return across the border.

(19RT 3132.) The prosecutor noted that Rivera was the only witness to identify appellant and Contreras at both the live lineup and again in court, he was thus the "most consistent identification witness" for the people, and he corroborated other witness testimony. (19RT 3132.)

Appellant's counsel argued that appellant's federal constitutional right to cross-examine Rivera was infringed during the preliminary hearing. The trial court found that appellant's confrontation rights were not violated. (19RT 3133-3136.) The prosecutor argued that "it's per se due diligence for a Mexican national to return." The court found that "due diligence ha[d] been shown":

> The court does find due diligence on behalf of Mr. Rivera. The objections concerning being restricted in cross-examination I think are not borne out by the full quantity and quality of the examination that I have seen in these transcripts, and the objection is overruled.

(19RT 3136-3137.)

B. This Claim Has Been Forfeited

It is well established that an evidentiary claim may be deemed forfeited it appellant failed to make a timely objection in the trial court on the specific ground advanced on appeal. (*People v. Dykes* (2009) 46

Cal.4th 731, 756-757; *People v. Thornton* (2007) 41 Cal.4th 391, 427; *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Partida* (2005) 37 Cal.4th 428, 433–435; *People v. Lewis* (2001) 26 Cal.4th 334, 357; see also Evid. Code, § 353.) Here, appellant did not object on the ground advanced here on appeal, that there was a treaty mechanism by which Rivera's live testimony could be obtained. In fact, defense counsel did not controvert the prosecutor's statement to the trial court that there was no such mechanism that could be used to obtain such testimony. His argument below was only that the People should have personally flown to Mexico to search for Rivera. Had appellant raised the specific claim that is now raised earlier, at trial, the trial court could have made specific findings on it, and if appellant were correct, could have made appropriate rulings. This new claim on appeal, that the People did not show due diligence because they failed to use treaty mechanisms to compel Rivera's live testimony at trial, thus fails as forfeited.

C. The Trial Court Properly Admitted Rivera's Preliminary Hearing Testimony

The general principles of applicable law regarding the admission of preliminary hearing testimony at trial in lieu of live testimony are set forth above in Argument V. Whether the prosecution exercised due diligence is a question of reasonableness, and whether the prosecution used good-faith efforts prior to trial to locate and present the witness. This good-faith obligation may require the use of measures that might be successful in producing the witness, but the law does not require the doing of futile acts. (*People v. Herrera, supra,* 49 Cal.4th at p. 622.)

In *Barber v. Page* (1968) 390 U.S. 719 [88 S.Ct. 1318; 20 L.Ed.2d 255, preliminary hearing testimony by a witness who was subsequently incarcerated in Texas, and was therefore unavailable to testify, was

admitted at trial in Oklahoma. The prosecution did nothing more than ascertain the witness was incarcerated out-of-state in a federal prison before claiming he was unavailable. The *Barber* court noted that there were procedures in place by which the prosecution could have sought to compel the witness's attendance at trial; because the prosecution did not do so, the witness's prior testimony could not properly be used at trial. That is, the only reason the witness was absent from trial was that the prosecution did not avail itself of available means to compel his presence. (*Ibid.* at pp. 720, 723-725, & fn. 4.)

Subsequently, in *Mancusi v. Stubbs* (1972) 408 U.S. 204 [92 S.Ct. 2308; 33 L.Ed.2d 293], a witness's testimony from a first trial (the conviction from which was reversed on appeal) was admitted in the second, based on testimony by the witness's son that the witness, an American citizen, had moved to Sweden (his native country) where he became a permanent resident. *Mancusi* distinguished *Barber,* because in that case, legislation, the availability of federal process, and the willingness of the federal prisons to honor state process in this regard were all available to present the witness in court, but the prosecution did not try. However, there were no similar means by which the state court could compel the witness living in Sweden to appear and testify. Thus, making a good faith effort did not require the prosecution to do more. (*Ibid.* at pp. 205, 207-209, 211-213)

In *People v. Ware* (1978) 78 Cal.App.3d 822, a sexual assault victim testified at the defendant's preliminary hearing, and then returned home to Spain. (*Id.* at p. 827.) Despite having the victim's address and telephone number in Spain, the prosecution made no attempt to obtain her presence at trial. (*Id.* at p. 829.) Nonetheless, *Ware* upheld the admissibility of the victim's videotaped preliminary hearing testimony. (*Id.* at pp. 837–838.) While acknowledging that mere absence from the jurisdiction was no

longer sufficient to dispense with the right of confrontation (*id.* at p. 831), *Ware* found its facts comparable to those in *Mancusi*, in that no alternative means were available at that time to secure the victim's attendance at trial (*id.*, at p. 837).

In *People v. St. Germain* (1982) 138 Cal.App.3d 507, unavailability was demonstrated as to one witness, but not as to another, even though each resided in the same foreign country at the time of trial. One witness was properly declared unavailable because he was a citizen and resident of the Netherlands at the time of trial, because no court process could compel the attendance of a foreign national and no treaty provision or compact with the Netherlands existed. (*Id.* at pp. 517–518.) However, the second was found not unavailable, even though she also lived in the Netherlands with the first witness at the time of trial. The second was distinguished from the first because she had a "green card," and was a permanent resident of the United States; thus, the prosecution could have used a federal subpoena to compel her to appear in a state superior court. Because the prosecution made no attempt to do so, the second witness was not unavailable. (*Id.*,at p. 516-517.)

In *People v. Herrera* (2010) 49 Cal.4th 613, 628, a missing witness had been deported to El Salvador several months after his preliminary hearing testimony, and months before trial. Based on testimony that a district attorney investigator had tried unsuccessfully to locate and contact the witness, and because there were no treaty mechanisms to compel his testimony at trial, the missing witness was constitutionally unavailable. (*Id.*, at pp. 628-632.)

In contrast, in *People v. Sandoval* (2001) 87 Cal.App.4th 1425, an absent witness was not constitutionally unavailable. In *Sandoval*, the absent witness was deported to his native Mexico after testifying at the defendant's preliminary hearing. (*Id.* at p. 1432.) The prosecution kept in

contact with the witness, and ascertained his willingness to return for the trial if given money for the trip to California, including $100 to pay for passport and visa fees for legal entry into the United States. (*Ibid.*) The prosecution ultimately declined to provide money to the witness, and did nothing more to secure his attendance at trial. (*Ibid.*) The *Sandoval* court expressly noted that the state was required to pay a travel allowance and compensation for the witness's time, and the People failed to show that $100, the sum requested by the witness, was an unreasonable burden upon the state. (*Id.* at 1442.)

The *Sandoval* court found it significant that the United States and Mexico had a treaty, effective in 1991, providing for cooperation in the prosecution of crimes and mutual assistance in obtaining witness testimony,[83] thus distinguishing *Mancusi*. (*People v. Sandoval, supra*, 87 Cal.App.4th at pp. 1434, 1439–1440.) Because the treaty with Mexico represented such an agreement, the prosecution's failure to pursue any of the cooperative methods outlined in the treaty was fatal to its showing of due diligence. (*Id.* at p. 1444.) Accordingly, *Sandoval* concluded the absent witness residing in Mexico was not constitutionally unavailable.

This case is unlike *People v. Sandoval, supra,* 87 Cal.App.4th 1425. (See AOB 200-202.) Here, the People could not locate the missing witness, who had indicated that he would not testify because the incident had so

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[83] *Sandoval* described the treaty as follows. "Article 7 allows a prosecutor in the United States to request that a witness in Mexico be compelled by Mexican authorities to appear and testify, but only in Mexico. Article 8 provides for the transportation to the United States of a person in custody in Mexico to testify if the person consents and Mexico has no reasonable basis to deny the request. And article 9 allows the prosecution to request the assistance of Mexican authorities to invite a person in Mexico to come to California and testify and to inform the person concerning the extent to which expenses will be paid." (*People v. Sandoval, supra*, 87 Cal.App.4th at p. 1439, fns. omitted.)

disturbed him. Moreover, contrary to appellant's assertion (AOB 202), the treaty did not provide for Mexican authorities to "compel" Rivera's attendance in Los Angeles. At most, if Rivera had been located, then possibly he could have been compelled to testify in Mexico, or invited to testify in Los Angeles. However, *Sandoval* did not change the calculus for determining whether due diligence had been shown. *Sandoval* expressly stated that the fact a Mexican citizen was in Mexico may constitute unavailability under Evidence Code section 240. To satisfy the federal Constitution, however, *Sandoval* noted that the prosecution was required to make a reasonable, good faith effort to obtain Rivera's presence at trial by utilizing applicable treaties. (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1443-1444.) Here, as the trial court found, the prosecution did make the required additional efforts by repeatedly trying to contact him, even after learning that Rivera did not want to testify, that he was emotionally scarred by appellant's crimes, and that he did not want to come back to Los Angeles.

Here, there was a great deal of evidence before the trial court showing the steps taken by the People to locate Rivera to obtain his live testimony for trial. They learned he was a Mexican national who had left the United States, intending to purchase land in Mexico, at least in part because he suffered severe emotional damage from the crimes of appellant and his codefendants. Rivera's brother repeatedly left phone messages for Rivera, but no response from Rivera was forthcoming, suggesting either that Rivera's location was unknown to his brother, or that Rivera was declining to respond. The People engaged in reasonable, good faith efforts to locate Rivera before trial, in part having relied on their understanding of appellant's counsel's statement that he would stipulate regarding due diligence. Moreover, at most, based on the treaty pointed to by appellant, the People could additionally have sought to have Mexican

authorities compel Rivera's testimony in Mexico, or to invite, through Mexican authorities, Rivera to come to California to testify. (See *People v. Sandoval, supra*, 87 Cal.App.4th at p. 1439.) However, Rivera had made clear that he was suffering emotional distress from having witnessed Mr. Kim's murder, he did not want to testify, he left the jurisdiction of the United States, and he did not respond to attempts to contact him through his brother. As such, under these circumstances, the People did make a reasonable, good faith effort to obtain Rivera's testimony at trial. (*Id.* at pp. 1443-1444.)

The law does not require the People to attempt the impossible, but only to make a reasonable, good faith effort to obtain a witness's presence at trial. (*People v. Herrera, supra*, 49 Cal.4th at p. 622, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 74 [100 S.Ct. 2531; 65 L.Ed.2d 597].) The fact that appellant now suggests other things that the People could have done does not mean that their actual efforts did not constitute a reasonable, good faith effort to secure Rivera's attendance at trial. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298; see also *People v. Gutierrez* (1991) 232 Cal.App.3rd 1624, 1641 ["Although appellant suggests the prosecution might have pursued others lines of inquiry (such as jobs, schools or voter registration records), the prosecution need not exhaust every potential avenue of investigation to satisfy its obligation to use due diligence to secure the witness"], cited with approval in *People v. Cummings, supra,* 4 Cal.4th at p. 1298, disapproved on another point in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3.) Given the totality of the circumstances under the authorities set forth above, the People acted reasonably and exercised due diligence, both under state law and the federal Constitution, to secure Rivera's attendance at trial, the trial court properly found he was constitutionally unavailable, his preliminary hearing

testimony was properly admitted into evidence, and appellant's constitutional rights were not violated.

D. Any Error Was Harmless

Even if admission of Rivera's preliminary hearing testimony violated appellant's federal constitutional rights, any error was harmless beyond a reasonable doubt under *Chapman v. California*, supra, 386 U.S. at p. 24, and under the applicable state law standards as well (Evid. Code, § 353, subd. (b); *People v. Watson*, *supra*, 46 Cal.2d at p. 836). Here, the evidence presented in Rivera's testimony, as set forth above in the summary of trial evidence related to the Woodley Market crimes and the murder of Mr. Kim, and in the harmless error section of Argument V, was largely cumulative to the other testimony presented as to the Woodley Market crimes.

According to Rivera, Mr. Kim ran into the meat freezer, pursued by one of the robbers. (19RT 3265-3272, 3278-3279.) However, Galvez also testified that Mr. Kim ran inside of the meat refrigerator and held on to the door tightly while appellant struggled to open the door from the outside. (17RT 2755.) Cuatle-Cisneros also testified to similar effect. (16RT 2694-2695, 2705, 2716.) Galvez testified that appellant eventually succeeded in opening the door to the meat freezer, where Kim sought refuge. (17RT 2756.)

While Rivera testified that he told the robbers, "Please don't do anything to him," and that Mr. Kim was "already very nervous" and gave the robbers the keys and valise Mr. Kim had dropped (17RT 2762-2763), Galvez testified he could hear Kim crying, begging appellant in English to not "do anything to him," stating the keys were "right here," and that Mr. Kim would "give them everything" (17RT 2760-2761). Rivera testified that appellant forced open the meat freezer door where Mr. Kim

was inside, frightened and begging, and tried to pull Mr. Kim outside of the freezer and struck him multiple times when Mr. Kim resisted, crying and begging. (19RT 3271-3276, 3287-3289.) However, Galvez testified substantially the same (17RT 2763-2765), as did Cuatle-Cisneros (16RT 2701-2706). Galvez, however, actually saw and testified about how appellant and Contreras shot Mr. Kim, something that Rivera did not testify to. (17RT 2768-2769, 2791, 2793, 2795, 2812, 2817-2818.) Cuatle-Cisneros described what he heard and saw of the shooting. (16RT 2706-2709.) Cuatle-Cisneros identified appellant in court as the shorter robber who was trying to open the door to the meat refrigerator to get to Mr. Kim. (16RT 2711-2712.) Shortly after the incident, Cuatle-Cisneros viewed photographic lineups and identified a photo of Contreras, then identified him in a live lineup at the county jail (17RT 2731-2734) and at the preliminary hearing (17RT 2735-2736). Cuatle-Cisneros also identified appellant at the preliminary hearing, but not in the photographic or live lineups. (17RT 2735.) Cuatle-Cisneros was 95 to 100 percent certain in his preliminary hearing identification of appellant, and 100 percent certain in his trial identification of him. (17RT 2736.) Eduardo Rivera similarly identified appellant and Contreras. Rivera identified appellant in court at the preliminary hearing as man number one, the robber who first shot at Mr. Kim. (19RT 3267, 3302.) Rivera identified Contreras in court as man number two. Rivera was 95 percent certain of his identifications. He also identified appellant and Contreras at a live lineup in the county jail. (19RT 3301-3305.) Rivera was "positive" in his identifications of appellant and Contreras. (19RT 3354.) Galvez also identified a photo of appellant as looking similar to one of the robbers, but stated that he was not one of the men. (17RT 2785, 2787-2788.) However, Galvez later attended live lineups at the county jail and identified appellant with 100 percent

certainty at the lineup, at the preliminary hearing, and at trial. (17RT 2788-2790, 2813, 2819.)

Under these circumstances, the admission of Eduardo Rivera's testimony, even if erroneous, could not have prejudiced appellant, since Rivera's testimony was largely cumulative to the other, overwhelming, evidence of appellant's guilt as to the Woodley Market crimes. This claim fails.

XIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S SEVERANCE MOTION

Appellant claims that the trial court erroneously denied his motions to sever him for trial from codefendants Contreras and Navarro, to use separate juries, or to hold sequential penalty phase trials.[84] He argues that his death judgment should be reversed because: (1) it was based on a comparison of appellant's actions with those of Navarro and Contreras; (2) the jury was "invited" to weigh appellant's mitigating evidence against that presented by his codefendants; (3) and consolidation allowed appellant's mitigation case to be negated by his codefendants' evidence in mitigation. (AOB 208-223.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

1. First Motion to Sever or for Separate Juries

Prior to trial, appellant filed a motion for a separate trial or for separate juries, citing the Fifth, Sixth, Eighth, and Fourteenth Amendments, arguing that he would be prejudiced by being compared to Navarro and Contreras in a joint trial, and would lose his right to an individualized penalty determination. (10CT 2924-2974.)

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[84] At trial, Appellant's counsel expressly limited appellant's severance motion to the penalty phase. (3RT 424.)

Appellant's counsel argued as follows in support of the motion. He expected the case to reach the penalty phase. Based on appellant's shooting of Officer Hoglund and Mr. Kim, compared to Navarro having killed no one and Contreras having only participated in killing Mr. Kim, appellant would by comparison be seen as the worst and would not receive an individualized penalty determination. In addition, evidence about appellant's background in Honduras would be diluted by similar evidence to be presented by Navarro and Contreras. By comparing appellant to Navarro and Contreras, it would be easier for the jury to sentence appellant to death. Further, argued appellant's counsel, the prosecution's death penalty memorandum demonstrated that they would seek to portray appellant as the worst of the three. (3RT 413-419.) As noted above, appellant's counsel expressly limited his severance motion to the penalty phase. (3RT 424.)

The People opposed severance, arguing there would be a "great duplication of efforts," and that the defendants were all properly joined for trial. The jury would be properly instructed to consider the evidence separately as to each defendant in reaching the penalty verdict. Each defendant stood in the same position based on his individualized conduct. (3RT 422-424.) The prosecutor stated,

> Mr. Navarro is not alleged to have actually shot the officer, but we do have a statement that he made and [A] casing that supports that statement, that he fired at the officer and was prepared to shoot an officer should they get in the way prior to committing the robbery. So he does have some relative culpability that's comparable to the other two defendants.

(3RT 423.)

The court denied the severance motion, finding as follows: Separate juries would hear the same evidence, and thus, even assuming there was a

variation in culpability, any such variation would not be affected. A case for severance might be stronger if the People did not seek the death penalty against Navarro. Appellant's argument regarding prejudice was speculative. (3RT 425.) The court, citing *Rowland*,[85] also noted that any request for a different jury to decide appellant's penalty should be made after the guilt phase. (3RT 425-426.) The court found, based on the facts before it, as follows:

> We are speculating about the impact of codefendants' mitigation. We are speculating that the codefendants might get on the stand and dump on [appellant] in favor of themselves. I don't know whether that will happen or not. If it does, we will deal with the impact. I don't expect that is going to happen. If it's so inflammatory that it does impact on his right to an independent decision by the jury, that is something to consider in a request for new trial or new penalty phase.
>
> I think it's speculating to argue that the People would be offering up Navarro in favor of death on [appellant], that somehow they would make a deal with the jury that if they give up on Navarro, they have a stronger position on [appellant]. I can't imagine they would make that argument. I don't expect they will and it doesn't sound like they will from what [the prosecutor] just indicated.
>
> As to cross-examination based on lesser culpability, I cannot imagine the logic in a tactic or strategy in which a victim impact witness will be cross-examined about how they must feel less strong towards a non-shooter. I mean that is such dangerous cross-examination that the possibility of backfiring is so great, I can't imagine that question being asked.

(3RT 426.)

Thus, the court ruled, if something happened regarding the penalty phase in which Navarro or Contreras presented inflammatory argument or

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[85] (See *People v. Rowland* (1992) 4 Cal.4th 238, 267-269)

evidence regarding appellant, or if the People presented evidence that was inflammatory toward just appellant, then they would deal with that at the time in a motion for a new penalty trial. As to the dilutive effect of mitigating evidence, it could easily work in appellant's favor as well by showing appellant's defense was not manufactured but was true for the other defendants as well. The court noted a recent six-defendant capital matter it had tried in which each defendant had the "same terrible background," and each was able to convince the jury to impose life without parole rather than death. The court also offered that two codefendants could be absent from the courtroom while the third presented mitigation evidence. (3RT 426-429.) The trial court denied the motion. (10CT 2975.)

2. Second Motion – for Separate Juries

Prior to guilt-phase jury selection, appellant moved for separate juries when the prosecutor announced the prosecution was filing a second amended information. The basis of his motion was that the second amended information removed Navarro from counts VI through IX and XXXVII through XL, and the multiple murder allegation against appellant and Contreras was moved from count VI to count I. (4RT 449, 453-454.) It does not appear that the court ruled on this motion or that appellant pressed for a ruling.

3. Third Severance Motion

During the People's case-in-chief, the parties discussed the admissibility of photographic evidence depicting Navarro and Contreras holding firearms. The court indicated it would sustain an objection to the photographs unless additional evidence supported admission. The court noted that any "gang signs" in the photographs were "fairly minimal" and

that, in any event, gang evidence would not be admitted in the guilt phase. Appellant's counsel objected to another photo that concerned him, in which someone was depicted flashing a gang sign over his shoulder. (11RT 1662-1676.) Appellant's counsel then objected to the People presenting in evidence an actual firearm that was recovered from Navarro's home: "And if they come in against Navarro, they are prejudicial to my client and I renew my severance motion." The court denied that motion, finding that the firearm was admissible. (11RT 1676-1677.)

4. Fourth Severance Motion

During the guilt phase, while discussing the admissibility of various exhibits, appellant's counsel moved again for severance because the court was admitting a photograph of Navarro and Contreras in which Navarro made a thumbs-up hand gesture, and Contreras extended his index and small finger on one hand. Against Mr. Leonard's objection that the photograph was "purportedly going to be indicative of Mara Salvatrucha," the court found that the jury would not know that. Appellant then renewed his severance motion because "it's gang evidence coming against the codefendants." The court denied that motion. (13RT 2203-2204.)

5. Fifth Severance Motion

During a discussion regarding the admission of various photographs (17RT 2822-2827),[86] appellant's counsel objected to photographs depicting persons other than appellant which the prosecution wanted to admit to prove intent to kill, or in the alternative, reckless indifference to life, as well as one photo that depicted appellant (17RT 2828-2832). It appears that all

[86] Appellant identifies this motion as being reported in volume 16 of the reporter's transcript. (See AOB 213.) It appears that the proceedings to which appellant refers are reported in volume 17 at the cited pages.

photographs were removed as to the guilt phase that depicted anything the jury could interpret as gang evidence. (See 17RT 2832-2841; see also 23RT 3996-3999.)

With respect to the photographs, appellant's counsel renewed appellant's severance motion if photographs were admitted of persons other than appellant holding guns and flashing gang signs. (17RT 2826-2829.) The court did not rule on this renewed severance motion. However, the court agreed to instruct the jury, and accordingly requested an appropriate instruction from appellant's counsel, that the photographs of others were not admitted as to appellant; only one photo that also depicted appellant was admissible as to him. Appellant's counsel stated that when the People moved the photographs into evidence, "they can move it into evidence against whoever they think it's appropriate to and the court can tell the jury." (17RT 2841-2845.)

The prosecutor noted that the photograph which depicted appellant showed him wearing a flowered shirt and dress pants that were described in testimony as to the Siete Mares crimes, offering that observation as "another item of relevance" for appellate review. (17RT 2844.) That photograph was later admitted into evidence. Appellant's counsel relied on his previous objection. (18RT 3123-3124.)

Later, appellant's counsel noted that they had discussed giving a limiting instruction as to photographs of Navarro and Contreras, and they had not done that. The parties noted that thus far, they had not presented the photographs in question. (19RT 3377-3378.) When the photographs in question were presented to the jury, the court admonished them as follows:

> Okay. Ladies and gentlemen, as [the prosecutor] goes through these photographs, let me just caution you that the photographs are admitted for your consideration only as to the defendant or the person shown in the photograph. [¶] So if the photograph is of Mr. Navarro, you cannot consider that picture

as against [appellant] or Mr. Contreras. It only goes as to the person in the photograph.

(20RT 3515-3516.)

When guilt-phase instructions were later given, the court gave CALJIC No. 2.07, instructing that certain evidence was admitted against one or more of the defendants and not admitted against the others, and when the evidence was admitted, the jury was instructed that it could not be considered against the other defendants. (21RT 3673; see 11CT 3099.) The court also gave CALJIC No. 2.09, instructing that certain evidence was admitted for a limited purpose, and when the evidence was admitted, the jury was admonished it could not consider the evidence for any other purpose. (21RT 3674; see 1CT 3100.)

6. Sixth Reference to Admission of Photos

Appellant cites to pages 3371 through 3373 of volume 19, where the parties discussed the admissibility of photographs previously discussed in conjunction with appellant's previous motions for severance, and implies a sixth renewal of the severance motion was made. (AOB 213.) Respondent's review of those pages discloses no such severance motion was made, although appellant's counsel did object to the admission of different exhibits. (See 19RT 3374.)

7. Sixth Motion for Severance, a Separate Penalty Phase Jury, or Sequential Penalty Trials

After the jury was instructed in the guilt phase and began deliberations, appellant moved for a separate penalty-phase trial. (11CT 3067.) He argued that unless separate trials or juries were implemented, then the jury might apply a "broad brush" and say "if you kill one, let's kill them all." Appellant would likely come out the "heavy,"

which could also result in the jury finding death as to appellant and life as to Contreras and Navarro. Moreover, if the prosecution sought to present any gang evidence as to appellant or his codefendants, that would cause prejudice. The court made clear that no gang evidence would be admitted as to appellant. (See 23RT 3992-3997.)

The prosecutor argued that the People's theory of liability had always been one of joint responsibility for each defendant based on principal liability, aider and abettor liability, and conspirator liability, based on eyewitness testimony from the robberies, as well as photographs and property seized from each of the defendants' locations. Many cases were jointly tried in the penalty phase where the defendants had differing degrees of prior criminality, and where some were being tried for crimes that the other codefendants did not commit. Here, the defendants were jointly charged and tried as to guilt, and the joint-responsibility theories would all be argued to the jury. Appellant's counsel argued that since the Eighth Amendment required an individual determination as to each defendant, the prosecution's joint responsibility argument was improper. The court found that the People could properly argue that the circumstances of the crime showed equal participation. (23RT 3998-4001.) The court denied the motion. (11CT 3067.) It found that the instructions to be given would properly guide the jury in their task whether or not there were separate juries. (23RT 4002-4004.)

Counsel for codefendant Contreras subsequently asked the court for a separate penalty trial for Contreras, to ensure that Contreras received an individualized sentencing. Appellant's counsel joined in that motion. The court noted that it would not permit counsel to cross-examine other defendants' witnesses during the penalty phase. (23RT 4036-4047.) The court found that the defendants were each in similar positions with respect to the crimes. The People would not be permitted to argue anything other

than individual information as to each defendant. (23RT 4048-4049.) The court found,

> It seems to me no matter what happens, if we have the jurors separated, that either way the jury, the entire jury is going to hear all the information whether it's [appellant's counsel's] information or your information and either way the jury has to abide by the admonition to separate and not consider the information presented as to one as against the other.
>
> I would indicate that if at the point where, say, [appellant's counsel's] witness testifies and one or the other of you anticipate some cross-examination, I would like a 402 at the side to determine whether or not there is anything that at least we can make a record on that may filter over and affect one of the other defendants and I would invite you, if it appears at the end of the trial, depending on what the verdicts of the jurors is, that if in fact there was some kind of inescapable inference that should not have been presented to the jury, I invite you to make a motion for new trial.
>
> But for us to make that type of decision now, based on pure speculation, is unwise and inappropriate and it infers no matter what the scenario is the jury will not follow an admonition we are all tied by and only protected by an admonition to the jury to completely consider the defendants separately, and that is something we have been hammering since the beginning of voir dire.
>
> The motion is denied. I don't see anything different than there was when we heard the motion twice before.

(23RT 4049-4050.)

8. Seventh Motion for a Separate Penalty Phase Trial or Jury

During the penalty phase, appellant's counsel asserted that the admission of purported gang evidence against Navarro and Contreras, as well as evidence that, by comparing appellant and his codefendants, made appellant look worse than they did, demonstrated his "objection from the

start" was correct. The court denied the "motion," which the court deemed "continuing." (28RT 4871-4872.)

9. Penalty Phase Argument by the People

The prosecutor delivered the People's penalty-phase jury argument, in pertinent part, as follows. The People would rely, in the penalty phase, "on the weight and gravity and the convincing force of the evidence" that was presented during the guilt phase. (29RT 5261-5262.) The character of "these defendants" was revealed by their violent conduct above and beyond that necessary to complete the robberies. (29RT 5264.) The prosecutor discussed what "they" did during the robberies, and specifically mentioned evidence against individual defendants, demonstrating the conduct of individual defendants, as appropriate. The prosecutor noted testimony that Contreras's bullet hit Mr. Kim in the eye,[87] thus demonstrating that appellant was not the only gunman. (29RT 5263-5270.)

The prosecutor discussed the murders, again referring to what "they" did, and also discussing specific trial evidence of what individual defendants did. (29RT 5270-5278.) The prosecutor did argue, as to appellant's individual conduct for Officer Hoglund's murder, in pertinent part, that he was "the hit man," that he was "the most violent of all the three defendants as evidenced by the prior six robberies," and that appellant made a "cold, calculated decision" based on his assessment to kill Officer Hoglund. Appellant had options available to him other than shooting Officer Hoglund but killed him because appellant "liked it." And, appellant cursed Officer Hoglund as he killed him, demonstrating that appellant acted from "spite, ill will, contempt, hatred and despise." (29RT 5274-5276.)

The prosecutor argued that appellant's conduct in the crimes demonstrated he was not capable of a religious conversion. (29RT 5278.)

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[87] See volume 17 of the reporter's transcript at page 2769.

She argued that photos depicted Contreras and Navarro in various poses with guns demonstrated "a carefree attitude towards killing and death of others," and their close criminal association. Another photo of all three defendants depicted them at a jewelry store. The prosecutor discussed photographs of Contreras and Navarro that demonstrated their close relationship. (29RT 5280-5282.)

The prosecutor noted that aggravation versus mitigation must be determined separately as to each defendant, "just like they were an individual case." She urged that each defendant was "morally responsible" just as each had been found to be legally responsible. (29RT 5282-5283.) They "don't back out, they don't back off, they back each other up, indicating their approval and acceptance of whatever happened at each location was okay by them." The prosecutor repeatedly argued that all of the defendants deserved the death penalty based on their conduct, and on the "increased frequency and the intensity of the violence that occurred." (29RT 5284-5285; see 29RT 5285-5287.) She also argued that the defendants never demonstrated remorse. (29RT 5286-5291.) With respect to appellant personally, the prosecutor discussed the Rod's Coffee Shop incident, and his prior conviction for sale of cocaine. She noted Navarro's prior robbery conviction. (29RT 5291.)

After a recess and before the prosecutor resumed her argument, the court "remind[ed]" the jury:

> Again, in presenting the argument to you on behalf of the People, they are combining their argument for all three. But, again, you must remember that your consideration has to be individual for each defendant. [¶] And, again, with respect to the factors in mitigation in rebuttal, you can only consider the evidence presented by a particular defendant as against that defendant and not as against the others.

(30RT 5308.)

When she resumed the People's argument, the prosecutor discussed Contreras's individual penalty-phase defense. (30RT 5309-5311.) She then discussed appellant's defense -- his purported religious conversion. She argued why it lacked believability given his lack of remorse, and his testimony that the prosecutor asserted disclosed lies about appellant's actions during the crimes. She also discussed appellant's claim that Mr. Kim had shot at him first, leaving a bullet in appellant's body. (30RT 5311-5341.) She also discussed Navarro's individual penalty-phase defense. (30RT 5341-5348.) The prosecutor then discussed additional specific aspects of each defendants' background that were offered in mitigation, as well as arguments in against various mitigating factors. (30RT 5349-5361.)

The prosecutor specifically argued that appellant was the leader and the major participant in the robberies and in the commission of violence, and that he killed Mr. Kim and Officer Hoglund. She also argued that the evidence showed Contreras to have been "the killer of [Mr.] Kim," and that he "was a major participant in the other robberies and the other crimes of violence[,] and he also intended to kill the officer." As to Navarro, she argued that he acted as a member of the core group of robbers, and that his actions in "crowd control" allowed "the others" to commit their "evil deeds." Further, Navarro was an active participant in the robberies, based on his statements to Rosa Santana he intended to kill Officer Hoglund and fired at him, and he shared in the proceeds from the robberies. (30RT 5361-5363.)

The prosecutor then made a more generalized argument why none of the defendants deserved any mercy from the jury, and criticized arguments that the defendants were likely to raise against imposition of the death penalty here. (30RT 5363-5384.) The prosecutor closed with the following:

[Appellant] fired the final bullet that killed Officer Hoglund in this instance, but Contreras and Navarro had their finger on the trigger. [Appellant] wouldn't have committed the robbery and he wouldn't have committed the murder without the preapproval, the support and the assistance from his companions, Contreras and Navarro. He knew they would be there for him and he knew they would back him up, and he was absolutely right.

These defendants shared equally in the plan to kill the officer. They shared equally in the proceeds from that robbery. And they deserve to share equally in the penalty.

I am asking you, ladies and gentlemen, to send a message to these vicious callous predators who murdered, shot, beat, tortured and terrorized their way from one location in the county to the other, leaving behind a trail of broken lives and bodies and dreams, and then gunned down the one police officer who stood up to try to stop them.

Tell them that this behavior will not be tolerated by our law abiding citizens of our community because there is nothing the defendants can do and nothing that can be done to these thugs to pay for what they have done. They deserve the death penalty for the killing of Officer Hoglund, alone, let alone the rest of the crimes you found them guilty of.

This is a serious decision and it's a weighty decision that you have to make. And if you decide to give the death penalty to one or two or three of these defendants, do not feel guilty, because these defendants deserve it based upon their own actions, their decision, their responsibility only, not yours. They, themselves, committed all the crimes here. Not you. Not me. Not the judge. Not the attorneys. They are solely responsible.

(30RT 5384-5386.)

10. Penalty Phase Jury Instructions

The court instructed the jury with CALJIC No. 1.00, in pertinent part, as follows:

> Your duty in this phase of the trial is different than your duty in the first "guilt" phase. Your responsibility in this penalty phase is not merely to find the facts but also to weigh the evidence and to render an individualized determination about the appropriate penalty.

(29RT 5234; see 12CT 3497.) The court gave CALJIC No. 8.84.1, in pertinent part, as follows:

> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You are to be guided by the previous instructions given in the first phase of the trial which are pertinent and applicable to the determination of penalty. However, you are to completely disregard any instructions in the first phase which had prohibited you from considering pity or sympathy. In determining the penalty, the jury may take into consideration pity or sympathy.

(29RT 5235; see 12CT 3497.) The court gave CALJIC No. 8.84, as follows:

> The defendants in this case have been found guilty of murder of the first degree. The allegation that the murder was committed under one or more of the special circumstances has been specially found to be true. [¶] It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances alleged in this case have been specially found to be true. [¶] Under the law of this state, you must now determine which of said penalties shall be imposed on each defendant.

(29RT 5238; see 12CT 3498-3499.) The court also gave CALJIC No. 8.85, which set forth the various factors the jury should consider, "In determining which penalty is to be imposed on each defendant." (29RT 5238; see 12CT 3499.) And, the court gave CALJIC No. 8.88, in pertinent part, as follows:

> In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted upon all the defendants, but you do agree on the penalty as to one or more of them, you must render a verdict as to the one or more upon which you do agree.

(29RT 5255-5256; see 12CT 3505.)

11. Deliberations and Related Proceedings

Following the reading of the jury instructions and argument by counsel, the deliberations began on November 16, 1994, and the proceedings were adjourned for the day. (30RT 5499-5508; 12CT 3491.) Deliberations began on the morning of November 17, 1994, at 8:30 a.m., and continued that entire day. (30RT 5509; 12CT 3492.) The jurors deliberated on November 18, 1994, from 8:40 a.m., to 11:27 a.m. (30RT 5510; 12CT 3493.) The jury resumed deliberations on November 21, 1994, then announced they had reached a verdict as to appellant and were hopelessly deadlocked as to Contreras and Navarro. The trial court declared a mistrial as to Contreras and Navarro. (30RT 5511-5523; 12CT 3518-3519.) The final vote was 10 to two for life as to Navarro, and eight to four for life for Contreras. (30RT 5519.)

B. The Trial Court Properly Joined All Defendants for Trial

Section 1098 provides that multiple defendants who are jointly charged must be jointly tried unless the court, in its discretion, orders separate trials. (*People v. Homick* (2012) 55 Cal.4th 816, 849.) The California Legislature has expressed a strong preference for joint trials. (*Ibid.*; See *People v. Soper* (2009) 45 Cal.4th 759, 771–772 [expressing judicial preference for joinder in context of joined charges]; see also *People v. Burney*, *supra*, 47 Cal.4th at p. 236; *People v. Lewis, supra,* 43 Cal.4th at p. 452.) Trial courts must thus order a joint trial as the "rule,"

and separate trials as an "exception." (*People v. Cleveland, supra*, 32 Cal.4th at p. 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 40, internal quotations omitted.)

Separate trials are usually ordered only in the face of an "incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Box* (2000) 23 Cal.4th 1153, 1195, disapproved on another point in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10, internal quotations omitted; see also *People v. Souza* (2012) 54 Cal.4th 90, 109; *People v. Cleveland, supra*, 32 Cal.4th at p. 726.) Severance may also be called for where there is a serious risk that a joint trial would compromise one of a defendant's specific trial rights, or would prevent the jury from reaching a reliable penalty determination. (*People v. Lewis, supra*, 43 Cal.4th at p. 452; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40.) As this Court noted in *People v. Homick, supra*, 55 Cal.4th at p. 854,

> "A prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a codefendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the codefendant." (*People v. Letner and Tobin* [(2010)] 50 Cal.4th [99,] 152.)"

As this Court also noted in *People v. Homick, supra*, 55 Cal.4th at p. 854,

> "To justify severance "the conflict between the defendants alone will demonstrate to the jury that they are guilty. If, instead

> 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.' [Citations]." (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 150.)"

(See also *People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 41.)

However, even antagonistic defenses alone do not compel severance. (*People v. Cummings, supra*, 4 Cal.4th at p. 1286.) "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case. (*People v. Souza, supra,* 54 Cal.4th at p. 109, internal quotations and citations omitted; see also *People v. Hardy* (1992) 2 Cal.4th 86, 168.) Even where there is some evidence before the trial court that jointly tried defendants would present different and "possibly conflicting defenses," a joint trial is "not necessarily unfair." (*People v. Coffman & Marlow, supra*, 34 Cal.4th at pp. 41-42.) "Thus, '[a]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' [Citation.]" (*People v. Hardy, supra*, 2 Cal.4th at p. 168.)

Trial court rulings denying severance motions are reviewed for abuse of discretion based on the facts before the court at the time of the ruling. (*People v. Homick, supra,* 55 Cal.4th at p. 849; *People v. Burney, supra,* 47 Cal.4th at p. 237; *People v. Lewis, supra,* 43 Cal.4th at p. 452.) If an appellate court finds the trial court abused its discretion in this regard, reversal may be required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Homick, supra,* 55 Cal.4th at p. 849; *People v. Burney, supra*, 47 Cal.4th at p. 237; *People v. Lewis, supra,* 43 Cal.4th at pp. 452-453; *People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 41.) If the trial court did not

abuse its discretion based on the facts then before it, the judgment may be reversed only upon a finding that joinder actually resulted in a gross unfairness that denied the appellant due process. (*People v. Homick, supra,* 55 Cal.4th at p. 849; *People v. Lewis, supra,* 43 Cal.4th at p. 452.) Severance motions in capital cases generally receive heightened scrutiny for potential prejudice. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at pp. 43–44.)

1. Guilt Phase

Here, appellant's counsel limited appellant's motion for severance to the penalty phase of the trial. (See 3RT 424.) Thus, any appellate claims as to the propriety of the trial court's rulings during the guilt phase as to severance must fail, since they were essentially not raised below. However, in an abundance of caution as to the guilt phase, appellant can establish an abuse of discretion only upon a "clear showing of potential prejudice." (*People v. Manriquez* (2005) 37 Cal.4th 547, 574; *People v. Carter, supra,* 36 Cal.4th at pp. 1153-1154.) Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41.)

Here, appellant and his codefendants were charged with having committed the same crimes (with minor irrelevant differences), thus presenting a "classic case" for a joint trial. (*People v. Homick, supra,* 55 Cal.4th at p. 849; see also *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 40; *People v. Cleveland, supra,* 32 Cal.4th at p. 726.) All three defendants were charged with capital crimes. The People prosecuted appellant, Contreras, and Navarro under various theories of criminal liability, including aider-and-abettor and conspiracy theories. Thus, virtually all of the evidence of the crimes, except as indicated to the

jury by the trial court, was cross-admissible against appellant, Contreras, and Navarro. (*People v. Soper, supra,* 45 Cal.4th at pp. 774-775.) "Cross-admissibility of evidence is sufficient but not necessary to deny severance." (*People v. Manriquez, supra,* 37 Cal.4th at p. 574.) Significantly, the evidence against each defendant as to guilt was overwhelming, and equally strong. (*People v. Avila, supra,* 38 Cal.4th at p. 575.) Moreover, there was no danger of jury confusion or prejudicial association, neither appellant nor his codefendants testified during the guilt phase trial, and there was no suggestion that either Contreras or Navarro would have exonerated appellant in separate trials – indeed, given the overwhelming evidence of appellant's guilt, it is not conceivable that they could have done so. There was no reasonably-raised issue concerning extrajudicial statements in which a codefendant implicated defendant. Finally, no evidence was presented at the joint guilt phase trial that would not have been presented at separate guilt phase trials since appellant and his codefendants essentially committed the same crimes.

As this Court held in *People v. Avila, supra,* 38 Cal.4th 491,

> This was a classic case for a joint trial: all defendants faced equivalent charges, most of the evidence was cross-admissible, and there was strong evidence against each defendant. Moreover, contrary to defendant's argument, the factors supporting severance were weak. For example, assuming [codefendant]'s extrajudicial statement about defendant incriminated defendant, it did not prejudice defendant because the court admonished the jury not to consider it for any purpose against defendant, and we presume the jury followed the instruction. [Citation.] Undoubtedly, the evidence showed defendant was associated with [the codefendant]. That association, however, did not dictate severance, considering that the evidence also showed defendant, not [the codefendant], actually shot the victims and was more culpable than [the codefendant].

(People v. Avila, supra, 38 Cal.4th at p. 576.) The instant case is analogous to *Avila* – here, each defendant faced equivalent charges, almost all of the evidence was cross-admissible, there was strong evidence against each defendant, any factors supporting severance were weak in force, the jury was instructed that some evidence was not admissible against appellant, the prosecutor's jury arguments and the court's instructions emphasized that the jury had to make separate findings against each defendant, and the evidence of appellant's guilt was overwhelming. Appellant has failed to show there was potential prejudice at the time of the trial court's rulings before or during the guilt phase, or in hindsight any prejudice, and thus, cannot show an abuse of discretion. (*People v. Thomas* (2012) 52 Cal.4th 336, 350-352.)

In any event, even if appellant could show an abuse of discretion, he would still have to show it was reasonably probable that he would have obtained a more favorable result at a separate trial. (*People v. Homick, supra,* 55 Cal.4th at p. 849; *People v. Burney, supra,* 47 Cal.4th at p. 237; *People v. Lewis, supra,* 43 Cal.4th at pp. 452-453; *People v. Coffman & Marlow, supra,* 34 Cal.4th at p. 41.) Appellant cannot do so here. The eyewitness testimony, the video from George's market, and appellant's possession of stolen jewelry would have remained as insurmountable for appellant in a severed trial as it was in the joint trial. The jury in a severed trial would still have learned of the same evidence that was presented in the instant joint trial, except perhaps for a few pieces of photographic evidence that depicted only Navarro and Contreras. However, that evidence was incidental as to appellant, and the jury was instructed that evidence not admitted against a particular defendant could not be considered against that defendant. Therefore, even if appellant received a separate guilt-phase trial, the verdict would have been no more favorable to him.

2. Penalty Phase

Nor can appellant show an abuse of discretion by the trial court in denying his penalty-phase-related motions for severance or separate juries. There is an "'undisputed statutory preference for a joint penalty trial following a similar trial of guilt (§ 190.4).'" (*People v. Letner & Tobin, supra*, 50 Cal.4th at p. 196, quoting *People v. Roberts* (1992) 2 Cal.4th 271, 328.) Section 190.4, subdivision (c), "expresses a clear legislative intent that both the guilt and penalty phases of a capital trial be tried by the same jury." (*People v. Rowland* (1992) 4 Cal.4th 238, 269; see also *People v. Bivert, supra,* 52 Cal.4th at p. 108.) The trial court must exercise its broad discretion to resolve motions to sever the penalty phases of jointly tried codefendants in a manner consistent with "'the need for individualized consideration as a constitutional requirement in imposing the death sentence.'" (*People v. Letner & Tobin, supra,* 50 Cal.4th at p. 196, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [57 L.Ed.2d 973; 98 S.Ct. 2954]; see also *People v. Ervin* (2000) 22 Cal.4th 48, 95-96)

This Court rejected a claim of improper failure to sever defendants for the penalty phase trial in *People v. Letner & Tobin, supra,* 50 Cal.4th 99, finding the trial court's ruling denying severance did not constitute an abuse of discretion, or deprive each defendant of an individualized penalty determination. This Court concluded that, as there was no showing the jurors "were unable or unwilling to assess independently the respective culpability of each codefendant," there was no basis upon which to find an abuse of the trial court's discretion. (*People v. Letner & Tobin, supra,* 50 Cal.4th at p. 197.)

In part, this Court based its holding on the facts that the prosecutor did not argue the jury need not separately consider the sentence for each defendant, but rather argued that each defendant was equally culpable, and that each defendant's conduct warranted the death penalty. To the extent

either defendant's evidence might have denigrated the other, the prosecutor did not exploit the defendants' respective mitigation cases. The trial court instructed the jury that it must consider separately the evidence concerning each defendant, must not consider evidence admitted for a limited purpose in favor of or against one defendant in deciding the penalty for the other defendant, and it must reach a separate verdict as to each defendant. The trial court also specifically instructed exactly which criminal activity of each defendant could be considered in aggravation, and that the jury could not consider any other criminal activity as aggravating evidence. This Court noted that the jury was presumed to have followed the trial court's instructions in the absence of any indication it was unwilling or unable to do so. (*People v. Letner & Tobin, supra,* 50 Cal.4th at pp. 196-197.) This Court further relied on the fact that the jury reached a penalty verdict as to one defendant, and was unable, at that time, to reach a verdict as to the other. (*People v. Letner & Tobin, supra,* 50 Cal.4th at pp. 197; see also *People v. Roberts, supra*, 2 Cal.4th at p. 328 [concluding that the record and the jury's "careful consideration of its penalty verdict" demonstrated that the defendant received an individualized determination of culpability].)[88]

Here, like in *Letner & Tobin*, there is no showing that the jurors "were unable or unwilling to assess independently the respective culpability of each codefendant," and there is no basis upon which to find an abuse of the trial court's discretion. (*People v. Letner & Tobin, supra,* 50 Cal.4th at p. 197.) The prosecutor here emphasized repeatedly during argument that the jury must separately consider the sentencing choice it would make as to

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[88] This Court also relied on the fact that, ultimately, the penalty jury also reached death verdicts against the codefendant. (*People v. Letner & Tobin, supra,* 50 Cal.4th at pp. 196-197.) Here, the jury could not reach penalty-phase verdicts as to either Navarro or Contreras.

each defendant on an individual basis, and argued the evidence individually as to each defendant, and did not seek to exploit appellant's or his codefendants' respective mitigation cases against the others. (29RT 5263-5278, 5282-5283; 30RT 5309-5348, 5349, et seq.) The trial court instructed the jury that it must render individual sentencing determinations as to each defendant. (30RT 5308; see also 29RT 5234; see 12CT 3497 [CALJIC No. 1.00]; 29RT 5238; see 12CT 3498-3499 [CALJIC N. 8.84]; 29RT 5238; see 12CT 3499 [CALJIC No. 8.85].) The trial court also specifically instructed exactly which criminal activity of each defendant could be considered in aggravation, and that the jury could not consider any other criminal activity as aggravating evidence. (29RT 5246-5247; see also 12CT 3502.) And, the instant trial court gave CALJIC No. 8.88, in pertinent part, as follows:

> In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted upon all the defendants, but you do agree on the penalty as to one or more of them, you must render a verdict as to the one or more upon which you do agree.

(29RT 5255-5256; see 12CT 3505.) Significantly, further demonstrating that the trial court did not abuse its discretion in denying appellant's penalty-phase severance motions, the jury deadlocked as to Contreras and Navarro, further demonstrating that it in fact rendered an individualized sentencing determination as to each defendant. (30RT 5511-5523; 12CT 3518-3519.)

This Court also rejected the claim that penalty-phase severance should have been granted in *People v. Roberts, supra,* 2 Cal.4th 271, finding as follows:

> Defendant asserts that six witnesses appeared against [the codefendant] and twenty-four against him, each different. He argues the lack of cross-admissible evidence mandated a severed

> trial, given the heightened scrutiny accorded to severance motions in capital cases. [Citation omitted.] But the court did not abuse its discretion [citations omitted], particularly in light of the undisputed statutory preference for a joint penalty trial following a similar trial of guilt (§ 190.4). Nor do we agree with defendant that the prosecutor improperly sought to portray [the codefendant] as the lesser offender. The prosecutor excoriated both defendants as wretched human beings; he did not spare [the codefendant] in the least. Moreover, if at times the prosecutor had less critical things to say about [the codefendant] than about defendant, it was because defendant was the worse offender: there was testimony he was the actual stabber of [the victim], and defendant, a convicted murderer, also had a more violent past than did [the codefendant], who was in prison for lesser though serious crimes. The verdict shows that the jury carefully weighed the culpability of each defendant and found defendant more blameworthy, but took care to discriminate among the charges on which defendant was convicted, deciding that he should be executed for the murder of [the victim] and for the violation of section 4500 but should receive life imprisonment without possibility of parole for [a different victim]'s death. This was not a jury that the record reveals to have been swayed by anything other than the relative culpability of each defendant.

(*People v. Roberts, supra*, 2 Cal.4th at p. 328.)

Here, as in *Roberts,* appellant was the most culpable out of the three defendants; that is, Navarro's and Contreras's brutality and violence did not rise to the same level as did appellant's. Appellant's murder of Officer Hoglund was particularly heinous – appellant cursed him in a particularly vile and gratuitous fashion, then executed him before the officer had even drawn his firearm, ignoring the opportunity to escape and killing Officer Hoglund with vituperation and obvious malice. As in *Roberts*, "This was not a jury that the record reveals to have been swayed by anything other than the relative culpability of each defendant." (*People v. Roberts, supra*, 2 Cal.4th at p. 328.) The trial court here did not abuse its discretion in

denying appellant's severance motions with respect to the guilt and penalty phases.

3. Separate Juries

Nor has appellant shown error in the trial court's denial of his request for separate penalty juries. Section 190.4, subdivision (c), provides that the same jury that decided guilt in a death penalty case shall also decide the penalty phase, "unless for good cause shown" the court decides to discharge that jury. While trial courts retain discretion to empanel separate juries, there is a "long-standing legislative preference for a single jury to determine both guilt and penalty." (*People v. Bennett* (2009) 45 Cal.4th 577, 599; *People v. Catlin, supra,* 26 Cal.4th at p. 114.) The decision whether to implement multiple juries is, like the denial of a severance motion, largely within the trial court's discretionary authority. (*People v. Bennett, supra,* 45 Cal.4th at pp. 599-600; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174; *People v. Kraft, supra,* 23 Cal.4th at p. 1069.) To obtain reversal on appeal, the defendant must show that the use of only one jury resulted in identifiable prejudice, or "'gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law,'" (*People v. Taylor, supra,* 26 Cal.4th at pp. 1174-1175, quoting *People v. Cummings, supra,* 4 Cal.4th at p. 1287.)

The reasons set forth above that demonstrate there was no reversible error trying all defendants jointly apply equally to the question of whether the trial court erred in not granting appellant's request for separate juries. This Court found the trial court in *Taylor* properly denied the defendant's motion for severance or separate juries based on the following:

> In the present case, we find nothing in the record indicating defendant's jurors failed to assess independently the appropriateness of the death penalty for defendant or [his codefendant], or engaged in improper comparative evaluations

> of these men. The penalty phase jury was instructed to consider the evidence separately as to each defendant, and not consider as evidence against one defendant any evidence admitted only against another. Moreover, the jury was told to "decide separately the question of the penalty as to each of the defendants," the same instruction given in the *Ervin* case. (*People v. Ervin, supra*, 22 Cal.4th at p. 95.) These instructions were adequate to ensure individual consideration of penalty as to each defendant. In the absence of a showing that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant, we can find no abuse of discretion in failing to sever the trial or order separate penalty phase juries.

(*People v. Taylor, supra,* 26 Cal.4th at pp. 1173-1174.)

Here, as in *Taylor*, and for the same reasons set forth above supporting the trial court's exercise of discretion in denying appellant's severance motions, the trial court properly exercised its discretion in denying separate juries.

C. Trying Appellant Jointly With Codefendants Navarro and Contreras Did Not Violate Appellant's Rights Under the Eighth Amendment and to Due Process, or Result in Appellant's Death Sentence

As this Court has held, even if the denial of severance or for separate juries was not erroneous when made, reversal may still be required if proceeding with a joint trial was so grossly unfair that due process was violated. (*People v. Gamache* (2010) 48 Cal.4th 347, 381-382; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998.) The mere fact that, in a joint trial, the defendant's codefendants could blame him is not a basis to find such gross unfairness, since,

> This is a common concomitant of a joint trial; it is the reverse of the opportunity severed trials afford former codefendants to put forward an "empty chair" defense, in which all blame is heaped on the absent accomplice.

(*People v. Gamache, supra*, 48 Cal.4th at pp. 381-382.)

This Court rejected a claim similar to appellant's in *People v. Burney, supra,* 47 Cal.4th at pages 256 through 257. Like appellant here, Burney was the actual gunman, and he claimed that trying him along with the codefendants allowed the prosecutor to emphasize a heightened culpability as to Burney with respect to the penalty phase, especially given section 190.3, factor (j), which permitted the jury to consider "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." This Court found that the trial court did not abuse its discretion and that Burney did not suffer actual prejudice from the trial court's denial of severance. While the prosecutor did refer to section 190.3, factor (j), and commented upon Burney's primary role, the prosecutor's comments were fully supported by the evidence, including Burney's own statements. The prosecutor did not refer during the penalty phase to the codefendants' redacted statements, which were not admitted into evidence against Burney, and the jury was instructed not to consider those statements against Burney in the penalty phase. (*People v. Burney, supra,* 47 Cal.4th at p. 256-257.)

Here, appellant's Constitutional rights were not violated by trying him along with Navarro and Contreras. They committed all of the crimes together (with minor exception as to Navarro), the evidence against each was cross-admissible, no conflicting defenses were presented, neither exculpatory nor inculpatory statements by Navarro or Contreras were implicated, the evidence against appellant was indeed overwhelming both in the guilt and penalty phases, the jury was properly instructed, and the prosecutors did nothing to improperly exploit the fact that appellant was jointly tried with Navarro and Contreras.

A similar claim was raised and rejected in *People v. Ervin* (2000) 22 Cal.4th 48:

> We see nothing in the record suggesting the jury assigned undue culpability to defendant after hearing his codefendants' mitigating evidence. Defendant had ample opportunity to present, and did present, testimony and argument regarding his own good character and rehabilitation. The prosecutor made it clear to the jury that McDonald's role as "mastermind" of his ex-wife's murder fully justified imposing a death sentence on him. The fact that the jury returned a death verdict for McDonald shows it was not unduly impressed by the array of mitigating evidence introduced on his behalf. Robinson's lesser verdict can only reflect the jury's careful consideration of the respective culpability of the three codefendants.

(*People v. Ervin, supra*, 22 Cal.4th at p. 96.)

Similarly, under the circumstances here, no gross unfairness resulted from the joint trial. (*People v. Lewis, supra*, 43 Cal.4th at p. 461; *People v .Coffman & Marlow, supra*, 34 Cal.4th at p. 41.) Appellant was convicted of the charged crimes and sentenced to death because of the overwhelming evidence against him, not because he was tried with Navarro and Contreras. Appellant's claims regarding severance fail. While appellant claims that prejudicial and irrelevant evidence was admitted against Navarro and Contreras to appellant's prejudice, and otherwise that he suffered prejudice under *Chapman v. California, supra,* 386 U.S. at pages 24 through 25, and *People v. Brown* (1988) 46 Cal.3d 432, at pages 447 through 448 (see AOB 208-223), respondent submits that the trial court's careful scrutiny with respect to the admission of evidence, the overwhelming evidence of appellant's guilt and favoring imposition of the death penalty, plus the trial court's limiting instructions to the jury as set forth above all demonstrate that appellant suffered no prejudice by virtue of the trial

court's rulings denying severance, separate juries, or sequential penalty trials.

XIV. THE TRIAL COURT PROPERLY REPLACED THE COURT INTERPRETER DURING APPELLANT'S CROSS-EXAMINATION IN THE PENALTY PHASE

Appellant claims that the trial court improperly replaced the court interpreter who was interpreting for him during the penalty trial. (AOB 224-235.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

During cross-examination of appellant in the penalty phase by the prosecutor, the court recessed for lunch. (26RT 4565-4566.) When court resumed, counsel for codefendant Contreras stated that one of the court interpreters approached him during the lunch break and said the prosecutor had "verbally attacked her" for the manner in which she was interpreting. (26RT 4567.) The court found the following:

> It was brought to my attention and I agree. I will have to admit in the translation the tone of voice has been entirely different for the questions directed by the D.A. as opposed to the responses. The interpreter was literally shouting the questions. [The prosecutor's] voice was high, but she was shouting the questions [the prosecutor] asked in an entirely different tone than the responses by [appellant].
>
> And I'm not saying – I am not making a comment, but I think at this point with the interaction that is going on, maybe we can switch without putting any pressure on you.

(26RT 4568.) The interpreter thanked the court. (26RT 4568.) Appellant's counsel asserted that the prosecutor was "shouting the questions." (26RT 4568.) The court responded,

> The interpreter should just be interpreting, there should be no hand motions, simply the interpretation without a change in voice. The change in voice could affect the jury in some way to hurt your client, too, and I wasn't comfortable with it either, so it was brought to my attention.
>
> The prosecutor apparently did have a conversation. At this point I would like to switch, keep her in here because we need her, and I don't see any problem with the interpretation, but I did notice the change in her voice.

(26RT 4568-4569.) The court noted that the jury was not affected by any actions of the prosecutor, who denied threatening the interpreter. The court wanted to relieve the interpreter of any pressure. The court noted that, while there was nothing wrong with what the interpreter was reporting, the court did "notice a very substantial change in the tone." (26RT 4569.)

Appellant's counsel objected to "the change in the interpreters" because the same interpreter had been working during appellant's direct examination, and most of his cross-examination. (26RT 4569.) The court overruled the objection, finding,

> We have three interpreters in here. When we don't have somebody on the stand we have two, they are constantly switching off. I don't see anything that will telegraph anything to the jury. They are constantly switching.

(26RT 4569.) The court further noted that the prosecution witnesses did not all use the same interpreter, and that there was nothing "affecting the jurors in this switch." (26RT 4570.)

Later, with respect to appellant's motion for a new trial, the court found as follows:

> With respect to the interpreter, no defendant or no witness has a right to have an interpreter act out for them their emotions and certainly what the court saw was great emotion invested in the interpreter's interpretation. There were gestures

> totally inappropriate and unprofessional. Certainly the interpreter who substituted for the interpreter we did have at the time was very professional. And I didn't see anything improper about the actual interpretation, there was nothing with the words, it was the inflection, the emotional addition to the statements, as well as the gestures.

(26RT 5594-5595.)

B. The Trial Court Properly Exercised Its Discretion and Replaced the Interpreter During the Penalty Phase

A person unable to understand English who is charged with a crime has a right under the California Constitution to an interpreter[89] throughout the proceedings. (*People v. Aguilar* (1984) 35 Cal.3d 785, 790; Cal. Const., art. I, § 14; see also *People v. Carreon* (1984) 151 Cal.App.3d 559, 566-567 [prior to the right to an interpreter being stated in the California Constitution, the failure to appoint an interpreter was sometimes seen as a violation of due process, and could also infringe upon a defendant's rights to the effective assistance of counsel, to be present at trial, and to confront witnesses].) The decision on whether to appoint an interpreter falls within the trial court's discretion. (*People v. Augustin* (2003) 112 Cal.App.4th 444, 451.)

It is well settled that a defendant is entitled to a competent witness interpreter. (*People v. Aranda* (1986) 186 Cal.App.3d 230, 237; *People v.*

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[89] As this Court has noted, an interpreter in criminal proceedings provides three services: (1) they permit the questioning of non-English speaking witnesses (called a "witness interpreter"); (2) they facilitate a non-English speaking defendant's understanding of the proceedings and the communication among counsel and the court (called a "proceedings interpreter"); and (3) they enable a non-English speaking defendant to communicate with his attorney (called a "defense interpreter"). (*People v. Aguilar* (1984) 35 Cal.3d 785, 790.) The issue raised here would appear to implicate the first category of interpreters.

Estrada (1986) 176 Cal.App.3d 410, 415.) Interpreters are treated, for the purpose of determining their qualification to interpret in court proceedings, as expert witnesses. (*People v. Roberts* (1984) 162 Cal.App.3d 350, 355; see also Evid. Code § 750 [court interpreters are subject to all of the rules relating to witnesses].) The competence of an interpreter may be raised whenever it becomes an issue. (*People v. Aranda, supra,* 186 Cal.App.3d at p. 237.) The competence of the interpreter is ordinarily for the trial court to determine. (*People v. Mendes* (1950) 35 Cal.2d 537, 543; *People v. Roberts, supra,* 162 Cal.App.3d at p. 355.)

It is within the trial court's discretion to determine whether a challenge to an interpreter's competency at trial is justified. (*People v. Mendes, supra,* 35 Cal.2d at p. 543; *People v. De Larco* (1983) 142 Cal.App.3d 294, 306; see *People v. Valencia* (1915) 27 Cal.App. 407, 408 ["The propriety of calling an interpreter and the fitness of the person so called are matters for the trial court"].) The determination of whether an interpreter is qualified or competent will not be disturbed on appeal absent a showing of a manifest abuse of that discretion. (*People v. Kelly* (1976) 17 Cal.3d 24, 39; *People v. Mendes, supra,* 35 Cal.2d at p. 543; *People v. Aranda, supra,* 186 Cal.App.3d at p. 237; *People v. Roberts, supra,* 162 Cal.App.3d at p. 355.) Generally, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998.)

Here, the trial court personally observed the interpreter's conduct in the courtroom and found it was problematic because of the level of drama the interpreter was adding to or interjecting in her translation during appellant's cross-examination by the prosecutor. The trial court made a record of its findings. The interpreter used different tones of voice for the questions asked by the prosecutor and the responses, and was "literally shouting the questions" in an "entirely different tone." (26RT 4568.)

Against appellant's counsel's assertion that the prosecutor was shouting his questions (26RT 4568), the court found, that the interpreter "should just be interpreting . . . without a change in voice." The court noted it was uncomfortable with the manner in which the interpreter was translating. (26RT 4568-4569.) The court later found that the interpreter had been investing "great emotion" in her work, using gestures that were "totally inappropriate and unprofessional." (26RT 5594-5595.) Moreover, there are no allegations that there were problems in the translation itself.

The court also noted that there were three interpreters working during the trial, that there was already a switching among interpreters for particular tasks, and that no hardship would result from using a different interpreter, who was also already assigned to that courtroom, to complete appellant's examination. The trial court thus properly exercised its discretionary duty under the above authorities, as well as its duty to control the proceedings and handle the trial "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) Indeed, a trial court has broad discretion to control the conduct of a criminal trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 79.) "When there is no patent abuse of discretion, a trial court's determinations under section 1044 must be upheld on appeal." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

In any event, any error would be harmless under any standard of review. Federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) State law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard* (2010) 51 Cal.4th 15, 38; *People v. Page* (2008) 44 Cal. 4th 1, 52-53; *People v. Gonzalez* (2006) 38 Cal.4th

932, 960–961.) This standard "is the same, in substance and effect" as *Chapman's* "reasonable doubt." (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

Here, appellant cannot show any prejudice. As the trial court found,

> We have three interpreters in here. When we don't have somebody on the stand we have two, they are constantly switching off. I don't see anything that will telegraph anything to the jury. They are constantly switching.

(26RT 4569.) The court further noted that the prosecution witnesses did not all use the same interpreter, and that there was nothing "affecting the jurors in this switch." (26RT 4570.) And as the court found, "Certainly the interpreter who substituted for the interpreter we did have at the time was very professional." (26RT 5594-5595.) Appellant testified live, so the jury could see and hear his emotion, as well as the tone of voice and emotional expression invoked by the prosecutor. Even assuming the trial court erred, any error was harmless.

XV. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S OUT-OF-COURT STATEMENT THAT HE HAD KILLED EIGHT OR NINE OTHER PEOPLE FOR THE PENALTY PHASE

Appellant claims that the trial court erroneously admitted his out-of-court statement that he had killed eight or nine other people for the penalty phase, thereby violating his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the California Constitution as well. (AOB 235-245.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

The proceedings regarding the admission of Santana's preliminary hearing testimony are described above in Argument VI. In pertinent part, the following is relevant to the instant claim.

1. Relevant Guilt Phase Proceedings

During the guilt phase, the trial court found that Santana's statement on the recorded interview tape that appellant had killed eight or nine persons was based on a statement by appellant, not a third person. (19RT 3225-3226, 3229-3230.) The court ruled that statement inadmissible during the guilt phase, but noted that it "may be relevant in a penalty phase." (19RT 3200-3203.) The court ruled,

> I will allow it at penalty. In terms of the state of mind, it's something that the People – I think the 352 evaluation is different and I think I will allow it at penalty if the People want to use it.

(19RT 3204.) The court elaborated,

> [T]his is part of the circumstances of the crime and this goes to state of mind. I think it's the relevance in the penalty phase for his state of mind even if it's puffing is much more relevant at the penalty than it is at the guilt phase [*sic*] and it comes under factor (a). . . . [¶] It goes to the state of mind at the time of the crimes or shortly thereafter.

(19RT 3205.) Appellant's counsel then said that he would "tactically rather have it come in now [during the guilt phase] rather than at penalty phase." The court reiterated that the evidence would be excluded for the guilt phase under Evidence Code section 352, but not from the penalty phase. Appellant's counsel reiterated that he would rather have the evidence of the statement regarding the eight or nine prior murders come in during the guilt phase. (19RT 3204-3206.) The parties again later discussed appellant's

statement that he had killed eight or nine other people. The court again ruled that evidence was admissible during the penalty phase only, but since appellant's counsel wanted it to come in if at all during the guilt phase, the court would so admit it with a limiting instruction. It would be relevant under factor (a) as to penalty. (19RT 3246.)

Appellant's counsel later asked the trial court to reconsider its ruling regarding the "circumstances of the crime being admissible" in the penalty phase with respect to Santana's taped statement. He argued that the transcript indicated it may not have been appellant who bragged about having committed eight or nine previous murders. The court found that the preliminary hearing demonstrated that Santana attributed the statement to appellant. The court emphasized that evidence was admissible only for appellant's state of mind. Appellant's counsel argued Santana's statement was unreliable. The court reaffirmed its prior ruling. (20RT 3387-3390.)

Appellant's counsel again later asked the court to reconsider its ruling admitting the tape, arguing that it was not at all clear that appellant was the person who bragged about having committed eight or nine other murders. The court again found, "The prelim makes it clear she is talking about him." Moreover, the People were not trying to prove that appellant had killed eight or nine people, but it was relevant to appellant's state of mind, which was the only reason it was being admitted, and the court would so instruct the jury. The prosecutor offered the option of "cleaning that statement up" to be "I've killed before," as opposed to "I've killed eight or nine." Appellant's counsel elected not to accept that suggestion. (20RT 3387-3390.)

The trial court instructed the guilt-phase jury:

> The reference in the tape, ladies and gentlemen, to [appellant's] comments about having killed eight or nine people is not offered for the truth of the matter. There's no evidence to

support that there were eight or nine people or anybody else killed. It is offered simply for your consideration as to the declarant's state of mind at the time the statement was made, not for the truth of that fact.

(20RT 3415.) The trial court also gave CALJIC No. 2.09, instructing that "certain evidence was admitted for a limited purpose":

> At the time this evidence was admitted, you were admonished it could not be considered by you for any other purpose other than the limited purpose for which it was admitted. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(21RT 3674; see also 11CT 3100.)

2. Relevant Penalty Phase Proceedings

Appellant testified on his own behalf during the penalty phase. During cross-examination, appellant denied having said to Santana that he had killed eight or nine other people. (26RT 4609.)

During the People's argument, the prosecutor argued that each defendant was morally responsible for the crimes, that each's conduct in committing the crimes and personal reactions after committing the crimes demonstrated a lack of remorse (noting it was not an aggravating factor in itself). (29RT 5286-5291.) The prosecutor also noted appellant's testimony denying having said that he had killed eight or nine other people. (30RT 5325-5326.)

The trial court instructed the penalty jury, in part, with CALJIC No. 8.84.1, as follows:

> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You are to be guided by the previous instructions given in the first phase of the trial which are pertinent and applicable to the determination of penalty. However, you are to

> completely disregard any instructions in the first phase which had prohibited you from considering pity or sympathy. In determining the penalty, the jury may take into consideration pity or sympathy.

(29RT 5235; see 12CT 3497.)

During the penalty phase instructions, the court told the jury that it "shall consider" all evidence received during any part of the trial, "except as you may be hereafter instructed," while being guided by, if applicable and among other factors, "the circumstances of the crimes" of which appellant was convicted. (29RT 5239-5240; see 12CT 3499 [CALJIC No. 8.85].) The court also told the jury that the factors set forth in CALJIC No. 8.85 as aggravating factors were the only ones the jury was permitted to consider in aggravation. (29RT 5241; see 12CT 3560 [CALJIC No. 8.854].)

The court also told that jury that aside from appellant's prior conviction for possession of cocaine base for sale, the jury "may not consider any evidence of any other crime as an aggravating circumstance." (29RT 5246; 12CT 3502 [CALJIC No. 8.86].) The court instructed the jury that the Rod's Coffee Shop evidence, that appellant committed attempted robbery and possession of a stun gun, acts that "involved the express or implied use of force or violence or the threat of force or violence," could be considered as an aggravating circumstance if the jurors were convinced beyond a reasonable doubt that appellant did commit such acts. (29RT 5246-5248; see 12CT 3502 [CALJIC No. 8.87].)

B. The Trial Court Properly Exercised Its Discretion and Admitted Appellant's Statement That He Had Killed Eight or Nine Other People

As noted above, "all relevant evidence is admissible" unless excluded under the federal or California Constitution or by statute. (Evid. Code,

§ 351; see also *People v. Carter, supra,* 36 Cal.4th 1114, 1166.) Relevant evidence is evidence, including that relevant to a witness's credibility, "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Carter, supra,* 36 Cal.4th at p. 1166.) Trial courts have broad discretion in making such determinations. (*People v. Richardson, supra,* 43 Cal.4th at p. 1001; *People v. Hoyos, supra,* 41 Cal.4th at p. 898.) Questions regarding the admission of evidence are evaluated for abuse of discretion. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 991 [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].)

Section 190.3, factor (a), permits penalty phase juries to consider the circumstances of the crime of which the defendant was convicted and the existence of any special circumstances found to be true pursuant to Section 190.1. Here, the trial court properly exercised its discretion in admitting appellant's statement for the penalty phase through Santana's testimony that he had killed eight or nine other people, because that statement was relevant to showing appellant's state of mind as to the commission of the crimes in this case, with respect to the penalty determination that the jury would have to reach.

Respondent's position is supported by this Court's holding in *People v. Michaels* (2002) 28 Cal.4th 486, 533.) In *Michaels*, most of the defendant's taped confession was admitted at the guilt phase, except for a portion in which he claimed that he was a contract killer and had committed 10 to 15 contract killings. The prosecution asked to play the entire recording at the penalty trial. Over defense objection, the judge granted this request. Before the tape was played to the jury, the judge gave a limiting instruction: the defendant's statements as to possible other homicides were being "offered on the issue of his mental state and motive

on the nature and circumstances of the present offense, and not for the truth of whether there were other homicides." The jury was not to consider such evidence "for any purpose except the limited purpose for which it is admitted." (*Id.* at pp. 533-534.)

This Court found that the trial court properly admitted the contested statements under section 190.3, factor (a), as part of the circumstances of the charged murder, noting that the court told the jury it could not consider the defendant's confession as proof that he had committed other homicides. (*Id.* at p. 534.)

As this Court held,

> The prosecution did not claim defendant had committed any contract killings or planned to do so, and the evidence was admitted solely to show defendant's attitude and motive in connection with the charged murder and, so limited, was properly admitted.

(*Id.* at p. 534.) Also properly admitted in *Michaels* was a "hit list" with names on it that the defendant was carrying with him when he was arrested. The hit list was properly admitted under section 190.3, factor (a), under the theory that, like the defendant's confession, it showed the defendant's motive to kill consistent with his claims of being a hit man. (*Id.* at p. 534.)

Michaels also found that section 352 did not bar admission of the defendant's statement that he was a contract killer who had killed 10 to 15 others. Evidence Code section 352 authorizes a trial court in its discretion to 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." In *People v. Box, supra,* 23 Cal.4th 1153, this Court held that the trial court retained limited discretion at the penalty phase to exclude unduly inflammatory evidence:

> We emphasize, however, that at the penalty phase, the trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed than at the guilt phase. During the guilt phase, there is a legitimate concern that crime scene photographs such as are at issue here can produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes. Such concerns are greatly diminished at the penalty phase because the defendant has been found guilty of the charged crimes, and the jury's discretion is focused on the circumstances of those crimes solely to determine the defendant's sentence. Indeed, the sentencer is expected to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light.

(*People v. Box, supra,* 23 Cal.4th at p. 1201.)

Here, the trial court did not abuse its discretion in admitting the challenged evidence. The prosecution did not try to convince the jury that appellant had committed other murders, no evidence other than appellant's statement to Santana was presented that appellant had, in fact, committed such murders, and the trial court gave a limiting instruction that carried over to the penalty phase (29RT 5235; see 12CT 3497). Hence, presumably, the jurors followed the trial court's instructions and viewed appellant's assertion of having committed multiple other murders as bragging, and, if anything, evaluated it as relevant to show appellant's state of mind with respect to the commission of the instant crimes rather than as a statement of fact that he had, in fact, killed eight or nine other people. Thus, the trial court reasonably concluded that the probative value of the evidence at issue outweighed any prejudicial effect. The trial court properly admitted the contested evidence.

C. Any Error Was Harmless

In any event, any error in admitting evidence of the contested statement was harmless. As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra*, 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.) Here, as set forth above, the evidence against appellant was overwhelming, and his brutal, gratuitous, and unrelenting violence against helpless victims who were cooperating as directed while being robbed, and his murder of Mr. Kim and Officer Hoglund, set him apart from his codefendants. There was no argument by the prosecutors here, or evidence, that appellant actually committed the other murders. Moreover, the jury was properly instructed on how to limit its use of appellant's statement during both the guilt and penalty phases, and it is presumed the jury understood and followed its instructions. (*People v. Letner & Tobin, supra,* 50 Cal.4th at pp. 196-197.) This claim fails.

XVI. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT AT THE PENALTY PHASE

Appellant complains that the trial court erroneously admitted evidence of the Rod's Coffee Shop incident at the penalty phase. (AOB 245-255.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

The guilt phase proceedings regarding the Rod's Coffee Shop incident are set forth above in argument VII. Respondent also notes the following.

At sidebar, during the guilt-phase presentation of the Casa Gamino evidence, appellant's counsel asked the court for a ruling whether the Rod's evidence would be admissible at the penalty phase – if it would be, then appellant's counsel intended to cross-examine Armando Lopez (who was then on the witness stand) regarding appellant's actions during the Casa Gamino crimes. The court found the evidence was admissible at the penalty phase. (14RT 2258-2260.)

Following the guilt phase, appellant's counsel moved to exclude evidence of the Rod's Coffee Shop incident from the penalty phase because there was "insufficient evidence" of an attempted robbery. (24RT 4180.) The trial court disagreed:

> Okay. If I treat the previous information provided at the – at the guilt phase as the sort of the *Phillips* hearing,[90] I think they provided enough. [¶] I think there was more than enough information to allow the jurors to consider it as prior violence. We have the threat of violence, the possession of the weapons, and that history that we now know, if it was not known at the time. [¶] So if that's a request for *Phillips*, we have had it, and I think the People have proven up their case.

(24RT 4180.) In response to appellant's counsel's argument for an "equivalent of an 1118.1 motion for acquittal," the trial court found and ruled,

> The motion is denied. It seems to me where we have the entry to the restaurant, an obvious artificial presence there, the mingling in the back even after there was no reason for them to remain, the location of the cars, one blocking the driveway and one in an – the other in an unusual location, I think there's more than enough to show that – and plus the possession of the

[90] This was apparently a reference to *People v. Phillips* (1985) 41 Cal.3d 29, 71.)

> weapons, there's more than enough to show they have gone beyond the mere planning stage.

(24RT 4181.)

Later, during the penalty phase, appellant's counsel objected to the proposed instructions relating to the Rod's incident. The court found that the Rod's incident was relevant as an act of "implied violence." (29RT 5080-5089.) The trial court instructed the penalty jury as to the Rod's incident as follows:

> Evidence has been introduced for the purpose of showing that [appellant] has committed the following criminal acts relating to Rod's Coffee Shop; attempted robbery, and possession of a stun gun, such acts which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that [appellant] did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.

(CALJIC No. 8.87; 29RT 5246-5247; see also 12CT 3502.) The court further instructed,

> You may not consider as aggravation any evidence of unadjudicated acts at Rod's Coffee Shop allegedly committed by [appellant] unless you first determine beyond a reasonable doubt that (1) [appellant] committed the acts; (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence; and (3) the acts were criminal. [¶] With respect to the crimes alleged, being attempted robbery and possession of a stun gun, you have those elements already provided to you in the jury instructions at the guilt phase.

(CALJIC No. 8.866; 29RT 5248; see also 12CT 3502.)

The prosecutor said the following about the Rod's Coffee Shop incident during the penalty phase argument:

> We have also produced evidence for you under factor (b) of the factors in aggravation which was the incident at the Rod's Coffee Shop which shows a long standing pattern of criminality and the use of implements of torture that was contemplated two years earlier at that incident, namely, the stun gun.

(29RT 5291.) She also noted that appellant denied having a stun gun during the Rod's Coffee shop incident, and denied having one during the Casa Gamino crimes as well, but admitted that someone else brought one into the Casa Gamino. (30RT 5320-5321.)

B. The Trial Court Properly Admitted Evidence of the Rod's Incident During the Penalty Phase Under Section 190.3, Factor (b)

As argued above in Argument VII, the trial court properly admitted the evidence related to Rod's Coffee Shop under Evidence Code section 1101, to prove appellant's identity as to the Casa Gamino crimes "as well as the other charged crimes." (10CT 2919-2922; 16RT 2567.) The evidence was also properly admitted for the penalty phase under section 190.3, factor (b), which permits the trier of fact, in determining the penalty, to consider aggravating evidence of a defendant's criminal conduct (aside from the capital offense) involving actual or threatened force or violence.[91] (*People v. Houston* (2012) 54 Cal.4th 1186, 1232; *People v. McKinnon, supra,* 52 Cal.4th at p. 682.) The prosecution may present evidence of the circumstances surrounding the criminal violence.

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[91] That section allows the jury to consider, "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."

(*People v. Watkins, supra,* 55 Cal.4th at p. 1033; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1377 [noting that the issue of other violent criminal activity encompasses not only the existence of such activity but also all the pertinent circumstances of that activity" and that it is appropriate for the prosecution to place evidence of violent criminal activity into context].) Evidence so admitted must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime. (*People v. Tully, supra,* 54 Cal.4th at p. 1027.) Whether the other crimes evidence is significant enough to be given weight in the penalty determination is a question for the jury. (*People v. Tully, supra,* 54 Cal.4th at p. 1027; *People v. Smith* (2005) 35 Cal.4th 334, 369.) The prosecution bears the burden of proving factor (b) evidence beyond a reasonable doubt. (*People v. Moore* (2011) 51 Cal.4th 1104, 1135; *People v. Huggins* (2006) 38 Cal.4th 175, 239.)

As this Court has noted, the reason for a separate penalty phase is to allow the jury to consider evidence that was not admitted at the guilt phase because it might have prejudiced the guilt determination, but that is relevant to the penalty determination once guilt is established. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 507.) As this Court has explained,

> The penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes. Prior violent criminality is obviously relevant in this regard; the reasonable doubt standard ensures reliability; and the evidence is thus not improperly prejudicial or unfair. [Citations and quotations omitted].

(*Ibid.*)

The purpose of section 190.3, factor (b) "is to enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed." (*People v. Grant*

(1988) 45 Cal.3d 829, 851.) This Court has repeatedly held that admission of section 190, factor (b), evidence does not violate any federal constitutional guarantees. (See, e.g., *People v. Smith, supra*, 35 Cal.4th at p. 368 [admission of adjudicated violent acts does not violate 8th or 14th Amends.]; *People v. Jenkins, supra*, 22 Cal.4th at p. 1054 [rejecting the defendant's claim that use of evidence of unadjudicated criminal activity in aggravation pursuant to section 190.3, factor (b), renders his death sentence unreliable and violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution"].) The jury's reliance on unadjudicated criminal activity as an aggravating factor under section 190.3, factor (b), without unanimously agreeing on its existence beyond a reasonable doubt, does not deprive a defendant of any rights guaranteed by the federal Constitution, including the Sixth Amendment right to jury trial. (*People v. Lomax, supra,* 49 Cal.4th at p. 593; *People v. Taylor* (2010) 48 Cal.4th 574, 651–652.)

The other crimes evidence may be conduct amounting to either a felony or a misdemeanor. (*People v. Phillips, supra,* 41 Cal.3d at p. 71.) A misdemeanor conviction may not be introduced in aggravation. (*People v. Osband, supra,* 13 Cal.4th at p. 735; *People v. Montiel* (1993) 5 Cal.4th 877, 936.) However, the jury can properly consider under section 190.3, factor (b), the violent criminal conduct underlying the misdemeanor offense. (*People v. Bunyard, supra,* 45 Cal.4th at p. 857 [§ 190.3, factor (b) applies to misdemeanor violent activity as well as felony activity]):

> [T]he circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, is admissible under factor (b). (*People v. Holloway* (2004) 33 Cal.4th 96, 143; *People v. Mendoza* (2000) 24 Cal.4th 130, 185–186.)

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 39.)

Possession of a weapon is not always, in every set of circumstances, an act committed with actual or implied force or violence. (See *People v. Elliott* (2012) 53 Cal.4th 535, 586-587; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127; but see *People v. Quartermain* (1997) 16 Cal.4th 600, 631 ["Possession of sawed-off firearms and silencer materials carries an implied threat of violence because their obvious purpose is to harm humans."].) The factual circumstances surrounding the possession, however, may indicate an implied threat of violence." (*People v. Bacon, supra*, 50 Cal.4th at p. 1127.)

This Court has held that in many cases the trial court may be well-advised to hold a preliminary inquiry to determine whether there is substantial evidence to prove each element of section 190.3, factor (b) evidence. (*People v. Phillips, supra,* 41 Cal.3d at p. 72, fn. 25.) However, the court's decision whether to hold such a hearing is discretionary, and, if held, need not be an evidentiary hearing but may be based on an offer of proof. (*People v. Jones* (2011) 51 Cal.4th 346, 380.)

A trial court's decision to admit other crimes evidence during the penalty phase is reviewed for abuse of discretion. (*People v. Elliott, supra,* 53 Cal.4th at pp. 586-587; *People v. Bacon, supra,* 50 Cal.4th at p. 1127.) In *People v. Elliott*, this Court found that the defendant's actions in possessing a firearm, under the circumstances present in that case, constituted an implied threat of violence because when after a deputy ordered Elliott to place his hands on a patrol car, Elliott reached for the pocket containing the gun, saying he was getting his identification. This court held that the jury was entitled to infer that Elliott intended to draw his firearm to threaten or shoot the deputy. (*People v. Elliott, supra*, 53 Cal.4th at pp. 586-587.) And in *People v. Thomas*, *supra*, 52 Cal.4th 336, the crime of grossly negligent discharge of a firearm was properly admitted under section 190.3, factor (b) because the circumstances showed

that the defendant intended his action to serve as an "express or implied threat to use force or violence." (*People v. Thomas*, 52 Cal.4th at p. 362.)

Here, appellant engaged in conduct at Rod's Coffee Shop that was consistent with his, Navarro's, and Contreras's conduct in taking over the Casa Gamino and torturing and robbing some of its occupants. Appellant was part of a small armed force of men in numbers sufficient to take over t Rod's Coffee Shop. Their actions reasonably appeared to have been an attempt to rob the persons at Rod's Coffee Shop like appellant and his friends had done at the various establishments implicated in the instant case. Thus, the evidence was relevant to show the jury what kind of person he was, with respect to its penalty determination under factor (b).

C. Any Error Was Harmless

As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra*, 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.) Here, the other aggravating evidence in this case -- specifically, the facts and circumstances of the instant crimes in and of themselves (§ 190.3, factor (a)) -- was simply overwhelming as to appellant's suitability for the death penalty. From that evidence, the jury found that defendant had committed numerous crimes of violence against multiple victims over a lengthy period of time, had committed two acts of murder that were each unnecessary to accomplish his robberies and to escape, but were each committed with cruelty and brutality. One of those acts of murder was against an ordinary citizen who was not resisting, but apparently so

overcome by fear that, although he was complying with appellant's orders, he did so under extreme emotional duress. The other act of murder was against a police officer responding to a silent alarm who could easily have been disarmed and disabled, say, by handcuffing him to his own car rather than killing him, since the officer had not drawn his weapon when appellant executed him with multiple gunshots, even though the first shots had felled the officer. Moreover, appellant had tortured victims at the Casa Gamino after stealing a large sum of money there while trying to obtain even more money to steal. Under these circumstances and given the mountain of overwhelming and properly admitted evidence, it would require "capricious speculation" for this Court to find that any error associated with admitting evidence of the Rod's Coffee Shop incident under factor (b) affected the penalty verdict. (*People v. Valdez, supra,* 55 Cal.4th at p. 172, quoting *People v. Belmontes* (1988) 45 Cal.3d 744, 809, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) This claim fails.

XVII. THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTOR TO IMPEACH APPELLANT'S PENALTY PHASE TESTIMONY BASED ON RELIGION

Appellant claims that the trial court improperly permitted the prosecutor to impeach him with respect to his testimony about religion, by cross-examining appellant about the facts of the crimes, thereby violating appellant's federal and state constitutional rights to due process, a fair trial, and to reliable death verdicts. (AOB 256-264.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

1. Trial Court Argument and Ruling

Before appellant testified during the penalty phase, appellant's counsel asserted that appellant intended to testify about his jailhouse

conversion, his plans for the future, and the authorship of his religious treatise. Appellant would not discuss remorse, and thus, argued appellant's counsel, there was no basis for the prosecution to go into the facts of the underlying crimes because such questioning would exceed the scope of cross-examination. (26RT 4495-4496.) The prosecutor argued,

> Our feeling is that a person who is going to assert a new found religious feeling is going to -- there is a justification of that position with the previous life that person has led, and unless that person owns up to what that person said, what that person says they feel now, you can't really test the sincerity of these beliefs.

(26RT 4496.) The court agreed:

> I agree with that, [appellant's counsel]. I don't see how you can put him on, claim you want to ask about current religious feelings without essentially presenting to the jury the fact he is now remorseful, he is now reformed compared to what he was before, and not allow cross-examination as to that impact is extremely artificial and I think the People have a right to cross-examine him on it, his life before, in contrast to what he is doing now and test the sincerity of what he is doing now. [¶] I don't see how I can keep them from cross-examining him.

(26RT 4496.)

Appellant's counsel then proposed having appellant testify that he wrote the religious treatise, then asking appellant no other questions. (26RT 4497.) The prosecutor argued that procedure would be akin to having a witness testify that he wrote an affidavit that was being admitted – there would be no cross-examination on the affidavit, and hearsay would be admitted without cross-examination. (26RT 4497.) The prosecutor cited *People v. Montiel, supra,* 5 Cal.4th at p. 934, in which this Court stated, "no constitutional principle precludes examination of a witness about the sincerity and depth of religious and remorseful feelings he himself has

placed in issue." At issue was not simply "a question of remorse, but sincerity and depth of religious feelings." (26RT 4497-4498.)

After further argument by appellant's counsel, the court found as follows:

> The whole impact of that document is he is now a good person as in contrast from before, he is now productive in contrast from before, and I don't think I can keep the People from questioning the sincerity of that by talking about what happened before. It is not presented in a vacuum.
>
> I am trying to think of [an] analogy. If this was in the form of a piece of art, a drawing or something, that doesn't reflect necessarily on [the] thinking process. I can see a piece of art coming in obviously where there wouldn't necessarily be the requirement that cross-examination be permitted. But this is not a situation of presenting new talent, this is the presentation of the thinking process, this treatise that was written and clearly the People have a right to cross-examine.
>
> If the jury is to consider that, they have a right to cross-examine as to the sincerity of that product. I can't preclude them from cross-examining or limit it the way you are asking. I think it's artificial and inappropriate.

(26RT 4500-4501.)

Appellant's counsel urged that he be permitted to limit appellant's testimony to him testifying about "his ability to help other people in the future" while not going into "other areas." (26RT 4501.) The treatise appellant wrote would be a part of the "knowledge" that appellant acquired based on his study, such that appellant was able to draft that treatise. To avoid cross-examination, appellant would not testify about the "sincerity of his conversion." Appellant's counsel would call appellant as a witness "for the simple purpose of showing he can be of help to other people in the future." According to appellant's counsel, not allowing such limits on

appellant's cross-examination would violate appellant's right against self-incrimination. (26RT 4501-4502.)

The trial court disagreed, finding that appellant's proposed testimony implied the sincerity of his purported conversion, and the People would have the right to cross-examine appellant:

> You are protecting yourself very well for appeal, when you are presenting a clear inference, although you are not articulating it that way, I think the People have a right to rebut that inference that you are laying out for the jury to see and that you are hoping they will adopt and be influenced by. That is what you are doing. And to articulate it on a more limited reason while asking to take advantage of the inference is inappropriate. I think they have a right to cross-examine on the inference.

(26RT 4503.) Appellant's counsel proposed to present the issue of the sincerity of appellant's conversion through other witnesses, to limit the prosecution's cross-examination of appellant. The court responded,

> But [the prosecution] can go into the reasonable inferences of what [appellant's] direct constitutes and I don't see any difference just because they are allowed to cross-[examine] the supporting witnesses and supporting cast here on that issue of the conversion, although we are not calling it a conversion, that is what is being presented to the jury. I cannot preclude them from cross-examining your client when the source of this is on the stand. I don't think so. [¶] So I don't know how you wanted to handle it, but if you are presenting it, the People have a right to cross-examine it.

26RT 4503-4504.) After appellant's counsel suggested he could limit cross-examination of appellant by presenting appellant's treatise through a witness other than appellant, the court found,

> We have already gone over that, [appellant's counsel]. I don't see that foundation is laid. [¶] The bottom line is you're still getting in his written word, word that he has written with the inference of conversion without allowing any cross-examination

> or any response by the prosecution as to the sincerity of that writing to Telemonte [*sic*]. And to have a person who is simply receiving something in the mail, I don't see a foundation being laid. I don't see you getting around it that way.

(26RT 4506.)

B. The Trial Court Properly Permitted the Challenged Cross-Examination

Prosecutors have the right to cross-examine capital defendants who testify during their penalty-phase trial. (*People v. Lightsey* (2012) 54 Cal.4th 668, 728-729; *People v. Cleveland, supra,* 32 Cal.4th at p. 766; *People v. Edwards* (1991) 54 Cal.3d 787, 838.) Where intended to impeach defense testimony, such cross-examination may be considered "rebuttal" evidence. (*People v. Payton* (1992) 3 Cal.4th 1050, 1066-1067; *People v. Fierro* (1991) 1 Cal.4th 173, 240.) Once a defendant offers evidence to convince the jury to impose life imprisonment rather than the death penalty, the prosecution is permitted to attempt to rebut such evidence. (*People v. Loker* (2008) 44 Cal.4th 691, 709; *People v. Eubanks* (2011) 53 Cal.4th 110, 145; see *People v. Ramos* (1997) 15 Cal.4th 1133, 1173 ["In light of [a defense witness's] portrayal of defendant's religious recommitment, the prosecution could impeach her testimony with acts tending to contradict that impression."]; *People v. Gates* (1987) 43 Cal.3d 1168, 1211, disapproved on another point in *People v. Williams, supra,* 49 Cal.4th at p. 459 ["If the defense chooses to raise the subject it cannot expect immunity from cross-examination on it."].) Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence on which the defendant has introduced evidence. (*People v. Loker, supra,* 44 Cal.4th at p. 709.) The scope of proper rebuttal is a function of the "breadth and generality" of the direct testimony. (*Ibid*; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1072.)

A criminal defendant has no right to mislead the jury through one-sided character testimony during either the guilt or penalty trial. (*People v. Eubanks, supra,* 53 Cal.4th at p. 145; *People v. Payton, supra,* 3 Cal.4th at p. 1066.) No constitutional principle precludes examination of a witness about the sincerity and depth of religious and remorseful feelings he himself has placed in issue. (*People v. Montiel, supra,* 5 Cal.4th at p. 934; see also *People v. Clark* (1993) 5 Cal.4th 950, 1032, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

In the penalty phase of a capital trial, "The prosecutor [is] entitled to inquire into the circumstances of the underlying crimes. (§ 190.3, factor (a))." (*People v. Farnam* (2002) 28 Cal.4th 107, 197.) The scope of rebuttal lies within the trial court's discretion. (*People v. Friend, supra,* 47 Cal.4th at p. 87.) That is, the trial court has broad discretion to determine the admissibility of rebuttal evidence; absent palpable abuse of that discretion, an appellate court may not disturb the trial court's exercise of that discretion. (*People v. Valdez, supra,* 55 Cal.4th at p. 170; *People v. Gurule, supra,* 28 Cal.4th at p. 656.)

And, as this Court has repeatedly held, "there is no right of allocution at the penalty phase of a capital trial." (*People v. Romero* (2008) 44 Cal.4th 386, 426; see also *People v. Lucero, supra,* 23 Cal.4th at p. 717; *People v. Davenport* (1995) 11 Cal.4th 1171, 1209.) That is, capital defendants have no right to address the jury during the penalty phase "in allocution" without being subject to cross-examination by the prosecutor. (*People v. Lucero, supra,* 23 Cal.4th at p. 717; *People v. Davenport, supra,* 11 Cal.4th at p. 1209; *People v. Clark, supra,* 5 Cal.4th at pp. 1036-1037; see also *People v. Jackson* (2009) 45 Cal.4th 662, 698.)

Here, appellant sought to present his defense that, as bad a person as he may have been, he underwent a true religious conversion following his arrest and could help other "former" criminals to live productive law-

abiding lives, and on that basis, his life should be spared. As the trial court explained at length to appellant's counsel and appellant, and as the above authorities make clear, the People thus had the right to test appellant's claim of redemption through religion by cross-examining appellant on the defense that he was presenting. In no way was appellant precluded from presenting his defense. Rather, he was simply cross-examined on it. Therefore, the trial court did not abuse its discretion.

C. Any Error Was Harmless

As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.) Here, the prosecutor cross-examined appellant with evidence that the jury had already learned during the guilt phase, to wit, the evidence of the instant crimes and appellant's repeated violent and predatory conduct. Certainly, even if this Court were to agree with appellant's instant claim of error, the prosecution could still have argued against appellant's religious defense based on all of the evidence that was admitted during the guilt phase trial. That is, the jury here would have learned and heard argument about how bad a person appellant was before his arrest in the instant case, and the terrible things he did in the instant crimes, and how appellant's religion defense patently lacked any support in fact and appeared to be disingenuous. Appellant cannot show prejudice under either standard.

XVIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE

Appellant next complains that the prosecutor committed misconduct during the penalty phase by insinuating that appellant had committed prior murders, by improperly cross-examining defense mitigation witnesses in subversion of prior court rulings, by initiating an improper ex-parte contact with the trial court with respect to replacing the interpreter, by engaging in improper histrionics, and by "attack[ing] the heart of appellant's mitigation theme." (AOB 264-275.) Respondent disagrees.

A. General Principles of Applicable Law

California courts apply the same substantive standards to claims of guilt-phase and penalty-phase prosecutorial misconduct. (*People v. Collins* (2010) 49 Cal.4th 175, 226; *People v. Gamache, supra,* 48 Cal.4th at p. 388; *People v. Valdez* (2004) 32 Cal.4th 73, 132.) Generally speaking, a prosecutor commits misconduct during the penalty phase of a trial under the federal constitution by engaging in conduct that renders the trial so unfair that due process is denied to the defendant. Under state law, a prosecutor commits reversible misconduct where he or she uses "deceptive or reprehensible methods" to convince the jury if there is a reasonable possibility that absent the misconduct, a more favorable outcome would have resulted. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

To preserve prosecutorial misconduct on appeal, the defendant must make a timely objection on the particular ground advanced on appeal, and ask that the jury be admonished. (*People v. McDowell* (2012) 54 Cal.4th 395, 436.) If the defense failed to object and to request the jury be admonished at the time of the purported misconduct, any related appellate

claim is ordinarily deemed to have been forfeited unless even an admonition would not have cured the harm. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th 622, 726; *People v. Williams supra,* 49 Cal.4th at p. 464.)

B. The Prosecutor Did Not Commit Misconduct by "Insinuating" During Penalty Phase Cross-Examination That Appellant Had Committed Other Murders

1. The Relevant Trial Court Proceedings

a. Summary of Appellant's Direct Testimony

Appellant testified on direct examination that he learned some English and experienced a religious awakening in custody following his arrest. He realized that his prior way of living, including violating the commandment to not murder, was wrong, and he began devoting his time in custody to studying the Bible. Appellant wanted to help others discover religion as appellant's cell companions had helped him to do. Appellant wrote five treatises while in custody, and religion made his incarceration much easier. While appellant knew his criminal actions were wrong before committing them and he felt unexpressed remorse after committing his crimes, through his newfound religious commitment appellant wanted to help others avoid making the mistakes he had made. (26RT 4517-4541.)

b. Summary of Appellant's Cross-Examination by the Prosecutor

Appellant found a "certain peace and happiness" through religion that helped him overcome "any feelings of remorse or unhappiness" related to his prior criminal behavior. Appellant's sense of peace and happiness was important to his ability to help others. Appellant went to a birthday party the day after he shot Officer Hoglund. Photos depicted him as appearing to

have a good time and smiling, but he was only pretending. Appellant had been incarcerated before, and had used a false identity in that matter. He wore a cross in the past for his own benefit, but not for its religious value. Appellant was not using religion as a false defense at trial. (2RT 4548-4561.)

With respect to the instant crimes, appellant killed Mr .Kim because Mr. Kim shot him first. Appellant killed Officer Hoglund to avoid arrest (but denied shooting him in the back of the head), even though appellant was aware of God's commandment to not kill. Appellant claimed that his body still held the bullet that Mr. Kim had fired at him. (26RT 4538-4539, 4561-4566, 4583-4586, 4591.) Appellant was certain he was not shot between December 31, 1991, and April 18, 1992. (26RT 4592, 4594.)[92] Appellant denied having had a stun gun during the Rod's Coffee Shop incident. Appellant admitted using a stun gun on Lopez during the Casa Gamino crimes. He denied using the stun gun on Maricella M. and that anyone tried to rape her. (26RT 4596-4602.) Appellant denied trying to shoot Juan Saavedra in the foot or leg during their struggle at Ofelia's Restaurant. (26RT 4603-4606.) Appellant denied the Outrigger Lounge crimes. Appellant admitted the Siete Mares crimes, but denied having beaten anyone. (26RT 4574-4575.)

Based on appellant's religious awakening, "El Morro" was "dead." (26RT 4614.) No one helped appellant write his treatise except the Lord. (26RT 4609-4612.) While appellant may have felt remorse for some of his actions, he was not repentant, as he continued committing such crimes. While he may have felt some remorse, he did not "allow it to express itself fully." (26RT 4580.) Appellant was not happy that he had killed Officer

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[92] Appellant murdered Mr. Kim on May 4, 1992. (See Statement of Facts, above.)

Hoglund, but later found peace and happiness through Christ. (26RT 4608-4609.)

c. Appellant's Specific Claims of Cross-Examination Misconduct

Appellant complains of a specific portion of the prosecutor's cross-examination that occurred near the end of appellant's testimony, after that set forth just above, as follows. (AOB 266-269.) The prosecutor asked appellant if he had felt "especially in a humorous mood as [he] recalled killing those eight or nine other people that you had killed?"[93] Appellant asked, "Which eight or nine other people?" The prosecutor responded, "The ones that you talked about when you were giggling and laughing over killing the officer?" Appellant denied having said to Santana that he had killed eight or nine people, and also denied ever speaking with her. The prosecutor asked, "Weren't you in fact laughing over the killing of the officer?" Appellant denied having done so. (26RT 4609.)

2. Any Claim of Misconduct Has Been Forfeited

Appellant forfeited this claim for appellate review. As noted above, to preserve prosecutorial misconduct on appeal, the defendant must make a timely objection on the particular ground advanced on appeal, and ask that the jury be admonished. (*People v. McDowell, supra,* 54 Cal.4th at p. 436.) If the defense failed to object and to request the jury be admonished at the time of the purported misconduct, any related appellate claim is ordinarily deemed to have been forfeited unless even an admonition would not have

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[93] Santana's prior testimony that was admitted during the guilt phase included her statement that appellant said that he had killed eight or nine people in "his country." (20RT 3489.) That statement was admitted with respect to appellant's state of mind at the time of the crimes or shortly thereafter. (19RT 3205.)

cured the harm. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

Here, appellant failed to make a timely objection to the prosecutor's question on the ground of prosecutorial misconduct. Appellant's counsel did object to the question about the "eight or nine murders that Rosa Santana had referred to," but he did so the next day. Appellant's counsel conceded that he objected too late. (27RT 4742 ["I should have objected at the time"].) The trial court specifically found that appellant's counsel failed to object, and noted that had he timely objected, the court would have sustained the objection. (27RT 4743.) Because appellant failed to make a timely objection on the basis of misconduct, this claim has been forfeited for appellate review.

3. The Prosecutor Did Not Commit Misconduct

A prosecutor may not ask questions of a witness suggesting facts harmful to a defendant without a good faith belief that such facts exist. (*People v. Pearson, supra,* 56 Cal.4th at p. 434; *People v. Bolden* (2002) 29 Cal.4th 515, 562; *People v. Mooc* (2001) 26 Cal.4th 1216, 1233.) The prosecutor did not violate this principle here, as the context of the questions in issue demonstrates. During the prosecutor's cross-examination of appellant, he examined appellant on his actions during some of the crimes and the Rod's Coffee Shop incident, and explored appellant's actions with respect to remorse. As noted above, appellant claimed that he shot Mr. Kim because Mr. Kim fired first, and that appellant shot Officer Hoglund to avoid arrest. (26RT 4574-4608.)

The prosecutor asked if appellant had testified that he felt a "lot of remorse" after shooting Officer Hoglund. Appellant responded that he had

"felt something about what [he] had done," but that he never said he was very remorseful. The prosecutor asked if that feeling was what caused appellant to "giggle and laugh and trip" when he returned to his apartment after killing Officer Hoglund. Appellant did not understand the question. The prosecutor again asked if appellant expressed those feelings as he "giggled and laughed over killing the officer" when he returned to his apartment. Appellant said it was impossible for a remorseful person to be laughing, and that the "normal thing would be for him to have his head bowed down, to be sad." The prosecutor asked how a person who is remorseful can be happy. Appellant responded that he "already [said] he wasn't happy." The prosecutor then asked, "But you are happy now?" Appellant responded, "Because Christ lives within my heart. That happiness, that peace is something different." (26RT 4608-4609.)

It was only then that the prosecutor asked appellant about his state of mind with respect to the testimony by Santana that appellant said he had killed eight or nine other people. It is clear from the context of his questions that the prosecutor was questioning appellant about his very own statements and state of mind (see 19RT 3205) and nothing more. In fact, the trial court so found as to the prosecutor's second question, which remedied any ambiguity associated with the first question. (27RT 4743.) The prosecutor had an evidentiary basis for the question regarding appellant's lack of remorse and his state of mind following his murder of Officer Hoglund – appellant's own statement to Santana, whose testimony on this point was admitted into evidence.

The prosecutor's use of the evidence was proper. The court had ruled,

> I will allow it at penalty. In terms of the state of mind, it's something that the People – I think the 352 evaluation is different and I think I will allow it at penalty if the People want to use it.

(19RT 3204.) The court elaborated,

> [T]his is part of the circumstances of the crime and this goes to state of mind. I think it's the relevance in the penalty phase for his state of mind even if it's puffing is much more relevant at the penalty than it is at the guilt phase and it comes under factor (a). . . . [¶] It goes to the state of mind at the time of the crimes or shortly thereafter.

(19RT 3205.) Thus, the prosecutor was properly permitted to question appellant about his state of mind shortly after he murdered Officer Hoglund, when he claimed to Santana to have killed other people.

As appellant points out, the trial court said it would have sustained an objection to the prosecutor's "first question," which the court thought was "inappropriate." (27RT 4743.) That question, "Did you feel especially in a humorous mood as you recalled killing those eight or nine other people that you had killed," was perhaps assailable due to ambiguity because it failed to clarify that it was based on appellant's own statement to Rosa Santana. However, as the trial court subsequently found, the prosecutor corrected the purported ambiguity or omission in his next question by clearly referring to the basis of the question – that appellant had *talked* about killing eight or nine other people. Appellant understood that point, and denied having told that to Rosa Santana. (26RT 4606-4609.) As the court found, appellant responded by acknowledging and reminding the jury that only Santana had attributed that statement to him, and that he denied ever saying that. (27RT 4743.) Because the prosecutor's questioning, in context, was clearly about appellant's state of mind with respect to the murder of Officer Hoglund as permitted by the trial court, and because the prosecutor clarified that his question was based on Santana's testimony which, in turn, was based on appellant's statement to her, which he denied making, there was no misconduct.

Appellant also complains that the prosecutor questioned appellant about a "shoot-out." (AOB 268.) Since that claim is the subject of its own separate argument (see AOB 276-287), respondent addresses it more fully below. In any event, respondent notes that appellant's counsel told the jury he would present evidence that appellant had some bullets in his "stomach area" resulting from Mr. Kim having shot first at appellant. (25RT 4391.) Then, appellant testified that while committing the Woodley Market crimes, Mr. Kim shot and wounded appellant, and appellant fired back at Mr. Kim. (26RT 4538.) The prosecutor was properly entitled, as set forth more fully below, to cross-examine appellant about his claim that appellant shot Mr. Kim because Mr. Kim fired first.

Appellant complains that the prosecutor improperly cross-examined Argentina Sanchez. (AOB 268-269.) This claim fails, first, because it has been forfeited as there was no misconduct objection by appellant. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. Williams, supra,* 49 Cal.4th at p. 464.) Appellant's claim that any objection would have been futile and thus was not required to preserve this issue for appeal (AOB 268-269), is belied by the many trial court rulings made in favor of appellant and/or his codefendants.

In any event, the claim fails on its merits. Before Argentina Sanchez testified, the trial court ruled that the prosecution could not cross-examine appellant's witnesses based on a newspaper article from Honduras found in appellant's home that described appellant as having been involved in a shootout during a robbery there. The court ruled that the newspaper article was "excluded." However, the prosecutor asked the court to "reserve any ruling until after we hear what [appellant] and his character witnesses have to say that may change the situation." The court stated that the prosecutor

could "renew any motions" it chose to. (24RT 4191-4194.) Later, before her testimony, appellant's counsel stated he intended to limit his questions to Argentina Sanchez to appellant's "early life before he left Honduras at the age of 16," to preclude asking any questions that could "[open] the door to any questions on cross." The court stated, "We have the original limitation." (27RT 4739.) Appellant testified that he had family who lived in Honduras. Appellant "kept in contact with family members about [his] beliefs in the Bible." He communicated with his family members in Honduras mostly by mail, since his arrest. (26RT 4530.)

On cross-examination, despite appellant's counsel's best efforts, the court ruled that ahe prosecutor could ask Argentina Sanchez about seeing appellant in Honduras during 1992. Argentina Sanchez indicated that was correct. (27RT 4779.) The prosecutor was not precluded from asking Sanchez questions about appellant attending a "school for young men" called the "El Carmen Central," in Honduras. (27RT 4782.) As the record clearly shows, the prosecutor did not ask any questions of Sanchez on cross-examination that violated any trial court rulings as identified by appellant.

4. Any Misconduct During Cross-Examination Was Harmless

As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.)

Appellant suffered no prejudice due to the prosecutor's question about appellant's statement to Santana regarding other murders. First, during the

guilt phase, when Santana's testimony describing appellant's statement about the eight or nine other murder victims came in, the trial court instructed the jury,

> The reference in the tape, ladies and gentlemen, to [appellant's] comments about having killed eight or nine people is not offered for the truth of the matter. There's no evidence to support that there were eight or nine people or anybody else killed. It is offered simply for your consideration as to the declarant's state of mind at the time the statement was made, not for the truth of that fact.

(20RT 3415.) The trial court also gave CALJIC No. 2.09, instructing that "certain evidence was admitted for a limited purpose":

> At the time this evidence was admitted, you were admonished it could not be considered by you for any other purpose other than the limited purpose for which it was admitted. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(21RT 3674; see also 11CT 3100.)

Then, during the evidentiary portion of the penalty phase, the trial court gave the admonition it would have likely given had appellant offered a timely objection:

> And one other matter I just wanted to mention. I don't know if it was yesterday or the day before, there was some reference when [appellant] was on the stand where [the prosecutor] asked about the statement about killing eight or nine people before.
>
> I want to remind you that that statement was offered not for the truth of the eight or [nine] people being killed, there is no such evidence, but it was admitted for your consideration as to the state of mind, if you believe that statement was made, offered only for the state of mind, not for the truth of eight nor nine people being killed. There is no such evidence. I want to

make sure you remember that admonition that you heard back at the guilt phase.

(28RT 4877-4878.)

The trial court later instructed the penalty jury, in part, with CALJIC No. 8.84.1, as follows:

> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You are to be guided by the previous instructions given in the first phase of the trial which are pertinent and applicable to the determination of penalty. However, you are to completely disregard any instructions in the first phase which had prohibited you from considering pity or sympathy. In determining the penalty, the jury may take into consideration pity or sympathy.

(29RT 5235; see 12CT 3497.)

The court also told the penalty jury that it "shall consider" all evidence received during any part of the trial, "except as you may be hereafter instructed," while being guided by, if applicable and among other factors, "the circumstances of the crimes" of which appellant was convicted. (29RT 5239-5240; see 12CT 3499 [CALJIC No. 8.85].) The court told the jury that the factors set forth in CALJIC No. 8.85 as aggravating factors were the only ones the jury was permitted to consider in aggravation. (29RT 5241; see 12CT 3560 [CALJIC No. 8.854].)

The court also told that jury that aside from appellant's prior conviction for possession of cocaine base for sale, the jury "may not consider any evidence of any other crime as an aggravating circumstance." (29RT 5246; 12CT 3502 [CALJIC No. 8.86].) The court instructed the jury that the Rod's Coffee Shop evidence, that appellant committed attempted robbery and possession of a stun gun, acts that "involved the

express or implied use of force or violence or the threat of force or violence," could be considered as an aggravating circumstance if the jurors were convinced beyond a reasonable doubt that appellant did commit such acts. (29RT 5246-5248; see 12CT 3502 [CALJIC No. 8.87].)

Moreover, the prosecutor did not argue during either the guilt or penalty phases that appellant had actually committed eight or nine other murders. To the contrary, during the penalty phase argument, the prosecutor – referencing appellant's statement about killing others with respect to his state of mind – noted only that appellant denied having made the statement to Santana:

> And then he denies talking about the eight or nine people that he killed when he was giggling and laughing about the Officer: [¶] I never said that. I never said that to Rosa Santana. I know that she said that, but I have never spoken with her.

(30RT 5325.)

Had a timely objection been made by appellant, then the court could have admonished the jury at the time. The court did later admonish the jury as it would have done given a timely objection, following appellant's counsel's untimely objection. Moreover, the reframed question by the prosecutor cleared up any ambiguity in the first question that might arguably have raised an improper inference, as did appellant's own response denying having made the statement to Santana. Certainly, the admonition and instructions given by the trial court cleared up any infirmity, as jurors are presumed to understand and follow the court's instructions. (*People v. Pearson, supra,* 56 Cal.4th at p. 414; *People v. Mills* (2010) 48 Cal.4th 158, 200; *People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Yeoman, supra,* 31 Cal.4th at p. 139.)

Appellant claims that he suffered "compounded" prejudice because the prosecutor was permitted to cross-examine appellant about whether he had been involved in a shoot-out between December 31, 1991, the date of the Outrigger crimes, and April 18, 1992, the date of the El Siete Mares crimes. (AOB 268.) However, as set forth below in Argument XIX, the prosecutor was properly permitted to ask questions about the bullet appellant carried in his body, purportedly from Mr. Kim shooting appellant, since appellant claimed on direct examination that Mr. Kim caused it to be there. (26RT 4538-4539.) Appellant cannot show any prejudice with respect to his claim regarding cross-examination of Argentina Sanchez because nothing improper occurred at all that could be subjected to a prejudice analysis.

Moreover, the penalty phase evidence against appellant was overwhelming. He was shown by the evidence to have been an extremely violent and cruel man who killed two innocent people, including a police officer, without any need or justification whatever while on an extended violent and brutal robbery campaign. This claim fails.

C. The Prosecutor Did Not Commit Prejudicial Misconduct by Asking Questions in Violation of Court Orders or by Otherwise Asking Improper Questions During Appellant's Penalty Phase Cross-Examination

Appellant next claims that the prosecutor committed prejudicial misconduct by asked him questions on cross-examination that violated specific trial court rulings. (AOB 269-271.)

1. The Court's Ruling That the Prosecutor Could Not Question Appellant About the Actions of Navarro or Contreras

The parties discussed appellant's proposed penalty-phase testimony. Appellant's counsel stated that he would call appellant to testify even if the

People would be permitted to cross-examine him, but that if the prosecutor asked who else was involved in the crimes and questions about the "role of the codefendants as the prosecution tries to build a case against them," appellant would choose not to answer those questions. (26RT 4511.) The court asked if the People intended to ask who else was involved. (26RT 4511.) The prosecutor responded,

> We believe that such questions would in fact test [appellant's] sincerity as to having a clean slate in life. The fact that he accepts for himself what was done is wrong must be buttressed in order to show sincerity by the fact that everybody else who was involved did wrong. And if he was not willing to say what these other people have done and their roles, their names, their locations, things like that, then it shows he is not in fact sincere in his religious beliefs. It goes directly to his sincerity, Your Honor.

(26RT 4511-4512.) Appellant's counsel responded,

> Assuming the prosecution asks those questions and assuming [appellant] doesn't answer those questions, they can argue that to the jury, whether or not he gave the information. But I have a duty to tell the court he may not be willing to answer those questions before I put him on the stand.

(26RT 4512.) The court ruled it would not hold appellant in contempt. However, the parties could handle appellant's responses to the prosecutor's questions in argument. (26RT 4512.)

Counsel for codefendant Navarro objected to "drawing the inference and arguing from appellant's failure to answer questions about other defendants. The court stated it thought the prosecutor would ask questions about the "unnamed six or seven people," and not Navarro. Counsel for codefendant Navarro specifically objected to questions about what Navarro did, but did not object to questions about the identity of the unnamed perpetrators. The prosecutor responded that he believed "that those are

relevant questions from [appellant]. I mean[,] he is going to own up to whether he in fact was the person." (26RT 4512-4513.) The court ruled,

> I am not going to do it. You can ask about what he did, you can't ask what the others did. You can ask him to indicate what he did if that is what you plan on doing, no cross-examination to the extent that we are asking the jury to separate the three of them. It makes it difficult to separate the three when you start attacking the other defendants, us[ing] [appellant]. So, no, you can't do it.

(26RT 4513.)

2. The Prosecutor Did Not Commit Misconduct in Asking if Appellant Shot Officer Hoglund so Appellant and His Crime Partners Could Escape

Appellant faults the prosecutor for asking appellant if he shot Officer Hoglund so appellant and his crime partners, as opposed to just appellant, could escape. (AOB 270.) On cross-examination, the prosecutor asked appellant questions about why he shot Mr. Kim and Officer Hoglund. Appellant testified that he did not want to shoot Mr. Kim, but had no choice because Mr. Kim fired first. The prosecutor pointed out that Officer Hoglund had not fired at appellant. Appellant responded that was different because Officer Hoglund had the power to arrest appellant. The prosecutor asked, then, if shooting Officer Hoglund was a matter of choice for appellant. Appellant responded with references to religion. The prosecutor asked, "You made a choice to kill Officer Hoglund in order for you to make an escape, for you and your compadres?" (26RT 4565.)

Counsel for codefendant Navarro objected, moved to strike the question, and asked for a curative instruction. (26RT 4565.) The court responded,

> Okay. Please limit it to just [appellant]. [¶] [By] the way, ladies and gentlemen, I want to remind you. We have talked

> about this before. Anything presented to you in the form of testimony by [appellant] is only being considered by you as against him only, not as to the other defendants. It is the same with the other defendants that present any evidence of any form.

(26RT 4565-4566.)

Appellant claims that the foregoing constitutes misconduct because the prosecutor violated the trial court's previous ruling by referring to appellant's "compadres." Appellant's misconduct claim fails first because appellant forfeited it. Appellant never objected to the question based on misconduct. Only counsel for codefendant Navarro did, on behalf of Navarro, without specifying it was based on a claim of misconduct. (26RT 4565.) Since appellant failed to object to the challenged question on the basis now urged in this Court, this claim has been forfeited for appellate review. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. McDowell, supra,* 54 Cal.4th at p. 436; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

In any event, the prosecutor did not commit any misconduct in this regard. "It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order." (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Silva* (2001) 25 Cal.4th 345, 373.) However, no misconduct occurs when the prosecutor acts reasonably in light of an ambiguous ruling. (*People v. Price* (1991) 1 Cal.4th 324, 452-453.) Here, the trial court's ruling was not that the prosecutor could not mention appellant's codefendants or crime partners, but rather, that the prosecutor could not question appellant about the *actions of* those other persons during the crimes. (See 26RT 4513, 4565-4566, 4571, 4577.) Here, the challenged question focused on *appellant's actions*,

e.g., in choosing to shoot Officer Hoglund so that appellant – and his crime partners – could escape. Given the evidence that all of the participants in the George's Market crimes fled to avoid capture (that is, they shared a joint purpose in escaping), and because the question focused on appellant's actions rather than on the actions of others (except the fact that, without identifying any such persons. the prosecutor did not contravene the court's rulings. Even if there was some reasonable argument available to appellant that the prosecutor did violate the court's ruling, to that extent the court's order would properly be characterized as ambiguous, and the prosecutor's questioning reasonable. (*People v. Price, supra,* 1 Cal.4th at pp. 452-453.)

3. Further Relevant Proceedings

During his cross-examination of appellant, the prosecutor advised the court, "Just one thing. I was going to bring the question, who did you do the other robberies with other than the two men in court." (26RT 4571.) The court ruled,

> No. Again, that gets into something other than himself and I don't think the relevance of his remorse. Just leave it alone. When we originally talked, it was just as to these defendants. I don't see anything to be gained by asking about anybody else involved other than him. I know it was said differently before, but as I think about it, the whole point of the penalty phase is to determine his culpability.

(26RT 4571.) The prosecutor declined the court's offer to discuss the matter at sidebar. (26RT 4571.)

4. The Prosecutor Did Not Commit Prejudicial Misconduct With Respect to His Question of Whether Appellant Cooperated With Law Enforcement Regarding the Identity of the Unnamed Crime Partners

Appellant claims that the prosecutor then immediately violated the trial court's ruling. (AOB 270.) As cross-examination by the prosecutor resumed, he asked,

> [Appellant], you said you want to dedicate the rest of your life [to] helping other people. [¶] Have you provided any information to any investigators in this case in an attempt to get the dangerous men who assisted you in the robbery and killing of Officer Hoglund so those investigators could go find them and arrest them?

(26RT 4574.) Upon appellant's counsel's request to approach, the court responded that the objection was sustained. The prosecutor asked, "Have you provided any information, sir, to get these people?" Again, appellant's counsel asked to approach. The trial court directed the prosecutor to "just go on to something else" as he had asked the "same question." (26RT 4574.)

The prosecutor did not commit misconduct as to these two questions. He did not ask appellant any questions about the actions of other people. Rather, the prosecutor's questions addressed *appellant's* conduct with respect to appellant's claims that he had found religion and essentially was remorseful and reformed. The question called for a "yes" or "no" answer without the need to discuss the identity or actions of others. Even if there was some reasonable argument available to appellant that the prosecutor did violate the court's ruling, to that extent the court's order would properly be characterized as ambiguous, and the prosecutor's questioning reasonable. (*People v. Price, supra,* 1 Cal.4th at pp. 452-453.)

5. The Trial Court Sustains Appellant's Counsel's Objection Regarding the Proceeds of the Robberies

Appellant next claims misconduct for the following. (AOB 270.) The prosecutor cross-examined appellant about the Siete Mares crimes, and asked if appellant felt remorse for beating Urrieta, the manager of that restaurant. Appellant denied beating anyone, or even knowing that anyone was beaten. The prosecutor asked how much money appellant made from that robbery. Appellant said he could not remember. In response to the question, "You don't remember taking $6,000 from the manager's office, plus money and jewelry from the customers?" appellant responded that it might have been that much, or more or less – he could not be precise due to the time that had passed. (26RT 4575-4576.)

The prosecutor asked appellant, "Didn't you split the money evenly with the other people who participated in the robberies?" Upon appellant's counsel's request to approach, the court stated,

> The objection is sustained. I want to remind you with respect to any of the cross-examination, any testimony is limited to [appellant] only. [¶] The objection is sustained to the form of that question.

(26RT 4576.)

The prosecutor then asked, "Did you get a fair share of the money, [appellant]?" (26RT 4576.) Appellant's counsel asked to approach, and stated,

> Your Honor, I ask the court to hold [the prosecutor] in contempt of court and in the minimum cite him for misconduct. I think the court's ruling is pretty clear on not going into the activities of other people and over and over again he is begging this issue.

(26RT 4577.) The court denied that request, finding that the way the prosecutor phrased the question was "appropriate." (26RT 4577.) Counsel

for codefendant Contreras then objected on behalf of Contreras, arguing that the prosecutor was trying to elicit how much appellant's share was, and by implication, he could later argue how much Contreras received. (26RT 4577.) The court stated that the prosecutor would not be permitted to make that argument, and ruled,

> He can ask what [appellant's] involvement was. He is allowed to ask that. The jurors know there were seven or eight people involved in the different [incidents]. I don't see any prejudice at all.

(26RT 4577.) The court added,

> The jurors are aware there were seven or eight people involved. He is only asking [appellant's] involvement at this point. This is not a surprise.

(26RT 4577-4578.) The court stated that the prosecutor could ask how much appellant's share was, over Counsel for codefendant Contreras's objection. (26RT 4578.)

The prosecutor did not commit misconduct with respect to these questions. While the prosecutor may have inartfully framed his question about an equal split of the proceeds the first time he asked it, the trial court immediately admonished the jury. (26RT 4576.) The court then found that the remaining questions, as reframed versions of the first question, were proper. Appellant's claim that the prosecutor asked these questions in violation of a court ruling fails – the trial court itself essentially rejected such an assertion. The prosecutor focused his questions on appellant's actions, not the actions or identities of others. Even if there were some reasonable argument available to appellant that the prosecutor did violate the court's ruling, to that extent the court's order would properly be characterized as ambiguous, and the prosecutor's questioning reasonable. (*People v. Price, supra*, 1 Cal.4th at p. 452-453.)

6. The Prosecutor Did Not Commit Prejudicial Misconduct as to a Question Regarding Carlos Umana

Appellant also claims the prosecutor committed misconduct for the following. (See AOB 270.) As noted above, appellant claimed that he shot Mr. Kim only because Mr. Kim shot him first, and that appellant was only acting to defend himself. (26RT 4584-4585.) In response to the prosecutor's question of where appellant went after he was shot, appellant testified,

> To the home – to the home of some friends. Then I went to a private clinic, but they didn't take care of me. I am talking about the City of Los Angeles. Then I went to the Good Samaritan Hospital, and there they took care of me.

(26RT 4585-4586.) In response to the prosecutor's question, appellant testified that the Umana family were the friends who helped him. The prosecutor asked, "Isn't that one of your partners in crime, Carlos Umana?" (26RT 4586.) Appellant's counsel objected:

> Your Honor, to renew my request that the court find [the prosecutor] in contempt for disobeying the court's order and second for misconduct into going into an area over and over again that he knows he is not supposed to. [¶] Umm, by allowing this cross-examination, it violates [appellant's] Eighth Amendment rights, as I talked about before. I think an appropriate remedy is to say enough is enough and cut off the cross-examination at this point.

(26RT 4586.) The court denied appellant's counsel's request, and explained its rulings to that point:

> [The prosecutor], I reversed my ruling as the jury was walking in. Earlier I did indicate you would be allowed to ask about the other persons. I rethought that. Even though it may not affect the other defendants here on trial, I am a little concerned about overlap over the other defendants and keeping

> it separate. And for you to ask a question involving others, you are risking the danger of having [appellant] include the other defendants. So if he talks about friends, leave it alone, or anybody else involved, and just ask what he did.

(26RT 4587.) Appellant's counsel stated that he "didn't hear the court talk about changing its ruling." (26RT 4588.) The court explained,

> Originally I told him he could, but if [appellant] chose not to reveal the names I wasn't going to hold [appellant] in contempt and the D.A. could argue whatever he wanted to argue, but I reversed myself because I think it brings inferences too closely to the other persons.

(26RT 4588.) The court added,

> To the extent there is any question about what [the prosecutor] has done, I don't see that it calls for any contempt. The defendant did make reference to going to a friend's house and there is a certain point – the D.A. does have a right to cross-examine, but you are stepping into areas that may affect the others, so stay away from anything that related to anybody other than himself.

(26RT 4587.)

The prosecutor did not commit misconduct in this regard, as the trial court essentially, and reasonably found. Here, even appellant's counsel was not clear on the parameters of the trial court's ruling. As the trial court found, the prosecutor's questions were reasonable in themselves, but excluded them because they could have led to improper inferences regarding Navarro and Contreras. Even if there was some reasonable argument available to appellant that the prosecutor did violate the court's ruling, to that extent the court's order would properly be characterized as ambiguous, and the prosecutor's questioning reasonable. (*People v. Price, supra,* 1 Cal.4th at pp. 452-453.)

7. The Prosecutor Did Not Commit Misconduct With Respect to Questions Regarding Where Appellant Had the Stun Gun He Used to Torture Two Victims at the Casa Gamino Restaurant

During his cross-examination of appellant, the prosecutor asked questions about the Casa Gamino crimes. Appellant denied bringing the stun gun into the Casa Gamino restaurant, and also denied having had a stun gun with respect to the Rod's Coffee Shop incident. Appellant admitted, however that he had used the stun gun during the Casa Gamino incident, and asserted that someone else had brought it there. (4596-4598.)

The prosecutor then asked, "Did you ask to borrow it for a moment while you tortured those people?" The court sustained counsel for codefendant Navarro's objection to the question "as phrased." The prosecutor asked, "You knew that stun gun had been brought to that location, didn't you?" The court overruled counsel for codefendant Navarro's reasserted "same objection." Appellant responded to the prosecutor's question and denied knowing that, and stated, "Well, I found out when the other person gave it to me once the robbery was already taking place." Appellant then used it on "Umm, Lopez. I don't remember. What I mean to say is I don't remember his name." (26RT 4598.)

Appellant claims the foregoing constitutes misconduct. (AOB 270.) Appellant's misconduct claim fails first because appellant forfeited it. Appellant never objected to the question. Only Counsel for codefendant Navarro did, on behalf of Navarro, and without specifying that it was based on prosecutorial misconduct. (26RT 4598.) By not objecting at the time on the basis now raised, appellant forfeited this claim for appellate review. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. McDowell, supra,* 54 Cal.4th at p. 436; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

In any event, the prosecutor did not commit misconduct. He did not violate any court order with his revised questions, as the trial court found. The prosecutor's first question was merely phrased imprecisely, but nevertheless focused on appellant's actions and state of mind. In any event, it was appellant who stated that someone else had brought the stun gun to the robbery. Even if there was some reasonable argument available to appellant that the prosecutor did violate the court's ruling, to that extent the court's order would properly be characterized as ambiguous, and the prosecutor's questioning reasonable. (*People v. Price, supra,* 1 Cal.4th at pp. 452-453.)

8. The Prosecutor Did Not Commit Prejudicial Misconduct With Respect to a Question Asked of Arturo Talamante on Cross-Examination

As noted above, Talamante testified he was the Hispanic coordinator of the ministry of prisons. He testified about how he and appellant established contact through a court interpreter, and how Talamante worked with appellant in learning about religion. Talamante testified that appellant had a strong desire to give himself over to the Lord, and that appellant had a strong spirituality. (26RT 4619-4624.)

On cross-examination, Talamante agreed with the prosecutor that part of finding religion, and having a "true conversion," was acknowledging the wrongs one had committed in the past. Appellant never discussed his crimes or wrongs from the past with Talamante. Appellant did not tell Talamante that he had shot a police officer in the back of the head, that he had tortured a young man and woman with a cattle prod to get money, that he tried to shoot a restaurant owner, or that he shot a man in a meat locker 10 times while the man begged for his life. Nor did appellant mention that he wanted forgiveness. However, Talamante testified that he found appellant to be "believable and credible," based on appellant's voice,

his studies, and his letters. Talamante's beliefs, based on his religion, included that belief that someone who "deliberately and intentionally wrongs" or "hurts another person should do everything in their power to make it right." (26RT 4628-4631.)

The prosecutor then asked, "And did [appellant tell you why he has done nothing to help the authorities to bring his other accomplices to justice?" Appellant claims this was prosecutorial misconduct, because the question included a reference to other people. (AOB 270.) The court sustained appellant's counsel's objection, without explanation or holding a sidebar conference. (26RT 4631.)

The prosecutor did not commit misconduct with this last question. His question was clearly focused on appellant's actions, or lack of actions, and not the actions of his crime partners, and was a direct and logical follow-up question to Talamante's testimony that a person who hurts another must do everything in their power to "make it right." After all, if appellant was not cooperating with the police by identifying other persons who were involved in the crimes, which would protect future victims, as part of appellant's own redemption, then under Talamante's reasoning appellant's claim of a religious awakening would appear to be false.

9. The Prosecutor Did Not Commit Prejudicial Misconduct With Respect to Questions Regarding the Proceeds of the Robberies

The prosecutor cross-examined appellant about the Siete Mares crimes, and asked if appellant felt remorse for beating Urrieta, the manager of that restaurant. Appellant denied having beaten anyone, or even knowing that anyone was beaten. The prosecutor asked how much money appellant made from that robbery. Appellant said he could not remember. In response to the question, "You don't remember taking $6,000 from the manager's office, plus money and jewelry from the customers?" appellant

responded that it might have been that much, or more or less – he could not be precise due to the time that had passed. (26RT 4575-4576.)

The prosecutor asked appellant, "Didn't you split the money evenly with the other people who participated in the robberies?" Upon appellant's counsel's request to approach, the court stated,

> The objection is sustained. I want to remind you with respect to any of the cross-examination, any testimony is limited to [appellant] only. [¶] The objection is sustained to the form of that question.

(26RT 4576.)

Appellant claims the foregoing constituted misconduct. (AOB 270.) However, here, again, the prosecutor did not contravene any court rulings. He was clearly asking appellant about appellant's own actions that secondarily involved others.

10. Any Misconduct During Cross-Examination Was Harmless

In any event, any misconduct was harmless. As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.)

Here, any misconduct did not work against appellant, but at most, could have worked against his codefendants and unnamed crime partners, since it could have tied them more directly to the act of shooting Officer Hoglund. That was, in fact, the basis of the court's rulings that the

prosecution could not ask questions about what others had or had not done. As noted above, the evidence presented against appellant during the penalty phase was overwhelming. And finally, even if the challenged questions could be seen as somehow prejudicial to appellant, the trial court did admonish the jury to consider appellant's testimony only as to him. (26RT 4565-4566.) Any misconduct was harmless.

D. The Prosecutor Did Not Commit Misconduct by Engaging in an Improper Ex Parte Contact With the Trial Court

The proceedings regarding the issue with the court interpreter are set forth at pages 4565 through 4570 of volume 26 of the reporter's transcript, and at pages 5594 through 5595 of volume 31 of the reporter's transcript. The propriety of the court's ruling regarding replacing the interpreter is discussed above in Argument XIV. Nowhere in the record before this Court is there any specific or general reference to an ex parte communication by the prosecutor with the court; nor is there any objection premised on an ex parte communication by the prosecutor. Since appellant failed to object to such purported ex parte communication, this claim has been forfeited for appellate review. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. McDowell, supra,* 54 Cal.4th at p. 436; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

Appellant nevertheless speculates that such an ex parte communication occurred, based on the fact that Mr. Richard Lennon stated that the prosecutor should have brought any problem he was having with the prosecutor before the court, rather than the prosecutor having spoken with the court reporter directly, and the court responded that the matter had been brought to its attention and the court agreed that there was a problem

with the interpreter. (AOB 271.) However, appellant has not pointed to any *evidence* supporting his assertion that the prosecutor spoke to the court ex parte. Any number of court personnel could have mentioned the matter to the court. The interpreter could have mentioned the matter to the court, as could have the bailiff or a court clerk, or the reporter. It could have been mentioned in the presence of all parties off-the-record, then was discussed on the record. It could have been brought to or come to the trial court's attention during the implicated examination. This latter explanation would seem to be more reasonable because the court was able to evaluate the interpreter's conduct while it occurred, rather than in hindsight as if it was the prosecutor who advised the court after the fact. (26RT 4568.) Significantly, no one present thought that the prosecutor had engaged in an ex parte communication with the court. Appellant's counsel was not one to miss making an objection, as the record well shows. This claim thus fails as lacking any basis in the record.

Moreover, any error would have to be seen as harmless. As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721; *People v. Howard, supra,* 51 Cal.4th at p. 38.) The proceedings at issue occurred in open court. The court explained its ruling in open court, then in open court replaced the interpreter. All parties had the opportunity to provide argument on the issue. As set forth above in Argument XIV, *supra*, the trial court properly replaced the interpreter. Moreover, the evidence against appellant during the penalty phase was overwhelming. Any misconduct was harmless.

E. The Prosecutor Did Not Commit "Other Misconduct"

Appellant claims that the prosecutor committed "other misconduct" because he was sarcastic, and used improper body language during appellant's cross-examination. Specifically, he complains that the prosecutor improperly used "sarcasm and theatrics" to communicate to the jury that he did not believe appellant's testimony. Appellant identifies the following reported proceedings as supporting this claim. (AOB 273-274.)

While cross-examining appellant, the prosecutor obtained his admission that before his arrest, appellant wore a gold cross but "for show" rather than to reflect religious beliefs. (26RT 4555.) The prosecutor then asked, "Let me discuss with you those two wonderful gentlemen who you met in jail" (26RT 4555), apparently referring to appellant's direct testimony about "two cell companions that were also Christians" with whom appellant shared his religious learning, and who helped guide his religious development (26RT 4522). (See 26RT 4555.)

At sidebar, the court asked the prosecutor, "Do you want to calm down for a second?" The prosecutor responded that he did not, because he "need[ed] this energy." Appellant's counsel asked the trial court to admonish the prosecutor to "calm down a bit," and asserted that the prosecutor was trying, through "theatrics," to "testify, to tell the jury how disgusted he is by [appellant]." The court declined to "make that order." Appellant's counsel referenced the prosecutor's question about "the wonderful gentlemen," which imparted, through sarcasm, that he did not believe appellant's religious defense. (26RT 4555-4556.) The court directed the prosecutor to "cut back on the editorializing," and to "just ask the questions and save it for argument." The prosecutor said he would do so. (26RT 4556.) The court then found, based on appellant's counsel's representation that the two inmates in question would not be called to testify, that the prosecutor's questions about the two inmates was not

relevant since no evidence of their credibility had been presented. (26RT 4556-4557.)

Appellant's counsel then stated the following:

> I would also object. I think there's some – it's part of the editorializing. There's comments back and forth between the two district attorneys in the court. Part of it is just suggesting questions I assume that –

(26RT 4557.) In response to the court's request for clarification of the objection, appellant's counsel stated, "That it's public displays of their thoughts on the testimony." (26RT 4557.) The court disagreed, and found,

> They're quietly conferring. I don't see that as a public display anymore that I see consultation between the Leonards or between [various defense counsel]. [¶] The objection is overruled if that was an objection.

(26RT 4557.)

At the end of his cross-examination of appellant, the prosecutor stated, "I have had enough, Your Honor," indicating his cross-examination was concluded. Appellant did not object, and appellant's counsel engaged in a short redirect examination. (26RT 4616-4617.) At sidebar, counsel for codefendant Contreras asked the trial court to admonish the prosecutor that when he was finished examining witnesses, to simply state "no more questions," rather than to engage in "reported oral indignation." (26RT 4618.) The trial court responded, "I will remind both of you, [codefendant's counsel] as well as [the prosecutor]. I will warn both of you again, we don't need any editorializing, [prosecutor]." (26RT 4618.)

Generally speaking, under both the federal and state standards for prosecutorial misconduct, a prosecutor may not engage in a pattern of misbehavior consisting of rudeness and intemperate remarks, offensive

personality, gratuitous sarcasm, a lack of respect for the court and courtroom procedure, improper expressions of personal belief concerning witness reliability, or improper laughter during defense examination. (See, e.g., *People v. Hill, supra,* 17 Cal.4th at pp. 819-820; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Here, the prosecutor's conduct did not rise to the level of misconduct. Only one instance of arguably inappropriate sarcasm was presented by the prosecutor during his examination, and the court promptly directed the prosecutor to ask questions during examination, and to save argument for the jury argument. Because sarcasm and other rhetorical devices may highlight for the jury the improbability of a defendant's explanation or testimony, their use in cross-examining a defendant is not necessarily improper. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1127 [sarcasm during cross-examination of defendant not misconduct where used as a rhetorical device]; *People v. Bemore* (2000) 22 Cal.4th 809, 847 [same].) While the prosecutor's examination was tough, it was otherwise fair and zealous advocacy. His comment at the end, that he had had enough, was not misconduct, even if it was hard-hitting. In fact, the trial court implicitly found that the prosecutor's conduct did not rise to the level of misconduct. (26RT 4555-4556, 4618.)

Nor can appellant show any prejudice in this regard. As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721.) It should have been abundantly clear to all, including the jury, that the prosecutor did not believe appellant's life should be spared

based on his defense, even without the complained-of remarks. Given the overwhelming evidence presented during the penalty phase, appellant cannot show prejudice.

XIX. THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTOR TO CROSS-EXAMINE APPELLANT DURING THE PENALTY PHASE REGARDING WHETHER HE HAD BEEN INVOLVED IN A SHOOTOUT AT A TIME OTHER THAN THE WOODLEY MARKET CRIMES

Appellant testified, in an effort to avoid the death penalty for the murder of Mr. Kim, that he shot Mr. Kim only because the victim had shot appellant first. Appellant claims that the trial court prejudicially erred in permitting the prosecutor to repeatedly question appellant on cross-examination during the penalty phase about whether appellant had received a bullet wound at a time other than during the Woodley Market crimes. Appellant also complains that the prosecutor committed misconduct in his questioning of appellant on this point. Appellant concedes that the questions asked by the prosecutor were proper cross-examination, because appellant expressly testified on direct that Mr. Kim had shot him. However, appellant complains that the prosecutor's questions about a shootout were improperly presented factor (b) evidence. (AOB 276-287.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

Appellant testified on direct and cross-examination that Mr. Kim fired at him first, shooting him, thereby causing appellant to shoot back, killing Mr. Kim. (26RT 4538; 4584-4585.) According to appellant, he then went to the home of friends, to a private clinic that did not treat appellant, then to the Good Samaritan Hospital. (26RT 4585-4586.) According to appellant, the bullet was never removed. X-rays were taken a couple of days before

appellant testified. (26RT 4591.)[94] No corroborating evidence of any kind with respect to when appellant was shot, such as records from the Good Samaritan hospital or testimony, were ever presented in court.

The prosecutor asked, "Are you sure you didn't get shot somewhere in the period between December 31, 1991, and April 18, 1992?" Appellant responded that he was sure. The prosecutor asked, "Were you involved in a shoot-out at that time? (26RT 4591-4592.) Appellant's counsel objected. At sidebar, the prosecutor said,

> I have a good faith basis for asking that, Your Honor. There is a big time gap and we know of a shooting he is connected to during that time.

(26RT 4592.) The court stated,

> You are bringing up – your client has brought up that he was shot by the victim, Mr. Kim. At this point, I don't know whether he had specific records relating to those X-rays. I have seen X-rays on the table but the jury doesn't know what we are talking about yet. I don't see how you can keep the People from suggesting that bullet was acquired some other time. [¶] Do we have records from whatever that hospital was that are consistent with the bullet shown on those X-rays?

(26RT 4593.) After appellant's counsel said he did not have such records, the court stated,

> How can I not let him cross-examine on that? [¶] You want all of us to take [appellant's] word and not allow any cross-examination where there is no record to support his position. It's his word. I think the People have a right to challenge that word.

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[94] As disclosed later during the proceedings, and as set forth above in the statement of facts, the X-rays revealed the presence of an "opaque foreign body" that appeared to be a bullet in appellant's abdomen. (See 26RT 4690-4696.)

(26RT 4593.) In response to appellant's counsel's assertion that the prosecution had not shared any basis for a good faith belief of such a shootout, the prosecutor stated he was referring to the "newspaper articles" which asserted that appellant had been involved in a shooting during February 1992.[95] The court ruled that if appellant denied he had been involved in such a shooting, the prosecution could not go into the newspaper article. Because the prosecution did not have "anything other than the article," the court ruled, "Then you can't," and asked what the next question would be. The prosecutor responded, "The Casa Gamino." (26RT 4594.)

The prosecutor resumed his cross-examination and asked, "Sir, were you involved in a shoot-out in February of 1992 in which you may very well have received that gunshot wound?" Appellant's counsel asked to approach the bench. The court sustained his "objection" and directed the prosecutor to rephrase his question. The prosecutor asked that the reporter read back the earlier related question as to which the objection was overruled, then asked, "Were you involved in the shootout during the time period, between December 31, 1991, and April 18, 1992?" Appellant responded that he did not think so. The prosecutor asked if appellant was just unsure about the time period. Appellant asked, "From the 31st of 1992 [*sic*]?" The prosecutor assented. Appellant said he was not involved in "the shoot-out, the one that he's talking about . . . that you are talking

[95] Presumably, the prosecutor was referring to a newspaper article from Honduras found in appellant's home that described appellant as having been involved in a shootout during a robbery there. The court had earlier ruled that the newspaper article was "excluded." However, The prosecutor had asked the court to "reserve any ruling until after we hear what [appellant] and his character witnesses have to say that may change the situation." The court stated that the prosecutor could "renew any motions" it chose to. (24RT 4191-4194.)

about." The court denied appellant's counsel's request to approach. The prosecutor then moved to the Casa Gamino Restaurant crimes. (26RT 4595-4596.)

Appellant later called Dr. Earl Landeau to testify on his behalf. Dr. Landau, the chief radiologist for the Los Angeles County Sheriff's Department, interpreted an X-ray that had been performed on "Carlos Juarez" by someone else. The X-ray depicted appellant's "pelvic portion of the abdomen," and disclosed an "opaque foreign body" that appeared to be a bullet, which was lodged "adjacent to the right femoral bone." There had been no prior request for such an X-ray by appellant. (27RT 4690-4697.)

During closing argument, the prosecutor said the following:

> [Appellant's counsel] will argue that [appellant] deserves mitigation because Mr. Kim shot or fired the gun at him during the incident in the freezer at the Woodley market. And you are entitled to consider that. If you feel that to be mitigation in that particular crime, you can consider it and give whatever weight you assign to it.
>
> But the evidence of that shooting is somewhat suspect. There's no medical treatment, no complaints of any medical treatment. There's no indication of any blood trail leading from the freezer to the door. We know that 13 days later he is at Casa Gamino committing assaults and robberies and tortures.
>
> And the timing of the discovery. He only has the X-rays done days before the – or during the penalty phase, and never asked to have the bullet removed. If he just had that bullet removed, it could have been compared with absolute certainty by his expert or ours, and we would know for sure where that bullet came from.
>
> And even if it's [Mr.] Kim's bullet, we don't know if it's a ricochet or crossfire, if he fired first or fired in response.

(30RT 5337.) The prosecutor also argued that even if Mr. Kim had fired at appellant, that did not justify in any way appellant's killing Mr. Kim, and

certainly did not mitigate appellant's murder of Officer Hoglund. (30RT 5337-5339.)

B. There Was Neither Judicial Error Nor Prosecutorial Misconduct

Appellant begins his assignment or error by acknowledging that "the prosecutor could cross-examine appellant so as to suggest that he was shot by someone other than Kim, because it was a matter appellant expressly testified about during the direct examination. (Evid. Code, § 773.)" (AOB 278.) However, appellant complains that the prosecutor purportedly went beyond proper cross-examination and implied that appellant committed a crime in another shootout, thus presenting evidence of criminal activity under factor (b). (AOB 276-287.)

At the outset, respondent notes that appellant has forfeited the claim that the prosecutor's impeachment questions of appellant constituted improper factor (b) evidence. It is well established that an evidentiary claim may be deemed forfeited if the defendant failed to timely object in the trial court on the specific ground advanced on appeal. (*People v. Dykes, supra,* 46 Cal.4th at pp. 756-757; *People v. Thornton, supra,* 41 Cal.4th at p. 427; *In re Sheena K., supra,* 40 Cal.4th at p. 881; *People v. Partida, supra,* 37 Cal.4th at pp. 433–435; *People v. Lewis, supra,* 26 Cal.4th at p. 357; see also Evid. Code, § 353.) Here, appellant did not object on the ground advanced here on appeal, that the questioning about a shootout constituted improper factor (b) evidence. Appellant never asserted this objection in the trial court. Rather, his objections were based on the prosecution's purported lack of a good faith basis to ask questions about a shootout unrelated to the crimes in this case. Nor did appellant object on the basis of prosecutorial misconduct because the prosecutor was trying to place "damaging insinuations before the jury," thus forfeiting a misconduct

claim in this regard. (*People v. Mickle* (1991) 54 Cal.3d 140, 191; see generally *People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. McDowell, supra,* 54 Cal.4th at p. 436; *People v. Souza*, 54 Cal.4th at p. 122; *People v. Fuiava, supra*, 53 Cal.4th at p. 726; *People v. Williams, supra,* 49 Cal.4th at p. 464.) Appellant's evidentiary and misconduct claims are thus forfeited.

In any event, the trial court did not err, and the prosecutor did not commit misconduct. As appellant acknowledges (see AOB 278), a witness may be cross-examined on any matter within the scope of direct examination. (Evid. Code, § 773; see *People v. Harris* (2005) 37 Cal.4th 310, 334.) Cross-examination is not limited to a categorical review of the matters, dates, or times mentioned in direct examination, and may concern any subject matter that overcomes or qualifies the effect of testimony from direct examination. (*People v. Farley* (2009) 46 Cal.4th 1053, 1109.) A defendant cannot "limit the cross-examination to the precise facts concerning which he testifies." (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) Evidence of "an unrelated offense" may be introduced through cross-examination if it refutes a defendant's statement made on direct examination. (*People v. Harris* (1981) 28 Cal.3d 935, 953.)

Prosecutors have wide latitude to draw inferences from evidence presented at trial and to present facts vigorously. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Questions may not be asked by a prosecutor on cross-examination about other, uncharged crimes committed by the defendant even where relevant to the questioning, absent a good-faith belief that such uncharged crimes occurred, for the purpose of placing "damaging insinuations before the jury." (*People v. Mickle, supra,* 54 Cal.3d at p. 191.) Wide discretion is granted to the trial court in controlling the scope of cross-examination. (*People v. Farnam, supra,* 28 Cal.4th at p. 187.) Trial court rulings

concerning the admissibility of evidence are reviewed for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 290; *People v. Thornton, supra,* 41 Cal.4th at pp. 444-445.)

Here, appellant testified on direct examination that he murdered Mr. Kim only after the victim shot appellant first, thus trying to mitigate the cold-blooded nature of the murder in order to avoid the death penalty. The trial court properly permitted the prosecutor to question appellant about the timing of the shooting, and to ask questions on cross-examination designed to ferret out the truth of when appellant was shot, if at all. After all, there was no evidence at the scene of the Woodley Market supporting appellant's claim of having been shot there. There was no testimony by any witness, save appellant, indicating that appellant had been shot, appeared wounded, or left a blood trail. Appellant produced no medical records that actually supported his claim regarding when and under what circumstances he was shot, but only X-rays which showed that, at some time, he may have been shot in the abdomen where the bullet lodged. Only two weeks later, after shooting Mr. Kim, appellant committed the crimes at the Casa Gamino, where he was very physical with the victims as he tortured, abused and robbed them. And, the prosecutor understood that appellant was likely involved in a shootout as reflected in the newspaper article. While the trial court found the article was insufficient to support specific questioning on the facts of that shootout, the fact remains that appellant validated the truth of the article to the extent it reported that a shootout occurred, when he testified that he was not involved in the shoot-out, "the one that you are talking about." (26RT 4596.) Thus, given appellant's unsubstantial and apparently false testimony regarding being shot by Mr. Kim, and given the information in the newspaper article that appellant seemingly validated in his testimonial response, the prosecutor had a good faith basis for doubting appellant's truthfulness, and cross-

examining appellant on this point, and the trial court properly exercised its discretion and permitted such cross examination.

Appellant agrees that some of the prosecutor's questions in this regard were proper cross-examination. (AOB 278.) However, he argues that the trial court erred by permitting the prosecutor to "go far beyond" proper cross-examination by permitting the prosecutor to imply that appellant had committed another crime involving a shootout, thus improperly presenting "inadmissible aggravating evidence" under factor (b). He argues that the prosecutor committed misconduct by implying that appellant had committed another crime without having a good-faith belief that there was admissible evidence to support such an assertion. (AOB 278-284.)

Here, as shown above, the prosecutor did have a good faith basis for his questions regarding when appellant may have been shot, and that it may have occurred at a time other than the time when appellant murdered Mr. Kim. The evidence that appellant had received the bullet during the Kim shooting was flimsy at best. There was no evidence that appellant was shot during the incident, save for his claim during the penalty phase of his trial. There was no blood trail at the Woodley Market consistent with appellant's claim he was shot. There was no evidence that appellant required assistance leaving the Woodley Market. The Kim murder took place on May 4, 1992, yet less than two weeks later, appellant committed the crimes at the Restaurant Casa Gamino, where he engaged in physical conduct that would belie a recent gunshot wound. Then, on May 22, 1992, appellant committed the Ofelia's Restaurant crimes. And on May 29, 1992, appellant committed the George's Market crimes. There was no indication at any point that appellant appeared to be wounded as he might have been if he had received the gunshot wound only weeks earlier. However, the prosecutor was also aware that after committing the Outrigger Lounge crimes on December 31, 1991, appellant was not charged with any crimes

occurring before April 18, 1992 (El 7 Mares Restaurant), which rendered it more likely that appellant received his wound during January or February, 1992.

Second, the prosecution possessed the newspaper article found in appellant's possession in which a shooting involving appellant was described as having taken place. Appellant implicitly validated that newspaper account by responding to the prosecutor's questions and acknowledging implicitly that the shootout referenced in the article had occurred. (See 26RT 4596.) Once the court ruled that the prosecutor could not go into the newspaper article, the prosecutor relied on questions concerning an expansive time frame in which appellant could have been shot. Even assuming arguendo that the prosecutor framed one question in an objectionable manner, he corrected that and reframed the question properly, thus complying with the court's rulings, and properly cross-examining appellant on a point appellant raised during direct examination. The prosecutor never presented evidence of other crimes related to the newspaper article.

Third, appellant presented only evidence that there may have been a bullet inside of his body. He did not present evidence that would presumably have been available to him to prove when such a bullet wound occurred, like supportive hospital records which he could have obtained. Or, appellant could have presented the testimony of a custodian of records to explain why such records were not available, if that was the case. In fact, when the court overruled the prosecution's objection to admission of the X-ray, because "We don't know where the bullet came from, when it was received, what type of bullet it is," the court ruled that "If he testifies, that takes care of that." (26RT 4514.) The prosecution was thus faced with very weak evidence supporting appellant's claim that appellant was shot first by Mr. Kim, further supporting their need to refute the claim.

There was no error or misconduct, but even if there was, it was harmless. As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721.)

Here, in pertinent part, the penalty jury was instructed that it "may not consider any evidence" of any crimes other than appellant's conviction for the possession of cocaine base for sale, and crimes associated with the Rod's Coffee Shop incident, as an aggravating circumstances. (26RT 5246-5247.) As noted earlier, it is presumed that the jury followed the instructions it was given, not that it ignored them. (See, e.g. *People v. Tafoya, supra,* 42 Cal.4th at pp. 192-193; *People v. Yeoman, supra,* 31 Cal.4th at p. 139; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Horton, supra,* 11 Cal.4th at p. 1121.) Moreover, the brief mention of a shootout could not have tipped the scales in favor of a death verdict, given the already overwhelming aggravating circumstances of the present crimes. There was never any attempt by the prosecutor to say that appellant had committed another crime involving a shootout, but only to rebut appellant's claim that Mr. Kim precipitated his own murder by shooting appellant first. These claims fail.

XX. THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTOR TO CROSS-EXAMINE APPELLANT'S WITNESS ARTURO TALAMANTE

Appellant claims that the trial court erroneously permitted the prosecutor to impeach one of appellant's "religious mitigation witnesses," Arturo Talamante, thereby violating appellant's rights to due process,

a fundamentally fair trial, and to reliable death verdicts. Specifically, appellant complains of questioning regarding Bedolla Duarte, [96] an incarcerated criminal with whom Talamante also had a religious relationship. (AOB 287-299.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

1. Evidentiary Issues

After appellant was convicted, and before the penalty phase trial began, the prosecutors told the court they intended to cross-examine the defense religious experts regarding appellant's purported recent religious conversion in the jail by examining those witnesses about an incident involving appellant in the jail. The court ruled the People could not raise that particular incident because factually their evidence to support its occurrence was insufficient. (24RT 4195-4198.) Appellant's counsel told the court he would present expert and lay witnesses who would testify,

> About [appellant] discussing God with them and trying to help them get in touch with God; priests who are going to testify; religious writings, the quality and depth of his writings. [¶] And I've got witnesses who will talk about – witnesses who, in order to test what is inside his heart, they challenged his mind and challenged whether or not he has the intellectual depth to support what he writes to see whether or not he has spent the time to study the Bible to the extent that it's not just lip service.

(24RT 4199.)

The prosecutor noted that appellant would call Bodoy Adarte and "Mr. Hernandez" to testify. Adarte was convicted of homicide even after finding God and preaching God's Word before the murders he committed.

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[96] As noted above, this person is identified as both "Bedolla Duarte," and "Bodoy Adarte" in these proceedings.

Hernandez also was convicted of murder. The prosecutor intended to cross-examine Adarte and Hernandez extensively since appellant also claimed to have found God after committing the instant crimes. The trial court would not restrict that cross-examination. (24RT 4202-4203.)

Later, appellant's counsel offered that the witnesses would not talk about their own lives, crimes, conversions, or opinions of religion. Rather, they would testify about their experience with appellant and his religious conversion. (25RT 4384-4386.) The court ruled that the issue of appellant's future dangerousness was off limits with those witnesses unless they also testified about appellant's "growth." (25RT 4386.)

2. Appellant's Opening Statement

In pertinent part, appellant's counsel told the jury the following during the penalty phase defense opening statement. Appellant had found religion while in jail following his arrest in this case. (25RT 4394-4396.) Appellant's counsel said,

> You are going to hear from a couple [of] Catholic witnesses about their time spent with him discussing the Bible, discussing the things that were of interest to him, his thoughts, his understanding, his growing understanding of what it all meant, and how that affected him spiritually and in everyday life.
>
> You are going to hear from a minister who helped his mother, who had come to the United States to be with him, helped the family, his mother survives his brothers, how this minister would come to visit [appellant] and his impression of his conversations with my client about religion.
>
> You are going to hear about my client's desire to be of help to other people, the peace he has found within himself by his devotion to the Bible, by the change he has felt himself, how that has helped him through difficult times, his efforts to help other people going through the same emotions, the same thoughts, deal with the reality of being in jail, and his desire to

> put his knowledge, a fairly extraordinary knowledge into use to help other people to avoid the mistakes, to avoid – to change their own perspective, to help them deal with the time.

(25RT 4396-4397.) Appellant's counsel closed his opening statement by asking the jury to keep an open mind about "jailhouse conversions." (25RT 4397-4398.)

3. Relevant Portions of Minister Ruiz's Penalty Phase Testimony

Minister Ruiz testified that during the year he had been visiting appellant in jail, he felt appellant had grown, and was "very deep into the will of God." (25RT 4470-4471.) Sometimes people would turn to religion when they were in trouble, to get a "favor from God or from something." Sometimes people would revert back to their sinful ways after their crisis had passed. Minister Ruiz did not believe appellant was faking religious belief to avoid the death penalty. (25RT 4475-4478.) Appellant "went very deep" in studying "certain points in the Word of God." Ultimately, Minister Ruiz would not know if someone was faking their knowledge of the Bible because Ruiz was not inside of their hearts. (25RT 4487-4489.)

4. Court Rulings Prior to Appellant's Testimony

The court ruled that if appellant testified about the treatise that he wrote, then the People had the right to cross-examine him on the inferences regarding appellant's sincerity. Appellant's counsel stated," I intend to put on my other witnesses to support the sincerity of his conversion and those witnesses would be subject to cross-examination." (26RT 4502.) The court again declined to limit the People's right of cross-examination in this regard. (26RT 4502.) Appellant's

counsel emphasized that the "sincerity of [appellant's] conversion" was the defense. (26RT 4503-4504.)

Appellant's counsel then proposed to have Arturo Talamante testify about the treatise appellant wrote, so appellant would not be cross-examined on it. However, because appellant's counsel could not lay foundation for the treatise through Talamante, Talamante could not put the treatise into evidence. (26RT 4504-4506.) Appellant's counsel then said,

> I have my experts on conversion and experts on Bible knowledge, religious knowledge, who would be able to testify or hopefully testify about the ability of my client to be of help to others because of his knowledge and his ability to pass on that knowledge to others. They, in order to give their opinion, they need to rely on the hearsay statements of my client to them and the hearsay document as a basis for their opinion that he would be of help to other people. [¶] So I ask that they be allowed to base their opinion on that.

(26RT 4507.)

Appellant's counsel then stated that he had experts on "conversion" and,

> Bible knowledge, religious knowledge," who would be able to testify or hopefully testify about the ability of [appellant] to be of help to others because of his knowledge and his ability to pass on that knowledge to others. They, in order to give their opinion, they need to rely on the hearsay statements of my client to them and the hearsay document as a basis for their opinion that he would be of help to other people.

(26RT 4507.) Appellant's counsel wanted such experts to be able to base their opinions on the treatise appellant wrote. (26RT 4507.)

The court ruled that one such expert, Brother Luke, would not qualify as an expert because he had insufficient contact with appellant. (26RT 4507-4508.) Another such witness was Mr. Talamante:

> Mr. Talamante, who is a long time Protestant minister with a jailhouse ministry who has a long term relationship; through writing and telephone calls is how he does his ministry, who would testify to the same thing, would need to rely on the hearsay statements of my client to him and the document in order to give the opinion that my client has sufficient knowledge to pass that knowledge on to other people, to be helpful to other people.

(26RT 4508.) The long term relationship was around a year and a half long, according to appellant's counsel. (26RT 4508.) The court ruled that while Talamante could testify that he relied on or discussed a document, and the People could cross-examine Talamante about the lack of foundation for the document, the document could not be presented into evidence through Talamante. (26RT 4509.)

Appellant's counsel indicated that the other religious expert would be Pacifico Diaz, a Catholic priest and chaplain in the jail, who had discussed with appellant appellant's views on religion, and established a relationship with appellant based on four or five in-depth conversations. (26RT 4509-4510.) Appellant's counsel also indicated that he wanted to present the testimony of his expert witness on the depth of appellant's knowledge based on that expert's discussions with appellant, and his testing appellant on the treatise and its contents. (26RT 4510-4511.)

The court ruled that the treatise was admissible if appellant testified. (26RT 4514.) Appellant testified that he received assistance in learning about religion from two "cell companions" who were Christians. (26RT 4522.)

5. Pertinent Portions of Arturo Talamante's Testimony

a. Talamante's Direct Testimony

According to Talamante, "one learns to know people" through prison ministry work" and "[i]n these past 25 years, I've only found two

people who have the spirituality that [appellant] has had." (26RT 4622.) Talamante believed that appellant understood what he wrote about in his treatise. Appellant's treatise exceeded the level of what a lay pastor could be expected to know about. (26RT 4623-4624.)

b. The People's Cross-Examination of Talamante

Talamante felt satisfaction from working with the "baddest of the bad" even when he was unable to reach such people. (26RT 4624-4625.) Talamante and appellant did not talk about religion, but about God. In Talamante's opinion, appellant had experienced a true conversion. (26RT 4628.) When Talamante and appellant spoke, Talamante felt as if he was speaking to another pastor. Talamante agreed that if a person had committed terrible crimes, then that person should acknowledge his crimes. Appellant did not tell Talamante what he had done. (26RT 4627-4630.)

Talamante acknowledged on cross-examination that he had testified on direct examination that "there are only two people [he] found in the past 25 years who have found the spirituality that [appellant] has." (26RT 4635.) One of the two people was Bedolla Duarte. Appellant objected as irrelevant and as inadmissible hearsay to the question of how Talamante compared Bedolla Duarte's spirituality to appellant's spirituality. The court overruled the objections. (26RT 4635-4636.) Talamante had the "same good feeling" about Duarte and appellant. Talamante thought that Bedolla was "equally as spiritual" as appellant. Appellant objected as irrelevant, and under Evidence Code section 352, to the question whether Talamante thought Duarte was "as believable" as appellant. The court overruled that objection. Talamante found each equally believable. He also believed each was "equally devoted to God." Talamante once told the prosecutor that he would put his hand in fire for Bedolla Duarte, and that he "love[d] that man," and that he would "invite

him to [Talamante's] house" given the opportunity. Talamante also felt that same way about appellant. (26RT 4636-4637.)

Talamante had observed a close relationship develop between appellant and Bedolla Duarte while they were in custody together. Talamante believed each had the same ability to "teach the word of God to others." Appellant objected on the ground of "improper future dangerousness" to the prosecutor's question whether Talamante believed that if someone like Duarte or appellant had really found God, they would not go out and commit vicious acts of murder. The prosecutor responded, "Testing his opinion." The court overruled the objection. (26RT 4637-4638.) Talamante believed that people who have truly found God "don't go out and commit vicious acts of murder." (26RT 4638.) Talamante believed that if a person is in the "service of God" and "is always with him [he] is not capable of committing the same mistake twice." Talamante felt that equally about appellant and Duarte. (26RT 4638-4639.) In Talamante's view, a person could find God, then "leave God"; such a person could then still go out and commit murder. However, in Talamante's opinion, appellant and Duarte had found God. (26RT 4639.) Talamante had seen a close relationship develop between appellant and Duarte. Duarte was in prison where he had "won over 70 young men," 45 of whom were recently baptized. (26RT 4639-4640.)

The prosecutor asked whether, since appellant shared the same interests as did Duarte, if they were sentenced to the same prison, Talamante would expect them to "work together." Appellant's counsel objected on grounds of "speculation." The court called a sidebar, and stated,

> Okay. I'm bothered a little bit. You are not objecting at this point, but I overruled your objection because it seems to me it is appropriate for her to cross-examine this witness as to his belief in the sincerity of this other person and test his belief also

> of the defendant. [¶] But you are going beyond that by bringing in the actions of this other person independent of what this defendant did. So I'm not comfortable with that, where that is going. [¶] It's one thing to challenge and cross-examine of this witness' evaluation of the person's sincerity. [*Sic*] But when you do start going into future dangerousness, I think that door has not been opened.

(26RT 4640.) The prosecutor stated she would not "go any further into that." (26RT 4640.) In response to comments by appellant's counsel, regarding whether or not the prosecution would seek to show whether or not Bedolla was a "good person," the court stated,

> I'm allowing it. This – I did not have any idea that this was coming, but he indicated of his 25 years there's only been two people of the level of spirituality he has ever experienced, Bedolla being one and [appellant] being the other. [¶] I am assuming Bedolla is the person who had found God and gone out and committed another homicide.

(26RT 4641.) After the prosecutor stated that Bedolla was that person, the court stated, "She can certainly inquire of that to impeach his assessment of sincerity, but not for future dangerousness. There you are crossing the line I am not comfortable with." The prosecutor indicated she was "done with that." (26RT 4641.)

Appellant's counsel argued that the prosecutor could not state whether or not Bedolla found God before he committed the murders, and appellant's counsel assumed Talamante would say he met Bedolla after he was in jail for the murders. (26RT 4642.) The court found that subject was something to be handled on cross-examination and redirect. The court found,

> But my understanding is that he was preaching or doing some kind of ministry before the latter murders had got him into prison, and then he returned to the ministry. When we have a very strong statement by this witness saying these are the only two people in 25 years, I think she certainly has a right to explore that.

(26RT 4642.) Appellant's counsel replied, "Okay." (26RT 4642.)

Talamante testified that he did not testify at Bedolla's trial for Bedolla, who was a minister at the time of his arrest. At the time of his arrest, Bedolla was a minister who had studied two-and-a-half years in a Bible institute and had pastoral certificates from that institute at the time of his arrest. The month before Talamante was testifying, Bedolla was convicted of three counts of first degree murder, five counts of attempted murder, two counts of attempted robbery, 10 counts of robbery, and 12 counts of assault with a firearm. Talamante did not know those things about Bedolla. Even knowing that, Talamante still believed Bedolla had "found God." (26RT 4642-4643.)

6. Relevant Portions of the Prosecution's Closing Penalty Phase Argument

The prosecutor noted appellant's claim of having made a "complete spiritual transformation," changing from a "mass killer and a leader of marauding robbers to a religious leader, to a man of God, a man of divine holiness." (30RT 5311.) The prosecutor discussed appellant's testimony, then stated, "It's for you, ladies and gentlemen, to decide what the meaning of that type of answer and questions are and whether or not Mr. Sanchez has really found God in his life." (30RT 5311-5315.) She argued that the evidence before the jury did not support appellant's claim of a religious conversion. (30RT 5315-5327.)

She then discussed appellant's religious witnesses. (30RT 5327-5329.) With respect to Talamante, the prosecutor stated the following:

> Mr. Talamante. Do you remember Mr. Talamante? He told you there's only been two people who have the type of spirituality that he has seen in his 25 years of practice. One of them was Mr. Sanchez and the other one was Mr. Bedolla.

> Well, Mr. Talamante knew about as much [sic] as [appellant] and the crimes he committed as he did about Mr. Bedolla, that he also was a mass killer and robber and was a certified minister and studied two and a half years in Bible college before he committed these crimes.

(30RT 5329.)

Appellant's counsel objected to these comments as not based on the evidence before the jury. The trial court instructed the jury that it was for them to determine what was and what was not in evidence, and that while the attorneys could argue reasonable inferences, they were not entitled to argue based on speculation. (30RT 5329.) The prosecutor then argued that appellant's religious witnesses were good men who believed that anyone can be redeemed, but were "not trained to be fair and impartial." Rather, they wanted to find good in everyone, believed no one would lie to them about a religious conversion, accepted appellant at face value, and did not know enough facts about appellant's background. Appellant lied to, deceived, and manipulated the religious witnesses he presented who were "good, God fearing, decent people." (30RT 5330-5333.)

B. The Trial Court Properly Exercised Its Discretion and Permitted the Prosecution to Cross-Examine Talamante About Bedollo

As noted earlier, "all relevant evidence is admissible" unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also *People v. Carter, supra,* 36 Cal.4th at p. 1166.) Relevant evidence is evidence, including that relevant to witness credibility, "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Carter, supra*, 36 Cal.4th at p. 1166.) Generally speaking, trial courts have broad discretion in making such

determinations. (*People v. Tully, supra,* 54 Cal.4th at p. 1010; *People v. Hoyos, supra,* 41 Cal.4th at p. 898.)

Unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it has a tendency in reason to disprove the truthfulness of the witness's testimony. (Evid. Code, § 780; *People v. Hawthorne* (2009) 46 Cal.4th 67, 99.) The collateral-matter limitation on attacking the credibility of witnesses applies when the cross-examiner elicits irrelevant testimony merely to contradict it. (*People v. Mayfield* (1997) 14 Cal.4th 668, 748; *People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Evidence Code section 352 grants trial courts the authority to control the use of impeachment evidence to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Mills, supra,* 48 Cal.4th at p. 195 [citations and internal quotations omitted].) That is, trial courts have discretion to admit or exclude evidence for impeachment on a collateral matter. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1005; *People v. Lewis, supra,* 26 Cal.4th at pp. 374–375; *People v. Mayfield, supra,* 14 Cal.4th at p. 748.) Thus, such appellate claims are reviewed for abuse of discretion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 808-809; *People v. Lewis, supra,* 25 Cal.4th at p. 637.)

As set forth more fully above in Argument VII, "Prejudice" under Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual with very little effect on the issues, and is not synonymous with "damaging." (*People v. Bolin, supra,* 18 Cal.4th at p. 320.) Thus, the prejudice that Evidence Code section 352 is intended to avoid is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Scott, supra,* 52 Cal.4th at pp. 490-491, internal citation and quotations omitted.) Further, the admission of evidence might violate federal constitutional due process if there were no permissible inferences

the jury might draw from the evidence. (*McKinney v. Rees, supra,* 993 F.2d at p. 1384.) Its admission must render the trial fundamentally unfair. (*Estelle v. McGuire, supra,* 502 U.S. at p. 70.)

Here, as set forth in the relevant trial proceedings section, appellant's counsel sought to convince the jury that appellant was such a changed person through his newfound devotion to God – after he committed his multiple murders, robberies, and other violent crimes – that he should receive life in prison rather than death. As appellant's counsel emphasized to the trial court, the "sincerity of [appellant's] conversion" was the defense. (26RT 4503-4504.) To attempt to prove the defense, appellant's counsel presented the testimony of various religious witnesses, including Talamante. Talamante testified to his opinion that appellant possessed a high level of spirituality that was matched by only two others whom Talamante had known over the past 25 years. No one forced Talamante to compare appellant to Bedolla Duarte as Talamante did on direct examination, and as he reaffirmed on cross-examination without any qualification whatever. (See 26RT 4622, 4635.) Once Talamante did, then cross-examination questions about that aspect of his testimony were proper. Otherwise, the jury would have been deprived of critical information about Duarte, appellant, and Talamante's standards as reflected in his testimony. "The value of giving the jury a full and accurate view of [Talamante's] credibility was not substantially outweighed by the probability of a substantial danger of undue prejudice. (Evid. Code, § 352.)" (*People v. Bennett* (2009) 45 Cal.4th 577, 607 [prosecutor properly permitted to cross-examine defense religious witness during penalty phase by asking about witness's views on the death penalty], with respect to witness credibility].)

This case is nothing like *People v. Melton* (1988) 44 Cal.3d 713, 744, cited by appellant. (See AOB 290.) Melton was tried for the first-degree special circumstances murder of an older gay man who was found beaten

and strangled to death in his home. Boyd, a parolee, told his parole officer that Melton was the killer. Boyd knew this because he and Melton had devised a scheme to steal from older affluent males, because Boyd had first met with the victim, and because Boyd arranged for the victim and Melton to get together. Boyd had also told authorities that "Charles" was the killer. Boyd, as a prosecution witness, testified that he had told Carpenter, the defense investigator, that "Charles" was the killer. Called as a defense witness, Carpenter testified under prosecutorial cross-examination about all the things he did not do to investigate "Charles" as a suspect. (*People v. Melton, supra,* 44 Cal.3d at pp. 724-729, 742-744.)

On appeal, Melton argued that permitting cross-examination of Carpenter about the things he did not do to investigate "Charles" was improper. This Court agreed, finding that,

> Carpenter's testimony about his lack of response to Boyd's information was, for the most part, irrelevant and incompetent. Evidence of what Carpenter did not do to follow up on Boyd's claims, had, in and of itself, no "tendency in reason" (see Evid. Code, §§ 210, 350) to establish that Charles did not exist or was not responsible for De Sousa's murder.

(*People v. Melton, supra,* 44 Cal.3d at pp. 743-744.) This court explained that lay opinion testimony about the veracity of particular statements by another was inadmissible on that issue because the fact finder is charged with deciding what was true, because law views do not meet expert witness standards, and because such lay opinions do not reasonably tend to prove or disprove the veracity of someone's statements. (*People v. Melton, supra,* 44 Cal.3d at p. 744.)

Melton and its holding is completely inapposite here. At issue in *Melton* was whether, in the guilt phase of a capital trial, a lay witness could testify to his opinions about another person's statements, with respect to the truth of the statements, and thus, who had committed the murder in

question. Here, in contrast, the proceedings in question took place during the penalty phase, during which Talamante, a religious expert, testified to appellant's purported religious knowledge and depth of spirituality in an effort to help appellant avoid the death penalty. Once he did that, Talamante was subject to cross-examination on his opinion to test the sincerity of appellatn's beliefs. Talamante himself and appellant's counsel provided the grist for the prosecutorial cross-examination mill. As appellant's counsel had explained to the trial court at length, the "sincerity of [appellant's] conversion" was the defense during the penalty phase. (26RT 4503-4504.) To attempt to prove up that defense, appellant's counsel called Talamante to testify, along with other witnesses, regarding the sincerity of appellant's conversion. For whatever reason, Talamante compared appellant to Bedolla Duarte favorably in terms of religious knowledge and spirituality. Appellant's presentation of that testimony invited the prosecutor to question that comparison on cross-examination. Had the prosecutor not done so, the jury would have been left with a false, or at least incomplete, factual basis upon which to evaluate Talamante's testimony. *Melton* does not assist appellant.

In fact, the function of a penalty-phase jury is critically distinguishable from that of a guilt-phase jury:

> Rather than the fact-finding function undertaken by the jury at the guilt phase, "the sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion . . . is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779 [parallel citations omitted].)

(*People v. Wilson* (2008) 44 Cal.4th 758, 830; see also *People v. Brown* (1988) 46 Cal.3d 432, 448, italics in original, citations and internal quotations omitted ["A capital penalty jury, . . ., is charged with a

responsibility different in kind from such guilt phase decisions: its role is not merely to find facts, but also – and most important – to render an individualized, *normative* determination about the penalty appropriate for the particular defendant – i.e., whether he should live or die."].) *Melton's* analysis may be appropriate in the guilt phase of a trial under the circumstances of that case, but not in the penalty phase of a case under the circumstances present here.

C. Any Error Was Harmless

As noted above, federal constitutional error is prejudicial unless it is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Prejudice from state law error occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472; *People v. Fuiava, supra,* 53 Cal.4th at p. 721.)

Here, the centerpiece of appellant's defense, that the treatise he had written demonstrated the genuineness of his religious claims, was patently unbelievable. As Talamante testified, the treatise demonstrated "so much learning and so much spirituality within it," that the level of knowledge reflected in the document was that of an "official pastor. Other pastors "could not believe that it had been written by someone who was in jail. So the level is a theological basic level completely." (26RT 4622-4624.) Appellant stood before his penalty jury as a basically uneducated thug who was closely associating with Bedolla Duarte (26RT 4639), another criminal who had claimed to find "God." Appellant presented a religious treatise displaying religious expertise that even appellant's own witness testified was well above appellant's abilities to have written, thus giving the lie to appellant's gallows conversion.

Here, the jury learned of appellant's brutal participation in a violent, extended crime spree, and heard him testify about his purported religious experience or conversion that occurred only after he was captured and facing the death penalty. The jury learned that appellant felt his religious awakening or conversion justified imposing life in prison rather than the death penalty. However, the persuasive value of appellant's defense was so minimal that he could not have been prejudiced by a full and complete cross-examination of a witness who tried to bolster appellant's penalty-phase case by a comparison that, as it turned out, was unfavorable. Any error was harmless.

XXI. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING PENALTY PHASE CLOSING ARGUMENT

Appellant claims the trial prosecutor committed multiple instances of prejudicial misconduct during the penalty phase. (AOB 299-313.) Respondent addresses each claim in turn, and submits that no misconduct occurred, and that, in any event, no prejudice resulted.

A. General Principles of Applicable Law

California courts apply the same substantive standards to claims of guilt-phase and penalty-phase prosecutorial misconduct. (*People v. Collins, supra,* 49 Cal.4th at p. 226; *People v. Gamache, supra,* 48 Cal.4th at p. 388; *People v. Valdez, supra,* 32 Cal.4th at p. 132.) Generally speaking, a prosecutor commits misconduct during the penalty phase of a trial under the federal constitution by engaging in conduct rendering the trial so unfair that due process is denied to the defendant. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Williams, supra,* 49 Cal.4th at p. 464.) Under state law, a prosecutor commits reversible misconduct where he or she uses "deceptive or reprehensible methods" to convince the jury, if there is a

reasonable possibility that absent the misconduct, a more favorable outcome would have resulted. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Williams, supra,* 49 Cal.4th at p. 464.)

To preserve prosecutorial misconduct on appeal, the defendant must make a timely objection on the particular ground advanced on appeal, and ask that the jury be admonished. (*People v. McDowell, supra,* 54 Cal.4th at p. 436.) If the defense failed to object and to request the jury be admonished at the time of the purported misconduct, any related appellate claim is ordinarily deemed to have been forfeited unless even an admonition would not have cured the harm. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Souza, supra,* 54 Cal.4th at p. 122; *People v. Fuiava, supra,* 53 Cal.4th at p. 726; *People v. Williams, supra,* 49 Cal.4th at p. 464.) Where the claim of misconduct is based on the prosecutor's remarks to the jury, the question is whether there is a "reasonable likelihood" the jury would have construed or applied the remarks in an objectionable manner. (*People v. Gonzales, supra,* 54 Cal.4th at p. 1294; *People v. Thomas, supra,* 53 Cal.4th 771, 821; *People v. Friend, supra,* 47 Cal.4th at p. 29.)

B. Purported Misstatements and Misrepresentation of the Law

Appellant first claims that the prosecutor committed misconduct by arguing to the jury that it could find premeditation and deliberation with respect to the murders as an aggravating circumstance. As a result, he claims, "the jury was informed that virtually all the guilt phase evidence was transmogrified into a circumstance of the crime." (AOB 300-302.)

1. The Relevant Trial Court Proceedings

Appellant's argument implicates the following proceedings.

a. The Guilt Phase Jury Instruction Discussions

During the jury instruction settlement conference, the prosecutor responded to the court's question regarding whether instructions on premeditation should be given as a "first degree theory" by indicating the People would rely solely on a felony murder theory. (21RT 3529-3630.) The prosecutor argued to the court that the only issue was identity, and asked, "How can they allege it as anything other than a felony murder?" (21RT 3630.) Appellant's counsel suggested the People did not want a premeditation theory presented to the jury because it might result in a second-degree murder conviction, rather than a first-degree conviction. (21RT 3630-3631.) The court found that there was sufficient evidence to support a premeditation finding, and noted that the People were asserting premeditation as to the attempted murder of Medina, but not as to Officer Hoglund. In response to the court's question of how they would distinguish between Officer Hoglund's murder and the attempted murder of Medina, the prosecutor agreed to drop the premeditation allegation as to Medina's attempted murder. (21RT 3631; see also 21RT 3632 [trial court found that the People could "legitimately" rely on both premeditation and felony murder theories if they chose].) After additional argument by appellant's counsel, the court agreed to give instructions on premeditation as well as felony murder. The premeditation allegation as to the attempted murder of Medina was then restored. (21RT 3633.)

The prosecutor noted, however, that the prosecution had been proceeding on a felony murder theory throughout the entire case, and objected to other instructions on different theories of murder. (21RT 3637-3638.) He also told the court, in response to appellant's counsel's request for self-defense instructions as to Mr. Kim's murder, that there was "no evidence that there was anything else going on" other than the robberies, "at which point victims were killed." (21RT 3639.)

After the court reviewed a particular case (the "*Williams*" case), and heard argument from counsel in which the prosecutor argued that *Williams* was a "straight robbery from beginning to end,"[97] the court stated,

> I think – I cannot make that distinction in these cases. I don't see any distinction at all. And the bottom line on this – what the Supreme Court has said in this case is that the issue of premeditation and deliberation is immaterial where the evidence conclusively disclosed that the homicide was committed in the course of a robbery. [¶] Now, although that is up to the jury to decide, the issue that we are left with is whether or not there would be some inexplicable reason for the jury to reject the evidence and adopt another scenario that is not supported by the evidence. And that's what we have here. [¶] So to that extent, I am going to reverse myself, and I will not be instructing on either second degree or premeditation as an alternative first degree where the People are not going on that issue.

(21RT 3701.) The court further noted that the People could proceed with a premeditation allegation as to the attempted murder charge, but that the *Williams* case foreclosed a premeditation instruction as to the murders where the People proceeded only on felony murder. (21RT 3701-3702.) The prosecutor agreed to strike the premeditation allegation as to the Medina attempted murder charge. (21RT 3708.)

b. The Prosecutor's Penalty Phase Jury Argument

The prosecutor began her penalty phase closing argument for the People by stating that the prosecution would rely on the "weight and gravity and the convincing force" of the guilt phase evidence. (29RT 5260-

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[97] Appellant states that the prosecutor said "this case was a straight robbery from beginning to end." (AOB 300.) In context, however, the prosecutor was clearly speaking of the "*Williams*" case. (See 21RT 3700-3701.) However, it seems clear that the prosecution was presenting the instant case as a homicide during robbery, and thus, sought first-degree felony murder convictions. (See also 21RT 3707.)

5261.) She argued for death based on the large number of victims, the way the robberies were committed, the use of gratuitous and excessive violence and abuse against unresisting victims, and the "acts of terrorism" at each robbery location to satisfy a secondary motive of power and control. She argued that Mr. Kim's murder was particularly "appalling and heinous" because he had already complied and handed over his property, and was begging to be left alone and trying to hide. She argued that Officer Hoglund's murder was the most aggravated act of the crime spree because there was evidence that appellant and his cohorts had armed themselves and "discussed killing the officer before" even going to the market. Based on the evidence, appellant was the "hit man," the most violent of the defendants, who "assessed the situation," made a "cold, calculated decision" based on that assessment, decided not simply to escape but rather ran directly into Officer Hoglund's path and executed the officer with shots to his heart, then the "coup de grace" to his head. Demonstrating true malice were the curses appellant levied upon Officer Hoglund in addition to killing him, when the officer posed no threat to him. Then appellant tried to kill Medina solely because he witnessed the murder of Officer Hoglund. (29RT 5261-5279.)

The prosecutor then made the remarks of which appellant now complains:

> Now, in looking at these murders, you can find premeditation and deliberation and some of you indicated in your jury questionnaires things like that are distinguished in your mind as to what is a more aggravated murder versus a non-aggravated murder.

(29RT 5279.) Appellant's counsel objected as "beyond the scope of the instructions." The court overruled the objection. (29RT 5279.) The prosecutor continued:

> Certainly premeditation and deliberation is certainly more aggravating than an unintentional killing or accidental killing during the course of a robbery, which would also be a first degree special circumstance killing. But this makes it even more aggravated. It's not legally necessary for you to find premeditation or deliberation, but it's helpful to your determination in assessing the weight to give to this crime.

(29RT 5279.) The prosecutor then argued that the facts of the crimes and the manner of their commission showed premeditation in that,

> The way they increased the risk of resistance to indicate that a murder was not just foreseeable, but an absolute guarantee that either a victim or bystander or police officer or someone was going to be killed.

(29RT 5279-5280.) Appellant and his cohorts did not "avoid confrontation," but "invited" and "incited it." They were all armed with deadly weapons, and their actions were likely to "invite more resistance than the mere use of a gun." There were statements made before the crimes that the robberies were preplanned, and that they had "planned for possible resistance." (29RT 5280.) Moreover, after Mr. Kim was murdered, the risk that another person might be killed was elevated to an "absolute guarantee." (29RT 5281-5282.)

During the remainder of the People's closing argument, the prosecutor argued that appellant and his colleagues repeatedly engaged in violent incidents with increasing frequency and intensity, continuing to become more violent and greedy. They planned to use a "cattle prod" which they brought with them to extract more money from victims. They committed "seven vicious robberies involving over a hundred victims where two people are killed within 25 days of each other." (29RT 5285-5289.)

Following a break in the argument, appellant's counsel objected, in pertinent part, to the prosecutor's argument that the murders were premeditated. He did not argue the prosecutor committed misconduct,

but that instructions should have been given during the guilt phase on premeditation and deliberation. Appellant's counsel argued that the jury could have concluded that the murders were not premeditated, and therefore returned verdicts of second degree murder, but the People insisted on proceeding only on a felony murder theory. (30RT 5297.) The prosecutor responded,

> I was not asking the jury to come back with a conviction on a first degree premeditation with deliberation theory. Obviously, we are way beyond that. [¶] I was really making the argument that it was necessary for their determination that the degree of aggravation here, they could consider that the defendants preplanned the possible killing; therefore, it was premeditated and deliberate, which would certainly be more aggravating than a spontaneous shooting or unintentional or accidental killing during the course of the robbery. And I think I am entitled to make that conclusion from the evidence.

(30RT 5298.) The court overruled the objection:

> It seems to me the thrust of the argument is to contrast the first degree murder, which can be accidental under felony murder, although I don't think that is what the evidence showed, as against something that is intentional. [¶] And I think the presentation of the premeditation argument is in the form of what the common person would understand as premeditation -- or intentional as opposed to the technical elements we refer to. [¶] So I don't think we are necessarily talking about a different theory. I don't see any problem with their argument. She is contrasting the intentional aspect of that killing as opposed to what could be an accidental felony murder. [¶] I don't see a problem with the argument.

(30RT 5299.) During the remainder of her argument, the prosecutor referenced preplanning, deliberation, and premeditation of the crimes, arguing they were not haphazard or spontaneous, but well-executed and well-thought out. (30RT 5336.)

2. Appellant Has Not Shown Prosecutorial Misconduct or Prejudice With Respect to the Prosecutor's Argument Regarding Premeditation and Deliberation

Appellant claims the foregoing constitutes improper misstatements and misrepresentations of the law by the prosecution. (AOB 300-301.) As this Court has frequently held, a prosecutor commits misconduct when he or she misstates the law in jury argument, particularly in an effort to avoid the reasonable doubt standard. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1077; *People v. Hill, supra,* 17 Cal.4th at p. 829.)

However, prosecutors have wide latitude to argue, based upon the evidence, that death is proper given the defendant's crimes. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1359.) The evidence of defendant's crimes presented at the guilt phase may provide a sufficient basis for the prosecutor's penalty phase argument. (*People v. Thomas, supra,* 53 Cal.4th at p. 822; see also *People v. Hinton* (2006) 37 Cal.4th 839, 910, fn. 22 [penalty-phase jury may rely on evidence presented during guilt phase].) It is up to the jury to determine whether the prosecutor's argument is reasonable. (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 179.)

Here, the prosecutor properly argued for death during the penalty phase based on the evidence presented during the guilt phase that demonstrated appellant's and his cohorts' high level of dangerousness as demonstrated by their sophistication, their repeated acts of gratuitous violence in a series of armed and well-executed takeover robberies, the fact that the nature of their violent acts continued to increase over time, and the fact that appellant, Navarro, and Contreras planned and thought about killing police officers and anyone else who got in their way before committing the George's Market crimes. The evidence of premeditation – that is, that appellant and his crime partners planned out their criminal activities, including the possibility of shooting police officers who got in

their way before appellant gunned down Officer Hoglund – was highly relevant to the jury's penalty determination since it showed that appellant's conduct amounted to far more than the typical felony murder. The trial court expressly found that the prosecutor could make such an argument when it overruled appellant's objections. And the court expressly instructed the jury during the penalty phase that it could consider the circumstances of the crimes in determining the penalty. (29RT 5243-5244; 12CT 3501; see also 29RT 5249; 12CT 3503.) There was no misconduct.

Nor can appellant show prejudice. The evidence of what appellant and his crime partners had done was all before the jury, including the fact that they planned for the contingency of shooting police officers who got in their way. Unfortunately, their pre-planning was prescient. The fact that appellant, Navarro, and Contreras and their unidentified crime partners were all well-armed and acted with precision and organization in all of the robberies demonstrates premeditation and deliberation even without the prosecutor's argument on that point, something the jury could not have helped but notice. This claim fails.

C. The Prosecutor Did Not Use Improper Tactics That Were Designed to Mislead the Jury

Appellant claims that the prosecutor improperly told the jury during opening "argument" [98] in the penalty phase that there was evidence of aggravating factors that was not being presented to them, thereby violating appellant's due process rights. (AOB 302-303.) Respondent disagrees.

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[98] Appellant refers to the opening statement as opening "argument." (AOB 302.) In fact, the proceedings he complains of occurred during the People's opening statement to the jury, before the presentation of any evidence. (24RT 4212.)

1. The Relevant Trial Court Proceedings

The prosecutor began the People's penalty-phase opening statement by noting that appellant and his codefendants were now "stripped of their presumption of innocence," as they had been convicted under the reasonable doubt standard based upon the jury's "decisive and intuitive verdicts." The prosecutor told the jury the proceedings would last another week or week-and-a-half "while we venture into the background and character of the defendants." (24RT 4212.) The prosecutor then said, "Now, we cannot tell you everything about the defendants in this phase of the trial," and explained that they were "limited by law" to the statutory factors in aggravation, as the jury was advised by the court, and as they would be instructed later. (24RT 4212.) She then told the jury that the People would rely on the evidence of the crimes that the jury had already heard, the presence of prior criminal activity, appellant's prior cocaine conviction, and Navarro's prior robbery conviction. (24RT 4213-4214.) There was no objection to the prosecutor's remarks.

The trial court later instructed the penalty jury that it may take into account "only those factors which are applicable from the evidence adduced at trial" in determining the penalty. (29RT 5242; 12RT 3500.) The court also told the jury that if there was a conflict between what the attorneys said and what the court instructed, the court's instructions controlled. (29RT 5234; 12CT 3497.) The court told the jury that it was to be guided by the guilt phase instructions that were "pertinent and applicable" to the penalty determination (except for instructions that prohibited the jury from considering pity or sympathy. (29RT 5235; 12CT 3497.)

During the first portion of the People's closing argument, the prosecutor did not reference facts about the defendants that were not in evidence. (29RT 5260-5291.) She began by telling the jury the following:

> So it will be my duty and my responsibility as a deputy district attorney for the People of the State of California to ask you once you consider the facts and circumstances of the case to which you heard, and in the guilt phase, the prior convictions and prior acts of violence to which you have already received evidence of, to return a verdict of death as to [appellants].

(29RT 5261.) The prosecutor began her discussion of the specific evidence she wanted the jury to consider by saying, "We chose, [my co-prosecutor] and I, to rely on the weight and gravity and the convincing force of the evidence that you heard during the guilt phase" (29RT 5261), then engaged in a discussion of the evidence (29RT 5261-5291). After the jury left the courtroom, appellant's counsel indicated he had objections to portions of the argument. The court stated they would address them the next morning. (29RT 5293.)

Following an overnight break, appellant's counsel objected to the prosecutor's statement that the People "decided to rely" on the circumstances of the instant crimes as their aggravating factors, thus implying there was more evidence supporting death that the prosecution could have used, but did not. (30RT 5294.) The court noted that appellant's counsel should have contemporaneously objected, then said, "But there was something I caught that could have been inferred that way, and then as she went on I thought the inference was not supported." The court added, "But there was something you said that struck me that way. You are going to have to find it." (30RT 5294-5295.) It does not appear that appellant's counsel raised the issue again. (See AOB 303.)

2. Appellant Has Forfeited the Instant Claims

Appellant attempts to make this claim one of improper jury argument. (see AOB 302.) In fact, as noted above, the prosecutor stated, "we cannot tell you everything about the defendants in this phase of the trial" during

her opening statement to the jury as she was outlining for the jury the People's penalty phase case. Following the prosecutor's opening statement, five volumes of reporter's transcript later, she told the jury during her closing argument that the prosecution "chose . . . to rely" on the guilt phase evidence. (29RT 5261.) Appellant's counsel objected later, after argument for that day was concluded, to the prosecutor's latter statement. (30RT 5294.) Appellant never objected to the first comment that was made during opening statement and which he now complains about. He has thus forfeited this claim for appeal. (*People v. Tully*, 54 Cal.4th at p. 1011; *People v. Foster, supra,* 50 Cal.4th at p. 1350; *People v. Cook, supra,* 39 Cal.4th at p. 606; *People v. Turner, supra,* 34 Cal.4th at p. 420.)

Appellant has also forfeited any appellate issues surrounding the other comment, made during the People's closing argument, by abandoning his objection. That is, appellant's counsel failed to provide the court with information regarding the purportedly offensive comment as the court directed. Appellant thus abandoned his objection. It is as if no objection was made, and the claim is forfeited. (See *People v. Valdez, supra,* 55 Cal.4th at p. 142-143 [failure to press for ruling on evidentiary issue]; *People v. Richardson, supra,* 43 Cal.4th at p. 1017, fn. 20 [evidentiary issue]; *People v. Lewis, supra,* 43 Cal.4th at p. 481 [jury selection issue]; *People v. Ramirez* (2006) 39 Cal.4th 398, 450 [shackling issue]; *People v. Braxton* (2004) 34 Cal.4th 798, 813, and authorities cited therein [new trial motion]; *People v. Cunningham, supra,* 25 Cal.4th at p. 984 [severance motion].)

3. The Prosecutor Did Not Commit Prejudicial Misconduct by Misleading the Jury or Implying the Existence of Undisclosed Evidence

Even if either the opening statement or closing argument claim, or both, survive for appellate review, the prosecutor did not commit prejudicial misconduct. Opening statement serves to tell the jury of the expected evidence, and to prepare the jurors to follow the evidence, and to readily understand its meaning, context, and significance. (*People v. Gurule, supra,*) 28 Cal.4th at p. 610; *People v. Coddington* (2000) 23 Cal.4th 529, 596.) During jury argument, the prosecutor has wide latitude to argue vigorously, providing she engages in fair comment on the evidence, including reasonable inferences or deductions that can be drawn from it. (*People v. Thomas, supra,* 53 Cal.4th at p. 822; *People v. Gamache, supra,* 48 Cal.4th at p. 371.) The prosecutor may not state or imply there are facts supporting the People's position that were not presented in evidence. (*People v. Blacksher* (2011) 52 Cal.4th 769, 838; *People v. Boyette* (2002) 29 Cal.4th 381, 452.)

Here, in context, the prosecutor essentially told the jury in opening statement that it must focus its attention on evidence of the statutory factors in aggravation and that there were constraints on what the jury could consider in reaching its verdicts, consistent with the instructions to be given by the court. (24RT 4212.) This was correct. There was no statement by the prosecutor that there was other information available to them that would not be presented in court that supported imposing death. As to the prosecutor's statement in closing argument that she and her co-prosecutor chose to rely on the evidence adduced at the guilt phase, she was simply informing the jury that she intended to focus primarily on the facts and circumstances of the instant crimes in aggravation.

In any event, appellant cannot show any prejudice. The jury was properly instructed as to how to discharge its duty. It was specifically instructed that its decisions must be based on the law and the evidence (29RT 5234-5235; see also 12CT 3497), as to the specific factors the jury may consider in reaching its verdict (29RT 5238-5242; see also 12CT 3499-3501), and generally, how to approach their task (29RT 5252-5256; see also 12CT 3504-3505). These instructions clearly and repeatedly told the jury that it must decide the case based solely on the evidence. The jury was also instructed that if anything concerning the law stated by the attorneys conflicted with the court's instructions, the jury must follow the instructions. (29RT 5234; see also 12CT 3497.) It is presumed that the jury understood and followed those instructions. (*People v. Tafoya, supra,* 42 Cal.4th at pp. 192-193; *People v. Yeoman, supra,* 31 Cal.4th at p. 139; *People v. Sanchez, supra,* 26 Cal.4th at p. 852.) Moreover, the evidence of appellant's vicious and violent crime spree, and his lack of any redeeming qualities further demonstrate that any purported misconduct was harmless.

D. The Prosecutor Did Not Make an Improper Vengeance Argument

Appellant contends the prosecutor improperly argued vengeance during the penalty-phase closing argument. (AOB 302-306.)

1. The Relevant Trial Court Proceedings

During the People's closing penalty-phase argument, the prosecutor noted that the jury could consider mercy and sympathy for the defendants as mitigation evidence, but that when it came to compassion, the jury should show appellant and his codefendants the same compassion they showed their victims. (30RT 5365.) She argued that the defense would argue that the death penalty was pure revenge, but that there was both just and unjust revenge, and the death penalty for murder was just.

The prosecutor stated it was natural for people to want to spare another's life, and quoted the Midrash and Supreme Court Justice Potter Stewart in support of the morality of imposing death – citizens gave up their right to individual vengeance as part of the societal compact. (30RT 5365-5367.) She argued,

> And [the victims] can't take the defendants out and shoot and torture and terrorize them or gun them down on 52nd Street. We owe the victims in this case vengeance as part of our system of justice and as sanctioned by the laws of our state, and that you swore to uphold as jurors in this case in determining the penalty.

(30RT 5367.)

Counsel for codefendant Navarro objected to this last statement. The court overruled the objection. (30RT 5367.) Outside of the jury's presence, counsel for codefendant Navarro objected to the prosecutor's "pounding on the issue of vengeance and how it's appropriate and to uphold the duty as jurors and it's completely improper." The prosecutor responded that,

> Vengeance is part of justice. Vengeance is part of justice. And your oath is to uphold the law. What is the inference they can draw from that?

(30RT 5371-5372.) Appellant's counsel stated, "A brief comment on vengeance has been said to be not reversible error, but they can't argue to kill as an exercise of vengeance." (30RT 5372.) The court overruled the objections but told the prosecutor to "stay away from any further discussions of vengeance." (30RT 5372.)

2. The Prosecutor's Argument Was Proper

At the outset, respondent asserts that appellant forfeited this claim, because counsel for appellant never objected and requested the jury be

admonished. At most, appellant's counsel simply offered a comment on counsel for codefendant Navarro's objection, which did not include a request for a jury admonition. This claim has thus been forfeited. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1358; *People v. McDowell, supra,* 54 Cal.4th at p. 436.)

In any event, as this Court has repeatedly ruled, it is not misconduct for a prosecutor to ask the jury to show a defendant the same lack of sympathy the defendant showed the victims. (*People v. Brady* (2010) 50 Cal.4th 547, 586; *People v. Kennedy, supra,* 36 Cal.4th at p. 636.) Here, as shown just above, the prosecutor's comments regarding vengeance were all made to counter the argument that mercy and sympathy should mitigate the aggravating factors in this case, and result in a verdict of life rather than death. Moreover, to the extent the prosecutor's comments were simply about vengeance, this Court has repeatedly held that brief references to retribution or community vengeance do not constitute misconduct providing such arguments were not the principal basis advanced for imposition of the death penalty. (*People v. Brady, supra,* 50 Cal.4th at p. 586; *People v. Collins, supra,* 49 Cal.4th at p. 228; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1177-1178, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Hinton, supra,* 37 Cal.4th at p. 907; *People v. Davenport, supra,* 11 Cal.4th at p. 1222; *People v. Sanders, supra,* 11 Cal.4th at p. 550, fn. 33.) As in *Zambrano* and *Collins,* the prosecutor's comments,

> "did not seek to invoke untethered passions, or to dissuade jurors from making individual decisions, but only to assert that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes."

(*People v. Collins, supra,* 49 Cal.4th at p. 228, quoting *People v. Zambrano, supra,* 49 Cal.4th at p. 1179; see also *People v. Martinez* (2010)

47 Cal.4th 911, 965-966; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1178.) As this Court further noted in *Collins*,

> We noted in *Zambrano* that it is not error to argue "that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation." ([*People v. Zambrano, supra,* 41 Cal.4th] at p. 1178.)

(*People v. Collins, supra,* 49 Cal.4th at p. 228.)

Here, it is not reasonably likely the jury would have relied on the prosecutor's brief, isolated references to vengeance to sentence appellant to death. While appellant also complains that the prosecutor told the jury it "owed the victims vengeance as part of a system of justice they swore to uphold" (AOB 305), in fact, the prosecutor' full statement was,

> We owe the victims in this case vengeance as part of our system of justice and as sanctioned by the laws of our state, and that you swore to uphold as jurors in this case in determining the penalty.

(30RT 5367.) The prosecutor's remarks reasonably related to the jurors' oath to follow the court's instructions, which in turn relate to the laws of our State, as argued by the prosecutor.[99] The prosecutor's proper statements regarding vengeance were not misconduct.

> Nor can appellant show prejudice in this regard. The prosecutor's comments in this regard were brief, the evidence favoring death for appellant was overwhelming, and the same jury that found death appropriate for appellant did not

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[99] The jurors' oath required them to "render a true verdict according only to the evidence presented to [them] and to the instructions of the court." (See 8RT 1216-1217.)

find the same as to Contreras and Navarro, as would surely have been the case had her comments been prejudicial.

E. The Prosecutor Did Not Make an Improper Argument Under *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [86 L.Ed.2d 231; 105 S.Ct. 2633]

In *Caldwell v. Mississippi, supra,* 472 U.S. 320, the United States Supreme Court held that a penalty-phase jury may not be told that the "responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Id.* at pp. 328-329.) In *Caldwell*, the prosecutor responded to a defense argument about the gravity of the jury's role by arguing that its decision was not the final one in the matter, and that the jury's decision was "automatically reviewable by the Supreme Court." (*Id.* at pp. 325–326.) Appellant contends that the prosecutor made analogous remarks in this case. (AOB 306-307.)

However, the prosecutor did nothing analogous to that of the *Caldwell* prosecutor. The instant prosecutor told the jury:

> The defense may argue that we are stooping to their level by giving the death penalty for killers, but there is a big difference, and that couldn't be further from the truth, [because be]for[e] the defendants will be executed, they will be entitled to all the rights, privileges and safeguards that out society could possibly provide, and that were meticulously honored by the police, the courts, the attorneys, [the co-prosecutor] and myself.
>
> And through the experts and family members and clergy, you heard all the hurts they suffered, all the good things they did, and all the reasons to spare their lives. But in a moment, the brief time it took to pull the trigger on those automatic handguns, [appellant], Contreras and Navarro became the judge, jury and executioner to those two victims. Mr. Kim and Officer Hoglund had no one to plead for them. And they received the death penalty.

(30RT 5367-5368.)[100] The prosecutor's comments simply compared appellant's, Navarro's, and Contreras's brutal, violent and cruel crime spree that culminated arbitrarily in two vicious and gratuitous acts of murder, with the safeguards built into our justice system that protect people, like appellant, charged with crimes.

Moreover, as this Court has held, to show *Caldwell* error, the court or prosecutor must have "improperly described the role assigned to the jury by local law." (*People v. Homick, supra,* 55 Cal.4th at p. 902; see also *People v. Murtishaw, supra,* 51 Cal.4th at p. 592.) That is, the jury must have been "affirmatively misled" regarding its sentencing role so that its "sense of responsibility" is "diminished." (*People v. Homick, supra,* 55 Cal.4th at p. 902; *People v. Osband, supra,* 13 Cal.4th at p. 694; see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004; 129 L.Ed.2d 1]; see *People v. Murtishaw, supra,* 51 Cal.4th at p. 592; *People v. Elliott, supra,* 53 Cal.4th at pp. 556-557; *People v. Loy* (2011) 52 Cal.4th 46, 59.) That did not occur here.

In deciding whether *Caldwell* error occurred, courts do not consider the challenged statements in isolation but in the context in which they occurred. (*People v. Loy, supra,* 52 Cal.4th at p. 59; *People v. Hinton, supra,* 37 Cal.4th at p. 905.) That is, this Court will consider not "any single statement" by the prosecutor, but the court's instructions, the arguments of counsel, and the "the overall context" of the prosecutor's closing argument. (*People v. Hinton, supra,* 37 Cal.4th at p. 905; see also *People v. Young* (2005) 34 Cal.4th 1149, 1221.)

Here, based on her remarks, the prosecutor did not tell the jury that their decision was not final, but rather, argued qualitatively that the death

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[100] Appellant's counsel did object to these remarks, and the court overruled the objection. (30RT 5370-5371.)

penalty was not akin to the murders committed by appellant and his crime partners. The prosecutor contrasted the procedures and safeguards offered to criminal defendants with the brutal, senseless acts of murder appellant and his cohorts committed upon Officer Hoglund and Mr. Kim. The prosecutor did not seek to shift responsibility for sentencing to a higher court or future jury. Certainly, her remarks were not "affirmatively misleading" to the jury of its role in choosing the appropriate sentence, or suggestive that the jury should feel less responsibility than warranted for its role in the sentencing process. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn. 15 [106 S.Ct. 2464; 91 L.Ed.2d 144]; *People v. Harris*, *supra*, 37 Cal.4th at p. 356.)

Moreover, the jury was instructed that its responsibility was to "render an individualized determination about the appropriate penalty" (29RT 5234; see also 29CT 3497), the jury was required to "determine which of two said penalties shall be imposed on each defendant" (29RT 5238; see also 12RT 3499), the jury would decide death or life imprisonment (29RT 5242; see also 12CT 3500), that "Death means exactly what it says, that the defendant will be executed" (29RT 5243; see also 12CT 3501), and that the "ultimate determination of the penalty thus remains the individual assessment of each juror" (29RT 5245-5246; see also 12CT 3501). The jury was also instructed that "It is now your duty to determine which of the two penalties, death or life without possibility of parole, shall be imposed on each defendant." (5252-5253; see also 12CT 3504.) This claim fails.

F. Appellant's Claims of "Other Flagrant Misconduct" Fail

Appellant raises four other claims of purported misconduct. (AOB 307-311.) Each lacks merit.

1. Purported Deterrence Argument

Appellant claims the prosecutor improperly argued appellant and his codefendants should be executed to deter criminal activity. (AOB 307-308.) He argues that the prosecutor improperly asked for the death penalty to say "enough is enough," and because it should be "the price they expect to pay." This Court has condemned the use of deterrence in argument to the jury as a reason to select the death penalty because "deterrence arguments rest on unproven assumptions and place a foreign weight on the scale on which should instead be made based on an *individualized* determination as to penalty." (*People v. Marshall* (1996) 13 Cal.4th 799, 859.) Deterrence relates to whether others will be deterred from committing crimes as a result of the ultimate punishment being imposed in the instant case. (Cf. *People v. Hinton* (2006) 37 Cal.4th 839, 907.)

Appellant's claim fails because the prosecutor did not make a deterrence argument, but rather urged that appellant and his codefendants deserved the death penalty for their individual actions in this case. She observed that some of the jurors were concerned that the death penalty be applied proportionately, and fairly, but that the jury's actual duty was to determine whether the death penalty should be applied in this individual case. The full context of the prosecutor's remarks demonstrates that appellant's selective quotation of the records is inaccurate by omission:

> Defense may argue there are worse murderers who got life and didn't get death or that the defendant's behavior is not bad enough for the death penalty. Well I could cite you an equal number for the opposite proposition and that shouldn't be anymore convincing to you than the opposite argument. You have to determine each case, case by case, just as you were instructed you have to determine each defendant by defendant.
>
> You weren't jurors in that case. You didn't hear the mitigation. You don't know what the law was at that time. And these defendants are eligible for the death penalty just based on

> one murder, not to mention the second murder. And you have to ask yourself how many dead people does it take? When is enough, enough? How many people have to be killed? How many people have to be terrorized, tortured and robbed before you say enough is enough and what penalty is appropriate.
>
> These defendants did not kill because they are mentally disordered sex offenders. They didn't kill out of revenge. They didn't kill out of passion. They didn't kill for political motives. They didn't kill out of retaliation. These defendants killed strictly and purely out of greed. In spite of the fact Officer Hoglund was a police officer, killing was part of conducting this type of business.
>
> The death penalty should also be the price they expect to pay in committing these types of crimes and risks they took.

(30RT 5376-5377.)[101] Viewed in context, the prosecutor's remarks urged the jury to impose the death penalty because of appellant's conduct in the instant case as his just rewards, not to deter others from committing other crimes.

Nor can appellant show prejudice. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Pearson, supra,* 56 Cal.4th at p. 472.) The trial court expressly instructed the jury that it may not consider deterrence "for any reason whatsoever." (29RT 5242; see also 12CT 3500.) Certainly, the instructions given by the trial court cleared up any infirmity, as jurors are presumed to understand and follow the court's instructions. (*People v. Pearson, supra,* 56 Cal.4th at p. 414; *People v. Mills, supra,* 48 Cal.4th at p. 200; *People v. Hovarter, supra,* 44 Cal.4th at p. 1005; *People v. Yeoman, supra,* 31 Cal.4th at p. 139.) Any indication of a prosecutorial argument regarding deterrence was, at most, ephemeral, and the aggravating factors,

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[101] Appellant's counsel objected to this argument as a deterrence argument. The court overruled the objection. (30RT 5377.)

namely, the facts and circumstances of the instant crimes, far outweighed any mitigating factors. This claim fails.

2. Comments Regarding the Humanity of Execution

Appellant next argues that the prosecutor committed misconduct by arguing that any execution would be carried out as humanely as possible. (AOB 308.)

The trial court ruled that the defense would not be permitted to present evidence about "execution, or something of that nature, what life in prison is like, that is not acceptable." (23RT 4162.) During her argument to the jury, the prosecutor argued that appellant and his codefendants were receiving due process and various protections, that appellant and his codefendants were able to tell the jury about the abuses they had suffered and the good things they had done, but they killed Officer Hoglund and Mr. Kim without similar care. Then, she added, "They may say that execution is horrible, but any means of execution in our state is done with great efforts and great attempts to make it as humane as possible." (39RT 5367-5368.) Counsel for codefendant Navarro objected. The prosecutor explained that she was trying to counter any defense argument talking about the horrors of execution. If counsel indicates they are not going to argue that issue –." The court stated counsel was not permitted to so argue, and sustained the objection. (30RT 5368-5470.) The court also admonished the jury:

> Before we broke there was an objection regarding part of [the prosecutor]'s argument. At this point I would like to admonish you are not to consider for any purposes the manner of execution. That is not something that needs to be or should be considered by you in your determination as to which penalty is appropriate.

(30RT 5375.)

Generally speaking, neither party in the penalty phase of a capital trial may offer evidence regarding the manner of execution, and thus, neither party may argue for or against imposition of the death penalty based on the manner of execution. (*People v. Collins*, *supra*, 49 Cal. 4th at p. 233.) However, the mere fact that the prosecutor made a brief comment during her argument as to which the trial court sustained an evidentiary-based objection does not mean the prosecutor committed misconduct.

Rather, as noted above, a prosecutor commits misconduct during the penalty phase under the federal Constitution during the penalty phase if her actions were so unfair as to deny the defendant due process, and under the state constitution if she utilized deception or "reprehensible methods" in trying to persuade the jury, engendering a reasonable possibility that a less-favorable outcome for the defendant resulted, with the focus being on the effect of the prosecutor's actions. (*People v. McKinzie*, *supra,* 54 Cal.4th at pp. 1325-1326.) Here, the prosecutor may have misspoken in seeking to counter an expected defense argument, not realizing that the defense would not make such an argument. However, her comment does not constitute misconduct under the above authorities.

Further, as this Court has recognized, an argument by a prosecutor that death by lethal injection was better than the violent murder for which the defendant was being sentenced could have been cured by admonition to the jury. (*People v. Collins, supra,* 49 Cal.4th at pp. 233.) Moreover, there was no prejudice because the improper argument occurred in contrasting the circumstances of the victim's death with execution, and any reference to the method of execution was a "passing reference." (*People v. Collins, supra,* 49 Cal.4th at pp. 233-234.) Here, the trial court did admonish the jury not to consider the manner of execution (30RT 5375), and the prosecutor's passing comment was of less descriptive force than was that of the *Collins* prosecutor (see *People v. Collins, supra,* 49 Cal.4th at pp. 231-

232). As in *Collins*, there is no reasonable possibility the prosecutor's minor comment affected the penalty determination. *People v. Collins, supra,* 49 Cal.4th at p. 234.) Certainly, the admonition and instructions given by the trial court cleared up any infirmity, as jurors are presumed to understand and follow the court's instructions. (*People v. Pearson, supra,* 56 Cal.4th at p. 414; *People v. Mills, supra,* 48 Cal.4th at p. 200; *People v. Hovarter, supra,* 44 Cal.4th at p. 1005.)

Appellant claims support for his position in *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357, in which the prosecutor argued to the penalty jury that the defendant would die instantaneously when the lethal gas was triggered. (AOB 308.) The Eighth Circuit concluded that the prosecutor's argument was erroneous, and "diminished the jurors' sense of responsibility for imposing the death penalty" by wrongly suggesting that death would not be difficult or prolonged. (*Id.* at pp. 1361–1362.) However, the Eighth Circuit's decision is not binding upon this Court. (*People v. Collins, supra,* 49 Cal.4th at p. 233.) Moreover, the prosecutor here did not make any statements similar to those of the *Antwine* prosecutor. As this Court noted in *Collins*,

> Further, [*Antwine's*] reasoning is suspect. While jurors may feel relieved that they are not condoning gratuitous suffering, their decision over life and death remains a profound one. That decision is no less profound or burdensome because a less onerous mode of execution is employed.

(*People v. Collins, supra,* 49 Cal.4th at p. 233.) Appellant has failed to show either misconduct or prejudice as to this claim. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Pearson, supra,* 56 Cal.4th at p. 472.)

3. Purported Instances of Inflammatory Language During Both the Guilt and Penalty Phase Arguments

Appellant claims that the prosecution committed misconduct during both the guilt and penalty phases of the trial by making inappropriate jury argument. (AOB 309-310.) Prosecutors have wide latitude during jury argument to discuss and draw reasonable inferences and deductions from the trial evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 768.) It is for the jury to determine whether the inferences and deductions are reasonable. (*People v. Thornton, supra,* 41 Cal.4th at p. 455; *People v. Wilson, supra,* 36 Cal.4th at p. 337.) Respondent submits that neither prosecutor committed any prejudicial misconduct during jury argument.

a. Guilt Phase Argument Contentions

According to appellant, the following proceedings constitute prejudicial prosecutorial misconduct.

(1) References to "Torture," "Impugning Sadistic Motivations to Appellant," Appellant and Defendants Enjoyed Their Crimes, and the Use of Phrase "Military Operations" During Guilt Phase

Appellant forfeited these claims for appeal. Appellant's counsel did object, as follows:

> A couple objections that amount to misconduct. That entire argument appears to be designed to invoke passion in the jury against them as people rather than describing what it is they did. It appears this is an attempt to get the passion built up for the penalty phase. There is unnecessary character attacks on the defendants that is not necessary in order to describe their conduct in calling [appellant] "this little man." [¶] . . . . [¶] As far as the military planning and such, I think that would be outside of the evidence. The emphasis on torture and the pleasure that they took in inflicting pain is – well, I don't know

> that is necessary to show the force and fear, and I think is an attempt to set up the penalty phase now by invoking hatred on the part of the jurors towards my client. [¶] I ask the court to find that to be misconduct and admonish the prosecution and not engage in personal attacks on the character of the physical character of [appellant].

(21RT 3795-3796.) Without waiting for the court to rule, appellant's counsel then objected to references to codefendant Navarro with respect to the Woodley Market crimes. (21RT 3796.)

The court asked the prosecutor if he wanted to respond to the Navarro issue. (21RT 3796.) After argument, the court found the prosecutor had not "crossed the line" on that issue. (21RT 3798.) Otherwise, the trial court did not rule on the misconduct objection raised by appellant's counsel and now asserted by appellant as to the enjoyment of hurting people, the analogy to military operations, and comments about torture. Because appellant failed to press the court for a ruling on these points, he has forfeited them for appeal. (See *People v. Valdez, supra,* 55 Cal.4th at p. 142-143 [failure to press for ruling on evidentiary issue]; *People v. Richardson, supra,* 43 Cal.4th at p. 1017, fn. 20 [evidentiary issue]; *People v. Lewis, supra,* 43 Cal.4th at p. 481 [jury selection issue]; *People v. Ramirez* (2006) 39 Cal.4th 398, 450 [shackling issue]; *People v. Braxton* (2004) 34 Cal.4th 798, 813, and authorities cited therein [new trial motion]; *People v. Cunningham, supra,* 25 Cal.4th at p. 984 [severance motion].)

Appellant claims he should not be found to have forfeited these claims because the trial court "consistently refused to find misconduct and/or admonish the prosecutor" throughout the trial. (AOB 310.) Respondent submits that the reason the court did not sustain all of appellant's objections was that they lacked merit, not because the trial court was somehow biased against appellant. Moreover, the court did rule for appellant and/or his codefendants multiple times throughout trial, which it conducted

throughout in a fair and balanced manner. In any event, these claims each fail on their merits.

(a) Enjoyment of Hurting People

The prosecutor delivered the People's opening argument during the guilt phase of the trial. (21RT 3757.) The prosecutor began his argument by stating that appellant and his crime partners stole a great deal of money and jewelry from their victims, and they "traded the lives" of Officer Hoglund and Mr. Kim for the proceeds of the robberies. The crimes were "about" the money and jewelry appellant and his crime partners stole, as well as "the power" over the victims. The prosecutor noted that they took around $6,000, $20,000, and $8,000 during three of the robberies, respectively, and that less than 24 hours after murdering Officer Hoglund, appellant went to a party at a park. (21RT 3757-3759.) The prosecutor stated,

> It wasn't only that. They liked putting the guns to people's heads. They liked putting the gun in Armando Lopez's mouth. They liked breaking the ribs of John Tucker at the Outrigger. You can see it, ladies and gentlemen. They liked it.

(21RT 3759.) The prosecutor added that appellant and his crime partners returned home laughing about killing Officer Hoglund, according to Rosa Santana, and that his murder was a "laughing matter" to them. (21RT 3760.) The prosecutor emphasized that appellant and his crime partners committed each robbery "looking for confrontation," knowing confrontation would result. (21RT 3760.)

The prosecutor did not commit misconduct in stating that appellant and his crime partners enjoyed breaking ribs and putting guns to people's heads. (AOB 309.) Rather, the evidence showed that appellant and his codefendants heartily embraced their chosen career as brutal and violent

armed robbers, continuing to target stores and restaurants even after harming others in violent takeover robberies. That they enjoyed hurting, threatening, and killing people was a reasonable argument based on the trial evidence which demonstrated that appellant assaulted, humiliated, beat, tortured, and murdered with zeal and near glee. In the context of his full remarks and in light of the trial evidence, the prosecutor's argument was based on reasonable inferences drawn from the evidence and was proper. (*People v. Dykes, supra,* 46 Cal.4th at p. 768.)

(b) Analogizing the Robberies to Military Operations

Appellant complains that analogizing the robberies to military operations constituted misconduct. (AOB 309.) The prosecutor argued that the robberies were a "big business" in which everyone present was subject to being robbed. "And they did this, ladies and gentlemen, . . . not in a hit and run fashion, but in a very professional manner. They planned their robberies" and "mapped out the approach" using a Thomas Guide. (21RT 3760-3761.) He further explained:

> They came with loaded weapons. Each of them came ready and willing to kill. When they did a robbery, they didn't just stumble on a location. As you heard from [Santana], they had an inside person at George's who gave them information. They would scout their location, they would figure out what day of the week was best for hitting the location, check cashing places on a Monday or Friday. Restaurant on Sunday when they have the week's receipts. These were well-planned, ladies and gentlemen.

(21RT 3761.) Appellant and his co-defendants spaced their robberies out over time and area to avoid a detection by a single police agency, dressed nicely, pretended to be customers, used lookouts, assumed strategic positions, restrained everyone present at each location through force or

threats, determined whether there were video cameras, and they identified the person in charge and forced him to cooperate. (21RT 3761-3762.) Then, the prosecutor said,

> They conducted themselves as though it were a military operation, ladies and gentlemen. They came in numbers where it's necessary, as necessary to a location. Four people up to eight people when they hit the Casa Gamino because of the size of that location, and the numbers of people who were at that location on that Sunday evening. There were over 60 people there, ladies and gentlemen. And they came prepared for the same contingencies that any military unit would need to be prepared for. And that is that deadly fight, the shoot-out, they came willing to accept casualties. Not their own, but the civilian population. The manager. Or the real enemy, the police officer who would put himself between their guns and their innocent victims.
>
> We know that they discussed their contingencies. We know that from Rosa. "We are going to go out, we are taking these guns in case of Blacks or cops getting in the way. [¶] They discussed what they were going to do. And we also know that they discussed it because we know how they reacted when that confrontation occurred.

(21RT 3762-3763.)

The prosecutor's comment that appellant engaged in a crime spree akin to a military operation was not simply a reasonable inference based on the evidence – it was an accurate description of the manner in which appellant and his crime partners conducted themselves, as shown by the summary of trial evidence in the statement of facts above. The prosecutor's comment was based on the evidence and was not misconduct. (*People v. Dykes, supra,* 46 Cal.4th at p. 768.)

Nor could the prosecutor's comments in this regard have been prejudicial – the evidence of guilt was incontrovertible, the evidence clearly showed that appellant, Navarro, and Contreras did act like members of a

military operation, and that characteristic of their crime spree was readily apparent to all jurors. Moreover, only appellant received the death penalty.

(c) Torture

Appellant complains that the following demonstrates misconduct. (AOB 309.) As discussed above, the prosecutor described how appellant and his crime partners committed their robberies. In part, he noted, "And then they identify the manager, isolate him, take him to the office, force him to open the safe, torture him if necessary or threaten to cut his wife's fingers off or simply to kill him." (21RT 3762.) The prosecutor told the jury that appellant and his crime partners tortured people during the Casa Gamino crimes, and that they only became more "brutal and vicious" after killing Mr. Kim. (21RT 3779.) And, the prosecutor described Armando Lopez's ordeal of torture and having a gun placed in his mouth. (21RT 3780.)

There was no misconduct. The trial evidence demonstrated the truth of the prosecutor's words which, again, were accurate. The prosecutor's comments were proper. (*People v. Dykes, supra,* 46 Cal.4th at p. 768.) Nor can his comments be prejudicial because evidence of appellant's guilt was incontrovertible, the evidence clearly showed that appellant and others engaged in torture and gratuitious violence with respect to some of the victims, and only appellant received the death penalty.

(2) Referring to Appellant as a "Little Man"

(a) The Relevant Trial Court Proceedings

The prosecutor argued that witness identifications and physical evidence linked appellant and his codefendants to each of the charged robberies, and that under aiding and abetting liability and the natural and

probable consequences doctrine, each defendant shared criminal liability for the various, charged criminal acts. (21RT 3783-3784.) Then the prosecutor, apparently referring to the stun gun used in the Casa Gamino crimes and in evidence, said the following:

> When Mr. Navarro and Mr. Contreras went in to the Casa Gamino with [appellant], they knew this was going to be used. This little man here didn't have this hidden in his pants. They knew and they discussed in advance that this was going to be used. And the others are not only – I urge you to think not only guilty because this was a natural and probable consequence that this would be used, and people would be assaulted with it, but they assisted, directly assisted [appellant], and the other two men who were shocking both Mr. Lopez and Marcella M. They assisted by restraining everybody else in that restaurant so that they could do the dirty work and extract the big money by use of this device.

(21RT 3785.)

Appellant's counsel objected to the use of the phrase "little man." (21RT 3795.) The prosecutor responded, "It's only in comparison to the stun gun." (21RT 3795.) Appellant's counsel argued,

> I think it is belittling of a person's physical height to set up the idea of – well, it's just an unfair and unnecessary personal attack on a person's height to gain an advantage with the jury to help build up the passion and anger and hatred of the jury against my client.

(21RT 3795-3796.) The prosecutor explained that he used the term "little man" to "show [appellant] couldn't have snuck in that large instrument by putting it in his pocket, or something like that." (21RT 3798.) The court overruled appellant's objection, stating, "I have seen all the cases that indicate where a D.A. has crossed the line such as using the word animal [or] snake. Little man is not on that list last time I looked." (21RT 3798-3799.)

(b) The Trial Prosecutor Did Not Commit Misconduct by Using the Phrase "Little Man"

Appellant appears to contend that the prosecutor's use of the phrase "little man" constituted prosecutorial misconduct. (AOB 310.) However, a prosecutor may use even opprobrious epithets where they are founded on the evidence in the record. (*People v. Fuiava, supra,* 53 Cal.4th at pp. 691-692; *People v. Garcia* (2011) 52 Cal.4th 706, 759-760; *People v. Friend, supra,* 47 Cal.4th at p. 32; *People v. Young, supra*, 34 Cal.4th at p. 1224.) Here, based on the evidence, appellant was apparently the smallest of a group of armed robbers who brutally robbed and brutalized others. As the prosecutor explained, following appellant's objection to the "little man" comment, his use of the complained-of term related to the use of the stun gun during the Casa Gamino crimes, and the fact that appellant could not have surreptitiously brought it into the restaurant, given the size of the weapon and appellant's diminutive physical stature, thus implying that his accomplices did. Moreover, as the trial court found "little man" is nothing like the kinds of phrases that do "cross the line." Significantly, the prosecutor's brief comment on appellant's physical size, "would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence." (*People v. Fuiava, supra,* 53 Cal.4th at p. 692; *People v. McDermott* (2002) 28 Cal.4th 946, 1003.) Appellant cannot show prejudice – here, appellant's diminutive size was on display for the jury throughout the trial, the evidence of guilt was overwhelming against appellant, and the prosecutor's point was well taken regarding the concealing the stun gun upon entering the Casa Gamino.

(3) Reference to Appellant and His Accomplices as "Storm Troopers" During the Penalty Phase

During the penalty phase argument, the prosecutor asked the jury to consider not merely the fact that the robberies had occurred, but how they were committed, and against whom they were committed. She urged the jury to focus on the violent nature of the robberies, and the fact that appellant and his accomplices committed gratuitous and needless violence even though they met no resistance during the robberies. (29RT 5262-5264.) She argued the following:

> You saw and heard acts of terrorism at each and every location of which the defendants were accused of and convicted. So what was their motive? Why didn't they just take the money, point the gun, grab the wallets and run? Well, there had to be a secondary gain here, a secondary motive, which tells you something about the character and nature of these defendants above and beyond just being robbers. They had a need for power, control and domination of their victims. And in some instances a distinct pleasure at torturing them and terrorizing them. And this was all at the expense of innocent people who would have turned over their property after just seeing that gun, alone.
>
> These were more than serial robbers, this was a reign of terror and as a few examples, highlights from some of the cases that you heard back at the guilt phase, at the Outrigger in Sunland the defendants were using shotguns, rifles and semiautomatics. And each one had one in their hand.
>
> They came into the Outrigger like storm troopers. They were shouting obscenities. They were pounding on the counter. They took the rifle and they knocked all the glasses off the bar just to induce terror in their victims. They said the wom[e]n were hysterical and crying. One of them jumped over the bar counter, knocking Mr. Lehman to the ground and pulled out the case drawer and knocked him over the head with it.

(29RT 5264-5265.) Appellant later objected to the use of the term "storm troopers," because it was like calling appellant and his accomplices "Nazis," which was an "improper characterization of the defendants." The court overruled the objection without explanation. (30RT 5295.)

Here, the use of the phrase "storm trooper" was properly based on the evidence. In context, the prosecutor was emphasizing the evidence that appellant and his accomplices did not simply commit robberies, but rather, well-armed, well-planned, and well-executed takeover robberies using gratuitous violence and brutality and literally "storming into" the Outrigger like storm troopers would. There was nothing improper about her remarks, even if they can be construed to refer to Nazis, since they were reasonably based on the evidence. (*People v. Fuiava, supra,* 53 Cal.4th at pp. 691-692; *People v. Garcia* (2011) 52 Cal.4th 706, 759-760; *People v. Friend, supra,* 47 Cal.4th at p. 32; *People v. Young, supra,* 34 Cal.4th at p. 1224.) Moreover, the prosecutor's brief comment "would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence." (*People v. Fuiava, supra,* 53 Cal.4th at p. 692; *People v. McDermott* (2002) 28 Cal.4th 946, 1003.) There was further no prejudice given that the jury heard all of the evidence of guilt, and thus was well aware of the manner in which appellant, Contreras, and Navarro conducted themselves during their crime spree. Moreover, the jury did not find death as to either Navarro or Contreras. This claim fails.

G. Appellant Was Not Prejudiced Either Individually or Cumulatively

As to appellant's guilt-phase claims of misconduct, even if this Court were to find prosecutorial misconduct, prejudice is measured under the state-law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836), or the federal constitutional standard of (*Chapman v. California, supra*, 386 U.S.

at p. 24). (*People v. Booker* (2011) 52 Cal.4th 141, 186.) As noted above, state law error or misconduct occurring during the penalty phase requires reversal if there is a reasonable possibility that the error affected the verdict, which is essentially the same as the *Chapman* standard. (*People v. Pearson, supra,* 56 Cal.4th at p. 472.)

Here, appellant has not shown the occurrence of any prosecutorial misconduct, let alone misconduct that was prejudicial, in either the guilt or penalty phases. The evidence of guilt and for death was overwhelming. The fact the jury did not return death verdicts against Navarro or Contreras demonstrates the jury properly weighed the evidence and reached an individual determination as to each defendant, regardless of any purported misconduct. The jury was able to compare the prosecutors' claims advanced during argument with the evidence. None of the prosecutorial remarks of which appellant complains was outside of the scope of the evidence that was before the jury. None of the prosecutorial comments in themselves were so egregious that appellant would have been prejudiced. The court's instructions also would have remedied any prejudice. Arguments by counsel "generally carry less weight with a jury than do instructions from the court." (*Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190; 108 L.Ed.2d 316]; see *People v. Mendoza* (2007) 42 Cal.4th 686, 703.) This claim fails.

XXII. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE PENALTY-PHASE JURY REGARDING "MERCY"

Appellant claims that the trial court erroneously refused to instruct the penalty phase jury on "mercy," thereby violating appellant's rights to a fair jury trial, to present a defense, to a reliable penalty determination, and to due process under the Sixth, Eighth, and 14th Amendments. (AOB 313-323.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

During the jury instruction settlement conference for the penalty phase, the court noted that appellant's counsel wanted only two additional instructions given – CALJIC Nos. 2.40 and 2.42 – which the court had included in its latest packet of instructions. Appellant's counsel noted that he wanted some of the instructions that Navarro had proposed to be given. Appellant's counsel noted that the words "mercy or compassion" were not included. The court stated it had left in sympathy and pity, and deleted "mercy and compassion." Appellant's counsel argued the jury should be instructed on mercy because the defense was based on "St. Paul's portion of the New Testament," which deals primarily with mercy. (29RT 5062-5064.) The court stated that sympathy encompassed mercy. Appellant's counsel disagreed. The court stated she would take it under submission and look at "the case law." (29RT 5064-5065, 5072.) Appellant's counsel emphasized that he wanted "mercy, sympathy, passion, and pity," but if he had to choose, he would elect "mercy and compassion." (29RT 5065.)[102]

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[102] In a section of the Supplemental Clerk's Transcript X entitled "Proposed Jury Instructions Recovered From District Attorney's File" (see 2SCT X 344), there is a jury instruction that is indicated "refused." There is no indication who may have proposed the instruction or how it came to be refused. (See 2SCT X 345.) The instruction, entitled "Scope And Proof Of Mitigation: Sympathy Alone Is Sufficient To Reject Death," reads as follows:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(continued...)

After reviewing several cases,[103] the court stated she would not give a mercy instruction because "sympathy and pity cover what you need to handle and you can argue." The court expressly ruled that appellant's counsel could argue mercy on appellant's behalf, provided his argument was based on the evidence. (29RT 5189-5190.)

The trial court instructed the jury in pertinent part that they must disregard any instructions from the first phase of the trial that prohibited them from considering pity or sympathy, that the jury "may take into consideration pity or sympathy" (29RT 5235; 12CT 3497 [CALJIC No. 8.84.1]) and that "In determining the penalty the jury could be guided by,

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that a defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(29RT 5238-5241; 12CT 3499-3500 [CALJIC No. 8.85].) The court also instructed the jury with CALJIC No. 8.88 on how to evaluate the aggravating and mitigating circumstances in deliberating on penalty. (29RT 5252-5256; 12CT 3504-3505.)

(...continued)
(2SCT X 345.) Standing alone on the next sequential page, which is otherwise blank, is "A juror is permitted to use mercy, sympathy, and/or sentiment in deciding what weight to give each mitigating factor." (2SCT X 345-346.)

[103] The cases the court cited were *People v. Wader* (1993) 5 Cal.4th 610, *People v. Danielson* (1992) 3 Cal.4th 691, *People v. McPeters* (1992) 2 Cal.4th 1148, *People v. Daniels* (1991) 52 Cal.3d 815, *People v. Wright* (1990) 52 Cal.3d 367. (29RT 5189.)

During his argument to the jury, appellant's counsel painted a picture of appellant, based on the evidence, as someone who had grown up under difficult circumstances, and had, after realizing the gravity of his crimes, followed a new life-path based on religion through which he could make a contribution. (30RT 5426-5441, 5469-5474, 5481-5486, 5489-5494.) Appellant's counsel argued that appellant had shown, during the Ofelia's incident, a spark of humanity that demonstrated he was worth saving. (30RT 5466-5467.) Appellant's counsel emphasized that the jury could find, based on the evidence of appellant's changed view of religion, that he should not be put to death based on sympathy and mercy. (30RT 5471-5476.) Appellant's counsel argued,

> [The prosecutor] asked why would I bring in somebody from – a representative of Mother Teresa to come in here, was I trying to engender sympathy or mercy or pity for you. That is what I was trying to do. I am begging for mercy. I am begging for you to recognize the sympathy the law says that you can consider. Recognize the sympathy. Recognize the mercy. Recognize that justice has to be tempered with mercy. And I am trying to persuade you, and that is why I brought in somebody associated with Mother Theresa.

(30RT 5476; see also 30RT 5477 [defense was trying to "engender sympathy"].) Appellant's counsel also told the jury,

> The jury instruction the judge told you about says that you can recognize, you can consider sympathy and pity, and I hope mercy as part of that in deciding the factor (k) information.

(30RT 5494.) And, he emphasized,

> Different from the guilt phase, the law tells you, but you are to consider sympathy in deciding the appropriateness of death. [¶] At the guilt phase you cannot consider that. Here at the penalty phase, the law tells you specifically that you can consider that and can return a life verdict based on that and nothing else.

(30RT 5495.)

B. The Trial Court Properly Declined to Expressly Instruct the Jury on Mercy

As this Court has repeatedly held, the CALJIC penalty phase instructions sufficiently instruct the jurors of their sentencing responsibilities in light of both federal and state constitutional requirements, and that instructions expressly telling the jury it may consider "mercy" as a basis to reject death are not constitutionally required. (*People v. Jones* (2012) 54 Cal.4th 1, 74-75; *People v. Brasure, supra,* 42 Cal.4th at pp. 1069-1070; *People v. Thomas, supra,* 53 Cal.4th at p. 827-828; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 326-327; *People v. Virgil, supra,* 51 Cal. 4th at p. 1279; *People v. Ervine* (2009) 47 Cal.4th 745, 801.) Here, as noted above, the jury was instructed with CALJIC No. 8.85 with respect to section 190.3, factor (k), that it could be guided in its penalty determination by,

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that a defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(29RT 5238-5241; 12CT 3499-3500 [CALJIC No. 8.85].) And as noted above, the jury was also instructed with CALJIC No. 8.88 on how to evaluate the aggravating and mitigating factors in deliberating. (29RT 5252-5256; 12CT 3504-3505.) It is thus "'assume[d] the jury already understood it could consider mercy and compassion.'" (*People v. Ervine, supra,* 47 Cal.4th at p. 801, quoting *People v. Brown* (2003) 31 Cal.4th 518, 570; see also *People v. Jones, supra,* 54 Cal.4th at p. 75.) No additional instruction on mercy was required. And because the jury

instructions allowed for argument about mercy by appellant's counsel, and because the trial court permitted such argument, any error was harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Pearson, supra,* 56 Cal.4th at p. 472.)

XXIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF THE JURY'S DEATH VERDICT

Appellant contends that the trial court erroneously denied hiss motion to modify the death verdict pursuant to section 190.4, subdivision (e), because the court "misconstrued the applicable law and facts. (AOB 324-327.) Respondent disagrees.

A. The Relevant Trial Court Proceedings

Before sentencing, appellant moved for a new trial on a variety of grounds that had been "previously litigated." The trial court denied that motion. (31RT 5558-5598.) Appellant also moved the court to modify the jury's death verdict, incorporating the grounds advanced in the motion for a new trial. (31RT 5598-5612.)

In response to appellant's counsel's arguments, the court stated that the standard was not to "make an independent and de novo determination," but rather, to reweigh the aggravating and mitigating factors, and to determine whether, "in the court's independent judgment, the weight of the evidence supports the jury's verdict." The court noted it was aware of its obligation to assess witness credibility, to determine the probative force of evidence that was presented, and to consider evidence of the factors under section 190.3. The court stated that "in reaching a conclusion under the standards required by law," it had reviewed the trial testimony by examining the transcripts and the court's notes, had reassessed witness credibility, reviewed the exhibits, and "evaluated the probative force and weight of the evidence." (31RT 5598-5599.) The court stated,

> In this review, the court has made a determination that the verdict is not contrary to the law or the evidence. The court further finds that the evidence relating to the truth of the special circumstances are proven beyond any doubt. The court's conclusion is that the jury's finding of death is proper according to the law and facts under and independent review by this Court of all the evidence.
>
> The court agrees with the jury's implicit findings that the circumstances in aggravation substantially outweigh the circumstances in mitigation as to [appellant], warranting the penalty of death as to [appellant].
>
> The jury's assessment of the evidence that the factors in aggravation substantially outweigh the factors in mitigation and that death is warranted is overwhelmingly supported by the evidence.
>
> As to the credibility of the witnesses, the court finds the People's witnesses to be credible and reasonable.

(31RT 5602-5603.)

The trial court further found that appellant's guilt was proven "beyond all doubt," including that the murders were committed during robberies, and that the murder of Officer Hoglund was of a peace officer engaged in the performance of his duties in order to prevent a lawful arrest and to effect an escape. (31RT 5603-5604.) The court further noted that the special circumstance of multiple murder was also supported by overwhelming evidence. (31RT 5604.)

The court found there was overwhelming evidence that appellant acted as the leader of a group of men in a "string of violent, well-orchestrated, take-over robberies" in which he did not hesitate personally, or through his accomplices, to use force and violence. (31RT 5604.) The court recited the trial evidence and made specific findings regarding the strength of the trial evidence of appellant's crimes. (31RT 5605-5608.)

The trial court stated, in pertinent part, that appellant had dragged Maricella M. during the Casa Gamino crimes, with a gun to her head, then he "personally beat and tortured her with the same stun gun [used to torture Armando Lopez], and sexually assaulted her. (31RT 5606.)

The court further noted that it had "further carefully examined, considered and been guided by every mitigating factor," including information about appellant's family life as a child, and his current religious conversion." (31RT 5608.) The court noted that the factors in aggravation were the "circumstances of the case," and appellant's prior conviction for the possession for sale of cocaine," and that the majority of mitigation evidence focused on appellant's religious conversion. (31RT 5608-5610.) In pertinent part, the court found as follows:

> The court finds that the evidence relating to [appellant's] upbringing and religious conversion does not serve as a moral justification or extenuation for his conduct and further finds that such mitigation is not sufficient to serve as a basis for a sentence less than death.
>
> The court also notes that it is in receipt of a letter from [appellant] . . . articulating that his conversion would essentially be of no moment were the court not to reduce the sentence, calling into question the sincerity of the conversion and its meaning. To be specific, on page 2 and 3, he makes reference to the fact that, quote, as you and I know, all my plans and dreams, conversion, and I would become a worthless believer in the time I have left to live, assuming that the court did not overturn the death verdicts. The court notes this letter was delivered after the completion of the trial and has no impact on the court's evaluation of the motion under 190.4, but to have an impact to find that the conversion is sincere, the court is not able to make that finding.

(31RT 5611.) The court denied the motion for modification, as follows:

> In reviewing all the evidence available pursuant to section 190.3, and in carefully and separately weighing the aggravating and mitigating factors, this court finds that the aggravating

> evidence as to [appellant] substantially outweighs the mitigating evidence, warranting the death penalty and supporting the jury's conclusions to that effect.

(31RT 5611.) Appellant did not object to any of the trial court's specific findings.

B. Forfeiture

Appellant forfeited any claim that the trial court improperly relied on an incorrect understanding of the facts in evidence. In *People v. Mungia* (2008) 44 Cal.4th 1101, 1140, this Court held that if a defendant fails to make a specific objection to the court's ruling at the modification hearing, the claim is forfeited. (See also *People v. Brady, supra,* 50 Cal.4th at p. 588; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) This rule applies only to cases in which the modification hearing was conducted after the finality of this court's decision in *People v. Hill, supra,* 3 Cal.4th at p. 1013. (*People v. Riel, supra,* 22 Cal.4th at p. 1220.)

This Court's opinion in *Hill* was filed on November 20, 1992. Hill's petition for writ of certiorari was denied by the United States Supreme Court in an order filed on November 8, 1993, in case number 92-8798. The instant modification hearing was held on March 3, 1995. (See 31RT 5557.) Thus, this claim fails at the outset because, post-*Hill*, appellant did not object to what he now claims were errors in the trial court's ruling on the motion to modify the verdict, and he thus forfeited the instant claim. (See also *People v. Thomas* (2012) 54 Cal.4th 908, 948; *People v. Wallace* (2008) 44 Cal.4th 1032, 1096.)

C. The Trial Court Properly Denied Appellant's Motion to Modify the Death Verdict Pursuant to Section 190.4

Section 190.4, subdivision (e), provides that every defendant as to whom the trier of fact has returned a verdict or finding imposing the death penalty shall be deemed to have applied for modification of the verdict:

> In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. [¶] The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

(§ 190.3, subd. (e).)

Trial courts ruling on motions to modify the death verdict must,

> "reweigh the evidence; consider the aggravating and mitigating circumstances; and determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict."

(*People v. Tully, supra,* 54 Cal.4th at pp. 1061-1062, quoting *People v. Brady, supra,* 50 Cal.4th at p. 588.) The trial court must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported, and in accordance with the weight the court believes the evidence deserves. (*People v. Carter, supra,* 36 Cal.4th at pp. 1210-1211.)

The trial court is not required to find that evidence offered in mitigation does in fact mitigate. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1334; *People v. Scott* (1997) 15 Cal.4th 188, 1222.) Although the court must consider all proffered mitigating evidence, as this court did, it need not find that any particular evidence is in fact mitigating under the circumstances. (*People v. Steele, supra,* 27 Cal.4th at pp. 1267-1268; *People v. Scott, supra,* 15 Cal.4th at p. 1222.)

The trial court does not make an independent and de novo penalty determination. (*People v. Tully, supra,* 54 Cal.4th at pp. 1061-1062; *People v. Weaver* (2001) 26 Cal.4th 876, 989.) The court need not recount or identify all mitigation or aggravation evidence, but rather, must only provide a ruling that allows effective appellate review. (*People v. Tully, supra,* 54 Cal.4th at p. 1063; *People v. Romero, supra,* 44 Cal.4th at p. 427; *People v. DePriest* (2007) 42 Cal.4th 1, 56.) Such trial court rulings are reviewed independently, but reviewing courts do not make a de novo determination of penalty. (*People v. Tully, supra,* 54 Cal.4th at p. 1062; *People v. Brady, supra,* 50 Cal.4th at p. 588.) Unless there is an affirmative indication that trial court overlooked or ignored mitigating evidence, the reviewing court will not find error. (*People v. Tully, supra,* 54 Cal.4th at p. 1064.) This Court reviews the trial court's determination after independently considering the record and does not make a de novo determination of penalty. (*People v. Young, supra,* 34 Cal.4th at p. 1227; *People v. Mickey* (1991) 54 Cal.3d 612, 704.)

A trial court ruling on the application should not consider evidence that was not presented to the jury during the penalty phase of the trial. (*People v. Abel* (2012) 53 Cal.4th 891, 940.) Thus, this Court has indicated trial courts should rule on the application for modification before reading, for example, the probation report. (*People v. Navarette* (2003) 30 Cal.4th 458, 526.) However, this Court has also held that it will not find error

where the trial court reads the probation report to prepare for sentencing the same day the court is going to rule on the modification motion if "nothing in the record suggests the court considered or relied on the probation report when ruling on the motion." (*People v. Alexander* (2010) 49 Cal.4th 846, 936.)

The trial court here complied with its duty under section 190.4. It identified what it viewed as mitigating and aggravating evidence of significance to its ruling, and it engaged in the requisite weighing. The court did not overlook any mitigating evidence, and thus, relief should not be granted on this issue. (*People v. Tully, supra,* 54 Cal.4th at p. 1064.)

Appellant nevertheless faults the trial court for stating that appellant was the person who had sexually assaulted Maricella M. during the Casa Gamino crimes. (AOB 325.) There is evidence in the record that when Maricella M. was taken from the office and sexually assaulted, appellant remained in the office with the Casa Gamino manager. (14RT 2236-2237, 2289-2291.) Arguably, the court was correct that appellant was responsible for the sexual assault because it was done by appellant's colleague while appellant and his friends kept others in the restaurant from helping her, and also because she was abused to compel Armando to give over more money, which was the principal object of the crimes.

However, even if the trial court did mistakenly find that appellant was the person who had sexually assaulted Maricella M., the trial court reasonably determined that the jury's decision that death was appropriate under all the circumstances was adequately supported, and in accordance with the weight the court believed the evidence deserved. That is, the trial court reasonably determined that the weight of the evidence supported the jury's verdict. (*People v. Tully, supra,* 54 Cal.4th at p. 1061-1062; *People v. Brady, supra,* 50 Cal.4th at p. 588; *People v. Carter, supra,* 36 Cal.4th at pp. 1210-1211.) After all, appellant personally engaged in torturing both

Maricella M. and the manager during that particular incident, and appellant was complicit in Maricella M.'s further torture outside of the office to compel Armando to give over more money. That is, appellant and his crime partners relied on torturing Maricella M. to compel Armando to give over the money they thought he was holding back while appellant and the others controlled the people present who would otherwise have protected Maricella M. The trial court reasonably concluded that the weight of the evidence supported the jury's verdicts, even if it was wrong about whether appellant remained in the office with Armando while another of the robbers continued torturing Maricella M., including a sexual assault, or whether appellant personally further tortured and assaulted Maricella M. outside of the office.

Second, appellant claims the court erroneously found that appellant had tortured Armando Lopez and Maricella M. during the Casa Gamino crimes, because the prosecution "never charged appellant with the crime of torture under section 206." This was improper, he claims, because there was insufficient evidence for the People to have charged appellant with "torture." (AOB 325.) However, in point of fact, appellant did torture Maricella M. and Armando Lopez. He beat and applied a stun gun to each many times while each screamed in pain and agony. Maricella M. even preferred to die rather than to endure more torture. (14RT 2229-2236, 2257, 2287-2289, 2294, 2299-2305; 2320-2323; 15RT 2405, 2408-2409, 2462.) Appellant inflicted torture upon Armando and Maricella M. to compel Armando – through pain, and through anguish over Maricella M.'s suffering – to give the robbers more money. The trial court was absolutely correct in its use of the term "torture."

Third, appellant claims that the court's statement that the evidence related to appellant's upbringing and purported religious conversion did not serve as a moral justification or extenuation for his conduct, and did not

serve as a basis for a sentence less than death, improperly suggested that the court thought appellant was required to show that his mitigating evidence morally justified his conduct. (AOB 325-326.) This claim lacks merit. The court's language implicated by appellant's claim was identical to that used in CALJIC No. 8.85, factor (f), which directed the jury to consider, "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." (29RT 5239-5240; see also 12CT 3499.) The use of the "moral justification or extenuation" was also consistent with the language used in CALJIC No. 8.85, with respect to section 190.3, factor (k). The jury was instructed as to factor (k), that it may consider, as follows:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that a defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(29RT 5240-5241; see 12CT 3500.) In fact, this Court recently considered a claim that a trial court had improperly denied an automatic motion for modification of the death verdict. The trial court had stated, in part, that,

> [A]fter considering "the evidence from the members of the defendant's family who have testified about his family history, activities and background . . . the court further independently finds that none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation of his conduct[.]

(*People v. Tully, supra,* 54 Cal.4th at pp. 1062-1063.) Although the particular language at issue here was not directly challenged on appeal, this Court found the trial court understood and properly discharged its duty with

respect to ruling on the motion. (*Ibid.*; see also *People v. Abel, supra,* 53 Cal.4th at p. 941.)

Fourth, appellant claims the court may have considered a letter appellant sent the court after the trial had ended – despite the trial court's express statement that it would not consider the letter – which the court stated called into question the sincerity of appellant's religious claims. (AOB 326.) This claim lacks any basis in the record. The court expressly stated that it could not consider the letter. (31RT 5611.)

Any errors by the trial court were minor and do not demonstrate it failed to properly examine and weigh the evidence under section 190.4. The evidence showed that appellant was an eager participant and vicious leader in a series of brutal, violent gunpoint takeover robberies in which two victims were killed, at least two others tortured with a cattle prod and guns, and numerous others beaten and abused. There is no reasonable possibility that any misstatement or error identified by appellant affected the court's sentencing decision. (*People v. Cleveland, supra,* 32 Cal.4th at p. 767; *People v. Mendoza, supra,* 24 Cal.4th at p. 198.)

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant raises nine separate claims asserting that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 328-344.) Each claim fails.

A. Section 190.2 Provides a Constitutionally Meaningful Basis for Imposition of the Death Penalty

Appellant summarily asserts that California's death penalty statute fails to meaningfully narrow the ambit of cases susceptible to capital punishment, and thus, California's death penalty is over-inclusive,

arbitrarily imposed in violation of the Fifth, Sixth, Eighth, and 14th Amendments to the United States Constitution. (AOB 328-329.)

To comply with the Eighth Amendment's proscription against cruel and unusual punishment, death penalty laws must provide a "meaningful basis" for distinguishing the cases in which the death penalty is imposed from those in which it is not. (*People v. Edelbacher* (1989 47 Cal.3d 983, 1023.) The United States Supreme Court has held that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871; 79 L.Ed.2d 29].) As this Court held in *People v. Williams, supra,* 49 Cal.4th at p. 469,

> the number of special circumstances is not so high as to fail to perform the constitutionally required narrowing function; the special circumstances are not over inclusive, either on their face or as interpreted by this court; and the felony-murder special circumstance is not invalid for failing to narrow meaningfully the class of persons eligible for the death penalty.

(See also *People v. Dykes, supra,* 46 Cal.4th at p. 813; *People v. Riggs, supra,* 44 Cal.4th at p. 329; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Thornton, supra,* 41 Cal.4th at p. 468; *People v. San Nicolas,* (2004) 34 Cal.4th 614, 676-677; *People v. Marks* (2003) 31 Cal.4th 197, 237.) This claim fails.

B. Section 190.3, Subdivision (a), Does Not Violate the United States Constitution

Appellant claims that section 190.3, subdivision (a), which directs the penalty-phase trier-of-fact to consider the circumstances of the crime, violates the Fifth, Sixth, Eighth, and 14th Amendments to the United States Constitution because the circumstances of each murder can be enough, without any narrowing filter, to impose the death penalty. (AOB 329-330.)

This Court, as appellant notes (see AOB 329-330), has repeatedly rejected this claim. (*People v. Gonzales & Soliz, supra,* 52 Cal.4th at p. 333; *People v. Moore, supra,* 51 Cal.4th at p. 1144; *People v. Lee, supra,* 51 Cal.4th at p. 653; *People v. Tate, supra,* 49 Cal.4th at pp. 711-712; *People v. Harris* (2005), *supra* 37 Cal.4th at p. 365; *People v. Maury, supra,* 30 Cal.4th at p. 439.)

C. California's Death Penalty Scheme's Burden of Proof Complies With the United States Constitution

Appellant claims that California's death penalty scheme fails to comply with the United States Constitution because proof beyond a reasonable doubt is not required during the penalty phase, except as to proof of prior acts of criminality. (AOB 331-334.)

1. Jury Findings Using the Beyond-A-Reasonable-Doubt Standard Are Not Constitutionally Required During the Penalty Phase

Appellant asserts that facts used to support an increased sentence (other than a prior conviction) must be submitted to a jury and proven beyond a reasonable doubt, and so the reasonable doubt standard must apply in the penalty phase as to whether aggravating factors existed, they outweighed mitigating factors, and were so substantial to render a death verdict appropriate. (AOB 331-332, citing *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531; 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536[104] U.S. 584, 609 [122 S.Ct. 2428; 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348; 147 L.Ed.2d 435].)

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[104] Appellant erroneously cites to "530" rather than "536."

This Court has held that the failure to require that the jury unanimously find aggravating circumstances true beyond a reasonable doubt, to require that the jury find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty, does not violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Parson* (2008) 44 Cal.4th 332, 370; *People v. Salcido* (2008) 44 Cal.4th 93, 167.) This Court has also expressly found that the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856; 166 L.Ed.2d 856]; *Blakely v. Washington, supra,* 542 U.S. 296; *Ring v. Arizona, supra,* 536 U.S. 584; *Apprendi v. New Jersey, supra,* 530 U.S. 466) do not alter this conclusion or affect California's death penalty law. (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 228; *People v. Salcido, supra,* 44 Cal.4th at p. 167; *People v. Stevens* (2007) 41 Cal.4th 182, 212.)

2. The Trial Court Was Not Required to Instruct the Jury as to a Burden of Proof During the Penalty Trial

The trial court instructed the jury, in pertinent part, that in order to return a death judgment, each juror must be,

> persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(12CT 3504-3505; 29RT 5255.) Appellant contends the trial court was required to instruct the jury on a particular burden of proof, or that no burden of proof was applicable, during the penalty phase. (AOB 333-334.) This court has repeatedly rejected this contention. (*People v. Valdez, supra,* 55 Cal.4th at pp. 179-180; *People v. Duenas* (2012) 55 Cal.4th 1,

27-28; *People v. Gonzales, supra,* 54 Cal.4th at p. 1299; *People v. Lightsey, supra,* 54 Cal.4th at p. 731; *People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1096-1097; *People v. Howard, supra,* 51 Cal.4th at p. 39.)

D. Appellant Is Not Entitled to Appellate Relief on the Basis That the Death Verdict Was Not Premised on Unanimous Jury Findings

1. Aggravating Circumstances

Appellant contends that the jury should have been instructed, under the United States Constitution, to make unanimous findings as to particular aggravating circumstances that warranted imposition of the death penalty. (AOB 334-335.) This court has repeatedly rejected this contention. (*People v. Valdez, supra,* 55 Cal.4th at pp. 179-180; *People v. Duenas, supra,* 55 Cal.4th at p. 27; *People v. Gonzales, supra,* 54 Cal.4th at p. 1298; *People v. Lightsey, supra,* 54 Cal.4th at p. 731; *People v. Fuiava, supra,* 53 Cal.4th at p. 732.)

2. Prior Criminality

Appellant claims that his penalty jury should have been instructed under the United States Constitution that prior criminality had to be found true by a unanimous jury, and that the jury was wrongly instructed that unanimity as to prior criminality was not required. (AOB 335-336.)[105] However, the United States Constitution does not require that jurors

[105] The jury was instructed on two prior acts of criminality by appellant -- a prior conviction for possession of cocaine base for sale, and unadjudicated criminal conduct related to the Rod's Coffee Shop incident. The jury was instructed that unanimity was not required only as to the Rod's Coffee Shop Incident. Since the cocaine-base conviction was adjudicated, only the Rod's conduct is implicated by this claim.

unanimously agree on unadjudicated criminal activity for use as an aggravating circumstance. (*People v. Thomas, supra,* 54 Cal.4th at p. 949; *People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. Mendoza, supra,* 52 Cal.4th at p. 1096; *People v. Scott, supra,* 52 Cal.4th at p. 497; *People v. Famalaro, supra,* 52 Cal.4th at pp. 42-43; *People v. Dykes, supra,* 46 Cal.4th at p. 799; *People v. Brasure, supra,* 42 Cal.4th at p. 1068.)

3. Use of Phrase "So Substantial" in CALJIC No. 8.88 Did Not Render the Penalty Determination Constitutionally Deficient

The trial court instructed the jury with CALJIC No. 8.88, in pertinent part, that,

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(29RT 5255; see also 12CT 3505.) Appellant argues that the phrase "so substantial" is "impermissibly broad," and establishes a "vague and directionless standard" that allows for "arbitrary and capricious sentencing" in violation of the Eighth and 14th Amendments. (AOB 337.) This Court has held to the contrary. (*People v. Duenas, supra,* 55 Cal.4th at p. 27; *People v. McKinzie, supra,* 54 Cal.4th at p. 1361; *People v. Gonzales, supra,* 54 Cal.4th at p. 1299; *People v. McDowell, supra,* 54 Cal.4th at p. 444; *People v. Abel, supra,* 53 Cal.4th at p. 943.)

4. Use of the Term "Warrants" in CALJIC No. 8.88 Did Not Violate the Eighth and 14th Amendments; the Jury Was Properly Instructed as to Its Duty

The trial court instructed the penalty jury with CALJIC No. 8.88 that it was the jury's duty to determine whether the death penalty or a prison sentence of life without parole should be imposed on appellant, and that the

jury must determine whether "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (12CT 3504-3505; see also 29RT 5252-5256.) Appellant complains that CALJIC No. 8.88 did not clearly instruct the jury that "the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty." (AOB 337-338.) This Court has repeatedly rejected this contention. (*People v. Duenas, supra,* 55 Cal.4th at p. 27; *People v. McKinzie, supra,* 54 Cal.4th at p. 1361; *People v. Russell* (2010) 50 Cal.4th 1228, 1273; *People v. Tate, supra,* 49 Cal.4th at pp. 712-713; *People v. Taylor, supra,* 48 Cal.4th at p. 658.)

5. CALJIC No. 8.88 Properly Instructed the Jury How to Consider Mitigating and Aggravating Circumstances

Section 190.3 requires that a jury impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating ones; conversely, that section requires that the jury impose life without parole if it finds that the mitigating circumstances outweigh the aggravating ones. Appellant claims that CALJIC No. 8.88 is constitutionally deficient because it does not expressly tell the jury it must impose life without parole if it finds that the mitigating circumstances outweigh the aggravating ones. (AOB 338-339.) This Court has repeatedly rejected this contention. (*People v. Jones, supra,* 54 Cal.4th at pp. 78-79; *People v. Taylor, supra,* 48 Cal.4th at pp. 658-659; *People v. Lewis* (2009) 46 Cal.4th 1255, 1315-1316; *People v. Jackson, supra,* 45 Cal.4th at pp. 701–702; *People v. Wilson* (2008) 43 Cal.4th 1, 31-32.)

6. The Penalty Phase Instructions Were Not Constitutionally Infirm for Failing to State a Standard of Proof and a "Lack of Need for Unanimity as to Mitigating Circumstances

Appellant claims that the jury instructions were constitutionally infirm because they failed to set forth a burden of proof applicable to mitigating circumstances, and because they failed to tell the jury that they did not need to unanimously find particular mitigating circumstances. (AOB 339-340.) This Court has repeatedly rejected this contention. (*People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. Mendoza, supra,* 52 Cal.4th at p. 1097; *People v. Loy, supra,* 52 Cal.4th at p. 78; *People v. Jones, supra,* 51 Cal.4th at p. 381; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Rogers* (2006) 39 Cal.4th 826, 897.)

7. The Penalty Phase Instructions Were Not Constitutionally Deficient for Failing to Instruct the Jury That Life-Without-Parole Is Presumptively Favored

Appellant claims that his penalty phase trial was constitutionally infirm because the jury was not instructed that a sentence of life without parole was presumed. (AOB 340-341.) This Court has repeatedly rejected this contention. (*People v. Souza* (2012) 54 Cal.4th 90, 142; *People v. Elliott* (2012) 53 Cal.4th 535, 594; *People v. Lee* (2011) 51 Cal.4th 620, 652; *People v. Moore* (2011) 51 Cal.4th 386, 416; *People v. Lewis* (2008) 43 Cal.4th 415, 534.)

E. Penalty Phase Juries Are Not Required to Make Written Findings

Appellant claims that his right to meaningful appellate review was infringed upon because his penalty jury was not required to make written findings, thus rendering the death judgment constitutionally infirm.

(AOB 341.) This claim fails, as penalty phase juries are not required to make written findings. (*People v. Tully*, 54 Cal.4th at p. 1068; *People v. Thomas, supra,* 54 Cal.4th at p. 949; *People v. McDowell, supra,* 54 Cal.4th at p. 443; *People v. Livingston* (2012) 53 Cal.4th 1145, 1180; *People v. Blacksher, supra,* 52 Cal.4th at p. 848.)

F. The Instructions on Mitigating and Aggravating Factors Did Not Violate Appellant's Constitutional Rights

1. The Use of "Restrictive Adjectives" in CALJIC No. 8.85 Did Not Violate the United States Constitution

CALJIC No. 8.85, encompassing the factors set forth in section 190.3 and given in this case, told the jury, in part, that if applicable in determining whether the death penalty should be given, the jury should consider whether appellant killed while under the influence of "extreme mental or emotional disturbance," and whether appellant killed while "under extreme duress or under the substantial domination of another person." (12CT 3499-3500; 29RT 5238-5241.) Appellant claims the use of the "restrictive adjectives" "extreme" and "substantial" violated his rights under the United States Constitution. (AOB 341-342.) This Court has repeatedly rejected this contention. (*People v. McKinnon, supra,* 52 Cal.4th at p. 692; *People v. Foster, supra,* 50 Cal.4th at p. 1365; *People v. D'Arcy* (2010) 48 Cal.4th 257, 309; *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Panah* (2005) 35 Cal.4th 395, 500.)

2. The Trial Court Was Not Required to Delete "Inapplicable" Factors From CALJIC No. 8.85

In giving CALJIC No. 8.85, which instructs the jury as to the factors set forth in section 190.3, the trial court did not excise factors that may have been inapplicable here, based on the evidence. Appellant claims this was

constitutional error. (AOB 342.) It was not. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. McKinzie, supra,* 54 Cal.4th at pp. 1364-1365; *People v. Thomas, supra,* 54 Cal.4th at pp. 947-948; *People v. Lightsey, supra,* 54 Cal.4th at p. 731; *People v. McDowell, supra,* 54 Cal.4th at p. 444.)

3. The Trial Court Was Not Required to Instruct the Jury as to Which Factors Were Aggravating, Which Were Mitigating, and Which Could Have Been Either in the Jury's Appraisal

Appellant complains that he suffered a constitutional violation during the penalty phase because the court did not instruct and identify the jury as to CALJIC No. 8.85 that certain factors were mitigating, that certain factors were aggravating, and that certain factors could be either depending on the jury's findings. (AOB 342-343.) This Court has repeatedly rejected this contention. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1362; *People v. Jones, supra,* 54 Cal.4th at p. 87; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Rogers* (2009) 46 Cal.4th 1136, 1178-1179.)

G. Intercase Proportionality Review Is Not Constitutionally Required

Appellant contends that intercase proportionality review is constitutionally required. (AOB 343-344.) He is incorrect. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Duenas, supra,* 55 Cal.4th at p. 28; *People v. McKinzie, supra,* 54 Cal.4th at p. 1365; *People v. Houston, supra,* 54 Cal.4th at pp. 1231-1232; *People v. Jones, supra,* 51 Cal.4th at p. 381.)

H. California's Death Penalty Scheme Does Not Violate Constitutional Equal Protection by Providing Death-Eligible Defendants Fewer Safeguards Than Non-Capital Defendants Receive

Appellant claims that death-eligible defendants receive "significantly fewer procedural protections" than do non-capital defendants because in non-capital cases, sentencing enhancement allegations are determined unanimously and beyond a reasonable doubt, and "aggravating and mitigating factors must be established by a preponderance of the evidence." In contrast, appellant notes, in capital cases, there is no burden of proof at all in the penalty phase, jurors need not agree unanimously on particular aggravating factors, and jurors do not provide written findings. (AOB 344.) This Court has repeatedly rejected this contention. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Jones, supra,* 54 Cal.4th at p. 87; *People v. Livingston, supra,* 53 Cal.4th at p. 1180; *People v. Mendoza, supra,* 52 Cal.4th at p. 1098; *People v. Manriquez, supra,* 37 Cal.4th at p. 590.)

I. International Standards Do Not Establish That California's Use of the Death Penalty Was Improperly Imposed Upon Appellant

Appellant claims that the "international community's overwhelming rejection of the death penalty" and the United States Supreme Court's citation of international law to prohibit imposing the death penalty upon juveniles in *Roper v. Simmons* (2005) 543 U.S. 551, 554 [125 S.Ct. 1183; 161 L.Ed.2d 1] demonstrate the death penalty should no longer be imposed in the United States. (AOB 345.) This Court has repeatedly rejected this contention. (*People v. Duenas, supra,* 55 Cal.4th at p. 28; *People v. McKinzie, supra,* 54 Cal.4th at p. 1365; *People v. Gonzales, supra,* 54

Cal.4th at p. 1301; *People v. Tully, supra,* 54 Cal.4th at p. 1070; *People v. Jones, supra,* 54 Cal.4th at pp. 87-88.)

XXV. APPELLANT'S DEATH SENTENCE SHOULD NOT BE DISTURBED ON THE BASIS OF CUMULATIVE PREJUDICE

Appellant finally claims that his death sentence must be reversed because, when aggregated, prejudice from multiple trial errors during both the guilt and penalty phases resulted in a greater prejudicial effect than prejudice from errors considered discretely, and because the accumulated prejudice violated his right to due process by rendering his trials unfair. (AOB 345-347.) Respondent disagrees.

It is true that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra,* 17 Cal.4th at p. 844.) However, even capital defendants are entitled only to fair rather than perfect trials. (*People v. Box, supra,* 23 Cal.4th at p. 1214; *People v. Cain* (1995) 10 Cal.4th 1, 82.) Here, the record shows appellant received a fair trial and discloses few, if any, errors. Given the strength of the People's case against appellant as to both guilt and penalty, any alleged errors could not have affected the outcome of either trial as set forth with respect to each claim raised by appellant. Considered cumulatively, the cumulative effect of any such errors would not support reversal of the judgment, either. (*People v. Bolden, supra,* 29 Cal.4th at pp. 567–568 [both guilt and penalty phases].) Therefore, appellant is not entitled to any relief.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: July 11, 2013

Respectfully submitted,

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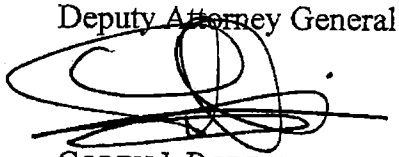

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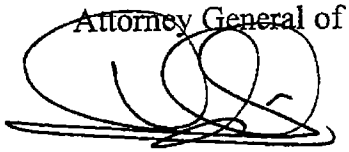
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 119,059 words.

Dated: July 11, 2013

KAMALA D. HARRIS
Attorney General of California



COREY J. ROBINS
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

CAPITAL CASE

Case Name: ***People v. Edgardo Sanchez-Fuentes*** No. **S045423**

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 July 11, 2013, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sara Theiss, Deputy State Public Defender
Office of the State Public Defender
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Oakland, CA 94607
Counsel for Edgardo Sanchez-Fuentes

Christina Borde, Attorney at Law
Habeas Corpus Resource Center
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Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Michael J. Grosbard, Head Deputy
Los Angeles County District Attorney's Office
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Los Angeles, CA 90012

Maria Arvizo-Knight, Death Penalty Appeals Clerk
Los Angeles County Superior Court
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Michael G. Millman, Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

On July 11, 2013, I caused an original and 13 copies of the Respondent's Brief in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by onTrac.

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 July 11, 2013, at Los Angeles, California.

Virginia Gow
Declarant

Signature

CJR:vg
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