IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROPATI SEUMANU,** Defendant and Appellant.	S093803 **CAPITAL CASE**

Alameda County Superior Court No. H24057A
The Honorable Larry J. Goodman, Judge

RESPONDENT'S BRIEF

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Other Authorities

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STATEMENT OF THE CASE

On June 19, 1997, the Alameda County District Attorney filed an information charging appellant, Ropati Seumanu, and his codefendants, Galovaie Jay Palega, Tony Iuli, and Tautai Seumanu, with first degree murder (Pen. Code, § 187; count one),[1/] kidnaping to commit robbery with punishment of life in prison without the possibility of parole (§ 209, subd. (a); count two), and first degree robbery (§ 211; count three). In connection with count one, the information alleged that appellant: killed the victim during a robbery and a kidnaping (§ 190.2, subds. (a)(17)(A) & (B)), personally used a shotgun to commit murder (§§ 1203.06, 12022.5), and that appellant's codefendants knew he was personally armed with a shotgun (§ 12022, subd. (d)). In connection with counts two and three, it was alleged that appellant kidnaped and robbed his victim with the intent to inflict great bodily injury (§ 1203.075), personally inflicted great bodily injury on the victim during the commission of both crimes (§ 12022.7, subd. (a)), and that appellant's codefendants knew that appellant was personally armed with a shotgun (§ 12022, subd. (d)). (6 CT 1441-1449.)

1. Subsequent statutory references will be to the Penal Code unless otherwise indicated.

On April 26, 2000, Iuli pled guilty to voluntary manslaughter (§ 192, subd. (a)), kidnaping (§ 207), and second-degree robbery (§ 211), and admitted arming enhancements for all three crimes (§§ 12022, subd. (a)(2), 12276), in return for his testimony for the People and a fixed sentence of sixteen years and eight months. (7 CT 1896-1897, 1901-1910; 11 CT 2804-2811, 2814-2815, 2518-2520.) On May 15, 2000, Palega pled guilty to the same charges as Iuli, pursuant to the same negotiated sentence. (7 CT 1935-1950; 9 CT 2207; 11 CT 2821-2838; 12 RT 2704-2705; 13 RT 3000.)

On June 19, 2000, Tautai Seumanu pled guilty to first-degree murder (§ 187), kidnaping with the intent to commit robbery (§ 209, subd. (b)), and robbery (§ 211), and admitted the arming enhancements on all counts (§ 12022, subd. (d)). (8 CT 2002-2004, 2009-2023.) On July 17, 2000, the trial court sentenced him to 28 years to life. (8 CT 2133, 2134-2137.)

On July 11, 2000, the Alameda County District Attorney filed an amended information charging appellant as the sole defendant and charging count 2 as kidnaping to commit robbery punishable with life in prison with the possibility of parole (§ 209, subd. (b)), deleting the great bodily injury enhancements previously charged in connection with counts two and three, adding a personal arming enhancement on counts two and three (§§ 1203.06, 12022.5), and alleging that appellant's former codefendants personally used a firearm to commit counts two and three (§ 12022, subd. (a)(1)). (8 CT 2118, 2120-2126.)

The same day, appellant's guilt-phase trial began. (8 CT 2119.) On October 19, 2000, the jury convicted appellant on counts 1 through 3, and found the two special circumstances and three personal firearm use enhancement allegations true. (11 CT 2707-2712; 17 RT 3656-3658.)

On October 23, 2000, appellant's penalty phase trial began. (11 CT 2720; 17 RT 3673.) On November 1, 2000, the jury returned a verdict of death

for the first-degree murder with special circumstances. (11 CT 2790, 2796.)

On December 12, 2000, after denying appellant's automatic motion to modify the death verdict (§ 190.4, subd. (e)), the trial court sentenced appellant to death for the first-degree murder and stayed a life sentence with the possibility of parole for count two, a four-year term for count three, and three, four-year terms for each firearm use enhancement. (11 CT 2879–2881, 2885-2892.)

Appellant's appeal to this Court is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

Nolan Pamintuan was to marry Rowena Panelo on May 18, 1996. (7 RT 1734.) The night before their wedding, Panelo presented Nolan with a black Movado watch as a wedding gift. (7 RT 1734.) Between 10:30 and 11:00 p.m., after spending the evening with Panelo and other family members at a rehearsal dinner, Nolan left Panelo to spend the night at his father's home in Hayward. (7 RT 1735-1738, 1747, 1748.) Nolan was wearing a gold engagement ring with diamonds, a brown Gucci watch, a black Structure-brand sport coat, a dark Old Navy-brand pea coat, and boots. (7 RT 1737, 1739, 1745, 1747.) He carried a "to do" list for the wedding, a pager, cigarettes, and breath mints. (7 RT 1742-1743.) Nolan's key chain included keys to his Acura and The Club safety device. (7 RT 1746.) Nolan's wallet contained his driver's license, two photographs of him and Panelo, his student identification, two Visa credit cards, an American Express card, a Great Western Bank ATM card, and a medical card. (7 RT 1749, 1750.)

On May 18, 1996, the morning of the wedding, Nolan's father Lope Pamintuan awoke at 5:30 a.m. and noticed that Nolan was missing. (8 RT 2183.) Lope found Nolan's Acura parked outside near his apartment. (8 RT

2187.) Lope was concerned because The Club security device was locked onto the steering wheel, but the car doors were unlocked. (8 RT 2189; 9 RT 2334.) Lope called the police, who conducted an investigation. (8 RT 2187, 2190; 9 RT 2332, 2333.)

At 1:30 p.m., a half-hour before Nolan and Panelo were scheduled to marry, Panelo was notified that Nolan had been murdered. (7 RT 1751.)

B. Prosecution Case

1. Background Information

Appellant, his wife Lucy, and her daughter Peggy lived with appellant's parents on Folsom Street in Hayward. (12 RT 2719.) Approximately 24 people lived at the house, including appellant's younger brother Tautai, Tony Iuli and Jay Palega and their wives, and Palega's entire family. (7 RT 1874; 8 RT 1994; 10 RT 2449, 2452, 2460; 11 RT 2676, 2687; 12 RT 2710, 2719; 14 RT 3183; 15 RT 3272, 3273.) Appellant was first in line to become the chief of the group when his father died. (13 RT 2910.)

Appellant was known as Paki, Afatia, Smurf, and Alf. (12 RT 2706.) Appellant, Palega, and Tautai were members of the Sons of Samoa (S.O.S.), a Crip-affiliated criminal street gang. (12 RT 2720; 13 RT 2983; 15 RT 3325-3327.) Appellant's gang nickname was "Mr. Smurf 1;" he had this name tattooed on his shoulder. (10 RT 2478, 2479; 11 RT 2622; 12 RT 2723.) Iuli belonged to a rival, Blood-affiliated gang but was protected because he was married to appellant's sister. (11 RT 2666; 13 RT 2984.)

Appellant's bedroom was the outbuilding behind the main house; he kept his belongings in a stereo cabinet in this room. (12 RT 2728-2729, 2864-2865; 15 RT 3217.) Tautai usually slept in either the outbuilding, or in the main house. (12 RT 2729-2730.) Iuli sometimes slept in the outbuilding, but mostly slept with his wife in his father's van parked in the driveway. (10 RT

2455-2457; 12 RT 2730.)

2. Purchase Of The Gun Used In The Murder

In 1996, appellant became acquainted with Brad Archibald. (9 RT 2326, 2328, 2347; 12 RT 2707, 2710-2711.) On more than one occasion, appellant told Archibald he wanted some guns. (9 RT 2349, 2416-2417.) One day Brad Archibald visited appellant at work to discuss firearms. (12 RT 2712-2713; 13 RT 2911.) Archibald said he had a variety of weapons available, including handguns and a .12-gauge shotgun. (12 RT 2714-2715, 2717.) Appellant indicated he wanted a small handgun; something like a .380-caliber gun. (12 RT 2715; 13 RT 2913.) The two later met for appellant to view Archibald's guns. (12 RT 2716.) When appellant held an AK-47, "his eyes lit up." (9 RT 2354.) Appellant asked Archibald to find him an assault rifle. (9 RT 2356.) Sometime thereafter, Archibald delivered a Winchester sawed-off shotgun in a duffel bag to appellant in the outbuilding. (9 RT 2367-2368.) Archibald also gave appellant shotgun ammunition in a small black bag (9 RT 2365, 2377), and a plastic bag filled with loose ammunition for a .22 rifle. (9 RT 2366.)[2/] Because appellant wanted to increase the ammunition capacity of the weapons, Archibald altered the gun. (9 RT 2374.)

Archibald loaded the shotgun and showed appellant how to operate it. (9 RT 2367, 2376-2379.) He told appellant to wear gloves because of the power of the gun and instructed appellant to wipe down the gun after use to prevent fingerprints. (9 RT 2380.) Everyone in the room watched Archibald show appellant how to operate it. (9 RT 2370, 2379.) Appellant was the only person who handled the shotgun. (9 RT 2429.) According to Archibald,

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2. Iuli, Tautai, and two or three female family members were also present. (9 RT 2369-2370.)

appellant and Iuli paid for the shotgun. (9 RT 2379-2380, 2385-2386).[3] About three days later, Archibald also gave appellant an unregistered and illegal .22 rifle in a duffel bag. (9 RT 2385, 2388, 2392, 2427, 2430.)

Sometime around the first week of May 1996, appellant showed the shotgun to Palega. (12 RT 2738-2739, 2746.)[4] Palega also viewed a .22 rifle. (12 RT 2741; 13 RT 2914.) Appellant handled both guns. (12 RT 2741.) Palega saw ammunition inside the duffel bag and several boxes of .12-gauge shotgun ammunition. (12 RT 2743, 12 RT 2744, 2754-2755.)

A couple of days later, appellant, Palega, Iuli, and Tautai were watching television when appellant pulled the shotgun out from the chimney. (12 RT 2746, 2747.) All four men handled the shotgun. (12 RT 2749, 2753-2754.) The men talked about the power of the shotgun (12 RT 2751-2752), and "[w]hat type of ammunition would have more kick or which one would do more damage." (12 RT 2755.) Appellant test-fired the .22 rifle on the side of the main house. (12 RT 2750.) Before appellant put the guns away, the men agreed to commit robberies together, and to wipe the guns for fingerprints. (12 RT 2756-2757, 2761, 2793-2794).

3. The Night Of The Murder

On the night of May 17, 1996, appellant, Iuli, Palega, and Tautai left the Folsom Street house; appellant was driving his father's gold van. (10 RT 2500-2501; 12 RT 2765.) Appellant stated his intention to steal a car and commit robberies. (10 RT 2503; 12 RT 2763.) All four agreed to commit robberies. (10 RT 2504.) The group stopped at the parking lot of a grocery store where Tautai unsuccessfully tried to steal a van. (10 RT 2502, 2505; 12 RT 2764.)

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3. Iuli testified he did not pay for the shotgun. (10 RT 2499.)

4. Appellant kept the shotgun hidden in the fireplace. (12 RT 2739, 2743.)

On the way back to the Folsom Street house, appellant pointed out a dark-colored minivan with tinted windows which appellant and Tautai stole by punching through the door handle and using a screwdriver on the ignition. (10 RT 2500, 2505-2507; 11 RT 2577; 12 RT 2762, 2766.) Appellant drove the stolen minivan back to the Folsom Street house and parked it a block away.[5] (10 RT 2508-2510; 12 RT 2768.)

Appellant and Palega changed their clothes and the group met in the outbuilding to get the guns, which appellant brought out in a bag. (10 RT 2512; 12 RT 2769-2771.) Iuli testified he knew "something big" was going to happen that night when he saw the guns. (11 RT 2578.) Appellant again talked about committing robberies, with the others agreeing to participate. (10 RT 2514.) Iuli testified that appellant needed money to pay for guns. (10 RT 2516, 2518.)

The men snuck out to avoid their wives (10 RT 2513; 12 RT 2771) and met at the stolen minivan. (12 RT 2773.) Appellant ordered Palega to drive because he "looked older." (12 RT 2774.) Appellant brought the guns into the van and sat in the front passenger seat; Iuli sat in the middle bench seat, and Tautai in the rear backseat. (10 RT 2521; 12 RT 2790; 13 RT 2936.) The four then went "looking for people to jack[.]" (10 RT 2492; 12 RT 2776.) Specifically, they looked for people in a "tight spot[;]" those who were isolated and who the "guys" could "sneak up on[.]" (10 RT 2492, 12 RT 2776-2777.) They saw one potential victim but all agreed the spot was not isolated. (12 RT 2777.) The group then went back to Hayward where they spotted a second possible victim exiting his car at a liquor store. (12 RT 2778-2779.) They assumed the "guy" had money because he had not yet purchased anything; he was also parked on the side of the building where there was no light. (12 RT

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5. Palega testified that he drove the stolen minivan with Tautai. (12 RT 2766, 2768.)

2779.) Tautai volunteered to rob him. (12 RT 2779, 2781.) Appellant moved to the bench seat in the middle to be involved in the robbery and coached Tautai to lure the victim closer. (12 RT 2790, 2791, 2796.)

Tautai approached the man with the loaded .22 rifle at his side and demanded the victim's belongings. (12 RT 2781-2783.) The man backed away. (12 RT 2782.) Appellant exited the van and unsuccessfully tried to block the man's path. (12 RT 2782, 2784.) The victim escaped. (12 RT 2778, 2784.) When appellant and Tautai returned to the van, Palega drove away. (12 RT 2785.) The group continued to look for people to rob, discussing how to complete a successful robbery, how to trap a vicitm and how to lure him close enough to the van to pull him inside. (10 RT 2527; 12 RT 2786, 2788, 2794, 2797.) Appellant also criticized Tautai for the botched robbery. (12 RT 2787.)

4. The Kidnaping And Robbery Of Nolan Pamintuan

As Palega drove toward home, appellant spotted Nolan Pamintuan exiting his white Acura on a street off of Folsom Street. (10 RT 2530; 12 RT 2797-2798, 2870.) Appellant removed the shotgun from the duffel bag, loaded the gun, and announced his intention to rob Nolan. (10 RT 2535; 12 RT 2803, 2805, 2879-2880; 12 RT 2798.) Appellant ordered Palega to drive by Nolan. (12 RT 2799.) Palega complied and pulled the minivan beside Nolan. (10 RT 2531-2534; 12 RT 2799-2801.)

The top portion of Nolan's body was still in his car. (12 RT 2802.) Appellant opened the sliding door, Iuli opened the front door, and they both exited. (10 RT 2533; 12 RT 2802.) Nolan was trapped in between the open car doors. (10 RT 2534; 12 RT 2805, 2806.) Appellant held the shotgun to Nolan's head and demanded Nolan's belongings. (10 RT 2533; 12 RT 2802,

2806.) Nolan looked shocked and scared. (12 RT 2806.)[6] Nolan offered appellant his black Movado wedding watch, telling them it was all he had. (12 RT 2807.)

Appellant took the black box containing the watch and ordered Nolan into the van with his hands raised. (10 RT 2533, 2535; 12 RT 2808.) Nolan pled, "[d]on't take me, just here you go, this is all I have." (12 RT 2808.) Appellant threatened to shoot Nolan and pulled him into the van. (12 RT 2808.) Appellant and Nolan sat on the middle bench seat; appellant kept the shotgun pointed at Nolan. (10 RT 2522-2523, 2540; 11 RT 2579; 12 RT 2809.) Before sitting in the front passenger seat, Iuli exited the van and closed the door to Nolan's car; Tautai remained in the backseat. (10 RT 2521, 2522, 2540; 12 RT 2810.) Palega drove away. (12 RT 2809.) Only appellant and Iuli exited the van during the kidnaping. (10 RT 2539.)

As Palega drove, appellant and Tautai stripped Nolan of "all he had." (10 RT 2541.) They took Nolan's wallet (12 RT 2810), and ordered him to take off his jacket and boots, and the Gucci watch he was wearing. (10 RT 2542; 12 RT 2810-2811, 2817.) Appellant and Tautai searched Nolan's pockets and wallet and became angry because Nolan only had $3. (10 RT 2545; 12 RT 2812, 2813.) Tautai slapped Nolan twice in the head. (12 RT 2812, 2813.) Appellant then cocked the gun and said, "don't think this gun ain't loaded." (10 RT 2546.) The gun released a shell onto the minivan floor. (10 RT 2546; 11 RT 2614.)

Nolan told appellant, "I have money in the bank, just please don't shoot

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6. Appellant weighed 230 pounds and Iuli weighed 330 pounds. (14 RT 3156-3157.) Nolan weighed approximately 135 to 140 pounds. (7 RT 1745.)

me."[7] (10 RT 2547.) Nolan suggested they go to an ATM. (10 RT 2547, 2548.) Nolan provided appellant with his pin number out of fear. (12 RT 2815.)

5. The Robbery Of Nolan At The ATM

Palega turned around and stopped at the Bank of America ATM on Mission and Sorenson Streets. (12 RT 2816.) Heriberto Castro was using the ATM machine when he noticed the van parked behind him. (7 RT 1803, 1807.) Castro never saw anyone exit the van. (7 RT 1804.) Appellant ordered Nolan to withdraw money and threatened him, "go to the ATM and pull out the money. If you plan on running, I'll shoot you." (10 RT 2550; 12 RT 2818.) Appellant ordered Iuli and Tautai to block both sides of the ATM. (10 RT 2551-2552.) Although Iuli did not want to participate because he knew there was a camera on the ATM; when appellant ordered him to do so, Iuli relented. (10 RT 2552, 2553.)

Tautai, Iuli, and Nolan exited the van. (10 RT 2565; 12 RT 2818-2819.) Appellant stayed in the middle seat and kept his shotgun pointed at Nolan. (10 RT 2557-2558, 2562;12 RT 2820, 2827; 13 RT 2880.)[8] Nolan was at the ATM with Tautai and Iuli for approximately five minutes during which time Nolan withdrew $300. (10 RT 2557, 2568.) During that five minutes, Malcolm Scott pulled in behind the van. (7 RT 1815; 10 RT 2554; 12 RT 2822.) Scott saw three men at the ATM: Tautai, one large man, and one small man, with the smallest man using the ATM. (7 RT 1817, 1838, 1840-1841, 1845.) Scott noticed that while the men were using the ATM, there was at least

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7. Iuli testified that from that point on, Nolan asked to be let out of the van several times and begged for his life. (10 RT 2547; 13 RT 2880.)

8. The ATM video played at trial showed appellant inside the van wearing a black leather jacket. (13 RT 2880.) Iuli identified the jacket as one appellant had previously stolen. (11 RT 2607-2608.)

one person inside the van. (7 RT 1825, 1841.) Scott testified that "it was kind of scary to get out of my car" so he waited until the three men returned to their van. (7 RT 1817, 1839, 1843.) Scott then passed and made eye-contact with Tautai as he walked toward the ATM.. (7 RT 1818, 1820.) Tautai repeatedly looked at Scott.[9/] (7 RT 1818.) Scott withdrew money and returned to his car aware that the van remained parked behind him while he used the ATM. (7 RT 1824, 1829.) At trial, Scott identified Tautai and testified that he believed the smallest man at the ATM looked like Nolan; he also identified the van.[10/] (7 RT 1821, 1823, 1827, 1830, 1846.)

After withdrawing money from the ATM, Nolan returned to the van and handed appellant the money. (10 RT 2569; 12 RT 2823.) When appellant ordered Nolan to withdraw more money, Nolan told him he was unable to do so. (12 RT 2823-2824.) The group became angered and accused Nolan of lying. (12 RT 2824.) Appellant pointed the shotgun at Nolan's chest. (12 RT 2828.) The men then discussed whether to rob Scott, but could not reach an agreement. (12 RT 2825, 2829.) Appellant ordered Palega to drive away. (11 RT 2582; 12 RT 2829.) Appellant remained next to Nolan in the middle seat. (11 RT 2592.) Iuli could hear Nolan "giving up his stuff." (11 RT 2592.)

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9. Tautai told the group that Scott was "looking at him very strange." (12 RT 2825.) The group became concerned that Scott would be able to identify them. (11 RT 2581; 12 RT 2822.)

10. The ATM robbery was recorded by Bank of America's video equipment. (12 RT 2826.) The videotape of the robbery showed Nolan, Tautai, and Iuli at the ATM machine, and a person sitting inside the van on the middle bench seat during the transaction. (7 RT 1857-1860, 1862.) Bank records reported that at 11:46 p.m., Nolan withdrew $300. (7 RT 1854-1856; 15 RT 3264.) The records also confirmed that Castro and Scott withdrew money before and after Nolan. (7 RT 1861.)

6. Nolan's Murder

Appellant ordered Palega to find a dark spot. (12 RT 2832; 13 RT 2931.) Palega drove down a dark street off of Mission Street. (11 RT 2583; 12 RT 2830.) Appellant ordered him to park the minivan "where it was more dark." (12 RT 2830, 2832.) Palega stopped and turned the headlights off, but kept the minivan running for a quick escape. (12 RT 2834.) Iuli knew at this point that appellant was going to kill Nolan. (11 RT 2584.)

Appellant exited the van and ordered Nolan to get out. (11 RT 2585; 12 RT 2834-2835.) According to Iuli, appellant, armed with a shotgun, exited the van with Nolan. (11 RT 2586, 2596.)[11] Nolan was scared and begged appellant three times not to shoot him. (11 RT 2587; 12 RT 2836.) Palega told appellant not to shoot Nolan, but to "just knock him out." (11 RT 2585; 12 RT 2836.) Appellant told Palega that Nolan had seen their faces. (12 RT 2837.) Palega again told appellant not to kill Nolan. (12 RT 2837, 2842.)

Palega testified that appellant and Tautai argued about who was going to murder Nolan. (12 RT 2838.) Palega said "Let's go." (12 RT 2839.) Palega saw Nolan standing with his hands up and saying, "don't shoot me." (12 RT 2839, 2840.) Appellant shot Nolan. (10 RT 2500; 11 RT 2593; 12 RT 2837.)[12] Iuli testified he wanted Nolan spared because "the guy already gave up the money. There was no reason to shoot him." "He didn't do nothing. He already gave up the money. He begged for his life."[13] (11 RT 2587.)

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11. Palega testified that Tautai exited the van as well. (12 RT 2834.) According to Palega, appellant held the shotgun; Tautai was unarmed. (12 RT 2835.)

12. Iuli opened his door to save Nolan when he heard appellant fire a shot. (11 RT 2585, 2587.)

13. Iuli testified that the rule on the street was that if a robbery victim surrenders his possessions, the victim should be released. (11 RT 2699.)

Palega left the scene quickly, with appellant running to catch up with the van. (11 RT 2589-2590; 12 RT 2841; 13 RT 2933.) Once inside, appellant directed Palega on where to go and ordered him to slow down. (11 RT 2590-2591.)

7. The Post-Murder Clean Up

Appellant, Iuli, Tautai and Palega left the minivan running a few blocks from the Folsom Street house. (12 RT 2842-2843.) They used a blue ielavalava that Palega had used to cover the steering wheel to try to wipe the van clean of blood. (12 RT 2843-2845, 2871; 13 RT 2982.)[14] Iuli saw appellant pick up two shotgun shells from inside the minivan. (11 RT 2596.) As the group left the minivan, appellant was carrying Nolan's $300, his boots, the guns, and a bloody glove. (11 RT 2596; 12 RT 2845, 2847; 13 RT 2934.)[15] Tautai, who was wearing Nolan's peacoat, offered Palega a breath mint. (11 RT 2595, 2621; 12 RT 2846, 2848, 2875).

They walked home and alternated carrying the gun bag. (12 RT 2847.) Appellant mentioned that Nolan's blood had gotten on his pants and leather jacket. (11 RT 2623, 2686; 12 RT 2848.) He tried to wipe the blood off the jacket with his hands, and then wiped his bloody hands on the jacket's sleeves. (12 RT 2849.)

8. Post-Murder Activity At The Folsom Street House

The men proceeded straight to the outbuilding where appellant divided Nolan's belongings. (12 RT 2849, 2856-2858.) Appellant removed Nolan's identification, photographs, credit cards, and a religious booklet from Nolan's

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14. An ielavalava is skirt-type cloth worn by Samoan men. (12 RT 2769.)

15. Only appellant wore the bloody gardening glove on the night of the murder. (13 RT 2976-2977.)

wallet. (12 RT 2857.) Appellant removed Nolan's $300 from his pocket and dispersed some of it to the others. (12 RT 2849-2851.) Palega took "a couple of 20's" and Iuli took $40. (10 RT 2491; 11 RT 2624; 12 RT 2849). Appellant kept the Movado watch and box and Nolan's pager, boots, wallet, and engagement ring. (12 RT 2851-2852, 2855-2856, 2858.) Tautai took Nolan's Gucci watch. (12 RT 2851.) Appellant hid the guns under his bed, placing the shotgun inside a bag. (10 RT 2481; 11 RT 2621; 12 RT 2858.) Appellant then moved the shotgun and the rifle into the trunk of his brown Dodge. (10 RT 2482, 2484, 2497-2498; 11 RT 2621.)

When Iuli returned to his father's van and his sleeping wife, he told her that "her fucking brother blew some dude away." (10 RT 2491, 2517; 11 RT 2625-2626.) In the days after the murder, Iuli saw Nolan's boots inside appellant's fireplace. (10 RT 2543.) Appellant told Iuli the boots belonged to "that guy we lit up." (10 RT 2543.) Iuli also saw the Movado watch and box on appellant's coffee table. (11 RT 2597, 2606.) Palega's wife noticed Tautai wearing Nolan's Gucci watch and wanted it; Tautai relinquished the watch to Palega. (12 RT 2853; 13 RT 2939, 2940.) Palega's wife left the watch on the microwave where it was later found by the police. (13 RT 2940.)

During the week before his arrest, appellant told friends about the murder, removing the shotgun from the chimney and showing it to them. (13 RT 2881-2882, 2980-2981.) Appellant clearly portrayed himself as the shooter. (13 RT 2982.)

Palega testified that appellant eventually removed the guns from the chimney. (12 RT 2859.) Appellant put the shotgun in a pool cue case. (12 RT 2859, 2871; 13 RT 2916.) Appellant then moved the pool cue case and the .22 rifle into the trunk of his brown Dodge. (12 RT 2859-2861.) Appellant talked about returning the "hot" guns to Archibald. (12 RT 2860.)

9. The Arrests And Statements Of Palega, Iuli, And Tautai

On May 25, 1996, the police arrived at the Folsom Street house to execute a search warrant. (7 RT 1871, 1874, 1884; 8 RT 2131.) The police arrested Palega and Iuli inside the main house before the search. (7 RT 1878; 10 RT 2447, 2457; 12 RT 2730; 13 RT 2942-2943, 2947; 14 RT 3176, 3178.) Palega and Iuli were placed in the same police car where their conversations were recorded. (10 RT 2485; 10 RT 2485, 2730; 14 RT 3137, 3138.) While they were in the car, Iuli said, "I hope they don't find the gun." (10 RT 2486.) Palega told Iuli to tell the police that the Gucci watch was a gift from Palega's mother. (12 RT 2487-2488, 2730-2731; 13 RT 2902, 2945-2946; 14 RT 3179.)

In a statement to police, Palega initially lied about several things. (12 RT 2730; 14 RT 3141.) For instance, he told the police he was at church during the murder. (12 RT 2732; 13 RT 2948.) He also lied about the true ownership of Nolan's Gucci watch, and told them that their friend Roger Prasad was present inside the van, carried a .380-caliber handgun, and fired two shots. (12 RT 2732-2735; 14 RT 3141.) When police told Palega he had been filmed at the ATM machine, he admitted lying about Prasad's involvement to try to deflect the blame from appellant. (12 RT 2733, 2735; 13 RT 2948, 2990; 14 RT 3142). He admitted Prasad was never present and never fired a gun during the crimes. (12 RT 2734; 13 RT 2949.) Palega also admitted that no second gun was used in the crimes and he never saw a .380-caliber handgun. (12 RT 2735; 14 RT 3142.) Palega admitted he was the driver during the crimes and that he followed appellant's orders. (12 RT 2734, 2736; 13 RT 2903, 2989; 15 RT 3212.) He also told police that appellant was the shooter and that he had shot Nolan because he had seen their faces. (12 RT 2738; 13 RT 2920, 2990; 13 RT 2881; 14 RT 3143-3144; 15 RT 3214-3215, 3226.) According to Palega, Nolan's murder was random and not gang-related. (13 RT 2928.) Palega never told anyone that Tautai was the shooter. (13 RT 2990.) Likewise,

Tautai never told Palega he shot Nolan. (13 RT 2991.)

In a post-arrest statement, Iuli told police he was a gang member. (11 RT 2699.) Iuli admitted his involvement and gave police appellant's, Tautai's, and Palega's names. (10 RT 2489; 11 RT 2698; 14 RT 3139.) Iuli told police that they committed the robbery so appellant could pay for guns, and that although Nolan begged for mercy, appellant shot him. (11 RT 2698; 14 RT 3140, 3144, 3211.)[16] Iuli identified himself, Tautai, and Nolan from the video and photographs taken at the ATM. (10 RT 2570-2571; 14 RT 3139.) Iuli told police appellant stayed inside the minivan and kept the shotgun pointed at Nolan. (10 RT 2571.) Iuli denied that Prasad or a fifth person was involved in the crimes, and never reported that Tautai exited the van with appellant to kill Nolan. (14 RT 3143, 3200, 3211.)

When Tautai was interviewed after his arrest, Tautai initially said that an unidentified man walked into the street with a gun. (14 RT 3202; 15 RT 3218.) According to Tautai, appellant and Tautai confronted the man outside the van. (15 RT 3218.) Tautai jumped into the van with a gun in his hand, and when the van door hit Tautai's hand, the gun fired, and shot Nolan. (14 RT 3203; 15 RT 3218.) Tautai later told police that he murdered Nolan because Nolan had seen everyone's faces. (15 RT 3221.) In this version, Tautai disparaged Nolan and falsely reported that Nolan had harassed his family. (15 RT 3223.) After Tautai eventually admitted that appellant was the shooter, he cried. (14 RT 3204, 3206; 15 RT 3222, 3224.) He claimed he had previously lied out of loyalty to appellant.[17] (15 RT 3222.)

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16. Iuli lied to police about the location of the shotgun, his presence during the theft of the minivan, Nolan's ownership of the Gucci watch, and his cut of Nolan's money. (10 RT 2489-2490.)

17. Once Tautai admitted appellant's guilt, his story never varied until trial. (15 RT 3222.)

10. The Search Of The Folsom Street House And Outbuilding

During a search of the Folsom Street house, police found Nolan's Gucci watch on top of the microwave in the kitchen. (7 RT 1885-1886; 8 RT 1962, 2133; 14 RT 3136.) Inside the fireplace in the outbuilding, police recovered Nolan's black Sketcher brand boots, Lucy's floral bag containing medicine for Peggy, a screwdriver, hammer, slim jim, pliers, checks in Lucy's name, and a channel lock. (7 RT 1871-1872, 1885, 1919; 8 RT 2009, 2148-2149, 2155.) On top of the washing machine, police recovered pieces of mail addressed to appellant at the Folsom Street address. (7 RT 1890; 8 RT 2008.)

In a white plastic garbage bag, police recovered a white lunch sack that contained the following items that had belonged to Nolan: his driver's license, two Visa cards, one American Express card, Marlboro Light cigarette labels, President Tuxedo receipts, Great Western ATM card, two photographs of Nolan and Panelo, three Great Western bank receipts, medical benefit card, student identification card, library card, and a small prayer book. The sack also contained a round of ammunition for a .380-caliber weapon and a May 17, 1996, Bank of America ATM receipt from the Mission and Sorenson branch for $300. (7 RT 1891-1895; 8 RT 1963, 2138-2139, 2145-2146.)

Underneath the white lunch sack, police recovered a Wells Fargo statement and medical bill in appellant's name, and a Food Source badge for "Paki." (7 RT 1898-1899; 8 RT 2144-2145.) Next to the garbage bag, police recovered a legal advertisement in appellant's name. (7 RT 1899; 8 RT 2137-2138.) Police also found one, .22-caliber casing on the ground. (7 RT 1900, 1902; 8 RT 2156.)

On appellant's bed under some clothing, police found appellant's black leather jacket with Nolan's blood on it. (7 RT 1922; 8 RT 2156; 12 RT 2870.) Inside the pocket, Detective Hernandez found a key to Nolan's Acura. (7 RT

1925; 8 RT 2157, 2170.) They also found a duffle bag with a black bag inside full of live ammunition, a box of shotgun ammunition, a screwdriver, one bloody gardening glove, and a blue and white ielavalava. (7 RT 1929; 8 RT 1936, 1942, 1944, 1946, 1949, 2163-2166.) On the coffee table, Detective Hernandez recovered a black Movado watch box (8 RT 1946), and a photo album with "Mr. Smurf 1" written on it. (8 RT 1946, 1948, 2159.)[18]

11. Near The Outbuilding

A stack of mattresses covered by a tarp was outside between the house and the outbuilding. (8 RT 1949.) On top of the mattresses, police found Nolan's Old Navy pea coat. (8 RT 1949, 1952, 2162.) Also, near the outbuilding, police recovered Nolan's black, Structure-brand sport coat. (7 RT 1887.) From the coat, Detective Hernandez recovered two handwritten "to do" lists and breath mint wrappers. (7 RT 1887-1888; 8 RT 2135, 2160.) The breath mint wrappers matched those found in the minivan and in Nolan's Acura. (7 RT 1888; 8 RT 2136, 2160-2162.)

Between the outbuilding and the property fence, a garbage-filled, two-foot space existed. (8 RT 1954.) From there, police recovered an expended Remington .12 gauge shotgun shell. (8 RT 1954, 1959-1960, 2166.)

12. Search Of Appellant's Brown Dodge

On May 30, 1996, police returned to the Folsom Street house with a warrant to search appellant's brown Dodge. (8 RT 1966; 14 RT 3158.) Detective Cardes asked appellant's wife Lucy for the car keys; she told him that appellant had the only set of keys. (14 RT 3159.)[19] During the officer's

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18. Iuli identified the photo album as appellant's. (10 RT 2478.)

19. At trial, the prosecution played a taped recording of the officer's conversation with Lucy. (14 RT 3166.)

conversation with Lucy, she never proclaimed appellant's innocence or told the officer that appellant was asleep next to her at the time of the murder. (14 RT 3161.)

Inside the trunk of the Dodge, police recovered the .12-gauge rifle; they also found a loaded shotgun inside a pool cue case. (8 RT 1966–1967, 1969; 14 RT 3161-3162, 3164.)

13. Appellant's Arrest

On May 25, 1996, at approximately 6:00 p.m., police stopped two Seumanu family vans as they returned from church and arrested appellant. (8 RT 1974; 13 RT 3004, 3007, 3029, 3116.) None of the women or children in the van were forcefully searched or restrained. (14 RT 3146.) A search of appellant's shirt pocket revealed Nolan's black Movado watch and engagement ring. (8 RT 1975; 13 RT 3012, 3112-3113, 3130.) During a search of the two vans, police recovered, inter alia, appellant's wallet; in the wallet, they found a receipt from the ATM where Nolan withdrew money the night of the murder. (14 RT 3152-3153, 3208.)

14. Post-Murder Chain Of Events

On May 17, 1996, Lorena and Luis Hurtado lived on East 13th Street in Hayward. (6 RT 1647, 1655.) At about 11:45 that night, they heard a single gunshot and looked outside; they saw a minivan speed away. (6 RT 1648-1651, 1666.) Luis found Nolan in the street moaning and trying to speak. (6 RT 1653-1654, 1667.) Nolan's chest looked like a "volcano." (6 RT 1667.) It was "pulled up" and "blood was coming out." (6 RT 1667.) At 11:52 p.m., Lorena called 911 and described the gunshot and the van. (6 RT 1653-1654, 1678; 15 RT 3264.) Luis stayed with Nolan until the police arrived. (6 RT 1669.) At approximately 11:54 p.m., Officer Phillip Wooley arrived and found Nolan in the road. (7 RT 1678-1679; 15 RT 3264.) Nolan was wearing a blue

sweater vest, white t-shirt, and jeans, but no shoes. (7 RT 1678, 1683.) Nolan's hands were raised above his head. (7 RT 1678.) Nolan showed no visible signs of life. (7 RT 1679.) On May 18, 1996, at 12:11 a.m., Nolan was pronounced dead. (7 RT 1692-1693, 1730; 15 RT 3264.)

When the minivan used in the robbery and murder was eventually discovered, police processed it and found the following: a puncture mark under the driver's door handle, a ruined ignition, and blood on the middle bench seat and on the van's exterior. (7 RT 1786, 1790-1791.)[20/] There were also breath mint wrappers from inside the minivan. (7 RT 1888.) Police found blood stains on the front passenger exterior door, on the middle bench seat, and on the driver's seat armrest. (8 RT 2105, 2118-2120.) The ignition cylinder and column were damaged. (8 RT 2119.) Inside Nolan's Acura, police found breath mints and wrappers that matched the wrappers found in the minivan. (7 RT 1888; 8 RT 2126-2127, 2129-2130.)

On May 18, 1996, Dr. Clifford Tschetter performed Nolan's autopsy. (7 RT 1698, 1705; 15 RT 3265.) He concluded that Nolan died of a shotgun wound to the chest. (7 RT 1706, 1707.) Dr. Tschetter noted the following injuries: a shotgun wound of the anterior chest approximately one-and-three-quarters inches in diameter; abrasions on the right side of the face, right eye, nose, below the nose, and above the lip; a laceration wound to the left hand; part of the lung protruding from the gunshot wound; and "a lot of blood about the body." (7 RT 1699-1700.) According to the doctor, Nolan had suffered: wounds to the heart, right lung, and liver. In addition, the right side of his heart was "virtually blown away[,[" his right lung was "severely torn up"; and a large amount of blood had settled in his right chest cavity. (7 RT 1703.)

Metallic shotgun pellets and plastic wadding from a shotgun were found

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20. The Hurtados identified the minivan as the one they saw leaving the scene of the murder. (6 RT 1658-1659, 1670-1671, 1673; 15 RT 3265.)

inside Nolan's chest. (7 RT 1701, 1704-1705.)[21] Dr. Tschetter deduced that the wound to the left hand was "probably caused by the shotgun in which the hand was put up in a defensive manner." (7 RT 1700, 1702.) The facial abrasions were likely caused when Nolan hit the pavement. (7 RT 1712, 1716.)

15. Criminalistic Evidence And Studies

Dr. John Thornton examined pellets and wadding recovered from Nolan's chest and ammunition recovered from the search of the outbuilding. (8 RT 2013, 2025, 2051.) Dr. Thornton test-fired the shotgun used to kill Nolan. (8 RT 2026.) Dr. Thornton compared the test-fired cartridge cases with the Remington cartridge case recovered by police, and concluded that the recovered cartridge had been fired through appellant's shotgun. (8 RT 2026, 2047, 2055, 2076.) The firing pin impression left on the recovered cartridge and the practice rounds had the same distinctive markings. (8 RT 2047, 2050.)

In April 2000, Dr. Thornton compared pellets and wadding from victim's body with ammunition recovered from appellant's home. (8 RT 2051.) There are approximately 388 pellets in each Remington shotgun shell. (8 RT 2055.) Three hundred eighty-seven pellets were found in Nolan's body and clothing. (8 RT 2054.) The ammunition recovered from appellant's house contained pellets identical to the pellets found inside Nolan's body. (8 RT 2052, 2092.) Dr. Thornton determined that the shotgun which killed Nolan was fired from five feet away or less. (8 RT 2063, 2079.) Forensic scientist Chuck Morton testified that appellant was about 18 to 36 inches from Nolan when he shot him. (9 RT 2290, 2298, 2321.)

An examination of the fingerprints recovered in this case revealed Tautai's fingerprints on the stolen minivan's sliding door, and appellant's left

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21. Wadding comes from inside the shotgun shell. (8 RT 2029.) The wadding recovered from Nolan's chest was from a .12-gauge Remington. (8 RT 2030, 2090.)

thumb print on a box of Remington shotgun ammunition (8 RT 2207-2208, 2211-2213, 2216, 2218-2220; 9 RT 2261-2267; 14 RT 3136.) A fingerprint expert determined that the expended shotgun shell recovered next to the outbuilding was fired from appellant's shotgun and matched the pellets and wadding recovered from inside Nolan's body. (9 RT 2238, 2268-2269, 2271, 2280.)

DNA specialist Lisa Calandro testified that the blood on the recovered glove matched Nolan's blood sample markers. (15 RT 3230, 3233, 3243-3244, 3247, 3255.) Calandro also found that the blood taken from the minivan's middle seat, from the exterior van door, and on appellant's black leather jacket matched Nolan's blood markers. (15 RT 3248-3251, 3255.)

16. Discussions In Jail

Appellant, Palega, Tautai, and Iuli communicated during their incarceration; while housed in the Santa Rita jail, appellant and Palega discussed the evidence against them (13 RT 2883-2884.) During court dates, all four stayed together in the court's holding cell. (11 RT 2633.) On one of these occasions, appellant told Iuli and Tautai to take the blame for the murder because they would receive lesser sentences as juveniles. (11 RT 2635; 13 RT 2884, 2952.) Appellant pledged to take care of them "from the outside." (11 RT 2635-2636; 13 RT 2887.) When Iuli refused, his relationship with appellant became strained. (11 RT 2636-2638; 13 RT 2888.) Tautai wanted to take the blame because he did not want to see his older brother "go down." (11 RT 2638, 2640-2643; 13 RT 2888, 2890.)

On April 25, 2000, Iuli told Tautai he had accepted a plea deal. (11 RT 2639.) Iuli advised Tautai to do the same if a deal was offered. (11 RT 2639-2640.) Tautai told Iuli he planned to take the blame for the murder. (11 RT 2640.)

Pursuant to a negotiated disposition both Iuli and Palega pled guilty to

murder, kidnaping, and robbery; in return for their truthful testimony at trial, they were sentenced to 16 years, eight months in state prison. (7 CT 1896-1897, 1901-1910; 6 RT 1441-1449; 10 RT 2446-2447; 12 RT 2703-2705.)

C. Defense Case

1. Tautai's Testimony

At the time of Nolan's murder, Tautai Seumanu was a minor. (15 RT 3268, 3319.) Tautai never received an offer from the prosecution and pled guilty to murder, kidnaping, and robbery. (15 RT 3269, 3313.) On July 17, 2000, Tautai was sentenced to 28 years to life in prison with the possibility of parole. (15 RT 3270, 3318.) According to Tautai, he did not plead guilty to help appellant. (15 RT 3272.) Tautai admitted, however, that because of his age, the prosecution could not seek the death penalty for his involvement in the murder. (15 RT 3320-3221.)

In May 1996, Tautai, appellant, Iuli and Palega lived at the Folsom Street house. (15 RT 3272, 3273.) The outbuilding was the "boy's house." (15 RT 3273.) Before appellant married Lucy, appellant, Tautai, and Palega lived in the outbuilding. (15 RT 3273-3274.) After Palega married, Tautai was "kicked out" of the outbuilding and Palega, his wife, and appellant lived there. (15 RT 3274.) Tautai slept in the main house, in a van, or in the storage part of the outbuilding. (15 RT 3274.) After appellant married Lucy, she would also stay in the outbuilding on occasion. (15 RT 3275.)

2. The Crimes

Tautai retrieved the duffel bag which contained a .12-gauge shotgun, a .22 rifle, ammunition, and a glove. (15 RT 3278, 3279, 3282.) The glove was used to prevent fingerprints on the guns. (15 RT 3283.) Tautai brought the duffel bag (15 RT 3278-3279, 3282), and appellant's black leather jacket (15 RT 3297, 3360).

The duffel bag was kept in the stereo cabinet in the outbuilding. (15 RT 3281.) Archibald supplied the shotgun. (15 RT 3281.) Tautai did not buy or view guns with Archibald, and was not present when Archibald delivered the gun. (15 RT 3281, 3349-3350.)

About one or two days before the murder, Tautai test-fired a .22 rifle and a .12-gauge shotgun in front of appellant, Iuli, and Palega. (15 RT 3279-3280.) Tautai also test-fired the guns with friends in Union City, and from a moving car. (15 RT 3280, 3348.) According to Tautai, he used .12-gauge ammunition and fired one round. (15 RT 3348, 3349.) The round popped out of the shotgun's chamber. (15 RT 3351.) Tautai saved it and threw it away in the Folsom Street house garbage. (15 RT 3351.) Tautai and Palega then threw the garbage away in a park. (15 RT 3352.)

On May 17, 2006, Tautai stole a van. (15 RT 3275-3276.) Iuli, Palega, and Prasad were present during the van theft. (15 RT 3276.) Tautai drove the van home and parked it beside the Folsom Street house. (15 RT 3277.) Tautai waited for Palega, Iuli, and Prasad. (15 RT 3277.) After Iuli and Palega got in the van, Tautai put the duffel bag with the guns inside the van and went from Folsom Street to pick up Prasad. (15 RT 3283; 16 RT 3278, 3378.)

Tautai testified he had been a member of the S.O.S. since he was eight years old. (15 RT 3325-3327.) Tautai and Palega intended to do a drive-by shooting to murder a rival D.G.F. gang member. (15 RT 3283-3284, 3346.)[22/] D.G.F. members had thrown rocks at Tautai and at his father's van, had shot at his house, tried to harm some of the Seumanu children as they rode their bikes, slashed tires, and bothered appellant. (15 RT 3284, 3347.) Tautai insisted that even though the group went out to retaliate against a rival gang, they left appellant at home. (15 RT 3347.)

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22. D.G.F. ("Don't Give A Fuck") is the criminal street gang that runs the Folsom Street area. (15 RT 3283-3284.)

Although Tautai was the youngest person in the van, the others took orders from him. (15 RT 3330; 16 RT 3379.) Tautai told everyone the murder plan inside the van. (15 RT 3285.) No one objected. (15 RT 3285.) They allegedly drove through D.G.F. turf, but were unable to find any D.G.F. members. (15 RT 3285, 3286, 3346, 3347). They did not shoot at any D.G.F. member's houses or cars. (15 RT 3347.) They decided to find something else to do. (15 RT 3286.) They drove around for awhile and attempted to rob "anyone." (15 RT 3286.) Palega drove, Prasad sat in front, and Iuli and Tautai sat in the back. (15 RT 3289.) Tautai did not try to rob anyone before he found Nolan. (15 RT 3287.)

The group saw Nolan near his white Acura and Tautai "felt like jacking him." (15 RT 3287.) Tautai did not know Nolan and Nolan did not appear to be a gang member. (15 RT 3287.) Palega stopped the van. (15 RT 3288.) Iuli and Tautai approached Nolan. (15 RT 3288.) Tautai was armed with the shotgun. (15 RT 3288.) Tautai ordered Nolan into the van. (15 RT 3288.) Nolan hesitated and did not automatically offer any of his possessions. (15 RT 3288.)

Palega drove, Iuli sat in the front, Nolan and Tautai sat in the middle seat, and Prasad sat in the back. (15 RT 3289-3291.) Tautai took Nolan's wallet, shoes, jacket, and jewelry. (15 RT 3289, 3291, 3317-3318.) Tautai handed Prasad Nolan's watch, wallet, jacket, and shoes. (15 RT 3291.) Nolan did not relinquish any money. (15 RT 3291.) Tautai did not remember stealing a watch in a black box or a cellular phone (15 RT 3291, 3317). Nolan did not offer his belongings voluntarily or beg for his life. (15 RT 3361.)

Tautai searched Nolan's wallet and found his credit cards. (15 RT 3291.) Tautai became upset because Nolan had almost no money.[23] (16 RT 3384.) Nolan told Tautai he had more money in the bank. (16 RT 3378.)

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23. Tautai did not remember slapping Nolan in the head. (16 RT 3384.)

Tautai ordered Nolan to get more money out of the ATM. (15 RT 3292.) Palega drove to the nearest ATM; when they arrived, they waited for another customer to finish. (15 RT 3292.) Tautai handed the shotgun to Prasad. (15 RT 3293; 16 RT 3378-3379.)[24/] Nolan did not want to exit the van. (15 RT 3293.) When Prasad pumped the shotgun Nolan exited and Tautai and Iuli accompanied him to the ATM machine. (15 RT 3293.) Everyone else stayed inside the van. (15 RT 3293.)

Nolan withdrew money and they returned to the van. (15 RT 3294.) After Scott pulled up behind them, Tautai and the others discussed robbing Scott but decided against it. (15 RT 3294-3296.) Tautai put on appellant's leather jacket that Tautai had brought from home. (15 RT 3296-3298, 3360.) They drove away from the ATM. (16 RT 3384.) Palega stopped the van on a back street by an empty lot, and the group discussed whether to beat Nolan. (15 RT 3299.) Nolan and Tautai exited the van alone. (15 RT 3299, 3362; 16 RT 3374.) Tautai wanted to kill Nolan to make a name for himself in the S.O.S. and earn his stripes as a gangster. (15 RT 3300, 3325, 3328, 3333.) Someone inside the van told Tautai to beat Nolan, and not kill him. (15 RT 3300, 3362-3363; 16 RT 3374.) Tautai said "no, fuck it, and shot."[25/] (15 RT 3300.)

After Tautai shot Nolan in the heart with the .12-gauge shotgun, Nolan fell to the ground. (15 RT 3270, 3300-3301, 3362.) Tautai jumped back inside the van and they drove away. (15 RT 3301.) According to Tautai, Iuli, Palega, and Prasad never left the van. (15 RT 3270-3271, 3301.) Nolan did not put up a struggle. (16 RT 3383.) On the way home, before they abandoned the van,

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24. Tautai did not remember telling police that he handed the shotgun to Palega and appellant, and that appellant stayed in the van and pointed the gun at Nolan while he used the ATM. (16 RT 3379.)

25. Tautai did not remember telling police he wanted to release Nolan. (16 RT 3380.)

Tautai wiped it down with a towel. (15 RT 3302, 3316.) The group then walked back to the Folsom Street house with Tautai carrying the duffel bag with the guns and Nolan's pager, watch, and ring. (15 RT 3303-3304, 3316; 16 RT 3383.) Tautai discarded Nolan's pager on the way home. (16 RT 3383.) Palega carried the money.[26] (15 RT 3304.)

When they arrived at the house, Iuli, Prasad, Palega, and Tautai walked to the outbuilding. (15 RT 3304, 3316; 16 RT 3376.) Appellant was not present. (16 RT 3376.) Tautai opened the duffel bag on the coffee table. (15 RT 3304.) Everyone took what they wanted; Tautai took Nolan's wallet and his ring. (15 RT 3305.) They split the money equally amongst themselves.[27] (15 RT 3305.) Tautai tested Nolan's pager and it worked.[28] (15 RT 3317.) Tautai put the guns in the cabinet, and left appellant's black leather jacket in the outbuilding. (15 RT 3305, 3307-3308; 16 RT 3382.)

When Tautai saw appellant the next morning, he told him about the murder and asked appellant to dispose of the guns. (15 RT 3306, 3318, 3373.) Later that day, Tautai gave appellant Nolan's ring and watch and told him to sell the items. (15 RT 3307.) Tautai did not know how appellant ultimately disposed of the guns and duffel bag. (15 RT 3307, 3318.)

Tautai admitted changing his story several times when he spoke to police. (5 RT 3271.) For instance, Tautai told the police that after he stole the

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26. Tautai did not remember eating or offering any of the others breath mints as they walked home. (16 RT 3376.)

27. Tautai could not remember how much money he took from the murder, nor did he remember telling police he was angry that he only received $20. (15 RT 3353; 16 RT 3376, 3383.)

28. Tautai had earlier testified that he had discarded the pager. (16 RT 3383.)

van, he picked up appellant. (16 RT 3376-3377.)[29] The first time Tautai spoke to police, he told them that he was the shooter. (15 RT 3309.) Second, Tautai told police he had robbed a drug dealer, but then admitted at trial that this never happened. (15 RT 3309, 3357; 16 RT 3357, 3377). Third, Tautai told the police that although appellant was present when Nolan was killed, Tautai shot Nolan accidentally when the van door slammed on his hand and caused the gun to fire.[30] (15 RT 3309, 3353-3354.) Fourth, Tautai admitted that appellant shot and killed Nolan, but "tried to make the killing sound like it wasn't on purpose[;]" that appellant was going to kill Nolan, but Tautai grabbed the gun and it fired. (15 RT 3272, 3309; 16 RT 3380-3381.) Tautai admitted sobbing after he told police appellant had shot Nolan, and that he told them he loved appellant and that appellant was the only person who ever paid him any attention. (16 RT 3382.)[31]

Tautai admitted he never told police that he intended to commit a gang-related, drive-by shooting on the night in question, and that he never mentioned Prasad's presence until he testified at trial. (15 RT 3354-3355.) Tautai acknowledged that he told police that he knew Nolan and that Nolan had given him "mouth" before, and admitted that Nolan was in fact a complete stranger. (16 RT 3381.) Tautai testified that he named appellant as the shooter for "personal reasons, family reasons." (15 RT 3309.) One, because appellant

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29. On cross-examination, Tautai said he did not remember telling the police that appellant was in the back of the van "just riding along." (16 RT 3377.)

30. On cross-examination, Tautai testified he did not remember telling police that appellant was present when the van door caused the accidental shooting. (16 RT 3373.)

31. At trial, Tautai claimed he only cried because he "got caught." (15 RT 3353.) Later in his testimony, Tautai said that he did not remember telling the police that appellant was the shooter and then sobbing uncontrollably. (15 RT 3364.)

had previously been incarcerated; according to Tautai, appellant would thus be better equipped for prison life than Tautai. (15 RT 3310.) Two, Tautai and appellant's father was the chief of their group with appellant first in line to ascend to the position of tribal chief. (15 RT 3309, 3311, 3324-3325.) By falsely implicating appellant, Tautai would be in a better position to be next in line to be chief. (15 RT 3345.)

Tautai testified he had not discussed the case with appellant "that much[,]" and that he was not told to plead guilty to help appellant. (15 RT 3272, 3324.) Tautai never discussed taking the blame for appellant with Iuli, and nobody told Tautai that appellant wanted him or Iuli to confess to the murder. (15 RT 3314, 3315.)

3. Lucy's Masefau's Testimony

Lucy Masefau married appellant on May 7, 1996. (14 RT 3034, 3065.) Lucy and her daughter Peggy lived with the Seumanus. (14 RT 3033, 3053, 3067.) When she married appellant, she became the second highest woman in the household. (14 RT 3054.) She and appellant were obligated to prepare meals and care for the children in the house. (14 RT 3055.)

Before Lucy married appellant, he, Tautai, Palega, and Palega's wife stayed in the outbuilding. (14 RT 3038, 3039.) Iuli and Lucy sometimes stayed in the outbuilding. (14 RT 3039, 3040.) During the day, anyone could spend time in the outbuilding. (14 RT 3040.) Appellant mainly slept there at night. (14 RT 3040.) Lucy had spent time in the outbuilding, and had noticed the writing on the walls, but never saw "Sons of Samoa" or "Blood Killer 187" written on the outbuilding. (14 RT 3066-3067, 3102.) Lucy had seen appellant's "Mr. Smurf 1" tattoo, but did not know that appellant was a gang

member. (14 RT 3066, 3067, 3102.)[32]

Lucy identified appellant in photographs depicting him making gang symbols, wearing a blue rag on his head, and sitting in front of a wall of the outbuilding covered with gang graffiti. (14 RT 3068-3070.)

On May 17, 1996, appellant went grocery shopping with Palega, Iuli, and Tautai; when he returned, he helped Lucy prepare and clear dinner. (14 RT 3053, 3055-3057.) Appellant and Lucy went to sleep on the floor inside the main house between 10:00 p.m. and 11:00 p.m. (14 RT 3058-3059.) Appellant did not wake during the night and was still asleep when Lucy awoke the next morning. (14 RT 3060.)

When police stopped the Seumanu van to arrest appellant on May 25, 1996, they ordered Lucy out of the van and searched the outside of her clothes. (14 RT 3036, 3045, 3082.) Although police had their weapons drawn, they did not handcuff Lucy, nor did they force any of the women or children to the ground. (14 RT 3078, 3082.)

Lucy maintained appellant's innocence, claiming he was with her the night of the murder. (14 RT 3050, 3079.) Despite this, and the fact that she had read a newspaper article saying that appellant was the suspected murderer (14 RT 3049), and talked to appellant in jail about his alibi, she did not disclose the alibi to anyone for over four years. (14 RT 3049-3050-3053, 3077).

In 2000, a member of the Seumanu family contacted Lucy and asked her to speak with defense investigator Clarick Brown. (14 RT 3051.) Lucy met with Brown and agreed to testify for appellant. (14 RT 3052.) For the first time, she discussed appellant's possible alibi. (14 RT 3079.) According to Lucy, appellant's arrest had frightened her so much that she did not bring up the

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32. Later, Lucy changed her story and admitted she had seen "Sons of Samoa" written inside the outbuilding. (14 RT 3101.) She explained that "S.O.S" was a cultural group, not a criminal street gang. (14 RT 3102.)

alibi for over four years. (14 RT 3061, 3087.)[33] At the time Brown contacted Lucy, she was on felony probation in connection with three convictions for "grand theft auto." (14 RT 3052, 3078.)

While she lived with the Seumanus, Lucy received $490 a month in welfare aid for Peggy. (14 RT 3071 3072.) Despite the fact that she was obligated to report any change in her living status, her marital status, and appellant's incarceration, every month Lucy signed documents under penalty of perjury that she was eligible for aid. (14 RT 3071-3074, 3076.) Lucy represented that she was homeless and single even though the Seumanus housed her and Peggy for free. (14 RT 3072-3073, 3098-3099.) Lucy admitted that she knew that if her social worker found out she was married and appellant was in jail, her welfare money would be reduced. (14 RT 3103.) After appellant's arrest, Lucy used part of Peggy's aid money to pay for appellant's jail costs. (14 RT 3073-3076.)

Lucy denied that the police came to the Seumanu residence and tried to talk to her. (14 RT 3078, 3089.) Lucy did not remember speaking to Detective Cardes about a search of appellant's brown Dodge, or being invited to the police station to discuss appellant's case. (14 RT 3090-3091.) After the prosecutor played an audiotape of Detective Cardes speaking to Lucy, she denied that the voice on the tape was hers. (14 RT 3092-3093.)

4. Jack Huth's Testimony

The defense also called the prosecutor's investigator, Jack Huth. (16 RT 3389.) Huth testified regarding the six interviews with Iuli, and five interviews with Palega where Huth was present and Iuli and Palega were represented by counsel. (16 RT 3389-3391, 3393-3396.) Iuli and Palega provided their

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33. Lucy testified she remained quiet for four and a half years because "the police pointed . . . guns at the vans," and because she was scared and nervous. (14 RT 3087.)

histories, and those of appellant and Tautai. (16 RT 3397.) Huth verified what could be objectively investigated to test Iuli and Palega's veracity. (16 RT 3397.) Palega and Iuli also identified selected photographs for the prosecution. (16 RT 3398.)

D. Penalty Phase

1. Prosecution

a. Carrying A Loaded Firearm In A Vehicle

On March 14, 1996, Hayward police officer Ruben Pola encountered appellant and a large group of gang members in Tennyson Park in Hayward. (18 RT 3702-3704.)[34/] When the officer asked appellant who owned a Ford Taurus parked nearby, appellant told him he had been driving the car, but that it was not registered to him. (18 RT 3705-3706.) Officer Pola asked to search the car for weapons; appellant opened the trunk and told the officer he had a gun under the driver's seat of the car. (18 RT 3706.) When the officer looked under the seat, he found a loaded .380 semi-automatic pistol. (18 RT 3706-3707.) He arrested appellant for the misdemeanor offense of carrying a loaded firearm in a vehicle. (18 RT 3707.)

b. Jacqueline Romero

On September 13, 1991, Jacqueline Romero was driving with her son in the car when the car directly in front of her stopped to allow a passenger to exit. (18 RT 3714.) Unable to move her car, Romero waited for the other car to move. (18 RT 3714.) While she waited, appellant and his father, who were in the van behind her, blew the van's horn and started "acting crazy." (18 RT 3714-3715.) After Romero gestured to them that she was unable to move, their

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34. Palega and Tautai, among others, were with appellant. (18 RT 3708-3709.)

van pulled alongside her car; appellant opened the side door of the van and threw a tire rack at Romero. (18 RT 3715.) The rack landed on the hood of her car, just missing her front windshield. (18 RT 3715.) When Romero was able to leave the area, the van followed her down the street, with appellant throwing things at her from the van. (18 RT 3715.) Appellant and his father were eventually arrested for assault with a deadly weapon. (18 RT 3715; 19 RT 3868-3869.)

c. Appellant's Threats To Other Inmates

On February 25, 1998, appellant, Palega, and Iuli were staged in a holding cell at the courthouse when Palega asked Alameda County Deputy Sheriff William McNally if Palega could pass some food items to appellant. (18 RT 3718-3720.) The deputy told Palega no, but told appellant to ask one of the inmate workers to pass the food for him. (18 RT 3719.) When the inmate worker refused, appellant, Palega, and Iuli threatened him, saying something like, "You are going back on the bus with us, we will take care of business on the bus." (18 RT 3721.) Deputy McNally ordered the inmate worker to leave the area; he wrote a memorandum suggesting that appellant, Iuli, and Palega be separated from the inmate workers. (18 RT 3721-3722.)

d. Appellant's Conduct In Jail

On August 31, 1996, while appellant was incarcerated at the Santa Rita Jail, appellant was written up for making and drinking an intoxicant in his cell. (18 RT 3736.) On May 22, 1998, appellant was housed in his unit at the jail when he shook his fists at housing deputy Donald Mattison for no apparent reason. (18 RT 3739-3740.) When the deputy communicated with appellant over the intercom, appellant said, "You ain't right, man. Come on down here and talk to me like a man." (18 RT 3740.) Deputy Mattison asked appellant what was wrong; appellant responded, "Come on down here so I can take care

of you." (18 RT 3741.) Appellant then pulled his shirt off and threw plastic chairs around the surrounding area. (18 RT 3742.) After Deputy Mattison and another deputy locked appellant down, appellant told Deputy Mattison, "I'll take care of you later." (18 RT 3741.) Deputy Mattison wrote appellant up and had him transferred to a different unit. (18 RT 3742-3743.)

On July 9, 1998, appellant was involved in a fistfight with at least three other inmates at the jail. (18 RT 3807-3809.) Deputy John Smith saw appellant "throw" three to four punches with a closed fist. (18 RT 3809.)

On March 14, 2000, appellant was told to return to his cell during lockdown; appellant refused to do so because he had not yet had his shower. (18 RT 3732.) When Deputy Richard Rice ordered appellant into his cell, appellant became "very aggressive" and hostile. (18 RT 3732.) According to the deputy, appellant "was getting real agitated, huffing, puffing towards" him. (18 RT 3733.) When appellant was approximately four to five feet from Deputy Rice, he cracked his knuckles and told the deputy he was not afraid of him. (18 RT 3732-3733.) Deputy Rice threatened to use pepper spray on appellant if he did not comply; with assistance, the deputy was ultimately able to place appellant in an isolation cell. (18 RT 3733.) Appellant was written up for endangering the staff and disobeying orders. (18 RT 3733-3734.)

e. Appellant Beats A Drunk Man At Ruus Park

In October 1994, appellant, Myron Cruz, and Darrell Churish were "goofing off" when they saw an intoxicated man staggering near Ruus Park. (18 RT 3757-3759.) When they ran to catch up to him, the man sped up to avoid them. (18 RT 3758-3759.) Cruz and Churish hung back, but appellant walked up to the man, hit him on the head, knocked him out, and left him on the ground. (18 RT 3758, 3760, 3781.) According to Cruz, appellant was "famous" for doing those kind of things, which Cruz described as a "one hitter quitter." (18 RT 3758-3759.)

f. Incident At The San Leandro Marina

One night, appellant, Cruz, Churish, Saiyad Hussain ("Ed"), and Iuli took Cruz's mother's van to the San Leandro Marina. (18 RT 3761, 3784, 3800-3801.) The men were shaking parked cars when a man inside one of the cars opened the door of his El Camino and shouted profanities at them. (18 RT 3761-3762.) While appellant and Ed beat the man, Cruz and Churish went to get the van. (18 RT 3762-3763, 3770, 3787; 19 RT 3932.) After the beating, the man in the El Camino started driving his car towards the van.[35] He hit the van, taking off its side door. (18 RT 3765-3766, 3787.) The men left the van at a park, ruined the interior, destroyed the locks and ignition, threw the door into a creek, and reported the van stolen. (18 RT 3766.)

g. Incident At Mount Eden High School

On December 18, 1995, Fadi Ghazawaneh was a student at Mt. Eden High School in Hayward. (18 RT 3788, 3790.) Ghazawaneh was in the passenger seat of his friend Avikash Singh's car in front of the school when Darrell Churish blocked Singh's car from the front and Roger Prasad blocked the car from the rear. (18 RT 3746-3747, 3752, 3790.) Eight Samoan men, including appellant, exited the two cars; appellant ordered Singh to roll his window down. (18 RT 3747, 3750, 3754, 3793.) After Singh complied, appellant asked him, "[y]ou got a problem?" (18 RT 3754.) Singh said no. (18 RT 3754.) Some of the men pulled Singh from the car and beat and kicked him, and one man hit the side window of the car with a crow bar. (18 RT 3748-3749, 3752, 3754-3755, 3793.) They also took Singh's pager and wallet. (18 RT 3755.)

According to Darrell Churish, Singh was beaten because he had

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35. By this time, appellant, Iuli and Ed had gotten into the van with Cruz and Churish. (18 RT 3765, 3787.)

previously been seen with Bobby Nair, who had been set to fight with Prasad; the men were unable to find Nair, so they beat Singh instead. (18 RT 3788, 3790, 3792.) Churish testified that he saw appellant standing over Singh while Singh was on the ground. (18 RT 3793.) Iuli testified that he saw appellant "stomping" Singh's head. ((19 RT 3930.)

h. Appellant's Reputation

Darrell Churish testified that sometime around 1991/1992, he met appellant at vocational school in Hayward. (18 RT 3773-3774.) Appellant told Churish that he "claimed" blue, and that he was a member of The Sons of Samoa (S.O.S.). (18 RT 3776.) Appellant also told Churish he was the leader of a Crip gang in Oakland. (18 RT 3776-3777.) Churish described an incident when appellant brought a .380 handgun to school; according to Churish, appellant "wasn't all talk[,]" was "pretty much respected around," "way bigger than most of us," and "was feared." (18 RT 3777-3778.)

On one occasion when Churish and appellant were standing on a balcony the two saw someone looking into Churish's parked car. (18 RT 3794-3795.) Churish commented that he thought the man might be planning on breaking into the car. (18 RT 3795.) By the time Churish made it to his car, appellant and Palega were there, and the man was "all bloody[.]" (18 RT 3795.)

Mannix Molia testified that he met appellant in Oakland sometime around 1989; Molia knew him as "Smurf" and "Alf." (19 RT 3830, 3840.) Appellant claimed blue as his gang color; as appellant grew bigger in size, he became known as "one of the hitters." (19 RT 3833-3834.) "Everybody became afraid of him." (19 RT 3834.) Molia had seen appellant do "the one hitter quitter" four or five times. (19 RT 3830.) Molia described it as "one punch" and "the guy drops[.]" (19 RT 3831.) Molia and appellant would look for people to beat who claimed red as their color; the beatings were appellant's

idea. (19 RT 3832.) Molia described several incidents at bars in Oakland where he saw appellant "knock people out." (19 RT 3831-3833, 3849-3850.) He also described an incident at Arroyo High School where they would "beat up on" people "mainly for the fame." (19 RT 3837.) According to Molia, they would terrorize people and then read about it in the newspaper for fun. (19 RT 3837.) The fighting earned appellant stripes in the gang and respect in the gang and on the street. (19 RT 3846-3847.) After one of their fights at Arroyo, appellant told Molia, "[i]t feels good. Let's go do it again." (19 RT 3842.)

i. Appellant Steals A Georgetown Trench Coat

One day during a lunch break from vocational school, appellant, Churish, and Oscar Felix saw someone standing at a bus stop wearing a long blue Georgetown trench coat. (18 RT 3781-3782, 3800.) Appellant got out of the car they were in, and ordered the man to relinquish his coat. (18 RT 3782.)[36] According to Oscar Felix, at first, the man refused to give appellant his coat. (19 RT 3816.) It was not until appellant punched the man in the face with his closed fist that he relinquished the coat. (19 RT 3817.)[37]

On one occasion when Churish and appellant were at the mall, Churish was admiring someone else's Raider jacket. (18 RT 3783-3784.) Appellant asked Churish if he wanted the jacket; Churish said no. (18 RT 3784.)

Mannix Molia testified that appellant had a new jacket "every other week." (19 RT 3846, 3851.) According to Molia, appellant would knock his victims out and take their jackets; appellant had even stolen a jacket from Molia. (19 RT 3846, 3851.)

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36. The man was over six feet tall and "at least six inches to a foot bigger" than appellant; he was also bigger in stature. (19 RT 3815.)

37. Churish testified that the man complied with appellant's order right away. (18 RT 3782.)

j. Jay Palega's Testimony

Palega testified that appellant admitted to him he had pulled someone out of his car at Mt. Eden High School and that he had beaten someone at the San Leandro Marina. (19 RT 3878, 3880.) As to the man looking into Churish's parked car, appellant hit him in the head with a bottle. (19 RT 3882.)

Appellant's father is a high chief in Samoa; thus, appellant is "considered as a prince." (19 RT 3890.) If appellant's father died, appellant would take his place as high chief. (19 RT 3892.)

k. Tony Iuli's Testimony

Appellant never told Iuli that Nolan's murder was an accident, nor did he express any remorse for killing Nolan. (19 RT 3944.) While Iuli was incarcerated at juvenile hall for the instant offenses, appellant wrote him a letter asking him to type a list of "brothers in our house." (19 RT 3942-3944.) Iuli identified People's Exhibit 46 as the list he typed for appellant; it was titled, "America's Most Wanted Samoans." (19 RT 3944.) The names included were listed from "[o]ldest to the youngest." (19 RT 3952.) According to Iuli, the phrase, "America's Most Wanted Samoans" "was a badge of honor." (19 RT 3944.)

l. Rowena Panelo

Nolan's fiancee, Rowena Panelo, testified that she received a call the morning of their scheduled wedding that Nolan was missing. (19 RT 3913.) Around 1:30 that afternoon, just hours before they were to be married, she learned that Nolan had been killed. (19 RT 3914-3915.) Nolan was a loving, caring, thoughtful person who always worried about his siblings and put others before himself. (19 RT 3917-3918.)

m. Clementina Manio

Nolan's mother, Dr. Clementina Manio, testified that Nolan was caring, loving, thoughtful and respectful. (19 RT 3966-3967.) Not only was he helpful, but he was always happy. (19 RT 3967.)

2. Defense

a. Clarence Scanlan

The owner of a security guard company and former detective with the Honolulu Police Department, Clarence Scanlan described his experience working with organized crime and gang activity involving the S.O.S. (19 RT 3976-3978.) Scanlan, who was born in American Samoa, has the title of high chief from the village of Vaitogi in Tutuila, American Samoa. (19 RT 3979-3980.) The high chief is a symbolic ruler, and the high talking chief "is the one that does all the speaking in [*sic*] behalf of the high chief." (19 RT 3980.) Scanlan can perform either function. (19 RT 3980.) Scanlan is also "the prince of the village and in charge of all the untitled men." (19 RT 3980.)

Scanlan testified at length about the Samoan culture. For instance, because Samoans are generally much bigger than other people, most people "don't mess with them . . . because they are strong." They also "have the reputation of being able to knock you out with one punch" and not giving up even when they are outnumbered. (19 RT 3988.) They establish fear through intimidation. (19 RT 3988.) According to Scanlan, Samoans learn that if they fight, they are to make sure that the person they fight knows you do not want to fight with them more than once; "you beat them up enough so that they understand that if you fight with me again, you are going to go through the same thing." (19 RT 3988.) "[Y]ou don't mess with us." (19 RT 3988.) In Samoan culture, Samoans are basically obligated to get involved if another Samoan is involved in some type of conflict. (19 RT 3989.)

Scanlan met and interviewed appellant and his family and considered information such as the facts and circumstances surrounding the instant offenses. (19 RT 3985.) Based on this information, Scanlan formed an opinion regarding appellant's gang affiliations. (19 RT 3985-3986.) According to Scanlan, there are two types of gangs; one type deals "in criminal activity for profit" and the other exists "for safety and protection in numbers so that they can offer protection to themselves, or their friends, and family, neighbors, whatever it might be." (19 RT 3986.) In Scanlan's opinion, appellant is affiliated with the "protective gang" rather than a "for profit" gang. (See 19 RT 3994-3996.) Appellant "is a protector type of person." (19 RT 3990.) His role is to protect others; for instance, his siblings, family members, friends and associates. (19 RT 3990.) It is not "his role to be the aggressor." (19 RT 3990.) "It is his role to take down whoever it is, because he can't let the lower subordinate be the one to settle the situation, because he will lose his esteem and position within the gang, or the organization, or village, or whatever it might be." (19 RT 3990-3991.)

Scanlan concluded that appellant "is more Samoan in his activity than criminally oriented." (19 RT 3997.) This conclusion was based on the fact that appellant is responsible for his family, and because many of the things he has done through the years were done to protect someone else rather than just for the sake of beating someone. (19 RT 3998.)

b. Appellant's Family Members

Appellant's stepmother, Sao Seumanu, testified that appellant was a very good son and is a good person; while he was growing up, he was her "right hand." (19 RT 4013, 4017.) He frequently helped her with the other children in the family, and also did a lot to help in the church where his father is a

minister. (19 RT 4015-4016.)[38] Appellant had a very close relationship with his brother Tautai, and with his grandfather, whom appellant took care of for a year when he was ill. (19 RT 4016-4017.) When appellant was working, he gave his earnings to her to help buy food for the other children in the family. (19 RT 4017-4018.) Sao did not know that her sons were in a gang, and never saw either of them carrying a weapon. (19 RT 4019.) Sao admitted she had a prior conviction for welfare fraud. (19 RT 4026.)

Appellant's uncle, Manua Malauulu, testified that appellant took very good care of, and was a "joy" to his grandfather. (20 RT 4062-4063.) Appellant's cousin, Nia Malauulu, testified that appellant is very loving and helpful. (20 RT 4060.)

c. Dr. Marlin Griffith

Clinical psychologist Marlin Griffith conducted clinical interviews with appellant and administered several psychological tests including the MMPI (Minnesota Mulitphasic Personality Inventory), the Incomplete Sentences Blank test, the House-Tree-Person test, and the Rorschach Inkblot test. (20 RT 4065-4067.) He also reviewed the acts of violence that served as factors in aggravation in this case. (20 RT 4080-4081.) Dr. Griffith opined that appellant is very personable, emotionally immature, and psychologically unsophisticated. (20 RT 4068.) According to Griffith, appellant suffers from chronic alcohol abuse which is in remission due to appellant's incarceration. (20 RT 4068.)[39] Appellant also suffers from low self-esteem, underlying depressive trends, and some antisocial personality trends. (20 RT 4069.)

None of the data Griffith relied on revealed that appellant is psychotic,

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38. Sao testified that appellant is a deacon in the church. (19 RT 4016.)

39. Griffith testified that appellant would likely "return to out-of-control alcohol use" if released from prison. (20 RT 4070.)

or that he is brain-damaged. (20 RT 4073.) While Griffith saw indicators and trends towards depressive tendencies, he did not find any indication that appellant had a severe personality disorder. (20 RT 4073.) The results of the inkblot test, the clinical data, and the results of the MMPI all support the conclusion that appellant "is not a cold-hearted, cold-blooded killer." (20 RT 4117-4118.)

d. Closing Argument

In closing, defense counsel argued that appellant was a protector, not an antisocial personality or psychopath like Ted Bundy, Charles Manson, or Jeffrey Dahmer. (4205-4207.) Counsel described some of the acts of violence presented by the prosecution as acts of "a young guy who wants to claim a gang and be tough." (20 RT 4207.) Counsel also attacked Iuli's and Palega's credibility and discussed many of the "factor (b) incidents," arguing there was reasonable doubt that appellant was the aggressor in those incidents. (See, e.g., 20 RT 4209, 4212.) Counsel portrayed appellant as someone with humanity and warmth, giving examples in the record to show that appellant "is not the individual" portrayed by the prosecutor. (See 20 RT 4212, 4214-4216.) If the jury voted to imprison appellant rather than imposing the death penalty, appellant would be able to be there for his family. (20 RT 4219.) The jury could protect society and still give Nolan's family closure by sentencing appellant to life in prison. (20 RT 4220-4221.)

ARGUMENT

I.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY PRESENTING EVIDENCE OF HER MOTIVATION FOR PROFFERING PLEA DEALS TO IULI AND PALEGA

Appellant contends that the prosecutor committed misconduct and denied him the right to a fair trial by presenting evidence of her motivation for entering "into a plea agreement with Tony Iuli and Jay Palega," and by using that evidence to vouch for Iuli's and Palega's credibility. Appellant further argues that this evidence was irrelevant and immaterial. (AOB 43-89.) Appellant has waived these claims by failing to object on these bases at trial; in any event, they fail on the merits.

A. Relevant Testimony And Proceedings

1. Iuli And Pelega's Plea Agreements

On April 26, 2000, pursuant to a negotiated disposition, appellant's co-defendant, Tony Iuli, pled guilty to voluntary manslaughter, kidnaping, and second-degree robbery, and admitted a firearm use enhancement. (7 CT 1902-1903; 10 RT 2445-2446.) The terms of the plea agreement were recited by the prosecutor as follows:

> Mr. Iuli is facing life in prison without parole with the charge of first-degree murder and special circumstances of kidnaping and robbery, which in exchange for entering a plea agreement of 16 years and 8 months, he understands that he is going to be required to testify fully and completely and honestly regarding the kidnap, robbery and homicide of the victim in this case, as well as any other crimes that he has committed with the defendants that are charged in the case, and any other, um, times when he has seen the defendants in the possession of firearms.
>
> The understanding is that he will testify both in the guilt phase and again at the penalty phase, and that prior to testifying, he will give me a full, complete and honest taped statement regarding all of the events

that I've just described.

(7 CT 1902-1903.)

On May 15, 2000, appellant's co-defendant, Jay Palega, pled guilty to the same charges as Iuli, pursuant to the same negotiated disposition. (7 CT 1941-1942.) The prosecutor recited the terms of the plea agreement as follows:

> Before the plea, Mr. Palega understands that he is facing a total of life in prison without the possibility of parole because of the special circumstances of murder during that course of kidnaping and robbery that are charged.
>
> And in exchange for dismissing the special circumstances, and letting him plead guilty to 16 years, eight months in state prison, these are the following terms of that agreement:
>
> That he would testify truthfully, completely and honestly regarding all questions posed to him regarding the murder of Nolan Pamintuan, and also regarding any of his own history or the history of any of his co-defendants; [¶] That he would testify at both the guilt phase and again at the penalty phase if such a phase occurs;
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> . . .
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> . . .
>
> Additionally, he would speak to me with his lawyer present, and his former attorney present, Ms. Louise Simpson, which I agreed to, and that he would speak to me on as many occasions that I requested. And then after I finish speaking to him, that he would give me a reported statement, under oath, regarding all of the areas of questioning. [¶] I believe that is it.

(7 CT 1941-1942.)

2. Defense Counsel's Opening Statement

During his opening statement, defense counsel made the following remarks about the prosecution's case and about Iuli and Palega's plea agreements in particular:

> *And one thing I want you to remember is a particular day, and that is March 3rd of this year. Because what occurred on that day is my client withdrew his time waiver, which meant he had to commence this*

trial within 60 days. And after that date, the prosecution realized that they cannot make the case against my client, that they had to get him by testimony.

The prosecution's case revolves around two people, Tony Iuli and Jay Palega. These men were former co-defendants of the defendant. They were charged with the same charges that my client was charged with, only the prosecution was not seeking the death penalty. The prosecution was only seeking, and has only sought, the death penalty against my client. Those two men were faced with prison, with life without the possibility of parole. They were going to die in prison.

The prosecution approached them, through their counsel, and offered them, what we say in the criminal vernacular, deals. And the deal was that if they testify against my client on the guilt phase of the trial, they would receive first-degree murder convictions. They had to plead to first degree, which meant 25 years to life. If they testified against my client at the penalty phase of the trial, they would get a second degree plea bargain, which was 15 years to life. [¶] Both those men refused that offer.

The prosecution was compelled to renegotiate her [*sic*] position and ultimately offer both of these men a fixed term of a maximum of 17 years in prison, 16 years, eight months. So no matter what happened, they would get no more than 17 years for their testimony.

When these men testify—they had given statements previously to the police. The prosecution worked with them with considerable time and effort to get their statements here in court. When they testify, they are testifying under complete distrust by the prosecution because they have not been sentenced yet.

(6 RT 1643-1644, italics added.)

3. Discussion Regarding Defense Counsel's Opening Remarks

On September 27, 2000, both parties and the trial court discussed Iuli's testimony and defense counsel's opening remarks.

THE COURT: All right. Counsel are present. The defendant is present. Also Mr. Berger is present who is the attorney for Mr. Iuli. [¶] Ms. Backers has submitted a stipulation this morning that we need to have a discussion about, also some discussion about the scope of testimony from Mr. Iuli. [¶] Ms. Backers, do you wish to make an offer of proof?

MS. BACKERS: Yes, your Honor.

With regard—this is all in response to something that was said in opening statement by defense counsel. And I believe there was a misleading statement of the way this case evolved by counsel, and that there is a wrong impression left with the jury from statements of counsel from his opening.

In the documents I filed this morning entitled: "People offer the following stipulation," and dated September 27th, I included the two pages from counsel's opening statement, pages 1643 and 1644.

And the concern I have is that counsel indicated to the jury that he wanted them to remember March 3rd because that is the day his client withdrew his time waiver. And after that date, quote:

"The prosecution realized that they cannot make the case against my client, that they had to get him by testimony," end quote.

Then he went on to say that I approached, and this is a quote again, line 17:

"The prosecution approached them through their counsel and offered them, what we say in criminal vernacular, a deal."

And the impression—well, then he goes on to say later that I was compelled to renegotiate a fixed term for these two witnesses, Mr. Palega and Mr. Iuli.

The truth of the matter is that I never approached Mr. Berger or Mr. Iuli, his client, with a deal until the defense had approached me asking for a deal.

Mr. Berger, for over one year, was asking me for a deal that would include Tony testifying against the remaining three co-defendants and identifying the shooter in the murder.

And I was in trial on another capital case . . . which I have attached the corpus printout showing I was in trial during that time. [¶] And the offer of proof is that after the 1538 in this case, that Mr. Berger approached me, no less than three times, probably more, whenever he would see me, basically he would say: Have you put together an offer for my client, Mr. Iuli? And I said I need to wait until I am finished with this trial, I am in trial on the Keith Lewis case.

So the impression left with the jury that I got desperate because I thought I couldn't prove my case against this defendant, and approached them for deals, is absolutely not true.

And I am trying to correct that misimpression by a series of stipulations that I have offered that indicate that I had been working on the case for two years providing discovery, and by the time they pulled time on March 3rd, I had, during the same week, provided them with 1174 pages of penalty phase discovery, which obviously indicated that I had already worked up a penalty phase, because I was giving them almost 1200 pages in penalty phase discovery.

And I would anticipate calling Mr. Berger [Iuli's attorney], and Mr. Muraoka [Palega's attorney], and having them testify—well, as far as Mr. Berger is concerned, that Mr. Berger is the one who approached me, not me approaching him.

And the question I would propose to ask Mr. Iuli when he is on the stand is: you and your lawyer had an agreement that you would take a deal from the prosecution that included you testifying against the others, and you had that agreement that you would take that deal for over a year before you actually pled guilty. And that is the substance of the question I would ask Mr. Iuli.

And there is a series of questions I would ask Mr. Berger, basically that would prove the offer of proof that I just made; that he came to me and was asking for a deal for quite a long period of time before I made him an offer.

MR. CIRAOLO: Your Honor, what the prosecution raises creates several issues, and I will try to handle them in some form of logical order.

First, and foremost, I believe my opening statement is a fair inference on what we believe the evidence would show. Whether the jurors—what the jurors believe, Ms. Backers can only speculate.

What she is concerned about appears to be that she feels that I have created an impression in the jurors' minds. She doesn't know the impression the jurors have unless she violated the law and communicated with them. So that is pure speculation.

The sequence of communications, who initiated it or not, if Mr. Berger testifies, I believe we are opening the door to attorney-client communications.

THE COURT: Well, you don't have any standing to object to that, Mr. Ciraolo.

MR. CIRAOLO: I believe it would be appropriate for me to cross-examine Mr. Berger on his—not only his timing, but for his reasoning for the attempt to negotiate the disposition. [¶] The reasoning for his attempt to negotiate a disposition may also include his evaluation in the case, statements his client made to him, and other factors of evaluation.

The other factor that Ms. Backers is creating is a unilateral impression that she was too busy to deal with this case and somehow giving us discovery at a particular time would erode that. [¶] The court can take judicial notice, from the records in this case, that myself and Ms. Levy were not appointed to this case until November of 1998.

Mr. Lincoln Mintz had this case. And I represented to the court previously that Mr. Mintz did not return my phone calls, did not answer my letters, and that he gave us no discovery.

So whether the court would order it or not, Ms. Backers had to reprovide us with discovery in the case. I also got some discovery from Mr. Berger, and I believe Mr. Muraoka. [¶] The stipulation as outlined there, there is no question that she gave us some discovery as he has, I don't have the stipulation before me, whether she was busy in another case I feel is irrelevant.

What is critical here is that an offer was not made until after we withdrew the time waiver. And the offer that was made by Ms. Backers was rejected. They had—there had to be a further offer. The subsequent offer was accepted. [¶] Whether Ms. Backers had a case or not, what her rationale was or was not for making an offer, I believe is fair comments in opening statement and outline and final argument.

If she wants to put her credibility on the line, the evaluation of the case, she is doing so here. And I don't think that is appropriate.

THE COURT: So what you are saying, Mike, is it is okay for you to raise an inference that she did this for a certain reason, but it is not okay for her to try to refute it.

MR. CIRAOLO: I am not saying that.

THE COURT: But that is what you are saying. Because you are saying that what you said was a fair inference on the evidence. And I don't disagree with that.

MR. CIRAOLO: Okay.

THE COURT: But she certainly is entitled to put before the jury her perspective so they can draw her inferences from the same evidence.

MR. CIRAOLO: I don't disagree with the Court. I think that is appropriate. But the way she plans to do it.[40/]

THE COURT: Well, I will agree with you. It is fairly inartful, both the way the stipulation is presented and also the way - - the question Ms. Backers wants to pose. It is probably not the best way to approach it, but I am not trying her case.

. . .

MS. BACKERS: If the court needs time to think about this.

THE COURT: It is not a question of thinking about it. It is a question that I agree with Mr. Ciraolo that what he said was fair comment. However, I also agree that Ms. Backers has a right to put her spin on the same facts before the jury.

I would indicate to Ms. Backers, though, that the stipulation I don't think really does that, and the question as posed it I think was fairly inartful in achieving this.

I think there are other ways to put the information in front of the jury without opening an entire Pandora's box. And what I foresee is the focus of this case being transferred, either intentionally or unintentionally, from the facts of the ultimate issue to prosecutorial conduct and credibility. And I don't think that serves the interest of justice here.

So let me see if I can come up with something else while we've got the gun dealer on the stand and then readdress this once we get done with this.

(10 RT 2395-2402.)

4. The Berger Stipulation

In response to portions of the discussion cited above, the trial court drafted and read the following agreed-upon stipulation to the jury:

Ladies and gentlemen, before we begin taking testimony, there is a stipulation that I want to read to you for the record . . .

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40. Appellant admits that the italicized portion of counsel's comments (see § A2 *ante*) "sounded the wrong note[.]" (See AOB 47-48.)

The stipulation is as follows:

> The information in this case was filed in the superior court of Alameda County on June 19th of 1997. At that time, California law provided that the defendant had a statutory right to demand a trial on the charges contained in the information within 60 days of June 19th, 1997 or on or before August 18th of 1997.
>
> The defendant entered a general time waiver waiving his right to a trial within 60 days of June 19th, 1997. [¶] The defendant withdrew that general time waiver on March 3rd of the year 2000. This required that the trial in this case commence on or before May 2nd of the year 2000. [¶] Deputy District Attorney Angela Backers was first assigned this case on or about December 28th of 1997.
>
> Mr. Michael Ciraolo and Ms. Deborah Levy became attorneys of record for the defendant on or about December 11th of 1998. [¶] There has been ongoing discovery and the providing of information on the guilt and possible penalty phases of this case by Ms. Backers to Mr. Ciraolo and Ms. Levy since December 11th of 1998.
>
> Mr. Michael Berger, who is the attorney sitting over there, has represented Mr. Tony Iuli in this matter from on or about May 27th of 1996. [¶] During the year 1999, Mr. Berger approached Ms. Backers on at least three occasions regarding a possible plea agreement which would involve Mr. Iuli being allowed to plead to a lesser offense in consideration for Mr. Iuli providing testimony in this trial.
>
> Mr. Iuli entered such a plea agreement on April 26th of the year 2000.

(10 RT 2445-2446.)

5. Defense Counsel's Cross-Examination Of Iuli

On cross-examination, defense counsel attacked Iuli's credibility and his reasons for accepting the plea agreement and testifying against appellant. (11 RT 2643-2647, 2652-2653, 2659-2661.) Counsel focused on the subject of appellant's time waiver and its effect on Iuli and his plea deal.

> Q. And the first deal you were offered was after March of this year; Is that correct?
>
> A. Yeah.

Q. Tony, you remember going to court with the three other guys several times; Is that correct?

A. Right.

Q. And you remember seeing me in court and Ms. Levy in court a couple times?

A. Right.

Q. The other lawyers were there, Mr. Berger, Bill Muraoka, Mr. Daley. [¶] So these were formal court appearances; is that correct?

A. Right.

Q. And do you remember one time in court my client, and I spoke for him, withdrew the time waiver; remember that happening earlier this year?

A. Right.

Q. And you were aware by withdrawing the time waiver this trial would have to start within a short period of time?

A. Right.

Q. And after that was done in court was the first time somebody told you you had a deal offered to you; is that correct?

A. Yes.

Q. And the deal that was offered to you at that time was a split deal, testify in guilt, get first degree, testify in penalty, get a second degree; Is that correct?

A. Yes.

Q. So you were given the option that if you could get Paki convicted, you get 25 to life; If you could get him executed, you could get 15 to life?

A. Right.

Q. And you turned that down?

A. Right.

Q. That wasn't good enough for you; is that correct?

A. Right.

Q. Now, up to that point in time, you had not talked to Ms. Backers

yourself directly?

A. Right.

. . .

. . .

Q. You had a hearing before another superior court judge where police officers came in and testified regarding the circumstances of the search warrant and the seizure of the property. [¶] Do you remember that?

A. Yes.

Q. So you heard what the police had to say as to what they found and why they found it?

A. Yes.

Q. And that all happened before the time waiver was withdrawn?

A. Right.

Q. So you had this information of two preliminary examinations and other information before the time wavier was withdrawn?

A. Right.

Q. Is that correct? [¶] The time waiver is withdrawn, and within a few days to a week after that, is that correct, an offer was made to you?

A. Right.

Q. And that offer wasn't good enough?

A. Right.

Q. For you?

A. Right.

Q. And we were actually assigned down to this courtroom for trial, remember that?

A. Right.

Q. And by "we," I mean yourself, Tautai, my client and Jay Palega, and all their attorneys. We were there, we were sitting over here; is that correct?

A. Right.

Q. And we were assigned to Judge Goodman. And there were discussions as to scheduling the motions and the jury selection and so forth?

A. Right.

Q. And after coming down here you were made aware of another offer; is that correct?

A. Yes.

Q. And that offer is the one that you believe you are operating under now?

A. Right.

Q. And that other offer is what we would call a fixed sentence offer, that you were given a release date from prison unless you pick up new offenses in prison?

A. Right.

Q. Is that right?

A. (Nods head affirmatively.)

Q. And you took that offer?

A. Right.

Q. And after taking that offer, Ms. Backers started talking to you?

A. Right.

Q. And Ms. Backers started showing you pictures?

A. Right.

Q. Ms. Backers started explaining to you what she wanted to know?

A. Right.

Q. She started indicating to you what she wanted you to say?

A. Not really.

Q. What did she do?

A. She just asked me questions and I was telling the truth.

Q. And when she asked you the questions, she was asking the questions the same way she asked the questions here in court?

A. Yes.

Q. She would give you information in the question so you knew what she was looking for?

A. No. She would ask. I would give her what she was asking for.

Q. You didn't know what she was asking for?

A. I already knew what she was asking.

Q. What did you think she asking for?

A. For what happened, what happened that night. The truth.

Q. Okay. And did you believe that it was in your best interest to make sure that Paki was the shooter?

A. Right.

Q. And whether that was truthful or not, you didn't really care?

A. It was the truth.

Q. It was the truth?

A. Yes.

(11 RT 2661-2665.)

6. Cross-Examination Of Palega

During his cross-examination of Palega, defense counsel revisited the matter of appellant withdrawing his time waiver and its effect on the plea agreement.

Q. After the preliminary you found out that they were seeking just to lock you up until you die?

A. Yes.

Q. And later on you found out you could get out of that by testifying?

A. Years later.

Q. This year?

A. Yes.

Q. And that was after Paki withdrew his time waiver in March of this year?

A. Yes

Q. You were in court with Paki, me, the other lawyers, and in the other department in March of this year, when we withdrew the time waiver?

A. Yes.

Q. When did you become aware that the prosecution was seeking the death penalty for the shooter only?

A. At the preliminary hearing.

(13 RT 2957-2958.)

B. Appellant Forfeited His Prosecutorial Misconduct/Vouching And Relevancy Claims Under Both The State And Federal Constitutionals

Appellant claims the prosecutor committed misconduct and denied him his right to a fair trial by putting in front of the jury evidence of her motivation for entering "into a plea agreement with Tony Iuli and Jay Palega," and by using that evidence to vouch for Iuli's and Palega's credibility. Appellant further challenges this evidence as irrelevant and immaterial. (See AOB 43-89.) As appellant correctly anticipates (see AOB 53, 67), his failure to lodge timely and appropriately specific objections and to request an admonition where necessary forfeited his claims on appeal. In any event, the claims fail on the merits.

Appellant specifically takes issue with portions of the prosecutor's direct examination of Iuli (AOB 43-44, 55), admission of a stipulation regarding a discussion between the prosecutor and Palega's attorney Mr. Muraoka (AOB 44, 64-67), and sections of the prosecutor's closing remarks (AOB 44, 68-77). Although the issues of relevancy and prosecutorial misconduct were discussed outside of the jury's presence (10 RT 2395-2401; 13 RT 2962-2971), when the actual questions, stipulation, and closing remarks were made during trial, appellant failed to lodge any objections on either relevancy or

vouching/prosecutorial misconduct grounds. Hence, these claims are forfeited.[41] (*People v. Thornton* (2007) 41 Cal.4th 391, 454 [must object on prosecutorial misconduct grounds or it is forfeited]; *People v. Bonilla* (2007) 41 Cal.4th 313, 336 [must object to alleged vouching to preserve a misconduct claim on appeal]; *People v. Carey* (2007) 41 Cal.4th 109, 126 [defendant must raise a relevance objection to the admission of evidence at trial to preserve the claim on appeal].)

As to the prosecutor's alleged vouching during her direct examination of Iuli and closing argument, appellant also failed to seek a curative admonition. Thus, the vouching claim is not reviewable. (*People v. Tafoya* (2007) 42 Cal.4th 147, 176 [misconduct is reviewable only if an admonition would not have cured the harm caused by the misconduct]; *Bonilla, supra*, 41 Cal.4th at p. 336 [defendant must request an admonition after objecting to a prosecutor's alleged vouching].)

Appellant argues that "the record will show that the trial court's clear pronouncements . . . rendered any timely objection futile and therefore excused any procedural default." (AOB 46.) However, a review of the record shows

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41. Appellant states that the defense counsel lodged the "proper" objection that the "personal opinion as to the moral justification of making an offer" and "personal belief and opinion" of the prosecutor "as to a person's guilt is misconduct." (AOB 65.) This objection was made outside the presence of the jury at a hearing in which no final ruling was entered. (13 RT 2962-2971.) When the challenged questions to Iuli were posed, however, the Muraoka stipulation was agreed upon and read, and the challenged closing remarks were uttered, appellant made no objection whatsoever. Thus, this one instance of discussing a possible objection does not save appellant from forfeiture. Further, this single objection did not mention or preserve appellant's claim based on the admission of irrelevant evidence (Evid. Code, § 353; *People v. Demetrulias* (2006) 39 Cal.4th 1, 22 [must make timely objection on "specific ground now urged" to preserve the claim for appeal]), nor did it nullify the fact that appellant agreed to the wording and admission of evidence through the stipulation he now challenges. (13 RT 2998.)

that the trial court was receptive to appellant's arguments against the prosecutor discussing her personal beliefs and moral reasons for offering Iuli and Palega lower sentences. (See 10 RT 2400, 2401-2402; 13 RT 2961-297 1.) Appellant has shown no basis for this Court to conclude that an objection and request for admonition would have been futile. Here, timely objections and requests for curative admonitions would have cured any possible resulting harm based on the challenged questions and closing remarks.[42/] (See *People v. Farnam* (2002) 28 Cal.4th 107, 167.)

Appellant has also waived his federal claims of error under the Sixth and Eighth Amendments by his failure to object. (See AOB 46, 77-80.) Recognizing this failure, appellant attempts to salvage review of his claims by arguing that "such objections are not necessary when, on appeal, the unconstitutional *effect* of state evidentiary error is the nature of the constitutional claim." (AOB 77, fn. 22.) Because appellant fails to show evidentiary error or prejudice (see *post*), appellant's federal claims are forfeited. (See *United States v. Olano* (1993) 507 U.S. 725, 731 ["No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."]; *Tafoya*, *supra*, 42 Cal.4th at p. 166 [Sixth Amendment confrontation claim forfeited by failure to object on this ground below]; *People v. Williams* (1997) 16 Cal.4th 153, 250 [constitutional objection to admission of evidence forfeited if not raised below]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [the defendant's federal constitutional due process, and Eighth Amendment fair trial, reliable guilt determination claims waived in a

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42. Appellant's lack of objection or request for admonition regarding the evidence contained in the Muraoka stipulation is irrelevant because appellant agreed that the jury be instructed with the stipulation. (13 RT 2998.)

capital case when they were not interposed in the trial court].) In any event, the prosecutor did not commit misconduct.

C. The Prosecutor Did Not Commit Misconduct

Appellant contends that the prosecutor introduced her personal motives for offering Iuli and Palega plea deals through Iuli's direct examination, the Muraoka stipulation, and through some of her closing remarks. The result, according to appellant, was that the prosecutor committed misconduct by vouching for Iuli's and Palega's credibility. (AOB 43, 67, 77.)

This Court has established the standards for evaluating a claim of prosecutorial misconduct.

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Impermissible vouching may occur in two ways: the prosecution may place the prestige of the government behind a witness through personal assurances of the witnesses's veracity or may indicate that information not presented to the jury supports the witness's testimony. (*Lawn v. United States* (1958) 355 U.S. 339, 359-360, fn. 15; *People v. Fierro* (1991) 1 Cal.4th 173, 211.) The vice of such remarks is that they "may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence." (*Bonilla, supra*, 41 Cal.4th 313, 336-337.) "Although a prosecutor may not personally vouch for the credibility of a witness, a prosecutor may properly argue a witness is telling the truth based

on the circumstances of the case." (*People v. Boyette* (2002) 29 Cal.4th 381, 433.) "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching." (*People v. Frye* (1998) 18 Cal.4th 894, 971; *People v. Ward* (2005) 36 Cal.4th 186, 215.)

1. Direct Examination Of Iuli

Appellant challenges the following portions of the prosecutor's direct examination of Iuli. (See AOB 44.)

Q. In the month of May, specifically on May 5th when I was talking to you, you told me that Jay had said several times to Paki: Don't shoot the guy, right?

A. Yes.

Q. And then you talked to me about Jay getting a deal, the same you got, right?

A. Yes.

Q. Tell the jury how that conversation went.

A. I asked you if you gave Jay the same deal that I got.

Q. And I asked you why I should, right?

A. Yes.

Q. And then did you write Jay a letter?

A. Yes.

Q. And I told you that before I could provide that letter to Jay I would have to see it and see if it was appropriate, right?

A. Yes.

Q. And you let me read it?

A. Yes.

Q. And then we gave it to your lawyer to give to Jay?

A. Yes.

Q. And today I showed you a copy of it, right?

A. Yes.

Q. And I have had it marked People's 117 for identification. [¶] On May 5th of this year, that is a copy of the letter you wrote to Jay, right?

A. Yes.

Q. Tell the jury what you told Jay.

MR. CIRAOLO: Your Honor, the evidence speaks for itself. He can read the letter.

MS. BACKERS: That is fine. [¶] Go ahead and read the letter you wrote to Jay.

THE COURT: He can read it.

MS. BACKERS: Go ahead.

THE WITNESS: Uso, well—

THE COURT: Slow down.

MS. BACKERS: Q. The first name you said, Tony, is Uso, right?

A. Yes.

Q. That means brother in Samoan?

A. Yes.

Q. Now, read it really slow because the court reporter is going to take it down.

A. Uso: [¶] Well, it's me, Tony. Just writing you a quick letter. I guess you already know that I'm taking the deal. I'm sorry, and I hope you understand. But the D.A. said they will give you the same deal, 16 years, eight months. It's a great deal. Remember what we talked about, our sons. Uso, if you ain't going to do it for yourself, do it for your son. It's a deal you wanted, now take it. It's not 15 to life. It's 16 and eight months. She said that she is going to change it. Uso, please take it. Please take it. As much as I love the others, but I ask you to take it. Please. Four years is already done, another ten and your [*sic*] done. Don't go out. Think about it, Uso. [¶] Love always, Tony Iuli.

Q. *And you wrote that while you and your lawyer and I and my inspector were sitting in this courtroom, right?*

A. *Yes.*

Q. *And you told me that you felt bad for Jay because if you guys had just robbed Nolan and let him go you would have been out by now, right?*

A. *Yes.*

Q. If Paki didn't shoot him?

A. *Yes.*

Q. *And then after you and I talked about Jay's involvement, then I told you I would offer the same deal I gave you, right?*

A. *Yes.*

Q. *But you would have to testify truthfully?*

A. *Yes.*

(11 RT 2630-2632, italics added.)

According to appellant, the italicized questions posed by the prosecutor were an attempt by the prosecutor to improperly present evidence to the jury of her reasons for offering Palega a "deal." (AOB 55.) Appellant further posits that by asking these questions, the prosecutor was vouching for Iuli's and Palega's credibility. (AOB 55.)

The questions posed by the prosecutor and the answers given in no way vouched for Iuli's and Palega's credibility or referred to evidence outside the record. (See *Fierro*, *supra*, 1 Cal.4th at p. 211.) Nor did they place the government's prestige behind Iuli and/or Palega as a way to assure the jury of their veracity. Rather, the prosecutor's questions merely placed Iuli's letter and his and Palega's plea agreements in context. Moreover, these questions did not indicate that the prosecutor had evidence supporting Iuli's or Palega's testimony that was not presented to the jury. As such, the questions did not constitute vouching. (See *Lawn v. United States*, *supra*, 355 U.S. at pp. 359-360, fn. 15.) To the extent they provided the jury with background information relating to the witness' credibility, they were also relevant. (See *People v.*

Rodriguez (1999) 20 Cal.4th 1, 9 [evidence bearing on a witness's credibility is always relevant].)

2. Muraoka Stipulation

Appellant also attacks a stipulation admitted at trial regarding discussions between Palega's attorney William Muraoka and the prosecutor regarding Palega's plea agreement. Appellant claims the stipulation was irrelevant, and that the introduction of this evidence on the prosecutor's "opinion on the relative levels of culpability of her witnesses over appellant[,]" constituted vouching. (AOB 44, 67.)

On October 3, 2000, the trial court and counsel discussed the best way to present the content of the plea discussions between the prosecutor and Muraoka to the jury. Their discussion follows:

> THE COURT: Counsel are present. The defendant is present. The jury is not present. [¶] It is my understanding that after we finish with this witness, Ms. Backers intends to call Mr. Muraoka; is that correct?
>
> MS. BACKERS: Yes, sir.
>
> THE COURT: All right. And this raises some issues that we need to address.
>
> MR. MURAOKA: Perhaps Ms. Backers can indicate to the court what areas she would offer me as a witness and then everyone can interpose their objections or comments.
>
> THE COURT: Not a bad idea.
>
> MR. CIRAOLO: For the record, I would request an offer of proof.
>
> THE COURT: That is what I was going—I will request an offer of proof.
>
> MS. BACKERS: The testimony I would seek to elicit from Mr. Muraoka is under the umbrella of how the plea for his client came about, the plea bargain.
>
> And what I would ask him is how the original—how the final offer came about, where on May 5th of this year, of 2000, defendant Tony Iuli wrote a letter, I checked it to make sure there were no threats or coercion

in it, gave it to Mr. Berger, Mr. Berger, in my presence and Tony's presence, called Bill Muraoka on the telephone. Bill Muraoka came over. I told him the same offer that was extended to Tony was being extended to Jay. We gave him the note. Actually, Mr. Berger handed him the note from Tony. And then on May 15th, the plea came about, Mr. Palega pled guilty on May 15th. I have a copy of the transcript of the plea.

I would ask Mr. Muraoka if the original offer on the case was a first, if he testified only about the murder, and a second, if he came back and testified again at the penalty phase with regard to defendant's entire history.

I would also ask Mr. Muraoka if it is his belief that an inmate who testifies in the penalty phase portion of a death penalty trial is subjected to greater personal jeopardy than if they testify just in the guilt phase, as a way of distinguishing between the two offers, first and second.

And the most important portion of the testimony that I would seek to elicit is a conversation I had with Mr. Muraoka on the 9th floor lobby of the district attorney's office, where after the plea took place, Mr. Muraoka was at the front counter and asked if he could speak with me. We sat down ten or 15 minutes and spoke. And his question to me was exactly this: I know that you did not need Jay to prove your case, I would like to know why you gave Jay that deal.

And I told him exactly my feelings. And my feelings were that after my full investigation of the case, and talking to Tony, that I believed that although all four of them were legally guilty, that there was a difference in moral culpability between the defendants, and that it was my belief that Tony and Jay did not want Nolan to get shot.

And so I made a moral distinction between them, and I believe that morally Tony and Jay were entitled to a lesser sentence, and that is why I gave his client the deal. And he thanked me.

And I would not seek to elicit this, but the conclusion of that conversation was that he thanked me and commended me for making that kind of distinction, moral distinction.

THE COURT: All right. As to the first part, why can't that be handled by stipulation? [¶] Would you be willing to stipulate?

MS. BACKERS: Remind me what the first part is.

THE COURT: The first part is that I would ask him how the final offer came about on May 5th of this year, Tony - - defendant Tony Iuli

wrote a letter, checked it to make sure no threats, gave it to Mr. Berger, in my presence placed a phone call to Mr. Muraoka, Mr. Muraoka came over, told him the same offer was being extended to Tony that was being extended to Jay, gave him note. [¶] Any problem that can't be stipulated to?

MR. CIRAOLO: Partly. I have no problem with the portion of the stipulation dealing as to what the previous offer had been first degree and the second degree. And I have no difficulty with the time frame. And I have no difficulty with that offer having been communicated to Mr. Palega and Mr. Palega rejecting the offer.

The second portion of it of how the present offer was communicated, I feel is inappropriate as to go into the kind of detail of whether there was an approval of the letter, what Mr. Berger's motivation might or might not have been in communicating the letter, and I think the stipulation that an offer through counsel was communicated to Mr. Palega. [¶] I have no problem.

THE COURT: I mean, the letter has been testified to. The letter has been read into the record. I don't see that that creates a problem. The letter was written, everybody looked at it and called Mr. Muraoka and he came over and picked up the letter. [¶] What is your objection? You don't have to stipulate, but I don't see what you are—

MR. CIRAOLO: The court is correct. I mean, if—

THE COURT: What I am trying to do is limit, if I allow it all, to the narrowest scope possible.

MR. CIRAOLO: I understand. [¶] If the stipulation would state that Mr. Iuli wrote a letter to Mr. Palega, and that was communicated to Mr. Palega through counsel, and that was the letter that was referred to before, and if it is in evidence it is in evidence, and that after that offer was communicated to Mr. Palega, he accepted it, I have no problem with that, with that kind of phraseology.

Ms. Backers did what Mr. Berger did, and so forth, I don't think should enter into this. I am prepared to stipulate that Mr. Palega wrote a letter—I mean Mr. Palega received a letter from Mr. Iuli.

THE COURT: All right. Well, then, we won't do it by stipulation. [¶] So Mr.—you wish to be heard on any of the other stuff, Mr. Ciraolo?

MR. CIRAOLO: Yes, your Honor. [¶] The other portions of it I believe deal with attorney-client privilege, I believe deal with the

opinion of Mr. Muraoka and his expertise and what he based that opinion on.

Furthermore, the ultimate substance of this whole exercise appears to be that Ms. Backers has rendered a personal opinion as to the moral justification of making an offer. And the personal belief and opinion of a direct attorney as to a person's guilt is misconduct.

The—I cite Witkin's Criminal Law, Second Edition, section 2908, volume 52909, 210 and 1999 supplement. The gist of all these authorities is that if the prosecutor, in closing argument, makes comments on the evidence, that is proper. If the prosecutor renders a personal opinion as to belief of guilt or innocence, that is misconduct and grounds for reversal. If the prosecutor vouches for the credibility of a witness, it could be misconduct. The one case cited dealt with the credibility of a witness in a plea bargain that was not read to the jury, was vouching, but under those circumstances was harmless.

THE COURT: Mr. Ciraolo, haven't you sort of thrown open the doors to what her motivation for making these offers was because your whole case so far has been based upon the implication that these offers were made in a fit of panic because your client pulled his time waiver?

MR. CIRAOLO: Your Honor—

THE COURT: Let me finish. [¶] So how do, in the spirit of fair play, in a search for the truth, do I allow Ms. Backers to rebut that insinuation that you've been raising throughout your entire cross-examination of both the last two witnesses where she is able to put on the record what maybe really happened.

MR. CIRAOLO: Your Honor, the way that can be done in fair play is as the court had previously ruled on this issue with Mr. Berger, by stipulation as to a time line. [¶] Ms. Backers may be able to make fair comment as to the evidence, but her personal opinions, especially when she talks of the moral judgment, I feel are completely inappropriate and would be grounds for reversal.

THE COURT: It may be inappropriate if done without you doing what you did, but I am not so sure it is inappropriate based upon the position you have taken. [¶] You have basically put her motivation at issue in front of the jury. And somehow she should be allowed to rebut what you inferred was—

MR. CIRAOLO: She could rebut it quite simply, is that even though this case was pending she had the opportunity to evaluate the case, look

at the evidence, and make decisions on the evidence that was presented to her. She doesn't have to talk about moral judgment. She doesn't have to talk about opinions of other counsel.

THE COURT: Well, if you take the word "moral" out of her offer of proof, isn't that what Mr. Muraoka would be testifying to?

MR. CIRAOLO: Then, your Honor, if Mr. Muraoka testifies aside from any privilege, I believe his testimony should be limited to he transmitted a communication to his client, his client accepted the offer. [¶] If she—why she made that offer at that time, the way she has presented it, involves an opinion of another witness, the credibility of another witness, and the moral judgment—excuse me.

The court is talking about fair play and fair comment. My opening statements indicated that the case did not have sufficient objective evidence to establish that my client was the shooter. She could argue that any way she can.

I submitted to the jurors that my position is that he is not the shooter, and that Ms. Backers realized that she needed more testimony. Whether she need each co-defendant to corroborate the other or not is for her to argue.

But I think this matter could be handled by stipulation or by restricted testimony aside from the Fifth or Sixth - - I am sorry - - the Sixth Amendment aspects and Mr. Muraoka's expertise.

THE COURT: Ms. Backers.

MS. BACKERS: Your Honor, the statements that were made in opening statement, and have been reiterated throughout the cross of Tony and Jay, are that I panicked when the time was pulled on March 3rd and thought I could not prove my case and that is why I had to lower the offer from second to a determinate.

And you have absolute offers of proof that that is not true. To the contrary, that in the discussions with Tony Iuli and in investigating the case, that I came to a moral decision that the two people in the front of the car did not want Nolan to get shot. And you have a witness who can testify to that.

THE COURT: Well—

MS. BACKERS: It is absolutely untrue.

THE COURT: I am not sure your moral decision is relevant. I mean, it may be relevant as your evaluation of the case, and based upon

your evaluation of the case you thought you could make these offers, but your moral judgment I don't think is something the jury needs to know about.

MS. BACKERS: If he told this jury, which he did, that the reason I extended those offers was because I believed I could not prove my case, that is a boldfaced untruth. And that is what he told this jury. And he has continued to pursue that avenue.

THE COURT: I understand that.

MS. BACKERS: That is not true. I never thought I couldn't prove my case. And he knows that one accomplice cannot corroborate another accomplice.

THE COURT: And the jury will be so instructed as to that.

MS. BACKERS: So making a deal—

THE COURT: Why are you insisting on using the word "moral" judgment?

MS. BACKERS: We could take the word "moral" out. The point of the matter is—

THE COURT: What Mr. Ciraolo says is that you can rebut it quite simply, even though this case was pending that you had the opportunity to evaluate the case, look at the evidence, and make decisions on information that was presented to you. That is the same way of saying what you want to say without putting the word "moral" into it.

MS. BACKERS: If you take the word "moral" out, we can still tell the jury the truth by having Mr. Muraoka testify that I told him I believed that the reason those two offers were made, and the offer to his client in particular was made, is because I believe that the people in the front of the van didn't want Nolan to get shot.

What I told Mr. Muraoka, if you take the word "moral" out of it, was that I believed Jay didn't want Nolan to die. And that is why I extended the offer. Not because I couldn't prove my case. [¶] And what he has perpetrated in this courtroom is not true. And I can rebut it with absolute testimony.

MR. CIRAOLO: Your Honor, the law has a simple solution to this matter. The law allows the prosecution to exercise their discretion in charging. The simple way is Ms. Backers exercised her prosecutorial discretion in making this offer.

Now, as far as—I don't recall using the words "panicked" in my opening statement. We looked at this once before.

THE COURT: Well, looks like a duck, smells like a duck, same thing, Mr. Ciraolo.

MR. CIRAOLO: Whatever it may be, the court previously indicated that was a fair comment on the evidence.

THE COURT: Absolutely.

MR. CIRAOLO: Okay. Now, she can make all kinds of fair comment, but what we are dealing with here is one, what she said, which is a hearsay, what she said deals with her motivation, and her motivation and her reasoning interjects personal opinion, which is improper under the authorities that I previously cited.

We are using the vehicle of another attorney, who, according to Ms. Backers, expressed his opinion. And the minute we get into Mr. Muraoka's opinion, then we start getting into his attorney-client privilege.

To deal with this matter and get this case going, I think the simple fact is, if the court want a stipulation, on such and such a day, a communication was made to Mr. Palega.

THE COURT: I know what the stipulation is.

MR. CIRAOLO: Okay.

THE COURT: The bottom line I am having trouble, I am not sure how we will resolve this, we are obviously going to hit a bump in the road that is going to throw us off time. I will have to look some stuff up, and I will have to continue the case after we are done with this witness.

I have no trouble with what has been said about her motivation versus what is probably the truth of the matter and the inferences that can be drawn from those assertions.

So what we will do is finish with this witness, we will recess as long as it takes me to figure out what I am going to do, research the law and explain it to the jury.

(13 RT 2961-2971.)

Ultimately, the trial court drafted the following stipulation on the matter, which was agreed to by both the prosecutor and defense counsel.

> If called to testify, Mr. William Muraoka, an assistant public defender in Alameda County, would testify that on or about May 15th of the year 2000 he had a conversation with Ms. Backers regarding the plea agreement entered into by his client [Jay Palega]. Ms. Backers indicated to Mr. Muraoka that based on her evaluation of the evidence as the deputy district attorney assigned to this case, that while she believed all four defendants were legally guilty of the murder, her review and evaluation of the evidence led her to believe it was appropriate for her to exercise her discretion as the prosecutor of the case, to enter into the plea agreements which have been stated on the record.

(13 RT 2998-3001.)

First and foremost, appellant agreed to the stipulation as worded with no objection. (13 RT 3001.) He thus has no right to now argue that the stipulation constituted reversible prosecutorial misconduct. Second, the trial court selected the wording of the stipulation, not the prosecutor (see 13 RT 2998), so there is no basis for appellant's claim that the challenged portion of the stipulation was a deliberate attempt at vouching by the prosecutor. Third, the stipulation clearly states that the prosecutor offered the plea agreements based on her "review and evaluation *of the evidence*" in the case (see 13 RT 3000, italics added), and not Iuli's and/or Palega's truthfulness or evidence not presented to the jury. The challenged statement did not constitute misconduct. (See *People v. Mincey* (1992) 2 Cal.4th 408, 447 ["A prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial."]; see also *People v. Bain* (1971) 5 Cal.3d 839, 848 [the danger that the jury will view a prosecutor's expressed belief in appellant's guilt as being based on outside evidence "is acute when the prosecutor offers his opinion and does not explicitly state that it is based solely on inferences from the evidence at trial"].)

3. Closing Remarks

Last, appellant challenges the following remarks made by the prosecutor in closing argument:

> The way we make specials apply to non killers, is we either make them have the intent to kill for the special to be true, or we say you are an aider and abettor and you acted with reckless indifference to life and you were a major participant in the crime. That is why all of the people in that van would be legally guilty of the specials if they were 16 or over.
>
> And it is because all of them went out with the intent to commit robberies and the intent to commit kidnaps, and they were all major participants in these robberies and kidnaps, and they all acted with reckless indifference to human life.
>
> So even Tony and Jay are legally guilty of the specials. And Tautai, the only reason Tautai isn't is because he was 15 years, nine months at the time. [¶] Now, you may wonder why I talk about that when it is clear that Paki is the killer and you don't need to find the intent to kill if he is the triggerman?
>
> Well, there is a very good reason why I even bring up the rules for non killers. Because all four of the men in that van Paki, Tony, Tautai, and Jay are legally guilty of first-degree murder and legally guilty of the specials. It doesn't mean that they all are morally guilty and deserve the same sentence.
>
> There is something in this case that you heard a stipulation on that is called discretion. And one of the absolute shams that have been perpetrated in this courtroom, throughout this trial, since September 18th, is that there was a prosecutor who panicked because she didn't have any evidence in the case and she made a deal with the devil to buy testimony.
>
> That could not be further from the truth. And you have absolute proof to the contrary. That is what you were told in your opening statement about the fact that Paki pulled time and I panicked and made a deal with the devil because I had no evidence.
>
> Remember the stipulations you got about the fact that when this information was filed against the defendant in June of 1997 that he legally had a right to trial within 60 days? [¶] In June of 1997, if you are sitting here and you are innocent and you have an airtight alibi, you

can have your trial in 60 days.

But he didn't. He waived time. He waived time. And that is proven by stipulation in this case. [¶] Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail.

The truth of this matter has been proven by stipulation; that I was assigned this trial at the end of 1997; that I had worked up both the penalty phase and the guilt phase and provided discovery to the defense over the years; both portions of the trial had been worked up.

By stipulations you have proof that Mr. Berger, Tony Iuli's lawyer, in 1999 approached me, not me going to them in a fit of desperation, but Mr. Berger approached me in the year of 1999 on at least three occasions asking for a deal for Tony.

Now, remember, Tony is the first one to confess. He is the first one to lay it out to the police. And sometimes when the police tell people that they will—things will work out better for them if they confess, that they will be presented in a better light to the prosecution, sometimes that actually comes true.

So in the middle of negotiations, this case— well, April this case was sent here for trial, in the year 2000. This case was sent here for trial. And as a starting point of negotiations, there was an offer made. And as a starting point in negotiations, the offer made was this: if you want to come in and talk about just the murder, you can have a first degree, dismiss the specials. If you want to come back and testify in penalty phase, testify for the prosecution in a death penalty trial about every other thing you know about the defendant, then you can have more of a benefit, you can have a second-degree murder.

Now, that has been portrayed to you in an absolutely false light. The light it was portrayed is this: if Paki gets convicted, you get a first; if he gets death, you get a second. That is a complete lie.

You heard the evidence in this case. The evidence is about snitch jackets and contracts to kill. The evidence is that when you testify against a triggerman in a case, your life is in jeopardy. The evidence in this case is clear, based on the cross-examination of Tony and Jay, that they have been promised they would be housed out of state after they testify.

Mr. Ciraolo asked them about false identities, being housed out of state, being protected because there are contracts, because they have

snitch jackets on them.

Ask yourself whether it is a reasonable inference based, on the video you have, that if a person comes in and testifies in the murder trial and just talks about the murder, that is one thing. But if they come back in the death penalty portion of the trial and testify about all the other things they know, whether or not they would be entitled to some greater benefit because they are placing themselves in greater jeopardy.

That is why those offers were made that way. [¶] So what happens? [¶] We come to trial. The offers are made. [¶] Before we go any further in this discussion, I wanted to say one thing. I, and I am sure you all heard it in jury selection in this case and that has to do with prosecution and law enforcement.

Throughout history, and Mr. Ciraolo bore this out in his questioning in each of you individually, prosecutors and law enforcement are always accused of abusing their power. And he talked to you about police framing people, abusing their power, not exercising their discretion with integrity. He even mentioned L.A. to some of you. [¶] So what happens in this case?

The evidence in this case comes forward, it is proven now to you, through stipulation, a prosecutor thoroughly prepares and evaluates her case, and she decides that while all four of them are legally guilty, there are some major differences between the men in that van.

And the differences are this: the two men in the front seat of that van wanted to let Nolan go. They wanted to let him live. They didn't believe Paki should shoot him. They even told Paki not to shoot him. Even Paki broke their code, their moral code, and they are criminals.

If somebody gives up their stuff, you let them go. But he broke their rule too. Instead of letting Nolan go, like they told him to, like they thought they should, he blew Nolan's chest apart.

There is a moral difference, not a legal difference, but a moral difference between the two in the front seat and the two in the back seat. And that is why there were different offers made. And that is only reason why.

The other thing portrayed to you in a false light was that Tony wasn't good enough for me so I had to go make a deal with the second devil, Jay. You will know at the end of this case that that is absolutely false. And the reason is each one of the laws you will be instructed on. You will be told Tony and Jay are accomplices as a matter of law.

Accomplices as a matter of law have to be corroborated because, like any person with common sense, you are going to distrust them.

So you are supposed to look to see if there is other evidence that would link the defendant to the crime besides their testimony. It is a common sense rule. [¶] Remember what I talked to each of you about whether you would approach it with a healthy skepticism.

So accomplices, as a matter of law have to be corroborated. One accomplice may not corroborate another. That is the law. Jay's testimony cannot corroborate Tony's.

So when Mr. Ciraolo told you that I had to go get a deal with Jay to make Tony's testimony better because I didn't trust Tony, that is all a lie, because one accomplice cannot corroborate another. [¶] So making a deal with Jay doesn't make my testimony with Tony any better. I can't use Jay to corroborate Tony and neither can you. So that tells you that the deal to Jay was made for a very different reason, not because I needed to bolster my case.

So the offers that were made, which you now have heard so much about, and you heard the actual conditions of the offer read to the witnesses while they were on the stand, is that those two men in the front seat who wanted to let Nolan go, let him live, got 16 years, eight months.

And clearly, after seeing Tautai testify, I think you can see why there is such a difference between the two in the front seat and the two in the back seat. I am sure you see that that discretion was exercised with a proper amount of integrity. Because once you met Tautai, and you saw his lack of moral fiber, I am sure that you could see that there was a big difference between the two in the back seat and the two in the front seat.

What you were told is that the reason those offers were lowered from a life top to a determinate term was because after he pulled time on March 3rd, I couldn't prove my case. That is what you were told. I want you to think about the evidence I have in this case and that you now know is true:

We have Nolan's belongings, almost all of his belongings, in the defendant's bedroom; [¶] We have Nolan's watch, his wedding gift in the defendant's front pocket; [¶] We have Nolan's engagement ring the defendant's front pocket; [¶] We have Nolan's blood on the defendant's glove; [¶] We have the defendant's thumb print next to that bloody glove; [¶] We have the murder weapon in the defendant's trunk to which he has the only keys; [¶] Just stop right there before you ever hear from

Tony, before you ever heard from Jay, if I stopped my case right there, that is more than enough to convict this man of this crime. But that is not all you heard.

We have DNA in four locations; [¶] We have an expended round right outside the defendant's bedroom window, that is identical to the rounds recovered inside the bag underneath defendant's bed, next to the defendants thumb print, where Nolan's blood is on the glove; [¶] We have an ATM surveillance tape; [¶] We have not one, but three confessions which say that Paki is the shooter.

You know how compelling and how strong the evidence is in this case. So now you know the truth about why those offers were made to Tony and Jay. [¶] Because they are called accomplices, Tony and Jay, there are special rules that apply to them. And that is because the law knows, and the law instructs you, that you should view their testimony with caution, with a careful eye.

(17 RT 3471- 3478.)

Appellant also challenges the following portion of the prosecutor's closing remarks:

On May 5th of this year in his conversation and interview with me, you now know that there were several times that he, Tony, told us that Jay was hollering at Paki not to shoot the guy, both in Samoan and English. And Tony asked me if I would give the same deal to Jay because both of them didn't want Nolan to get shot.

And after evaluating the evidence and the differences, the moral differences, between the guys in the front and the guys in the back, Tony said he felt bad for Jay because if Paki hadn't shot Nolan, if they had just done a robbery and let this guy go like they wanted, if Paki had just let him go that they would be out by now, they would have done a robbery, let the guy go, and they would be out of jail by now.

That is what they went out to do. But no, Paki had to kill the guy, so Tony told me, and he told you, that he felt bad for Jay because if Paki hadn't shot him they would have been out. [¶] So we talked about it, his involvement, Jay's involvement. And I told Tony that I would offer Jay the same deal that I offered him.

(17 RT 3512-3513.)

According to appellant, the prosecutor committed misconduct by using closing argument as an opportunity to "reveal in more express terms the

inferences she desired . . . [specifically presenting] her subjective state of mind as the index of her integrity and, thereby, the integrity of the prosecution itself." (AOB 68.) Appellant's claim is misplaced. Although the prosecutor discussed the differing levels of culpability between appellant, Tautai, Iuli, and Palegas, including their "moral" guilt, she did so only in the context of what *the evidence showed*, and in terms of *the participants'* moral code. She never invoked the prestige of her office or even her personal belief as to the differing levels of moral culpability of the participants. She also supported her remarks with detailed and specific references to the evidence. (See 17 RT 3474-3475, 3477-3478, 3512-3513.) The challenged portions of the prosecutor's argument did not constitute misconduct. (See *Ward*, *supra*, 36 Cal.4th at p. 215 [prosecutor is given wide latitude during closing argument; as long as argument amounts to fair comment of evidence, including reasonable inferences to be drawn, argument may be vigorous]; *Frye*, *supra*, 18 Cal.4th at p. 972 [it is not improper to attempt to persuade jury to draw inferences based on the evidence].)

To the extent appellant claims the prosecutor vouched for Iuli's and Palega's credibility because she discussed their testimony and thus implicitly argued to the jury they were telling the truth (see AOB 77), his claim is misplaced. As noted *ante*, a prosecutor like this one may properly argue that their witnesses are telling the truth based on the evidence presented at trial. What a prosecutor may not do is proffer her personal opinion as to guilt. (See *People v. Earp* (1999) 20 Cal.4th 826, 864; *Frye*, *supra*, 18 Cal.4th at p. 975.) That is not the case here.

4. The Challenged Statements By The Prosecutor Were Properly Made As Rebuttal

Even if this Court entertains appellant's claims that the prosecutor's questions to Iuli, the Muraoka stipulation, and closing remarks constituted

misconduct by vouching, these claims fail because the challenged questions and statements were asked and made as permissible rebuttal.

"[T]here is no misconduct and note, moreover, that even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, do not constitute misconduct. [Citation.]" (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.) In other words, rebuttal remarks by the prosecutor that are "fairly responsive to argument of defense counsel" and "based on the record" cannot constitute misconduct. (See *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1313.)

Here, during opening argument the defense told the jury that the prosecutor offered deals to Iuli and Palega because she could not prepare and prove her case within the 60 days required after appellant withdrew his time waiver. (6 RT 1643-1644.) Defense counsel revisited the issue during his cross examination of Iuli and Palega. (11 RT 2661-2665; 13 RT 2957-2958.) As the trial court held (see 13 RT 2965-2966), the prosecutor could properly rebut defense counsel's assertion that the prosecutor panicked when appellant withdrew his time waiver by informing the jury why she offered Iuli and Palega deals. Thus, in rebuttal, the prosecutor was entitled to tell the jury that she extended the deals not because she was pressed for time and lacked evidence, but because the evidence showed that while all four assailants were legally guilty of the charged crimes, there were differing levels of moral culpability among the men. The prosecutor argued that the decision to extend plea agreements to Iuli and Palega was based on the evidence and that this information was presented in response to defense counsel's statements to the contrary. (13 RT 3000; 17 RT 3472, 3475, 3477-3478, 3512-3513.) The comments were proper rebuttal. (See e.g., *Mendibles, supra,* 199 Cal.App.3d

at p. 1313.)[43/]

5. The Jury Did Not Apply Any Of The Complained-Of Remarks In An Objectionable Fashion

When a prosecutorial misconduct claim focuses on comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*Morales*, *supra*, 25 Cal.4th at p. 44; Cain, supra, 10 Cal.4th at p. 48.) Given that the Muraoka stipulation was agreed-upon evidence entered with the acceptance of both parties and the prosecutor's direct examination of Iuli was also part of the evidentiary portion of trial, our focus is solely on the prosecutor's challenged closing remarks.

The challenged portions of the prosecutor's closing remarks were not construed by the jury as either testimony or vouching as appellant implies. (AOB 70.) First, the prosecutor made clear she was simply rebutting defense counsel's opening remarks (17 RT 3472), using the evidence to highlight the differing levels of culpability between the four participants in an attempt to explain why Iuli and Palega received deals. (17 RT 3475, 3477-3478, 3512-3513.) There is no misconduct where the "prosecutor's statement did not implore jurors to forego their independent assessment of the evidence. . . ." (*Frye*, *supra*, 18 Cal.4th at p. 972.) Moreover, a comment during closing argument that merely asks the jury to reflect on the evidence is not reasonably likely to refer the jury to any personal knowledge or information held by the prosecutor but not admitted at trial. (See *Frye*, *supra*, 18 Cal.4th at p. 972.)

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43. Appellant claims that the prosecutor's "remedy for any defense misconduct in opening statement" was for her to "have objected and requested an admonition. [Citation.]" (AOB 46, see also AOB 48.) As noted by the trial court, defense counsel urged a fair inference on the evidence (see 10 RT 2399-2400); thus, there was no basis for the prosecutor to object. Both parties were free to argue their interpretation of the evidence to the jury.

Second, the closing remarks of an attorney are not considered evidence. (See CALCRIM No. 222.) The jury in this matter was instructed as such (17 RT 3428); the jury is presumed to follow instructions. (See *People v. Delgado* (1993) 5 Cal.4th 312, 331; see also *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396 [even if misconduct occurred, the prejudicial effect may be dissipated by an instruction that the statement of the attorneys are not evidence].)

Last, the challenged comments were relatively brief and isolated and the jury was twice instructed to find appellant guilty based only on the evidence. (See 17 RT 3438, 3611-3612.) There is no reasonable likelihood the jury misconstrued or misapplied the prosecutor's closing comments in an objectionable fashion.

6. No Federal Constitution Violation Occurred

Appellant contends that the alleged state law errors discussed above rose to the "egregious level" of federal constitutional violations. (AOB 78.) Specifically, he opines that the prosecutor functioned as "an advocate-witness" in violation of his Sixth Amendment confrontation rights (AOB 70, 79), and that because this was a capital case, her alleged misconduct constituted an Eighth Amendment violation of "a heightened degree of reliability . . . for factual determinations" (AOB 79), and violated due process (AOB 78).

California courts generally assume that prosecutorial misconduct "is error of less than federal constitutional magnitude." (*People v. Bolton* (1979) 23 Cal.3d 208, 214, fn. 4.) Further, a defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation. (See *People v. Davis* (1995) 10 Cal.4th 463, 506, fn. 7.)

Regarding the prosecutor's comments during closing argument, she was not functioning as an "advocate-witness;" rather she was summarizing her case for the jury before deliberations. Closing remarks are the attorney's opportunity

to "marshal the evidence . . . before submission of the case to judgment[]" and do not comprise testimony. (See *Herring v. New York* (1975) 422 U.S. 853, 862.) Further, it is permissible for the prosecutor to "interject her own view if it is based on facts of record. [Citation.]" (*Frye, supra*, 18 Cal.4th at p. 1018.)

Appellant opines that he is entitled to relief under the federal Constitution because "Ms. Backers' integrity, whether personal or official or both, and her 'expertise' in conducting prosecutions on behalf of the People, were factors external of the proper assessment of guilt *vel non* based on the facts of the case established by relevant and material evidence." (AOB 78.) The prosecutor here never discussed her integrity, reputation, or expertise with the jury. Moreover, there is no evidence that the jury decided this case based on the prosecutor's reputation rather than the evidence. As noted *ante* (see § C), the prosecutor did not commit misconduct under state law. Appellant has failed to show that the challenged actions denied him due process under the federal Constitution.

7. The Prosecutor's Reasons For Extending Plea Agreements To Iuli And Palega Constituted Relevant Evidence

Appellant argues that the prosecutor's selected questions to Iuli, the Muraoka stipulation, and the prosecutor's selected closing remarks were irrelevant. (AOB 43-46, 51, 52, 55-56.) Because appellant never objected on relevancy grounds during the challenged direct questioning of Iuli or during closing remarks, and *agreed* to the Muraoka stipulation as worded (13 RT 2998), there was no ruling made on relevancy grounds below. This claim should not be considered on appeal. (See *Carey, supra*, 41 Cal.4th at p. 126.) Regardless, appellant's claim has no merit.

"The trial court has broad discretion in determining the relevance of evidence. [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.) In reviewing a defendant's claim that the trial court erred because the challenged

evidence was irrelevant and inadmissible, the appellate courts must be cognizant of this broad discretion and "apply the deferential abuse of discretion standard." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) The court's decision will not be reversed absent a showing that such discretion was exercised in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.) "Evidence is relevant if it has *any* tendency in reason to prove or disprove a disputed fact at issue. [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 749, italics in original.)

During an out-of-court discussion, appellant's trial counsel conceded, and the trial court agreed, that the prosecutor's reasons for extending the plea deals to Iuli and Palega were relevant after defense counsel raised the issue in his opening statement. (6 RT 1643). Defense counsel stated, "Whether Ms. Backers had a case or not, what her rationale was or was not for making an offer, I believe is fair comment in opening statement and outline and final argument." (10 RT 2399.)

The following discussion on relevancy ensued:

> THE COURT: So what you are saying, Mike [defense counsel], is it is okay for you to raise an inference that she did this for a certain reason, but it is not okay for her to try to refute it.
>
> MR. CIRAOLO: I am not saying that.
>
> THE COURT: But that is what you are saying. Because you are saying that what you said was a fair inference on the evidence. And I don't disagree with that.
>
> MR. CIRAOLO: Okay.
>
> THE COURT: But she is certainly entitled to put before the jury her perspective so they can draw here inferences from the same evidence.
>
> MR. CIRAOLO: I don't disagree with the Court. *I think that it is appropriate.* But the way she plans to do it.

(10 RT 2399-2400, italics added.)

"The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of 'palpable error.'" (*People v. Carrera* (1989) 49 Cal.3d 291, 323.) Here, the trial court properly allowed the prosecutor to present evidence regarding her reasons for extending plea agreements to "offset any impression" left by defense counsel that she engaged in negotiations with Iuli and Palega because she had insufficient evidence to convict appellant and panicked when appellant withdrew his time waiver. (See e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1023 [prosecutor permitted to discuss an old negotiated plea not in evidence to rebut subject of leniency raised by the defendant].)

As to a challenge to the prosecutor's closing remarks, first and foremost, the prosecutor's statements about the difference in moral culpability between Iuli, Palega, appellant and Tautai was not evidence. The jury was so instructed. (17 RT 3428.) Thus, appellant cannot challenge her remarks under state evidentiary law.

Regardless, the prosecutor was vested with wide latitude to discuss and draw inferences from the evidence presented at trial. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) It was within the realm of proper argument for the prosecutor here to discuss Iuli and Palega's culpability based on the evidence showing they did not want Nolan killed. "Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 337.)

To the extent appellant acknowledges that the prosecutor's inference was reasonable but argues it was irrelevant and immaterial (see AOB 52), this claim should likewise be rejected. The content of Iuli's and Palega's "deals" and the circumstances surrounding their plea agreements, including how and why they were offered "deals" was at a minimum relevant to Iuli's and Palega's credibility, including whether they were biased and/or had any motive to lie.

> [T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. [Citation.] Indeed, . . . 'when an accomplice testifies for the prosecution, *full disclosure* of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility. [Citation.]

(*People v. Fauber* (1992) 2 Cal.4th 792, 821, italics added; see also *People v. Phillips* (1985) 41 Cal.3d 29, 46.)

Appellant contends that under *People v. Arends* (1957) 155 Cal.App.2d 496, 508-509, and *People v. Gambos* (1970) 5 Cal.App.3d 187, no "'open-the-door' doctrine exists in California[.]" (AOB 46.) Neither case held as much; regardless, both cases are distinguishable from this case.[44/] In *Arends*, prosecutor Ritzi was originally assigned to the case and fully prepared to try the matter. (*Arends, supra*, 155 Cal.App.2d at p. 506.) Ritzi did not try the case, however, but was called as a witness by the prosecutor to testify concerning a plea offer made to the defendant. (*Ibid.*) During cross-examination by defense counsel about the offer, Ritzi testified that he believed the defendant was guilty of the charged crimes. (*Id.* at p. 507.) He compounded this error by testifying that it was the policy of his office to dismiss a case unless it was believed that the defendant was guilty. (*Ibid.*) The court rejected the respondent's claim that defense counsel had "opened the door" to the witness's testimony by asking improper questions on cross-examination. (*Id.* at p. 508.) The court noted in relevant part that a party may not ask questions on cross-examination that are irrelevant simply because the subject matter of the questions was elicited on direct examination. (*Id.* at p. 509.) Here, in contrast, the trial court found, and defense counsel agreed, that the prosecutor's reasons for extending the plea agreement to Iuli and Palega were relevant. (See 10 RT 2399-2400.)

In *Gambos*, defense counsel announced his intention to examine a

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44. Because these are lower court decisions, they are not controlling in any event. (*People v. Camacho* (2000) 23 Cal.4th 824, 837.)

prosecution witness (a police officer) regarding a statement that the defendant's roommate had made to the officer. (*Gambos*, *supra*, 5 Cal.App.3d at p. 191.) Although the statement was hearsay, counsel argued it was admissible as a "declaration against interest." (*Ibid.*) Counsel failed to show, however, that the roommate was unavailable as required under Evidence Code section 1230. (*Id.* at p. 192.) The deputy district attorney did not object, hoping to use the opportunity to elicit a second inadmissible statement made to the officer by the roommate. (*Id.* at p. 192.) The *Gambo* court held that defense counsel had not "opened the door" to the prosecutor's questions. (*Ibid.*)

> By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called "open the door" or "open the gates" argument is "a popular fallacy." [Citations.]

(*Ibid.*)

As noted *ante*, the challenged evidence here was relevant and admissible; *Gambos* is thus inapposite.

Defense counsel told the jury that the prosecutor extended plea deals to Iuli and Palega because she did not have enough evidence to proceed to trial in 60 days. (6 RT 1643.) Counsel challenged the prosecutor's motives, competency, and most importantly her evidence at the beginning of trial. In response, the prosecutor simply elicited relevant evidence and argued her case to rebut defense counsel's suggested inferences. The admission of evidence regarding the prosecutor's reasons for offering plea deals constituted proper rebuttal evidence; the trial court did not abuse its discretion by ruling it admissible. (See *Cunningham*, *supra*, 25 Cal.4th at p. 1023 [prosecutor permitted to rebut the subject of leniency first raised by the defendant].)[45/]

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45. Where there is a possible overlap between appellant's relevancy argument and his prosecutorial misconduct claim, the admission and use of the evidence during the questioning of Iuli and the Muraoka stipulation did not amount to misconduct. "Although offering evidence the prosecutor *knows* is

8. Even Assuming Error, It Was Harmless

Assuming arguendo that the prosecutor's questions to Iuli, her closing remarks challenged by appellant, and the admission of the Muraoka stipulation constituted misconduct and involved the admission of irrelevant evidence, given there was overwhelming evidence of appellant's guilt, it is not reasonably probable appellant's verdict would have been more favorable without the prosecutor's remarks/questions and the introduction of the challenged evidence. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)[46/]

Appellant's intentions to commit robbery *and* murder were evident from his procurement of firearms and ammunition. He bought a sawed-off shotgun and a .22 rifle from his acquaintance, Brad Archibald, which he had Archibald alter to increase its ammunition capacity. (9 RT 2347, 2357, 2372, 2374, 2377, 2379-2380, 2385-2386, 2388-2389, 2392, 2427, 2429-2430; 10 RT 2467, 2496-2497.) Iuli saw the shotgun, rifle, and ammunition on appellant's bed (10

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inadmissible may be misconduct (*People v. Scott* (1997) 15 Cal.4th 1188, 1218), the adversarial process generally permits one party to offer evidence, and the other party to object if it wishes, without either party being considered to have committed misconduct." (*People v. Harris*, *supra*, 37 Cal.4th at p. 344, italics in original.)

46. Appellant claims that the federal "harmless beyond a reasonable doubt" standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, applies here. (AOB 46, 83, 89.) The law is clear, however, that the state law standard set forth in *Watson*, *supra*, 46 Cal.2d at p. 836, applies. Reversal is the appropriate remedy for prosecutorial misconduct only if, after an examination of the entire cause, including the evidence, it is reasonably probable a result more favorable to appellant would have been reached absent the offending comments. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Hines* (1997) 15 Cal.4th 997, 1037-1038; *Bain*, *supra*, 5 Cal.3d at p. 849; *People v. Fauber*, *supra*, 2 Cal.4th at p. 822.) Virtually the same standard is applied when considering the erroneous admission of irrelevant evidence. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Scheid* (1997) 16 Cal.4th 1, 21; *Rodrigues*, *supra*, 8 Cal.4th at p. 1125.)

RT 2468, 2470-2471, 2475-2476, 2499); according to Iuli, appellant was the only person to fire the shotgun. (10 RT 2496, 2499.) Palega testified that appellant kept the duffel bag containing the shotgun and ammunition hidden in the outbuilding fireplace. (12 RT 2738-2741, 2743-2744, 2754-2755.)

Approximately one week before the murder, appellant made his intentions clear; appellant exhibited the shotgun to Tautai, Iuli and Palega in the outbuilding (12 RT 2746-2747), and discussed using the gun to commit crimes. It was evident that the weapon was to be used to kill given that the men discussed the power of the shotgun (12 RT 2751-2752), "what type of ammunition would have more kick or which one would do more damage[]" (12 RT 2755), and how to wipe the gun of fingerprints. (12 RT 2793-2794).

The evidence of appellant's actions just before the murder also clearly evidence appellant's guilt. After he, Iuli, Palega, and Tautai spotted Nolan Pamintuan (10 RT 2530, 2535; 12 RT 2798, 2803, 2805, 2870), appellant removed the shotgun from the duffel bag and took care to make sure it was loaded before he and Iuli exited the minivan and trapped Nolan between the doors of their vehicle. (10 RT 2533-2534; 12 RT 2802, 2805-2806; 13 RT 2879, 2880.) When Nolan pled with the men, appellant was the one who threatened to shoot Nolan. (12 RT 2808.) When appellant ordered Nolan to withdraw money from an ATM machine, he threatened, "[G]o to the ATM and pull out money. If you plan on running, I'll shoot you." (10 RT 2550; 12 RT 2818.) He also ensured Nolan would be unable to escape by ordering Iuli and Tautai to block both sides of the ATM machine. (10 RT 2551-2552.)

While Tautai and Iuli walked Nolan to the ATM, it was appellant who kept the shotgun pointed at Nolan. (10 RT 2565; 12 RT 2818-2819.) After appellant took the $300 that Nolan had withdrawn from the ATM, he ordered Palega to drive to a dark area, exited the van, and ordered Nolan out. (11 RT 2585; 12 RT 2830, 2832, 2834-2835; 13 RT 2931.) In spite of the fact that

Palega told appellant not to kill Nolan, and Iuli opened his door to try to save Nolan, appellant told the others Nolan had to die because he had seen their faces. (10 RT 2569; 11 RT 2585, 2587; 12 RT 2823, 2836-2837.) Appellant then shot Nolan from a distance of only 18 to 36 inches. (9 RT 2290, 2298, 2321; 11 RT 2585, 2587; 12 RT 2837.)

Even after the murder, appellant's role as killer and leader of the group of men was evident. When the men returned home, they went to the outbuilding where appellant was in charge of dividing up Nolan's belongings. (12 RT 2849, 2856-2858.) He emptied Nolan's wallet and retrieved the $300 previously taken from Nolan. (12 RT 2849-2850, 2857.) Appellant then divided the money between himself, Iuli, Palega, and Tautai. (10 RT 2491; 11 RT 2624; 12 RT 2849-2851.) Appellant, however, kept the other spoils from the robbery: Nolan's wedding watch, Nolan's pager, Nolan's boots, Nolan's wallet, and Nolan's engagement ring which appellant wore. (12 RT 2851-2852, 2855, 2856, 2858.)

Overwhelming evidence of appellant's guilt was likewise evident in the days after the murder. Appellant kept the box for Nolan's watch on his coffee table, and Nolan's boots inside his fireplace, telling Iuli that the boots belonged to "that guy we lit up." (10 RT 2543; 11 RT 2597.) Appellant told his friends about the murder and showed them the shotgun he used to kill Nolan, portraying himself as the shooter. (13 RT 2881-2882, 2980-2981.) Most importantly, in each of their voluntary post-arrest statements, Iuli, Palega, and Tautai identified appellant as the killer. (11 RT 2585, 2587, 2698; 12 RT 2738, 2837; 13 RT 2920, 2990; 14 RT 3140, 3143-3144, 3204, 3206, 3211; 15 RT 3214-3215, 3222, 3224, 3226; 15 RT 3323, 3342-3343.)

As to the physical evidence of appellant's guilt, in total, Detective Hernandez recovered 22 items of evidence from the main house on Folsom Street and 96 items from the back area. (8 RT 2177-2178.) (See *People v.*

Snyder (2003) 112 Cal.App.4th 1200, 1225 ["a defendant's possession of recently stolen property is by itself sufficiently incriminating to warrant conviction, if coupled with only 'slight' corroboration by other inculpatory circumstances tending to show guilt"].) Appellant's bedroom was located in the outbuilding behind the main house. (12 RT 2728-2729; 15 RT 3217.) In that area alone, Detective Hernandez recovered the following: an abundance of indicia of appellant's ownership (7 RT 1890, 1898-1899; 8 RT 2008, 2137-2138, 2144); Nolan's boots (7 RT 1872, 1885); the contents of Nolan's wallet (7 RT 1892-1897); an ATM receipt for the $300 Nolan was forced to withdraw the night of the murder (7 RT 1896), a .22 caliber casing (7 RT 1900, 1902; 8 RT 2156), a live .22 Remington round (7 RT 1901), appellant's leather jacket with Nolan's blood on it (7 RT 1922; 8 RT 2156; 12 RT 2870), and a key to Nolan's Acura (7 RT 1925; 8 RT 2157, 2170). Detective Hernandez found the duffel bag under appellant's bed that contained a black bag full of live ammunition, a box of shotgun ammunition, a screwdriver, and a bloody gardening glove. (7 RT 1929; 8 RT 1936-1942, 1944, 1946, 1949, 2163-2166.) The blood on the glove tested positive as Nolan's blood. (15 RT 3243-3244, 3247-3251, 3255, 3322.) Appellant's thumb print was also found on one of the other boxes of shotgun ammunition near the bloody glove. (8 RT 2218-2220; 9 RT 2261-2267; 15 RT 3322.)

On the coffee table, Detective Hernandez recovered the black Movado watch box and appellant's photo album with "Mr. Smurf 1" written on it. (8 RT 1946, 1948, 2159; 10 RT 2478.) Near the outbuilding, Detective Hernandez recovered Nolan's pea coat (8 RT 1949, 1952, 2162), and Nolan's sport coat (7 RT 1887). Inside the sport coat, Detective Hernandez found Nolan's wedding "to do" list and breath mint wrappers that matched those found in the stolen minivan and in Nolan's Acura. (7 RT 1887-1888; 8 RT 2135-2136, 2160-2162.)

In a garbage-filled space between the outbuilding and the property fence, Detective Hernandez recovered an expended .12-gauge shotgun shell. (8 RT 1954, 1959-1960, 2166.) Matching breath mints and wrappers were found inside the stolen minivan (8 RT 2125), inside Nolan's sports coat (7 RT 1887-1888; 8 RT 2135, 2160), and inside Nolan's Acura (7 RT 1888; 8 RT 2129, 2130). More evidence of appellant's guilt was recovered from his brown Dodge. (8 RT 1966; 14 RT 3158-3159.) Inside the trunk, Detective Cardes recovered a .22-caliber rifle and loaded shotgun inside a pool cue bag. (8 RT 1966, 1967, 1969; 14 RT 3161, 3162, 3164.) When appellant was arrested, police found Nolan's black Movado wedding watch and his engagement ring in appellant's shirt pocket. (8 RT 1975; 13 RT 3012, 3112, 3113, 3130.)

Evidence of appellant's guilt was also presented through various prosecution witnesses. Dr. Thornton test-fired appellant's shotgun and examined the recovered cartridges found during the search. (8 RT 2026, 2055.) The firing pin impression left by the shotgun on the recovered rounds and his practice rounds had the same distinct markings. (8 RT 2047, 2050.) Dr. Thornton also concluded that the pellets and wadding recovered from Nolan's chest were an identical match to the recovered rounds. (8 RT 2051-2052, 2092.)

Michele Fox determined that the expended shotgun shell found next to the outbuilding was fired from appellant's shotgun and matched the pellets and wadding recovered from inside Nolan's body. (9 RT2268-2269, 2271, 2280.) Lisa Calandro found that the blood found on appellant's leather jacket was Nolan's. (15 RT 3243-3244, 3247, 3255.) Chris Pagtakhan identified incriminating fingerprints recovered at the scene, including appellant's left thumb print on a box of the Remington shotgun ammunition recovered inside the duffel bag. (8 RT 2207-2208, 2218-2220; 9 RT 2261-2267.)

Evidence adduced during appellant's case-in-chief further supported the

jury's finding of guilt. For instance, appellant's brother Tautai knew he could not receive the death penalty because of his age at the time of the murder. (15 3320-3321.) He admitted that he was aware that changing his earlier claim that appellant shot Nolan and implicating himself as the shooter would have no effect on his sentence. (15 RT 3340.) Moreover, Tautai's testimony was wrought with falsehood and inconsistency. First, he insisted that although he was the youngest person inside the van, the others took orders from him.[47/] (15 RT 3330; 16 RT 3379.) Second, Tautai testified that he, Palega, Iuli, and a friend intended to perform a gang-related drive-by shooting. (15 RT 3283-3284, 3346.) Although gang members had been bothering appellant, the others allegedly left appellant at home. (15 RT 3347.) Third, at different times during his testimony, Tautai admitted that Nolan was not a gang member, but a stranger (see e.g., 15 RT 3287), and then inconsistently testified he killed Nolan to earn his stripes as a gangster. (15 RT 3300, 3325, 3328, 3333.) Fourth, Tautai provided no reason why he allegedly wore appellant's black leather jacket to commit the murder. (15 RT 3307-3308.)

Tautai's statement to police further destroyed his credibility. First, he told police he shot Nolan. (15 RT 3309.) Second, he told them he had robbed a drug dealer. (15 RT 3309, 3357; 16 RT 3377.) Third, Tautai admitted appellant was present, but insisted that he, and not appellant, accidentally shot Nolan. (15 RT 3309, 3353-3354.) Fourth, Tautai admitted that appellant shot Nolan, but claimed that the gun had accidentally fired when he tried to grab the gun from appellant. (15 RT 3272, 3309; 16 RT 3380-3381.) Tautai also told police that he knew Nolan and that Nolan had given him "mouth" before. (16 RT 3381.) At trial, however, Tautai admitted that Nolan was a complete

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47. This was highly unlikely as Tautai had so little respect from the older men that Palega made him relinquish Nolan's Gucci watch, the only item of value item he received from the robbery and murder. (12 RT 2853.)

stranger. (16 RT 3381.)

Although Tautai testified that the men's friend Roger Prasad was a major player in the robbery, kidnaping, and murder of Nolan, Tautai never mentioned Prasad to the police and did not name him until trial. (12 RT 2733; 15 RT 3276, 3283, 3289-3291, 3293; 16 RT 3355, 3378-3379.) At trial, Tautai supplied additional reasons for naming appellant as shooter; he insisted he did so because appellant was better equipped for prison life due to prior incarceration (15 RT 3310), and because Tautai would become the first in line to ascend to tribal chief of the family if appellant were in prison. (15 RT 3311, 3324-3325, 3345.) In addition, while incarcerated, appellant had told Tautai to take the blame. (11 RT 2635; 13 RT 2884, 2952.)

Appellant's wife, Lucy also provided evidence of appellant's guilt through her inconsistent and unbelievable testimony. At trial, Lucy claimed that on the night of the murder, appellant helped her prepare and clean up after dinner. (14 RT 3053, 3056, 3057.) Lucy and appellant then slept on the floor inside the main house. (14 RT 358, 3059.) Appellant did not awake during the night and was still asleep the next morning when Lucy woke up. (14 RT 3060.) Lucy maintained appellant was innocent because he had spent the night with her. (14 RT 3050, 3079.) She did not, however, disclose this alibi to police or anyone else for over four years after the murder when she agreed to testify for the defense. (14 RT 3050-3053, 3077.) According to Lucy, she failed to come forward to save her husband because she had been so frightened by his arrest. (14 RT 3087.) She admitted, however, that she had never been handcuffed when appellant was arrested, nor were any women or children forced to the ground at the time of his arrest. (14 RT 3078, 3082.) She also admitted that police only searched her outside her clothes and then permitted her to walk home. (14 RT 3045, 3048, 3079.) When asked on cross-examination about speaking to Detective Cardes about the keys to appellant's Dodge, and/or her

conversation with police about the murder, Lucy initially denied the conversations, even though the conversation was tape-recorded by police. (14 RT 3078, 3089, 3090-3093). On redirect, however, she remembered the conversation. (14 RT 3094, 3095.)[48/]

Based on this overwhelming evidence of appellant's guilt, it is not reasonably probable appellant's verdict would have been more favorable without the challenged testimony, evidence and argument. (See *Scheid, supra*, 16 Cal.4th at p. 21; *Hines, supra*, 15 Cal.4th at pp. 1037-1038.)

9. Defense Counsel's Failure To Object Does Not Constitute Ineffective Assistance Of Counsel

Appellant also seeks relief by attacking the competency of his trial counsel. Appellant argues that counsel's failure to object to the challenged direct examination questions posed to Iuli, the Muraoka stipulation, and the prosecutor's closing argument, fell below "professional norms." (AOB 80.) Appellant fails to establish his burden of showing ineffective assistance of counsel.

To succeed on an ineffective assistance of counsel claim, appellant must show that his counsel's performance fell below minimal professional standards. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Holt* (1997) 15 Cal.4th 619, 703.) An appellate court must presume counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. (*Holt, supra*, 15 Cal.4th at p. 703.) Great deference is afforded to counsel's tactical decisions. (*Ibid.*)

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48. Lucy's credibility was further weakened by her admission that she committed welfare fraud and perjury every month by failing to report any change in her living status, her marriage, and appellant's incarceration (14 RT 3071-3072, 3074, 3076), her use of her daughter's welfare money to pay for appellant's jail costs (14 RT 3033, 3067, 3073-3076), and the fact that she was currently on probation for committing three felonies. (14 RT 3052, 3078.)

Appellant must also affirmatively prove prejudice. (*Holt*, *supra,* 15 Cal.4th at p. 703.) Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors," the result of the trial would have been different. (*Id.* at p. 704.) A reasonable probability is "a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.)

Generally, it is appropriate to raise a claim of ineffective assistance of counsel in a writ of habeas corpus rather than on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 ["claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding"].) Ineffective assistance of counsel may be addressed exclusively on direct appeal where there appears no satisfactory explanation for trial counsel's actions. (*People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Rios* (1992) 9 Cal.App.4th 692, 704.) However, "If the record sheds no light in why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one or unless there could be no satisfactory explanation, the case is to affirmed on appeal. [Citations.]" (*Rios*, *supra*, 9 Cal.App.4th at p.704, original italics omitted.) This Court makes clear that an appellate court should not brand an attorney incompetent "unless it can be truly confident all the relevant facts have been developed . . . ." (*Mendoza Tello*, *supra*, 15 Cal.4th at p. 267.)

Appellant argues that his attorney rendered ineffective assistance by failing to object to the prosecutor's questions and remarks regarding her reasons for extending plea deals to Iuli and Palega. He cites *People v. Donaldson* (2001) 93 Cal.App.4th 916, for the proposition that his claim should be considered on direct appeal. (AOB 81.) First, while the court in *Donaldson* reversed the defendant's conviction on direct appeal based on her claim of ineffective assistance of counsel, the court did so based on the facts of that case

as noted *post.* (See *id.* at pp. 918-932.) The court did not generally hold that a claim of ineffective assistance of counsel should be considered on direct appeal. Here, the record shows that defense counsel had reasons for not objecting to the prosecutor's questions and closing remarks. As the trial court properly found, appellant raised the issue of Iuli's and Palega's plea deals during his opening remarks. (6 RT 1643-1644.) According to the trial court, appellant was entitled to make these inferences. (See 10 RT 2399-2400.) As such, he had no reason to object to the prosecutor rebutting his remarks by offering the jury a contrary inference. Thus, a writ of habeas corpus rather than direct appeal is the proper vehicle for review of appellant's claim. (See *Mendoza Tello*, *supra*, 15 Cal.4th at pp. 265-267; *Wilson*, *supra*, 3 Cal.4th at p. 936; *Rios*, *supra*, 9 Cal.App.4th at p. 704.)

Even if this Court considers appellant's ineffective assistance claim on direct appeal, it is without merit. In order to show that counsel's performance was constitutionally deficient, "appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) Ineffective assistance must be shown as a demonstrable reality. Speculation will not suffice. (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

Appellant argues that counsel was incompetent for failing to object to the prosecutor's alleged misconduct during trial and her closing remarks regarding her reasons for extending the plea deals to Iuli and Palega. (AOB 80-81.) First, the mere failure to object to evidence or argument has seldom been found to reflect trial counsel's incompetence. (*People v. Maury* (2003) 30 Cal.4th 342, 419 ["failure to object will rarely establish ineffective assistance"]; see also *People v. Vieira* (2005) 35 Cal.4th 264, 297 [defense counsel's failure to object to prosecutorial argument can lead to forfeiture of the claim on appeal

but does "not necessarily constitute ineffective assistance of counsel"].) Second, "the choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal. [Citation.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 749.) Further, great deference is afforded to counsel's tactical decisions. (See *Holt*, *supra*, 15 Cal.4th at p. 703.)

Here, trial counsel questioned the prosecutor's reasons for extending Iuli and Palega plea deals in front of the jury and could lodge no legitimate objection to the prosecutor's decision to rebut his inaccurate remarks. In addition, instead of objecting, defense counsel attacked the prosecutor's motivation through thorough cross-examination of Iuli and Palega. (11 RT 2661-2665; 13 RT 2957-2958.) Counsel's failure to object was not objectively unreasonable.

Appellant supports his ineffective assistance claim with *Donaldson*, *supra*, 93 Cal.App.4th 916. (AOB 80.) *Donaldson* is inapposite. In *Donaldson*, the prosecutor called herself to the stand as a witness in order to impeach her own witness with a prior inconsistent statement and to testify about her own personal beliefs regarding the defendant's guilt. (*Id.* at p. 916.) Defense counsel not only failed to lodge an appropriate objection, but asked questions about the prosecutor's personal beliefs regarding the victim's credibility. (*Id.* at pp. 923-927.)

The Court of Appeal reversed the judgment and found that defense counsel had rendered ineffective assistance. (*Donaldson*, *supra*, 93 Cal.App.4th at p. 919.) The court held that defense counsel should have objected under the Rules of Professional Conduct to the prosecutor's inappropriate testimony about the witness's credibility and the defendant's guilt. (*Id.* at pp. 931-932.)

Although appellant concedes that the prosecutor here did not testify as a witness like the prosecutor in *Donaldson*, appellant argues that "the admission

of immaterial evidence regarding her extrajudicial statements to Mr. Muraoka about the case, and her assertions in closing argument were the functional equivalent of the prosecutor's testimony in *Donaldson*." (AOB 81.) Clearly, there is a marked difference between the prosecutor's proper questioning, stipulations, and closing remarks in this case and calling oneself as a witness to discuss one's personal opinions on guilt and veracity as in *Donaldson*. Appellant has failed to show that defense counsel's failure to object to the challenged remarks was objectively unreasonable. Because appellant failed to prove the first prong of *Strickland*, his claim must be rejected. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687 [defendant must prove both prongs of *Strickland* test to prevail].) Regardless, appellant has failed to show he was prejudiced by counsel's failure to object.

Appellant generally refers to "these errors" in his argument but does not show how the specific errors he raised *ante* (i.e., the direct examination of Iuli, the Muraoka stipulation, and the prosecutor's closing remarks), amounted to prejudice worthy of remedy. Appellant's prejudice argument essentially consists of his displeasure with the prosecutor's confidence in her case and with her style of argument. (See AOB 82-89.) He cites no case law holding that effective advocacy or appellate counsel's dissatisfaction with a prosecutor's case presentation amounts to prejudice. In any event, the jury heard evidence detailing the events of the murder, including Iuli's and Palega's live testimony. It was thus free to determine whether the witnesses were credible. Given that, and the overwhelming evidence supporting the jury's finding of guilt in this case (see § I, *ante*), appellant was not prejudiced by counsel's failure to object to the challenged remarks at trial.

Appellant's failure to object to the challenged remarks and evidence waives his claims of prosecutorial misconduct and evidentiary error on appeal. Regardless, his claims fail on the merits. The prosecutor's actions did not

constitute misconduct because they were based on the evidence and offered as rebuttal. Further, it was not reasonably likely that the jury misapplied any of the prosecutor's remarks in an objectionable fashion. Likewise, the trial court's decision to allow the prosecutor to rebut defense counsel's opening remarks about the prosecutor's reasons for extending plea deals did not amount to the erroneous admission of irrelevant evidence. Rather, the comments were relevant rebuttal evidence. Last, even assuming arguendo that any error occurred below, it was harmless in light of the overwhelming evidence of appellant's guilt. Appellant has also failed to show that counsel's failure to object was objectively unreasonable or prejudicial; his claim of ineffective assistance of counsel should be rejected.

II.

THE PROSECUTOR DID NOT COMMIT *DOYLE* ERROR

Appellant points to the following passage from the prosecutor's closing argument and, citing *Doyle v. Ohio* (1976) 426 U.S. 610, claims the prosecutor committed misconduct by improperly commenting on his post-arrest silence. (AOB 89-97.)

> . . . one of the absolute shams that has been perpetrated in this courtroom, throughout this trial, since September 18th, is that there was a prosecutor who panicked because she didn't have any evidence in the case and she made a deal with the devil to buy testimony.
>
> That could not be further from the truth. And you have absolute proof to the contrary. That is what you were told in your opening statement about the fact that Paki pulled time and I panicked and made a deal with the devil because I had no evidence.
>
> *Remember the stipulations you got about the fact that when this information was filed against the defendant in June of 1997 that he legally had a right to trial within 60 days?*
>
> *In June of 1997, if you are sitting here and you are innocent and you have an airtight alibi, you can have your trial in 60 days.*
>
> *But he didn't. He waived time. And that is proven by stipulation in*

this case. [¶] *Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail.*

The truth of this matter has been proven by stipulation; that I was assigned this trial at the end of 1997; that I had worked up both the penalty phase and the guilt phase and provided discovery to the defense over the years; both portions of the trial had been worked up.

By stipulation you have proof that Mr. Berger, Tony Iuli's lawyer, in 1999 approached me, not me going to them in a fit of desperation, but Mr. Berger approached me in the year of 1999 on at least three occasions asking for a deal for Tony.

(17 RT 3472-34730, italics added.)

Appellant forfeited his misconduct and *Doyle* error claims when he failed to object on state and federal grounds and/or to request an admonition. Regardless, the claims fail on the merits.

A. Applicable Legal Principles

Doyle v. Ohio, *supra*, 426 U.S. 611, holds that a prosecutor violates due process if she uses a defendant's post-arrest silence to impeach his "exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda*[49] warnings at the time of his arrest." The Supreme Court has explained its rationale as follows:

> [The] use of silence for impeachment [is] fundamentally unfair . . . because "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him . . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."

(*Fletcher v. Weir* (1982) 455 U.S. 603, 606.)

> *Doyle* stands for the more general principle that a person's silence in apparent reliance on *Miranda* advice cannot be used against him or her in a criminal trial. By extension, the prosecution also cannot use a person's refusal to answer questions or his or her invocation of the right

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49. *Miranda v. Arizona* (1966) 384 U.S. 436, 467-473.

to remain silent or the right to counsel. [Citations.]

(*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1525-1526.)

B. Appellant Has Waived His Claim Of Prosecutorial Misconduct Based On *Doyle* Error

This Court has repeatedly upheld the requirement that a defendant must make timely and appropriate objections in order to preserve state and federal claims and must request a curative admonition where appropriate. (*Olano*, *supra*, 507 U.S. at p. 731; *Tafoya*, *supra*, 42 Cal.4th at pp. 166, 176 [must object on Sixth Amendment grounds and seek a curative admonition to statements constituting misconduct in the trial court]; *People v. Thornton*, *supra*, 41 Cal.4th at p. 454 [must object on prosecutorial misconduct grounds and request admonition or the claim is forfeited].) This requirement applies equally to claims of *Doyle* error. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1207 [defendant forfeited claim of *Doyle* error by failing to make a timely and specific objection at trial].)

Where a defendant fails to pose a timely and specific objection at trial, his claim must "be rejected on appeal, unless it could be said that even had there been a timely objection, an admonition to the jury could not have cured the error. [Citation.]" (*People v. Kelly* (1981) 125 Cal.App.3d 575, 581.) Appellant claims that an objection and request for admonition would have been "useless" because when the prosecutor accused appellant "of manufacturing [his] alibi four-and-a-half years later, no admonition could keep the jurors . . . from viewing the Berger stipulations as impeachment of appellant's alibi." (AOB 96.) Appellant's claim assumes the jury cannot follow instructions. We must, of course, presume otherwise. (*People v. Morales*, *supra*, 25 Cal.4th at p. 47; see also *People v. Green* (1980) 27 Cal.3d 1, 34-35, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [prosecutorial misconduct challenge to remarks, including one expressing disbelief in the

defendant's alibi, could have been cured by timely objection and admonition].) In any event, there is no basis for appellant's claim of *Doyle* error.

C. The Prosecutor Did Not Commit *Doyle* Error

Appellant argues that the prosecutor's argument to the jury that appellant did not come forward with his alibi until well over four years after he was arrested violated due process under *Doyle*. (AOB 91.) Appellant's interpretation of the prosecutor's closing remarks is inaccurate and his reliance on *Doyle* is misplaced. *Doyle* involved the specific instance where a defendant immediately invoked his right to remain silent under *Miranda* and made no post-arrest statements to the police. (*Doyle*, *supra*, 426 U.S. at p. 610.) At trial, the defendant in *Doyle* claimed for the first time he had been framed. (*Id.* at p. 612-613.) In response, the prosecutor asked the defendant on cross-examination why he had not told the police when he was arrested that he had been framed. (*Id.* at p. 613.) *Doyle* found this line of questioning erroneous and held:

> The use for impeachment purposes of petitioners' silence, at the time of arrest and after they receive *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. Post-arrest silence following such warnings is insolubly ambiguous; moreover, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by the *Miranda* warnings, that silence would carry no penalty.

(*Id.* at p. 610.)

Here, appellant takes issue not with cross-examination during trial, but the prosecutor's closing remarks. (AOB 90, 91.) Appellant fails to understand *Doyle* error. *Doyle* applies only where the defendant testifies and is cross-examined about his post-*Miranda* silence. (*Doyle*, *supra*, 426 U.S. at pp. 610-613.) Appellant's claim ignores the fact that he never testified and was not cross-examined. *Doyle* does not apply to the case at bar.

In addition, the prosecutor's select comments focused on appellant's

decision to waive time after the information was filed in 1997. (17 RT 3472-3473.) No amount of creative interpretation changes the fact that the prosecutor did not specifically comment on appellant's 1996 post-arrest and post-*Miranda* silence. Further, any comment about silence was plainly directed at Lucy's decision not to come forward with appellant's alibi and not appellant's post-arrest silence. (17 RT 3472-3473.)

Finally, unlike *Doyle* where the defendant testified for the first time at trial about his possible defense, appellant never testified; Lucy testified about the alibi defense. The prosecutor not only properly cross-examined her on her four-and-one-half year silence, but also properly pointed out for the jury that she remained silent while her allegedly innocent husband remained incarcerated. (17 RT 3472-3473.) The closing remark was not an improper comment on appellant's silence, but was a valid attack on Lucy's credibility. (See e.g., *People v. Garrison* (1966) 246 Cal.App.2d 343, 354-355.) Moreover, while the prosecutor did not argue in the challenged portion of her closing that appellant used Lucy's delay in coming forward to fabricate an alibi (see AOB 94), she was certainly entitled to urge that inference as well.

Appellant also argues that under *Doyle*, the prosecutor's closing remarks violated his federal constitutional rights under the Sixth and Eighth Amendments. (AOB 91-92, 97.) Appellant cannot cite to anywhere in *Doyle* where the United States Supreme Court spoke to these rights or expanded its holding beyond the Fourteenth Amendment. Appellant instead relies on *Marshall v. Hendricks* (3d Cir. 2002) 307 F.3d 36, 70-71 to support his claim that *Doyle* applies to prosecutorial abuses of any enumerated right. (AOB 92.) Federal law as determined by the U.S. Court of Appeals for the Third Circuit, however, is not binding on this Court. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [state courts are not bound by lower federal court decisions even on federal questions]; see also *Belshe v. Hope* (1995) 33 Cal.App.4th 161, 171 [lower

federal court cases merely provide persuasive authority and are not binding on state appellate courts].) Besides, since *Doyle* was not violated in this case, appellant's attempt to create federal constitutional error where there is none cannot prevail. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7 [a defendant does not create a federal constitutional violation by simply recasting his state law claim "under constitutional labels"].)

Appellant now offers his own explanations about why he delayed going to trial and why the alibi evidence took so long to surface. (AOB 93-94.) An appeal is not the proper forum for appellant to relitigate his case. Besides, defense counsel argued to the jury during closing that Lucy's alibi testimony should be believed and provided the jury with explanations for her failure to come forward earlier. (See 17 RT 3585-3586.) The issue does not fall within the situation contemplated by *Doyle*.

D. Because There Was No Doyle Error, There Was No Prosecutorial Misconduct

In a related claim, appellant contends that because the prosecutor's argument violated *Doyle* it also constituted prosecutorial misconduct. (AOB 90-91.) A prosecutor's conduct amounts to prosecutorial misconduct under state law "only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*Morales*, *supra*, 25 Cal.4th at p. 44.) "Regarding the scope of permissible prosecutorial argument, . . . a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill* (1998) 17 Cal.4th 800, 819-820, internal quotation marks omitted; see also *Frye*, *supra*, 18 Cal.4th at p. 1018.) A prosecutor may attack the credibility of a witness during closing argument. (See *People v. Babbit* (1988) 45 Cal.3d 660, 702.) A prosecutor may also comment on the fact that a defendant's

defense is a recent fabrication as long as it is supported by the evidence. (*People v. Mitchum* (1992) 1 Cal.4th 1027, 1081-1082.)

As shown above, the prosecutor did not violate *Doyle*; she therefore did not use deceptive or reprehensible methods in an attempt to persuade the jury. Her comment on appellant's decision not to waive time simply urged the inference that based on her tardiness in coming forward with appellant's alibi, Lucy did not provide appellant with a believable defense. (See *Earp*, *supra*, 20 Cal.4th at pp. 862-863; *Hill*, *supra*, 17 Cal.4th at pp. 819-820; *Babbit*, *supra*, 45 Cal.3d at p. 702; *Garrison*, *supra*, 246 Cal.App.2d at pp. 354-355.) The argument was proper.

E. Even Assuming Misconduct, Appellant Was Not Prejudiced

Even if the prosecutor's closing remarks violated *Doyle* and constituted prosecutorial misconduct, any error was harmless given it is not reasonably probable a result more favorable to appellant would have been reached absent the offending comments. (*Barnett*, *supra*, 17 Cal.4th at p. 1133; *Hines*, *supra*, 15 Cal.4th at pp. 1036-1038; *Bain*, *supra*, 5 Cal.3d at p. 849; *Fauber*, *supra*, 2 Cal.4th at p. 822)[50/]

Appellant contends that "the jurors could have found a reasonable doubt as to [appellant's] alibi since this alibi had circumstantial support and did not have to rely solely on the credibility of a wife testifying on behalf of her husband." (AOB 97.) Appellant ignores the fact that in order for the jury to believe appellant's alibi defense, it had to find Lucy credible. The record shows otherwise.

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50. Appellant again argues that the "harmless beyond a reasonable doubt" (see *Chapman v. California*, *supra*, 386 U.S. at 24), standard applies. (AOB 97.) It is well-settled, however, that the state law harmless error standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at p. 836 applies to a claim of prosecutorial misconduct. (See Arg. I, § I *ante*.)

Lucy claimed she was too scared from the arrest to come forward with the alibi defense until over two years after the murder. (14 RT 3061, 3087.) By her own admission, though, Lucy was only pat searched; she was not handcuffed or forced to the ground, and was ultimately permitted to walk home with her family. (14 RT 3045-3046, 3048, 3078-3079, 3082.) Thus, the evidence belies her claim of fear. Moreover, Lucy could have told Detective Cardes about appellant's alibi when he spoke with her at her home and invited her to talk with him at the police station. (See 14 RT 3159, 3161.) She did neither. Lucy remained silent during direct examination and on cross-examination denied speaking to Detective Cardes at all.[51] (14 RT 3078, 3089, 3091-3093.) The prosecution further destroyed Lucy's credibility by exposing her criminal record (14 RT 3052, 3078), her welfare fraud (14 RT 3071-3074, 3076, 3098-3099, 3103), and her use of her child's welfare aid money to support appellant in jail. (14 RT 3073-3076.) The prosecutor's argument did not preclude the jury from agreeing with appellant's version of events; i.e., that Lucy was credible and that appellant was home the night of the murder. It merely urged a contrary inference.

Regardless, in light of the overwhelming evidence of appellant's guilt as discussed in respondent's Argument I, subsection I, and adopted herein, it is not reasonably probable appellant's result would have been more favorable had the prosecutor not reminded the jury that Lucy did not come forth with appellant's possible alibi for well over four years after his arrest. Any assumed error was harmless.

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51. Lucy changed her story on redirect examination and admitted that Detective Cardes attempted to talk to her at the Folsom Street house. (14 RT 3094-3095.)

III.

THE PROSECUTOR DID NOT IMPUGN THE INTEGRITY OF DEFENSE COUNSEL

Appellant contends that the prosecutor committed prosecutorial misconduct by impugning defense counsel's integrity, arguing that defense counsel "knew appellant was guilty," and that counsel fabricated appellant's defense. (AOB 97, 100, 101.) Appellant further asserts that select portions of the prosecutor's remarks in closing and rebuttal (see *post*) allowed the prosecutor to enter irrelevant evidence, and violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 97, 102-104.) Appellant forfeited his claims by failing to object and/or to request a timely admonition. Even if this Court considers appellant's claims, they fail on the merits.

A. Appellant Forfeited His Prosecutorial Misconduct And Federal Constitutional Claims

Appellant concedes that he did not lodge the appropriate objections. (AOB 102.) As discussed *ante* (see Args. I, § B, II, § B & authorities cited therein), appellant's failure to make timely and appropriate objections has waived his claims on appeal.

Appellant attempts to salvage his claims by arguing that the trial court's previous rulings about the prosecutor's alleged state of mind as to the plea agreements reached with Iuli and Palega (see Arg. I, *ante*), show that an objection based on the current issue, i.e. the prosecutor's alleged attempt to impugn the integrity of defense counsel, would not have been upheld. (AOB 102.) This is pure conjecture. The argument presumes that the trial court could not discern the difference between these two distinct claims of misconduct which were based on different statements, evidence, and which occurred at different parts of the trial. We must presume otherwise. (See Evid. Code, § 664.)

Appellant also baldly states that an admonition would be "fruitless" and suggests that the jury would not have "been able to follow a curative admonition." (AOB 102.) Appellant ignores recognized presumptions in the law. (*People v. Burgener* (2003) 29 Cal.4th 833, 873 ["In the absence of evidence to the contrary," jurors are presumed to follow admonitions]; *People v. Brigham* (1979) 25 Cal.3d 283, 314.) Appellant shows no persuasive reason why the jury would have been unable to follow any appropriate curative admonitions given by the court; his prosecutorial misconduct claim is forfeited.

B. The Prosecutor Did Not Commit Misconduct; The Challenged Remarks Were Relevant

Appellant asserts that the prosecutor engaged in prejudicial misconduct by impugning the integrity of defense counsel with the following closing remarks:

> You met Detective Cardes. And he had different things to say about this case. The things that are important for this conversation we are having right now is that he attended this autopsy. And while he was at the autopsy, he personally saw and photographed Dr. Tschetter removing the pellets and wadding from Nolan's chest.
>
> There has been a lot said about that wadding in this case. And Mr. Ciraolo asked Dr. Tschetter: Well, you didn't dictate into your autopsy report, so how do you know it actually came out of Nolan's chest?
>
> And Dr. Tschetter told you: Because I took it out. I put it in this Petri dish. I labeled it: Pellets and wadding from Nolan's right chest. Then it was inside this envelope, which I also signed which said: Pellets and wadding from Nolan's right chest.
>
> And now we know there is a photograph of it lying on the table in the coroner's office covered in blood.
>
> And you might ask yourself: Why is all this hullabaloo being made about this wadding?
>
> I will tell you why.
>
> That wadding was imbedded [*sic*] in Nolan's chest. And that means this shooting was at close range.

Well, why does Mr. Ciraolo care if the shooting was at close range if Tautai is the shooter?

Why does he care?

Because he knows you are not going to believe that Tautai is the shooter. He knows that Paki is the shooter. And he is hedging his bets by making all this conversation about this wadding because he knows that you know Paki is the shooter.

(17 RT 3436-3437, italics added.)

Appellant also challenges the following portion of the prosecutor's rebuttal remarks.

There are several shams that have been put forward to you in the hopes that you might believe one of them. And these are those:

Number one, that the wadding didn't really come from Nolan's chest;

Number two, that after March 3rd the prosecution realized they couldn't make their case and they approached the two co-defendants for a deal because there was no evidence in the case;

Number three, that Paki was home asleep with this wife, who just never happened to mention his alibi for four-and-a-half years;

That Tautai is really the triggerman and that Tautai told the police back in '96 that Paki was the triggerman so he could ascend the royal throne to be the tribal chief.

That is what you have been asked to buy by the defense. This is the package that they are selling.

(17 RT 3604-3605, italics added.)

Personal attacks on the integrity of opposing counsel may constitute prosecutorial misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) For instance, a prosecutor commits misconduct if he "attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.]" (*Hill, supra*, 17 Cal.4th at p. 832.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statement as an assertion that defense counsel sought to deceive the jury, misconduct would be established.

[Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) In conducting this inquiry, the reviewing court will not "lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Frye*, *supra*, 18 Cal.4th at p. 970.)

Here, appellant categorizes the above-mentioned portions of closing and rebuttal as misconduct.

> When [the prosecutor] extended the "significance" of the wadding as evidence of [his] lack of belief in the very defense he was presenting, she had crossed the line into misconduct, stating that counsel knew appellant was guilty, did not believe the defense he was presenting, and was somehow disingenuously "hedging his bets," presumably for the penalty phase of trial. There can be little doubt that this is improper argument. [Citations.] [¶] The implication of arguing defense counsel's personal disbelief in the defense case of course implies that *counsel* had been fabricating the defense, which is another form of the same kind of misconduct. [Citations.]

(AOB 100, italics in original.)

Appellant's argument is based on his own, overly-dramatic interpretation of the prosecutor's actual closing remarks. When the comments are analyzed in context and the prosecutor's exact words are considered, no misconduct occurred. (See *Gionis*, *supra*, 9 Cal.4th at pp. 1216, 1221 [challenged remarks viewed in context on review].) Appellant's claim fails because the prosecutor never stated that defense counsel knew appellant was guilty or that defense counsel did not believe appellant's defense. Nor did the prosecutor accuse counsel of being disingenuous or fabricating a defense. While it may be improper for the prosecutor to state that defense counsel does not believe in his client's defense, to imply that defense counsel himself has fabricated evidence, or to otherwise malign defense counsel's character (See e.g., *Farnam*, *supra*, 28 Cal.4th at p. 171; *People v. Adcox* (1988) 47 Cal.3d 207, 237; *Bain*, *supra*, 5 Cal.3d at p. 847), a prosecutor is permitted to argue "on the basis of inference from the evidence that a defense is fabricated[.]" (*People v. Pinholster* (1992)

1 Cal.4th 865, 948; see also *Cummings*, *supra*, 4 Cal.4th at p. 1303 [prosecutor may argue for the jury not be mislead by the defense's interpretation of the evidence]).

The prosecutor's statements could not be construed by the jury to suggest that defense counsel had knowledge of appellant's guilt but was nevertheless trying to deceive the jury. Rather, her comments were plainly intended to focus the jury's attention on the compelling evidence that showed that appellant, and not Tautai, shot Nolan. Armed with the overwhelming evidence of appellant's guilt, the prosecutor's inference, that defense counsel was aware of the weakness in appellant's defense, was proper. (See *Adcox*, *supra*, 47 Cal.3d at pp. 236-237.)

As for the prosecutor's comments about the wadding recovered from Nolan's body, the prosecutor was simply countering defense counsel's cross-examination of Dr. Tschetter and subsequent argument suggesting that the wadding was not taken from Nolan's chest. The prosecutor's comments were thus relevant to the evidence presented by the pathologist and appellant's cross-examination on the "discrepancies" in the doctor's report. (See AOB 100, fn. 25.)

Moreover, the prosecutor was entitled to comment on the strength of the evidence and to remind the jury not to be swayed by the unpersuasive and extraneous argument about the wadding. (See *People v. Bemore* (2000) 22 Cal.4th 809, 846 ["prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account"]; see also *Gionis, supra*, 9 Cal.4th at p. 1217, fn. 13; *People v. Bell* (1989) 49 Cal.3d 502, 538 [prosecutor's argument that defense counsel's job was to confuse, "throw sand in your eyes," and "get his man off" was proper as a reminder to the jury "it should not be distracted from the relevant evidence and inferences that might properly and logically be drawn therefrom"].) The prosecutor "did not cross the

'line of acceptable argument, which is traditionally vigorous and therefore accorded wide latitude.' [Citations.]" (*People v. Turner* (2004) 34 Cal.4th 406, 430.)

C. No Federal Constitutional Violation Occurred

Appellant also argues that the prosecutor's closing remarks violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 13-104.) Not so. California courts generally assume that prosecutorial misconduct is error of less than federal constitutional magnitude. (*Bolton*, *supra*, 23 Cal.3d at p. 214, fn. 4.) Further, a defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.) Since no error occurred under state law, there was no federal constitutional violation.

D. Even Assuming Misconduct, Appellant Was Not Prejudiced

Even assuming arguendo that the prosecutor's remarks constituted misconduct, any error was harmless under *People v. Watson*, *supra*, 46 Cal.2d at p. 836.[52] Given the overwhelming evidence of appellant's guilt (see Arg. I, § I, *ante*), it is not reasonably probable the jury would have reached a more favorable verdict absent the challenged remarks. (*Gionis*, *supra*, 9 Cal.4th at p. 1220.)

IV.

THE PROSECUTOR DID NOT IMPERMISSIBLY APPEAL TO THE JURY'S PASSIONS AND PREJUDICES

Appellant claims that the prosecutor improperly deflected the jury's

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52. As discussed *ante* in Argument I, § I, and Argument II, § E, fn. 16, the *Watson* standard is used in determining whether prosecutorial misconduct and/or the erroneous admission of evidence was prejudicial.

attention from the evidence by appealing to its passions and prejudices. (AOB 105.) Specifically, appellant claims that selected sections of the prosecutor's opening and closing statements constituted reversible misconduct because: (1) she "invoked the theme of the bridegroom murdered on his wedding day, while his bride's gift became the 'trophy' of a murderer" (AOB 105), (2) she asked the jury to view the evidence "'through the eyes of the victim[]'" (AOB 106), and (3) she referred to Nolan and his family as her "clients." (AOB 107-108). Appellant forfeited his misconduct claim when he failed to object on state and federal grounds and to request a timely admonition. Even assuming arguendo appellant preserved his claim, it fails on the merits.

A. Background Information

Appellant challenges the following portions of the prosecutor's opening argument as impermissibly appealing to the jury's passions and prejudices.

> May 18, 1996. That was the date that Rowena Panelo had engraved on the back of this watch. May 18, 1996. It was a special day, for it was to be her wedding day. And this was to be her wedding gift to her groom.
>
> . . . .
>
> . . . .
>
> It was such a lovely and treasured gift from Rowena that Nolan, after looking at the watch, put it back into its case because he didn't want to get it scratched before the ceremony. So he looked at it, admired it, thanked her, and put it back in the case, back in the box, and put it with him so that he would take it home and wear it with his tuxedo the next day.
>
> This very watch became a murderer's trophy. Because it was just over a week after Nolan's chest was blown apart by a shotgun, at close range, just a week later that this watch was found in that man's shirt pocket. He was carrying it; this watch and Nolan's engagement ring. A week after the murder the defendant had this watch and Nolan's engagement ring in his front pocket, a trophy.

Ladies and Gentlemen of this jury, may it please the court, counsel, Nolan's family and friends, I am about to share with you a family's worst nightmare, the story of their son's murder and the evidence that so horrifyingly tells that story.

Ven, Charlie, Ricky, Raul, Paul, Victor and Mark. [¶] Who are these people? Who are these special people? [¶] Well these are the people that would be wearing tuxedos along with Nolan, on his wedding day.

(6 RT 1554-1555.)

Nolan rented [a tuxedo] for himself to marry his bride in, but after the defendant was done kidnaping him and shooting him at close range with a shotgun, he didn't get married in that tuxedo.

On the day that you first came into this courtroom, so many months ago, you met his Honor, Judge Goodman, you met his staff, and then a little bit later you met me.

You were introduced to me, Angela Backers, a member of the Alameda County District Attorney's Office, the prosecutor in this case, the lawyer representing the People of the State of California. And then you were introduced to the defendant's two lawyers, Mike Ciraolo and Deborah Levy. Ms. Levy, in turn, asked the defendant, Afatia Ropati Seumanu, to stand and look at each one of you. And he smiled. And he was introduced to you.

On some mornings and afternoons he actually spoke to you and greeted you and said "Good morning" or "Good afternoon."

I have a client too. The chair next to me appears to be empty, but his name is Nolan. And I would like to introduce you to him. [¶] This is Nolan Pamintuan.

(6 RT 1555-1556.)

[Nolan] was . . . making a list to himself, a list of things to do that he wanted to be sure to remember to take care of. It was in his writing. He used a special piece of paper to make that list; it was the wedding program.

And on the front side of the program was the information about the ceremony and who was sponsoring them in the wedding, who would participate in the wedding.

On the back side is his writing about what he needed to take care of that night and the next morning.

The front piece of this paper I have had blown up for you and it has the name of their wedding. Rowena's last name is Panelo, and his last name is Pamintuan. It has who is celebrating them; they are having a priest marry them on the other side of the bay, all the sponsors in the wedding, then their actual wedding party.

His best man is his brother Paul, who is with us today. His groomsmen were Ricardo, Victor, and Noel, one of Rowena's brothers. We have her maid of honor and her bridesmaids. [¶] And as secondary sponsor, they are listed, and people who would carry things: the cord, the coin, and the ring, and the flower girl.

There is a young woman here who is with us today, his little sister named Pia. . . . That is Nolan's sister, his only sister.

Now, on the back of that piece of paper, it is actually pink in color, is a list he wrote to himself of things he wanted to remember to do. And he started at the bottom of the page and put: Number one, call Jeff about the hotel booking. And he had the hotel information at the top. Take care of Auntie Edith. Take care of Victor and Auntie, Pick up the tux. Paul, pick up his tux. Me, remember my tux, not to forget my tux.

Then it moves up here. No. 6 take care of Uncle Armand and take care of my baby sister Pia. Pia was the last thing he wrote.

(6 RT 1562-1563.)

When Nolan left Rowena's home that night, he told Rowena he was going to drive across the San Mateo Bridge and spend the last night of his single life at his dad's house with his dad, Lope, who is with us today and his brother Paul, and his dad's wife Elizabeth, who is with us today.

(6 RT 1563.)

The prosecutor made the following challenged comments in closing.

This case is about good and evil. It is about the joyful bliss of the anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest your life never comes.

It is about a bride's gift to her handsome husband that becomes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart.

The breath to life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life all alone on your wedding day. [¶] That is the defendant's crime. That is Paki's crime, the crime for which he is on trial. And today is the day which he must be held accountable for this horrible, brutal murder.

(17 RT 3429.)

Appellant also challenges the following single comments made by the prosecutor during her opening and closing arguments.

And he left that sweet bridegroom to die all alone on a deserted street.

(6 RT 1641.)

So the evidence in this case will compel you to do the right thing. It will compel you to give Nolan and his family justice. . . .

(17 RT 3430.)

And I ask you to remember that this case is about Nolan. . . .

(17 RT 3431.)

One of the people that you met in this case is Nolan's fiancée, Rowena. . . .

(17 RT 3431.)

You have all those pictures showing the last moments of Nolan's happiness.

(17 RT 3432.)

Rowena also told us that the last time she saw Nolan was Friday night, the 17th of May, between 10:30 and 11:00 when he left to go spend the night with his father.

And she told us that on Saturday she found out her bridegroom had been murdered about 1:30, 30 minutes before her wedding was scheduled to marry Nolan.

(17 RT 3432.)

Patricia Henshaw came in and Nolan was pronounced dead by Dr. Snoey at 11 minutes into his wedding day.

(17 RT 3435.)

You met Nolan's father, Lope. He went to the rehearsal at the

church. He went to the dinner at the restaurant afterwards. And that was the last time he saw his son alive.

(17 RT 3435.)

Imagine begging for your life, begging to be let go, being held captive at the end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash.

(17 RT 3532.)

B. Appellant Forfeited His Prosecutorial Misconduct And Federal Constitutional Claims

Appellant claims that the above-mentioned portions of the prosecutor's opening and closing remarks constituted prosecutorial misconduct and violated his Eighth and Fourteenth Amendment rights. (AOB 104, 113-114.) Appellant concedes he failed to lodge an objection and did not request an admonition. (AOB 111.) As discussed *ante* (see Args. I, subd. B, II, subd. B & authorities cited therein), appellant's failure to make timely and appropriate objections has waived his claims on appeal.

Relying on *People v. Bandhauer* (1967) 66 Cal.2d 524, appellant attempts to salvage his claim by arguing that an objection would have been futile. (AOB 112.) This claim is misplaced.

During the penalty phase of a capital case, the prosecutor in *Bandhauer* presented facts not in evidence "in the guise of argument." (*Bandhauer, supra*, 66 Cal.2d at p. 529.) He also referred to himself as a public officer who "bore a mantle of trust that required him to be fair[,]" and explained to the jury he had objected to the admission of certain evidence at trial because it would have been damaging to the defendant. (*Ibid.*) Finally, the prosecutor told the jury that during his many years as a prosecutor he had never seen a character as depraved as the defendant. (*Ibid.*) The court explained why a curative admonition by the trial court would not have cured the prosecutor's error:

The statement that defendant was one of the most depraved

> characters that the prosecutor had seen was testimonial. It was not related to the evidence in the case and was not subject to cross-examination. It presented to the jury an external standard by which to fix the penalty based on the prosecutor's long experience. The error was aggravated by the prosecutor's telling the jury he would recommend life imprisonment in a proper case, for his thus made clear that his request for the death penalty was based on his personal judgment and belief. [Citations.]
>
> . . . .
>
> The testimonial statements were injected gradually into the argument so that it was not until the prosecutor made the clinching assertion that he had seldom seen a more depraved character that grounds for objection were apparent. It was then too late to cure the error by admonition, and any effort of the prosecutor to cure the error by formally retracting what he obviously believed would only have compounded it. Under these circumstances defendant is not precluded from raising the issue for the first time on appeal. [Citation.] It is reasonably probable that a result more favorable to defendant would have been reached in the absence of the prosecutor's presenting to the jury facts not in evidence. [Citations.]

(*Id.* at pp. 529-530.)

Unlike the prosecutor in *Bandhauer*, here, the prosecutor did not make any testimonial statements to the jury without any basis in the record. Moreover, the prosecutor here made the same challenged remarks on the same facts from the very beginning of her opening statement with no final "clinching assertion" as in *Bandhauer*. If appellant found the remarks objectionable, he thus had the opportunity to cure any possible misconduct by an immediate objection in the first few moments of trial. Further, nothing stopped appellant from objecting to the same argument during the prosecutor's closing remarks if he truly believed the prosecutor had again committed misconduct. Thus, the nature and timing of the comments were different in this matter; appellant's reliance on *Bandhauer* is unavailing.

Appellant also focuses on two sections of the prosecutor's cross-examination of Lucy in an attempt to illustrate that the trial court would

not have sustained an objection on prosecutorial misconduct grounds had he objected. (AOB 113.) Because the court overruled objections to the prosecutor referring to Nolan as a "sweet Filipino boy" and asking Lucy, "You never saw how traumatized this family was on the news?" (14 RT 3080), appellant asks, "If the Court would not suppress argumentative rhetoric in the questioning of witnesses, would the court suppress it in argument itself?" (AOB 113.) The fact that the trial court permitted the prosecutor some latitude in cross-examining an adverse witness provides no support for appellant's claim that an objection during opening and closing arguments would have been futile.

Where a defendant fails to pose a timely and specific objection at trial, his claim must "be rejected on appeal, unless it could be said that even had there been a timely objection, an admonition to the jury could not have cured the error. [Citation.]" (*Kelly, supra*, 125 Cal.App.3d at p. 581.) Appellant claims, "As to the efficacy of admonitions, these matters, even the murder of a victim about to be married the next day is inherently inflammatory without the aid of exploitive rhetoric. Once the Pandora's box was opened, no admonition could restore the contents and close it. The only remedy in this case was for Ms. Backers to have exercised appropriate restraint and to have waited for the penalty phase of trial, which would have given her almost all, if not all, the rhetorical scope she could want for weddings, bridegrooms, and trophies." (AOB 113.) First, the prosecutor did not engage in "exploitive rhetoric;" rather, she presented the heinous and true facts to the jury. The evidence presented during the guilt phase plainly demonstrated that appellant murdered Nolan on his wedding day and stole his wedding watch, a gift from his bride. (7 RT 1751; 10 RT 2533, 2535; 11 RT 2698; 12 RT 2738, 2808, 2837.) The prosecutor is not required to save the most damaging and emotional facts until the penalty phase simply because they are damning to appellant. Appellant's crimes were heinous and his timing unimaginably painful for Nolan's loved

ones. Appellant's own actions made his crimes and his trial emotionally charged, not the prosecutor's argument of the facts. "Counsel may vigorously argue his case and is not limited to 'Chesterfieldian politeness' [Citations.]" (*Bandhauer*, *supra*, 66 Cal.2d at p. 529.) As long as he does not act unfairly. (*People v. Wein* (1958) 50 Cal.2d 383, 396.)

In addition, if appellant believed the prosecutor's comments were inflammatory, he was free to object and ask the court to admonish the jury to disregard any inappropriate comments. His failure to do so waived his claim of prosecutorial misconduct. Regardless, the challenged comments did not constitute misconduct.

C. The Prosecutor Did Not Commit Misconduct

Appellant first takes offense with the prosecutor's "theme of the bridegroom murdered on his wedding day, while his bride's gift became the 'trophy' of a murderer." (AOB 105.) He also takes issue with the fact that the prosecutor used the evidence to remind the jury about appellant's missed wedding. (AOB 109.) It is not misconduct for a prosecutor to be a passionate advocate. He or she may make even "hyperbolic and tendentious" inferences if they are reasonably drawn from the evidence and there is no substantial misstatement of the facts. (See *People v. Rowland* (1992) 4 Cal.4th 238, 277.)[53]

Here, the prosecutor simply discussed the evidence which was tied to the victim's wedding and thus emotional in nature. The wedding details were testified to by Nolan's fiancee, Rowena Panelo. (7 RT 1734-1751.) There was evidence presented that appellant was carrying Nolan's wedding watch when

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53. The court in *Rowland* noted that while the implication of the challenged remarks in that case were "somewhat insulting," they "did not amount to a deceptive or reprehensible method of persuasion." (*Rowland*, *supra*, 4 Cal.4th at p. 277.)

apprehended by police (8 RT 1975; 13 RT 3012, 3112-3113, 3130), and that police recovered Nolan's list of groomsmen from a tuxedo receipt and found his wedding "to do list." (7 RT 1748.)[54/] The jury also learned that as a result of Nolan's death, the wedding never took place. (7 RT 1751). The prosecutor's statement, "And he left that sweet bridegroom to die all alone on a deserted street" (6 RT 1641), was a true statement based on this evidence, along with the testimony of Iuli and Palega that after appellant shot Nolan, the men drove away and left Nolan behind. (11 RT 2590; 12 RT 2841.) As discussed *ante*, appellant's heinous actions made his crimes and his trial emotionally charged, not the prosecutor's argument of the facts. (See *People v. Escarcega* (1969) 273 Cal.App.2d 853, 862-863.) The prosecutor's challenged opening and closing remarks were based on the evidence and did not misstate the facts. (See *Rowland, supra*, 4 Cal.4th at p. 277.)

Appellant next claims the prosecutor impermissibly asked the jury to view the evidence "through the eyes of the victim." (AOB 106.) In the guilt phase of a trial, a prosecutor may not ask the jury to view the crime through the eyes of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.) The prosecutor may, however, vigorously argue facts based on the evidence. (See *Rowland, supra*, 4 Cal.4th at p. 277.) Here, the prosecutor argued the facts of the case. Simply because the facts were sad and referenced Nolan's missed wedding does not mean that the prosecutor was trying to make the jury view the crime through Nolan's eyes. The challenged statements that appellant apparently claims ask the jury to view the crime through the victim's eyes are, "Imagine begging for your life, begging to be let go, being held captive at the

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54. Appellant argues that Nolan's "to-do list" was of marginal relevance; thus, the prosecutor's argument detailing the list could only be attributed to "a calculated appeal to passion and prejudice." (AOB 108-109.) The weight to be accorded the evidence is not a matter for appellant. Rather, it is exclusively within the province of the jury. (Evid. Code, § 312.)

end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash[]" (17 RT 3532), and "Imagine trying to save your own life, giving them the most you can give them, and you are being called a liar and having a gun pointed at you." (17 RT 3537.) When these remarks are viewed in the context of the prosecutor's preceding and following comments, it is clear that the prosecutor was not asking the jury to view the instant crime through Nolan's eyes.

> Nolan gets in [the van] at gunpoint. Paki sits right next to him with the shotgun in his hands. Tony gets in after closing Nolan's driver's door.
>
> Paki starts telling him to give it up, give up everything you've got. Give up whatever you have on him. And Nolan was saying he didn't have anything. Then Tautai and Paki took his wallet and stuff. They are stripping him of his belongings. They were telling him to take his stuff off.
>
> Paki is starting to go through the wallet. Tautai gets the watch off his wrist, the Gucci watch. Both of them are mad.
>
> *Imagine begging for your life, begging to be let go, being held captive at the end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash.*
>
> So they both get mad. [¶] How does Tautai express his anger? [¶] He says in a harsh tone while he is slapping him on the back of the head from the far rear: you've got to have fucking more than this.
>
> And he smacks him on the head twice from the back. Paki shows his anger a little different way. He cocks the shotgun to show that he is not playing. He pumps the slide. Don't play with me, just don't lie and you won't get shot.

(17 RT 3532, italics added.)

> Nolan gives the $300.00 to Paki. Not to anybody else, but to Paki. [¶] Now they are sitting there at the curb with the sliding door closed and these men, Paki and Tautai and Jay, tells you - - actually all four of them got angry at Nolan because they thought they could get more. They still weren't satisfied with the amount of money he got out of the machine.
>
> And he says: we were all in agreement that he was lying, that he

could have gotten more. And we were angry at him. And Nolan was saying he wasn't lying, that he took out the most he could get out of the machine.

So Paki is yelling at him calling him a liar, telling him to stop lying to us.

Imagine trying to save your own life, giving them the most you can give them, and you are being called a liar and having a gun pointed at you. . . .

(17 RT 3537.)

As noted by the argument surrounding both challenged remarks, the prosecutor was not asking the jury to view the crime through Nolan's eyes. Rather, she was illustrating appellant's thought process leading up to him shooting Nolan and the coldblooded nature of his decision to do so. That appellant became angry with Nolan simply because he thought Nolan was "holding out" on them by giving them a mere $300, and that it was Nolan's "audacity" that prompted the killing in part. These comments on the evidence did not constitute misconduct.

Appellant's final assertion of misconduct refers to the prosecutor's references to Nolan and his family as her clients. (AOB 107-108, 110.) First, the prosecutor never referred to Nolan's family and/or fiancee as such. In fact, she introduced herself as "the lawyer representing the People of the State of California." (6 RT 1556.) Then, after the defense was given the opportunity to introduce appellant to the jury as their client, the prosecutor took the same opportunity to remind the jury about her client, Nolan. (6 RT 1556.) Although the prosecutor's use of the word "client" was not the most precise term to describe the victim, clearly she was using the term merely as a means to introduce the jury to Nolan, the person for whom she was seeking justice. (See 6 RT 1556.) A prosecutor is permitted to reference a victim's family during trial. Here, the prosecutor's references to the suffering of family members "were generalized and consisted of obvious truisms to the effect that they were

aggrieved." (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) Thus, no misconduct occurred. (*Ibid.*; see also *People v. Rich* (1988) 45 Cal.3d 1036, 1089-1090 [remarks about victim's family not misconduct during guilt phase closing argument].) As to the prosecutor's use of the word "client" in connection with her introduction of Nolan to the jury, it is clear from the context of the prosecutor's comments, including her introduction as the representative of the People, that Nolan was not her client, but that she was merely indicating to the jury that although not present, the jury should not forget that the instant trial centered around the taking of Nolan's life.

The challenged comments were restatements of the facts presented at trial and/or vigorous inferences from the evidence. They did not amount to "the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." As such, they did not constitute misconduct under California law. (See *Morales*, *supra*, 25 Cal.4th at p. 44.)

D. The Jury Did Not Apply Any Of The Complained-Of Remarks In An Objectionable Fashion

When a prosecutorial misconduct claim focuses on comments made by the prosecutor before the jury, the remarks are reviewed to determine whether there is a "reasonable likelihood" that the jury misconstrued or misapplied the prosecutor's remarks. (See *Morales*, *supra*, 25 Cal.4th at p. 44.) Here, it is not reasonable likely that the prosecutor's remarks were misconstrued by the jury as a "calculated appeal" to allow them to decide the case based on their passions and prejudices (see AOB 105), namely because the jury was instructed not to be swayed by passion or sympathy in deciding defendant's guilt. (17 RT 3612.) The jury is presumed to have followed that instruction. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Defense counsel also told the jury in his opening statement that any "emotionalism" relied on or exhibited by either attorney in this case was not evidence. (6 RT 1641-1642.)

E. Appellant's Federal Constitutional Rights Were Not Violated

Appellant also argues that apart from state law error, "the emotionalism of the prosecution's case was so pervasive as to constitute a denial of the right to a fair trial under the Fourteenth Amendment" and to have impugned the reliability of the jury's guilty verdict. "as required by the Eighth Amendment." (AOB 113-114.) Not so.

Again, prosecutorial misconduct is generally error of less than federal constitutional magnitude. (See *Bolton*, *supra*, 23 Cal.3d at p. 214, fn. 4.) Further, a defendant who simply "recasts his state claim under constitutional labels[,]" as appellant does here, does not create a federal constitutional violation. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.) The challenged comments did not "infect the trial with such unfairness as to make [appellant's] conviction a denial of due process." The prosecutor's comments did not constitute misconduct under the federal Constitution. (See *Morales*, *supra*, 25 Cal.4th at p. 44.)

F. Even Assuming Misconduct, Appellant Was Not Prejudiced

Appellant asserts that the prosecutor's "appeals to sympathy for the victim and his family" constituted misconduct and it was "reasonably probable without the misconduct appellant would have been acquitted." (AOB 113.) Although this statement uses the proper *Watson* standard, appellant continues to argue that the federal *Chapman* standard should be applied. (AOB 114.) As previously discussed (see Arg. I, subd. I, Arg. II, subd. E, fn. 16 *ante*), reversal is the appropriate remedy for prosecutorial misconduct only if, after an examination of the entire cause, including the evidence, it is reasonably probable a result more favorable to appellant would have been reached absent the offending comments. (See *Barnett*, *supra*, 17 Cal.4th at p. 1133.)

In *People v. Stansbury*, *supra*, 4 Cal.4th 1017, a case relied on by

appellant, this Court found misconduct when a prosecutor urged the jury to consider the victim's suffering as follows:

> "Under what were are dealing with here, we are dealing with a 10-year old child who was taken from her home, taken to a place she had never been, experiencing things she had no idea how to deal with. [¶] She was degraded, violated, raped, evidence of oral sex. [¶] *Think what she must have been thinking in her last moments of consciousness during the assault.* [¶] *Think of how she might have begged or pleaded or cried.* All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator."

(*Id.* at p. 1057, italics in original.)

Thus, in *Stansbury*, the prosecutor expressly asked the jury to imagine what the victim was thinking and doing while the defendant was perpetrating the charged offenses. In contrast, here, the prosecutor was simply referencing the victim as a means of highlighting appellant's actions; she was not asking the jury to imagine what Nolan went through when appellant committed the instant offense. Regardless, this Court did not find reversible error in *Stansbury*. Rather, by looking at the prosecutor's statement in context, this Court held that the defendant was not prejudiced given it was "but a single reference in a long, complex and otherwise scrupulous argument about the facts of the case." (*Stansbury*, *supra*, 4 Cal.4th at p. 1057.) Likewise, even if the prosecutor's references to Nolan and his family constituted misconduct, given the challenged comments were isolated, and made at the beginning of a lengthy closing argument and rebuttal, any alleged error was similarly not prejudicial. (See *Sanders*, *supra*, 11 Cal.4th at p. 527.)

Finally, as discussed *ante* (see e.g., Arg. I, § I), and adopted herein, given the overwhelming evidence presented of appellant's guilt, any alleged error was harmless.

V.

THE TRIAL COURT PROPERLY ADMITTED IULI'S STATEMENT TO HIS WIFE

Shortly after the murder, Iuli told his wife that appellant killed Nolan. (11 RT 2626.) Appellant apparently contends that the admission of this hearsay evidence was an abuse of discretion. (AOB 114-124.) Given that the challenged statement was a spontaneous and a prior consistent statement and not unduly prejudicial, it was properly admitted into evidence.

A. Relevant Proceedings

Iuli testified that immediately after Nolan's belongings were divided in the outbuilding, he returned to the van and discussed the murder with his wife.

MS. BACKERS: What did you tell your wife?

A. I told her what happened.

Q. What did you tell her?

A. I told her—

MR. CIRAOLO: Objection. Self-serving, hearsay.

THE COURT: Overruled.

MS. BACKERS: You can answer.

A. I said: Your fucking brother blew some dude away.

Q. I can't hear you.

A. I told her her fucking brother blew some dude away.

(11 RT 2626.)

B. Appellant Forfeited His Eighth Amendment Claim

In addition to challenging Iuli's above-cited statement to his wife under the hearsay rule, appellant asserts, "insofar as the state evidentiary error was of the nature to substantially undermine the reliability of the factual determination of Tony Iuli's credibility—a central issue in the guilt phase of the case,—that

error resulted in a violation of the Eighth Amendment. [Citation.]" (AOB 124.) Appellant's failure to lodge an objection on this ground forfeits his claim on appeal. (*United States v. Olano*, *supra*, 507 U.S. at p. 731 ; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20 [claim on Eighth Amendment grounds forfeited where no objection lodged in trial court].) Regardless, the evidence was properly admitted.

C. The Trial Court Did Not Abuse Its Discretion When It Admitted Iuli's Statement To His Wife

Appellant asserts that the trial court erred in overruling his hearsay objection and admitting Iuli's statement made to his wife. (See AOB 115.) Iuli's statement was a spontaneous and prior consistent statement, and thus excepted from the hearsay rule.[55/]

The trial court is vested with broad discretion in determining the admissibility of evidence. (See *Karis*, *supra*, 46 Cal.3d at p. 637.) A trial court's evidentiary rulings under the hearsay rule are reviewed for an abuse of discretion. (See *People v. Lawley* (2002) 27 Cal.4th 102, 153.) The court's ruling should not be disturbed on appeal unless there is a manifest abuse of discretion "resulting in a miscarriage of justice." (*People v. Milner* (1988) 45 Cal.3d 227, 239.)

1. Iuli's Statement Was A Spontaneous Statement

Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

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55. Evidence Code section 1200 provides in relevant part:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted. [¶] (b) Except as provided by law, hearsay evidence is inadmissible.

(a) Purports to narrate, describe, or explain a condition or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

In *People v. Poggi* (1988) 45 Cal.3d 306, this Court stated:

"To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it."

(*Id.* at p. 318, quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

Whether a statement satisfies the foregoing requirements of the spontaneous statement exception is largely a question of fact within the discretion of the trial court. (*Poggi*, *supra*, 45 Cal.3d at p. 318.) A mere preponderance of the evidence is sufficient to support a trial court's finding that a statement is a spontaneous statement. (See *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177-178.) There is no requirement that the trial court make any factual findings on the record regarding its decision to admit evidence. (*People v. Anthony O.* (1992) 5 Cal.App.4th 428, 434.)

A statement is spontaneous when is it reasonable to conclude the person was under the influence of the stress of excitement at the time he made the statement. (See *People v. Brown* (2003) 31 Cal.4th 518, 541.) The stress of excitement may be caused by observing or participating in a stressful or exciting act or event. (See *Gutierrez*, *supra*, 78 Cal.App.4th at p. 181.) "[T]he discretion of the trial court is at its broadest when it determines whether" the statement was made under the stress of the perceived event; "Dean Wigmore goes so far as to urge that the issue should be left 'absolutely to the

determination of the trial court.'" (*Poggi, supra*, 45 Cal.3d at p. 319, quoting 6 Wigmore, Evidence (Chadbourne rev. ed. 1976) § 1750, p. 22 1.)

Moreover, the lapse of time between the event and the declaration does not deprive the statement of spontaneity if it appears that the statement was made "under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Washington* (1969) 71 Cal.2d 1170, 1176.) "Neither contemporaneity . . . nor spontaneity . . . is required." (*Anthony O., supra*, 5 Cal.App.4th at p. 436.)

In *People v. Trimble* (1992) 5 Cal.App.4th 1225, the appellate court upheld an incriminating statement about Trimble's guilt made by the decedent's child two days after witnessing the altercation that ultimately led to the murder. (*Id.* at pp. 1229, 1234-1235.) Trimble argued that the child's statement could not be considered spontaneous or without reflection two days later. (*Id.* at p. 1234.) The appellate court disagreed and held, "The lapse of time between the described event and the statement, although a factor determining spontaneity, is not determinative." (*Ibid.*) The appellate court found the statement spontaneous because "[o]nce appellant left the premises, nothing preceded or provoked [the child's] volunteered statements; only the obviously continuing influence of the prior assault, coupled with appellant's absence and the first secure opportunity for disclosure, accounts for her spontaneous, animated description of the incident. [Citation.]" (*Id.* at p. 1235.)

Here too the challenged statement was spontaneous. Iuli witnessed appellant murder Nolan at close range with a shotgun. (11 RT 2585, 2587, 2698; 14 RT 3140, 3144, 3211; see *Anthony O., supra*, 5 Cal.App.4th at p. 434 [only an "exciting" event is necessary for spontaneous statement]; see also *Anthony O., supra*, at p. 434 ["[c]ertainly two close-range shotgun blasts . . . qualify as an 'exciting event'"].) He then fled the scene rapidly (11 RT 2590; 12 RT 2841), and watched appellant, Tautai, and Palega wipe down the bloody

van (12 RT 2843-2845, 2871; 13 RT 2982). Iuli then walked home with the others, carrying the murder weapon and the bloody glove (12 RT 2847), and immediately went to the outbuilding and divided up Nolan's belongings. (12 RT 2849-2851, 2856-2858.) From there, he joined his wife in the van (10 RT 2517; 11 RT 2625), where he was unable to sleep (11 RT 2626), immediately telling her without any apparent prompting, "Your fucking brother blew some dude away." (11 RT 2626).

Iuli told his wife about the murder the same night, when he was still under the stress of the murder after having continued uninterrupted with the escape, clean up, and division of stolen property. His continuation of the crime, escape, and cover up as an accessory after the fact thus left Iuli "under the stress of excitement" of the murder and follow-up crimes and left his "reflective powers" "in abeyance." (See *Poggi, supra*, 45 Cal.3d at p. 319.) Like the child in *Trimble*, Iuli told his wife about the murder at the first secure opportunity for disclosure he had away from his cohorts. Further, by the forceful wording he chose to present the news to his wife and the fact that he was unable to sleep (11 RT 2626), it was clear he was still under the excitement and emotion of witnessing appellant's cold-blooded murder of Nolan. Iuli's statement was properly admitted by the trial court because it fell under the hearsay exception for a spontaneous declaration.

2. Iuli's Statement Also Constituted A Prior Consistent Statement

Iuli's statement to his wife was also admissible as a prior consistent statement, which is governed by Evidence Code section 1236:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with [Evidence Code] [s]ection 791.

(See *People v. Hitchings* (1997) 59 Cal.App.4th 915, 920-921.)

Evidence Code section 791 provides:

> Evidence of a statement previously made by a witness that is consistent with his testimony as to the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that the [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(See *Hitchings*, *supra*, 59 Cal.App.4th at p. 920-921.)

Appellant acknowledges that the admission of Iuli's statement involved subdivision (b) of Evidence Code section 791 because of the defense counsel's implied charge of fabrication or improper motive. (AOB 118.) Appellant concedes "there is no doubt that defense counsel in fact made the implied charge against Iuli of fabrication and improper motive in his opening statement (6 RT 1643-1644)" (AOB 118), and that the implied charge of fabrication or improper motive here was "the plea deal and accomplice status of Tony Iuli." (AOB 120, fn. 29).

This Court has held that prior consistent statements are admissible to rebut a charge of recent fabrication as long as the statements are made before the existence of any motives the opposing party suggests may have induced the witness's testimony. (See *People v. Noguera* (1992) 4 Cal.4th 599, 629.) Here, the charge of fabrication or bias occurred during appellant's opening argument. According to appellant, though, an opening statement does not lay the required foundation for the admissibility. (AOB 118.) We disagree.

It is undisputed that defense counsel made clear that Iuli's credibility and motive to testify would be challenged because of the plea deal he accepted to testify against appellant. (6 RT 1643-1644.) Defense counsel's opening statement was short, totaling only about three-and-a-half pages of transcript.

(6 RT 1641-1645.) Counsel spent half of his statement addressing the issue of Iuli's and Palega's credibility as follows:

> The prosecution's case revolves around two people, Tony Iuli and Jay Palega. These men were former co-defendants of the defendant. They were charged with the same charges that my client was charged with, only the prosecution was not seeking the death penalty. The prosecution was only seeking, and has only sought, the death penalty against my client. Those two men were faced with prison, with life without possibility of parole. They were to die in prison.
>
> The prosecution approached them, through their counsel, and offered them what we say in the criminal vernacular, deals. And the deal was that if they testify against my client on the guilt phase of the trial, they would receive first-degree murder convictions. They had to plead to first degree, which meant 25 years to life. If they testified against my client at the penalty phase of the trial, they would get a second degree plea bargain, which was 15 years to life.
>
> Both those men refused that offer. [¶] The prosecution was compelled to renegotiate her position and ultimately offer both these men a fixed term of a maximum of 17 years in prison, 16 years, eight months. So no matter what happened, they would get no more than 17 years for their testimony.
>
> When these men testify—they had given statements previously to the police. The prosecution worked with them with considerable time and effort to get their statements here in court. When they testify, they are testifying under complete distrust by the prosecution because they have not been sentenced yet.
>
> So from my point of view, my case, there is not going to be much questioning or cross-examination of what occurred at the scene of the shooting. There will be some questioning dealing with access and control of the property they recovered at the residence where some 25 people live and had access.
>
> There will be considerable questioning dealing with Tony and Jay as to their credibility and motivation and their accuracy and how much of this was based upon information that they accrued by reading police reports for the previous three years before they came to trial.

(6 RT 1643-1644.)

Thus, the idea of fabrication and improper bias was not only planted with the

jury at the beginning of the trial, it constituted a major portion of defense counsel's opening statement and was not a "mere suggestion" as urged by appellant. (See AOB 119.) In addition, as noted in the last paragraph cited above, counsel forewarned the jury he would be extensively questioning Iuli and Palega "as to their credibility and motivation[,]" thus underscoring the importance of their testimony to the case. (6 RT 1644.) In fact, as laid out by defense counsel, appellant's case consisted of damaging Iuli's and Palega's credibility and showing that Tautai shot Nolan. (6 RT 1641-1644.)

There is no doubt that counsel's opening statement expressly charged that Iuli's testimony at trial would be fabricated and/or "influenced by bias or other improper motive[]" as required under Evidence Code section 791.[56] Given that defense counsel's opening statement not only raised the issue of Iuli's credibility, but underscored its importance to the case, and promised that counsel would be extensively cross-examining Iuli on the matter, the court's decision to allow the testimony during the People's direct examination rather than waiting for redirect, was not an abuse of discretion. (*People v. Hall*, *supra*, 41 Cal.3d at p. 834 [court's retain "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice"] *People v. Kilborn* (1970) 7 Cal.App.3d 998, 1002 [order of proof a matter within trial court's discretion."].)[57]

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56. While appellant acknowledges that defense counsel's statements constitute an *implied* charge of fabrication or improper motive (see e.g., AOB 120, fn. 29), given the force with which counsel discussed Iuli's and Palega's credibility and its importance to the case, it is respondent's position that counsel was *expressly* charging that these witnesses were biased and/or influenced by an improper motive.

57. Appellant relies on a comment by the Law Revision commission to support his claim that Evidence Code section 1236 is only to be used during "the normal evidentiary process of impeachment and rehabilitation." (AOB

Appellant claims that by eliciting the challenged statement during Iuli's direct examination rather than calling Iuli's wife to testify regarding the statement, the prosecutor was creating "drama" rather than seeking to rehabilitate Iuli's credibility. (AOB 120.) There is no basis for appellant's claim. In fact, it is more likely that the prosecutor elicited the statement during Iuli's testimony as a matter of efficiency—it was undoubtedly easier than calling Iuli's wife as an additional witness. Moreover, given that appellant did not call Iuli's wife to dispute Iuli's testimony in this regard, we can presume she would not have done so. To have her corroborate Iuli regarding the challenged statement would thus have been extremely damaging to appellant, thus creating the potential for even more "drama" than Iuli's testimony on the matter.

D. Even Assuming Error, It Was Harmless

Even assuming this Court finds that Iuli's statement to his wife did not constitute a spontaneous statement or fall under the prior consistent statement exception to the hearsay rule, any error in admitting the statement was harmless.

First, Iuli's statement, regardless of how many times it was stated (whether during Iuli's testimony, or through the prosecutor's questions (see AOB 123-124)), was cumulative of Iuli's direct testimony describing the murder. (11 RT 2582-2589; *People v. Gonzales* (1969) 269 Cal.App.2d 586 [even if hearsay statement erroneously received, not grounds for reversal because it was cumulative of direct evidence properly received].) Second, given defense counsel's claim that he would be questioning Iuli on cross-

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119.) Appellant ignores the comment's reference to Evidence Code section 791, which, as noted *ante*, simply requires that "[a]n express or implied charge" be made that a witness's testimony is influenced by improper motive. Regardless, given that defense counsel raised the issue in his opening statement, the prosecutor's use of Iuli's prior consistent statement was clearly done to rehabilitate his credibility to the extent defense counsel damaged it at the outset of the case.

examination regarding any issues related to his credibility, motivation to testify and the accuracy of his testimony (see 6 RT 1644), clearly the prosecutor would have asked Iuli about the challenged statement on redirect. If the prosecutor did not ultimately do so, or if it turned out that the challenged statement was not relevant after defense counsel questioned Iuli, counsel could have moved to strike the statement. Last, as noted *ante* in Argument I, section I, and adopted herein, there was overwhelming evidence of appellant's guilt.[58] It is not reasonably probable appellant's verdict would have been more favorable in the absence of the challenged statement. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *Harris*, *supra*, 37 Cal.4th at p. 336; *People v. Quitiquit* (2007) 155 Cal.App.4th 1, 12-13.).

Appellant also challenges Iuli's statement to his wife on Eighth Amendment grounds. (AOB 124.) It is settled that decisions concerning the hearsay rule are an "application of ordinary rules of evidence," and do not "implicate the federal Constitution." (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.) Appellant's claim of federal error should be rejected.

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58. Appellant argues that "the instant error substantially complemented the vouching errors, consisting, in one of its important aspects, as vouching for the credibility of Tony Iuli himself. If the prejudice from the hearsay error alone is insufficient to warrant reversal, certainly in combination with the errors set forth in the first issue of this brief, the prejudice is more than adequate." (AOB 124.) Appellant makes this same claim as part of his Argument VIII; it will be addressed in the context of that argument.

VI.

THE TRIAL COURT DID NOT PERMIT IULI TO OFFER IMPROPER OPINION TESTIMONY

Appellant argues that the trial court erred under state evidentiary law and the Eighth Amendment by allowing Iuli to testify that it was his opinion that Tautai Seumanu agreed to take the blame for the instant offense at appellant's request. (AOB 125-128.) Appellant forfeited his Eighth Amendment claim by failing to object. Regardless, Iuli's testimony was not inadmissible opinion evidence and was properly admitted. Finally, any possible evidentiary error was harmless.

A. Relevant Proceedings

On direct examination, Iuli testified that on dates when they were to be in court, appellant, Tautai, Iuli, and Palega talked as they rode the bus and stayed together in the court's holding cell and stairwell. (11 RT 2633-2634.) According to Iuli, one time when the four were in the stairwell, appellant asked Iuli or Tautai to "take the beef" for the murder because they were juveniles. (11 RT 2634-2635.)[59] In exchange, appellant pledged to take care of them "from the outside" by sending them money and "putting money on [their] books[.]" (11 RT 2635-2636.) Iuli forcefully declined. (11 RT 2637.)

The following colloquoy transpired regarding Tautai's reaction to appellant's offer.

> Q. What did Tautai do when Paki asked one of the two young guys to take the beef?
>
> MR. CIRAOLO: Objection. Hearsay.
>
> THE COURT: Overruled.
>
> MS. BACKERS: You can answer, sir.

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59. Appellant and Palega were over 18. (11 RT 2635.)

A. He didn't do nothing.

Q. What was the look on his face?

A. Don't know.

Q. Did he get angry at Paki like you did?

A. No.

Q. Didn't you tell me he looked like he was going for it?

A. Yes.

MR. CIRAOLO: Calls for opinion and conclusion. Ask it be stricken.

THE COURT: Sustained. It may be stricken.

MS. BACKERS: Have you ever told anybody that Tautai looked like he was going to take the beef from somebody?

A. Yes.

Q. What made you say that?

MR. CIRAOLO: Calls ultimately for the man's opinion and conclusion. It has been asked and answered.

THE COURT: No. That is asking for factors he based his conclusion on. Overruled.

MS. BACKERS: What made you say that, Mr. Iuli?

A. I think because it was his brother, his older brother. He wouldn't want to see his older brother go down.

(11 RT 2637-2638.)

B. Appellant Forfeited His Eighth Amendment Claim

In addition to his state law evidentiary claim, appellant asserts that by permitting the above-cited testimony, the trial court violated his Eighth Amendment rights. (AOB 128.) Appellant never lodged a specific Eighth Amendment objection during Iuli's testimony; his Eighth Amendment challenge is forfeited. (*United States v. Olano*, *supra*, 507 U.S. at p. 731; *Rodrigues*, *supra*, 8 Cal.4th at p. 116, fn. 20 [claim on Eighth Amendment

grounds forfeited where no objection lodged in trial court].) In any event, the evidence was properly admitted.

C. The Challenged Testimony Was Not Opinion Testimony

Appellant claims the trial court improperly overruled his second objection as noted above. According to appellant, Iuli's testimony should have been excluded as improper opinion testimony. (AOB 125-128.) Appellant's claim is misplaced.

As noted by the trial court's ruling, the prosecutor was not asking Iuli for opinion testimony. Rather, she was simply asking him to explain the factors upon which he based his conclusion that Tautai "looked like he was going to take the beef or somebody[.]" (11 RT 2637-2638.) The trial court properly overruled appellant's objection. Regardless, even assuming arguendo this evidence was improperly admitted, any error was harmless.

D. Any Evidentiary Error Was Harmless

Appellant argues that "[i]f Tony Iuli's incompetent opinion evidence had been properly excluded, it is reasonably probable that appellant would have been acquitted."[60] (AOB 128.) Although appellant cites the *Watson* standard of review, later in his argument he asserts that this Court should use the *Chapman* harmless error standard. (AOB 128.) Again, *Watson* is the appropriate standard when considering the erroneous admission of evidence. (See *Harris*, *supra*, 37 Cal.4th at p. 336.)

In this case, there is no reasonable probability a result more favorable to appellant would have occurred had the trial court excluded Iuli's challenged

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60. Appellant repeatedly refers to Iuli's challenged testimony as "incompetent" evidence. (AOB 127, 128.) "[T]here is no such thing as "incompetent" evidence. Evidence is either admissible or inadmissible." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 847.)

testimony. Most importantly, Iuli's testimony regarding whether Tautai was going to "take the beef" for the murder was cumulative. Later in his testimony, Iuli properly testified that Tautai told him he "was going to take the blame" (11 RT 2640), a fact acknowledged by appellant in a subsequent argument. (See AOB 134.) Moreover, given Tautai's inconsistent testimony during the defense case, the jury likely drew the same conclusion—that Tautai tried to take the blame to protect appellant. (See 15 RT 3268-3270, 3272, 3309, 3312-3315, 3318, 3320-3321, 3324, 3353-3354; 16 RT 3357, 3364, 3377, 3380-3381.)

Last, in light of the overwhelming evidence of appellant's guilt (see Arg. I, § I *ante* & adopted herein), the admission of this statement did not prejudice appellant.

VII.

EVIDENCE OF APPELLANT'S CONTRACT ON IULI'S LIFE WAS NOT HEARSAY AND WAS PROPERLY ADMITTED

Appellant asserts that hearsay evidence that he took a contract out on Iuli's life was improperly elicited through leading questions posed to Iuli during the prosecutor's direct examination. (AOB 129-139.) Appellant challenges the admission of this evidence under state law and Eighth and Fourteenth Amendment grounds. (AOB 139.) Appellant forfeited his federal claim and his claim that the prosecutor's questions were leading by failing to object on these bases. Even if this Court considers appellant's claim on the merits, no error occurred under state or federal law because the challenged statements were properly admitted for a nonhearsay purpose—as circumstantial evidence of the declarant's state of mind. If any evidentiary error occurred, it was harmless in light of the overwhelming evidence of appellant's guilt and his incredible alibi defense. Appellant also failed to demonstrate that he received constitutionally ineffective assistance of counsel.

A. Relevant Proceedings

Appellant challenges the following portion of Iuli's direct examination:

Q. What happened after you told Paki to take his own beef?

A. We just walked our own ways.

Q. And after that, things got pretty chilly between you and Paki, right?

A. Yeah, a little bit.

Q. Well, didn't you get a contract put out on you?

MR. CIRAOLO: Objection. Hearsay, opinion and conclusion.

THE COURT: Sustained.

MR. CIRAOLO: No foundation.

THE COURT: Sustained.

MS. BACKERS: On April 25th of the year 2000 in this courtroom right here, did you have a conversation in Samoan with Tautai?

A. Yes.

Q. And your lawyer, Mr. Berger, was present, correct?

A. Yes.

Q. And nobody else was here except the bailiffs, right?

A. Yes.

Q. And during that conversation, that was the day before you took the deal, right?

A. Yes.

Q. All four of you had been in court that morning, right?

A. Yes.

Q. In this very courtroom?

A. Yes.

Q. And then in the afternoon you and Tautai were sitting at that end of the table talking in Samoan, right?

A. Yes.

Q. And what was the conversation?

A. Just told him what happened.

Q. What did you tell him?

A. Told him if they were going to come at him with a deal to take it.

Q. If I offered him a deal for him to take it?

A. Yes.

Q. What else did you tell him?

A. I told him I have some heat on me.

Q. You have some heat on you?

A. Yes.

Q. What does that mean?

A. I have a contract out on me.

Q. Did you tell him who put that out on you?

A. Yes.

Q. What did you tell him?

A. I told him his brother did.

Q. His brother Paki, right?

A. Yes.

Q. And what did Tautai say when you said that his brother Paki had put a hit on you, or put some heat on you?

A. He said—

MR. CIRAOLO: Hearsay. Objection.

THE COURT: Overruled.

MS. BACKERS: You can answer, sir.

A. He said don't take—first he said he was going to take the blame, and then he said: Don't take the deal and he'll try to talk to—try to talk to his brother.

Q. To take the heat off of you right?

A. Yes.

Q. So you are sitting here in the courtroom and you are about to take the deal, right?

A. Yes.

Q. You tell Tautai that his brother has put a hit on you?

A. Yes.

Q. You basically got a snitch jacket in this case, right?

A. Yes.

Q. You were the first one to confess back in May of '96?

A. Yes.

Q. And then on April 25th of this year, here in this courtroom, when you told Tautai that his brother put a hit on you, he said he knew about it, right?

A. Yes.

Q. And he was going to try to talk you out of the deal?

MR. CIRAOLO: Excuse me. Continued objection as to what Tautai said on hearsay grounds.

THE COURT: Overruled.

MS. BACKERS: Tautai was trying to talk you out of taking the deal, right?

A. Yes.

Q. And he told you that if you didn't take the deal, that he could talk to his brother about taking the heat off you, right?

A. Yes.

Q. What did you understand that to mean?

A. Excuse me?

Q. What did you understand that to mean, that Tautai would talk to Paki about taking the heat off, that he would lift the contract?

A. Yes.

Q. And he told you he was going to take the blame?

A. Yes.

Q. And part of your deal is that if you requested, you would be

housed out of state, right?

A. Yes.

Q. During that conversation on April 24th, this year, toward the end of the conversation did you tell Tautai that you have been sitting here for four years for something his fucking dumb-ass brother did?

A. Yes.

Q. Did you say that in Samoan?

A. I think I did.

(11 RT 2638-2642.)

B. Appellant Forfeited His Claims Of Error

Appellant claims that hearsay evidence that he put out a contract on Iuli's life was improperly admitted, and that the prosecutor's questions eliciting this evidence were leading. Appellant further asserts error that the admission of this evidence violated his federal constitutional rights. (AOB 129-139.) Appellant forfeited these claims by failing to lodge appropriate objections in the trial court.

First, appellant did not object that the prosecutor's questions were leading; he has thus forfeited this claim on appeal. (Evid. Code § 353.) Second, although appellant lodged two specific hearsay objections, one of which was meritorious (11 RT 2638), and a "continued objection as to what Tautai said on hearsay grounds" (11 RT 2641), to the extent he challenges as hearsay any other statements (e.g., that Iuli stated that he sat in prison for four years for something appellant did (see AOB 136)), his failure to lodge a hearsay objection to these statements waives his claim on appeal. (Evid. Code, § 353, subd. (a); see also *People v Hinton* (2006) 37 Cal.4th 839, 894.)

Appellant claims that an objection to all alleged hearsay statements would have been futile given the trial court's "apparent inclination" to allow the prosecutor's line of questioning. (AOB 134.) Appellant's claim ignores the

fact that the court not only entertained his other hearsay objections, but sustained one of them in his favor. His futility argument is not persuasive.

Third, appellant argues that admission of evidence that he put a contract out on Iuli's life violated his Eighth and Fourteenth Amendment rights. (AOB 139.) Appellant lodged no objection on these grounds. His federal constitutional claim is therefore forfeited. (*United States v. Olano*, *supra*, 507 U.S. at p. 731; *Rodrigues*, *supra*, 8 Cal.4th at p. 116, fn. 20.) Regardless, the admission of this evidence was proper.

C. Admission Of Evidence That Iuli Believed Appellant Put Out A Contract On His Life Was Not Hearsay; It Was Properly Admitted As Circumstantial Evidence Of Iuli's State Of Mind

The trial court is vested with broad discretion in determining the admissibility of evidence. (See *Karis*, *supra*, 46 Cal.3d at p. 637.) The court's ruling will not be disturbed on appeal unless there is a manifest abuse of discretion. (*Milner*, *supra*, 45 Cal.3d at p. 239.) Appellant asserts that the trial court erred by admitting Iuli's statements about the contract appellant placed on Iuli's life. (AOB 133.) Given that these statements could properly have been admitted as circumstantial evidence of Iuli's state of mind, admission of the evidence was not an abuse of discretion.

A declarant's statement is admissible as a nonhearsay statement, i.e., not introduced for the truth of the matter asserted, to circumstantially prove a relevant fact.

> [A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible, the declarant's state of mind must be in issue. [Citation.]

(*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

Iuli testified to a conversation he had with Tautai in the courtroom before he accepted his plea deal. (11 RT 2638-2640.) Iuli told Tautai that appellant had placed a contract on his life. (11 RT 2639-2640.) What was important was not the truth of this claim; i.e., whether appellant had in fact placed a contract out on Iuli's life, but Iuli's belief that such a contract existed. In spite of the fact that Iuli believed he could be killed for accepting a deal and testifying in this case, Iuli made the decision to do so. The challenged evidence was thus highly relevant to bolster Iuli's credibility as a witness. The prosecutor's questioning of Iuli on the matter demonstrates that this was the purpose for which the prosecutor elicited the information.

First, the prosecutor clarified that the exchange between Iuli and Tautai occurred the day before Iuli "took the deal[.]" (11 RT 2639.) She then reiterated the point by asking Iuli, "[s]o, you are sitting here in the courtroom . . . about to take the deal, right?" (11 RT 2640.) Next, the prosecutor elicited from Iuli that as a result of his participation in this case, he earned a reputation as a "snitch jacket." (11 RT 2640.) Last, she elicited testimony that Iuli had expressly negotiated that he be housed out-of-state, no doubt in an effort to highlight Iuli's fear of retaliation. (11 RT 2641.)

As discussed in respondent's Argument I, section (A)(2), defense counsel's opening argument called into question Iuli's credibility as a prosecution witness with a favorable plea deal. (6 RT 1643-1644.) During his cross-examination of Iuli, defense counsel again attacked his credibility and his reasons for accepting the plea agreement and testifying against appellant (11 RT 2643-2647, 2652-2653, 2659-2661, 2664-2665.) In addition, the jury heard from the prosecution that Iuli would not receive his fixed-term sentence unless he testified truthfully and was forthcoming with information about the crimes committed against Nolan. (7 CT 1902-1903; 11 RT 2632.) The prosecutor was thus entitled to rebut these claims by presenting evidence that Iuli was credible.

(See Evid. Code, § 780 ["jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing"]; see also *People v. Warren* (1988) 45 Cal.3d 471, 481 [evidence of a witness's fear of testifying is relative to witness's credibility]; *People v. Malone* (1988) 47 Cal.3d 1, 30 [evidence of a witness's fear of retaliation, including retaliation from gang members, admissible as relevant to witness's credibility].)[61/]

Appellant also attacks as hearsay Tautai's statement to Iuli that he was aware appellant had put out a contract on Iuli's life. (AOB 134.)[62/] As with evidence of the contract, this testimony was not elicited for its truth—that Tautai knew about the contract. Given the context in which the prosecutor's questions were asked (see *ante*), what was clearly important, and what the prosecutor was undoubtedly trying to highlight, was that Iuli believed Tautai could be instrumental in influencing appellant "to take the heat off" Iuli if he decided not to take the deal. By eliciting this testimony, the prosecutor was drawing the jury's attention to the fact that Iuli did not take Tautai up on what Iuli believed was a viable offer, again, bolstering Iuli's credibility.

Finally, the prosecutor asked Iuli the following question, "During that conversation on April 24th, this year, toward the end of the conversation did you tell Tautai that you have been sitting here for four years for something his

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61. Appellant argues that because the prosecutor did not directly ask Iuli if he was afraid to testify, the challenged evidence was inadmissible to show Iuli's fear. (AOB 136.) This claim ignores the fact that appellant attacked Iuli's credibility from the beginning of trial, and made his plea deal a major issue. As such, the circumstances surrounding both matters were clearly relevant.

62. Appellant claims this evidence was "multiple hearsay" but does not provide support for his assertion. (AOB 134.) Given that Iuli testified that Tautai told him he knew about the contract (see 11 RT 2641), even assuming this evidence was hearsay, it was only a single layer.

fucking dumb-ass brother did?" (11 RT 2642.) Iuli admitted to making the statement. (11 RT 2642.) Appellant briefly argues that this statement was "unadulterated hearsay[.]" (AOB 136.) Again, Iuli's statement was admissible not for its truth, but was admissible to explain why Iuli did not accept Tautai's offer to "take the heat off" Iuli.

Because we may infer the trial court allowed the challenged testimony into evidence for a nonhearsay purpose as noted above, the admission of this evidence was not an abuse of discretion.

D. No Federal Constitutional Violation Occurred

Appellant also argues that the admission of the above-challenged statements violated his Eighth and Fourteenth Amendment rights. (AOB 139.) Not so. Decisions concerning the hearsay rule are an "application of ordinary rules of evidence," and do not "implicate the federal Constitution." (*Harris*, *supra*, 37 Cal.4th at p. 336; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) A defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.) As shown above, no error occurred under state evidentiary law in admitting the challenged statements. For the same reasons, there was no federal constitutional error.

E. Any Possible Evidentiary Error Was Harmless

Even assuming this Court finds that Iuli's and/or Tautai's challenged statements were erroneously admitted, it is not reasonably probable appellant's verdict would have been more favorable absent this evidence. (See *Harris*, *supra*, 37 Cal.4th at p. 336 [evidentiary rulings analyzed under *Watson* standard].)[63/]

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63. Appellant asserts prejudice by citing to portions of the prosecutor's opening and closing remarks where the prosecutor mentions the challenged

As noted *ante*, overwhelming physical evidence connected appellant with the crimes. (See Arg. I, § I.) Appellant's three cohorts also identified him as the triggerman (15 RT 3323), and the inconsistencies in Tautai's defense testimony and the insufficiently-explained tardiness of appellant's wife's alibi evidence rendered appellant's defense incredible. In addition, Iuli's opinion about serving time for appellant's actions is cumulative of his trial testimony that both Palega and Iuli were against appellant killing Nolan. (11 RT 2587, 2630, 2632; 12 RT 2836-2837, 2842.) Admission of the challenged evidence thus did not prejudice appellant. (See e.g., *Rodrigues*, *supra*, 8 Cal.4th at p. 1119.)

Even if the jury improperly considered evidence that appellant may have placed a contract on Iuli's life, that Tautai was aware of the contract, and that Iuli felt he was in prison because appellant killed Nolan instead of letting him go after the robbery, it is not reasonably probable that appellant would not have been convicted absent this evidence.

F. Defense Counsel Did Not Render Constitutionally Ineffective Assistance Of Counsel

Appellant attacks his attorney's failure to consistently lodge a hearsay objection as ineffective assistance of counsel. (AOB 132.) As argued in Argument I, § J, and adopted herein), appellant's claim should not be considered on direct appeal. Even if considered here, appellant's claim of ineffective assistance of counsel fails.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance

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statements (AOB 137-138; 6 RT 1591-1592; 17 RT 3514-3515) and argues "there was in fact no competent evidence to support the argument." (AOB 138, 139.) There is no such thing as "incompetent" evidence. Evidence is either admissible or inadmissible. (*People v. Kurey*, *supra*, 88 Cal.App.4th at p. 847.)

> was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

(*Strickland, supra*, 466 U.S. at p. 687.)

In order to show that counsel's performance was constitutionally deficient, appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. (*Montoya, supra*, 149 Cal.App.4th at p. 1147.) "The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1210.) Great deference is accorded counsel's tactical decisions. (*Holt, supra*, 15 Cal.4th at p. 703.) Counsel's failure to object "will seldom establish ineffective assistance. [Citation.]" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092.)

As noted in the quoted passage above (see § A), defense counsel objected at least twice during portions of the challenged testimony; both times on hearsay grounds. (See 11 RT 2640-2641.) Given counsel's awareness of the possible hearsay nature of the testimony related to that which appellant now challenges, and the fact that the evidence was properly admitted for a nonhearsay purpose (see § C), it is reasonable to conclude that counsel did not object to the challenged statements as a matter of trial tactics. Appellant cannot show that counsel's failure to object was constitutionally deficient.

Appellant argues that counsel's failure to object was prejudicial because, "[t]he highly inflammatory evidence of a contract killing could not but overwhelm" his alibi defense. (AOB 139.) Respondent disagrees. For the reasons stated in section E, *ante*, appellant suffered no prejudice. His

ineffective assistance of counsel claim must be rejected.

VIII.

THE ALLEGED ERRORS DISCUSSED IN APPELLANT'S ARGUMENTS I, V, VI, AND VII DID NOT AMOUNT TO CUMULATIVE PREJUDICIAL ERROR

Appellant contends that the errors alleged in his arguments I, V, VI, and VII, were "unified by their placement in the direct examination of Tony Iuli." (AOB 139.) According to appellant, this placement amplified their prejudicial effect by unduly bolstering Iuli's credibility. (AOB 139.)

Because there is no merit to appellant's individual claims of error (see Args. I, § C, V, § B, VI, § C, VII, § C), "his claim that he was prejudiced by their cumulative impact[]" must be rejected. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) "The zero effect of errors, even if multiplied, remains zero. [Citation.]" (*People v. Calderon* (2004) 124 Cal.App.4th 80, 93.) In any event, the due process clause of the Fourteenth Amendment entitles appellant to a fair trial, not a perfect one. (*Hill, supra*, 17 Cal.4th at p. 844; *People v. Osband* (1996) 13 Cal.4th 622, 702.) As this Court has observed, "[l]engthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*Hill, supra*, 17 Cal.4th at p. 844.) Review of the record without appellant's speculation and interpretation shows he received a fair trial free from prejudicial error.

Appellant claims that the alleged errors "contributed so substantially to a skewed portrait of [the credibility of Iuli] that it is reasonably probable that the guilt phase of trial would have resulted more favorably for appellant without these errors." (AOB 140.) "All evidence, however, has the potential of bolstering or undermining a witness's credibility." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 176.) Moreover, while the challenged portions of Iuli's testimony may have helped his credibility, they may not have done so, given

that these portions of his testimony were such a small part of his overall testimony. Further, based on the overwhelming physical evidence recovered by the police, appellant's thumb print found on the box of ammunition, the fact that Palega and Tautai also both identified appellant as the murderer, and the ATM video, appellant's guilt was plainly proven without Iuli's testimony at all. Appellant has failed to show he suffered a miscarriage of justice; his claim of cumulative error must be rejected.

IX.

THE TRIAL COURT'S SINGLE CHALLENGED COMMENT DID NOT CONSTITUTE JUDICIAL MISCONDUCT

Appellant claims the trial court committed judicial misconduct by "casting aspersion and ridicule on" defense witness Tautai Seumanu's credibility. (AOB 141, 146.) Appellant forfeited his claim under both state and federal law when he failed to lodge any objection to the comment below. Even if this Court considers the claim on the merits, the challenged remark did amount to misconduct, and if error was harmless in any event.

A. Relevant Proceedings

The prosecutor questioned Tautai Seumanu in relevant part as follows:

Q. You are a gangster with a capital G, aren't you?

A. No.

Q. Really? [¶] Then what were you trying to earn your stripes for, sir?

A. To get there.

Q. To get there. [¶] And exactly what gang were you trying to ascend into?

A. I was already into.

Q. Who jumped you in?

A. People.

Q. Yeah, your big brother Paki?

A. No.

Q. What gang did you belong to?

A. S.O.S.

Q. Sons of Samoa?

A. Yes.

Q. That is not a social club, is it?

A. No.

Q. Not a little place where Samoan children get together and play games, is it?

A. No.

Q. It is a criminal gang, isn't it?

A. I wouldn't call it that.

Q. What would you call it?

A. Brotherly love.

Q. Brotherly love. [¶] Go out and do murders, earn stripes, that is brotherly love?

A. They do, they do.

Q. Who is "they?"

A. Those who are in it.

Q. I thought you were in it?

A. Me too.

Q. How old were you when you were jumped into S.O.S.?

A. Eight.

Q. Eight. [¶] So you have been claiming blue as a Crip since you were eight years old?

A. Yeah.

Q. Who jumped you in?

A. People.

Q. People. [¶] Like who?

A. Certain people in the click [*sic*].

Q. Answer the—

A. I can't give no names.

Q. Why not?

A. Because they are not in the case.

Q. You are under oath to tell the truth. I know that doesn't mean much to you.

MS. LEVY: Objection. Argumentative.

MR. CIRAOLO: Argumentative.

THE COURT: *Ms. Backers, I know the temptation, but sustained.*

(15 RT 3325-3327, italics added.)

B. Appellant Forfeited His Judicial Misconduct Ad Federal Constitutional Claims

Appellant claims the italicized statement constituted judicial misconduct and violated his Eighth and Fourteenth Amendment rights. (AOB 141, 146.) Appellant, however, lodged no objection to the trial court's comment.

This Court has established that judicial misconduct claims are forfeited if appellant fails to lodge an objection on that ground in the trial court. (*People v. Geier* (2007) 41 Cal.4th 555, 613; *People v. Sturm* (2006) 37 Cal.4th 1218, 1236.) This Court has also repeatedly upheld the requirement that a defendant must make timely and appropriate objections on federal constitutional grounds in order to preserve a federal law claim. (*United States v. Olano*, *supra*, 507 U.S. at p. 731; *Rodrigues*, *supra*, 8 Cal.4th at p. 116, fn. 20.) Even if this Court considers appellant's claim of misconduct, it fails on the merits.

C. The Challenged Comment Did Not Constitute Misconduct

In an attempt to create misconduct where none occurred, appellant

mischaracterizes the trial court's single statement and wrongly interprets it as a "virtually explicit judicial pronouncement that the oath to tell the truth did not in fact mean much to Tautai Seumanu." (AOB 145.) Appellant further asserts that the comment highlighted "the trial court's own partisan sympathies with the prosecution." (AOB 146.)

"[T]he trial court has broad latitude in fair commentary, so long as it does not effectively control the verdict." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 768.) The court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.)

> No hard and fast rule can be evoked to arithmetically determine the extent to which a judge may or may not comment on the evidence or the credibility of the witness. Each case must necessarily turn upon the context of the comments and the peculiar circumstances under which the comment is made.

(*People v. Flores* (1971) 17 Cal.App.3d 579, 584-585.)

When the content of the court's comment is viewed in the context in which it was made, free from appellant's hyperbole, the unmistakable conclusion is that the court's statement did not discredit the defense or create the impression that the court was allying itself with the prosecution. Rather, the comment was simply a politely-phrased reminder to the prosecutor to refrain from losing her composure and commenting on Tautai's deliberate evasiveness and decision to be less than forthright when answering the prosecutor's questions. The court made the comment during a particularly frustrating portion of Tautai's cross-examination when he chose to be argumentative and evasive when answering the questions posed to him. (15 RT 3325-3328.) The trial court could clearly comment on what was evident to the jury. Given the isolated nature of the court's comment and the context in which it was made, appellant has failed to establish misconduct. (See e.g., *People v. Chong* (1999)

76 Cal.App.4th 232, 244 [judge's comments did not constitute misconduct where they were appropriate responses to defense counsel's actions, and did not discredit defense theory or create impression that court was allying itself with prosecution].)

D. Even If This Court Finds That The Court's Comment Constituted Misconduct, Appellant Was Not Prejudiced

Even assuming arguendo that the trial court's single remark constituted judicial misconduct, the challenged comment was not prejudicial. Contrary to appellant's claim, when reviewing a trial court's comment for prejudicial error, the reviewing court must utilize the state law standard of harmless error; whether it is reasonably probable a result more favorable to defendant would have been reached absent the error. (*Watson, supra*, 46 Cal.2d at pp. 836-837; *People v. Melton* (1988) 44 Cal.3d 713, 736.)

The trial court here instructed the jury with CALJIC No. 17.30 as follows:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(17 RT 3646.)

In light of the trial court's instruction, appellant was not prejudiced by the challenged comment.

> Even where conduct by a trial judge may approach the boundaries of improper discretion, an admonition to disregard his conduct can be deemed curative, and it must be assumed that the jury was possessed of ordinary intelligence and followed such instructions. [Citation.]

(*People v. Franklin* (1976) 56 Cal.App.3d 18, 24 [CALJIC No. 17.30 sufficient to protect defendant from prejudice "that may have remotely occurred"].)

E. No Federal Constitutional Violation Occurred

Anticipating that this Court will find no error or prejudice under state law, appellant nonetheless suggests that the court's comment invoked the federal constitution. (AOB 146.) This cannot be. If no error occurred under state law, there is no federal constitutional violation. (See e.g., *Davis, supra*, 10 Cal.4th at p. 506, fn. 7.)

X.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO USE EXHIBIT 46 TO IMPEACH TAUTAI DURING CROSS-EXAMINATION

Appellant alleges that the trial court permitted the prosecutor to reference People's Exhibit 46 to impeach Tautai on cross-examination without first establishing the proper foundation. (AOB 148.)[64/] Specifically, appellant contends the exhibit was not properly authenticated and that Tautai did not possess the requisite knowledge to testify about the exhibit. (AOB 156.) Appellant also argues that the alleged error violated his federal constitutional rights and that the prosecutor committed misconduct by questioning Tautai regarding the exhibit. (AOB 151, 160-161.) Appellant forfeited his misconduct and federal constitutional claims by failing to object on these grounds at trial. Regardless, appellant's claims fail on the merits.

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64. People's Exhibit 46 is a chart with the heading, "Uso For Life." (6 RT 1540-1541.) It appears to list the nicknames of several members of "America's Most Wanted Samoans." (6 RT 1541.) During pre-trial in limine hearings, the prosecutor argued to admit the exhibit as a party admission by appellant. (6 RT 1540-1541.) The trial court declined to admit the exhibit under this theory and ordered the prosecutor not to mention the exhibit during her opening argument. (6 RT 1541.) The prosecutor followed the trial court's order and did not reference exhibit 46 until her cross-examination of Tautai during the defense's case in chief. (15 RT 3332-3338.)

A. Relevant Proceedings

During cross-examination, Tautai alleged that he murdered Nolan to earn gang stripes. (15 RT 3325, 3333.) He admitted he was a member of the Crip-affiliated criminal street gang, Sons of Samoa (S.O.S.) and that his gang nickname was Teaspoon (15 RT 3325-3326, 3331). Tautai testified that appellant and Palega were also Crip members, and that appellant's gang nickname was Mr. Smurf 1. (15 RT 3328-3329, 3331.) According to Tautai, a Crip member gained status within the gang "by doing killings." (15 RT 3329.) Tautai claimed that although he was the youngest person in the van the night of the murder, he gave orders to the others. (15 RT 3330.)

Based on the above-referenced testimony, the prosecutor used Exhibit 46 to impeach Tautai—to rebut his claim that he, and not appellant murdered Nolan. She attempted to show that the exhibit did not list Tautai's name in a position of seniority, thus contradicting his claim that committing the murder earned him stripes in the gang. (15 RT 3332-3338.)

The following exchange then occurred regarding the introduction and use of the exhibit.

> MS. BACKERS: After you were in custody for this crime and you put your brother as the triggerman, you went to the hall for two years, right?
>
> A. Yeah.
>
> Q. Right?
>
> A. Yeah.
>
> Q. And your brother drew up a little drawing of some people in the gang, right?
>
> A. I don't remember that.
>
> Q. You don't remember seeing it at the hall when he asked [Iuli] to type it up at the hall?
>
> MR. CIRAOLO: Objection. No foundation.

THE COURT: Overruled.

MS. BACKERS: When you are doing a murder, and you are proud of it, and you earn your stripes, you are going to be number one on that list, aren't you? [¶] That is the whole idea behind it, right?

A. Some.

MS. LEVY: Objection. Compound.

THE COURT: Overruled.

MS. BACKERS: You earn your stripes, you are number one on the list, right?

MR. CIRAOLO: Objection. No foundation. Assumes facts not in evidence and vague as to what list.

THE COURT: Counsel, overruled. This is cross-examination. And I don't expect objections after every question when the questions are legally sufficient and proper.

Q. You told us that you jumped out of that van and killed that young man to earn a stripe because of your ego, right?

A. Yeah.

Q. So you would gain status in your Crips gang, right?

A. Yeah.

Q. Right. [¶] To earn your stripes, right?

A. Yeah.

Q. And so that would move you up to the top of the class, wouldn't it?

A. Wouldn't necessarily move me to the top.

Q. Well, when you say earn stripes, are you talking about becoming a lieutenant? [¶] What are you talking about?

A. Just get my respect.

Q. Get your respect. [¶] And if you had just done this cold-blooded, brutal murder of a sweet, innocent bridegroom—

MR. CIRAOLO: Objection. Argumentative.

THE COURT: Sustained.

MS. BACKERS: If you had just done a cold-blooded murder to earn

your stripes, that would move you up the list in the gang, wouldn't it?

A. Not necessarily.

Q. Not necessarily? [¶] Then what is the point of doing it to earn a stripe?

A. They will let you—let you know that you gonna play.

Q. After you were in custody on this murder, tell us how come you were fifth on the list if you were such a bad actor.

MR. CIRAOLO: Objection. No foundation. No foundation that he has knowledge of this list, your Honor.

THE COURT: Overruled.

MS. BACKERS: Mr. Seumanu, you've seen that before, right?

A. No, I haven't.

Q. You were in the hall when [Iuli] typed it up, right?

MR. CIRAOLO: Objection. Assumes facts not in evidence. He answered he hadn't.

THE COURT: Sustained.

MS. BACKERS: Mr. Seumanu, you know what Uso means, it means brother right?

A. Yeah.

Q. Brother for life, right?

A. Yep.

Q. Right. [¶] The first guy on there is Paki, right?

A. Yeah.

Q. Your big brother, right?

A. Yeah.

Q. The second guy on there is Big Tony, right?

A. Yeah.

Q. The next guy on there, the third guy on there, is Jay Palega, Mac Jay, right?

A. Yeah.

Q. The fourth guy on there is Tim Tao who passed away in 1998, right?

A. Yep.

Q. That is Tony's brother, right?

A. Yeah.

Q. You don't make the list until number five.

MR. CIRAOLO: Objection, Your Honor. May we approach the bench?

THE COURT: Sure.

(Whereupon, the following discussion was had at side bar.)

MR. CIRAOLO: He did not write that. It was sent to them. She is implying he created it.

THE COURT: No, she is not.

MS. BACKERS: Paki wrote it.

MS. LEVY: Should be cleared up.

THE COURT: Clear it up then. He is a gangbanger to earn stripes.

MR. CIRAOLO: The other objection is that there is not foundation to establish this is any kind of a gang status.

THE COURT: So he can say it is not a gang status list.

MR. CIRAOLO: He says he doesn't know about it.

MS. LEVY: Never saw it.

THE COURT: That is all he has to say.

MR. CIRAOLO: He said it.

THE COURT: Mike, I am not going to stand in the way of legitimate cross-examination when this guy is lying through his teeth and everybody in the court room knows it and it is just the way it is going to come out.

MR. CIRAOLO: That may be, but I think it is appropriate that if we are going to have cross-examination there has to be a proper, legal foundation for it.

THE COURT: That is right.

MR. CIRAOLO: There is no proper, legal foundation.

MS. BACKERS: Yes, there is.

MR. CIRAOLO: That this is a list—

MS. BACKERS: It says.

THE COURT: Wait a minute. There has been testimony that uso for life is brothers for life. They refer to that amongst the gang. If he doesn't know anything else about it, then he doesn't, but that ties it into the gang.

MR. CIRAOLO: That may be, but by questioning the way it is going, about assuming it is a gang list and this is a status report, and he says he hasn't seen it and doesn't know, doesn't establish this is a gang status list.

THE COURT: Ask him that question.

MS. BACKERS: I will.

(Whereupon, the following proceedings were had in open court.)

MS. BACKERS: Mr. Seumanu, what does America's most wanted Samoans mean to you?

A. Samoans wanted.

Q. And you were one of the four wanted for this murder, right?

MR. CIRAOLO: Objection, Your Honor. [¶] May I approach the bench again?

(Whereupon, the following discussion was had at side bar.)

MR. CIRAOLO: There is no foundation connecting that statement to this crime. Counsel is trying to draw an improper inference by her question. The court had ruled she should establish if he has knowledge of what this thing represents, what does it stand for. She hasn't established that foundation yet.

MS. BACKERS: I only asked one question.

THE COURT: She asked him if he knew what it meant and he said no. She asked if he knew what they were for—wanted for murder.

MR. CIRAOLO: I don't think she said it that way. I think the one before—

THE COURT: If you were wanted for murder.

MR. CIRAOLO: There is no foundation this is correlated to this crime where he has knowledge of it.

THE COURT: Angela, let's not spend a lot more time.

MS. BACKERS: I am not going to.

(Whereupon, the following proceedings were had in open court.)

MS. BACKERS: Mr. Seumanu, if you pulled the trigger, on this list, explain to the jury why you are number five on the list—excuse me—if you pulled the trigger in this murder, explain to the jury why you are number five on that list.

MS. LEVY: Objection.

MR. CIRAOLO: Objection. No foundation.

THE COURT: Counsel, one of you is going to object. The other is going to keep quiet.

MR. CIRAOLO: I will do it. [¶] Objection. No foundation.

THE COURT: Sustained.

(15 RT 3332-3338.)

B. Appellant Forfeited His Prosecutorial Misconduct and Federal Constitutional Claims

In addition to his state law evidentiary claim, appellant argues that the prosecutor's use of Exhibit 46 constituted prosecutorial misconduct and violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 151, 160, 161.) Appellant failed to object on these grounds. Thus, he has waived these claims on appeal. (*Olano*, *supra*, 507 U.S. at p. 731; *Tafoya*, *supra*, 42 Cal.4th at pp. 166, 176; *People v. Price* (1991) 1 Cal.4th 324, 481; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.) The admission of the challenged testimony was proper in any event.

C. The Trial Court Properly Allowed The Prosecutor To Reference Exhibit 46 To Impeach Tautai

Appellant contends that Exhibit 46 was not properly authenticated and

that Tautai did not possess the requisite personal knowledge neces sary to testify about the exhibit at trial. (AOB 156.) This claim is misplaced.

A writing must be authenticated before it may be received in evidence. (Evid. Code, § 1401.) "Authentication of a writing is defined as (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law. (Evid. Code, § 1400.)" (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262.) A document may be authenticated by circumstantial evidence. (*Id.* at p. 263.)

"[T]he authentication of a document is not necessary when the execution of [the document] is not [at] issue, but only the fact of the [document's] existence[.]" (*People v. Adamson* (1953) 118 Cal.App.2d 714, 720 [where document used to show that witness's actions were motivated by document, authenticity of document had no bearing on intended use].)

Here, the prosecutor did not offer Exhibit 46 as an authentic document created by appellant and typed by Iuli. Rather, she established its existence in order to impeach Tautai's claim that he murdered Nolan to earn gang stripes. Authentication was not required under these circumstances. (See e.g., *Adamson, supra*, 118 Cal.App.2d at p. 720.) Even assuming authentication was required here, because Tautai "testified as to the circumstances surrounding the document[,]" it was properly admissible in any event. (See *McAllister v. George, supra*, 73 Cal.App.3d at p. 263.)

First, Tautai admitted that "some" of the idea behind his decision to murder Nolan was to move up to the first position on the gang seniority list. (15 RT 3333.) Second, Tautai reiterated that he killed Nolan to "earn a stripe" and to gain gang status. (15 RT 3325, 3333-3334.) Third, Tautai testified that the word "uso" used in Exhibit 46 means "brothers for life." (15 RT 3335.) Fourth, he admitted that he, appellant, and Palega belonged to the criminal

street gang S.O.S. and disclosed their gang nicknames. (15 RT 3325-3326, 3328-3329, 3331.) Fifth, Tautai confirmed that appellant was first on the list, Iuli was second, Palega was third, and he was fifth on the list. (15 RT 3335.) As the trial court noted in its ruling, "[t]here has been testimony that uso for life is brothers for life. They refer to that amongst the gang. If he doesn't know anything else about [the list], then he doesn't, but that ties it into the gang." (15 RT 3337.)

To the extent appellant argues that Tautai did not possess the requisite knowledge to testify about the exhibit (see AOB 156), appellant's claim is misplaced. As the trial court noted, the prosecutor did not imply that Tautai created the list and Tautai was free to testify that the exhibit was not a gang status list as implied. (See 15 RT 3336-3337.) Because the prosecutor was simply using the exhibit to impeach Tautai on his earlier claim, Tautai's knowledge of the document was not required.

"To testify, a witness must have personal knowledge of the subject of the testimony, i.e., 'a present recollection of an impression derived from the exercise of the witness' own senses. [Citations.]' In order to have personal knowledge, a witness must have the capacity to perceive and recollect." (*People v. Lewis* (2001) 26 Cal.4th 334, 356.)

> "'[I]f there is evidence that the witness has those capacities, the determination whether [he] in fact perceived and does recollect is left to the trier of fact.' [Citations.]" (*People v. Dennis* [(1998)] 17 Cal.4th [468, 526]; 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 46, p. 297 [the capacity to perceive and recollect is "only preliminarily determined by the trial judge, and ultimately redetermined by the jury"].) A trial court should allow a witness's testimony unless "no jury could reasonably find that he has such [personal] knowledge.) (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code, *supra*, foll. § 701, p. 284.)"

(*Ibid.*)

The prosecutor properly utilized Exhibit 46 during cross-examination to

impeach testimony offered by Tautai on direct examination.[65] Appellant's contrary claim should be rejected.

D. The Prosecutor's Use Of People's Exhibit 46 In Her Qu estioning Of Tautai Did Not Constitute Prosecutorial Misconduct

In a related claim, appellant contends that the prosecutor's use of Exhibit 46, and her questioning regarding the exhibit constituted prosecutorial misconduct. (AOB 151, 160.) "[C]apitalizing on the trial court's foundational errors during her cross-examination of Tautai, she committed misconduct in presenting information to the jurors that she could not reasonably expect to prove either from Tautai, Iuli, or by any other evidence." (AOB 151.) As noted *ante*, appellant's failure to object on this basis and to request a curative admonition waives this claim on appeal. Regardless, the prosecutor did not commit misconduct.

A prosecutor's conduct amounts to prosecutorial misconduct under state law "only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*Morales*, *supra*, 25 Cal.4th at p. 44.) "It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.]" (*Price*, *supra*, 1 Cal.4th at p. 481.)

As noted above, authentication of the exhibit was not required for the prosecutor's impeachment of Tautai and, in any event, Tautai's testimony

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65. The scope of cross-examination delineated by the rules of evidence is "quite generous." (*People v. Matola* (1968) 259 Cal.App.2d 686, 691.) "[W]ide latitude may be permitted" as long as the cross-examination is limited to matters within the scope of direct examination. (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 421.) A witness can be cross-examined with respect to facts or denials which are implied from his direct examination testimony as well as with respect to facts which the witness expressly states. (*Matola*, *supra*, 259 Cal.App.2d at p. 690-691.)

provided the requisite foundation. To the extent appellant claims the prosecutor committed misconduct because she could not reasonably have expected to prove that the exhibit served as a gang status list (see AOB 151), the prosecutor's direct examination of Iuli during the penalty phase suggests otherwise, as noted by the italicized portion below.

Q. And after [appellant] was in custody on this murder, did he ever give you anything to type up on the computer at juvenile hall?

A. Yes.

Q. And tell the jury about that.

A. Some name of the brothers in our house.

Q. And what does that mean, "brothers in our house"? What does that mean?

A. Brothers, my little brothers and his brothers.

Q. And what was on—first of all, how does that happen, he gives you a piece of paper? How does that happen?

A. I had wrote him a letter on the computer. And he wrote back saying since you can use the computer, I want you to type this up for me.

Q. So when you were in juvenile hall for those two years before you turned 18, you had access to a computer in the hall?

A. Yes.

Q. And you wrote him a letter?

A. Yes.

Q. And then what did he hand you to type up?

A. The names of my brothers.

Q. And when he gives it to you, is it in handwriting?

A. Yes.

Q. Where is it that he gives it to you?

A. In a letter.

Q. In a letter?

A. Yes.

Q. Tell the jury how you receive a letter in jail.

A. You get it through the mail.

Q. And is there something called jail mail or inmate mail?

A. That is in the jail. I was in juvenile hall.

Q. This is actually through the postal system?

A. Yes.

Q. And what does he send you?

A. He says he wants me to do that for him.

Q. Did you type it up for him?

A. Yes.

Q. And did you provide a smaller version of this to me when I was interviewing you?

A. Yes.

Q. Is this—this is People's 46, for the record. [¶] Is this what Paki asked you to type up?

A. Yes.

Q. Now, of all the times you've ever talked to Paki about the murder of this young man, has he ever told you that it was an accident?

A. No.

Q. Has he ever told you that he was sorry?

A. No.

Q. *And, in fact, he had you type up "America's Most Wanted Samoans;" is that right?*

A. *Yes.*

Q. *What does that mean?*

A. *Just means what it says.*

Q. *You told me that was a badge of honor, right?*

A. *Yeah.*

(19 RT 3942-3944.)

Given the format of the list and Iuli's testimony that the phrase "America's

Most Wanted Samoans" included in Exhibit 46 was a badge of honor, the prosecutor could reasonably have believed that the list was a gang status list and that Tautai would confirm that fact. Given the close relationship between appellant, Iuli, Palega, and Tautai, and the fact that Tautai and Iuli were housed in juvenile hall together when Iuli created the list, the prosecutor also had reasonable grounds to believe Tautai had seen the list or at a minimum was aware of its existence. Her use of the exhibit to impeach Tautai did not constitute misconduct.

E. The Use Of People's Exhibit 46 During Tautai's Testimony Did Not Violate Federal Law

Appellant also argues that the trial court's decision to admit exhibit 46 and the prosecutor's use of the exhibit violated his Sixth, Eighth and Fourteenth Amendment rights (AOB 160, 161.) Not so. California courts generally assume that prosecutorial misconduct is error of less than federal constitutional magnitude. (See *Bolton*, *supra*, 23 Cal.3d at p. 214, fn. 4.) Further, a defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.) The prosecutor had a legitimate belief that Exhibit 46 was a gang status when she questioned Tautai about it. Her use of the exhibit did not "infect the trial with such unfairness as to make [appellant's] conviction a denial of due process." (See *Morales*, *supra*, 25 Cal.4th at p. 44.) Appellant's claim of federal constitutional error must be rejected.

F. Harmless Error

Even if the prosecutor's use of Exhibit 46 to impeach Tautai constituted misconduct, the limited and brief use of the exhibit was not prejudicial. Reversal is required only if after an examination of the entire cause, including the evidence, it is reasonably probable a result more favorable to appellant

would have been reached in the absence of the misconduct. (*Barnett*, *supra*, 17 Cal.4th at p. 1133; *Bain*, *supra*, 5 Cal.3d at p. 849.)

Tautai testified he did not recall seeing the list (15 RT 3333-3335); thus, the jury likely placed little weight on its importance. Moreover, the point the prosecutor was trying to make—that Tautai's lack of elevated status within the gang showed he did not kill Nolan—was proven by other evidence. For instance, Tautai essentially testified he was at the mercy of the other gang members, presumably those more senior, to let him "know that you gonna play." (15 RT 3334.) Tautai also gave the police several different reasons for killing Nolan that were not gang-related, including accident (14 RT 3203; 15 RT 3218), and fear that Nolan saw their faces and could identify them. (15 RT 3221). Importantly, Tautai also identified appellant as the shooter to police. (14 RT 3204, 3206; 15 RT 3222, 3224.) Thus, the circumstantial evidence in Exhibit 46 that allowed the jury to infer that Tautai was not the triggerman was cumulative of other properly admitted evidence. Finally, as discussed *ante* (see Arg. I, § I), overwhelming evidence of appellant's guilt was presented.[66]

XI.

THE PROSECUTOR'S QUESTIONS TO TAUTAI ABOUT HIM TESTIFYING AGAINST APPELLANT DID NOT CONSTITUTE MISCONDUCT

Appellant claims the prosecutor committed misconduct during her cross-examination of Tautai. Appellant's failure to lodge timely and appropriately specific objections and to request an admonition where necessary forfeits his claim on appeal. (See *Thornton*, *supra*, 41 Cal.4th at p. 454 [must object on prosecutorial misconduct grounds or it is forfeited].) Regardless, the challenged

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66. In connection with his harmless error argument, appellant claims that the instant claim was prejudicial in combination with the errors alleged in his Argument I. (AOB 161.) Appellant repeats this claim in his Argument XII; respondent will address it in our Argument XII.

questions by the prosecutor did not constitute misconduct and were not prejudicial in any event.

A. Relevant Proceedings

During the prosecutor's cross-examination of Tautai, she questioned him in relevant part as follows:

Q. So when you took the deal, you knew [Iuli] was going to testify against you?

A. Yes.

Q. And your big brother?

A. Yes.

Q. And you knew that all three of you had said that your big brother was the triggerman in '96?

A. Yes.

Q. And you asked me for the same deal to testify against your big brother, didn't you?

MR. CIRAOLO: Objection. Hearsay, privileged communications.

THE COURT: Overruled.

MR. CIRAOLO: No foundation.

THE COURT: Overruled.

THE WITNESS: When did I ask you this?

[PROSECUTOR]: You wanted the exact same deal that [Iuli] and [Palega] got, and I said no way.

MR. CIRAOLO: Your honor, objection. Counsel is testifying and no foundation.

THE COURT: Overruled.

[PROSECUTOR]: Q. You were willing to come in and say that your big brother was the triggerman if you could get the "L" taken off of your sentence, weren't you?

A. I didn't.

Q. You didn't want the same deal [Iuli] and [Palega] got?

A. Hell no.

Q. Hell no?

A. No.

Q. You wanted to go down for life?

A. No.

Q. You never wanted to get out of jail?

A. No.

Q. No, you don't want to get out of jail?

A. No.

Q. Are you telling this jury that you did not ask me for the same deal [Iuli] and [Palega] got so you could testify against your big brother?

MR. CIRAOLO: Same objection, your honor. [¶] Could we approach the bench on this?

THE COURT: Sure. [¶] (Whereupon, the following discussion was had at side bar.)

MR. CIRAOLO: Your honor, I am objecting. No foundation. Counsel is trying to establish there was a direct communication between the [witness], who is represented by counsel, with her.

THE COURT: I don't hear him say it didn't happen. I don't see—Mr. Daley is his lawyer. You cannot assert a privilege.

MR. CIRAOLO: I am objecting there is no foundation.

THE COURT: She asked him if it happened. He said no. I don't see anybody else asserting any privilege. [¶] The objection is overruled.

(15 RT 3342-3344.)

Later, outside the presence of the jury, the court and Tautai's attorney, Mr. Daley revisited the matter.

MR. DALEY [Tautai's attorney]: But I can be very brief. [¶] My concern is the questions addressed to my client about whether or not he had requested a deal. Obviously, he had no communication with Angela, at least none that I am aware of. I don't think they ever exchanged any words.

I can say that I did make an inquiry, and was abruptly turned down. And without getting into confidential communications, I can say I did it without any instructions from my client just to see if it was available. [¶] And I think I communicated that to Angela at the time. Of course, we are going back four or five months at this point. [¶] There was the implication in the record, at this point—

THE COURT: Well, Mr. Daley, I didn't hear you objecting at the time.

MR. DALEY: The objection was whether my client had any communications and requested an offer and he answered no, which is true.

THE COURT: Okay. So—

MR. DALEY: The implication—

THE COURT: Mr. Daley, I can't deal with implications if you sit there and don't say anything, okay? So you didn't say anything, he answered no, so that is the end of that story as far as I'm concerned.

(15 RT 3366-3367.)

B. The Prosecutor's Cross-Examination Of Tautai Did Not Constitute Misconduct

Appellant claims that the prosecutor's questions regarding Tautai approaching her for a deal in exchange for testifying against appellant constituted misconduct. (AOB 162-172.) Specifically, appellant argues that these questions called for inadmissible evidence, implied facts the prosecutor could not prove, and constituted false representations of fact. (See AOB 162, 166-170.)

As noted above, Tautai's attorney approached the prosecutor about a deal for Tautai, but was "abruptly turned down." (15 RT 3366.) Given this fact, it was reasonable for the prosecutor to assume that Tautai had his attorney approach her because he wanted the same deal negotiated by Iuli and Palega. Moreover, her "abrupt" response could reasonably be interpreted as her saying,

"no way."[67] Thus, the prosecutor did not try to elicit inadmissible evidence, ask questions she did not reasonably believe she could prove, or try to falsely represent the facts. The prosecutor's questions did not involve "the use of deceptive or reprehensible methods to persuade . . . the jury." (See *Morales*, *supra*, 25 Cal.4th at p. 44.) Most important, there is no evidence that the jury applied her remarks in an objectionable fashion. (See *ibid.* [when prosecutorial misconduct claim focuses on comments made by prosecutor before jury, question is whether there is reasonable likelihood that jury construed or applied complained-of remarks in objectionable fashion].)

Tautai vehemently denied having approached the prosecutor for a deal, a point underscored by defense counsel in closing. (See 17 RT 3564 [defense counsel arguing, "When Ms. Backers was questioning Tautai, she said you came crawling and begging to me for a deal. No evidence of that. He answered no."].) The challenged remarks were also brief and the jury was twice instructed to find appellant guilty based only on the evidence (See 17 RT 3438, 3611-3612), and were instructed that the remarks of an attorney are not considered evidence. (See 17 RT 3428; CALCRIM No. 222.) The jury is presumed to have followed these instructions. (See *Delgado*, *supra*, 5 Cal.4th at p. 331; see also *Hughey*, *supra*, 194 Cal.App.3d at p. 1396 [even if misconduct occurred, prejudicial effect may be dissipated by an instruction that the statement of the attorneys are not evidence].)

C. Even Assuming Error, It Was Harmless

Assuming arguendo that the prosecutor's questions to Tautai constituted

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67. Although Daley told the court he believed he had informed the prosecutor he was approaching her "without any instructions from" Tautai, Daley could not be sure given the lapse of time since the conversation. (15 RT 3366.) Thus, we can reasonably assume that Tautai was aware of Daley's actions on his behalf.

misconduct, given the trial court's instruction to the jury as noted above, and the fact that there was overwhelming evidence of appellant's guilt (see Arg, I, § I, *ante*), it is not reasonably probable appellant's verdict would have been more favorable without the prosecutor's remarks/questions and the introduction of the challenged evidence. (See *Watson*, *supra*, 46 Cal.2d at p. 836.)

D. No Federal Constitutional Violation Occurred

Appellant contends that the alleged state law errors discussed above constituted a violation of the federal constitution. (AOB 168-169.) Specifically, he opines that the prosecutor functioned as "an advocate-witness" in violation of his Sixth Amendment confrontation rights (AOB 70, 79), and that because this was a capital case, her alleged misconduct constituted an Eighth Amendment violation and violated due process. (AOB 78-79.) California courts generally assume that prosecutorial misconduct "is error of less than federal constitutional magnitude." (*Bolton*, *supra*, 23 Cal.3d at p. 214, fn. 4.) The prosecutor's questions did not "infect the trial with such unfairness as to make [appellant's] conviction a denial of due process." (See *Morales*, *supra*, 25 Cal.4th at p. 44.) Further, a defendant who simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.)

As noted *ante* (see § B), the prosecutor did not commit misconduct under state law. Appellant has failed to show that the challenged actions denied him due process under the federal Constitution.

E. Defense Counsel's Failure To Object Does Not Constitute Ineffective Assistance Of Counsel

Appellant also seeks relief by attacking the competency of his trial counsel. Appellant argues that counsel's failure to object to the challenged questions as misconduct constituted ineffective assistance of counsel. (AOB

172.) Respondent renews our previous argument that an ineffective assistance of counsel claim is properly raised in a petition for habeas corpus. (See Arg. I, § J, and authorities cited therein.) Regardless, appellant fails to establish his burden of showing ineffective assistance of counsel.

As discussed above, the prosecutor's questions were reasonable given that Tautai's attorney approached her regarding a possible deal and her reaction to this approach. Even assuming defense counsel's failure to object was not objectively reasonable, given there was no prejudice (see § C, *ante*), appellant's ineffective assistance of counsel claim fails in any event. (See *Strickland*, *supra*, 466 U.S. at pp. 687-688, 694; *Holt*, *supra*, 15 Cal.4th at pp. 703-704.)

Appellant's failure to object to the challenged remarks and evidence waives his claims of prosecutorial misconduct and evidentiary error on appeal. Regardless, his claims fail on the merits. The prosecutor's actions did not "infect the trial with unfairness;" thus they did not constitute misconduct. Further, it was not reasonably likely that the jury misapplied challenged remarks in an objectionable fashion, and their was no prejudice in any event. Last, appellant has failed to show that counsel's failure to object was objectively unreasonable or prejudicial; his claim of ineffective assistance of counsel should be rejected.

XII.

THE ERRORS ALLEGED IN ARGUMENTS IX-XI WERE NOT PREJUDICIAL IN COMBINATION

Appellant next contends that the combined effect of the errors alleged in Arguments IX-XI was prejudicial. (AOB 173-174.) As noted in our arguments responding to appellant's individual claims, the court and/or the prosecutor did not commit misconduct. (See Args. IX-XI, *ante*.) "The zero effect of errors, even if multiplied, remains zero." (*Calderon*, *supra*, 124 Cal.App.4th at p. 93.)

XIII.

THERE WAS NO CUMULATIVE ERROR

Appellant claims that the cumulative effect of the asserted guilt phase errors warrants reversal even if none of these errors was individually prejudicial. (AOB 174-178.) Appellant's claim is misplaced.

As noted in our arguments (see Args. I-XI, *ante*), appellant's claims of error have no merit. Thus, his claim of cumulative error must fail. (See *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1309.) In any event, "[l]engthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*Hill*, *supra*, 17 Cal.4th at p. 844.) Appellant has failed to make such a showing. Given the overwhelming evidence of appellant's guilt (see Arg. I, § I), appellant's incredible alibi defense and claim that Tautai killed Nolan, even assuming arguendo any actual errors occurred at trial, they "did not undermine the facts supporting [appellant's] guilt[.] (*People v. Hinton*, *supra*, 37 Cal.4th at p. 872.) Appellant's claim of cumulative error should be rejected.

XIV.

THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 2.15 WAS PROPER

Appellant argues that the trial court's instruction with CALJIC No. 2.15 "unconstitutionally lightened the prosecution's burden of proof[.]" (AOB 178-182.) This instruction is constitutional and was properly given to the jury.

The trial court instructed the jury with CALJIC No. 2.15 as follows:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of robbery or receiving stolen property. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.

> As corroboration, you may consider the attributes of possession, time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, and any other evidence that tends to connect the defendant with the crime charged.

(17 RT 3642-3643.)

Appellant claims that CALJIC No. 2.15 improperly instructs the jury it may "infer guilt based on conscious possession of recently stolen property" with only *slight* corroborating evidence. (AOB 180.) Appellant supports his claim with a lengthy citation to federal law regarding a conspiracy instruction. (AOB 179-180 .) The instant case does not involve a conspiracy instruction, however, but one on possession of recently stolen property; thus the cases cited by appellant are not controlling. Federal law is not binding on this Court in any event. (*Belshe v. Hope, supra*, 33 Cal.App.4th at p. 171 [decisions by lower federal courts not binding on state appellate courts].) Regardless, the court in *People v. Snyder, supra*, 112 Cal.App.4th 1200, rejected the same claim made by appellant.

> CALJIC No. 2.15 does not create an improper presumption of guilt arising from the mere fact of possession of stolen property, or reduce the prosecution's burden of proof to a lesser standard than beyond a reasonable doubt. Rather, the instruction "relates a contrary proposition: a burglary . . . may not be presumed from mere possession unless the commission of the offense is corroborated." [Citation.] The inference permitted by CALJIC No. 2.15 is permissive, not mandatory. Because a jury may accept or reject a permissive inference "based on its evaluation of the evidence, [it] therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt." [Citation.] Requiring only "slight" corroborative evidence in support of a permissive inference, such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the accuser's right to due process unless the conclusion suggested is not one that reason or common sense could justify in light of the proven facts before the jury.

(*Id.* at p. 1226.)

The inference permitted by CALJIC No. 2.15 has been upheld as proper

(see *People v. McFarland* (1962) 58 Cal.2d 748, 754-755), and CALJIC No. 2.15 as a correct statement of the law. (See *Snyder*, *supra*, 112 Cal.App.4th at p. 1228, fn. 11.) In addition, this Court has expressly upheld CALJIC No. 2.15 against constitutional attack. (*Holt*, *supra*, 15 Cal.4th at p. 677.) Appellant's claim that CALJIC No. 2.15 is unconstitutional should be rejected.

Even if the trial court erred in instructing the jury with CALJIC No. 2.15, any error was harmless under the *Watson* standard. (See e.g., *People v. Hayes* (2006) 142 Cal.App.4th 175, 182 [*Watson* standard used to determine whether instructional error harmless].) In its other instructions, the trial court admonished the jury of its responsibility to evaluate the evidence in its totality (17 RT 3611), to decide all questions of fact (17 RT 3611), to assign every part of the instructions equal importance (17 RT 3612), to give appellant the presumption of innocence (17 RT 3623), that the People carry the burden of proof (17 RT 3428, 3623), and to convict only if the prosecution bore its burden of proving guilt beyond a reasonable doubt (17 RT 3615, 3623). The trial court also instructed that an inference is a logical and reasonable deduction which may be drawn from proven facts; that circumstantial evidence is evidence from which an inference "may" be drawn; and that when circumstantial evidence is equally susceptible to two reasonable interpretations, the jury was required to adopt that pointing to innocence. (17 RT 3614-3616.) Viewing all these instructions as a whole (see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248), there is no reasonable probability appellant's verdict would have been more favorable had the trial court not instructed the jury with CALJIC No. 2.15. (See *People v. Morris* (1988) 46 Cal.3d 1, 41 [in view of trial court's cautionary instructions, improper use of CALJIC No. 2.15 harmless error], disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

Moreover, even without the permissive inference arising from

appellant's possession of Nolan's watch and ring at the time of his arrest and the abundance of Nolan's other property recovered from the outbuilding, main house and surrounding grounds, the other evidence of appellant's participation in the crime was strong. Most notably, the fact that Iuli, Palega, and Tautai all identified appellant as the murderer (11 RT 2585, 2587, 2698; 12 RT 2738, 2837; 13 RT 2920, 2990; 14 RT 3140, 3143-3144, 3204, 3206, 3211; 15 RT 3214-3215, 3222, 3224, 3226; 15 RT 3323, 3342-3343) and the fact that appellant's alibi defense and claim that Tautai killed Nolan were incredible.

XV.

THE VOUCHING ERRORS ALLEGEDLY COMMITTED AT THE GUILT PHASE DID NOT CONSTITUTE PENALTY PHASE ERRORS

Appellant next revives his earlier claim that the prosecutor committed misconduct by vouching for Iuli's and Palega's credibility. (See Arg. I, *ante*.) Appellant claims that the prosecutor's vouching in the guilt phase carried over and constituted penalty phase error. (AOB 182-196.) Appellant's failure to raise this claim below waives it on appeal. (See *Thornton*, *supra*, 41 Cal.4th at p. 454.) Regardless, appellant's claim is misplaced.

First, appellant points to selected portions of the prosecutor's penalty phase closing argument, comparing it to the prosecutor's alleged vouching for Iuli's and Palega's credibility at the guilt phase, and claims that the prosecutor's "persistent appeals to morality" are evidence that she was "vouching for the morality of the death penalty in this case." (AOB 188.) In all the instances cited by appellant, the prosecutor was clearly arguing that the death penalty was a moral and proper verdict based on the facts of the instant case and appellant's history, and not on her personal assessment and/or beliefs. (See e.g., 20 RT 4134 [arguing that brutality of instant murder by itself warranted death penalty]; 4135 [arguing that given all the acts of senseless violence committed by

appellant, and threats of violence made by him, death penalty was morally correct sentence]; 4148 [asking jury to impose death penalty as "moral and just verdict *for this crime*"], italics added.)

Next, appellant claims that the decision in *Kindler v. Horn* (E.D. Pa. 2003) 291 F.Supp.2d 323 "illuminates" the alleged vouching here. Appellant's comparison to *Kindler*, is misplaced. In *Kindler*, a capital case involving two defendants, the prosecutor argued to the jury "that it was the 'position' of his office that" one of the defendants (Kindler) be put to death, and that the other (Shaw) be sentenced to life in prison. (*Id.* at p. 362.) Based on the wording of the prosecutor's argument to the jury and the context of the whole record, the court held that the argument constituted improper vouching.

> Indeed, the entire premise of the prosecutor's argument was that the Commonwealth possessed even stronger evidence of Joseph Kindler's guilt and statutory aggravators than that presented to the jury and that was why "the urging would be done based on the evidence . . . against Mister Kindler." By contrasting Petitioner with his co-defendant and arguing in favor of the death penalty as to him alone, it further appears that the goal of the prosecutor was to use Mr. Kindler as a "sacrificial lamb" in order to secure at least one death penalty conviction. We therefore find blatant misconduct on the part of the prosecutor here and we are compelled to grant the petition for writ of habeas corpus on the basis of this argument.

(*Id.* at p. 363.)

Thus, the prosecutor hinted that Kindler's guilt was based in part on evidence not in front of the jury. That is not the situation here, where the prosecutor relied solely on the evidence presented at trial.

Appellant next argues that the prosecutor committed misconduct because she relied on facts testified to by Iuli and Palega to argue for the death penalty. (AOB 189.) Iuli's and Palega's testimony at trial was properly admitted; the prosecutor could thus rely on these facts to make her case. As respondent argued in Argument, section C, *ante*, and adopted herein, the prosecutor did not vouch for Iuli's and/or Palega's credibility in the guilt phase of appellant's trial.

Appellant's attempt to characterize this claim as a penalty phase error is baseless.

To the extent appellant claims counsel's failure to object rendered ineffective assistance, appellant claim must fail. Given there was no vouching and thus no basis to object, counsel's failure to do so was not objectively unreasonable. Moreover, in light of the overwhelming evidence of appellant's guilt (see Arg. I, § I *ante*), appellant was not prejudiced by counsel's failure to object. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) Likewise, appellant's attempt to repackage a state claim as one of federal constitutional error (see AOB 191-192), must also fail. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7.)[68/]

XVI.

THE TRIAL COURT'S REFERENCE TO THE "SO SUBSTANTIAL" STANDARD WAS NOT MISLEADING OR CONFUSING

During initial discussions with prospective jurors, the trial court talked about the basic legal concepts applicable to a criminal case. (See 1 RT 113.) When discussing the possibility of a penalty phase, the court at one point framed its comments in relevant part as follows:

> The jury in the penalty trial will be instructed they can assign whatever moral or sympathetic value they want to the evidence that they received in the penalty trial. The jury is instructed they are to weigh the aggravating circumstances against the mitigating circumstances. Again,

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68. Appellant's attempt to attack the presentation of victim impact evidence (see AOB 194) must also fail. As noted, *post* (see Arg. XIV), this evidence was properly admitted. To the extent appellant characterizes himself as a "brawler" and "street thug" rather than a cold-blooded killer, and claims that evidence of his prior acts and threats of violence "did not significantly contribute to the strength of the prosecution case for death[]" (AOB 195), the evidence shows otherwise. Regardless, the jury apparently rejected appellant's characterization of the record, and, as the trier of fact was free to do so.

it is not a numerical weighing process. I can't give you a percentage. It is a moral weighing process.

The instruction that is key to the penalty trial indicates that in order to return a verdict of death, each juror must be persuaded or satisfied that the aggravating circumstances are so substantial when compared to the mitigating circumstances that it warrants the death penalty rather than life without parole.

The key phrase in that instruction is: "are so substantial." *And that is a fairly ambiguous phrase.* And the law intends it to be such because the law recognizes that you will be engaging in the moral weighing process when you weigh that type of evidence.

(1 RT 125, italics added; see also e.g., 1 RT 193, 225, 261, 296.)

Appellant contends that the trial court's assertion that the phrase, "so substantial" was ambiguous misled the jurors by creating "an ambiguity where none existed[.]" (AOB 199.)[69/] Appellant's failure to object to the court's comments waives this claim on appeal. (See e.g., *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 778-779 [defendant may not complain on appeal that instruction misleading where he did not ask court for clarification].) In any event, the claim has no merit.

Each time the trial court noted that the phrase, "so substantial" was ambiguous during voir dire, the court explained to the jury that when weighing the aggravating and mitigating circumstances, the jury would be engaging in a "moral" rather than a numerical weighing process; the court also told the jurors they could assign "whatever moral or sympathetic value" they wanted to evidence presented at trial, and/or that there were no numbers or percentages attached to the weighing process. (See e.g., 1 RT 124, 158, 192-193, 225, 260-261, 295-296; 2 RT 313-314, 366,417-418, 472-473, 514, 550, 574-575; 3 RT 599-600, 643, 684, 715-716, 768-769, 801; 4 RT 834-835, 882-883, 926-927,

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69. This Court has repeatedly held that the phrase, "so substantial" is not unconstitutionally vague. (See *People v. Salcido* (2008) 44 Cal.4th 93, 117; *People v. Jackson* (1996) 13 Cal.4th 1164, 1242-1243.)

994-995, 1043, 1110; 5 RT 1151-1152, 1191-1192, 1240-1241 , 1298-1299, 1358, 1411-1412; see also 6 RT 1448 [trial court telling prospective jurors they "will be looking into [their] heart[s]" when engaging in weighing process].)

CALJIC No. 8.88[70] instructs the jury in part that it can "assign whatever moral or sympathetic value" the jury deems appropriate "to each and all of the" aggravating and mitigating factors. Thus, each juror was to use a different standard in weighing the relevant factors; specifically their own moral

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70. After the evidence was presented in the penalty phase, CALJIC No. 8.88 was presented in relevant part to the jury as follows:

> It is now your duty to determine which of the two penalties, death or imprisonment in state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> . . . .
>
> . . . .
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(20 RT 4239-4240.)

standards. Clearly, the trial court's reference to the "so substantial" standard as being ambiguous was the court's attempt to indicate that each juror would bring their own individual standard to the weighing process. The reference was not improper.

To the extent appellant claims that the trial court's use of the terms "good" and "bad" when referring to the aggravating and mitigating circumstances, was erroneous (see AOB 201), given that this Court has done the same (see *People v. Brown* (1985) 40 Cal.3d 512, 542, fn. 13, italics omitted ["to return a death judgment, the jury must be persuaded that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole]), appellant's claim has no merit. Defense counsel's use of these terms during voir dire (see e.g., 4 RT 967 ["prosecution will present evidence she believes are factors in aggravation, that my client is a bad person"]; 6 RT 1476 ["law allows the prosecution to bring evidence to show that [my client] is a bad person, factors in aggravation"]) underscores this point.

Even assuming arguendo, the challenged comments were improper, any error was harmless. The challenged comments were made before the presentation of evidence in the guilt phase, long before the jury was formally instructed with CALJIC No. 8.88 on the proper standard to be used in weighing the aggravating and mitigating factors. (See 20 RT 4329-4330.) Moreover, the jury did not request clarification of the instructions. (See e.g., 20 RT 4243 [only request from jury while deliberating was for a readback of Dr. Griffith's testimony].) Last, before making the challenged comments, the trial court told each prospective panel of jurors that it was speaking to them informally, and that the court would give them the formal and/or approved instructions after the close of evidence. (See e.g., 1 RT 113, 148, 181, 213, 249, 284.) The court underscored this fact by telling each panel that the matters being discussed were

for the court and counsel to ascertain the jurors' individual views on the death penalty. (See e.g., 1 RT 113, 115, 118-119, 123, 129, 136-138, 170-171, 201-203, 215, 238-239, 250, 273, 284.)

> The trial court . . . was not instructing the jury at the time it made the comments in question. Indeed it was conducting voir dire of prospective jurors. Its "comments 'were not intended to be, and were not, a substitute for full instructions at the end of trial.'" [Citation.] "'The purpose of these comments was to give prospective jurors, most of whom had little or no familiarity with courts in general and penalty phase death penalty trials in particular, a general idea of the nature of the proceeding.'" [Citation.] In the context of voir dire, the trial court's comments in this case were proper.

(*People v. Romero* (2008) 44 Cal.4th 386, 423 [finding trial court's general comments about capital cases made during voir dire were proper].)

It is not reasonably probable appellant's verdict would have been more favorable at the penalty phase without the challenged comments made by the trial court before trial began. (*Watson*, *supra*, 18 Cal. 3d at p. 836; see also *People v. Rogers* (2006) 39 Cal.4th 826, 873 [when reviewing an ambiguous instruction, this Court uses *Watson* standard to determine whether error was harmless); *People v. Breverman* (1998) 19 Cal.4th 142, 149 [misdirection of jury not a structural error; *Watson* standard used to determine whether error harmless].)

XVII.

THE PROSECUTOR DID NOT IMPUGN DEFENSE COUNSEL IN THE GUILT PHASE; THERE IS NO BASIS FOR APPELLANT'S CLAIM THAT THIS ALLEGED MISCONDUCT CARRIED OVER INTO THE PENALTY PHASE

Appellant contends that the prosecutor's impugning of defense counsel in the guilt phase (see Arg. III, *ante*), carried over and constituted a penalty phase error as well. (AOB 207-208.) Appellant did not object on this basis at the penalty phase; thus, his claim is waived on appeal. (See *Thornton*, *supra*,

41 Cal.4th at p. 454.) In any event, as noted *ante*, in Argument III, section B, and adopted herein, the challenged comments were not a personal attack on defense counsel, but proper argument based on the evidence. Appellant's claim that the prosecutor's "slander . . . hovered over the entire trial" (see AOB 207-208), must be rejected.

XVIII.

THE PROSECUTOR DID NOT EXPLOIT EVIDENCE OF A CONTRACT ON IULI'S LIFE AT THE PENALTY PHASE

During her penalty phase closing argument, the prosecutor discussed mercy and compassion as follows:

> As you are thinking about mercy and compassion, whether [appellant] should be granted leniency, ask yourself whether he showed mercy and compassion to Nolan, who was so frightened and begged for his life.
>
> What compassion did he show to those students at Arroyo High School when he kicked them and beat them and stomped them? [¶] What kind of compassion did he show to Jacqueline Romero when he threw a pipe at her? [¶] What mercy did he show all of us in our community when he walked around for years with a loaded gun?
>
> And what compassion was shown to that man looking into D's car when he ended up bloody and beaten and in the hospital? [¶] What mercy has he shown to any of his victims who were at the receiving end of the one hitter quitter or any of his victims that he stomped into the ground and left bloody?
>
> *What mercy did he show to Tony when he put out a contract on his life, when Tony decided to come forward*?
>
> What kind of mercy do you show to a person who continues to be violent in jail, who threatens the custodial officers who watch over him or inmates that are housed with him? [¶] Isn't that morally perverted to ask for leniency for somebody like that?

(20 RT 4199-4200.)

Appellant now argues for the first time that the italicized comments by

the prosecutor improperly asked the jury to use the alleged contract on Iuli's life "as a factor in aggravation when there was no competent evidence to support it." (AOB 209.) Appellant's failure to object to the challenged comment at trial waives this claim on appeal. (See *Thornton*, *supra*, 41 Cal.4th at p. 454.) Regardless, the prosecutor did not refer to the contract as an aggravating factor. Rather, she merely included it in a list of instances where appellant failed to show mercy and/or compassion as a means of urging the jury to do the same with respect to appellant's sentence.

Even assuming arguendo the prosecutor improperly referred to the contract on Iuli's life in closing, the closing remarks of an attorney are not considered evidence. (See CALCRIM No. 222.) The jury here was instructed as such (17 RT 3428); the jury is presumed to follow instructions. (See *Delgado*, *supra*, 5 Cal.4th at p. 331; see also *Hughey*, *supra*, 194 Cal.App.3d at p. 1396 [even if misconduct occurred, prejudicial effect may be dissipated by an instruction that the statements of attorneys are not evidence].) The challenged comment was brief, and buried within a laundry list of other acts of violence committed by appellant. The jury did not misapply the prosecutor's comment in an objectionable fashion. (See *Morales*, *supra*, 25 Cal.4th at p. 44 [when defendant raises claim of prosecutorial misconduct, question is whether there is reasonable likelihood jury misconstrued or misapplied complained-of remark in objectionable fashion].)

XIX.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HER PENALTY PHASE CLOSING ARGUMENT BY REFERRING TO PEOPLE'S EXHIBIT 46

In closing argument of the penalty phase, the prosecutor made the following comments:

> Now that you know the real truth, the real evidence, the brutality of this crime, and you know how it not only destroyed a single life, not

only a single human being's life, not only a kind, unselfish, compassionate young person's life, but his whole family and his bride's family, and it turned his wedding day into a day of unending despair.

All of those who know and love Nolan will never wake up from this darkest nightmare. *And this nightmare is the handiwork of Afatia Ropati Seumanu, for which he has named himself one of America's Most Wanted Samoans, a badge of honor that he awarded to himself for blowing Nolan's chest to pieces.*

(20 RT 4133-4134, italics added.)

Appellant claims that the italicized comments constituted misconduct. (AOB 210-214.) According to appellant, because no witness testified that the list contained in Exhibit 46 was "an award 'for blowing Nolan's chest to pieces[,]'" the prosecutor's comment was a misstatement of the the evidence, constituting misconduct under the state and federal Constitutions. (See AOB 212-213.) Appellant's state and federal claims have been waived by his failure to object below and to request a curative admonition. (See *Thornton*, *supra*, 41 Cal.4th at p. 454; *Olano*, *supra*, 507 U.S. at p. 731.) In any event, the prosecutor did not commit misconduct.

The prosecutor [is] entitled to argue [her] interpretation of the evidence, just as defendant [is] entitled to argue his interpretation of that same evidence. '[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. [She] has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [she] deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citation.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented.' [Citations.]

(*People v. Valencia* (2008) 43 Cal.4th 268, 284.)

Iuli testified during the penalty phase that Exhibit 46 was a list of "brothers in our house" that he typed for appellant while they were incarcerated; the title of the list was "America's Most Wanted Samoans." (19 RT 3943-3944.) Iuli also testified that the title "was a badge of honor." (19 RT 3944.)

In the guilt phase, Tautai acknowledged that appellant's name was included on the list. (15 RT 3331.) Because the challenged inference was based on the evidence presented at trial, the prosecutor's argument fell within the "wide range of permissible argument." (See *Valencia*, *supra*, 43 Cal. 4th at p. 284.) It did not "involve the use of deceptive or reprehensible methods to attempt to persuade" the jury or "infect the trial with such unfairness as to make [appellant's] conviction a denial of due process." Appellant's claims of misconduct under the state and federal Constitutions must therefore fail. (See *Morales*, *supra*, 25 Cal.4th at p. 44.)

XX.

THE PROSECUTOR'S REFERENCE TO APPELLANT'S JAIL CLOTHES DID NOT CONSTITUTE MISCONDUCT

Appellant claims that the prosecutor's reference to his jail attire in the penalty phase closing argument constituted misconduct. (AOB 214-216.) Appellant's claim is without merit.

As noted by appellant, after the guilt phase of appellant's trial, appellant chose to continue the proceedings in jail clothes, rather than the civilian clothes he had worn previously. (18 RT 3673.) When the jury reconvened, the trial court instructed it in relevant part as follows:

> Good morning, ladies and gentlemen. Couple of things. First of all, Mr. Seumanu has chosen not to dress in civilian clothes. He is here in jail clothes. That is the defendant's choice that they [*sic*] can make. You are not to consider that in any way during your deliberations, and that is not a factor that should be considered by you in any way during your deliberations.
>
> Is there anybody that has a problem with Mr. Seumanu wearing jail clothes during this part of the trial? [¶] See no hands.

(18 RT 3675.)

Later, after the close of evidence in the penalty phase, the prosecutor made the following relevant remarks during her closing argument while

discussing defense witness Dr. Griffith's testimony:

> Then he says there are some other personality, quote, descriptors. He has low self-esteem, depressive trends, antisocial personality trends. And then: any one of those tests can be an indicator. And he says, quote, I guess the only one of those tests that had a threshold, speaking specifically to the scale of sociopathic personality disorder, would be the MMPI.
>
> There are certainly those same indicators on other tests, and particularly with regards to the subjective tests. So basically they are seeing this trend in all the testing for sociopathic personality disorder which in the old days was a psychopath, they didn't like that word because it had a bad connotation so they changed it to anti-social personality disorder, we don't call it that way anymore because it has a lot of baggage.
>
> There are indicators on the other tests. And then he was asked this absolutely bizarre question just way out of left field. Okay. Well, you know that he is really interested in putting on a good face to this jury and in the testing he even faked good, right, so what is he doing in his jail clothes.
>
> And the answer is this: it would support an underlying depression. [¶] What does that mean, it would support an underlying depression? [¶] And: it is in the clinical data and tests. [¶] What does that mean?
>
> That is what we call psychobabble. That doesn't mean a thing. [¶] *The guy—do you remember what Richard Allen Davis did to his jury after he got convicted?* [¶] *Same thing Paki did to you. You convicted him of first-degree murder and specials. And guess what? He thumbed his nose at you, took down his hair, put his jail clothes on and said: you can't touch me. I am not afraid of you.* [¶] *He has a rebellious personality style. That is the least of what he did.* [¶] *He doesn't have anything clinical.*

(20 RT 4166, italics added.)

Appellant now claims for the first time that the italicized remarks by the prosecutor constituted misconduct. (AOB 214-216.) First, appellant claims that these remarks were in direct violation of the trial court's implied "order that there was to be no reference to appellant's jail clothing as a consideration against him[,]" and second, appellant argues that the prosecutor's reference to

Richard Allen Davis was "inflammatory" without any connection to the evidence at trial. (AOB 215-216.) Preliminarily, respondent notes that appellant's failure to object to the prosecutor's comments at trial and request a curative admonition waives this claim on appeal. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 836.) Regardless, appellant's claims are misplaced.

During appellant's penalty phase case-in-chief, psychologist Marlin Griffith testified on direct examination that one of the "important" factors in describing appellant's personality was that there were indications that appellant suffered "underlying depressive trends[.]" (20 RT 4069.) A short time later, defense counsel questioned the witness as follows:

> Q. Hypothetically, Dr. Griffith, if an individual had been going to court on a case, as Mr. Seumanu, and had been dressing out in civilian clothes, and then at some point changed wearing the jail clothes, his attire changed, would that have any psychological implications for you, would that indicate anything?
>
> A. Well, given the gravity of Mr. Seumanu's case, and given the psychological information that I have previously pulled together, yes, I am very surprised that Mr. Seumanu is dressed in the county jail uniform as opposed to civilian clothes, providing that was available to him.
>
> It certainly would suggest, it would support an underlying question that I referred to, and it is in the clinical data and in the tests as well.

On cross-examination, the prosecutor asked the witness for clarification:

> Okay. Now, you indicated for the jury, when [defense counsel] asked you something about the defendant refusing to dress out now that he is wearing jail clothes, number one, you said it was surprising to you, right?
>
> A. Yes.
>
> Q. And then you said it was consistent with your evaluation. [¶] What does that mean?
>
> A. I meant that as the test is indicating in a number of cases that Mr. Seumanu is making a concerted effort to present himself in a most favorable light; to come in court at this level of his trial, and the gravity of his trial, and not presenting himself in the most favorable light is a clear indication that some depression has set in. That was my statement.

Q. So, for instance, you understand that he was dressing out and was presenting himself in a certain light up until he was convicted of first-degree murder and specials, right, and that after that he stopped dressing out?

A. That is my understanding, yes.

Q. And so that he wanted to portray himself in a certain light before his conviction, and then afterwards, he decided not to, right?

A. No, that is not my interpretation.

Q. Well, you know he has a right to dress out if he wants to?

A. Yes.

Q. And that he is refusing to?

A. Right. I assume he is refusing, yes.

Q. And isn't one of his personality styles rebelliousness?

A. I think that may be a good descriptive statement, yes.

Q. So it also could be a way of thumbing his nose at the jury for convicting him and saying, basically, huh-huh to you, and a way of resenting them, showing them his resentment or rebelliousness, couldn't it?

A. That would not be my interpretation.

Q. And there are people who are in custody for periods of years who are facing the death penalty who tend to show signs of depression, right?

. . . .

. . . .

[PROSECUTOR]: You wouldn't find it abnormal that someone who is facing the death penalty would tend to be a little depressed about that?

A. I would.

Q. You would expect that, wouldn't you?

A. I would expect it, yes.

(20 RT 4097-4098.)

Given defense counsel's questioning of Dr. Griffith on direct examination, and her portrayal of appellant's change in attire as a manifestation

of his depression, the prosecutor was certainly allowed to address the matter on cross-examination. (See e.g., *People v. Sakarias* (2000) 22 Cal.4th 596, 643-644 [cross-examination by defendant may open door for admission of evidence on redirect that is favorable to prosecution and which may not have been admissible in prosecution's case-in-chief].) Likewise, given that evidence was presented of appellant's rebellious personality (see e.g., 20 RT 4097-4098), the prosecutor could properly urge the jury to accept her version of appellant's actions; e.g., that appellant wore jail clothes after the jury convicted him of murder to "thumb his nose" at the jury. The prosecutor's reference to appellant's change in clothing was proper rebuttal and did not involve "the use of deceptive or reprehensible methods to attempt to persuade" the jury." (See *Morales*, *supra*, 25 Cal.4th at p. 44.) The prosecutor's remarks did not constitute misconduct. (See *Mendibles*, *supra*, 199 Cal.App.3d at p. 1313 [remarks by prosecutor that are "fairly responsive to argument of defense counsel" & "based on record" do not constitute misconduct].)

While the prosecutor could not compare appellant to "historic villain" Richard Allen Davis where such a comparison was "unlinked to the evidence" (see *People v. Bloom* (1989) 48 Cal.3d 1194, 1213 [generally, prosecutors "should refrain from comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence"]; AOB 216), that is not what the prosecutor did in this case. This Court's opinion in *Jablonski* illustrates the point.

In *Jablonski*, the defendant argued that the prosecutor committed misconduct by referring to Lorena Bobbit and the Menendez brothers; the prosecutor's comment was made "in the context of [a] . . . discussion of a defense in which a defendant seeks to depict himself or herself as a victim and thus to deflect responsibility for his or her conduct." (*Jablonski*, *supra*, 37 Cal.4th at p. 836.) This Court rejected the defendant's claim of misconduct:

> In this case, the prosecutor did not compare defendant to either Bobbitt or the Menendez brothers, but referred to them to illustrate a larger point about defenses based on shifting moral culpability for crimes away from a defendant. Such references were not, in context, impermissible nor did they constitute misconduct.

(*Id.* at pp. 836-837.)

As in *Jablonski*, the prosecutor here referred to Davis not as a means of comparing appellant's crimes with Davis's and/or that showing that Davis and appellant and/or their actions in court were similar, but to illustrate her point that appellant, like Davis, showed contempt for the jury's verdict. The prosecutor's use of Davis to illustrate this point did not constitute misconduct. (See *Jablonski*, *supra*, 37 Cal.4th at pp. 836-837.)

Even assuming arguendo the challenged comments constituted misconduct, they comprised a small portion of the prosecutor's closing argument. Moreover, the prosecutor did not present any details regarding Davis's actions when convicted, or any details of his crimes. Nor is there any evidence that members of the jury were aware of Davis's actions in this regard.[71] Thus, we may not assume the jury misapplied the prosecutor's

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71. To the extent appellant asks this Court to take judicial notice of Davis' actions in court after he was found guilty of murder (see AOB 216), respondent objects. Even assuming that Davis "winked, pursed his lips and raised both hands with his middle fingers extended" in court (see AOB 216), there is no authority for appellant's claim that the actions of an individual can be judicially noticed. Regardless, appellant's only support for his claim that Davis's actions were "of such common knowledge . . . that they cannot reasonably be the subject of dispute" (see Evid. Code, § 452, subdivision (g)), is the purported existence of a newspaper article providing such details. (See AOB 216.) Without evidence that the jury was aware of this article or of Davis's actions, we cannot conclude that this information was common knowledge. Moreover, because the prosecutor here did not reveal Davis's actions but only referred generally to Davis's showing of contempt (see 20 RT 4166), the jury's knowledge of Davis's actions is relevant to appellant's misconduct claim rather than the actions themselves. Thus, the precondition to the taking of judicial notice has not been met here. (See *People ex rel. Lockyer*

remarks. (See *Jablonski*, *supra*, 37 Cal.4th at p. 837 [even assuming prosecutor's comparison to Lorena Bobbitt and the Menendez brothers constituted misconduct, this Court would not assume jury applied prosecutor's references "in an erroneous or improper manner or even that it drew the most damaging meaning from them; reversal not required. [Citation.]"]; see also *People v. Brown*, *supra*, 31 Cal.4th at p. 553 [appellate court may not lightly infer that jury drew most damaging, rather than least damaging meaning of challenged statement].) There is no reasonable likelihood the jury misconstrued or misapplied the prosecutor's comments. (See *Morales*, *supra*, 25 Cal.4th at p. 44.)

Appellant's failure to object to the challenged comments on federal grounds waives his claim that they constituted a violation of the federal Constitution. (See *Olano*, *supra*, 507 U.S. at p. 731.) Regardless, because the prosecutor did not commit misconduct under state law, appellant's claim that his federal constitutional rights were violated should be rejected on the merits. (See e.g., *Davis*, *supra*, 10 Cal.4th at p. 506, fn. 7 [state claim repackaged "under constitutional labels" does not create a federal constitutional violation].)

XXI.

DARRELL CHURISH'S TESTIMONY WAS PROPERLY ADMITTED

Appellant contends that prosecution witness Darrell Churish's testimony at the penalty phase should have been excluded as speculative and that the prosecutor's eliciting of this testimony constituted misconduct. (AOB 217-219.) These claims have no merit.

During the penalty phase, prosecution witness Darrell Churish testified on direct examination that he was with appellant when appellant ordered

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v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 422, fn. 2.)

someone standing at a bus stop to give appellant a "blue Georgetown trench coat" the man was wearing. (18 RT 3781-3783.) The prosecutor then questioned Churish as follows:

Q. Now, Mr. Churish, had Paki ever offered to you that he would take somebody's coat from them so he could give it to you?

A. I don't know if he like came out straight up and said offered, but like one time, I guess I looked at a jacket. And he is like—we were at the mall—and he asked me if I wanted it. I was like, no, that is all right. Because I would have to take it home to my mom and explain how I got it.

Q. What kind of jacket were you admiring?

[DEFENSE COUNSEL]: Your honor, I will object and ask the answer be stricken. Speculation on the part of the witness.

THE COURT: Objection overruled.

[THE PROSECUTOR]: You can answer.

A. I think it was a Raider jacket.

Q. Was somebody wearing that jacket?

A. Yes.

Q. And so you admired that jacket. [¶] What do you say to Paki?

A. I probably looked at it, said: that is a nice jacket. And he might have come back and said like: do you want it, or—and I said no.

Q. Mr Churish, did you say he might have come back, or he did? Didn't you tell me he did?

A. Yes.

Q. So what does he say to you when you admire the jacket?

A. He says: do you want it? I was like: no.

Q. He was going to take it off that guy for you, right?

A. Probably, yeah.

Q. And you said no?

A. Yes.

(18 RT 3783-3784.)

According to appellant, Churish's testimony that he assumed appellant would take the Raiders jacket for him was speculative, and that the trial court thus erroneously overruled his objection. (AOB 217-219.) Appellant's claim is misplaced. As noted by the foregoing colloquoy, the prosecutor asked Churish whether appellant had offered to take someone's coat and give it to Churish. (18 RT 3783.) Churish's response, which appellant objected to as speculative, was that appellant did not directly tell Churish he would take a jacket for him, but that on a particular occasion when Churish had admired a jacket, appellant had asked Churish if he wanted it. (18 RT 3783.) Thus, Churish merely testified as to what appellant said; his testimony was direct and free from speculation and conjecture. The trial court properly overruled appellant's objection on this basis.

Appellant also claims that the prosecutor's question, "[h]e was going to take it off that guy for you, right?" constituted misconduct by "attempting to elicit a speculative answer" from Churish. (AOB 219.) Just prior to the challenged question, Churish testified that when he admired someone's Raider jacket appellant asked him if he wanted it and Churish said no. (18 RT 3783-3784.) Churish had also testified that he saw appellant take a "Georgetown" jacket from someone at a bus stop. (18 RT 3783-3784.) The prosecutor's question merely reiterated the point already in front of the jury. Appellant has failed to show that the prosecutor's posing of the challenged question involved "the use of deceptive or reprehensible methods to attempt to persuade the jury[,]" or that it infected his trial "with such unfairness as to make [his] conviction a denial of due process." (See *Morales*, *supra*, 25 Cal.4th at p. 44.) The prosecutor did not commit misconduct under either the state or federal constitutions.[72/]

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72. Appellant's failure to object on federal grounds at trial waives his claim of federal error in any event. (See *Olano*, *supra*, 507 U.S. at p. 731.)

XXII.

APPELLANT DID NOT SUFFER ANY PREJUDICE IN THE PENALTY PHASE FROM THE ALLEGED GUILT PHASE ERRORS

Appellant next argues that several of the errors alleged in the guilt phase prejudiced him in the penalty phase by "slandering" the defense and/or contributing to the improper consideration of "factor (a) evidence" by the jury. (AOB 219-222.) Appellant specifically takes issue with the errors alleged in Arguments II, VI, and IX. (AOB 219-222.) As noted in our responses to those claims, there was no *Doyle* error (see Arg. II), Iuli's testimony regarding the factors upon which he based his conclusion that Tautai would "take the beef" for appellant was proper (see Arg. VI), and the trial court did not commit misconduct when commenting on Tautai's credibility (see Arg. IX). Adopting those arguments here, respondent maintains that appellant's attempt to repackage his claims of guilt phase error as penalty phase error by claiming that this evidence added "to the weight of aggravation" in the penalty phase (AOB 222), has no merit.

XXIII.

THERE WAS NO CUMULATIVE ERROR RESULTING FROM THE GUILT AND PENALTY PHASES

Appellant claims that the cumulative effect of the asserted guilt and penalty phase errors warrants reversal. (AOB 222-224.) Appellant's claim is misplaced.

As noted *ante* (see Args. I, X, XVI-XXIII), appellant's claims of error have no merit. Thus, his claim of cumulative error must fail. (See *Coryell*, *supra*, 110 Cal.App.4th at p. 1309.) In any event, "[l]engthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*Hill*, *supra*, 17 Cal.4th at p. 844.)

Appellant has failed to make such a showing. Given the overwhelming evidence of appellant's guilt (see Arg. I, § I), appellant's incredible alibi defense and claim that Tautai killed Nolan, and the strength of the case presented in aggravation, even assuming arguendo any actual errors occurred at either the guilt or penalty phase trials, they "did not undermine the facts supporting [appellant's] guilt[.] (*People v. Hinton*, *supra*, 37 Cal.4th at p. 872.) Appellant's claim of cumulative error should be rejected.

XXIV.

VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190, SUBDIVISION (A)

While recognizing that victim impact evidence is admissible under the federal Constitution (see *Payne v. Tennessee* (1991) 501 U.S. 808, 817-830), appellant claims that the admissibility of such evidence "under California's death penalty statute is another question." (AOB 225.) Appellant's failure to object to the admission of this evidence at trial forfeits this claim on appeal. (See Evid. Code § 353.) In any event, appellant's claim is without merit.

Citing the high court in *Payne*, this Court held in *People v. Edwards* (1991) 54 Cal.3d 787, 833, that "'evidence of the specific harm caused by the defendant'" is admissible under section 190.3, subdivision (a). This is the case so long as the evidence is not so inflammatory as to divert "the jury's attention from its proper role" or invite a purely subjective, irrational response. (*Id.* at p. 836.) This Court has expressly noted that California law is consistent with the principles outlined in *Payne* and *Edwards*. (*People v. Lewis* (2006) 39 Cal.4th 970, 1056.)

To the extent appellant argues that the history and intent behind section 190.3 precludes a finding that "circumstances of the crime" includes victim impact evidence (see AOB 226-227), appellant's claim ignores the precedential

authority of the cases noted. Appellant's reliance on this Court's decision in *People v. Love* (1960) 53 Cal.2d. 843, is misplaced.

The defendant in *Love* objected to the admission of a photograph of the victim with "her face in death[,]" and a tape recording of the victim in her last minutes of life, including her groans as she lay dying. (*Love*, *supra*, 53 Cal.2d at pp. 853-856.) This Court held that this evidence was inadmissible at the penalty phase of the defendant's trial, because it served "primarily to inflame the passions of the jurors" and "had no significant probative value." (*Id.* at p. 856.) "[T]he photograph and the tape recording tended to prove only that [the victim] died in unusual pain. Proof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted." (*Ibid.*)

Even assuming *Love* survives this Court's decision in *Edwards*, it is distinguishable from the instant case. Here, unlike the court in *Love*, the trial court expressly excluded a videotape offered by the prosecutor, given the possibility it could inflame the jury. (18 RT 3804-3805.)[73] The victim impact evidence admitted at appellant's trial consisted in part of a photograph of Nolan with his fiancee, Rowena, two photographs of Rowena at the mortuary, a photograph of Nolan, and a photograph of Nolan's casket at the funeral. (See 18 RT 3805.) None of these photographs depicted Nolan dying, and most important, the defense attorney here expressly noted for the record that she had no objections to the admission of this evidence. (18 RT 3805.) The victim impact evidence was properly admitted. (See *Lewis*, *supra*, 39 Cal.4th at p. 1056.)

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73. The videotape depicted images of Nolan and Rowena, which was originally to be played at their wedding. (18 RT 3804-3805.)

XXV.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant asserts a number of challenges to California's death penalty statute, although he acknowledges they have been decided adversely to his position. (AOB 229-257.) The specific claims are addressed briefly below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant claims that section 190.2 is constitutionally defective as it fails to properly narrow the class of death-eligible defendants. (AOB 231-233.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958, and cases cited therein; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43, and cases cited therein.)

B. Penal Code Section 190.3(a) Does Not Allow For The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant claims that section 190.3(a) fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. (AOB 233-235.) This Court has repeatedly rejected such claims; appellant offers nothing to distinguish his case from those previously decided. (See e.g., *Stanley*, *supra*, 39 Cal.4th at p. 967, and cases cited therein; *People v. Harris*, *supra*, 37 Cal.4th at p. 365, and cases cited therein.)

C. California's Death Penalty Provides Appropriate Safeguards To Avoid Arbitrary And Capricious Sentencing

In addition to the two above-noted provisions, appellant claims that other aspects of California's death penalty statute deprive him of necessary safeguards to avoid arbitrary and capricious sentencing. These include: lack of written findings or unanimity regarding aggravating circumstances; no

requirement that aggravating circumstances outweigh mitigating circumstances, and that death is the appropriate punishment; no instruction as to burden of proof except for other criminal activity and prior convictions; the use of "restrictive adjectives" with respect to potential mitigators, the failure to instruct the jury that it could consider possible mitigators only in mitigation; and no inter-case proportionality review. (AOB 236-255.) All of these claims have been previously rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from those holdings. (See e.g., *People v. Valencia*, *supra*, 43 Cal.4th at p. 311, and cases cited therein; *Demetrulias*, *supra*, 39 Cal.4th at pp. 39-45, and cases cited therein; *Harris*, *supra*, 37 Cal.4th at p. 365, and cases cited therein; *People v. Morrison* (2004) 34 Cal.4th 698, 730, and cases cited therein.)

D. California's Use Of The Death Penalty Does Not Violate The Eighth Amendment

Appellant asserts that California's use of the death penalty violates international norms and thus violates the Eighth and Fourteenth Amendments. (AOB 255-257.) This Court has repeatedly rejected such claims and appellant offers nothing specific to his case that would warrant a reversal of that position. (See e.g., *Valencia*, *supra*, 43 Cal.4th at p. 311; *People v. Tafoya*, *supra*, 42 Cal.4th 147; *Demetrulias*, *supra*, 39 Cal.4th at p. 43, and cases cited therein; *Harris*, *supra*, 37 Cal.4th at p. 365, and cases cited therein.)

E. Cumulative Error

Appellant argues that, when considered cumulatively, the California death penalty is so devoid of safeguards as to violate his constitutional rights. (See AOB 229-230.) As set forth above, however, appellant has failed to establish the existence of any errors which could be considered cumulatively. Moreover, this Court has specifically held that, "[t]he claimed flaws in our

state's death penalty statute . . . whether considered individually or together, do not make it unconstitutional." (*Demetrulias*, *supra*, 39 Cal.4th at p. 45.) Appellant's claim must be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 3, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 62,039 words.

Dated: September 3, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

Lavette Wrakter for Kelly Croxton

KELLY CROXTON
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Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Seumanu***

No.: **S093803**

I declare:

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

On September 3, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 3, 2008, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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