In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TOMMY ADRIAN TRUJEQUE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S083594

Los Angeles County Superior Court Case No.
VA048531
The Honorable Patrick Couwenberg, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a three-count felony complaint, the Los Angeles County District Attorney charged appellant in count 1 with the murder of Max Facundo, in violation of Penal Code[1] section 187, subdivision (a) (the "Facundo murder"), in count 2 with the murder of Raul Luis Apodaca, in violation of section 187, subdivision (a) (the "Apodaca murder"), and in count 3 with the second degree robbery of Spartan Burgers, in violation of section 211 (the "Spartan Burgers robbery"). As to the Facundo and Apodaca murders, it was alleged that appellant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1). As to all three counts, it was alleged under sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), that appellant suffered 13 prior convictions of serious or violent felonies or juvenile adjudications. It was further alleged that he was previously convicted of five serious felonies within the meaning of section 667, subdivision (a)(1). Additionally, a prior prison term enhancement was alleged under section 667.5, subdivision (b). (1CT 1-5.)

The Los Angeles County District Attorney filed an information on October 13, 1998, charging the same three counts and alleging the same enhancements. The information further alleged a multiple-murder special circumstance under section 190.2, subdivision (a)(3), in connection with counts 1 and 2. As to count 3, a personal firearm use enhancement was alleged under sections 12022.5, subdivision (a)(1), and 12022.53, subdivision (b). (1CT 39-43.)

On the same date the information was filed, appellant made his first appearance in pro per in the superior court. (1CT 46.) In accordance with

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[1] Unless indicated otherwise, all further statutory references are to the Penal Code.

the court's direction, appellant filed a petition to proceed in propria persona. (1CT 47-56.)

On October 16, 1998, the court granted appellant's request to represent himself. Appellant pled not guilty and denied all of the special allegations. (1CT 58-59.) He also requested advisory counsel. (1CT 59.)

On November 6, 1998, at appellant's request, the court ordered that photographs of the crime scene and autopsy be made available for his review in the pro per library. The court further ordered that appellant return the photos at the conclusion of each library visit. (1CT 67.)

On November 13, 1998, the court appointed Andrew Stein as standby counsel for appellant. (1CT 68.)

On November 30, 1998, notice was filed with the court that appellant's in-custody pro per privileges were revoked following an administrative hearing, which revealed that he had unlawfully removed items from the pro per library. (1CT 71-102.) On the same date, appellant filed a substitution of attorney, substituting Stein as his counsel of record. (1CT 70.)

On December 3, 1998, appellant attempted to withdraw his substitution of attorney. The court denied his request, revoked his pro per privileges, and continued the trial over his objection. (1CT 103.)

On January 22, 1999, the Los Angeles County District Attorney filed an amended information charging the same three counts. As to counts 1 and 2, it was alleged that appellant was previously convicted of second degree murder, within the meaning of section 190.2, subdivision (a)(2). One of the prior serious felony convictions alleged under section 667, subdivision (a)(1) was stricken, and only one prior conviction was listed in the section 667.5 prior prison term enhancement. The amended information was identical to the initially filed information in all other

material aspects. (1CT 108-113.) Appellant pled not guilty and denied all of the special allegations. (1CT 115.)

On July 27, 1999, appellant filed a motion to dismiss count 2 and the related special circumstance allegations on the ground that the crime alleged therein had been charged against him three previous times and dismissed each time; thus, section 1387 barred further prosecution. (2CT 333-479.)

On August 2, 1999, appellant filed a motion to strike his prior conviction in case number A246211 and the related special circumstance allegations. (2CT 481-495.) Appellant also filed a motion to sever count 3 from counts 1 and 2. (2CT 496-539; 3CT 536-584.)

On August 9, 1999, the prosecution filed its opposition to appellant's motion to sever. (3CT 598-608.) The prosecution also filed its opposition to appellant's motion to strike his prior conviction in case number A246211. (3CT 609-618.) The following day, the prosecution filed its opposition to appellant's motion to dismiss count 2. (4CT 923-935.)

On August 11, 1999, the court denied appellant's motion to sever count 3 from counts 1 and 2. The court also denied appellant's motion to strike his prior conviction in case number A246211. (4CT 944-945.) The following day, the court denied appellant's motion to dismiss count 2 after finding excusable neglect existed. (4CT 946-947.) The court issued a stay until August 16, 1999, so that appellant could take a writ on the denial, and on August 16, 1999, the Court of Appeal denied the writ. This Court further denied his petition for review. (4CT 948-949, 954-955, 959; Supp. V 1CT 65-263; Supp. V 2CT 264-596; Supp. V 3CT 598-899; 4RT 984.)

On August 17, 1999, the court appointed counsel for witnesses Helen (Elena) and Charlie (Charles) Trujeque, respectively, under section 987.2. (4CT 957.) On August 20, 1999, Charlie exercised his privilege against

self-incrimination under the Fifth Amendment on the advisement of his counsel. (4CT 964.)

On August 23, 1999, appellant filed a motion to exclude his letter to former District Attorney Gil Garcetti under Evidence Code section 352. (4CT 972-988.) He also filed a motion to sanitize his 1969 murder conviction. (4CT 971.) On the same date, the court considered appellant's motion to exclude. The court and parties agreed to submit a redacted version of the letter to the jury. (4CT 970-971.) The following day, the court denied appellant's motion to sanitize his 1969 murder conviction. (4CT 990.)

On August 30, 1999, the jury returned a verdict of guilty of first degree murder as to count 1, guilty of second degree murder as to count 2, and guilty of second degree robbery as to count 3. The jury further found the personal use enhancements to be true. Additionally, the jury found true the special circumstance of multiple murders under section 190.2, subdivision (a)(3) to be true. Appellant waived his right to a jury trial as to the prior conviction allegations and admitted the convictions. (4CT 1000-1002; Supp. V 4CT 900-901, 903-904.)

On September 3, 1999, the court found the prior murder conviction in case number A246211 to be true, as well as the related special circumstance. On the same date, the penalty phase began. (4CT 1007, 1009.)

On September 16, 1999, Charlie exercised his privilege against self-incrimination again as he did during the guilt phase. His wife Helen did the same. (4CT 1064-1065.)

On September 20, 1999, the court and counsel conferred in chambers regarding the admissibility of appellant's juvenile probation reports. Following the conference, the court read portions of the reports to the jury. (4CT 1068-1069.)

The following day, the court and counsel discussed purported juror misconduct by Juror No. 12. The court spoke with both the bailiff and juror involved, found no misconduct occurred, and denied appellant's motion to remove the juror. (5RT 1084.)

On September 24, 1999, the jury fixed appellant's penalty at death. (5CT 1091, 1291-1292.)

On November 9, 1999, the court reached its independent finding that the evidence supported the jury's verdict of death and denied appellant's automatic motion to modify the death sentence under section 190.4, subdivision (c). It imposed the death penalty as to count 1. As to count 3, the court sentenced appellant to a consecutive sentence of 25 years to life. As to counts 1 and 2, the sentences were enhanced with one additional year for the use of a dangerous or deadly weapon. As to count 3, the court imposed an additional 10 years for using a handgun. As to all counts, the sentences were enhanced with a further 35 years for the seven five-year priors within the meaning of section 667, subdivision (a). (5CT 1310-1311, 1312-1314, 1317-1327A; 12RT 3078.) The abstract of judgment stated that, as to counts 2 and 3, the court sentenced appellant to 25 years to life in prison. (5CT 1327-1327A.)

This automatic appeal followed.

STATEMENT OF FACTS

I. THE GUILT PHASE

A. The Prosecution Evidence

1. Appellant Murders Raul Apodaca With Jesse Salazar

Robert de Alva[2] was friends with Ricky Rivera, the owner of an upholstery shop in East Los Angeles.[3] (5RT 1106-1107; 6RT 1517.) Rivera went by the nickname of "Conejo," and de Alva believed him to be a member of the White Fence gang. He sold drugs out of the shop and allowed people to use drugs and have prostitutes there. In fact, de Alva obtained heroin and cocaine at the shop and used both there in the bathroom as well. (5RT 1107-1109, 1139.) He believed that other White Fence members associated at the shop too. (5RT 1111.)

On the evening of January 23, 1987, de Alva was drinking and doing drugs at the shop. Rivera, Jesse Salazar, and several others, including Raul Apodaca, were at the shop as well. (5RT 1113-1115.) De Alva had recently been released from prison and was on parole. (5RT 1116.) Appellant, whom de Alva knew, could have been there. (5RT 1114, 1123.) At trial, de Alva claimed to recall few other details about that evening other than that he walked to the shop from a nearby bar with about six to eight other people, and tried to perform mouth-to-mouth and CPR on Apodaca

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[2] De Alva admitted that he had used cocaine as recently as the week before he testified at trial. (5RT 1124.) De Alva also admitted that his memory was poor as a result of his past drug use. (5RT 1137.) He, however, was not concerned about being characterized as a snitch. (5RT 1134-1135.) Yet he admitted that being labeled a snitch in prison would be dangerous. (5RT 1151.)

[3] Rivera was unavailable and, therefore, his prior testimony was read into evidence. (6RT 1516-1517.)

before taking Apodaca to the hospital with Rivera in Rivera's van, and that Apodaca died. (5RT 1113, 1119, 1129, 1147.)

According to Rivera, appellant, Salazar, Luis Villalobos, Apodaca, Frank Contreras, Willie Contreras, and Al Hernandez were all at the shop on the night in question. (6RT 1517-1518.) Everyone was drinking, but no one was doing drugs. Salazar and Contreras got in a fight during a card game. (6RT 1520.) During the fight, Apodaca grabbed Salazar, and Villalobos grabbed Contreras to stop the fight. (6RT 1521.) Following the fight, everyone left except de Alva, appellant, Salazar, and Apodaca. (6RT 1522.) Rivera went to the bathroom, and when he returned Apodaca was lying on his back. Apodaca was not breathing, so Rivera opened his shirt and saw a puncture wound on his chest. (6RT 1525-1527.) Salazar and appellant had left, but de Alva was still there. (6RT 1527-1528.) Rivera and de Alva tried to resuscitate Apodaca before dragging him to Rivera's van so they could take him to the hospital. (6RT 1528, 1531-1532.) Rivera saw Salazar and appellant quickly walking away from the scene. (6RT 1529.) Rivera did not call the police because he thought Apodaca would survive to tell the police what transpired. Rivera lied to the nurse and Apodaca's stepfather about where the incident occurred. (6RT 1533, 1536, 1539.)

Los Angeles Police Detective Birl Adams was the investigating officer assigned to the Apodaca murder. (6RT 1365.) At the upholstery shop, he observed what appeared to be gang graffiti. He also saw a piece of wood with the word, "Killer," written on it. (6RT 1368.)

On January 26, 1987, Rivera took de Alva to the police station to speak with Detective Adams. (5RT 1119, 1155; 6RT 1369.) According to Detective Adams, de Alva was not intoxicated and had no problem

communicating during the interview.[4] (6RT 1370.) De Alva told the detective that he had done heroin on the evening in question, fell asleep on a table, and awakened around 1:30 or 2 a.m., to a scuffle between Apodaca and others. (5RT 1122, 1126, 1128; 6RT 1371.) De Alva thought the noise of the scuffle may have awakened him. (5RT 1146.) De Alva knew that his statement was recorded. (5RT 1132-1133.) De Alva spoke with Detective Adams before the recorder was ever turned on in the room. (5RT 1156.)

Detective Adams recalled several other details de Alva provided during the interview. De Alva said he was at the shop with Rivera, Villa, Hernandez, Apodaca, Salazar, and appellant. They were all playing poker when a fight broke out that was stopped by some of the men. De Alva later went to sleep while appellant, Salazar, and Apodaca were still in the shop. (6RT 1372.) As de Alva recalled, he was awakened by the fight. But Detective Adams recalled that de Alva had said the fight was between appellant, Salazar, and Apodaca, and Apodaca fell to the ground before Salazar and appellant ran from the shop. It was then Rivera went over to Apodaca and told de Alva that Apodaca had been stabbed. (6RT 1373.) De Alva also gave Detective Adams descriptions of appellant and Salazar and had no problem recalling the descriptions or their names. (6RT 1374.)

On January 28, 1987, Detective Adams showed de Alva photographs, including those of appellant and Salazar. De Alva identified both without hesitation. (6RT 1376.) The only details he could not remember when he spoke with Detective Adams were the last names of both men. (6RT 1379-1380.)

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[4] De Alva thought he may have been on drugs at the time. (5RT 1155.)

De Alva spoke to a detective again on May 19, 1998. (5RT 1155.) He was certain that he was high on drugs at the time. (5RT 1156.)

Dr. Eugene Carpenter, Jr. had worked for the Los Angeles County Coroner for 11 years. (5RT 1161-1162.) He had performed and supervised autopsies and testified for physicians who were unavailable to do so in the past. (5RT 1162.) He, however, did not perform the autopsy on Apodaca. (5RT 1178.) Dr. Sarah Reddy performed it, but was retired at the time of trial. (5RT 1178-1179.)

Dr. Carpenter reviewed Dr. Reddy's report and photographs from the autopsy. (5RT 1179.) From this information, he described the nature of Apodaca's wounds and concluded, like Dr. Reddy, that the cause of death was a stab wound to the chest. (5RT 1179-1187, 1189.) He reached this conclusion on his own based upon his review of the materials he received. (5RT 1196.) Dr. Carpenter relied on the description of the wounds from Dr. Reddy's report and prior testimony, and concluded that Apodaca suffered five other wounds to his torso that did not break the skin, and another single shallow puncture wound to the back of the neck. The wounds were not caused by a knife and could have been caused by upholstery needles. The weapon that caused them must have been sharp and larger than an ice pick. And the wound to the back of the neck appeared to have been caused by a different weapon than the one that caused the other wounds. (5RT 1187-1188, 1205, 1207, 1224-1225, 1243.)

2. Appellant Murders Max Facundo

Charlene Trujeque, appellant's cousin, was not close to appellant. But appellant began writing letters to her when she was 16 or 17 years old, while he was incarcerated. In the letters, he tried to learn about his family. (5RT 1016.) He also told Charlene that he wanted her to stay out of trouble. Charlene did not understand the letters. (5RT 1017.)

Charlene's mother, Helen, knew appellant and was aware he was sending letters to Charlene. (5RT 1250-1251.) She had found the letters on Charlene's bed and looked through them. The contents of the letters concerned her, so she mentioned them to her husband, appellant's uncle Charlie. (5RT 1249, 1251-1252.) Helen believed one of the letters read like a "love letter," because appellant had written that Charlene meant the world to him and would always be his. (6RT 1288-1290.) Helen also noticed the phone bill increasing and found out from Charlene that Charlene was accepting collect calls from appellant, who was incarcerated. Helen could tell that Charlene and appellant were becoming friendly, and she and Charlie tried to stop the two from developing a friendship. But Charlene continued to write letters to appellant. (5RT 1253.)

When Charlene was about 20 years old, she entered into an intimate relationship with Max Facundo. (5RT 1014, 1016-1017.) During the relationship, Charlene spent some time living with her parents and some time with Facundo. (5RT 1015.)

Charlene's relationship with Facundo was good at first, but troubled later. Facundo eventually started using drugs and wanted Charlene to do the same. Charlene initially did not want to use drugs, so Facundo retaliated by hitting her on occasion. (5RT 1018.) About once a month during the final six months of their nearly two-year long relationship, they would argue about drugs, and he would beat her. In fact, the beatings left her with black eyes and a busted lip at times. (5RT 1019.)

Charlie and Helen noticed the injuries and knew Facundo to be a jealous person. Helen recalled seeing Charlene with injuries, including black eyes and bruises, on 15 to 20 separate occasions. (6RT 1296, 1326.) Although Charlie and Helen were upset, they only voiced their concerns to Charlene. Charlie never verbally threatened Facundo, but he told Helen he was going to beat Facundo up and once ran after Facundo with a bat. (5RT

1019, 1048, 1051, 1253; 6RT 1299-1300.) Charlene would not tell them the truth about how she got the injuries, yet Charlie and Helen asked many times that she end her relationship with Facundo. (6RT 1297-1299.)

Helen and Charlie went to Facundo's home to try to find out exactly what was happening, but Facundo would not let them in to see Charlene or him. (5RT 1254.) So they went to the police station to report the domestic violence, but the police told them Charlene had to report it. As a result of the troubles between Charlene and Facundo, Charlene stayed off and on with her parents. (5RT 1254.)

Charlene continued to write to appellant while she was seeing Facundo. She mentioned Facundo to appellant and his membership in the Florencia gang. (5RT 1020, 1046.) Charlene never told appellant that Facundo was beating her. (5RT 1019.)

When appellant was released from prison in June 1986, Charlene met him at her parents' home. (5RT 1021, 1255.) Appellant was drinking at the time. (5RT 1255.) Charlene did not mention Facundo or the beatings. She also did not have any visible injuries from the beatings. (5RT 1021.) According to Helen, Charlene and appellant talked all night. (5RT 1257.)

It frightened Helen to have appellant over because she had heard stories about him. (5RT 1256.) Despite Helen's and Charlie's feelings about Facundo, they never had a conversation with appellant about hurting him and never told appellant to rough him up. (5RT 1268-1269.) And they never promised him money for killing Facundo. (5RT 1270.) However, Charlie once asked appellant to break Facundo's leg or arm and teach him a lesson, but otherwise not to hurt him too badly. (6RT 1303-1304, 1308.) In addition, Helen wanted appellant to break Facundo's legs. (6RT 1309.) But Charlie and Helen wished for appellant only to hurt Facundo. (6RT 1340.) Although they knew one of Charlie's nieces, Vicki, had been murdered, they never referred to Vicki's murder in regards to what they

wished for Facundo. (6RT 1341.) Helen did not even know how Vicki was murdered. (6RT 1347.)

A week or two before June 21, 1986, appellant asked Charlene if Facundo was beating her. Charlene said he was not. (5RT 1075.)

On the evening of June 21, 1986, Charlene saw appellant at her parents' home. (5RT 1021-1022.) He had arrived there around 7 or 8 p.m. (5RT 1259.) Charlie and Helen were present as well, and her cousin Raymond had arrived with appellant. (5RT 1022.) Charlene was not drinking. (5RT 1056.) She had a black eye at the time, and appellant asked her about it. She would not tell him how she got the black eye, so he asked if her boyfriend gave it to her. She still refused to answer. (5RT 1022.)

Appellant and Raymond called Charlie outside to talk. (5RT 1259.) Charlie went outside, and when he returned, Helen asked him what happened. Charlie did not respond, which concerned her. (5RT 1260.) Charlie seemed to be nervous and afraid. (5RT 1261.) Helen assumed that appellant might hurt Facundo after the talk. (6RT 1314.) Helen had spoken to appellant in the past about her worries regarding Facundo's violence toward Charlene. (6RT 1323.)

Later in the evening, Charlene was sitting on the porch, and appellant told her he wanted to meet her boyfriend. Charlene said her boyfriend would be coming by later to pick her up. Appellant continued to ask her questions and drink Cognac. (5RT 1022.) He kept asking about her boyfriend coming over, which caused Charlene to feel suspicious. She could tell appellant was angry about the bruise on her face, so she asked appellant if he was going to hurt her boyfriend. She also asked him to promise not to hurt her boyfriend. Appellant replied that promises were made to be broken. (5RT 1023-1024.) He added that she need not worry because nothing would happen. (5RT 1076.)

Eventually, Facundo arrived at Charlie's and Helen's home. Charlene introduced Facundo to appellant and Raymond. She left him with them for a short while, and when she returned, Raymond asked her if Facundo could drop them off at their cousin Pat's home. Charlene asked Facundo, and he agreed to do so. (5RT 1023, 1082.)

Helen and Charlie knew that Charlene was outside with appellant and the others. They watched television together, and eventually Charlie told Helen that Charlene, appellant, Raymond, and Facundo had left. (5RT 1261.)

Facundo, Charlene, Raymond, and appellant got in Facundo's car, and Facundo drove them towards Pat's house. Appellant and Raymond were seated in the backseat. (5RT 1025.) Facundo wanted to get high and pulled out a cigarette dipped in PCP. He began smoking it and shared it with Charlene and Raymond. Charlene could not recall if appellant smoked the PCP. (5RT 1023, 1025-1026.) She was extremely high. (5RT 1057.)

At some point during the drive, Facundo pulled over and switched seats with Charlene so she could drive. Charlene drove them to Pat's house; they arrived around 10:45 p.m. (5RT 1026, 1028, 1066.) Charlene exited the car to let Raymond out of the backseat. (5RT 1026, 1028.) She walked with Raymond around the car towards the driveway of Pat's home, and waited for Facundo and appellant to follow. But Charlene instead heard something that sounded like yelling. (5RT 1028.)

Charlene turned around and saw appellant and Facundo struggling. She ran towards them and screamed for them to stop. Charlene held onto Facundo, and he fell to the ground. He was covered in blood. Appellant fled the scene. (5RT 1029.)

Charlene did not see Raymond and screamed for someone in the neighborhood to call the police and to help her. She also screamed out for appellant and Raymond. (5RT 1030.)

While Charlie and Helen continued to watch television, the phone rang. Charlie answered the phone. It was his niece, Pat. Helen thought Charlie looked nervous, and she grabbed the phone from him. (5RT 1261-1262.) She could hear Charlene screaming in the background and told Charlie that she wanted to go to Pat's house. Helen got off the phone and drove there with Charlie. (5RT 1263.)

The police arrived at the scene of the stabbing. (5RT 1030.) The officers put Charlene's hands and feet in cuffs and placed her on her stomach in a patrol car, because she was upset and screaming. (5RT 1034.) The police transported her to the police station. Her blouse was ripped and she had knife marks or scratches across her chest and around her right forearm. (5RT 1035.)

Charlie and Helen arrived at Pat's house around 9:30 or 10 p.m. There was a crowd of people outside, including the police. (5RT 1264.) Because Charlene was no longer there, they went home. (5RT 1265.)

Charlie repeatedly called Pat until she answered the phone. Pat told Charlie that appellant killed Facundo. Charlie asked about Charlene's whereabouts, and Pat told him the police took both her and Raymond to the station. (5RT 1265.) Helen and Charlie called the police station, but could not get the information they wanted. (5RT 1266.)

Appellant called Charlie's home, and Charlie answered the phone. He and Helen were scared. Appellant asked Charlie to pick him up and give him a ride somewhere. Helen told Charlie not to go, but he said he was going. Helen would not allow him to go alone and went with him to pick up appellant. (5RT 1266.)

Helen and Charlie picked appellant up, and Helen feared that he might harm them. Appellant was no longer wearing the shirt he had on earlier in the evening. They asked appellant what happened, and appellant said he killed Facundo. Charlie yelled at appellant and asked why. Appellant told

them that they did not have to worry about Facundo anymore. Helen asked appellant why he did it and said that they had told him not to do anything stupid. But appellant had no remorse. (5RT 1267-1268.) Charlie and Helen were upset that appellant had involved them in the murder by asking for a ride. (5RT 1268.) They did not act happily about the murder during the drive with appellant. (5RT 1270.) Appellant assured them that they were not in any trouble. (6RT 1334.) He never mentioned Vicki. (6RT 1346.)

After dropping appellant off at his mother's home, Charlie and Helen returned home. (5RT 1271.) Helen was relieved that Facundo could no longer beat Charlene now that he was dead. (6RT 1322.) But she feared Facundo's family might retaliate. (6RT 1323.)

Los Angeles Police Sergeant Russell Beecher arrived at the crime scene around midnight. (6RT 1386.) He searched Facundo's car and found $20 on the driver's seat, a sixpack of Budweiser, and a pint of Cognac on the left rear floorboard. He also recovered a marijuana cigarette on the street. (6RT 1387.) Sergeant Beecher did not recall detecting the smell of PCP in the car. (6RT 1388.) Sergeant Beecher additionally recovered a pair of bloody shoes in the driveway of Pat's home. (6RT 1388.) He was advised that Charlene and Raymond were already in custody. (6RT 1389.)

At the police station, Charlene was placed in a holding cell where she continued to scream. A detective eventually approached her and informed her of Facundo's death. At no time did she inform the police that appellant killed Facundo. (5RT 1039.)

Detective Terry McWeeney interviewed both Charlene and Raymond while they were in custody. (6RT 1408.) Charlene was under the influence of a substance and upset. Raymond was also under the influence but did not show much emotion. (6RT 1409.) Charlene told Detective McWeeney that she saw Facundo lying on the street and no longer saw appellant or

Raymond at the scene of the murder. She also said they were all drinking and using PCP, which Facundo had provided. Detective McWeeney recalled that Charlene had some cuts on her. (6RT 1412-1413, 1415.)

Just a few hours after the murder, Sergeant Beecher received a phone call around 2 or 3 a.m. (6RT 1390.) The caller identified himself as appellant and said he committed the Facundo murder. The caller also asked that the police release Charlene and Raymond. Finally, the caller stated that he did not want his call traced before he hung up on Sergeant Beecher. (6RT 1390.)

As a result of the call, Sergeant Beecher contacted appellant's parole officer and obtained a photograph of him. He also obtained some information so that he could determine where to find appellant. (6RT 1390.) He then went with other officers to appellant's mother's residence. Sergeant Beecher called the residence, and appellant answered. Sergeant Beecher told appellant the police were there to arrest him and ordered him to come outside to surrender. Appellant said that he would cooperate, but Sergeant Beecher then heard other officers on the scene yelling that appellant was attempting to flee. Eventually, appellant came outside and was arrested. Afterwards, Sergeant Beecher entered the home. (6RT 1391.)

Charlene was later released to her parents at the station. (5RT 1036, 1271.) Charlene was hysterical and had cuts on her arm and chest. As a result, Charlie and Helen took her to the hospital. (5RT 1271.)

A couple of days after Facundo's murder, Charlie's and Helen's home was shot at, but they were not physically harmed. They reported the incident to the police. (6RT 1335.)

Sometime after the murder, appellant called Charlie's and Helen's home. Charlene answered, but did not want to speak with him. Charlene gave the phone to Helen, and appellant asked how they were. Helen told

him they were not doing well. Appellant asked how Charlene was taking Facundo's death, and Helen told him that she was very badly hurt. (5RT 1272.)

About one or two months following Facundo's murder, Charlene visited appellant in jail. Her goal was to ascertain why he murdered Facundo. Appellant, however, refused to answer her questions about the murder. He further refused to admit to the murder. (5RT 1037.) Charlene told him that he did not need to kill Facundo. (5RT 1038.)

Although Charlie, Helen, and Charlene knew appellant killed Facundo, they did not really discuss the murder. Helen was terrified of appellant, and the family wanted to forget about the murder. (5RT 1272.) Because Helen thought appellant might hurt them, she never went to the police to turn appellant in as the murderer. (5RT 1273.)

Charlene came to fear appellant as well. A couple of years after he murdered Facundo, he sent Charlene a letter in which he threatened to "come after" her husband[5] if anything bad ever happened. He also wrote that he would have her husband taken care of as well. (5RT 1040-1041.) She had also received a letter stating that her husband would be killed if she did not tell the truth. (5RT 1041.)

Charlene additionally received threats from Facundo's family that his uncles would come to her home. Once they did and threatened her. Otherwise, they did not take any action against her in response to Facundo's murder. But they wanted to know who appellant was and where they could find him. (5RT 1081.)

Despite fearing appellant, Helen felt she became closer to him after Facundo's murder. (6RT 1317.) The closeness arose from her taking appellant's daughter Diana in to stay with Charlie and her at appellant's

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[5] Charlene married years after the murder.

request. Appellant had asked by letter for Helen's and Charlie's help with Diana because Diana was living on the streets. (6RT 1318.) Helen agreed to take Diana in because she felt sorry for her, not because she felt she owed appellant for the Facundo murder. (6RT 1341.) Helen, however, eventually learned that Diana was using them, and Diana ran away with her boyfriend when he was released from jail. (6RT 1318.) She returned to their home when she became pregnant and asked them to take care of the baby because she was using drugs. But she later became violent with them and again moved out of their home. (6RT 1319.)

Dr. Carpenter reviewed Dr. Eva Heuser's autopsy report and photographs of Facundo. Dr. Heuser had retired about two years before trial. (5RT 1164-1165.) Dr. Carpenter explained that Facundo suffered eight total stab wounds to his chest and left arm. (5RT 1166.) The wounds were caused by a knife going in and out of Facundo's body. (5RT 1248.) And as a result of the stabbings, each of Facundo's lungs, his pulmonary artery, aorta, and liver were injured. Each one of these injuries was fatal. (5RT 1166-1167.) It was Dr. Carpenter's opinion that the wounds were caused by only one type of knife. (5RT 1171-1176.) Dr. Carpenter added that the amount of PCP in Facundo's system was not in the lethal range. (5RT 1177.)

3. Appellant Robs Spartan Burgers

On January 21, 1998, at about 8 p.m., Ronni Mandujano was working at Spartan Burgers in Huntington Park. (6RT 1398.) He was putting money from a customer in his apron when appellant entered the restaurant. (6RT 1399.) Appellant placed an order, but after Mandujano told him his total, he took out a gun and demanded money from Mandujano. (6RT 1400.) The gun was small and black. The owner of the restaurant approached appellant and Mandujano, said, "no problem," opened the register, and placed its cashbox on the counter. (6RT 1401.) Mandujano

began to walk away, but appellant ordered him to come back. (6RT 1401.) Appellant asked the owner if there was any other money in the restaurant. The owner said there was additional money in the back. Appellant said, "lets go," and directed Mandujano and the owner to the back. Appellant pushed Mandujano, and Mandujano could feel appellant pressing the gun on his back and head. The owner then gave appellant more money, and appellant left. (6RT 1401-1402.) Mandujano called the police. (6RT 1403.)

On April 19, 1998, the police showed Mandujano some photographs, including one of appellant. From the photographs, Mandujano identified appellant. (6RT 1404.)

4. Appellant's Admission Of His Involvement In The Murders And Desire To Be Prosecuted

In February 1998, Los Angeles Police Detective Frank Durazo received a call from San Diego Sheriff Deputy Chavez. Deputy Chavez informed Detective Durazno that he had appellant in custody in San Diego. He further informed Detective Durazo that he had information on the Facundo and Apodaca murders, as well as the Spartan Burgers robbery. According to Detective Durazo, appellant had made it known that he wanted to be prosecuted for the crimes. (6RT 1420.)

As Detective Durazo readied himself to leave for San Diego a few days later, he received a call from San Diego Police Sergeant Newman. Sergeant Newman advised him that appellant wanted to know where he was. (6RT 1421.) Detective Durazo went with his partner, Jose Romero, to San Diego to interview appellant. (6RT 1421.)

When Detective Durazo arrived, appellant was so anxious to talk about the crimes that he began doing so before any officer could even read him his rights. (6RT 1429.) Appellant began by excitedly confessing to the Facundo murder. (6RT 1430.) He explained that he was released from

prison on May 29, 1986, and a week later, went to visit Helen and Charlie. He noticed that Charlene looked as if she was beaten up because she had a black eye, bumps on her forehead, and a swollen lip. Appellant asked Charlene what happened, but Charlene did not want to tell him. After she left, Charlie and Helen told appellant that Facundo was beating her everyday and the two were doing drugs together. Charlie then asked appellant and Raymond, "if we would do anything about it, if we would do something to make it stop." (31CT 8973-8974.) Appellant told Charlie, "we'll take care of it, I'll take care of it, don't worry about it." (31CT 8974.) Charlie told appellant that he was serious and wanted appellant to do something to stop the beatings "because if it doesn't stop eventually he's gonna kill her." (31CT 8974.) Helen added, "if you do, whatever you want we'll give it to you . . . ." (31CT 8974.)

Appellant confessed that a month later, Charlene came to Raymond's house where he was staying. She was wearing sunglasses and again had a swollen face, but would not respond when appellant asked what happened. Appellant asked if Facundo caused the injuries, and Charlene said he did. She also said that Facundo asked if appellant was a member of the Mexican Mafia and requested appellant's whereabouts. (31CT 8974.)

According to appellant, two weeks later, Charlie came to Raymond's house to remind appellant about taking care of Facundo because the beatings were continuing. Appellant told Charlie, "we'll go take care of it tonight," and Charlie told him that Facundo would be at Charlie's house that evening. (31CT 8975.) Appellant told Charlie that he would come to Charlie's home. He went upstairs to retrieve a hunting knife that would "tear everything up" when pulled out of someone after a stabbing. (31CT 8975.) Appellant described the knife as "the good kind." (31CT 8975.) After retrieving the knife and concealing it in his pocket, appellant went with Charlie, Raymond, and his cousin to Charlie's home. It was dark

outside, and appellant went inside. About an hour later, Charlene came into the home, and Charlie indicated to appellant that Facundo had arrived. (31CT 8975.)

Appellant explained that he looked outside and saw Facundo standing by a car. (31CT 8975-8976.) Appellant went outside, and Raymond and Charlene followed. Appellant believed Charlene could sense something was about to happen even though no one mentioned anything to her. She introduced appellant and Raymond to Facundo. Appellant shook Facundo's hand and asked for a ride to his cousin Pat's home. Facundo agreed to give appellant a ride, and all four got in Facundo's car. (31CT 8976.)

Appellant told Detective Durazo that Charlene and Facundo were doing drugs on the way to Pat's home, and Raymond was already high. He claimed, however, that he did not want to get high because he wanted to be able to "handle business," and do so "in the right way," because he had been taught by "'OG's' that . . . when you kill somebody the main thing is to get away with it . . . ." (31CT 8976.) As best as appellant could remember, Facundo pulled the car over because he was too high and asked Charlene to drive the rest of the way. (31CT 8976.) At that point, appellant knew he would not get caught because, "the dude is helpless . . ." and could not defend himself. Appellant knew that Facundo was so high he could catch Facundo "off guard . . . ." (31CT 8977.)

Charlene pulled the car over at Pat's house. Appellant got out of the car and took out his knife in a way "so that nobody will see me . . . ," "cause I know what I'm gonna do as soon as I get to the side of the curb." (31CT 8977.) Appellant walked to the curb and saw some people seated in front of Pat's house. He also saw that Charlene and Raymond were watching him. Facundo's back was to appellant. Appellant grabbed him around the neck and stabbed him in the heart. (6RT 1430; 31CT 8977.) He

wanted to stab Facundo "100 times . . . ," but as he pulled out the knife, Charlene yelled out for him to stop. (31CT 8977.)

Appellant described that Facundo fell to the curb. He heard Charlene yelling and saw some lights turn on, so he knew he had to "get the fuck out of here . . . ." (31CT 8977.) Appellant ran with the knife and hid behind some bushes. He left the knife by the bushes and covered it with dirt. (6RT 1430; 31CT 8977.)

Appellant confessed that he next went to a phone booth and called Charlie to ask for a ride. He claimed Charlie already knew what had transpired because Pat had called Charlie and told Charlie that he killed Facundo. (31CT 8978.) Appellant believed it was five to ten minutes later that Charlie and Helen arrived. He got in their car, and Charlie told him that he did not have to kill Facundo. Charlie added that he only wanted appellant to beat up Facundo. Appellant admitted, however, that he had no intention to just beat up Facundo because he learned to kill in prison it was better to kill in order to avoid revenge by the victim. Appellant stated that Helen was happy and thanked him. (31CT 8979.)

Appellant informed Detective Durazo that Charlie and Helen dropped him off at his mother's home. He called Raymond's wife, and she told him that Charlene and Raymond were taken into custody by the police. Appellant learned that Charlene was released, but Raymond was not. He also learned that Pat's neighbors told the police that a woman at the scene of the stabbing was yelling, "Tommy," during the crime. (31CT 8979.) At his mother's home, appellant took his shoes and pants off because they had blood on them. He put them in the garage at first, but threw them away months later. (31CT 8985.)

Appellant believed that one of his mother's neighbors must have turned him in to the police, because the police came by the home and arrested him on June 26. Appellant thought the charges against him were

dismissed, however, because the prosecution had no evidence. (31CT 8980.) Appellant claimed that before he was released, Charlie and Helen sent him $200, and after he was released they gave him $300 because he told them "what I needed to buy a .45 automatic . . . ." (31CT 8988.) He claimed that he received a total of $500 for killing Facundo and that Helen promised him before the killing that "she would give me what I wanted" in exchange for dealing with Facundo. (31CT 8988-8989.) Appellant described the knife he used to kill Facundo as eight inches long with a black, four-inch long handle, and teeth on one side. (31CT 8980-8981.)

Appellant also provided details about the Apodaca murder as to which Detective Durazo had no information at the time. (6RT 1431.) Appellant admitted that he committed another murder at Conejo's upholstery shop where he used to party with prostitutes. Appellant explained that Conejo and Salazar used to deal drugs out of the shop, and he used to go there most days. According to appellant, Apodaca did not get along with Salazar, but Conejo liked Apodaca. Conejo also liked Salazar because they grew up together as part of the White Fence gang. (31CT 8989.)

Appellant admitted that he was at the shop on the night in question with Salazar, Rivera (aka "Conejo"), Apodaca, and others. They all decided to go to a local bar for a few hours and went in Rivera's van. At the bar, Salazar kept saying that he hated and wanted to kill Apodaca. Salazar said he was going to stab Apodaca when they got back to the shop and asked appellant to "have his back." (31CT 8990.) Appellant told Detective Durazo that he did not think Salazar was really going to stab Apodaca but, nevertheless, said he had Salazar's back. (31CT 8990.)

The men returned to the shop from the bar after a couple of hours. They were playing poker, drinking, and snorting cocaine. Some of the people at the shop left, but Salazar, Rivera, Apodaca, and appellant remained. Salazar and Conejo began arguing and got into a fist fight.

Appellant broke up the fight and then went to the bathroom to use more cocaine. (31CT 8989-8991.) When he came out of the bathroom, Salazar and Apodaca were fighting. Appellant did not see either man armed. Apodaca was on top of Salazar and winning the fight. Appellant went over to break it up, but Apodaca pushed him in the face. Appellant explained to Detective Durazo that when he got pushed, "the red light goes on and the alarm goes off . . . ." He turned, walked to a table where Rivera's tools were, retrieved a screwdriver, and went back to the fight. Salazar was on top of Apodaca and stabbing him. Appellant confessed that he bent down and stabbed Apodaca two to three times on the left side of the body with the screwdriver. (31CT 8991.) Detective Durazo believed appellant's confession was credible. (6RT 1472.)

Appellant spoke to Detective Durazo while he was not being recorded as well. Appellant told Detective Durazo that he wanted to die. He did not want to die an old man in prison as a result of serving a life sentence. (6RT 1492-1493.)[6] Additionally, when discussing one of the murders, appellant blurted out that Charlie and Helen sent him money while he was incarcerated to purchase another 9mm gun when he was released to "do whatever he does with 9 millimeters." (6RT 1494.) Detective Durazo asked appellant if he knew he was implicating his family in his crimes, and appellant said he did not care and wanted to implicate them. He dragged them into the crimes by alleging that Charlie and Helen recruited him for the murder for hire of Facundo. (6RT 1495.) But he had never implicated them before during the 12 years preceding his interview with Detective Durazo. (6RT 1498.)

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[6] At trial, appellant admitted that he wanted to go to death row for personal reasons. (7RT 1634.)

Detective Durazo began his own investigation to attempt to verify appellant's confession. (6RT 1433.) On April 24, 1998, he interviewed Charlene. (5RT 1081-1082; 6RT 1434.) During the interview, Detective Durazo played Charlene a portion of appellant's recorded statement. (5RT 1084; 6RT 1434.) Charlene was reluctant and afraid to talk about the Facundo murder. (6RT 1434.) But she broke down crying after hearing the recorded statement. (6RT 1435.)

Detective Durazo spoke with Helen and Charlie on the same day. (5RT 1273; 6RT 1435-1436.) Helen and Charlie were still afraid of appellant, but told Detective Durazo what happened on the night of the murder. (5RT 1274; 6RT 1438.) Detective Durazo also played appellant's recorded statement for Charlie and Helen. On the recording, Helen heard appellant claim that she and Charlie offered him money to kill Facundo. (5RT 1274-1275; 6RT 1435.) Helen refuted appellant's claim, which she had never heard before, and added that she never sent him money while he was incarcerated. (5RT 1276; 6RT 1336-1337, 1437.) She was hurt and disgusted by appellant's implication. (6RT 1438.) Charlie was even more disgusted. (6RT 1439.)

According to Detective Durazo, Helen stated that Charlie had asked appellant to beat up Facundo. (6RT 1490.) During the interview, she did not mention any letters from appellant to Charlene that came across as "love letters." She only brought them up a week before Detective Durazo testified. Helen admitted that she and Charlie may have asked appellant to teach Facundo a lesson. (6RT 1490-1491.)

Detective Durazo also interviewed Raymond and Salazar. (6RT 1480-1481.)

Detective Durazo transported appellant from San Diego to Los Angeles. (6RT 1465.) Since then, he had several additional conversations with appellant and received calls from appellant. Most of the conversations

did not involve discussion of the charged offenses. (6RT 1466.) Appellant, however, contacted Detective Durazo twice to help with information on other active cases as he promised to do during his recorded statement. (6RT 1466-1467.)

B. The Defense Evidence

1. Appellant's Account Of The Apodaca Murder[7]

Appellant was friends with Rivera, whom he called Conejo. (7RT 1610.) He and Rivera were both members of the White Fence gang. Appellant also knew Apodaca. (7RT 1611-1612.) According to appellant, Apodaca would not give appellant money and drugs when appellant asked for both. (7RT 1661.)

Appellant and others used to frequent Rivera's upholstery shop. In fact, appellant's nickname was Killer, and a piece of wood at Rivera's upholstery shop had the name on it. (7RT 1614.) People used drugs at the shop. Prostitutes were often there as well. (7RT 1619.) In general, the shop was a place where White Fence members could associate. (7RT 1676.)

Appellant went from a nearby bar to Rivera's upholstery shop on the night he murdered Apodaca. (7RT 1616.) He played cards with some other men, including Salazar and Apodaca, and drank Cognac at the shop. (7RT 1618, 1620.) A fight broke out during the card game, and the table they played cards on was turned over. (7RT 1622.) Later, appellant's friend Salazar got in a fight with Apodaca. (7RT 1620.) It appeared to appellant that Salazar was getting the worse of the fight, so he approached

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[7] Appellant admitted he was a manipulative person and had no loyalty to his family. (7RT 1606, 1629.) He was previously convicted of second degree murder in 1971, two counts of assault with a deadly weapon in 1977, attempted murder in 1979, four counts of robbery in 1989, and robbery in 1998. (7RT 1705-1706.)

to help his friend. Apodaca was on top of Salazar. Apodaca struck appellant in the face, and appellant picked up a screwdriver. Using the screwdriver, he stabbed Apodaca two or three times. (7RT 1622, 1625, 1627.) He recalled stabbing Apodaca in the front, and knew that Salazar stabbed Apodaca too. (7RT 1690.) Appellant saw Salazar step around de Alva, who was trying to break up the fight, and stab Apodaca in the chest with a screwdriver. Salazar threw the screwdriver over a fence after the murder. (7RT 1710-1711.)

Appellant confessed that he killed Apodaca. He claimed at trial that he was trying to break up the fight even though he was not doing so. (7RT 1604, 1625-1626.) Nevertheless, he did not know if the wound he inflicted on Apodaca was lethal. He recalled stabbing Apodaca on the left side, but did not remember the precise location or number of stabbings. He did not recall whether he was responsible for the lethal wound below where the knot of a tie would fall. (7RT 1605-1606, 1627.) He never admitted that he did cocaine after the murder. (7RT 1626.) And appellant claimed that he told the police about the argument between Apodaca and Salazar. (7RT 1709.)

2. Appellant's Account Of The Facundo Murder

Appellant was released from prison on May 29, 1986. During the preceding two or three years, Charlene would write to him while he was incarcerated, and he would write back. (7RT 1586.) Upon his release, he was paroled to his mother's home. (7RT 1587.)

About two weeks after his release, appellant's cousin Raymond took him to Charlie's and Helen's home. When he arrived, Charlene was there. (7RT 1587-1589.) Charlene had a black eye and said that her boyfriend had been beating her. (7RT 1589-1590.)

At some point, Charlie asked appellant to kill Facundo. Charlie and Helen believed Facundo would end up killing Charlene. Charlie did not

confine his request to breaking Facundo's limbs or just hurting Facundo. And appellant carried out Charlie's request. (7RT 1590-1591, 1624.) He, however, never asked Charlie why Charlie wanted Facundo killed. (7RT 1593.) He just assumed Charlie wanted him to kill Facundo because Facundo was beating up Charlene. (7RT 1593.) Later in his testimony, appellant claimed that Charlie only said, "take care of it," and never expressly told him to kill Facundo. (7RT 1639.)

Helen had told him that Facundo was beating Charlene almost every day. (7RT 1623.) Appellant thought Facundo deserved to be killed for hitting Charlene.[8] (7RT 1595.)

On the evening of the murder, Charlie drove appellant and Raymond from Raymond's home to Charlie's home. (7RT 1593-1594.) Charlie said that Facundo would be coming over later. (7RT 1595.)

Once appellant, Raymond, Facundo, and Charlene were all at Charlie's and Helen's home, the four left together in Facundo's car. Facundo was driving at first while Raymond and Charlene smoked PCP. (7RT 1597.) Appellant was drinking Cognac, and consumed about half a pint. He was not using PCP. (7RT 1592.) Eventually, Charlene drove the remainder of the way to Pat's home. (7RT 1598.)

At Pat's home, appellant got out of the car, walked to the passenger side, grabbed Facundo around the neck, and stabbed Facundo in the heart. (7RT 1599-1600.) Appellant intended to inflict quickly a fatal wound to Facundo, and used a method of stabbing he learned in prison. (7RT 1645.) He admitted that he could have killed Facundo at a later time, but did not want to wait. (7RT 1647.) He had planned to kill Facundo by stabbing

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[8] Appellant's cousin Vicki died from a stab wound inflicted by her boyfriend. (7RT 1608.) Appellant did not know whether Vicki's relationship with her boyfriend was similar to Charlene's relationship with Facundo. (7RT 1609.)

Facundo in the heart, and even obtained a knife at Raymond's house before ever going to Charlie's home. (7RT 1651.) Appellant was not worried about Facundo before killing him, and had been thinking about killing him since appellant was released from prison. (7RT 1652.) He hoped to inflict at least 100 stab wounds. (7RT 1660.)

After killing Facundo, appellant ran from the scene to avoid being arrested. (7RT 1645.) He threw the knife he used away after the killing. (7RT 1646.) Appellant called Charlie and Helen to pick him up so that he would not be arrested. Charlie was not upset when they spoke. (7RT 1664-1665.) When Helen and Charlie arrived, he may have said "our" or "their" troubles were over. (7RT 1666.) They drove him to his mother's home, where he discarded his shoes and clothing. (7RT 1646, 1669.)

Appellant was arrested after the murder and held for six months on a parole violation. While he was incarcerated, he wrote to Charlene. Charlene never came to visit him, but Charlie did. (7RT 1672-1673.)

Although Helen sent appellant money while he was incarcerated, he did not kill Facundo in exchange for money. He killed Facundo because Facundo was beating up Charlene. (7RT 1609.) Appellant received additional money from Helen when he was released in 1987, after asking her for it. He intended to buy a gun with the money. (7RT 1674-1676.)

Appellant recalled calling the police after the murder to inform the police that Charlene and Raymond were not responsible for Facundo's murder. Appellant did not recall confessing on the night of the Facundo murder. (7RT 1591, 1670.) He never said he wanted to go to death row because it would be safer there. (7RT 1600.) But he told Detective Durazo and others that he wanted to die, even though he no longer knew if he wanted to die at the time of trial. (7RT 1601.)

3. Appellant Denies Any Involvement In The Spartan Burgers Robbery

Appellant claimed he had no involvement in the Spartan Burgers robbery. (7RT 1707.)

II. THE PENALTY PHASE

A. The Prosecution Evidence

1. The 1998 Robbery Of TLC Liquor

Nissim Jenah worked at TLC Liquor in 1998. (8RT 1901.) On January 25, 1998, he initially saw appellant in the store at about 10 a.m. (8RT 1901-1902.) Appellant was with a Hispanic woman, and they purchased some items. Appellant took out a lot of money when paying, and then he and the woman left the store. (8RT 1902-1903.) At about 4 p.m., appellant returned to the store and asked, "You remember I was here in the morning?" (8RT 1904.) He then told Jenah that he was having a big party and needed Hennessey. Jenah showed him the Hennessey, and appellant stated that he needed large bottles. Jenah reached to grab the bottles and placed them on a table. Appellant then said he wanted cartons of cigarettes. Jenah retrieved the cartons and then told appellant the total amount of his bill. Appellant took out some money and began counting it. (8RT 1904.)

Suddenly, appellant pulled out a gun from his jacket and put a bandana around his face. (8RT 1905.) He loaded bullets into the gun, showed the gun to Jenah, and threatened to shoot Jenah if Jenah did not give him what he wanted. He pushed the gun against Jenah's chest, and Jenah asked him what he wanted. Appellant demanded all the money. (8RT 1906.) Jenah gave him money, and then appellant asked for anything in Jenah's pockets too. Jenah showed appellant that all he had in his pocket was an identification and items other than money. Appellant demanded

those items as well, and Jenah complied. Appellant then told Jenah, "if you fuck with me, I'm going to shoot you." (8RT 1907.) He pressed the gun against Jenah's forehead and pushed Jenah to the ground. Appellant then put the gun to the back of Jenah's head and threatened to shoot Jenah if Jenah moved. (8RT 1908-1909.)

Appellant left the store, and Jenah ran after him while shouting. (8RT 1909-1910.) Los Angeles Deputy Sheriff Ralph Scott Siegfried was driving by and saw Jenah waving his arms and yelling he had been robbed. Deputy Siegried recognized Jenah, stopped his patrol car, and learned from Jenah what had occurred. (8RT 1911, 1931.) Jenah provided a description of appellant. (8RT 1931.)

Alan Winkelman owned the Ye Old Plank bar and lived above it. Around 4 p.m. on the date of the incident, he was above the bar and saw something out his window. His dog was barking, which led Winkelman to believe someone was by his gate or front door. He walked to his bathroom window, looked outside, and saw appellant standing against his front door. Appellant was nervously looking in both directions. (8RT 1922.) Winkelman saw him pull out a gun from his belt area and put it inside a coat he was holding. Appellant put the coat and gun in the nearby shrubbery. Winkelman called 911, retrieved his own gun, and went downstairs to look for appellant. (8RT 1923.)

While Deputy Siegfried spoke with Jenah, he heard a radio call about a suspicious person near the Ye Old Plank bar. From the description, Deputy Siegfried believed the suspicious person might be the same person who robbed Jenah. He got in his patrol car and drove to the bar. (8RT 1931.)

Janice Dunn lived near Winkelman's bar. Around the time of the incident, she was walking out of her garage and saw appellant. He was acting strangely and appeared to be paranoid as he checked around.

Appellant was in front of a dumpster. (8RT 1927-1928.) Dunn went back inside her home and told her husband what she saw. Dunn's husband confronted appellant, who was squatting behind the dumpster. Appellant said he was urinating and then walked away. (8RT 1928.)

Winkelman searched for appellant, but did not find him. He saw Deputy Siegfried and told him what he had observed. (8RT 1923, 1931.) Winkelman also showed Deputy Siegfried where appellant had placed the jacket and gun. Deputy Siegfried retrieved a black, semiautomatic, 9mm handgun and a jacket. (8RT 1924, 1932.) He and Winkelman then saw appellant come out from behind an apartment. Winkelman identified appellant, and Deputy Siegfried tried to contact him. (8RT 1924, 1932.) Deputy Siegfried took out his gun and ordered appellant to the ground. Appellant complied, and Deputy Siegfried placed him in handcuffs. (8RT 1932.) Dunn witnessed the detention. (8RT 1928.)

Deputy Siegfried returned to the liquor store and asked Jenah if he would be able to identify the perpetrator. Jenah did so while appellant was in custody. (8RT 1912, 1932.)

Deputy Siegfried transported appellant to the station and placed him in a holding cell. Deputy Siegfried asked appellant what he wanted done with the jacket. Appellant asked that it be left for his wife. His wife tried to pick the jacket up the next day. (8RT 1933.)

2. The 1976 Attack On Rondelle Self[9]

On January 12, 1976, Rondelle Self was an inmate at the Los Angeles County Central Jail. At about 2:30 p.m., he was alone in his cell when appellant entered it with inmates Guzman and Lopez. (8RT 1945-1946.) Self had seen the men before. Lopez asked Self if he knew what a "211"

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[9] Rondelle Self was deceased at the time of trial and, thus, his prior testimony was read into the record. (8RT 1945.)

was. (8RT 1946.) He told Lopez it was a robbery. Lopez next asked if he knew what a "217" was. (8RT 1947.) Self said he did not know, and Lopez stated it was an attempted robbery with an attempted murder. Lopez then demanded Self's money. Self said the men would have to take it from him. Two men then came by the cell and asked if Self wanted to play cards. Self said he did and stood up. Guzman then pushed Self towards Lopez. Lopez smacked Self on the head with a belt buckle. Guzman and appellant pushed and kicked Self, and Lopez continued hitting him on top of the head. They went through Self's pockets. (8RT 1948.) Self's injuries required stitches. (8RT 1949.) Self was able to identify appellant, Guzman, and Lopez after the attack when he was recovering. (8RT 1950.)

3. The 1976 Attack on Tony Montano And Rudy Ortiz At The Laundromat

On May 13, 1976, at about 10 p.m., Rudy Ortiz was with his friend Tony Montano at a laundromat in Baldwin Park. They were playing pinball when appellant approached them and asked for a ride. (8RT 1973-1974.) Ortiz told appellant that Montano was the driver and that they were leaving. Montano said he would give appellant a ride. (8RT 1975.)

The three men got in the car and drove around the corner. They picked up another man to give him a ride to the same place appellant asked to go. Either appellant or the other man asked Montano if he wanted gas money and asked to be taken somewhere to get change. Montano and Ortiz took the men to get change. On the way, appellant and the other man pulled out knives. Appellant, who was seated in the backseat, grabbed Ortiz and put a knife to him. (8RT 1976-1977.) The other man, who was also seated in the backseat, told Montano not to try anything funny. He demanded that Montano drive until told to pull over, and eventually the man told Montano to stop the car. (8RT 1978.)

Montano pulled the car over. The other man told Montano to get out and leave the keys, but Montano grabbed the key, and tried to run away. The man grabbed Montano, and a struggle ensued. Appellant told Ortiz to get out of the car and not to try anything. Appellant was holding Ortiz by the collar and had the knife to Ortiz's collar. (8RT 1978-1979.) Ortiz tried to get loose and ended up in a struggle with appellant. Appellant tried to stab Ortiz, but Ortiz had a hold of appellant's wrist. (8RT 1980.)

Montano wrestled free from the other man and ran from the scene. Ortiz, however, ended up on the ground with appellant. He heard either appellant or the other man asking for help to finish Ortiz off so that he could not "rat." (8RT 1980.) Appellant and the man then began cutting Ortiz on his chest, leg, and wrist. Montano ran back to the scene, retrieved his keys, and ran away again to a house where he called the police. (8RT 1980-1981.) Appellant and the other man pursued Montano, freeing Ortiz up to run home. (8RT 1981.) Later, Ortiz returned to the scene where he met with the police and was transported to the hospital. (8RT 1981.)

Los Angeles Police Officer Kenneth R. Boyd learned that the suspects might be in the area and began searching for them. (8RT 1983-1984.) Someone pointed out the suspects to Officer Boyd. They were running through an apartment complex. Officer Boyd chased them through the complex into a backyard. (8RT 1984.) He yelled for them to stop and identified himself as an officer. He then pursued them over a fence, and in doing so, his gun fell out of his holster as he tried to holster it. (8RT 1985.) Appellant stopped and turned to face Officer Boyd. Appellant had his right fist drawn back, and Officer Boyd threw his flashlight at appellant's chest. He then jumped appellant and started striking appellant. Appellant and Officer Boyd ended up on the ground, and appellant said he had enough. Officer Boyd got off appellant and placed him in handcuffs. After appellant was cuffed, Officer Boyd retrieved his handgun. (8RT 1986.)

Officer Fred Mueller searched appellant and retrieved a steak knife from his back pocket. (8RT 1987.)

4. The 1987 Robberies Of The El Cafetin Liquor Store

On February 14, 1987, Raul Campos was working at El Cafetin Liquor Store, which his mother owned. (8RT 1992.) At about 7:30 p.m., he heard someone enter the store and began yelling. Campos saw appellant retrieve a rifle from under a long coat and point it at his brother, who was working near the cash register. (8RT 1994.) Appellant demanded the store's money from Campos' brother. He then asked what Campos was doing and pointed the rifle at Campos. Campos' brother quickly gave appellant the store's money. Appellant told both men to be quiet. He ordered them not to do anything and then walked away. (8RT 1995.)

On February 16, 1987, appellant came to the store again around 9:30 p.m. He had on the same clothes and wielded the same rifle. He pointed the rifle at Campos and demanded the store's money. Campos gave him the money, and appellant left the store. (8RT 1996-1997.)

5. The 1987 Robbery Of Nate's Liquor Store

On February 14, 1987, Victor Arreola was working at Nate's Liquor Store when appellant entered. Appellant was wearing a big jacket, had his hand inside it, and said he had a gun. Appellant did not show Arreola the gun, but demanded the store's money. He took the money from Arreola, and on his way out of the store, shot at a refrigerator where a busboy was standing. (8RT 2000-2002.) The following day, appellant came to the store again, said he had a gun, robbed the store again, and left. (8RT 2003.)

6. The 1987 Robbery Of Frank's Liquor

Jung Poy Chin[10] owned Frank's liquor. (8RT 2005.) On February 14, 1987, he lived in the back of the store. While in the back of the store, he heard a bell go off indicating that someone had entered through the store's door. He came out of the back and saw appellant wearing a long coat. (8RT 2006-2008, 2011.) Appellant had a rifle in his coat and pointed it at Chin while demanding the store's money. (8RT 2008-2009.) Another customer entered the store, and appellant turned to face the customer. Chin took the opportunity to run to the back of the store. There, he heard gunshots fired. (8RT 2010.)

7. The 1978 Stabbing Of Ruben Anthony Gaxiola[11]

In 1978, Dennis Joiner was a correctional officer at the California Institution for Men in Chino. On July 26, 1978, he was working in the Security Housing Unit, which housed prison gangs. (8RT 2095-2096.) Officer Joiner was transporting inmates from the yard to their cells. (8RT 2097.) Another officer had already asked appellant to go in his cell and close the cell's door, but appellant instead proceeded to roam around and go upstairs with a paper bag in his hand. (8RT 2100.) Ruben Anthony Gaxiola, another inmate, was walking upstairs too. (8RT 2114.) Appellant dropped the bag, revealing what Officer Joiner saw to be a shiny object that may have been a shank or knife, which he used to begin stabbing Gaxiola in the left side of Gaxiola's rib cage. (8RT 2101, 2111.) Gaxiola felt a punch to his side, but did not see appellant at first. He turned and tried to protect himself by fighting back. (8RT 2115-2116.)

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[10] Jung Poy Chin was deceased at the time of trial and, thus, his prior testimony was read into evidence. (8RT 2005.)

[11] Ruben Anthony Gaxiola was convicted of voluntary manslaughter, assault with a deadly weapon, burglary, and felony possession of a firearm. (8RT 2114.)

Officer Joiner hollered that a man was down and sounded an alarm. Appellant was on top of Gaxiola and swinging at him with the hand that was holding the knife or shank. (8RT 2102, 2116.) Officer Joiner hollered that there was a shank or knife and ordered appellant to get off Gaxiola. Appellant looked at Officer Joiner. Officer Joiner grabbed Gaxiola and dragged him away from appellant. (8RT 2103, 2116.) Appellant backed up, tripped, and dropped the knife or shank. Other officers ordered appellant to lie down and then placed him in handcuffs. (8RT 2103, 2116.)

Gaxiola had no prior interactions with appellant and did not know him. (8RT 2116-2117.) From the incident he suffered several stab wounds, including one to his eyelid. He also suffered a punctured lung. (8RT 2118-2119.)

8. The 1978 Stabbing of Frank Allen O'Hare[12]

Frank Allen O'Hare was incarcerated in Folsom prison in 1978. On one occasion, he was standing in the canteen line when appellant asked him if he was going to purchase coffee. O'Hare said he was, and appellant said he had a package of coffee to sell O'Hare in exchange for some items. O'Hare gave appellant the items in exchange for the coffee, but when appellant went to his cell to retrieve the coffee, he never returned with it. (9RT 2183-2184.)

About an hour later, O'Hare approached appellant and demanded the items back if appellant was not going to give him the coffee. O'Hare was angry and felt disrespected. (9RT 2195-2197.) Appellant turned around, pulled a knife from his waist area, and stabbed O'Hare in the mouth and on the top of the head. O'Hare kicked appellant and fell down before an

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[12] Frank Allen O'Hare was convicted of armed robbery, escape, and burglary. (9RT 2182.) In 1974, he attempted to tunnel out of prison. The same year, he also shot a police officer. (9RT 2190-2191.)

officer loaded his shotgun and ordered appellant to back off. (9RT 2184, 2199.)

O'Hare reviewed the investigating documents from the incident and spoke to other inmates. He learned from the other inmates that appellant's nickname was Killer. (9RT 2185.)

O'Hare spoke about the incident with the prosecution's investigators on September 3, 1999. He was not asked about any charges pending against him and he was not made any promises by the investigators in exchange for talking with them. (9RT 2187.) He, however, asked Detective Durazo and the prosecution to notify the California Department of Corrections and Rehabilitation that he was providing information and to recommend that he be housed in protective custody. (9RT 2189.)

9. The 1969 Murder Of Allen Rothenburg

Los Angeles Police Detective Ruben Sanchez lived near Nate's Liquor Store and was familiar with it. (9RT 2220.) He used to patrol the area around the store, and his children attended a church near it. Detective Sanchez also frequented the store. (9RT 2221.) As a result, he knew both Allen Rothenburg and Rothenburg's father. (9RT 2224.) He used to speak to Rothenburg in the store. (9RT 2225.)

According to Detective Sanchez, Rothenburg used to drag one foot when he walked and was mentally slow. His speech was slow, and it took him a few minutes to respond. (9RT 2225.)

On February 7, 1969, Detective Sanchez received a call to investigate a murder near the store. He responded to the scene and was directed to an area where the body of Allen Rothenburg was lying on the opposite side of a fence. (9RT 2222.) Rothenburg's pockets were turned inside out, and he had multiple stab wounds to his chest area. (9RT 2223.)

Detective Sanchez followed a blood trail from Rothenburg's body to a residence. He entered the premises and saw a lot of blood in the dining

room, a Colt 45 beer on the table, and a ring with the initials "A.R." on the porch. (9RT 2223.) The ring belonged to Rothenburg. (9RT 2225.) There was blood splattered on the wall, doorknob, and bottles of liquor in the trash. An investigator pointed out a knife found on the side of the residence. The knife was a 13-inch kitchen knife with blood on it. A piece of a shirt sleeve was also retrieved on the sidewalk a few feet from the residence. (9RT 2223.) Fingerprints, blood samples, and photographs were taken at the crime scene. (9RT 2226.)

The investigation of Rothenburg's murder revealed that Rothenburg had gone to the residence to deliver some Colt 45 beer after a male identifying himself as Mr. Martinez placed an order for the beer with the store. (9RT 2232.) Detective Sanchez found appellant about two to three miles from the crime scene based on information provided in a telephone call. Appellant was with Bert Gonzalez. He appeared to be a little excited. His hand was banged up, and his shirt was missing a sleeve. (9RT 2233.)

Detective Sanchez arrested both men, separately read them their rights, and transported them to the station. Appellant did not appear to be drunk or under the influence of drugs. (9RT 2234-2235.) On the way to the station, appellant stated that his street name was Turkey. (9RT 2238.) At the station, appellant was placed in a squad room, and Gonzalez was placed in a holding room. (9RT 2235.)

Detective Sanchez could not keep appellant from talking. Appellant wanted to talk about what happened. (9RT 2235.) He kept asking if he was going to get a lot of time for the killing. Appellant was read his rights again before a typewritten statement was taken from him. (9RT 2236.) Clerk typist Victor R. Miguel typed exactly what appellant said, and recalled that appellant was calm and clear at the time. (8RT 2164-2167.) He did not appear to be under the influence or intoxicated. He also did not appear to have a problem understanding anything. (8RT 2171.)

Although other officers were present, Detective R.J. Duretto was responsible for taking the statement from appellant. (8RT 2171; 9RT 2237.) In the statement, appellant said he was in possession of the knife before Rothenburg arrived because he already planned to rob Rothenburg. Appellant stabbed Rothenburg multiple times when he entered the premises and then threw Rothenburg's body into the yard next door. His hands were cut during the killing because they slid down the blade while he was stabbing Rothenburg. (8RT 2168-2170.)

Dr. Carpenter agreed with Dr. Herrera's findings from the autopsy of Allen Rothenburg on February 8, 1969. (8RT 2088-2089, 2092.) Rothenburg suffered two main stab wounds and seven smaller ones. One of the main wounds was into Rothenburg's left chest area near his sternum. The wound went into his heart and lung and was lethal. (8RT 2089-2090.) The other main wound was to Rothenburg's left abdomen and damaged his large intestine. It too was lethal. (8RT 2090.) Rothenburg had defensive wounds on his left hand. (8RT 2092.)

B. The Defense Evidence

1. Appellant's Family History

a. Appellant's Half-Sister

Rosemary Miller was appellant's half-sister and about seven years older than he was. She and appellant had the same mother, Mildred Dominguez, but different fathers. (9RT 2287, 2289, 2335-2336.) Miller lived with appellant and her mother from kindergarten through high school. (9RT 2294.) From as early as when she was four or five years old, Miller recalled that appellant's father, Adrian Trujeque, used to beat up Dominguez. (9RT 2295.) Miller would hear Dominguez screaming and would play music to try to soothe herself. (9RT 2340-2341.) Dominguez would be bruised badly following the beatings. (9RT 2342.) Miller's uncle

would try to intervene, and Miller also told her aunt about the beatings. She thought that might be why she eventually stayed with her aunt for a period of time when she was a child. (9RT 2297.) She could not recall whether the beatings continued after appellant was born in 1953. (9RT 2299.) But she never saw appellant's father beat him or Dominguez after appellant was born. (9RT 2347-2348.)

Miller was aware that Dominguez became romantically involved with Sol Slotnick. She believed Dominguez met him at work. (9RT 2298.) Dominguez and Slotnick had a child named Rebecca, but Rebecca died when she was about one year old. (9RT 2299.)

Slotnick was like a father to Miller until his death around 1967. Miller even went on trips with him, and Slotnick treated appellant just as well. Dominguez, on the other hand, was very cold and kept her feelings to herself. She neither provided love nor affection. (9RT 2300, 2332, 2350.) She was a perfectionist who demanded that things be neat and tidy. (9RT 2302.) Miller felt rejected by Dominguez and, therefore, was closer to her biological father because he was understanding. Miller only recalled going to Dominguez for help with homework. (9RT 2309.) She remembered that Dominguez was on welfare at times. (9RT 2310.) She also remembered that Dominguez put up a "good front" as a good mother to people outside the family. (9RT 2332.)

Dominguez and Slotnick never married. Miller believed they did not due to Slotnick's having another family in New Jersey. (9RT 2310.) On Christmas Eve in 1965, Dominguez did not come home until midnight or 1 a.m. Miller believed Dominguez was with another man named Bob Aru. Miller hated Dominguez for not being there, and Slotnick walked out on Dominguez. (9RT 2310.)

Miller described appellant as an active and hyper child. Dominguez would tie a rope around appellant to the handle of a door to keep him from

getting away. (9RT 2302.) In general, however, he was a normal, smart, and "good" boy. (9RT 2303, 2309.)

When Miller was six or seven years old, she argued with appellant because he was nagging her while she was talking on the phone. He wanted her to get off the phone, and she threw a shoe at him. The shoe hit him in the head. The same night, appellant got sick, and Dominguez took him to the hospital. (9RT 2304.) Appellant was about two and a half years old at the time of the incident. (9RT 2347.)

Appellant left home when he was eight or nine years old, and never really lived there again. Dominguez only explained to Miller that appellant was gone because he was not behaving. (9RT 2312.) Miller did not remember Dominguez taking appellant to the doctor very often and never saw Dominguez giving him medication. (9RT 2314.) She and Miller used to go to correctional centers to see appellant, but she never visited him at a psychiatric hospital. (9RT 2314.) Eventually, she stopped seeing appellant all together. (9RT 2316-2317.) Dominguez would send money and packages to appellant while he was in custody. (9RT 2324.)

Miller moved out of Dominguez's home when she was 19 years old. (9RT 2305.) She never met any of appellant's friends, and none ever came to the home. Miller met some of appellant's relatives on his father's side. They lived in a bad neighborhood, and Miller recalled that they had tattoos. (9RT 2306.)

Miller married just after graduating high school. She had a baby the following year. (9RT 2311.) Appellant was about 14 years old at the time, and Miller would take her son to visit him. (9RT 2318.) Dominguez never asked Miller to take appellant in, and she did not really know what was going on with appellant. (9RT 2323-2324.) In the past few years, Miller had more contact with appellant, but never inquired how he got in trouble in the past. (9RT 2324, 2366.) She would sometimes pick him up and take

him places, including her grandson's birthday party. Appellant seemed to have a good time when they were together, and afterwards she usually dropped him off at a bus stop. (9RT 2326-2327.) Miller knew that others had tried to help appellant get jobs when he was not in custody, but he would fail to show up to various appointments. (9RT 2327.) Nevertheless, Miller thought the final time he was released, he wanted to change. He was even employed. (9RT 2328.) During Thanksgiving a few years before appellant was last taken into custody, Miller went over to Dominguez's home to see appellant, but he told her to leave because he did not want to see her. (9RT 2325.)

A few years before appellant was taken into custody, Dominguez became ill after suffering a stroke and was hospitalized. Miller would take appellant to see Dominguez. He would cry "like a baby" upon seeing Dominguez and was very afraid she was going to die. (9RT 2328, 2367.) When Miller could not take him to the hospital, he would take several buses to get there. (9RT 2329.) On one occasion, she went to pick him up, and all his belongings from Dominguez's home were gone. That was the last time Miller ever saw him. Miller did not believe appellant was capable of living outside of custody. (9RT 2330.)

Miller admitted that she had recently sought professional help to deal with issues from her own childhood. Specifically, she always fought with Dominguez when she was a child. (9RT 2307.) Dominguez even stopped speaking with Miller for a period of years. (9RT 2308.) Miller also believed that Dominguez made mistakes in how she raised appellant. (9RT 2333.)

Miller's son, Los Angeles County Deputy Sheriff Gregory Mark Martinez, spoke to appellant while appellant was in custody. (9RT 2336.) In fact, appellant called Deputy Martinez to speak with him about the murders appellant committed. (9RT 2337.)

b. Appellant's Uncles

Marcelo Ramirez was Dominguez's brother. (9RT 2373-2375.) He was born October 20, 1925, and his mother died when he was 13 years old. (9RT 2375.) Eventually, he was removed from his father's home and taken to live in boarding homes due to his father's drinking. (9RT 2376.) He lived in one owned by Josephine Castro with his sisters for about seven to eight months. After, they lived in one owned by Jesusita Salas. (9RT 2377.) Ramirez then moved back in with his father before enlisting in the Navy. (9RT 2378.)

Dominguez wanted to get married when she was about 16 years old. Salas did not want her to and reported her to the authorities. Dominguez and another one of Ramirez's sisters then were forced to live at a convent before being transferred to a school for girls. (9RT 2378.) Ramirez lost track of his sisters after they moved there. (9RT 2379.)

Ramirez fought in World War II and was honorably discharged. Following the war, he returned to live with his father. (9RT 2379.) He learned that Dominguez married, but also met Slotnick. Slotnick, however, was married to someone else and had another family in New Jersey. (9RT 2382.) Ramirez's daughter once said that Slotnick hit and pulled on appellant. (9RT 2395.)

Ramirez never met appellant's father Adrian, except for one time when he went to see Adrian after he heard Adrian was beating up Dominguez and Miller. Ramirez told Adrian not to touch Dominguez and Miller ever again. On other occasions when Adrian was released from prison, he would ask Ramirez for permission to see Dominguez and Miller. (9RT 2384.)

Ramirez saw appellant growing up and described him as hyper and active. Appellant was always running around and trying to hit other kids. He was especially rough with girls. (9RT 2386.) Ramirez was unaware

that there were times appellant did not live with Dominguez. (9RT 2386.) He wished Dominguez would have sent appellant to live with him so that he could have tried to help appellant. (9RT 2387.) Ramirez had always tried to give appellant guidance. (9RT 2405.) But Dominguez hid a lot from appellant. (9RT 2390.) Ramirez, nevertheless, believed that Dominguez was a warm mother who treated appellant properly. (9RT 2401.)

Ramirez heard that appellant was sent to the California Youth Authority around age 16. Ramirez did not know what appellant had done. (9RT 2388-2389.) He corresponded with appellant via mail while appellant was in custody and also sent appellant money, including for the purchase of glasses. In appellant's correspondence, he demonstrated concern for how his family was doing. (9RT 2396, 2405.)

After appellant was released from custody, Ramirez saw him at Dominguez's home. Ramirez gave him a pep talk and instructed him to behave. (9RT 2397.) Ramirez maintained contact with appellant over a period of four months and helped him get an identification card from the Department of Motor Vehicles. Ramirez would also see appellant at the hospital when visiting Dominguez after her stroke. (9RT 2398.) Shortly thereafter, however, appellant disappeared. (9RT 2399.)

Tony Garcia was another one of appellant's uncles and was married to Dominguez's sister Sophie. (10RT 2676-2677.) According to Tony, Dominguez took shelter from appellant's father at his home when she was pregnant with appellant. She was sometimes hysterical due to being beaten and had slight bruises to her mouth and bleeding from her nose. In general, she was afraid when she would come over to his home. (10RT 2678-2679.)

Tony used to see appellant when appellant was a child. Although he described appellant as very active, he did not think appellant's behavior

was different from that of other children. (10RT 2679-2680.) He understood appellant to be taking medications. (10RT 2681.)

c. Appellant's Cousin

Geraldine Luna was Ramirez's daughter and appellant's cousin. (9RT 2407.) She described him as hyper and incapable of staying put. (9RT 2408.) Appellant faded out of her life around the time she was eight or nine years old. (9RT 2408.) But Luna would hear that appellant was getting in trouble. (9RT 2409.)

Appellant wrote Luna letters from prison when she was 17 years old. And she saw appellant briefly when he was released in 1998. Ramirez took him for a job interview, and he was excited. (9RT 2410-2411.)

d. Appellant's Aunts

Genevieve Moraza was appellant's aunt. Her brother was Ramirez and her sisters were Dominguez and Sophie Garcia. Another sister Rose was deceased. (10RT 2666-2667.)

Moraza seldom saw Dominguez while she was growing up. Miller did not really have a father around. Moraza knew of Slotnick and heard he was married to someone else. (10RT 2668-2669.)

Moraza never met appellant's father. (10RT 2669.) But on one occasion, she took Rose to Dominguez's home to pick up Miller. Rose went inside the home and when she came out with Miller, she was upset. (10RT 2670.) Moraza asked Rose what was wrong. Rose replied, "as soon as we leave, he's going to beat on Mildred." Moraza asked, "how can you say something like that?" Rose answered, "I know." (10RT 2671.) They then drove around the block and when they came back, they could hear Dominguez screaming and crying. (10RT 2671.) Moraza believed Rose picked up Miller because Dominguez did not want Miller to witness the

beatings. Moraza, however, never spoke with Dominguez about the beatings. (10RT 2672.)

Moraza knew very little about appellant's problems during his upbringing. She had no knowledge of his taking medication. She was also unaware he was ever expelled from school or seen by psychiatrists. Moraza had no idea appellant was not living at home as early as when he was eight or nine years old. (10RT 2673.) And she had never heard about his being struck on the head with a shoe. (10RT 2674.)

Another one of appellant's aunts was Sophie, Tony's wife and Dominguez's sister. Sophie was very close to Dominguez, but did not really know appellant's father. (10RT 2683-2684.) She confirmed that she and Tony used to provide Dominguez with shelter from appellant's father while Dominguez was pregnant with appellant. She did not see injuries on Dominguez, but she knew appellant's father was hitting and kicking Dominguez, even while Dominguez was pregnant. Miller would also stay with Sophie and Tony because she was afraid of appellant's father. (10RT 2684.)

Sophie never took care of appellant for Dominguez. Like Tony, Sophie thought appellant was like other children. She knew he took medication. (10RT 2685.) She also knew he had problems in school, but she never asked why he was removed from Dominguez's home. (10RT 2688-2689.) Sophie had never heard that appellant suffered any brain damage. (10RT 2690.)

e. Appellant's Ex-Wife

Margaret Trujeque was formerly married to appellant. She was also friends with Charlene and acquainted with Helen and Charles. In fact, Charlene introduced Margaret to appellant. (10RT 2713-2715.) Charlene had asked Margaret to take her to visit appellant in prison, and Margaret took her three separate times. One day, Charlene told Margaret that

appellant had requested Margaret's phone number. After that, Margaret and appellant began corresponding and were married in March 1988. (10RT 2715-2716.) Appellant also corresponded with one of Margaret's daughters, which did not concern her. (10RT 2716-2717.)

Margaret planned to have a life with appellant after he was released in 1997, but they were divorced by that time, so he went to live with Dominguez. She would go with him to visit Dominguez in the hospital after Dominguez had a stroke. Appellant was very emotional during the visits. (10RT 2717, 2721.) He was also working and taking care of Dominguez. (10RT 2722.) But around November or December 1997, appellant was apprehended in connection with a robbery in San Diego. (10RT 2718.) He had never mentioned to Margaret that he was going to San Diego, but he called from there and asked her to pick up his jacket. (10RT 2719.) She did not do so. (10RT 2720.)

f. Appellant's Daughter

Diana Adriana Trujeque was appellant's daughter, but she had never seen him in person until testifying in court. Diana, nevertheless, maintained a relationship with him via correspondence. (11RT 2757-2759.) They would speak on the phone and try to write to each other almost every day. Diana felt that appellant had always given her great advice. (11RT 2759.) She considered him an intelligent and loving man who had been rejected his entire life. (11RT 2776.) But they did have periods of time when they did not communicate because Diana was mad at him. (11RT 2783-2785.)

Diana was born to appellant and her mother Debra Trujeque in 1976. Appellant and Debra did not have a relationship at the time and did not live together. Diana lived with Debra until she was nine years old and one time again for about a month later in her life. She also lived in foster homes. (11RT 2760.)

When Diana was nine years old, she moved in with her grandmother. (11RT 2760.) Debra was involved with several men, was on welfare, and was using drugs and alcohol. (10RT 2761.) Multiple boyfriends of Debra sexually abused Diana. Debra told appellant about the abuse, and that was how she ended up living with her grandmother. (11RT 2762-2763.)

Although Diana grew up hating Debra, she found appellant's advice useful. (11RT 2764.) She would tell appellant what was going on at school and would send him her report card. (11RT 2765.)

Around the time Diana was 13 years old, she became rebellious and ran away from her grandmother's home. She did so because her grandmother threatened to send her away due to her behavior. (11RT 2765.) Diana went to a friend's home, but her friend's mother told her grandmother. Diana's grandmother took her home and sent her away to Big Bear for a month. Diana then tried living with Debra again, but disliked the experience so much that she went back to her grandmother's home. (11RT 2765-2766.)

Diana next became attracted to a gang called Haze in El Monte after being introduced to it by her sisters. (11RT 2766.) She was jumped into the gang. (11RT 2767.) As a gang member, Diana did not engage in a lot of violent activities, but she did get in fights, even with males. (11RT 2767.)

At around 14 years of age, Diana began drinking alcohol and smoking marijuana. She got gang tattoos and started getting into trouble with the law. At age 16, she started using heroin. (11RT 2769.) She afforded her drug habit by stealing and robbing. (11RT 2770.) Diana was honest about these activities with appellant. He told her to respect people, be loyal, and forgive people. He also told her to be truthful and accept her punishment. (11RT 2768, 2771.) He arranged with her to live with Charles and Helen,

but she ran away. Charles and Helen, however, welcomed her back and helped her enroll in school. (11RT 2772.)

Diana was in jail for about three months in 1997. She managed to stay out of custody for about six months after she was released, but then she was sent to prison in 1998. She was released from prison in 1999, and had accepted Jesus Christ as her savior. Since that time she had maintained her sobriety, lived with her grandmother, and been employed. (11RT 2773-2774.)

Diana had her first child when she was 18 years old. The child was a boy, and lived with her aunt. She had another child, a girl, when she was 20 years old. Her daughter lived with her at her grandmother's home. (11RT 2771-2772.)

The last time Diana corresponded with appellant was in April or May 1999. She had received letters from him. (11RT 2774-2775.) Diana learned from her grandmother that appellant was facing the death penalty. (11RT 2775.)

Diana planned to continue corresponding with appellant in the future. (11RT 2776.) She had not visited him while he was in custody on the current charges and had never taken her children to see him because appellant's attorneys told her not to do so. (11RT 2786, 2788.)

2. Appellant's Probation and Parole Officers

Kurt J. Kocourek was a deputy probation officer for the County of Los Angeles in 1965, and was assigned to appellant. (9RT 2414, 2416.) During the time he oversaw appellant's probation, he prepared 11 total probation reports. He prepared the first in December 1965, and the last in October 1967. (9RT 2417, 2419.)

Kocourek explained that although it was uncommon for a child to be taken from his parents in 1962, he believed it happened to appellant. (9RT

2420.) Appellant was then returned to Dominguez in September 1965. (9RT 2439.)

Kocourek was tasked with finding suitable placement for appellant after appellant was expelled from previous placements. When Kocourek met appellant, he was living with his mother. Kocourek remembered him being friendly and hyperactive. (9RT 2420-2421, 2439.) As a matter of record, appellant had some brain damage noted as far back as when he was three and a half years old. (9RT 2428-2429.) And when Kocourek first became involved as appellant's probation officer, appellant's father Adrian was already incarcerated. (9RT 2429.)

Kocourek believed that Dominguez's living situation affected appellant's behavior from 1965 through 1967. Dominguez was involved with Slotnick, and appellant was unhappy about the relationship. He believed that Slotnick should not tell him what to do. Appellant referred to Slotnick as "that man," and said that Slotnick was not his father. Kocourek met Slotnick and thought he was a decent person trying to do well by appellant. (9RT 2446, 2457.) Appellant did not want Slotnick in the home. (10RT 2458.) Kocourek believed Slotnick and Dominguez did not want to marry due to divergent religious beliefs. (10RT 2457.) Kocourek also learned from Dominguez that Adrian took appellant to some woman who introduced him to sex. (9RT 2447.)

Despite the living situation, Kocourek described appellant as a likeable kid, and Dominguez as being cooperative with the exception of inconsistently medicating appellant. He, however, admitted that appellant had a lot of problems. Kocourek believed appellant probably suffered from attention deficit disorder. Appellant had difficulty focusing and was unambitious. He was impulsive, but not a delinquent. And he possessed at least average intelligence. (10RT 2453-2454.) Appellant liked Dominguez

and listened to her. She cared for him and had a good relationship with him. (10RT 2456.)

Kocourek recommended placing appellant in a psychiatric hospital's children's wing in Tarzana, and was able to arrange the placement when he was 12 years old on October 10, 1966. (9RT 2422, 2440.) The reason he recommended a psychiatric hospital was because he knew appellant to get in trouble at school as a result of appellant's hyperactivity. He also knew appellant had spent time in the psychiatric unit at juvenile hall and had been previously recommended psychiatric medications, despite Dominguez's habit of not giving him his medication if he was doing well. Kocourek believed placement in the hospital would also assist with appellant's brain disorder. As such, Kocourek discussed the matter with friends who were psychologists and concluded that Dominguez could not control appellant. Kocourek selected the hospital in Tarzana because it was a closed setting from which appellant could not flee. It also provided counseling. (9RT 2428, 2463.)

The hospital in Tarzana quickly lost control of appellant, but did not inform Kocourek. (10RT 2463.) One day, a representative finally contacted Kocourek and said that appellant was totally out of control. Appellant had snuck over to the girls' side of the ward, and the facility was concerned he was having sex with girls. He also was uncooperative with staff and was "raising hell." (9RT 2440; 10RT 2463-2464.) Appellant was removed from the hospital in Tarzana and placed in juvenile hall on November 22, 1966. Appellant remained in juvenile hall pending placement elsewhere. (9RT 2441; 10RT 2465.)

Kocourek did not want appellant to be placed with the California Youth Authority. He did not consider appellant to be a delinquent youngster. Appellant may have been hyperactive and lacked impulse control, but Dominguez was trying to make a home for him. And

Kocourek was sympathetic to the fact that Adrian, as a convict, was in and out of appellant's life. (9RT 2442-2443.)

Appellant remained with Dominguez until his next placement. He failed to adjust in school and reverted to his old pattern of not cooperating and not being able to attend school. He also ran away at times, which Kocourek attributed to Slotnick's being in the home and to appellant's poor impulse control. (10RT 2466-2467.) Eventually, Dominguez concluded that appellant needed to be placed in another facility. (10RT 2467-2468.)

Kocourek had appellant placed in an intensive therapy-oriented program in juvenile hall. But after appellant's tardy return from leave to his home, the program would not take him back. (9RT 2445.)

Kocourek was next able to place appellant in a facility in Lake Elsinore at the end of June 1967. It was difficult to arrange for the placement because it was well known among facilities that appellant had poor impulse control. (9RT 2444; 10RT 2465.) The facility was the only one that would consider appellant based on his history of unsuccessful placements. (10RT 2468.) He remained there for about four months until October 1967. (10RT 2469.) He was removed following an assault with a deadly weapon in which he was throwing rocks at kids on motorcycles. (9RT 2443-2444; 10RT 2469, 2474.)

After appellant's removal from the facility in Lake Elsinore, he was placed in the Probation Department's Junior Camp. (10RT 2469.) That would be his final placement before a commitment to the California Youth Authority. (10RT 2470.) He remained there until February 1968. (10RT 2471.)

Kocourek was not responsible for appellant's placement in the Sycamores. The Sycamores was not a lock down facility. It was a facility for younger children who did not have as many behavioral problems as the older ones. (10RT 2456.)

Kocourek reviewed a probation report from May 11, 1967. The report indicated that several encephalographs had been performed on appellant. The earlier ones showed evidence of a brain lesion or some type of organic damage. The later ones did not show as severe of damage. (10RT 2458, 2460.) Kocourek insisted that another neurologist should examine appellant for purposes of future placement. (10RT 2460.) Further testing showed minimum brain dysfunction. (10RT 2461.) From the dysfunction, Kocourek believed appellant had an emotionally impulsive type of reaction. (10RT 2462.) It was appellant's impulse control that was his biggest problem in Kocourek's mind. (10RT 2462.)

John Kersey was a supervising parole agent for the California Youth Authority around 1971. (10RT 2696.) He met appellant in 1971 when appellant was released on parole because he supervised appellant's parole agent. Kersey believed appellant was originally committed for something other than murder, but recommitted for murder. (10RT 2697.)

Kersey thought appellant was fairly intelligent and had a lot of potential. He also thought appellant liked to test limits. (10RT 2698, 2706.) Appellant had been confined since he was nine years old and seemed more comfortable in an institution than the community. (10RT 2698, 2712.) Kersey explained that the longer one was housed in an institution, the less likely one was to succeed in the community. (10RT 2699.)

Kersey developed a friendship with appellant. (10RT 2699.) He corresponded with appellant in writing, beginning in late 1972. (10RT 2702, 2704.) He also picked appellant up when appellant was released from prison. Appellant and his ex-wife Margaret even spent a couple of days at Kersey's home. (10RT 2704.) Kersey took appellant to see his parole agent, to the DMV, and to the Social Security office. (10RT 2705.)

Kersey helped appellant find places to live. He tried to counsel appellant and helped appellant financially. (10RT 2702-2708.)

Kersey met Dominguez several times. He thought Dominguez kept a nice home, but worried about appellant. (10RT 2706.) Kersey had no knowledge about appellant's stabbing anyone in prison or committing two other murders. (10RT 2709.)

3. Kocourek's and Ikemoto's Probation Reports

In a February 14, 1964 report, Ikemoto noted that appellant had completed the first semester of school in January 1963, with less than average grades, but no failures. Ikemoto clarified that appellant received B's and several C's on his report card, but was restless and hyperactive. It was difficult for appellant to manage in the classroom setting, but he was trying. (11RT 2833-2834.)

The report continued that appellant was still seeing a psychiatrist, Dr. Kagan, and adjusting marginally in an institutional setting after being suspended from school several times the same year. He was cited for throwing rocks at school windows and running around the classroom and disturbing kids, which led to the suspensions. But he was always welcomed back to school after his suspensions even though he was demanding the attention of staff. (11RT 2834-2835.) In addition to Dr. Kagan, the school psychologist was spending a lot of time with appellant. Appellant was prescribed tranquilizers, but the medications proved ineffective. His rebellious behavior led to a three-week suspension. His social adjustment was so poor that he required increased attention and exhibited persistent larcenous tendencies, overt hatred towards his father, and a poorly integrated personality. (11RT 2835.)

Ikemoto's report added that appellant had a faulty identification with his father. His mother was employed and unable to supervise him unless he attended a local school. As such, she wished for his institutional placement

to continue and had been cooperative. Appellant's father would be returning to the Los Angeles area around March 1, 1964, and he had adjusted well in prison. Ikemoto noted, however, a suspicion about the adjustment because appellant's father was very immature and a child-like narcotic addict. (11RT 2836.)

A July 16, 1964 report by Ikemoto documented a visit between appellant and his father. The visit was arranged by the probation department. Appellant embraced his father and seemed somewhat relaxed following the visit. He, however, continued to behave poorly at school. His behavior was so erratic that he required close supervision. The report documented that appellant's father was readmitted to prison due to a narcotics-related offense. (11RT 2836-2837.)

A January 8, 1965 report by Ikemoto further documented appellant's school troubles. Ikemoto had visited appellant three times due to suspensions and disturbances. On November 10, 1964, Ikemoto went to the school for a staff meeting. The staff informed him that appellant had been suspended for using profanity, refusing to cooperate, and failing to participate in physical activities. The staff was reluctant to keep trying with appellant. Appellant, however, said he had enjoyed school in the past month despite reports that he was abusing younger and smaller children, taking property from other children, and demanding personal favors. Ikemoto characterized appellant as very disturbed and requiring continued institutional placement. (11RT 2838-2839.)

In a January 18, 1965 report, Ikemoto documented that appellant was continually involved in disturbing activities such as fighting, which led to his being suspended from school at least five times. Appellant was placed in a small remedial reading class in which he initially performed well, but was immediately disruptive when returned to a regular class. (11RT 2840-2841.) Also in the report, Ikemoto wrote that the school determined it

could not longer manage appellant. Appellant's mother stated she would pay for a private tutor if he could be kept in an institutional setting. A social worker did, in fact, arrange for a tutor. (11RT 2841.) The same report stated that appellant had been placed in institutions since June 1962, and was like an "animal" at first. (11RT 2841.) He could not care for his own hygiene or get along with others. He, however, had come a long way and was undergoing psychotherapy. Yet, he required more supervision. Appellant's mother and significant other hoped for appellant to return home. (11RT 2841-2842.)

Ikemoto's September 24, 1965 report showed that appellant was exhibiting increased behavioral problems. Appellant's father received permission to visit him, but his father never visited. Appellant's mother believed associating with his father would not be helpful for him. She did not want his father visiting him unless under close supervision. Although the prognosis on appellant's release to his mother was "guarded," continued placement was not helpful, and appellant had much support from his mother and her significant other. (11RT 2842-2844.)

By the time of Kocourek's December 24, 1965 report, appellant was living with his mother. The report noted appellant's already lengthy criminal history. (11RT 2844-2845.) Appellant had been adjusting satisfactorily to living with his mother, who said he was more mature and helpful. She added that he was listening and behaving well. Appellant's mother was happy to have him home and wanted him to stay. (11RT 2845-2846.) She was providing him with a good home, and he was behaving obediently. (11RT 2847-2848.) Appellant was under the periodic supervision of his mother's doctor. He was taking the medication Delantin, and appeared predisposed to hyperactivity. His hyperactivity was not causing any disciplinary problems at school, and he was receiving average grades. (11RT 2846.) The report documented that appellant's father had

been released on parole. Appellant's mother was restricting visits with his father and wanted the visits only under strict supervision. (11RT 2847.)

Kocourek's November 22, 1966 report showed that appellant had been taken back into custody the same month because the institution where he was housed requested his removal due to his serious and persistent misbehavior. (11RT 2848.) Before the request, he had been housed at an institution after he left home absent authorization and was suspended from four different schools. As such, he had been placed in a psychiatric institution for children. But the institution alleged appellant had sexual intercourse with female patients and could not be kept out of the female ward. (11RT 2848-2849.) In relation to appellant's sexual behavior, his mother stated that his father took him to be seduced by a woman shortly before his placement in the institution was ordered. As a result, she asked that his father not be permitted to visit him. (11RT 2850.) Reports indicated appellant's father had severely abused his mother, and his father realized he should stay out of appellant's life. (11RT 2851-2852.)

Appellant's mother was opposed to his placement in the California Youth Authority. She was unopposed to his placement in a boy's home, but his behavior and apparent brain damage made such placement unavailable. (11RT 2850.) As a result, appellant's mother was willing to take appellant back into her home and agreed that he should participate in a psychotherapy program. Kocourek suggested appellant's mother attend psychotherapy with appellant. She stated that she would contact a local high school about enrolling him in spite of his poor school performance. (11RT 2851-2852, 2856.) Kocourek's report, however, noted that she could not set appropriate limits for appellant. (11RT 2854.) The report further noted that appellant disliked Slotnick and threatened to run away based on Slotnick's presence in the home. (11RT 2855.) A subsequent report on February 14, 1967, stated that appellant's situation was

complicated by his relationship with both his father and Slotnick. (11RT 2856.)

A November 16, 1966 reevaluation report recommended that appellant be returned home with probationary and medical supervision. (11RT 2852.) No electroencephalogram test or other neurological study was performed. Kocourek, however, stated that he would arrange both if appellant were released to his mother's home. (11RT 2852-2853.) Kocourek indicated that appellant still required placement. (11RT 2855.) Kocourek's report also indicated that appellant was still taking medications to alleviate his hyperactivity and prevent seizures. The report described appellant as being able to communicate meaningfully, but also as being insecure and frightened with poor impulse control due to his "brain syndrome," which was never definitively established. (11RT 2853.)

Kocourek's May 11, 1967 report described appellant as a friendly person of normal intellect who could communicate effectively. Yet, it further described him as very confused and frustrated. Kocourek thought appellant needed external controls, which his mother could not provide. Moreover, appellant's father appeared to be both an abusive father and husband. (11RT 2857.) Kocourek reiterated appellant's lack of impulse control. He explained it may have been due to "brain syndrome," but clarified that exams had shown minimal dysfunction at best. As a result, Kocourek's report concluded that appellant's lack of impulse control was probably emotionally based rather than due to brain damage. (11RT 2857-2858.)

Two reports from Kocourek in June 1967, showed that appellant's father was incarcerated before his whereabouts went unknown. (11RT 2858-2859.)

Kocourek's report several months later on September 13, 1967, showed that shortly after appellant's father's whereabouts went unknown,

appellant was placed in another institution where he was adjusting favorably. The placement was required because his mother could not establish adequate authority or supervise appellant properly. Additionally, no other family member would take on the responsibility of caring for appellant. (11RT 2859-2860.)

4. Dr. Marshall Cherkas' Expert Testimony Regarding Appellant's Psychiatric History And Condition

Dr. Marshall Cherkas was a psychiatrist who initially evaluated appellant when he was nine years old and whom the court appointed in this matter to conduct a competency evaluation. At the time of the evaluation, Dr. Cherkas did not remember having evaluated appellant when he was nine years old and did not recall the materials he reviewed during that evaluation. Dr. Cherkas reviewed appellant's probation reports starting as far back as 1962, other psychiatric reports, school reports, and the reports of other doctors. (10RT 2475, 2480, 2481, 2491.)

One of the probation reports Dr. Cherkas reviewed was from November 22, 1966. The court read the report to the jury. The report indicated that at 13 years old, appellant was referred to a psychiatric clinic for evaluation and placement while he was in the custody of juvenile hall. He had suffered a long history of impulsive behavior and trouble in school. Appellant had been bullying younger children and hiding in the girl's dorm in the Tarzana hospital. He also had not been studying at school and had wanted to outsmart staff in the Tarzana hospital. (10RT 2494-2495.)

The report stated that since coming to juvenile hall, appellant had indicated he wanted to go home to Dominguez. He tried to show that he could control himself and do well in school. For the moment, he was at least exhibiting a short-lived and definitive attitude change. (10RT 2495.)

The report diagnosed appellant with mild emotional instability, manifested by incorrigibility and attention seeking devices in a child

struggling with anxiety about parental rejection. (10RT 2496.) Appellant had a history of provocative behavior and some borderline organic results on electroencephalogram examinations. He also had been treated for psychomotor epilepsy. (10RT 2495.) Electroencephalogram and neurological evaluations had been done. They gave some indication of abnormal results with signs of a minor cerebral injury. Due to the minor injury, it was recommended that appellant be treated with Dilantin[13] and see a neurologist. (10RT 2497.)

The report concluded that appellant should have another opportunity to go home so long as Dominguez was willing to take him back. Otherwise, he would need to be placed in a setting with firm boundaries. If he was returned home, he required some supervision regarding his medications, but a relationship with a probation officer would be sufficient. (10RT 2496.)

Dr. Cherkas testified that the report evidenced some mild brain disturbance. (10RT 2498.) An organic brain disorder could have grown worse or improved over time, and Dr. Cherkas had no idea whether appellant suffered from a brain disorder anymore. (10RT 2523.) There was some suggestion that appellant's being hit in the head with a shoe as a child may have caused the brain damage. Resulting seizures indicated a mild probability that some small brain damage existed. But Dr. Cherkas believed a connection between the shoe incident and the seizures may have been coincidental. He also could not see how Adrian's history of drug abuse could have caused appellant's brain damage. (10RT 2500.)

Dr. Cherkas reviewed a report by Dr. Kagan. Dr. Kagan had prescribed appellant Mellaril and Compazine. Both of the drugs were neuroleptics or antipsychotics that were intended to reduce psychotic and

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[13] Dilantin was used to treat seizures and convulsions. (10RT 2501.)

primitive behavior, as well as impulsiveness driven by anxiety. (10RT 2501-2502.)

Dr. Cherkas opined that if he diagnosed appellant by present standards, he would conclude that appellant suffered from attention deficit disorder. He possibly would have also concluded that appellant suffered from generalized anxiety disorder and exhibited some characteristics of antisocial personality disorder. Dr. Cherkas further opined that if appellant continued to exhibit the same impulsiveness he did as a child at a later age, Dr. Cherkas would have diagnosed him with intermittent explosive disorder.[14] (10RT 2506.) Dr. Cherkas admitted that a person could grow out of intermittent explosive disorder. (10RT 2518.) But he believed that appellant presently suffered from intermittent explosive disorder and antisocial personality disorder. (10RT 2521.) Based on the diagnoses, Dr. Cherkas concluded that appellant was likely to harm someone in a moment of anger, frustration, and rage. (10RT 2522.) Dr. Cherkas would have provided medications like Ritalin, Gabapentin, and Depakote to treat appellant as the time of trial. (10RT 2507.)

Dr. Cherkas testified that people who are not prescribed medication appropriately or who do not take their medications appropriately often turn to drugs and alcohol to deal with their problems. If appellant had done so, he could have experienced even lower inhibitions and increased aggressiveness. (10RT 2509.) He also would have been incapable of managing his life. (10RT 2509.)

Dr. Cherkas believed that appellant had a great disadvantage in life in terms of receiving a nurturing experience. Rather than being nurtured by Adrian, Adrian was a drug addict who was in prison. As such, appellant

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[14] Intermittent explosive disorder referred to acting primitively on impulse. (10RT 2514.)

received modeling for being a criminal. Additionally, Dominguez was unable to handle him. The result was appellant's deficiency in empathy that would have gotten worse as he aged and experienced further maternal deprivation. (10RT 2511-2512.) Joining a gang and killing would evidence this lack of empathy. (10RT 2530.) In general, Dr. Cherkas saw appellant's feelings of abandonment and lack of parental control and an authority figure as factors contributing to his criminal and violent history. (10RT 2526.) Dr. Cherkas admitted that a stepfather's presence in the home could have helped ameliorate appellant's poor nurturing experience. (10RT 2527.) Yet appellant was largely indifferent and had little intimacy with his family. He was almost selfish in his familial dealings. (10RT 2532.) Dr. Cherkas also believed that appellant was hurt by his own substance abuse, lack of appropriate medication, lack of psychiatric treatment, and lack of appropriate placement. (10RT 2527.)

Dr. Cherkas last saw appellant on August 7, 1999. He was not tasked with prescribing appellant medication at the time and did not do so. Appellant, however, was on an antidepressant and sedative at the time. He was not being treated with any medications to control his impulses. (10RT 2517-2518.)

5. Dr. James Diego Vigil's Expert Testimony Regarding Environmental Influences On Appellant

Dr. James Diego Vigil was a professor and researcher in Anthropology and Urban Studies. His studies had a particular emphasis in adolescent, street youth. (10RT 2599-2600.) According to Dr. Vigil, the term "barrio," was Spanish for neighborhood or ghetto. In a barrio, youth tended to be isolated and band together. (10RT 2616-2617.) When youth had nothing going on at home or school for them, often gangs would form. (10RT 2619.) Factors affecting gang formation included the neighborhood, poverty, family and school situation, lack of self control, cultural conflict,

social control, and what Dr. Vigil called adolescent crisis. (10RT 2620-2621.)

Dr. Vigil explained that gang members usually had fragile and segmented or fragmented egos, which were incomplete. (10RT 2624.) In other words, they experienced an incomplete feeling of who they were. As a result, they would derive their identities from the group ego of the barrio. (10RT 2625.) The gang would provide them with both affection and protection, which they needed from the cruel and cold environment of the streets. (10RT 2626-2627.) Individuals with physical challenges or brain damage were more susceptible to joining gangs. (10RT 2650.) Often times, gang members either lacked a male influence at home or had a destructive and negative one. This absence coupled with an overall lack of guidance contributed to becoming a member of a gang. Youth would become street socialized, and the gang would become their parents. (10RT 2632.)

Dr. Vigil explained a concept he referred to as "soul murder," which was a traumatic experience one experienced at a young age. It was a life changing event one could never overcome. The event would destroy the ego and cause one to feel worthless. And it often made one act out destructively due to rage. (10RT 2633-2634.)

Gangs provided youth with a sense of loyalty to other members. Members would feel a need to pay back the gang for the friendship and loyalty derived from membership. The gang would become a substitute for loyalty, and the members would become dependent on the gang for their identities. (10RT 2635-2636.) They would feel pressure to conform, even by performing acts of violence including killings. (10RT 2642.)

Besides generally explaining gang membership, Dr. Vigil interviewed appellant and reviewed reports regarding him. (10RT 2628, 2640.) Dr. Vigil testified that the gang moniker Killer could refer to many ideas, such

as being a "lady killer" or killing people. (10RT 2638.) He also discussed appellant's childhood and family situation. According to him, appellant had a disorganized and dysfunctional family situation. (10RT 2640.) Appellant was not really monitored by a guardian and had trouble in school too. His family had a history of gang membership, including his father. (10RT 2641.) And appellant's cousin got him involved with White Fence. (10RT 2642.) Appellant sought affection, protection, validation, and assurances at a young age, and the need for all this increased as he aged. (10RT 2644.)

Dr. Vigil opined that placement in the California Youth Authority would have affected appellant. It would make him want to seek institutionalization to gain status and respect in the gang. As such, it would cause him to commit more crimes to achieve that goal. (10RT 2643-2644.) But he also admitted that killings could just be acts of cold blooded murder rather than gang-related acts. (10RT 2650.)

ARGUMENT

I. APPELLANT HAS FORFEITED HIS DOUBLE JEOPARDY CLAIM AND, REGARDLESS, IT IS WITHOUT MERIT BECAUSE HE MAY NOT COLLATERALLY CHALLENGE HIS PRIOR CONVICTION ON THIS BASIS AND THE PRECEDENT HE RELIES ON IS INAPPLICABLE TO HIS CONVICTION (FILED UNDER SEAL)

Appellant's first argument on appeal is that his death sentence is unreliable and in violation of the Eighth and Fourteenth Amendments because the finding on the prior-murder special circumstance was based on an invalid 1971 conviction for second degree murder, which was obtained in violation of double jeopardy. (AOB 38-56.) First, appellant forfeited his claim by failing to plead double jeopardy within the trial court. Second, even if this Court reaches the merits of appellant's claim, he may not

collaterally challenge his prior conviction based on an alleged violation of the double jeopardy protections. And the precedent he relies on may not be retroactively applied to his 1971 conviction, which was already final at the time the precedent was established.

A. The Relevant Trial Court Proceedings

On February 11, 1969, a petition was filed in juvenile court alleging that appellant, having turned 16 years of age on January 10, 1969, came within the provision of Welfare and Institutions Code section 602. The petition further alleged that appellant willfully, unlawfully, and with malice aforethought murdered Rothenburg, in violation of section 187, and willfully and unlawfully by means of force and fear take from the person, possession and immediate presence of Rothenburg personal property, in violation of section 211. The petition arose from the Rothenburg murder and robbery, which occurred on February 7, 1969, and is detailed above. (Supp. IV 1CT 243.)

On February 13, 1969, appellant appeared in juvenile court before Judge Leopoldo G. Sanchez. The juvenile court appointed the public defender to represent appellant, and appellant denied all of the allegations in the petition. The court further appointed a psychiatrist, at counsel's request, to assist with a determination of whether a plea of not guilty by reason of insanity should be entered or whether appellant had diminished capacity. The court invited the Los Angeles County District Attorney to assist in the prosecution, and ordered appellant detained in juvenile hall pending a March 6, 1969 adjudication of the petition. (Supp. IV 1CT 251.) On February 28, 1969, the public defender was replaced by privately-retained counsel, David Marcus. (Supp. IV 1CT 256.)

The adjudicatory hearing commenced on March 6, 1969, before Referee Jules Barnett. Over the objection of appellant's co-defendant's counsel, the matter was treated as civil rather than criminal and, thus, the

standard of beyond the reasonable doubt under section 1096 was inapplicable. (Supp. IV. 2CT 296-298.) The hearing ensued, and the prosecution called eight witnesses and introduced twenty-eight exhibits. (Supp. IV. 2CT 307-470.) Counsel for appellant informed Referee Barnett that appellant had conferred with his mother and was willing to admit to a violation of section 192.2. Referee Barnett inquired of counsel whether he was requesting to amend the petition to add Paragraph III, a violation of section 192.2. Counsel stated that was his desire and confirmed appellant would admit to the violation. (Supp. IV.A. CT 6.) The prosecution objected to the dismissal of Paragraphs I and II in exchange for appellant's admission to Paragraph III. (Supp. IV.A. CT 6-7.) Referee Barnett requested an offer of proof as to the evidence the prosecution had in support of Paragraphs I and II, and the prosecution made its offer. (Supp. IV.A. CT 7-8.) Despite the offer of proof, Referee Barnett believed that accepting the proposed admission from appellant and deleting the allegation of malice aforethought would be in the interest of justice. (Supp. IV.A. CT 8-9.) Referee Barnett then asked appellant if he participated in the stabbing and if he knew Rothenburg died following it. Appellant answered affirmatively to both questions, and Referee Barnett granted appellant's motion, accepted the admission, and sustained the petition as to a violation of section 192.2. (Supp. IV. A. CT 9.) Referee Barnett reviewed a probation officer's behavioral report for appellant and concluded that "justice is best served by retaining jurisdiction" and committing him to the California Youth Authority. (Supp. IV.A. CT 10-11.)

Referee Barnett issued his Findings and Order of Referee on March 7, 1969. In his Findings and Order, Referee Barnett indicated that the petition was amended to add Paragraph III, which alleged that appellant "'in the commission of an unlawful act killed [Rothenburg], thereby violating

Section 292.2 (sic) . . . .'" (Supp. IV 1CT 264.) Referee Barnett additionally sustained Paragraph III, and dismissed Paragraphs I and II in the interests of justice. (Supp. IV 1CT. 264.) Also on March 7, 1969, Referee Barnett issued a memorandum stating that appellant "admitted the amended paragraph," and recommending appellant be recommitted to the California Youth Authority. (Supp. IV 1CT 265.)

In a minute order dated March 18, 1969, and entered March 28, 1969, Judge A.J. McCourtney, acting on his own motion, ordered a rehearing as to the March 7, 1969 adjudication. Judge McCourtney stayed appellant's recommitment pending the rehearing, which he set for March 27, 1969. (Supp. IV 1CT 268.) He subsequently continued the rehearing date to April 7, 1969, before Judge Robert A. Wenke. (Supp. IV 1CT 273.)

On April 7, 1969, Judge Wenke held the rehearing ordered by Judge McCourtney. Appellant moved to dismiss the petition, and Judge Wenke denied the motion. The parties then stipulated to submit the matter in part upon the transcript of the March 6 and March 7, 1969 hearings, as well as all exhibits received into evidence and objections and rulings. The parties also presented additional evidence, including appellant's testimony in his own behalf. (Supp. IV 1CT 277.)

On May 14, 1969, appellant requested a stay of the proceedings until resolution of the petition for writ of prohibition his counsel had filed in the California Supreme Court on his behalf. Judge Wenke denied the application and found the allegations in Paragraphs I and II of the petition to be true. Judge Wenke also found that appellant was "not a fit and proper subject to be dealt with under the Juvenile Court Law, in that: [he] was 16 years of age or older at the time of the commission of the offense . . . [and] would not be amenable to the care, treatment, and training program available through the facilities of the Juvenile Court." (Supp. IV. 2CT 478.) Judge Wenke ordered the prosecution "to prosecute [appellant] under

the applicable criminal statute or ordinance" and continued the matter "to ascertain whether prosecution of [appellant] has been commenced in another court and for consideration of dismissal." (Supp. IV. 2CT 478.) Appellant then filed an application for a stay of proceedings. (Supp. IV. 2CT 476-477.)

On May 15, 1969, Judge Wenke imposed a stay of entry of his order from the previous day pending resolution of appellant's writ of prohibition by the California Supreme Court. (Supp. IV. 2CT 479-481.)

The petition for writ of prohibition was denied, and the stay expired on May 26, 1969. Judge Wenke ordered "full effect and implementation of his findings and orders of May 14, 1969." (Supp. IV 2CT 484.) On June 4, 1969, appellant appealed Judge Wenke's order. (Supp. IV 2CT 488.)

On July 3, 1969, Judge Wenke ordered, "the Probation Officer to file a report and Reccomendation (sic) showing that proceedings have been commenced in the Adult Court and for consideration of dismissing this case." (Supp. IV 2CT 504.) Upon receiving the Probation Officer's report, Referee John H. Major dismissed the petition because appellant was found "to be an unfit subject for consideration under the provisions of the Juvenile Court Law." (Supp. IV 2CT 507.)

On July 22, 1970, the Court of Appeal dismissed appellant's appeal. (Supp. IV 2CT 520.)

On December 20, 1970, Judge Newell Barrett issued a minute order indicating that the juvenile court had dismissed appellant's case under Welfare and Institutions Code section 1179. (Supp. IV 2CT 522.)

On February 1, 1971, appellant pled guilty to second degree murder in the superior court. (2CT 494.)

The prosecution alleged the 1971 murder conviction to fall within the meaning of section 190.2, subdivision (a)(2), as a prior-murder special circumstance in the information in the instant matter. (2CT 109-110.)

On August 2, 1999, appellant filed a motion to strike the 1971 murder conviction and related special circumstance allegation. In the motion, appellant argued that the guilty plea was constitutionally invalid because he was not advised of nor did he waive his constitutional rights to confrontation and cross-examination and against self-incrimination. (2CT 481-495.)

On August 9, 1999, the prosecution filed its opposition to the motion to strike the prior conviction. In the opposition, the prosecution indicated that the judge and defense attorney who participated in appellant's 1971 guilty plea had passed away, but the deputy district attorney, John Breault, was alive and available to testify. The prosecution represented that Breault would testify that he would have advised appellant of his constitutional rights and obtained a waiver of same. For this reason and others advanced in the opposition, the motion to strike the prior conviction on the basis that the plea was unconstitutionally invalid was without merit. (3CT 609-618.)

To assist with the resolution of appellant's motion, the prosecution called Breault to testify outside the presence of the jury on August 10, 1999. (4CT 944; 4RT 769.) Breault had handled the motions after the case was certified to the superior court from the juvenile court. He also took appellant's plea and negotiated appellant's sentence when appellant was sent to the California Youth Authority. (4RT 770.) Breault explained that it was rare in 1971 for a juvenile to be certified to adult court from the juvenile court. (4RT 779.) He was aware that appellant had already been sentenced in juvenile court before the initiation of proceedings in adult court. (4RT 783-784.) He was further aware that the sentencing proceeding had been called into question. (4RT 784.) Breault added that appellant's guilty plea was taken on the same day his motion to dismiss was denied. Breault recalled that appellant's counsel asserted a double jeopardy

argument in the motion, and Breault argued in response that jeopardy did not attach to juvenile proceedings. (4RT 784-785.)

Following argument by the parties and Breault's testimony, the court found that appellant was advised of his constitutional rights and gave a knowing, intelligent, and voluntary waiver of those rights at the time of the plea in 1971. (4RT 801.) On this basis, the court denied appellant's motion to strike the 1971 murder conviction and related special circumstance allegation. (4CT 944-945; 4RT 801.)

B. Appellant Forfeited This Claim By Failing To Plead Double Jeopardy In The Trial Court

Appellant indisputably failed to challenge the 1971 conviction and related special circumstance allegation on double jeopardy grounds in the trial court. Indeed, appellant apparently waited until the filing of the AOB to challenge collaterally the 1971 conviction for the first time on double jeopardy grounds. As detailed above, appellant's motion to strike the conviction and related special circumstance allegation was grounded in his argument that his 1971 guilty plea was constitutionally invalid because he was not advised of nor did he waive his constitutional rights to confrontation and cross-examination and against self-incrimination. (2CT 481-495.) Resultantly, the prosecution's opposition rebutted that argument, and Breault's testimony focused on the voluntary, knowing, and intelligent nature of the plea. (3CT 609-618.) And it followed that the trial court's denial of the motion to strike arose from its finding that the 1971 plea was voluntary, knowing, and intelligent. (4CT 944-945; 4RT 801.) Because appellant failed to raise the issue below, the record is not complete. In light of the foregoing, appellant aptly concedes that "trial counsel did not challenge the prior murder conviction on double jeopardy grounds." (AOB 53.) Given the procedural history and appellant's concession, it necessarily follows that appellant forfeited this claim on appeal by failing to raise a

double jeopardy challenge to the 1971 conviction in the trial court. (*People v. Batts* (2003) 30 Cal.4th 660, 676; *People v. Scott* (1997) 15 Cal.4th 1188, 1201; *In re Henry C.* (1984) 161 Cal.App.3d 646, 648-649.)

C. Appellant May Not Collaterally Challenge His Prior Conviction On The Basis Of An Alleged Violation Of The Double Jeopardy Protections

Assuming this Court finds that appellant did not forfeit his claim, he is still not entitled to appellate relief because he is not permitted to challenge collaterally his prior conviction on the basis of an alleged violation of the double jeopardy protections. In *People v. Horton* (1995) 11 Cal.4th 1068, a capital case, this Court concluded that "[*Custis v. United States* (1994) 511 U.S. 485 [114 S.Ct. 1732, 128 L.Ed.2d 517,] neither compels nor justifies a modification of existing California law governing a collateral attack, in a capital proceeding, upon a prior conviction that the prosecution has alleged as a special circumstance rendering the defendant eligible for the death penalty." (*Id.* at p. 1134, italics omitted.) In capital cases, this Court concluded, a collateral challenge to an alleged prior conviction "may not properly be confined to a claim of *Gideon*[15] error [denial of counsel], but may be based upon at least *some* other types of *fundamental constitutional flaws*." (*Id.* at p. 1135, italics added.) This Court, however, has never concluded that a violation of the double jeopardy protections qualifies as a type of fundamental constitutional flaw that may support a collateral challenge on appeal.

To the contrary, this Court in *In re Reno* (2012) 55 Cal.4th 428, recently held in the context of a capital habeas proceeding that the defendant failed to show his double jeopardy issue involved a fundamental constitutional error. This Court, therefore, has in a different capital context

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[15] *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799].

concluded that a double jeopardy violation does not qualify as a fundamental constitutional flaw. In light of the limited nature of collateral attacks to prior convictions, there is no rational basis to qualify a double jeopardy claim as a "fundamental constitutional flaw" in this case but no in *In re Reno*, which involved procedural limitations on habeas corpus claims. Therefore, this Court should apply its conclusion in *In re Reno* to prohibit appellant's collateral challenge of his prior conviction on a ground *Horton* has not recognized.

D. Case Law Holding That Jeopardy Attaches To Juvenile Proceedings May Not Be Applied Retroactively To The Rothenburg Murder

In *Breed v. Jones* (1975) 421 U.S. 519, 527, 541 [95 S.Ct. 1779, 44 L.Ed.2d 346], the high court held that the Fifth Amendment prohibition against double jeopardy precludes criminal prosecution of a juvenile subsequent to commencement of juvenile court adjudication involving the same offense. Appellant's contention that *In re Bryan* (1976) 16 Cal.3d 782, 787, rendered *Breed* retroactively applicable to the Rothenburg murder (AOB 48) fails to consider the appropriate analysis regarding the retroactive application of precedent pronouncing a new rule to a final judgment.

"[A] new [constitutionally related] rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649]; see also *People v. Reyes* (1998) 19 Cal.4th 743, 755 ["all new constitutional rules of criminal procedure are fully retroactive to cases not yet final, even when they represent a 'clear break' with the past"].) For purposes of determining retroactivity, a judgment becomes final "at that point at which the courts can no longer provide a remedy on direct review." (*In re Pine* (1977) 66

Cal.App.3d 593, 595.) It has long been the rule in federal and California courts that a case is not final for purposes of determining the retroactivity and application of a new decision addressing a federal constitutional right until direct appeal is no longer available in the state courts, and the time for seeking a writ of certiorari has lapsed or a timely filed petition for that writ has been denied. (*Caspari v. Bohlen* (1994) 510 U.S. 383, 390 [114 S.Ct. 948, 127 L.Ed.2d 236]; *In re Gomez* (2009) 45 Cal.4th 650, 654-655; *In re Spencer* (1965) 63 Cal.2d 400, 405.)

In 1971, when appellant's conviction for the Rothenburg murder became final, the new rule announce in *Breed* did not exist. Before *Breed*, California courts recognized a single, continuing jeopardy in juvenile-criminal proceedings. (*Breed, supra*, 421 U.S. at p. 541.) In other words, the rule was that jeopardy attached when the jurisdictional stage of juvenile court proceedings had been entered upon, but that such jeopardy was a continuing jeopardy which was not terminated by a dispositional order in the juvenile court or an order by that court transferring proceedings to a criminal court and that there was accordingly no second exposure to jeopardy if the case was tried in adult court. (*Bryan v. Superior Court* (1972) 7 Cal.3d 575, 580-584.) It was not until 1975, that the *Breed* court rejected this concept and announced a new constitutionally related rule for criminal proceedings. (*Breed, supra*, 421 U.S. at p. 541.) And it was the following year that this Court ruled in *In re Bryan* that the rule of *Breed* was to be given retrospective application. (*In re Bryan, supra*, 16 Cal.3d at p. 787.) This holding in *In re Bryan*, was based on the retrospective application test set forth by the United States Supreme Court in *Linkletter v. Walker* (1965) 381 U.S. 618 [85 S.Ct. 1731, 14 L.Ed.2d 601]. (*Id.* at pp. 785-786.) Similarly, in *Jesse W. v. Superior Court* (1979) 26 Cal.3d 41, this Court announced a new constitutionally related rule for criminal proceedings when it held that a de novo rehearing in a juvenile proceeding

infringed the double jeopardy protections. (*Id.* at pp. 46-47.) But because *Breed*, *In re Bryan*, and *Jesse W.* were all decided before the United States Supreme Court rejected the test set forth in *Linkletter* in *Griffith* (*Griffith*, *supra*, 479 U.S. at pp. 711-715), the retroactivity of the rules set forth in those cases must be considered under the applicable *Griffith* test.

Applying the test set forth in *Griffith*, it follows that the rules created by *Breed* and *Jesse W.* may not be used here to challenge collaterally the 1971 conviction. Here, there is no dispute that appellant's conviction for the Rothenburg murder based on his guilty plea in 1971 was final at the time *Breed* became law. Direct appeal, petition for writ of certiorari, and other remedies to challenge the conviction on double jeopardy grounds were no longer available at the time *Breed* and *Jesse W.* became law. The decisions in those cases, thus, cannot be applied retroactively to disturb the 1971 conviction, which was valid at the time it became final. And appellant has not and cannot present any authority supporting a claim otherwise. This Court, therefore, should reject appellant's attempt to challenge collaterally a conviction that he could not have challenged directly in the same manner.

However, even if this Court finds that *Breed* and *Jesse W.* apply retroactively to appellant's 1971 conviction, prejudicial error did not occur. Under the standard of review for federal constitutional errors, any error in not striking the special circumstance allegation concerning the 1971 murder requires reversal unless it appears beyond a reasonable doubt that the error did not contribute to the judgment. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) As shown below, because the multiple-murder special circumstance alleged under section 190.2, subdivision (a)(2), was validly alleged and appropriately found to be true, appellant would have still been eligible for and received the death penalty,

regardless of whether the 1971 conviction was alleged as a special circumstance as well.

II. THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION TO STRIKE THE APODACA MURDER CHARGE

Appellant's second argument on appeal is that the trial court erroneously applied section 1387.1[16] retroactively to permit the People to refile the previously barred Apodaca murder charge, in violation of the ex post facto clauses of both the state and federal Constitutions. (AOB 57-85.) The prosecution, however, was permitted to rely on section 1387.1 to file the charge because, contrary to appellant's claim, the section was applied prospectively rather than retroactively. Even if this Court agrees with appellant that the section was applied retroactively, such retroactive application was intended by the Legislature and did not render the section an ex post facto law. Finally, appellant's assertion that the filing of the charge here actually constituted a fourth rather than third filing is incorrect

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[16] Section 1387.1 provides:

> (a) Where an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the People shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith.
>
> (b) As used in this section, "excusable neglect" includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses.

because the magistrate made no factual determination regarding the charges in case number A798706.

A. The Relevant Trial Court Proceedings

1. The Procedural History Regarding The Apodaca Murder

Apodaca was murdered on January 23, 1987. On February 5, 1987, the Los Angeles County District Attorney filed a felony complaint in case number A795989, in which it charged appellant and Salazar with the murder. The complaint further alleged a special allegation under section 190.2, subdivision (a)(2). (2CT 335, 349-352.) The complaint in case number A795989 appears to have been dismissed on March 13, 1987, because the prosecution could not locate critical witnesses. (2CT 335-336, 352; 4CT 923.)

On March 25, 1987, the District Attorney filed a felony complaint in case number A798706. In the complaint, the District Attorney charged appellant with the murder of Apodaca and alleged the same special circumstance. (2CT 336, 353-354.)

On April 8 and 9, 1987, a preliminary hearing was held in case number A798706. The prosecution requested a reasonable continuance to locate a witness who was served with a subpoena, yet failed to appear. (2CT 363.) The prosecution advised the court that the witness instructed Detective Barry Jones to give the subpoena to the witness's mother, which was done, and the witness acknowledged by telephone that he was supposed to appear in accordance with the subpoena. (2CT 363-364, 367.) The defense complained that the prosecution had not properly served the witness and that the same problem with getting witnesses to appear had occurred in case number A795989. The prosecution replied that because of the gang-related nature of the case, many witnesses were hostile and difficult to get to appear. (2CT 364.) The prosecution was unaware why

the witness failed to appear, but believed the witness could be located by the date of the requested continuance. It explained to the court that it would be very difficult to prove its case without the witness. The court inquired if Detective Adams was looking for the witness, and the prosecution confirmed he was. (2CT 365.) Detective Adams represented to the court that he had been searching for the witness, and the witness's mother would not provide the witness's whereabouts or address. The court believed that the family did not want the witness to testify. (2CT 366.) The court then learned from Detective Jones and Detective Adams that the witness never picked the subpoena up from his mother. (2CT 367-368.)

Despite the situation with the witness, the defense refused to waive time. (2CT 370.) The court did not find that the witness had been sufficiently served with the subpoena, and it inquired whether the prosecution knew of other contacts that might be able to provide the whereabouts of the witness. The prosecution represented that witnesses and friends of the witness in the courtroom might know. (2CT 370.) But the prosecution was concerned that these individuals might not cooperate. The court then had a discussion with counsel in chambers. (2CT 371.)

Following the discussion in chambers, the court elected to proceed with the preliminary hearing while the prosecution made additional efforts to locate the witness. (2CT 371.) The prosecution then called Rivera as a witness. (2CT 372-394.) Following Rivera's testimony, the parties stipulated to the admissibility of the autopsy report. (2CT 394-395.)

Later the same day, the prosecution called the coroner, Dr. Sara Reddy. (2CT 398-409.) Following Dr. Reddy's testimony, the prosecution rested and requested a recess until the next day. The court granted the request. (2CT 409.)

The following day, the prosecution advised the court that it had been unable to locate the missing witness. (2CT 411.) The defense rested (2CT

412), and the court held appellant to answer for the lesser offense of manslaughter on April 24, 1987. (2CT 421.)

On April 24, 1987, the District Attorney filed an information in which it charged appellant with murder in case number A798706. The information omitted the prior-murder special circumstance. (2CT 425-426.)

On June 23, 1987, the court granted appellant's motion to dismiss the information under section 1382, after the prosecution represented that it still could not locate its witness. (2CT 428.)

2. Appellant Moves To Dismiss The Apodaca Murder From The Instant Information

On July 27, 1999, appellant filed a motion to dismiss the Apodaca murder and the related special circumstance allegation. (2CT 333.) In the motion, appellant alleged that he had been charged with murdering Apodaca on three previous occasions, and that on each occasion the action was dismissed. He asserted, therefore, that section 1387 barred further prosecution and that no exception under 1387.1 applied. (2CT 334.)

The prosecution opposed appellant's motion. (4CT 923.) In its opposition, the prosecution argued that the instant matter constituted the third filing of the Apodaca murder charge against appellant. The prosecution further argued that such filing was permitted under section 1387.1, which applied retroactively, because excusable neglect led to the previous dismissals. (4CT 923-935.)

On August 10, 1999, the court held a hearing on appellant's motion, at which the prosecution called Robert Schraeder, a former investigator for the District Attorney. Schraeder worked with the Hardcore Gang Unit and attempted to locate de Alva in connection with case number A795989. Schraeder was unable to locate him. (4RT 815-816.) After Schraeder's

testimony, the court wished to hear from the prosecutor whom Schraeder was assisting, Sandy Harris. (4RT 837.)

The prosecution called Harris, who testified that case number A798706 was dismissed because the only eyewitness to the murder, de Alva, could not be located after an extensive search. (4RT 846-847.) Harris added that case number A795989 had been dismissed after de Alva was not located, and case number A798706 was subsequently filed. (4RT 847-848.)

The prosecution next called Detective Adams. Detective Adams testified that he did everything possible to locate de Alva, but was unable to find de Alva. (4RT 862-864, 866.)

After the court heard the testimony of the witnesses, it heard argument from the parties. (4RT 872-913.) The court then found that the prosecution had shown excusable neglect within the meaning of section 1387.1. (4RT 913.) The parties then argued as to whether section 1387.1 was applicable. (4RT 914-933.)

On August 12, 1999, the court ruled as follows:

> And I think this case can be distinguished in that, unlike the others, in this case [appellant], the second time around was held to answer on a lesser necessarily included offense, which I think in terms – and perhaps I'm wrong, but dictates the remedy with which the People can avail themselves, either section 739 or 871.5.
>
> So perhaps that's an issue that needs clarification, and for that reason I'm going to deny your motion . . . .

(4RT 981-982.) In other words, the court found that the order holding appellant to answer for manslaughter rather than murder was not a dismissal or termination of an action under section 1387. (4RT 981-982.) The court agreed that its ruling included an implicit finding that section

1387.1 applied retroactively and did not violate the ex post facto clause. (4RT 984.)

Appellant challenged the court's ruling by petition for writ of prohibition to the Court of Appeal. (Supp. V 1CT 66-92.) On August 16, 1999, the Court of Appeal denied the petition without discussion or citation to authority. (4CT 953.)

Appellant subsequently filed a petition for review in this Court. (Supp. V 3CT 874-899.) This Court denied the petition without discussion or citation to authority on August 18, 1999. (4CT 959.)

B. Section 1387.1 Was Not Applied Retroactively To This Case

Appellant's initial contention is that the Legislature did not intend for section 1387.1 to apply retroactively. (AOB 65-67) As a preliminary matter, the trial court did not even apply section 1387.1 retroactively. Its application of section 1387.1 to the prosecution's filing of the Apodaca murder charge here was actually prospective in nature.

> In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." [Citation.]

(*People v. Grant* (1999) 20 Cal.4th 150, 157.)

For example, in *In re E .J.* (2010) 47 Cal.4th 1258, this Court was confronted with the question of whether a new law imposing a restriction on where sex offenders may reside was being applied retroactively to the petitioners, whose commitment offenses were committed before the law went into effect but who were released on parole after the law's effective

date. The California Department of Corrections and Rehabilitation then tried to enforce the new law as a condition of parole, thereby subjecting the petitioners to revocation of parole for noncompliance. (*Id.* at pp. 1263-1264.) This Court concluded there was no retrospective application. Its conclusion was based on its reasoning that the last act necessary to trigger application of the new law to the petitioners—moving into noncompliant housing—would occur after the law was enacted. (*Id.* at p. 1272.) According to this Court:

> Section 3003.5[, subdivision](b) places restrictions on where a paroled sex offender subject to lifetime registration pursuant to section 290 may reside while on parole. For purposes of retroactivity analysis, the pivotal 'last act or event' [citation] that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his release from custody on parole. If that 'last act or event' occurred subsequent to the effective date of section 3003.5 [, subdivision](b), a conclusion that it was a violation of the registrant's parole does not constitute a "retroactive" application of the statute.

(*Id.* at p. 1274.)

Here, just as was the case in *In re E.J.*, the pivotal act triggering the applicability of the statute did not occur until after the effective date of section 1387.1. The parties do not dispute that section 1387.1 became effective January 1, 1988. (AOB 62.) And the act that triggered its applicability to the instant matter was the prosecution's filing of the Apodaca murder charge against appellant for the third time in the information here, i.e., in 1998. Had the prosecution not refiled charges a third time after the enactment, section 1387.1 would not have applied at all. It follows that the trial court actually applied section 1387.1 prospectively due to the third filing, contrary to appellant's argument that the court applied the law retroactively. (See, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 ["[A] law governing the conduct of trials is being applied

'prospectively' when it is applied to a trial occurring after the law's effective date, regardless of when the underlying crime was committed or the underlying cause of action arose"].) On this initial basis, this Court should reject appellant's claim.

C. Even If Applied Retroactively To This Case, The Legislature Intended Such Retroactive Application

Even if this Court disagrees and finds that the trial court applied section 1387.1 retroactively, the Legislature obviously intended for the statute to apply even where the two prior dismissals occurred before its enactment. Respondent agrees with appellant (AOB 65) that this Court's decisions have recognized that statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230; *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 174; see also § 3 ["No part of [this code] is retroactive, unless expressly so declared"].) In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of "'express language of retroactivity or . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475; see also *Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 230; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.) Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather "'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.'" (*Myers*, *supra*, 28 Cal.4th at p. 841; see *id.* at p. 843; see also *Californians for Disability Rights*, *supra*, 39 Cal.4th at pp. 229-230; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209, fn. 13.)

The terms "retroactive" and "prospective," however, are not always easy to apply to a given statute. (See *Californians for Disability Rights*, *supra*, 39 Cal.4th at pp. 230-231.) To determine whether the Legislature intended a statute to apply retroactively, this Court must consider "'"the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event" [citation]. In exercising this judgment, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." [Citation.]' [Citation]." (*In re E.J.*, *supra*, 47 Cal.4th at p. 1273.)

In general, a law has a retroactive effect when it functions to '"'change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct'"' that is, when it '"'substantially affect[s] existing rights and obligations[.]'"' (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 231; see also *In re E.J.*, *supra*, 47 Cal.4th at p. 1273 ["'In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date'"].) Ordinarily, considerations of basic fairness militate against such retroactive changes. (*McClung*, *supra*, 34 Cal.4th at p. 475; *Myers*, *supra*, 28 Cal.4th at pp. 840-842.)

The language and legislative intent behind section 1387.1 provide a clear and unavoidable implication that the Legislature intended its application to cases in which murder charges have been previously dismissed. Senate Bill 709 proposed the enactment of section 1387.1. (3CT 708-709.) The impetus for the bill was the matter of *People v. Mackey* (1985) 176 Cal.App.3d 177. (3CT 654-655, 678, 690.) There, a first information charging murder was dismissed due to the prosecution's failure to supply the defendant with a statement of the principal witness against him. The prosecution then filed a second information, which was

also dismissed, this time for failure to hold a preliminary examination within the 60-day period prescribed by section 859b. The prosecution refiled for a third time and appealed the dismissal of the second information. The defendant petitioned for relief by prohibition or habeas corpus, seeking dismissal of the third complaint. The Court of Appeal affirmed the dismissal and issued a peremptory writ, holding in part that the prosecution was foreclosed from filing the third complaint by section 1387. (*Ibid.*)

The Legislature found the result in *Mackey* untenable. It believed that the mistakes in *Mackey* should not serve to punish the general community by releasing a suspected murderer. (3CT 655.) And by enacting section 1387.1, the Legislature could help reduce "gamesmanship with procedural rules," that allowed violent criminals to escape justice. (3CT 696.) For example, the Legislature was advised that enacting 1387.1 "would eliminate some of the problems which can arise when witnesses are threatened . . . ." (3CT 702.) Section 1387.1 struck a balance between protecting the community and the rights of defendants by focusing only on the most violent and serious felons. (3CT 697.) A further safeguard was left in place to protect defendants by providing the court with the discretion to dismiss an action and prohibit continuances by the prosecution where it found the prosecution was "refiling the case to harass the defendant." (3CT 705, 737.) The Legislature, therefore, was concerned with refiling for the purpose of harassing a defendant, regardless of the length of time between the third filing and the previous dismissals.

Given the above legislative history, it is obvious that the Legislature intended section 1387.1 to apply where prior dismissals occurred before its enactment. Indeed, the language of the statute and the legislative intent permit a third filing in murder cases without any mention of time constraints on the prior dismissals. In other words, the statutory language

and legislative history show no concern for the date of the prior dismissals. To the contrary, the Legislature was concerned with protecting the community from dangerous and violent felons who were able to evade justice due to excusable neglect and gamesmanship. In fact, it considered the gamesmanship of a defendant who evaded justice where a witness was threatened.

As detailed above, in the instant case, the prosecution notified the courts that handed down the prior dismissals that the eyewitness of the Apodaca murder was failing to appear and evading service due to the gang-related nature of the incident. Consistent with the Legislature's intent, this gamesmanship and manipulation of procedural rules should not save a murderer from the consequences of his crime. This point is particularly applicable to appellant who brought the instant filing upon himself by confessing to the Apodaca murder. The third filing, therefore, did not raise the Legislature's concern of prosecutors using the statute to harass defendants. The statute, instead, was used in the precise manner it was intended by the Legislature. The Legislature may not have used the express word "retroactive" in its analysis, but "'no talismanic word or phrase is required to establish retroactivity.'" (*Myers*, *supra*, 28 Cal.4th at p. 843.)

To the extent the statutory language arguably supports appellant's position, this Court should not adopt his suggested statutory construction because it would lead to absurd results contrary to the Legislature's apparent purpose and would create an unreasonable and unwarranted loophole in the statutory scheme. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908, 911 ["we presume the Legislature did not intend" absurd consequences]; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.) Where the language of a statutory provision is susceptible of two constructions, the reviewing court must adopt the one that, "in application, will render it reasonable, fair and harmonious with its manifest

purpose," and must reject the one that "would be productive of absurd consequences." (*Ibid.*) This is true even if the literal meaning of the statute supports appellant's construction, since the intent of the statute prevails over its letter and the letter must be so read as to conform to the statute's spirit. (*People v. Thomas* (1992) 4 Cal.4th 206, 210; see, e.g., *People v. Perez* (2001) 86 Cal.App.4th 675, 681-682 [construing section 12022.53, subdivision (f) in accordance with its language and its intent]; *People v. Valencia* (2000) 82 Cal.App.4th 139, 143-149 [rejecting literal meaning and construing former section 12022.53, subdivision (d) in accordance with its intent].)

Here, it would be absurd to treat the two similarly situated groups unequally, i.e., those whose previous dismissals occurred before the enactment of section 1387.1, and those whose dismissals occurred after the enactment. The latter class of defendants would be subject to different scrutiny permitting a third filing of the twice dismissed charge whereas the former class would avoid such scrutiny. This statutory distinction would be absurd in light of the legislative purpose behind section 1387.1, which was to permit the prosecution to bring to justice violent felons in certain limited circumstances. Under appellant's interpretation of the statute, a defendant with a previous dismissal of a murder charge even just one day before section 1387.1 was enacted would evade justice, whereas a defendant whose dismissals occurred a day later would not. This result is not only preposterous, but would undermine the very state interest section 1387.1 sought to advance, i.e., protecting the community from violent felons. This Court, therefore, should apply section 1387.1 where the previous dismissals occurred before its enactment to avoid absurd consequences.

D. Retroactive Application Of Section 1387.1 Does Not Violate The Ex Post Facto Clause

Also, appellant unpersuasively argues that the Legislature's intent to apply retroactively section 1387.1 violates the ex post fact clause of the United States and California Constitutions. (AOB 67-69.) The passage of ex post facto laws is prohibited. (*In re E .J.*, *supra*, 47 Cal.4th at p. 1279.) This Court has explained this prohibition as follows:

> In *Collins v. Youngblood* [(1990)] 497 U.S. 37, the high court explained that an impermissible ex post facto law is one which "'makes more burdensome the punishment for the crime, after its commission.'" [Citation.] "Through this prohibition, the Framers sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. [Citations.] The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. [Citations.] [¶] In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." [Citation.]

(*In re E .J.*, *supra*, 47 Cal.4th at p. 1279, italics omitted.) This Court "has observed that there is no significant difference between the federal and state ex post facto clauses." (*Ibid.*)

Here, interpreting section 1387.1 to apply where the previous dismissals occurred before its enactment would not qualify section 1387.1 as an ex post facto law. Such an interpretation would not require that this Court "retroactively enlarg[e] a criminal statute but *merely interpret[] one* . . . ." (*People v. Billa* (2003) 31 Cal.4th 1064, 1073.) A routine interpretation of a law rather than "overruling of controlling authority or a sudden, unforeseeable enlargement of a statute" does not constitute an ex post facto law. (*Ibid.*)

Moreover, accepting the trial court's interpretation of section 1387.1 would not make it an ex post facto law because it would not "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins*, *supra*, 497 U.S. at p. 43; accord *People v. Alford* (2007) 42 Cal.4th 749, 755.) "A change in the law that merely operates to the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto. It must be 'a more burdensome punishment.'" (*People v. Bailey* (2002) 101 Cal.App.4th 238, 243.) The law here in no way changed the evidence required to convict of murder. It also did not make the crime's punishment greater than when it was committed. It, instead, created a change that was procedural in character. In other words, similar to the class of defendants at issue in *In re E.J.*, where no ex post facto violation was found, this interpretation of section 1387.1 would not operate to permit additional punishment for previously committed offenses. Rather, the interpretation would operate to " protect the public in the present, not to serve as additional punishment for past crimes." (*In re E.J.*, *supra*, 47 Cal.4th at p. 1278.)

Relying on *Stogner v. California* (2003) 539 U.S. 607 [123 S.Ct. 2446, 156 L.Ed.2d 544], appellant contends that section 1387 operates like a statute of limitations, that section 1387.1 created an exception to section 1387, and that the People were barred from prosecuting him for the Apodaca murder but for the new exception created by section 1387.1. He claims that, under *Stogner*, applying section 1387.1 where the prior dismissals occurred before its enactment would constitute an ex post facto law. (AOB 68-69.) In *Stogner*, the State of California attempted to revive the statute of limitations for the crime of child molestation after the original statute of limitations had expired. The United States Supreme Court held that California was barred from doing so because the new statute of

limitations attached criminal liability "'where the party was not, by law, liable to any punishment.'" (*Id.* at p. 613.)

Here, however, the Legislature did not revive a statute of limitations to attach criminal liability where appellant was no longer liable to any punishment. Unlike child molestations, the crime of murder carries with it no statute of limitations and, resultantly, is never time barred. (§ 799; *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) More importantly, as appellant concedes, the prosecution was not barred under section 1371from prosecuting him for manslaughter. (AOB 68-69.) As a result, appellant was still liable for punishment unlike the defendant in *Stogner*. This continued liability coupled with appellant's own confession to the crime demonstrates that the concern in *Stogner* of a defendant no longer preserving exculpatory evidence in reliance on the fact that he could no longer be charged was not present here. Also, section 1387.1 neither aggravated a crime nor made it greater than when it was committed. (See *Stogner*, *supra*, 539 U.S. at p. 613.)

Furthermore, section 1387.1 is completely unrelated to the statute of limitations associated with a charged offense. It, instead, depends upon whether certain types of violent felonies have been twice dismissed and refiled for a third time. The question of whether the statute of limitations has expired or has been tolled is an entirely separate question. Section 1387.1 provides a procedural remedial tool (*People v. Massey* (2000) 79 Cal.App.4th 204, 211) for saving prosecutions to avoid the release of dangerous and violent felons, and is not contingent upon time. The statute challenged in *Stogner*, therefore, is distinguishable, because section 1387.1 did not revive an expired statute of limitations. (*Stogner*, 539 U.S. at p. 616-619.) And its application to permit a third filing of the Apodaca murder here did not constitute the application of an ex post facto law.

E. The Apodaca Murder Was Previously Dismissed Twice, Not Three Times

Appellant's attempt to challenge the filing of the Apodaca murder on the additional ground that it had been dismissed three times (AOB 69-84) lacks merit like his other claims. His assertion turns on whether the magistrate's previous refusal to hold him to answer for murder and decision to hold him to answer for the lesser-included offense of manslaughter in case number A798706 constituted a dismissal under section 871.[17] In other words, if the prosecution was permitted under section 739[18] to include the

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[17] Section 871 provides:

> If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate shall order the complaint dismissed and the defendant to be discharged, by an indorsement on the depositions and statement, signed by the magistrate, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order that the complaint be dismissed and that he or she shall be discharged."

[18] Section 739 provides:

> When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county within 15 days after the commitment, an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed. The information shall be in the name of the people

(continued...)

murder charge in the subsequently-filed information, appellant's claim fails. Here, the prosecution was permitted under section 739 to include the murder charge in the subsequently-filed information because the magistrate made no factual determination regarding the charges of murder and manslaughter.

"A mere refusal to hold to answer does not amount to a factual determination fatal to the charge." (*People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, 1017.) Unless the magistrate made express findings of fact, a reviewing court "cannot assume that he has resolved factual disputes or passed upon the credibility of witnesses." (*People v. Slaughter* (1984) 35 Cal.3d 629, 638.) The magistrate in case number A798706 made the ultimate legal conclusion that manslaughter had been committed. (2CT 421.) Appellant cannot transform this ultimate legal conclusion into a factual finding merely by labeling it as such. The magistrate made no comment regarding the evidence or lack of evidence regarding malice. The magistrate also did not comment on the significance of the individual items of evidence in relation to malice. (2CT 413-414, 420-422.) Moreover, the case law is clear that a magistrate's factual finding fatal to a criminal allegation cannot be implied. (*Day*, *supra*, 174 Cal.App.3d at p. 1019.) Because the magistrate did not hold appellant to answer for murder without making a factual finding, the prosecution was not precluded from later filing the information charging murder, and the magistrate's ruling did not constitute a dismissal of the action under section 1387. (§ 739; *Slaughter*, *supra*, 35 Cal.3d at p. 633.)

(...continued)

of the State of California and subscribed by the district attorney.

This distinction brings this case in line with the holding of *People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, rather than *Ramos v. Superior Court* (1982) 32 Cal.3d 26, and *Bodner v. Superior Court* (1996) 42 Cal.App.4th 1801, as appellant would have this Court believe (AOB 70-75). In *Martinez*, the court held the magistrate's dismissal of a count did not terminate the action and, therefore, the dismissal of the information was the first termination within the meaning of section 1387. (19 Cal.App.4th at pp. 744-747.) The court explained a magistrate's failure to hold defendants to answer is not a dismissal because it is not a final termination of the action. (*Id.* at p. 744.) The court stated as follows:

> The action continues with an information filed under the same case number pursuant to section 739. The action is not terminated at all if the superior court disagrees with the magistrate and denies a section 995 motion based on the evidence produced at the preliminary hearing. The action then proceeds, possibly to conviction. In any event, the action remains alive at least until the superior court agrees with the magistrate's ruling and grants the defendant's section 995 motion. The action is terminated when the superior court dismisses the information pursuant to section 995.

(*Id.* at p. 745.) The court opined, "[A] magistrate's (first) dismissal under section 871 is not by itself a termination of the action when followed by the filing of an information under section 739 . . . ." (*Id.* at p. 746.)

In *Ramos*, on the other hand, the prosecutor attempted to ignore a second dismissal by proceeding directly under section 739. (*Ramos*, *supra*, 32 Cal.3d at p. 36.) There, the magistrate clearly dismissed a special circumstance allegation on two separate occasions based on a finding of insufficient evidence to support the allegation, precluding the prosecutor from proceeding under section 739 to reinstate the allegation. (*Id.* at p. 29, 35.) Because no similar second dismissal exists here, *Ramos* is not controlling. *Bodner*, which similarly faced two dismissals under section 871 by a magistrate, is distinguishable for the same reason. (See *Bodner*,

supra, 42 Cal.App.4th at p. 1801.) This Court should, therefore, find that the trial court correctly rejected appellant's contention that the Apodaca murder had been dismissed three times.

F. The Prosecution Showed Excusable Neglect

Appellant incorrectly asserts that the prosecution did not show the requisite excusable neglect under section 1387.1. (AOB 81-84.) In prosecutions for violent felonies as defined in section 667.5, the prosecution may file a third time if either of the prior dismissals was due solely to excusable neglect and the prosecution did not act in bad faith.[19] (§ 1387.1; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 739.) An appellate court reviews the trial court's finding of excusable neglect for abuse of discretion. (*Miller*, *supra*, 101 Cal.App.4th at p. 745.)

Here, the trial court did not abuse its discretion. "'"Simply expressed, '[e]xcusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.'" [Citation.]"'" (*Miller*, *supra*, 101 Cal.App.4th at p. 741.) In case number A795989, De Alva, a critical witness to the Apodaca murder, instructed Detective Jones to give a subpoena to his mother, and Detective Jones complied. De Alva even acknowledged by telephone that he was supposed to appear in accordance with the subpoena. Yet he failed to appear like many witnesses due to the gang-related nature of the case. (2CT 363-364,

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[19] In full, section 1387.1 provides: "(a) Where an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith. [¶] (b) As used in this section, 'excusable neglect' includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses."

367.) Detective Adams then did everything he could to locate de Alva, but de Alva's mother refused to provide de Alva's whereabouts or address, and de Alva never picked up the subpoena despite his representation that he would. (2CT 365-368; 4RT 862-864, 866.) Because the defense refused to waive time (2CT 370), the preliminary hearing had to continue. The prosecution, nevertheless, continued to search for de Alva, but still could not locate him. (2CT 371, 411.) The prosecution was similarly unable to locate de Alva when it again filed the murder charge in case number A798706. (2CT 428.) And the dismissal of the charge was because the only eyewitness to the murder, de Alva, could not be located after an extensive search. (4RT 846-847.)

Both dismissals, therefore, were the result of the prosecution's failing to secure de Alva as a witness and to obtain his whereabouts, other than by relying on de Alva's representation that he would attend trial after picking up the subpoena from his mother. A reasonably prudent attorney could have suffered the same fate, particularly in a gang-related case where it was tough to get any witnesses to cooperate and, thus, it would have been more reasonable to accept de Alva's representation.

This type of "neglect" was deemed sufficient in *Massey*, where "[t]he 'neglect' under section 1387.1 was the failure of the People to have the witnesses in court on the date set for the first trial. This neglect was 'excusable' because reasonable efforts had been made to secure the witnesses' attendance." (*Massey*, *supra*, 79 Cal.App.4th at p. 211.) The *Massey* court explained that if the police and prosecution did all that could be reasonably expected to locate the witnesses and secure the witnesses's appearance, but failed to do so, "'their failure should still be labeled excusable neglect, despite the absence of any actual neglect, as commonly understood to include an element of carelessness or lack of sufficient regard or effort.'" (*Ibid.*)

The type of neglect found sufficient here was also found sufficient more recently in *People v. Mason* (2006) 140 Cal.App.4th 1190. There, the appellate court held that the trial court did not abuse its discretion when it ruled that the prosecution's inability to produce a witness for trial was the result of excusable neglect. (*Id.* at p. 1196.) The witness had cooperated fully with the prosecution up to that point and advised the prosecution of his telephone number and the contact information for his grandparents. (*Ibid.*) As a result, the appellate court found the prosecution had every reason to believe that the witness would make himself available for trial. (*Id.* at p. 1197.) As detailed above, the details of the instant matter are quite similar to those of *Mason* and, thus, the same reasoning there supports the finding of excusable neglect here. On this record, the trial court did not exceed the bounds of reason when it found that the dismissals resulted from excusable neglect. For this reason, as well as those others set forth above, this Court should reject appellant's claim.

III. APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY RELINQUISHED HIS RIGHT TO REPRESENT HIMSELF

Appellant's third argument on appeal is that the trial court improperly revoked his pro per status, in violation of the Sixth and Fourteenth Amendments. (AOB 86-98.) His claim that the court revoked his pro per status is erroneous given that he knowingly, intelligently, and voluntarily relinquished his right to represent himself. Any assertion to the contrary lacks merit and rests on his manipulative gamesmanship at the time of trial.

A. The Relevant Trial Court Proceedings

On October 13, 1998, appellant appeared in pro per and was advised that he should be represented by counsel or, at a minimum, have advisory counsel present. Appellant stated that he did not want the court to appoint advisory counsel. (1RT 1.) The court informed the parties that it had not

received a petition to proceed in propria persona, and the prosecution explained that appellant should complete a form in the superior court because the previous form was filed in the municipal court. (1RT 3.) Appellant understood and agreed to do so. (1RT 4-5.)

On October 16, 1998, appellant advised the court that he wished to continue in pro per and had filled out the forms necessary to do so. (1RT 7-8.) He added that he was capable of representing himself and did not want advisory counsel. (1RT 8-9.) The prosecution asked him if he wanted the death penalty, and he affirmatively nodded. As such, the prosecution suggested appellant speak with a lawyer, and the court explained to him the concept of standby counsel. (1RT 9.) Appellant believed having standby counsel would be prudent. (1RT 9-10.)

The court reviewed the forms submitted by appellant. It noted that appellant represented himself in 1976 on an attempted robbery charge and was acquitted. It also noted that he represented himself in 1976 on an assault with deadly weapon charge and was convicted. It finally noted that he represented himself again the same year on robbery and assault with deadly weapon charges and was convicted. (1RT 10.)

After conferring with the court, appellant stated that he understood the meaning and limitations of pro per status. (1RT 10-11.) He added that he wanted to represent himself and also wanted the court to appoint standby counsel. (1RT 11.) The court granted appellant's request to proceed in pro per. (1RT 12, 17.)

Appellant continued to represent himself, and on November 6, 1998, appeared in pro per with standby counsel. (1RT 26.) He advised the court that he wished to take some photographs back to his cell. (1RT 29.) The court, however, wanted the Sheriff's Department to take custody of the photographs and to allow appellant to see them in the prison's law library. (1RT 30.)

On November 13, 1998, appellant again appeared in pro per with standby counsel, Andrew Stein. (1RT 34.) Stein informed the court that he had arranged for an investigator for appellant. (1RT 34.) The court replied that it received a letter from the investigator stating that he would be unable to assist appellant because appellant's requests were impermissible. Appellant stated that the investigator refused to do what he asked. (1RT 36.) The court highlighted appellant's requests to the investigator for jokes from the Internet and listings of literary agents. Appellant then stated that he did not need an investigator. (1RT 37.)

Appellant informed the court that Stein had permission to speak at his leisure. The court explained it was not standby counsel's role to speak for appellant. Appellant, nevertheless, reaffirmed his desire to represent himself. (1RT 37-38.) The court assured appellant it would contact the prison's legal department to see if he could have possession of photographs outside of the law library. (1RT 46.)

On December 3, 1998, appellant appeared and was represented by Stein after signing a substitution of counsel form. (1RT 51.) Stein informed the court that appellant had told Stein he was willing to relinquish his pro per status. (1RT 51-52.) Appellant, however, told the court he was involuntarily relinquishing his pro per status. He added that he was informed the court would revoke his pro per status based on the Sheriff's Department's contention that he stole legal materials from the prison's law library and his presence in the library would prevent other inmates from preparing their defenses. (1RT 52-53.) Appellant complained that he could not receive a fair trial if he continued to represent himself and, thus, his only available recourse was to relinquish his pro per status. (1RT 53.)

The prosecution explained to the court that pocket parts and other items from the library had been found in appellant's cell. The Sheriff's Department had represented that it wanted appellant's pro per privileges in

prison revoked. The prosecution further explained to appellant that he could still represent himself because Stein would be able to provide him with research needed from the law library even if his prison pro per privileges were revoked. (1RT 54.) According to the prosecution, appellant was "playing a game." The prison refused to give him anymore materials from the law library because he was stealing them. The prosecution, however, reiterated that Stein could give appellant the necessary materials while he still represented himself. (1RT 55.)

The court asked appellant if he voluntarily signed the substitution of counsel form. Appellant stated he had. (1RT 55.) The court next asked whether he understood what it meant to relinquish his pro per status and be represented, instead, by Stein. He said he did. (1RT 56.)

Stein told the court that he agreed with the Sheriff's Department's position and that it was justified in denying appellant access to the law library. He also told the court that he had a long talk with appellant after which appellant voluntarily relinquished his pro per status. (1RT 56-57.)

The prosecution asked appellant how he wished to proceed and explained yet again that he could continue to represent himself even if he no longer had pro per privileges in jail because Stein could get him materials needed. Appellant answered that he wanted to represent himself and wanted to have access to the law library. (1RT 57.) Stein took a moment to speak with appellant again and then asked the court if it would accept the substitution of counsel. (1RT 58.)

The prosecution was dissatisfied with the record of the proceedings. The court, therefore, explained the reasons behind the revocation of appellant's pro per privileges in jail, including that pocket parts and other items from the law library were found in his cell. (1RT 58.) The court then found that appellant voluntarily and willingly signed the substitution of counsel form before accepting the substitution. (1RT 59.)

B. Appellant Withdrew His Request To Represent Himself Following A Thorough Explanation That He Could Continue To Represent Himself Despite Revocation Of His Pro Per Privileges In Jail

Although appellant timely asserted his right to represent himself, he subsequently relinquished this right. It is well-settled that "the *Faretta* right, once asserted, may be waived or abandoned." (*People v. Dunkle* (2005) 36 Cal.4th 861, 909, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Tena* (2007) 156 Cal.App.4th 598, 609-610 [defendant's conduct following preliminary hearing demonstrated that he abandoned any desire to represent himself].)[20] A "waiver may be found if it reasonably appears from the conduct of the defendant that he has abandoned his request to represent himself." (*People v. Kenner* (1990) 223 Cal.App.3d 56, 60; *People v. Butler* (2009) 47 Cal.4th 814, 825 ["*Faretta* right may be waived by . . . abandonment and acquiescence in representation by counsel"]; *People v. Stanley* (2006) 39 Cal.4th 913, 929 [defendant abandoned his asserted right of self-representation by his "subsequent acceptance of several appointed counsel to represent him"].)

The United States Supreme Court's decision in *McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] is instructive. There, the trial court permitted the defendant to proceed in propria persona, but also appointed standby counsel. (*Id.* at pp. 170-172.) Although the defendant protested the presence of standby counsel at his trial, he sometimes sought their advice and permitted them to act on his behalf. (*Id.* at pp. 172-174.) In concluding that the defendant had forfeited his contention that their participation had impaired his right to self-

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[20] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

representation, insofar as he had invited the participation, the Supreme Court stated: "A defendant can waive his *Faretta* rights. Participation by counsel with a pro se defendant's express approval is, of course, constitutionally unobjectionable." (*Id.* at p. 182.) The Court added: "Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." (*Id.* at p. 183.)

Here, appellant's abandonment of his *Faretta* rights was even clearer than by the defendant's conduct in *McKaskle*. The court asked appellant if he voluntarily signed the substitution of counsel form, and in response appellant expressly stated he had. (1RT 55.) He further stated that he understood what it meant to relinquish his pro per status and be represented by counsel. (1RT 56.) And his own counsel informed the court that following a long talk with appellant, appellant voluntarily relinquished his pro per status. (1RT 56-57.) Appellant may have subsequently reasserted that he wished to represent himself, but thereafter his counsel conferred with him and requested that the court accept the substitution of counsel. (1RT 57-58.) From this conduct and the remaining circumstances in the trial court, the court found that appellant voluntarily and willingly signed the substitution of counsel form before accepting the substitution. (1RT 59.) The trial court was in the best position to make this determination.

Aside from the above express abandonment by appellant, his subsequent conduct further supported a finding that he relinquished his *Faretta* rights. Under *McKaskle*, no violation of appellant's *Faretta* rights occurred following the abandonment unless appellant "expressly and unambiguously renew[ed] his request" to represent himself. (*McKaskle*, *supra*, 465 U.S. at p. 183.) Appellant made no such request. He simply

cannot identify a single reference in the record following his substitution of Stein as his counsel in which he again asserted his *Faretta* rights. His failure to use all of the opportunities during his lengthy trial to assert his *Faretta* rights established that he had no desire to represent himself. (See *Stanley*, *supra*, 39 Cal.4th at pp. 930-933.) His acquiescing to representation absent further attempt to exercise his *Faretta* rights also shows that appellant abandoned his rights and that his previous attempt to exercise them was just a manipulative game to him, evidenced by his desire to retain an investigator to research jokes and literary agents. (1RT 36-37.)

In an attempt to avoid the obvious conclusion from the above facts that he relinquished his *Faretta* rights, appellant claims that the relinquishment was involuntary and, thus, invalid, because he misapprehended the law, and the court failed to correct his misapprehension. (AOB 95-97.) His interpretation of the record is inaccurate.

No dispute exists that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*Brady v. United States* (1970) 397 U.S. 742, 748 [90 S.Ct. 1463, 25 L.Ed.2d 747]; *People v. Mroczko* (1983) 35 Cal.3d 86, 110.) And here, appellant's relinquishment of his *Faretta* rights was nothing short of voluntary, knowing, and intelligent after being made sufficiently aware of the relevant circumstances and likely consequences. He did not even possess a misunderstanding of the law. The record demonstrates that he did not believe he was required by law to relinquish his *Faretta* rights as a result of the jail's revocation of his pro per privileges based on his theft of materials from the law library. He, instead, made the sound tactical decision to relinquish his *Faretta* rights and accept representation by counsel given the

impediments inherent in representing himself absent the jail pro per privileges. (1RT 52-53.)

Notwithstanding, even if this Court accepts appellant's contention that he misunderstood the law, his misunderstanding was thoroughly clarified in the trial court. The prosecution explained to appellant that he could still represent himself because Stein would be able to provide him with research needed from the law library even if his jail pro per privileges were revoked. (1RT 54.) Later, the prosecution reiterated that Stein could give appellant the necessary materials while he still represented himself. (1RT 55.) Following these explanations of the law to appellant, appellant did not represent to the court that he had any misunderstanding as to his rights. In fact, he stated that he voluntarily signed the substitution of counsel form and understood what it meant to relinquish his pro per status and be represented, instead, by Stein. (1RT 55-56.) His own counsel even had a "long talk" with him, following which appellant voluntarily relinquished his pro per status. (1RT 56-57.) And after all of these explanations and voluntary relinquishments, the prosecution yet again explained to appellant that he could continue to represent himself even if he no longer had pro per privileges in jail because Stein could get him materials needed. Following this third explanation, appellant did not assert that he believed as a matter of law he could not represent himself without pro per privileges in jail. Rather, he declared that he wanted access to the law library restored to him despite the thefts. (1RT 57.) His counsel then took a second opportunity to speak with him after which the court was again asked to accept the substitution of counsel. (1RT 58.) With all the above in mind, the court aptly found that appellant voluntarily and knowingly relinquished his *Faretta* rights. (1RT 59.)

The court was not required to take any further corrective measures given the sufficient explanations of the law by the prosecution and

appellant's own counsel. "[A]lthough in some cases a 'personal dialogue' between the court and the defendant may be advisable to determine whether there is a waiver, no such inquiry is necessary where all circumstances indicate that the defendant has abandoned his request to conduct his own defense. [Citation.]" (*People v. Kenner* (1990) 223 Cal.App.3d 56, 61.) In light of the detailed summary above, the court did not need to restate what had already been explained to appellant multiple times.[21]

Under no reasonable interpretation of the record can it be said that appellant was operating under the belief that he was legally foreclosed from representing himself. Instead, the record tends to show that appellant was utilizing his substantial criminal expertise in an attempt to manufacture an issue on appeal. Appellant was no stranger to the criminal justice system or the exercise of *Faretta* rights. The court noted that appellant represented

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[21] This case is inapposite to *People v. Carter* (1967) 66 Cal.2d 666. In *Carter*, the defendant moved to waive his right to counsel and represent himself at trial. (*Id.* at p. 668.) With the court's permission, the deputy district attorney undertook the inquiry to determine the defendant's ability to defend himself. During this colloquy, the defendant stated he was willing to represent himself if he were permitted the use of the law library. Later, the defendant refused to defend himself because he had not been provided access to the library; the trial ended in his conviction. (*Id.* at pp. 668-669.) On appeal, this Court reversed because there was no constitutionally effective waiver of the defendant's right to counsel. (*Id.* at p. 670.) The record clearly established that the "defendant's willingness to proceed without counsel was predicated upon his mistaken belief, reinforced by the failure of the trial judge to promptly and unequivocally reject the condition imposed by [the] defendant, that he would be permitted some sort of meaningful access to and use of library facilities." (*Ibid.*) This Court further noted that the defendant's conduct throughout the trial was consistent with that belief, in that he made multiple requests for access to library facilities in order to prepare his case. (*Id.* at pp. 668-670.) Here, however, appellant was plainly made aware of the fact that he could not use the law library any longer, but could receive materials he needed from his counsel.

himself in 1976 on an attempted robbery charge and was acquitted. It also noted that he represented himself in 1976 on an assault with deadly weapon charge and was convicted. It finally noted that he represented himself again the same year on robbery and assault with deadly weapon charges and was convicted. (1RT 10.) Given appellant's substantial experience with the judicial system and his willingness to speak in court, this Court should conclude that he made a tactical decision not to represent himself absent return of his in jail pro per privileges. One way to interpret the record is that he hoped the court would not accept his substitution of counsel form so that he could "slyly save[ ] his *Faretta* ace to play triumphantly on appeal." (*Kenner*, *supra*, 223 Cal.App.3d at p. 62.)

Further evidence of appellant's deplorable gamesmanship were his requests to the investigator for jokes from the Internet and listings of literary agents, and subsequent representation to the court that he did not need an investigator. (1RT 37.) Simply put, appellant was playing the system. This "cunning strategy . . . should not be rewarded" on appeal (*Kenner*, *supra*, 223 Cal.App.3d at p. 62) and was even identified at the time of trial by the prosecution when it stated to the court that appellant was "playing a game." (1RT 57.) For these reasons, this Court should find that appellant voluntarily relinquished his *Faretta* rights.

IV. THE TRIAL COURT DID NOT ERR BY ALLOWING HELEN AND CHARLIE TRUJEQUE TO EXERCISE THEIR PRIVILEGES AGAINST SELF-INCRIMINATION

Appellant's fourth argument on appeal is that the trial court erred by allowing Helen and Charlie to make an overbroad, blanket assertion of the privilege against self-incrimination. He claims this error precluded him from presenting critical evidence in his defense and in mitigation of the death penalty, in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 99-125.)

Appellant's claim is without merit. Following an adequate inquiry, the trial court properly accepted Charlie's assertion of the privilege against self-incrimination. The trial court's acceptance of Helen's invocation of the privilege during the penalty phase in no way distorted the factfinding process by allowing her to give some testimony on a topic but assert the privilege as a bar to related questioning. Moreover, even if the trial court erred, the absence of Charlie's testimony and Helen's penalty-phase testimony did not prevent the jury from hearing evidence from which it could infer that Charlie and Helen wanted appellant to kill Facundo. And the alleged error did not prevent the jury from hearing evidence of appellant's familial history and childhood that might mitigate his penalty.

A. The Relevant Trial Court Proceedings

Following the testimony from Helen, the prosecution called Charlie to the stand. The defense informed the court that its understanding was Charlie would be asserting his Fifth Amendment privilege against self-incrimination. (6RT 1353.) Counsel for Charlie confirmed that Charlie had been advised to do so, and Charlie confirmed that he would be asserting the privilege. (6RT 1355.) The prosecution advised the court that the defense was intending to call Charlie as a witness during the penalty phase as well. (6RT 1355.) Charlie's counsel stated that on advice of counsel Charlie would assert the privilege then too. (6RT 1356.)

The defense argued that the privilege could not apply to shield Charlie from any charges relating to the solicitation of Facundo's murder or being an accessory after the fact because the statute of limitations as to both had expired. (6RT 1356-1357.) The defense added that it would inquire of Charlie about appellant and appellant's parents during the penalty phase. The court wished to confine the issue to the assertion of the privilege during the guilt phase for the time being. (6RT 1357.)

The defense then asserted that no privilege could be asserted regarding the appellant's letters or relationships with family members. According to the defense, to allow such an assertion of the privilege denied appellant the right to confront and cross-examine the witnesses against him. (6RT 1358-1359.) The defense further asserted that it wanted to ask Charlie about what he knew of Vicki's death and if he talked about her death with Helen. The court replied that it had already ruled that Vicki's death was a collateral matter and evidence regarding it was excluded under Evidence Code section 352. But it permitted the defense to ask Charlie about concerns he had regarding Charlene and her relationship with Facundo. (6RT 1359.) The defense argued that it should be permitted to ask Charlie if he knew Charlene was using PCP based on his own prior arrest for possession of narcotics. The court, however, ruled that no such questioning would be allowed. (6RT 1360.)

The prosecution advised the court that Charlie should not be allowed to pick and choose whether he was asserting the privilege as to specific questions. The court then ruled that it would not allow Charlie to testify at all based on his assertion of the privilege and the testimony previously received from Helen, because her testimony coupled with anything he could say might implicate him in the Facundo murder. (6RT 1361-1362.)

During the penalty phase, the defense advised the court that it would be calling Charlie as a witness. The prosecution reminded the court of the Fifth Amendment issues raised by Charlie's and Helen's court-appointed attorneys during the guilt phase. (10RT 2564.) The prosecution argued that because of Helen's testimony, more evidence existed of a link in a chain to self-incrimination than existed before she testified. For this reason, the prosecution believed that Helen and Charlie both had self-incrimination concerns even in the penalty phase. Charlie's court-appointed attorney agreed. (10RT 2565.)

The defense contended that it was only calling Charlie as a family historian to discuss subjects such as Adrian's relationship with appellant. It promised to refrain from asking any questions about events concerning Facundo. (10RT 2565.) The court decided to rule on the issue on a question-by-question basis as the defense questioned Charlie.

The defense then called Charlie and began to question him. The prosecution immediately objected that any further information elicited would potentially incriminate Charlie. Charlie's court-appointed attorney asserted Charlie's privilege against self-incrimination. He explained that he had reviewed Helen's testimony from the preliminary hearing and guilt phase, and that her testimony provided information that would tend to place Charlie in a position to be prosecuted. He added that any information, even as to appellant's family history, would have a tendency to show motive and bias, and would open the door for cross-examination by the prosecution. This cross-examination would then possibly enter into the areas of self-incrimination. (10RT 2567-2568.) The prosecution explained that the defense's theory was that Charlie induced appellant to kill Facundo because Facundo was beating Charlene and, thus, called on appellant as a family member whom he knew would understand what it meant to take care of the situation. As a result, evidence about the family relationships would incriminate him. (10RT 2569.)

The court determined from Charlie that he had spoken to counsel and intended to invoke his privilege against self-incrimination. (10RT 2569-2570.) The defense argued that Charlie's relationship as appellant's uncle was already before the jury. It then tried to ask Charlie if appellant had brothers and sisters, but Charlie's counsel objected again. The court then found that the questioning could potentially incriminate Charlie. (10RT 2571-2572.)

The defense asked the prosecution to grant Charlie immunity and argued that Charlie was the only one who could testify as to what Adrian was like. The court explained that although the question itself might not incriminate Charlie, follow-up questioning and cross-examination would show that familial relationships contributed to the Facundo killing. The defense argued that the jury had already heard about the familial connection to the killing from Helen. (10RT 2573.) But the court clarified that the issue was not if the jury heard similar evidence, but whose mouth the evidence came from and whether such evidence then exposed the witness to prosecution. (10RT 2574.) The prosecution added that the defense was exposing Charlie to criminal charges, including perjury. (10RT 2574.)

The defense tried to ask other questions, but Charlie continued to assert his privilege against self-incrimination. (10RT 2575-2577.) The jury then left the courtroom for further questioning of Charlie. Charlie was steadfast in his assertion of the privilege against self-incrimination. (10RT 2580-2584.) The defense then made an offer of proof that it was going to make Charlie the family historian and would also call Helen if the court deemed that Charlie was legally unavailable to testify. (10RT 2585.) The court found a potential nexus between establishing familial relationships and asking appellant to kill Facundo. (10RT 2586.)

The defense asked the court to declare Charlie legally unavailable so that under the family historian exception, Helen's hearsay testimony would be admissible. In other words, the defense wanted to elicit testimony from Helen regarding what Charlie told her about the familial relationships. The defense claimed she could not assert her privilege against incrimination as to such information. (10RT 2588.)

The prosecution noted that the defense had indicated that Helen perjured herself during the guilt phase. (10RT 2589.) The defense had told the prosecution it would speak with the District Attorney about having

Helen charged with perjury if the prosecution did not charge her. (10RT 2590.) The prosecution added that Helen's counsel also was concerned about Helen committing perjury and that the privilege against incrimination was even more applicable in light of more facts that had come out. The court inquired of the prosecution whether Helen had waived the privilege, and the prosecution said she had not in terms of a potential perjury charge. (10RT 2590.) The prosecution also informed the court that it had provided the defense with the name and address of Patricia Perez, who could provide a family history if called as a witness. (10RT 2593.)

Helen's counsel stated the defense blindsided them by presenting a document showing Helen visited appellant while in state custody contrary to her testimony. Counsel added that she feared the conflicting testimony could incriminate Helen and open her to the possibility of being prosecuted. (10RT 2593-2594.) The court inquired of counsel whether Helen intended to invoke the privilege against self-incrimination as to questions pertaining to familial relationships. (10RT 2594-2595.) Helen's counsel said she would, and the defense argued that questions about familial history could not incriminate Helen or Charlie. (10RT 2595-2596.) Charlie's counsel then added that he would invoke the spousal/marital communication privilege if Helen was questioned about conversations Charlie had with her. (10RT 2598.)

B. The Applicable Law

The principle that a witness may not be compelled to incriminate himself is a "bedrock principle" of American law embedded in the federal and state Constitutions. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.) A witness may properly assert the privilege if he has "'reasonable cause to apprehend danger from a direct answer.' [Citations.]" (*Ibid.*) The privilege is liberally interpreted. A witness may not avoid testifying simply by stating that to do so would be incriminating. However, "'[t]o sustain the

privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [Citation.]" (*Ibid.*) The assertion of the privilege must be allowed unless after careful consideration of all the circumstances the answers sought "cannot possibly" have a tendency to incriminate. (*Id.* at pp. 304-305; see also Evid. Code, § 404.)

In deciding whether the privilege is properly invoked, a court is not permitted to consider the likelihood of an actual prosecution in which the witness's statements would be offered. The sole question is whether the answers sought might tend to incriminate the witness. (*Seijas, supra,* 36 Cal.4th at p. 305.) It is not even necessary that the answers sought would incriminate the witness. It is enough that the witness "had reasonable cause to apprehend danger from the testimony." (*Id.* at p. 306.) A court may not be skeptical about a witness's apprehension that the testimony sought would be incriminating. The court "must . . . be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry." (*Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 326-327, fn. 9; italics omitted; abrogated on different grounds in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 370–372.) In addition, a witness may be able to assert a valid Fifth Amendment privilege with respect to a criminal offense at issue in a trial, notwithstanding that the witness is not a defendant in the case in which she is invoking the privilege. (*People v. Cudjo* (1993) 6 Cal.4th 585, 617; *People v. Mincey* (1992) 2 Cal.4th 408, 441.)

In reviewing a trial court's ruling on a witness's assertion of the privilege against self-incrimination, an appellate court views its factual determinations deferentially but independently reviews the ultimate issue of

whether the privilege was properly invoked. (*Seijas*, *supra*, 36 Cal.4th at p. 304.)

C. The Trial Court Did Not Err When It Allowed Charlie To Invoke His Privilege Against Self-Incrimination

Contrary to appellant's assertion, the trial court did not improperly abdicate its responsibility to conduct an inquiry into Charlie's invocation of his privilege against self-incrimination. Furthermore, the court did not improperly allow him to invoke it. Although the court should make a particularized inquiry as to whether a claim of privilege is well founded (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 428), to approve invocation of the privilege "'it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" (*Cudjo*, *supra*, 6 Cal.4th at p. 617, quoting *Hoffman v. United States* (1951) 341 U.S. 479, 486 [71 S.Ct. 814, 95 L.Ed. 1118].) Innocent persons, as well as the guilty, are entitled to invoke the privilege. As the high court has declared, "'[t]he privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'" (*Grunewald v. United States* (1957) 353 U.S. 391, 421 [77 S.Ct. 963, 1 L.Ed.2d 931]; see also Ratner, Consequences of Exercising the Privilege Against Self–Incrimination (1957) 24 U.Chi.L.Rev. 472, 472-473.) Here, the court exercised its discretion based on the context at the time Charlie was called and following a sufficient inquiry.

The court did not blindly accept Charlie's assertion of the privilege during the guilt phase. Counsel was appointed for Charlie and confirmed for the court that he would assert the privilege. (6RT 1355.) The court then explored Charlie's assertion by hearing argument from the parties. Based on the defense's assertion that the privilege could not apply to shield

Charlie from any charges relating to the solicitation of Facundo's murder or being an accessory after the fact, it was apparent to the court that the defense did not intend to confine the scope of any questioning to avoid a suggestion that Charlie solicited the murder or acted as an accessory. (6RT 1356-1357.) The court further learned that the defense intended to inquire about Charlie's relationship with appellant, Charlene's relationship with appellant, Charlie's knowledge of Vicki's death, Charlie's past use of PCP, Charlie's knowledge of Charlene's PCP use, and appellant's letters to Charlene. (6RT 1358-1360.) The court even initially found that the defense could ask Charlie about concerns he had regarding Charlene and her relationship with Facundo. (6RT 1359.) This in-depth exploration of the intended questioning and the defense's theories could hardly be characterized as insufficient, particularly in light of the court's already having heard Helen's testimony. It follows the real issue on appeal is whether the court's finding that Charlie could invoke the privilege was proper. As explained below, it was.

Based on the above inquiry and Helen's testimony, the court properly allowed Charlie to assert the privilege against self-incrimination at the guilt phase. (6RT 1361-1362.) Respondent agrees that a witness "may not invoke a blanket privilege against self-incrimination," and the trial court must determine whether the particular testimony sought to be elicited would "'support a conviction'" or "'furnish a link in the chain of evidence needed to prosecute the witness' [citation] . . . ." (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 308.) But in the present case, the trial court was not required to do any more than was done, given the obvious intent of Charlie expressed during questioning to invoke the privilege to all questions about the Facundo murder. Equally obvious was the circumstance that at least a link in the chain of evidence of guilt would have been furnished if the defense elicited any testimony from Charlie, thereby

causing him to waive his privilege with respect to all matters to which he testified expressly or impliedly on direct examination or were relevant to impeach his credibility as a witness. (See *Harrison v. United States* (1968) 392 U.S. 219, 222 [88 S.Ct. 2008, 20 L.Ed.2d 1047]; *People v. Malone* (2003) 112 Cal.App.4th 1241, 1245; *People v. Humiston* (1993) 20 Cal.App.4th 460, 474; *People v. Harris* (1992) 8 Cal.App.4th 104, 109.)

Any testimony given by Charlie that recounted his relationship with appellant, his relationship with Charlene, his concerns about Facundo, his concerns about Charlene's drug use due to her relationship with Facundo, and his discussions with appellant could have provided a link in the chain of evidence tending to incriminate him as an accessory to the murder or solicitor of the murder. (*People v. Lucas* (1995) 12 Cal.4th 415, 455.) Given Helen's testimony, it was already apparent that appellant had grown close to Charlene and had an affinity for her such that he saw himself as her protector. It was also apparent that Helen and Charlie shared grave concerns for Charlene due to Facundo's abuse of her, so much so that they wanted appellant to hurt Facundo. Because this evidence was before the jury, the court correctly found that Charlie had reason to fear that his own testimony might show that because he knew appellant cared for Charlene, he asked appellant to kill Facundo. "'Where, as here, it is apparent that the witness would have offered no testimony in response to questions posed, it is not improper for the trial court to determine that fact in advance and excuse the witness.' [Citation.]" (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 638.)

The court's permitting Charlie to invoke the privilege during the penalty phase was no less sound. Again, the court waited to reach its ruling until after the parties' positions on Charlie's testimony were set forth, including Charlie's counsel's argument that any information, even as to appellant's family history, would have a tendency to show motive and bias,

and would open the door for cross-examination by the prosecution into areas of self-incrimination. (10RT 2564-2565, 2567-2569.) The court began by handling the matter on a question-by-question basis as the defense questioned Charlie and ultimately found, as it did during the guilt phase, that Charlie's testimony, even about family relationships, could provide a link in the chain of evidence incriminating him. (10RT 2571-2573.) The court then tried questioning outside the presence of the jury before finding a potential nexus between establishing familial relationships and asking appellant to kill Facundo. (10RT 2575-2577, 2580-2586.) For the same reasons that this finding was appropriate during the guilt phase, it remained appropriate during the penalty phase.

Even assuming for the sake of argument that the trial court had erred in allowing Charlie to assert the privilege against self-incrimination, the error would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) As detailed above, the jury already learned from Helen that she and Charlie were extremely concerned about Charlene's relationship with Facundo, not only because she began using drugs with Facundo, but also because Facundo was beating her. (5RT 1251-1253; 6RT 1296-1299; 7RT 1624.) The jury further learned that Charlie believed he had the type of relationship with appellant that he could ask appellant to take care of Facundo, perhaps given appellant's purported love for Charlene. (6RT 1288, 1303-1304, 1308, 1490; 7RT 1639.) During the penalty phase, the jury received a detailed history of appellant's family, including his extremely challenging upbringing and troubled youth, from family members and probation officers well-equipped to provide such information. (See Arg. XIII, *post.*) The absence of Charlie's testimony did not prevent the jury from hearing evidence from which it could infer that Charles and Helen wanted appellant to kill Facundo. (7RT 1593.) And the alleged error did not prevent the jury

from hearing evidence of appellant's familial history and childhood that might mitigate his penalty. All the jury was prevented from hearing was the same type of testimony from Charlie's mouth. Given the jury's conviction of appellant and finding that the death penalty was appropriate with the same information before it, it follows that any purported error was harmless beyond a reasonable doubt.

D. The Trial Court Did Not Err When It Allowed Helen To Invoke Her Privilege Against Self-Incrimination During the Penalty Phase

Appellant's contention that Helen could not assert her privilege against self-incrimination during the penalty phase because she testified during the guilt phase is unsupported by the law. A nonparty witness may elect to waive his or her privilege against self-incrimination. In addition, in some instances a waiver may be implied when a witness has made a partial disclosure of incriminating facts.

> It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. [Citation.] The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross-examination." [Citation.]

(*Mitchell v. United States* (1999) 526 U.S. 314, 321 [119 S.Ct. 1307, 143 L.Ed.2d 424]; see *Rogers v. United States* (1951) 340 U.S. 367, 374 [71 S.Ct. 438, 95 L.Ed. 344] [a witness may not invoke the privilege as to details after voluntarily disclosing incriminating facts].) In other words, a witness who chooses to make a statement or testify waives the privilege against compulsory self-incrimination only "'with respect to the testimony he gives . . . .' [Citation.]" (*People v. Malone* (2003) 112 Cal.App.4th 1241, 1245.)

The question, therefore, is not whether Helen was permitted to invoke the privilege during the penalty phase, because she was allowed to do so. Rather, the question is whether her waiver of the privilege during the guilt phase was so broad that it encompassed the testimony the defense sought to elicit during the penalty phase. It did not.

As detailed above, Helen did not invoke the privilege against self-incrimination during the guilt phase. The defense, thus, was permitted to and did cross-examine Helen regarding any and all relevant details of the subjects she testified to on direct examination. But this questioning did not include the subjects the defense wished to question Helen about during the penalty phase. Appellant concedes that the defense only intended to inquire about "Trujeque family history and particularly about appellant's father." (AOB 121.) Helen never testified as to these subjects during the guilt phase. As a result, she did not waive the privilege as to them. Her invocation of the privilege in no way distorted the factfinding process by allowing her to give some testimony on a topic but assert the privilege as a bar to related questioning. (See *People v. Williams* (2008) 43 Cal.4th 584, 617-618.) In light of the foregoing, Helen did not waive the privilege with respect to the penalty phase, and the privilege was properly invoked for the same reasons set forth regarding Charles. Similarly, even if it was error to permit Helen to invoke the privilege, the error would have been harmless for the same reasons set forth regarding Charles.

V. THE EVIDENCE DID NOT SUPPORT A JURY INSTRUCTION ON IMPERFECT DEFENSE OF ANOTHER OR NECESSITY AS TO THE FACUNDO MURDER

Appellant's fifth argument on appeal is that the trial court erred by refusing to give his requested instructions on imperfect defense of another or necessity as to the Facundo murder, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 126-143.) Appellant's

argument is entirely without merit. First, he was not entitled to an instruction on imperfect defense of another because no evidence existed that would show appellant actually believed that Facundo posed an imminent danger or threat of great bodily harm to anyone. Second, he was equally unentitled to an instruction on necessity because the instruction is inapplicable to murder and the evidence in no way showed that appellant was without any legal alternatives to the killing due to an emergency situation.

A. The Relevant Trial Court Proceedings

The defense requested that the court instruct the jury with CALJIC No. 4.43 regarding necessity. (6RT 1556-1557.) The prosecution objected on the basis that there was no evidence of imminent injury caused by Facundo. Instead, the evidence showed that Facundo was doing drugs, and appellant was waiting for the right time to strike his victim. (6RT 1557-1558.) The court declined to give the instruction because it found no evidence Facundo posed an immediate risk of harm. It also found that there was a reasonable legal alternative available to appellant other than killing Facundo and that killing Facundo was disproportionate to the harm allegedly to be avoided, i.e., Facundo's hitting Charlene. (7RT 1713, 1730.)

The defense also requested CALJIC No. 5.13 regarding defense of another and related instructions. (6RT 1561.) The court stated that the totality of the evidence did not support the instructions. The evidence showed that appellant had no present fear of Facundo and, even if he did, the fear did not rise to the level of committing homicide. (6RT 1561-1562.) The court added that the evidence showed no threat of imminent danger. As a result, the court declined to give CALJIC Nos. 5.10, 5.13, 5.14, 5.15, 5.16, and 5.17. (6RT 1565; 7RT 1714-1719, 1730.)

B. The Evidence Did Not Support An Instruction On Imperfect Self-Defense Because The Evidence Did Not Show Facundo Presented An Imminent Threat Or Danger Of Physical Harm

Appellant incorrectly argues that the trial court should have instructed on imperfect self-defense of another. He has failed to show that substantial evidence supported a finding that appellant actually (but unreasonably) believed that Facundo presented an imminent threat or danger of physical harm. Although a trial court must give a requested instruction on a defense that is supported by substantial evidence (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685; *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1346), the court need not instruct the jury on a defense or a lesser offense for which there is no substantial evidence, even if the defendant requests the instruction (*People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355). "Evidence is substantial if a reasonable jury could find the existence of the particular facts underlying the instruction." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1426.) An appellate court reviews a trial court's decision not to give a requested instruction de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

California recognizes the doctrine of imperfect defense of another. (*People v. Randle* (2005) 35 Cal.4th 987, 994-1001.) Imperfect self-defense is the actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) Similarly, "one who kills in imperfect defense of others—in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury—is guilty only of manslaughter." (*Randle, supra*, 35 Cal.4th at p. 997.) The threat or danger defended against must be imminent, creating danger of harm at that very instant. (See *In re Christian S.* (1994) 7 Cal.4th 768, 783.) The

evidence at trial, including appellant's own admissions, flatly refutes this requirement of imminence.

Substantial evidence did not support the contentions that appellant either subjectively believed that he had to defend Charlene or that any imminent peril to Charlene existed. The evidence actually showed that appellant planned to kill Facundo all along, irrespective of any imminent threat or peril. He had already planned to go to Charlie's and Helen's home on the evening of the murder to encounter Facundo. (5RT 1022.) Charlene could tell from this plan that appellant intended to harm Facundo. (5RT 1023.) Appellant even hinted about the plan to Charlie when he called Charlie outside to speak. (5RT 1259.) And the next step of appellant's plan to kill was to ask Facundo for a ride. Any contention that appellant believed Facundo presented an imminent threat or danger of physical harm is preposterous given his willingness to speak with Facundo and then voluntarily ask for a ride and get in a vehicle with Facundo. (5RT 1023, 1025.) Furthermore, nothing at all occurred between the time appellant met Facundo and his killing of Facundo that in any way created an imminent danger or threat. In fact, Facundo was so profoundly under the influence of narcotics that he could not even operate a vehicle and had to request that Charlene drive. (5RT 1026.) Moreover, appellant went out of his way to approach Facundo so that he could stab Facundo, who was not acting in a threatening manner at the time. (5RT 1028.) This conduct also refutes any suggestion that appellant believed Facundo was dangerous at the time. "'[A] quarrel which [a defendant] has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger.'" (*People v. Holt* (1944) 25 Cal.2d 59, 65-66.)

Appellant's admissions provide even more persuasive evidence that the instruction was wholly inapplicable. Appellant testified that he killed Facundo because Facundo deserved it. He never mentioned any imminent harm. He, instead, was relying on past beatings to justify his conduct. (7RT 1595.) He was so motivated by past behavior rather than anything that occurred at the time of the killing, that he gathered a knife for the purpose of killing Facundo before ever going to Charlie's and Helen's home to meet Facundo. (7RT 1651.) Appellant had even been thinking about the killing since being released from prison. (7RT 1652.) Previous threats are not considered imminent, nor do they provide justification for a deadly assault. (*People v. Scoggins* (1869) 37 Cal. 676, 683; *Curtis, supra,* 30 Cal.App.4th at p. 1359.) No evidence that appellant had to respond immediately with deadly force to prevent any harm existed. Instead, appellant testified that he could have even waited until later to kill Facundo, but wanted to take advantage of the opportunity to strike while Facundo was defenseless due to drug use.[22] (7RT 1647; 31CT 8977.)

Appellant's own defense undermined his claim of instructional error. He claimed both in recorded confessions and at trial that he was paid to kill Facundo. (6RT 1495.) By his own theory, he contended that he killed Facundo not in response to an imminent harm or danger, but rather to perform his contractual duties under the alleged murder-for-hire agreement. (7RT 1591.) In fact, he did not even ask Charlie why Charlie allegedly wanted Facundo killed, which additionally demonstrates that imminent danger had no bearing on the killing. (7RT 1593.)

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[22] "There can be no reasonable ground for apprehending harm in the absence of some overt act or physical demonstration." (*People v. Duchon* (1958) 165 Cal.App.2d 690, 693; see also *People v. Mayes* (1968) 262 Cal.App.2d 195 ["no provocative act which does not amount to a threat or attempt to inflict injury . . . [is] sufficient to justify a battery"].)

Given the above state of the evidence, to posit that appellant had an actual but unreasonable belief in the need to defend Charlene with lethal force would be pure speculation plainly contradicted by the evidence adduced at trial. """[S]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 116.) Appellant, nevertheless, contends that *Randle*, *supra*, 35 Cal.4th at page 987, supports his claim of instructional error. The facts of *Randle*, however, are easily distinguishable from those here.

In *Randle*, the victim Robinson confronted the defendant Randle while the latter was in the process of stealing a stereo speaker from a car owned by Robinson's cousin, Lambert. Robinson told the defendant that he was going to "beat your ass." The defendant then fired a gun several times without hitting Robinson, and fled on foot with his cousin, Bryon W., carrying a backpack full of Lambert's stereo equipment. (*Randle*, *supra*, 35 Cal.4th at p. 991.) Robinson went to get his own cousin and the two men got into a truck to pursue the defendant and Bryon. They caught Bryon but not the defendant, and the two took turns severely beating Bryon. After they recovered the stolen stereo equipment and placed it in their truck, Robinson returned to beat Bryon, while his cousin drove off to get Lambert's father. All the while, Bryon was "hollering his lungs out." The defendant came on the scene and shouted, "Get off my cousin," but Robinson continued beating Bryon. The defendant then opened fire, killing Robinson. Bryon testified that he believed the defendant had saved his life. And the defendant testified that "he fired his gun to make the [victim] stop beating Bryon." (*Id.* at pp. 991-992.) In short, in *Randle*, there was evidence not only that Bryon faced imminent harm because the victim showed no signs of stopping the beating, but also testimony that the defendant fired his gun to stop the beating and that Bryon believed the

defendant had saved his life. The facts of the instant case are clearly distinguishable.

Although it is obvious from the evidence that the instruction was not only unnecessary but completely inapplicable, even if it was error to omit it, such error would have been harmless. "Any error in failing to instruct on imperfect [self-defense or] defense of others is state law error alone, and thus subject, under article VI, section 13 of the California Constitution, to the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . ." (*Randle, supra*, 35 Cal.4th at p. 1003.) Under *Watson*, a reviewing court """evaluate[s] whether 'it is reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error.'"" [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 67.)

As shown above, a finding of imperfect defense of another would have been based on rank speculation. Appellant's own statements and testimony contradicted such finding. Thus, it is readily apparent that had the jury received the imperfect defense of another instruction, the jury would have rejected it outright and still convicted appellant of murder. Appellant's claim, therefore, fails in every conceivable way.

C. The Evidence Did Not Support An Instruction On Necessity Because The Evidence Did Not Show That Appellant Had No Adequate Alternative To The Killing Or That An Emergency Situation Existed

Appellant's argument that the trial court also should have instructed the jury on the defense of necessity is equally unavailing. The necessity defense is founded upon public policy considerations and "involves a determination that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. [Citation.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 900-901.)

> To justify an instruction on the defense of necessity, there must be evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. [Citations.]

(*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035.)

As a preliminary matter, murdering someone cannot be done out of "necessity," because the harm caused is at least equivalent to the harm avoided. (*People v. Anderson* (2002) 28 Cal.4th 767, 772-781 [explaining why duress cannot excuse murder]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100-101 ["'[i]t is not acceptable for a defendant to decide that it is necessary to kill an innocent person in order that he [or she] may live'"]; accord *United States v. Holmes* (C.C.E.D. Pa. 1842) 26 Fed. Cas. 360 [captain tossed passengers off of life boat to preserve lives of crew; conviction affirmed]; *The Queen v. Dudley & Stephens* (1884) 14 Q.B. 273 [15 Cox C.C. 624] [sailors in life boat killed boy for nourishment; convictions affirmed].) In addition, there was no evidence that Facundo intended to kill Charlene. At most, there was evidence that he had beaten her in the past. Thus, appellant created a greater danger that the one avoided. The instruction, thus, was inapplicable even if appellant could meet the other above-listed elements.

Regardless, appellant cannot show that the evidence satisfies the other requisite elements for the giving of a necessity instruction. A defendant is not entitled to a claim of necessity unless, given the imminence of the threat, violation of the law was the only reasonable alternative. (*United States v. Bailey* (1980) 444 U.S. 394, 410-411 [100 S.Ct. 624, 62 L.Ed.2d 575; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538-1539.) If there was a reasonable alternative to violating the law, the defense will fail.

(*Ibid.*) In other words, the necessity defense does not arise from a "choice" of several sources of action, but is instead based on a real emergency. (*United States v. Dorrell* (9th Cir. 1985) 758 F.2d 427, 431; see also *People v. Patrick* (1981) 126 Cal.App.3d 952, 960 ["a well-established central element [of the necessity defense] involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent"].) As detailed above, the evidence in no way supported a finding of an imminent and greater harm or emergency situation. If anything, it was Facundo who could have acted out of necessity had he been able to thwart appellant's brutal premeditated murder. As noted above, appellant armed himself in advance to accomplish a planned attack rather than respond to an imminent harm. It is well-established that arming for self-defense against a future anticipated attack is no defense to the crime. (*People v. Velasquez* (1984) 158 Cal.App.3d 418, 420.) Even had the jury accepted that Charlene would be imperiled by remaining with Facundo, that evidence did not establish that appellant considered the future peril to pose an "emergency" situation. (Cf. *In re Eichorn* (1998) 69 Cal.App.4th 382, 389.)

In addition,

> self-help by lawbreaking and violence cannot be countenanced where the alleged danger is merely speculative and the lawbreaker has made no attempt to enlist law enforcement on his side. "[T]he defense of necessity is inappropriate where it would encourage rather than deter violence. Violence justified in the name of preempting some future, necessarily speculative threat to life is the greater, not the lesser evil." [Citation].

(*People v. Miceli* (2002) 104 Cal.App.4th 256, 268.) Appellant cannot dispute the fact that he never attempted to enlist law enforcement or even to encourage Charlene to do so in response to the past abuse at the hands of Facundo. His claim fails for this reason as well. To find otherwise would

sanction vigilantism and murder as appropriate remedies for past domestic violence.

Finally, for the same reasons that the failure to instruct the jury with imperfect defense of another would have been a harmless error, so too would the failure of the court to instruct with necessity. In addition, a necessity instruction would have been confusing as it would have stated that necessity was a defense to the crime, but the crime was murder to which necessity is not a defense. It is not error to refuse confusing or incomplete instructions. (See *People v. Diedrich* (1982) 31 Cal.3d 263, 286; *People v. Campanella* (1941) 46 Cal.App.2d 697, 703.) This Court, therefore, should reject appellant's claims of instructional error as to the Facundo killing.

VI. THE EVIDENCE DID NOT SUPPORT A JURY INSTRUCTION ON IMPERFECT DEFENSE OF ANOTHER OR NECESSITY AS TO THE APODACA MURDER

Appellant's sixth argument on appeal is that the trial court erred by refusing to instruct on imperfect defense of another and necessity as to the Apodaca murder. (AOB 144-146.) For the same reasons this claim fails as to the Facundo murder, it also fails as to the Apodaca murder.

First, with respect to imperfect defense of another, the evidence showed that Salazar provoked the altercation with Apodaca, and that appellant knew that Salazar intended to kill Apodaca long before the altercation occurred. Just as the Facundo killing was the result of a preconceived plan, so too was the Apodaca killing. Appellant, himself, even admitted that he was not trying to stop the fight when he involved himself by stabbing Apodaca. As he admitted, he knew what he was doing and meant to kill Apodaca in accordance with Salazar's request to assist Salazar in doing so. (7RT 1625; 31CT 8990.) He did not stab Apodaca at the time when Apodaca was getting the best of the fight with Salazar.

Appellant, instead, waited until Salazar was on top of Apodaca before helping Salazar kill Apodaca. (31CT 8991.) The provokers and instigators of the altercation that preceded the death should not be allowed the protection that self-defense may afford. (*Holt*, *supra*, 25 Cal.2d at pp. 65-66.)

Second, with respect to necessity, again, the defense and related instruction do not apply to murder. Appellant also cannot show that he had no reasonable legal alternative other than helping stab Apodaca. Needless to say, appellant could have attempted to stop the altercation or to call for help.

Third, any error in failing to instruct the jury with either instruction would have been harmless. Like with the Facundo murder, the jury would have rejected both defense theories had it received the instructions based on the absence of evidence to support the instructions' elements.

VII. THE TRIAL COURT DID NOT ERR BY EXCLUDING THE DETAILS OF VICKI'S DEATH BECAUSE THE COLLATERAL MATTER WAS INDISPUTABLY UNRELATED TO AND UNNECESSARY TO ESTABLISH APPELLANT'S MENTAL STATE AND MOTIVE IN THE FACUNDO MURDER

Appellant's seventh argument on appeal is that the trial court erred by improperly preventing the defense from eliciting evidence that appellant's cousin Vicki was killed by an abusive boyfriend. Appellant contends such evidence was material to explain his perception of the danger Facundo posed to Charlene. (AOB 147-154.) His contention is unsupported by his own admissions and other evidence establishing that Vicki's murder did not impact his mental state and motive in the Facundo murder. More importantly, absent the evidence, he was still able to present evidence that he felt he had to protect Charlene from grave danger due to Facundo's abuse. His defense was not harmed by the exclusion of the evidence. The

trial court, instead, made certain that Helen, who lacked personal knowledge of the cause of Vicki's death and never discussed the matter with appellant in connection with Facundo, did not confuse the jury with evidence lacking the requisite foundation for admission.

A. The Relevant Trial Court Proceedings

During the cross-examination of Helen, the defense attempted to elicit whether Helen was aware of another relative having been killed by a boyfriend. The prosecution objected to the entire line of questioning regarding Charlie's niece Vicki having been killed by a boyfriend. The court sustained the prosecution's objections. (6RT 1324.)

The defense subsequently wanted to inquire if Helen told appellant about Vicki and her murder. It was the defense's position that Helen's testimony on the subject would be admissible as to Helen's state of mind and potential motive to lie about whether she wanted appellant to kill Facundo. (6RT 1329-1330.) The court responded that Helen had already admitted that she thought Charlene was in danger due to Facundo's abuse. (6RT 1330.) The prosecution interjected that Helen was not even aware of the details of Vicki's killing, but the defense disagreed. (6RT 1331.) The court, nevertheless, sustained the prosecution's objections and refused to permit the questioning under Evidence Code section 352. (6RT 1333.)

Later in the penalty phase, the defense called Helen to testify despite her counsel's advising the court that Helen had been advised to assert her privilege against self-incrimination. (10RT 2659, 2661.) The defense attempted to question Helen, but she asserted the privilege as to each question. (10RT 2661-2662.)

B. The Trial Court Properly Excluded The Evidence Because It Was Irrelevant And Would Have Unduly Prejudiced And Confused The Jury While Needlessly Consuming Judicial Resources

Contrary to appellant's theory, evidence of the details of Vicki's death was properly excluded and unnecessary to establish appellant's mental state concerning the threat Facundo posed to Charlene. All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. (Evid. Code, § 351.) Evidence Code section 210 states that "relevant evidence" is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) Relevant evidence may be excluded pursuant to Evidence Code section 352 if the trial court in its discretion concludes "'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069-1070.) A trial court's decision to exclude evidence pursuant to Evidence Code section 352 will not be overturned absent an abuse of that discretion. (*Id.* at p. 1070.)

Here, the trial court appropriately excluded the evidence because it was undisputed that appellant's killing of Facundo had nothing to do with the death of his cousin Vicki. First, Helen had no idea how or why Vicki was murdered. (6RT 1341.) It strains credulity to explain how she could have then testified on cross-examination about Vicki's purportedly being murdered by her abusive boyfriend. She lacked the personal knowledge that would have permitted her to answer the defense's questions, and the defense was unable to lay a foundation to determine otherwise. Second, Helen testified that she and Charlie never mentioned Vicki or her death to appellant when they discussed Facundo's abuse of Charlene with him.

(6RT 1347.) So not only was Helen incapable of explaining the circumstances of Vicki's death, but also her knowledge of them was irrelevant because she did not discuss them with appellant.

Appellant did not testify to the contrary. He in no way suggested either on the stand or during his recorded confession that Vicki's murder had anything to do with his killing Facundo. He also did not suggest that Helen and Charlie ever brought up Vicki's murder in connection with Facundo. His omission of any discussion of Vicki was consistent with Helen's testimony that appellant never mentioned Vicki to her or Charlie after he killed Facundo. (6RT 1346.) It was additionally consistent with Charlene's testimony that appellant never mentioned Vicki when she visited him in jail and asked why he killed Facundo. (5RT 1037.) Simply put, Helen was not the appropriate witness to discuss Vicki's death, and the details of Vicki's death were irrelevant and prejudicial because there was no evidence at all that they factored into Facundo's murder.

More importantly, appellant's claim that he needed to put evidence of Vicki's murder and Helen's knowledge of it before the jury to establish "that Vicki's murder made Charlie and [Helen] . . . even more afraid that Facundo would kill their daughter and that they had discussed Vicki's fate and their fear with appellant, thus affecting his state of mind concerning the threat that Max Facundo posed to his cousin Charlene" is preposterous. (AOB 147.) Ample evidence that appellant believed Facundo would harm and possibly even kill Charlene, particularly due to his discussions with Helen and Charlie about Facundo, was before the jury.

First, the jury learned that Charlene told appellant that Facundo was a gang member. Given that appellant had been a gang member, the obvious inference is that Facundo's gang status informed appellant that Facundo was violent and dangerous. (5RT 1046.) This inference was confirmed by appellant's seeing the injuries to Charlene, which Facundo caused, first

hand. (5RT 1022-1023.) Second, the jury learned that appellant had stated in a letter to Charlene that he was not going to let anyone hurt her. (6RT 1289.) From this evidence, the jury was aware of appellant's state of mind concerning his fear of her being harmed by someone, including Facundo. Third, the jury learned through Helen's testimony that appellant had stated his motivation for killing Facundo was so that she and Charlie would no longer have to worry about what might happen to Charlene. (6RT 1326.) From this evidence, the jury was aware that Charlie and Helen feared for Charlene's life, and this fear motivated appellant to kill Facundo. Fourth, the jury heard from appellant that Charlie had asked him to kill Facundo because Facundo was beating Charlene. (7RT 1590-1591, 1593.) From this evidence, the jury was again made aware that Charlene's parents were worried about her and shared their concern with appellant. Fifth, the jury also learned from appellant that he had killed Facundo because Facundo deserved to die for beating Charlene. (7RT 1595.) No other evidence could have made his state of mind more clear to the jury.

Furthermore, the jury heard from appellant's own mouth that Vicki was murdered by her own boyfriend. (7RT 1608.) As such, it cannot be said that he was deprived of the right to put the evidence before the jury in support of his defense. What he was instead deprived of was the right to muddy a trial with unsupported theories, especially from the mouths of witnesses without personal knowledge of the matters, that would confuse a jury and consume judicial resources by creating a trial within in a trial as to the cause and circumstances of Vicki's death. Appellant's own admission that he had no idea whether Vicki's relationship with her boyfriend was like that of Charlene's with Facundo demonstrates that the testimony regarding Vicki should not have gone into any greater detail than it already had. (7RT 1609.)

Despite the complete absence of a link between Vicki's death and appellant's murder of Facundo, appellant attempts to draw an analogy to the facts of *People v. Minifie* (1996) 13 Cal.4th 1055, in support of his claim that the trial court erred in excluding the evidence. (AOB 150-151.) His attempt is futile.

In *Minifie*, defense counsel argued that evidence of violent threats of the assault victim's associates towards the defendant was at the core of the defendant's self-defense claim. Our Supreme Court held that the evidence had been improperly excluded. It found as follows:

> [the] excluded evidence was central to the defense. Without it, defense counsel could argue to the jury only that [the victim] was a friend of a person [the] defendant had killed, and [the] defendant thought the unarmed [victim] was about to hit him with a crutch. The excluded evidence would have strengthened the defense considerably: [the] defendant could have argued that [the victim's] "crowd" had in fact killed his friend and threatened that [the] defendant would be "next." The jury might find these circumstances justified a stronger reaction to [the victim's] punch than would otherwise be reasonable.

(*Minifie, supra*, 13 Cal.4th at p. 1071.) Our Supreme Court cautioned, however, that such threats are not admitted "categorically, but . . . may be considered on a case-by-case basis. The . . . weaker the logical link between them and the defendant's actions, the more the court may be justified in excluding them." (*Id.* at p. 1070.)

Unlike the threats in *Minifie*, no connection at all existed between Vicki's killing and the Facundo murder. Also, unlike in *Minifie*, appellant was not entirely deprived of arguing a defense or suggesting by inference that Vicki's killing affected his state of mind, due to additional exclusion of the evidence about Vicki's death. He, instead, was prevented from eliciting facts about a killing from a witness who lacked personal knowledge. Had appellant proffered any evidence that Helen was personally aware of how Vicki was killed and raised Vicki's killing with appellant when discussing

Facundo, the trial court likely would have overruled the objections. The trial court, therefore, did not abuse its discretion in excluding the evidence.

Even if it was error to exclude the evidence, such error would have been harmless. As an initial matter, appellant contends that the harmless-beyond-a-reasonable-doubt standard of *Chapman*, *supra*, 386 U.S. at p. 24, is applicable here. (AOB 152-153.) He is incorrect. "Where a trial court's erroneous ruling is not a refusal to allow a defendant to present a defense, but only rejects certain evidence concerning the defense, the error is nonconstitutional and is analyzed for prejudice under *Watson* . . . ." (*People v. Garcia* (2008) 160 Cal.App.4th 124, 133; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) Here, the trial court did not refuse to allow appellant to present a defense regarding his fear that Facundo might harm or even kill Charlene. Rather, the court refused to allow appellant to present inadmissible evidence in support of such a defense and required him to present some evidence that there was a link between Vicki's death and Facundo's murder. The *Watson* harmless error standard is applicable as a result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Applying the *Watson* standard here, appellant has not shown that it is reasonably probable he would have obtained a more favorable result without the alleged error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) As set forth above in Argument III.C., overwhelming evidence supported appellant's conviction for the Facundo murder. The jury accepted this evidence even though it was plainly aware of Helen's and Charlie's fear of Facundo, and appellant's concern for what Facundo was doing to Charlene. What is more, appellant was still able to inform the jury that Vicki was murdered by her boyfriend. With this evidence in mind, the jury could have drawn an inference that the murder influenced appellant, yet it still convicted him. The evidence, therefore, overwhelmingly supported appellant's conviction and a finding that admission of the evidence at issue

would not have impacted the jury's verdict. On the above grounds, appellant's claim is devoid of merit.

VIII.. APPELLANT HAS FAILED TO SHOW THAT HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE ADMISSION OF DR. CARPENTER'S TESTIMONY AND REGARDLESS, ANY ERROR IN THE ADMISSION WAS HARMLESS

Appellant's eighth argument on appeal is that the trial court improperly admitted the expert testimony of a pathologist. Relying on *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S. Ct. 2527, 174 L. Ed. 2d 314], and *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S. Ct. 2705, 180 L. Ed. 2d 610], he claims that the pathologist's testimony should not have been admitted because the pathologist did not actually perform the autopsies on the decedents. As such, he contends that the admission of the pathologist's testimony was in violation of the Confrontation Clause. (AOB 155-176.) As fully briefed below, this Court recently rejected this argument in *People v. Dungo* (Oct. 15, 2012) 2012 WL 4856703. Moreover, any error in admitting the testimony was harmless given the overwhelming evidence supporting appellant's convictions, as well as the minimal influence the pathologist's testimony even had on the instant matter.

A. Appellant's Reliance on *Melendez-Diaz* and *Bullcoming* Is Unavailing In Light Of This Court's Holding In *Dungo*

Appellant's claim that Dr. Carpenter was not permitted to give expert opinions based on autopsy reports he did not prepare and autopsies he did not conduct is unavailing as this Court recently rejected an analogous claim in *Dungo*. There, the defendant was charged with murder, and the prosecution informed the trial court that the pathologist who performed the autopsy would not be called as an expert witness. The prosecution, instead,

was going to call a different forensic pathologist, even though it did not represent that the one who performed the autopsy was unavailable. The defendant objected, but the trial court overruled the objection and permitted the other pathologist to testify. (*Dungo*, *supra*, 2012 WL 4856703 at *2.)

At trial, the pathologist testified that he reviewed the autopsy report and photographs. He provided his conclusion as to the cause of death, and pointed out injuries to the victim that supported his conclusion. The pathologist did not testify as to the other pathologist's opinion regarding the cause of death. On cross-examination, the defense counsel inquired about the testifying pathologist's views of the cause of death. (*Dungo*, *supra*, 2012 WL 4856703 at *2.)

The defendant was convicted, but prevailed on his challenge on appeal to the admission of the pathologist's testimony on the basis that it violated the Confrontation Clause. The prosecution petitioned this Court for review, and this Court granted review. It confined its inquiry on review to whether the testifying expert's testimony about objective facts known to him from the autopsy report and photographs entitled the defendant to confront and cross-examine the pathologist who conducted the autopsy. (*Dungo*, *supra*, 2012 WL 4856703 at *3, *6.) This Court answered its inquiry by holding that the testifying witness's description of objective facts of the victim's body, which he derived from the autopsy report and photographs, did not give the defendant the right to confront and cross-examine the pathologist who conducted the autopsy. This Court based its holding on it findings that the facts related to the jury were not so formal and solemn to be considered testimonial under the Sixth Amendment, and that criminal investigation was not the primary purpose of recording the facts. As such, this Court held that the Court of Appeal erred because allowing the pathologist's testimony did not violate the Confrontation Clause. (*Id.* at p. 8.)

This Court should equally apply its reasoning in *Dungo* to the facts here. This case is not one in which the testifying expert was a mere conduit for forensic information prepared and analyzed by someone else. Like the testifying pathologist in *Dungo*, the main thrust of Dr. Carpenter's testimony expressed his independent interpretation of the autopsies Dr. Heuser and Dr. Reddy had performed, as well as his independent interpretation of the post-mortem photographs, based upon his knowledge and experience. (5RT 1164-1176, 1178-1214.) Dr. Carpenter's opinions in this case, thus, were reached and conveyed not on the basis of the nontestifying pathologists' testimonial statements or findings, but through his own independent assessment of the results of the autopsies, photographs, and other nontestimonial evidence. Appellant had a full opportunity to test Dr. Carpenter's opinions on cross-examination and to explore any weaknesses in his conclusions and any discrepancies in the evidence on which his assessments were premised. (See *Dungo*, *supra*, 2012 WL 4856703 at *3, *6, *8.) The facts here, therefore, are analogous to those in *Dungo*, and this Court should once again reject the argument that the pathologists who performed the autopsies must testify to satisfy the Confrontation Clause and that an expert witness may not provide his independent opinion based on a review of the autopsy report and photographs. Under *Dungo*, appellant is not entitled to relief on this claim.

B. Any Purported Error Was Harmless Given The Overwhelming Evidence Supporting The Verdicts And The Fact That The Autopsy Information Was Completely Unnecessary To Obtaining Such Verdicts

In any event, any alleged error in admitting Dr. Carpenter's testimony regarding the autopsies was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 18; *People v. Davis* (2009) 46 Cal.4th 539, 620 [applying *Chapman* to *Crawford* claim].) The *Chapman* harmless-error inquiry requires consideration of "the importance of the witness'

testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674.) As the majority stated in *Melendez-Diaz*:

> We of course express no view as to whether the error was harmless . . . . In connection with that determination, however, we disagree with the dissent's contention that only an analyst's testimony suffices to prove the fact that the substance is cocaine. Today's opinion, while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.

(*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542, fn. 14, citation, internal quotation marks, and brackets omitted.)

Here, Dr. Carpenter was entitled to rely on other forensic reports as the basis for his expert testimony. Expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. [Citations.]"

(*Ibid.*) Thus, Dr. Carpenter was allowed to give his own expert opinions about the victims' injuries and cause of death based on information or data set forth in the autopsy reports.

Moreover, to the extent Dr. Carpenter's testimony regarding the findings of the two other doctors who participated in the victims' autopsies ran afoul of the Sixth Amendment, it was not prejudicial. None of Dr.

Carpenter's conclusions (or any of the other physicians' conclusions) were in any way harmful to appellant's defense. Appellant did not challenge the cause of death as to Facundo or his participation in the murders. Rather, his counsel attempted to explain why appellant killed Facundo and helped kill Apodaca. And as already detailed above, appellant's testimony and confession flatly refuted any suggestion that he intended anything short of premeditated murder. Although he makes much of purported discrepancies and inconsistencies regarding which stab wound actually killed Apodaca, whether the wound appellant inflicted was the fatal one had no bearing on whether the jury could convict him of the murder as an aider and abettor. His convictions, therefore, were not established by Dr. Carpenter's testimony or the autopsies, and could have been obtained absent even a cursory reference to either. For all of the foregoing reasons, any error in admitting into evidence Dr. Carpenter's testimony regarding the findings of the two other doctors was harmless beyond a reasonable doubt.

IX. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION TO SEVER THE SPARTAN BURGERS ROBBERY FROM THE APODACA AND FACUNDO MURDERS

Appellant's ninth argument on appeal is that the trial court erroneously failed to sever the murder charges from the robbery charge. He claims the robbery charge was unrelated, and, thus, the failure to sever it was highly prejudicial and in violation of his right to a fair trial and a fair and reliable penalty determination. (AOB 177-190.) The trial court, however, did not err when it denied appellant's motion to sever the Spartan Burgers robbery from the Apodaca and Facundo murders.

The statutory requirements for joinder were met because robbery and murder are the same class of crime for purposes of section 954. The evidence of the murders was also cross-admissible to establish intent and refute appellant's defense theories in accordance with Evidence Code

section 1101. And even if the evidence was not cross-admissible, the trial court instructed the jury that each count was separate and it must consider each count separately. Given that joinder was statutorily permissible, the trial court additionally did not abuse its discretion when it denied the motion to sever because a less inflammatory charge was not joined with more inflammatory ones, a weak case was not joined with a strong case or another weak case, and the evidence against appellant on all three offenses was overwhelming.

A. The Relevant Trial Court Proceedings

After acknowledging that it had reviewed the parties' briefs regarding appellant's motion to sever the robbery charge from the two murder charges, the court allowed appellant to be heard. (3RT 736.) Appellant explained that the court should sever the robbery count because the prosecution's case as to the Apodaca murder was weak, and the robbery charge pertained to a violent crime that occurred 11 to 12 years after the Apodaca and Facundo murders. Appellant admitted that he did not locate a single case holding that the court was not permitted to join the three counts. (3RT 737.) He, nevertheless, explained that severing the robbery count would not unnecessarily consume judicial resources, and trying it with the murder counts was not appropriate because the robbery had no real bearing on those crimes. (3RT 738.) Appellant, however, conceded that the robbery count would be relevant at the penalty phase. (3RT 739.)

The court inquired what prejudice appellant would face if it declined to sever the robbery count. (3RT 739.) Appellant answered that failing to sever the count would cause the jury to learn that appellant was an ex-convict who used a gun during a robbery. He contended that people looked more harshly on someone who used a gun versus a knife, as he did to commit murder. (3RT 739-740.) The court disagreed with appellant and explained it was just as reasonable to believe that someone would think

using a knife was worse than using a gun. (3RT 740.) Appellant added that the robbery could not have been joined based on the state of the law in 1987 when it occurred. He further added that the court should not join a strong count, such as the robbery, to a weak count, such as the Apodaca murder. (3RT 741-743.) The court inquired whether appellant was suggesting the level of prejudice in joining the robbery count with the two murder counts was so severe as to require severance. Appellant replied that was his precise contention. (3RT 744.)

The prosecution argued that the Facundo and Apodaca murders were not weak cases because for each it had a complete confession from appellant. The prosecution further argued that the jury would find the manner in which appellant used a knife in each murder much worse than how he used a gun during the robbery. (3RT 745.) As a result, the prosecution saw no prejudice in denying the motion to sever. (3RT 746.)

The court found that it was not required to sever the robbery count. It also found that appellant would not suffer any serious prejudice by trying all three counts together. As a result, the court denied appellant's motion to sever. (4RT 752.)

B. Not Only Were The Statutory Elements Of Section 954 Met Here, But Also The Court Did Not Abuse Its Discretion

Section 954 permits the joinder of "two or more different offenses of the same class of crimes or offenses." (*People v. Soper* (2009) 45 Cal.4th 759, 771.) The law favors the joinder of counts because such a course of action promotes efficiency. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) A trial court has discretion to order that properly joined charges be tried separately (§ 954), but there must be a "clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130,

160.) In assessing a claimed abuse of discretion, a reviewing court assesses the trial court's ruling by considering the record then before the court. (*Soper, supra*, 45 Cal.4th at p. 774; *People v. Avila* (2006) 38 Cal.4th 491, 575.)

If the evidence underlying each of the joined charges would have been cross-admissible under Evidence Code section 1101 had they been prosecuted in separate trials, "that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper, supra*, 45 Cal.4th at p. 775; see also *People v. Vines* (2011) 51 Cal.4th 830, 855.)

Lack of cross-admissibility is not dispositive of whether the court abused its discretion in denying severance. (§ 954.1; *People v. Thomas* (2011) 52 Cal.4th 336, 350 ["When two crimes of the same class are joined, cross-admissibility is not required"].) To resolve the question of abuse of discretion, the reviewing court must further inquire "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*People v. Bean* (1988) 46 Cal.3d 919, 938; see *Thomas, supra*, 52 Cal.4th at p. 350.) To make that determination, the court must determine:

> [1] whether some of the charges are likely to unusually inflame the jury against the defendant; [2] whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and [3] whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]

(*People v. Thomas* (2012) 53 Cal.4th 771, 798-799.) The court must "'then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.' [Citation.]" (*Ibid.*) As this Court recently explained in *Thomas, supra*, 53 Cal.4th at pp. 799-800,

> [o]ur concern . . . is whether joinder "would tend to produce a conviction when one might not be obtainable on the evidence at separate trials. Clearly, joinder should never be a vehicle for bolstering either one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence." [Citation.]

(*Ibid.*)

Even when a trial court's denial of severance was not an abuse of discretion at the time it was made, a reviewing court must reverse the judgment on a showing that joinder actually resulted in """gross unfairness""" amounting to a denial of fair trial or due process. (*Mendoza*, *supra*, 24 Cal.4th at p. 162.)

Here, joinder was permissible and did not constitute an abuse of discretion for several reasons. Robbery and murder are the same class of crime for purposes of section 954 because both offenses "involve a common element of assault on the victim." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243.) Accordingly, the statutory requirements for joinder were satisfied on this basis alone (see *Soper*, *supra*, 45 Cal.4th at p. 771), leaving only the question of whether the trial court abused its discretion in denying appellant's motion to sever. Even if the evidence was not cross-admissible (§ 954.1 [lack of cross-admissibility not dispositive]), the trial court instructed the jury that each count was separate and that it must consider each count separately. This Court must presume the jury followed the trial court's instructions. (*Mendoza*, *supra*, 42 Cal.4th at p. 699.)

Second, the trial court's ruling did not result in the joinder of a less inflammatory charge with more inflammatory ones. The charges and the evidence supporting them were equally inflammatory. (See *People v. Balderas* (1985) 41 Cal.3d 144, 170, 174.) As mentioned above, both the robbery and two murders involved violent crimes against the person. All three offenses involved the use of deadly weapons. And regardless of

whether a gun or a knife is a more dangerous weapon, the murder charges involved brutal attacks on the victims, who were stabbed numerous times. So, the robbery charge, which did not involve any great bodily injury, was hardly more inflammatory than the two brutal murders.

Third, this action did not involve joinder of a weak case with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges. Although there was no valid dispute at trial that appellant stabbed Facundo and Apodaca, appellant unconvincingly asserts "the murder cases were weak with respect to the level of intent involved, whereas the robbery demonstrated an unambiguous criminal intent." (AOB 185.) His argument ignores the great dearth of intent in the record. Dr. Carpenter's testimony showed that all of Facundo's major stab wounds were fatal, and that the wounds on Apodaca were the result of targeted stabbings to Apodaca's chest and back. The location and number of wounds evidenced a clear intent to kill both victims. (5RT 1166-1167, 1189.) Additionally, appellant admitted that he intended to kill Facundo because Facundo deserved it for beating Charlene in the past. (7RT 1595, 1609.) He admitted that he meant to kill Facundo and used the methods of murder he had learned in prison. (7RT 1645.) His intention to kill both Facundo and Apodaca were also well-spelled out in his letter to District Attorney Garcetti. (Peo. Exh. 9B; Peo. Exhs. 8 & 8A.) It is also important to note that the Spartan Burgers robbery was the only offense appellant denied committing.

Fourth, although the murder charges were both alleged as capital offenses, this final factor does not establish that the court's denial of appellant's motion to sever constituted an abuse of discretion. "[E]ven where capital charges are involved, 'consolidation may be upheld on appeal where the evidence on each of the joined charges is so strong that consolidation is unlikely to have affected the verdict. [Citation.]'

[Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 130, fn. 11; cf. *People v. Smallwood* (1986) 42 Cal.3d 415, 431-432 [finding joinder to be prejudicial where evidence of one of the charged offenses was so untrustworthy that an acquittal would have been likely].) As detailed above, the evidence against appellant on all three offenses was so overwhelming, that this final factor in no way undermines the denial of appellant's motion to sever. Appellant, therefore, has failed to establish that the trial court abused its discretion by denying his motion to sever.

Finally, appellant has failed to show that the trial court's denial of his motion to sever violated his federal constitutional rights (AOB 190). "'If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process.'"'" (*People v. Letner* (2010) 50 Cal.4th 99, 150.) Appellant rests all of his contentions of federal constitutional error on the same bases he relies on in support of his argument that the trial court abused its discretion. Because appellant has failed to show an abuse of discretion, he has similarly failed to show a violation of his federal constitutional rights. In addition, the evidence presented at trial shows that there was no spill over effect and that all the convictions were supported by overwhelming evidence. (See Statement of Facts, *ante*.) In sum, he is not entitled to appellate relief under any of his theories.

X. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING REDACTED VERSIONS OF THE LETTER TO DISTRICT ATTORNEY GIL GARCETTI DURING BOTH THE GUILT AND PENALTY PHASES

Appellant's tenth argument on appeal is that the trial court erred by admitting into evidence his letter to former District Attorney Gil Garcetti. He claims the letter was far more prejudicial than probative under Evidence

Code section 352, misled the jury, and undermined the reliability of the sentencing process. (AOB 191-209.)

The trial court did not abuse its discretion by admitting a redacted version of the letter during the guilt phase because it possessed substantial probative value that was not outweighed by any risk of prejudice in that it corroborated the other evidence of appellant's guilt by means of his own words. The letter was also admissible during the penalty phase because although emotion must not "reign over reason" at the penalty phase (*People v. Haskett* (1982) 30 Cal.3d 841, 864; see *People v. Edwards* (1991) 54 Cal.3d 787, 836; *People v. Frank* (1990) 51 Cal.3d 718, 734), the prosecution was permitted to introduce evidence supporting the factors set forth by section 190.3. Even if the trial court erred, such error would have been harmless.

As detailed above, the evidence against appellant was overwhelming and more than sufficient to support his convictions. It would be difficult to find a case less likely to have been affected by a purported erroneous evidentiary ruling. Additionally, any error in admitting the letter or using it during the penalty phase was harmless given the other aggravating evidence the prosecution presented.

A. The Relevant Trial Court Proceedings

During the guilt phase, the prosecution advised the court that it wished to introduce into evidence appellant's letter to former District Attorney Gil Garcetti. The defense objected under Evidence Code section 352 that the letter was cumulative to the evidence obtained from appellant's recorded statement, and more prejudicial than probative. The defense added that the issue may need to be revisited and reconsidered during the penalty phase, but much of the letter's contents was irrelevant and prejudicial for the purpose of the guilt phase. The court informed the

parties it would rule after listening to appellant's entire recorded statement. (6RT 1424.)

Later the defense stated that it wanted the entire letter excluded, and highlighted specific portions it felt were objectionable as follows:

> Both of these cowards deserved what they got: death and an early expiration in life, to say the least. Needless to say, sir, I didn't feel bad about their untimely demise then, nor did I regret my actions in any way, shape or form, and I definitely don't share/experience those feelings and emotions today. As a matter of fact, if I had the opportunity to do it over, I would cut off their heads and send them both to their family.
>
> So you needn't "cry for me, Argentina," because I'm more than ready, willing and able to face the music and accept responsibility for my actions, as well as pay whatever price there is to pay for "playing the game!" Yes, it is all a big game, and the only reason I lost part of the game is because I got caught. That's all. But, I didn't get caught for two other 187's that I committed in prison, so I guess that you can say I'm batting 500, right?"

(6RT 1441-1442.)

The court agreed to exclude the portion of the letter that referred to two other murders (187's) appellant alleged he committed in prison. Otherwise, the court believed the letter was "one of the most literal and coherent letters and eloquent letter[s], in its own way, that I've read in a long time." (6RT 1442.)

The defense argued that appellant's lack of remorse evidenced in the letter was not relevant in the guilt phase of the trial. (6RT 1442.) The court, however, felt the contents of the letter were relevant because they confirmed and substantiated appellant's tape-recorded confession. Nevertheless, the court additionally agreed to exclude a portion of the letter in which appellant threatened to kill others if he did not receive the death penalty, and a portion about how appellant felt about the murders now, including the fact that he would cut off the victims' heads. (6RT 1443.)

The prosecution agreed with the exclusion of the statement about killing others if appellant did not receive the death penalty. (6RT 1433-1434.)

The defense asked that the court exclude a portion of the letter setting forth appellant's nickname, El Killer de Varrio White Fence. The prosecution believed the nickname should come in because it was, in fact, appellant's nickname. (6RT 1444.) The defense, however, contended the nickname need not come in because the identity of the killer was not at issue and neither was how appellant presently felt about the killings. The prosecution responded that the letter was highly probative of appellant's premeditation and deliberation. The court agreed. (6RT 1445.)

Several days later, the defense filed a motion to exclude the letter under Evidence Code section 352. The defense informed the court that it prepared a copy of a proposed redacted letter if the court decided not to exclude the letter entirely. (6RT 1453-1454.) The defense reiterated that appellant's lack of remorse was not relevant and added that the letter was clearly written in an attempt to receive the death penalty. (6RT 1554-1555.)

The court again reviewed the portion of the paragraph of the letter ending with appellant's statement that he would cut the victims' heads off if he committed the murders all over again. The prosecution contended this portion of the letter should come in to refute any contention by the defense that the murders were provoked and should be reduced to voluntary manslaughter. In other words, the prosecution believed this portion of the letter showed that appellant did not lose his mind at the time of the murders based on heat of passion, provocation, and sudden quarrel. (6RT 1457-1458.)

The court moved on to the portion of the letter in which appellant threatened to kill again if he did not receive the death penalty. The

prosecution had no objection to the exclusion of the statement during the guilt phase. (6RT 1458-1459.)

The court turned to the portion of the letter about appellant representing himself and continuing to do so. The prosecution had no problem excluding that portion, but wanted the part stating appellant's nickname Killer included because the name was inscribed on wood in the upholstery shop where Apodaca was murdered. (6RT 1459.) The defense countered that the nickname did not tend to prove any disputed fact. (6RT 1460.)

The court ruled that it would allow the portion of the letter about cutting off the victims' heads, but that it would exclude the portion about appellant's present feelings about the murders. (6RT 1461.) Finally, the court ruled that it would allow the introduction of appellant's nickname in the letter because the jury heard evidence about graffiti with the same nickname at the upholstery shop, which was a White Fence hangout. (6RT 1462.)

During the penalty phase of the trial, the prosecution moved to admit the letter and advised that it would redact the portion in which appellant wrote he had committed other murders for which he was not caught. (9RT 2267.) The defense objected under Evidence Code section 352. (9RT 2268.) The court, however, admitted the letter into evidence, this time including the previously redacted portions, except for the claim about two other murders. (9RT 2267-2268.)

B. The Letter As Redacted Was Admissible During the Guilt Phase

The trial court did not abuse its discretion by admitting a redacted version of the letter during the guilt phase because it possessed substantial probative value that was not outweighed by any risk of prejudice in that the letter corroborated the other evidence of appellant's guilt by means of his

own words. Trial courts have broad discretion concerning the admission of evidence. (E.g., *People v. Anderson* (2001) 25 Cal.4th 543, 591; *People v. Smithey* (1999) 20 Cal.4th 936, 973-974.) This Court has repeatedly held that "[r]ulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) The undue prejudice related to the admission of evidence must substantially outweigh its relevance to constitute error. (Evid. Code, § 352; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) A reviewing court finds error only where there is a clear showing that the trial court's ruling exceeded the bounds of reason. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) Appellant has failed to show that the trial court's ruling exceeded the bounds of reason here.

Contrary to appellant's contention, the probative value was far from negligible. First, the letter directly refuted any claims of self-defense, defense of others, and necessity with respect to either the Apodaca or Facundo killing. Besides the letter, no other evidence existed to show that appellant was in the process of robbing Apodaca, not defending himself or coming to the defense of Salazar, before the killing. (Peo. Exh. 8B.) Additionally, the letter was probative of appellant's intent to kill both men. It was further probative of that intent being formed by rational and reflective thought instead of heat of passion or provocation. (Peo. Exh. 8B.)

More importantly, the absence of certain information in the letter also possessed substantial probative value. Nowhere in the letter was there any claim that appellant killed Facundo to protect Charlene from imminent peril. Nowhere in the letter was there any claim that appellant killed Facundo because of his feelings about what happened to Vicki in the past.

Nowhere in the letter was there any claim that appellant was coming to Salazar's aid because he was being beaten with deadly force by Apodaca. In sum, the absence of any of these claims in the letter helped prove that appellant made a conscious decision as a cold-blooded killer to murder Apodaca and Facundo absent any justification. The absence also showed that the letter was not simply cumulative to appellant's statements to law enforcement. It was another piece that helped put the puzzle together to prove his intent and motive.

The letter was also corroborative of the other witnesses' testimony that appellant was the killer, that he was not provoked to kill, and that he was not defending himself or others at the time. The prosecution was entitled to prove all of the above relevant facts out of appellant's own hand. (See *People v. Scheid* (1997) 16 Cal.4th 1, 16-17.)

Despite the clear probative value of the letter, appellant relies heavily on *People v. Coleman* (1985) 38 Cal.3d 69, in support of his claim that the letter was unreliable because he had a motive to misrepresent or exaggerate his conduct. (AOB 196-199.) The facts of *Coleman*, however, are materially distinguishable from those here.

In *Coleman*, the defendant was tried for the murders of his wife, son, and niece. He asserted diminished capacity and insanity defenses, and both sides presented extensive psychiatric and psychological testimony. (*Coleman*, *supra*, 38 Cal.3d at pp. 74-75, 78.) Three "highly emotional and inflammatory letters" written by the defendant's wife "long before the murders" were admitted for the limited purposes of impeaching the defendant's credibility and explaining and challenging the bases for the various doctors' expert opinions. (*Id.* at pp. 74, 81.) In addition to describing the defendant's paranoia and "the generally tragic development of the family's complex problems," the wife stated in her letters that the defendant had "'twice before' tried 'to hurt' her, that he had 'many times'

threatened to kill the family, that he did not want his children going through life as he had, and that his wife feared that he would 'do this to us and then find out' [that she was not involved in what he believed was a conspiracy against him]." (*Id.* at p. 82.)

"[V]ia a series of largely unsuccessful attempts to fashion proper questions" during his cross-examination of the defendant, the prosecutor was able to bring the most prejudicial portions of the letters before the jury. (*Coleman*, *supra*, 38 Cal.3d at p. 86.) One expert was later permitted to read the entirety of two of the letters into the record. (*Id.* at p. 88.) In holding that the trial court abused its discretion in allowing these "[a]ccusatory statements 'from the grave'" to come into evidence over the defendant's Evidence Code section 352 objection, this Court noted that the prosecutor could have impeached the defendant "without revealing to the jury those details of the letters which did not impeach the veracity of [his] testimony . . . ." (*Id.* at pp. 87, 88, 93.) Emphasizing that "the letters were only a small portion of the material on which the psychiatrists based their opinions and were not cited by them as items of major significance in their evaluation of the defendant's mental capacity," the court also observed that "those portions of the letters which the prosecutor legitimately offered to challenge the psychiatric opinions could have been selected and presented in a fashion that would have lessened their emotional impact and would have avoided the improper inference that the victim's accusations were true." (*Id.* at p. 93.)

This case is not like *Coleman*. No "[a]ccusatory statements 'from the grave' " came into evidence due to experts' reliance on such hearsay to form their opinions. (*Coleman*, *supra*, 38 Cal.3d at p. 87.) As such, this Court is not confronted here with hearsay statements written years before the offenses, and, thus, the purpose of excluding hearsay evidence need not concern this Court. Indeed, the statements here were not from one of

appellant's victims, as was the case in *Coleman*. They, instead, were appellant's own admissions, which obviously did not constitute inadmissible hearsay. Unlike in *Coleman*, there was no risk of incompetent hearsay from a deceased witness, who could not be cross-examined, being used to prove the truth of the matter asserted to the jury.

In addition, irrelevant yet highly prejudicial evidence was presented through bungled cross-examination or otherwise. (*Coleman*, *supra*, 38 Cal.3d at p. 86.) Whereas in *Coleman*, evidence of the wife's state of mind was admitted despite the trial court's express finding that her state of mind was not at issue (*id.* at p. 84), here appellant's state of mind was obviously at issue. Respondent has detailed the relevance of this evidence above and will not belabor the point.

Also not present here is the same fear of misrepresentation or exaggeration of concern in *Coleman*. There, an expert physician was not even certain that the wife's statements in the letters were accurate. And her perception may have been clouded by her own psychiatric problems. (*Coleman*, *supra*, 38 Cal.3d at p. 85.) Here, the court did not face the same concerns about the accuracy of appellant's statements because they were corroborated almost entirely by his recorded confession, his confession at trial, and the testimony of other witnesses.

Not only is appellant's reliance on *Coleman* misplaced, his attempt to distinguish the facts of *People v. Kipp* (2001) 26 Cal.4th 1100, is unpersuasive. In *Kipp*, the defense objected during the guilt phase to the admission of a letter the defendant had sent to this wife. In the letter, the defendant admitted to raping and killing two victims. The defense argued that the trial court should exclude the letter under Evidence Code section 352. The trial court overruled the objection, stating that "the letter will be admitted in some form." (*Id.* at pp. 1120-1121.) It subsequently agreed to delete racial epithets and derogatory references to female deputies, but did

not delete references to "Satan." (*Id.* at pp. 1121.) The letter was admitted as redacted. (*Ibid.*)

On appeal, the defendant challenged the court's overruling of his objection to the letter's admissibility under Evidence Code section 352. (*Kipp*, *supra*, 26 Cal.4th at p. 1121.) This Court was unpersuaded by the defendant's argument that his writing the letter years after the offenses diminished the probative value of the letter. (*Id.* at pp. 1121-1122.) This Court was further unpersuaded by the defendant's argument that his admission that he had sodomized the victims weakened the letter's probative value because the prosecution had presented no such evidence of sodomy. This Court noted that the possibility that he sodomized the women was not precluded by the remaining evidence. (*Id.* at p. 1122.) Moreover, this Court found that even if the sodomy claim was exaggeration or embellishment, the claim did not reduce the probative value of appellant's other admissions. (*Ibid.*)

The facts of *Kipp* are so analogous to those here that this Court should apply the same reasoning it did there in upholding the trial court's decision to admit the letter here. Indeed, like the defendant in *Kipp*, appellant wrote the letter at issue years after he committed the offenses. And in the letter he admitted to committing the charged offenses and provided other relevant and probative evidence set forth above in detail. As this Court explained in *Kipp*, even if appellant embellished or exaggerated in his letter, such bragging, as he characterizes it now, did not diminish the probative value of appellant's admissions. This Court, therefore, should find that the trial court properly admitted the redacted letter here, just as it did in *Kipp*.

Appellant cannot avoid this Court's upholding the admission of the letter because he cannot establish that the letter's prejudicial value substantially outweighed its probative value. For purposes of Evidence Code section 352, "'prejudicial' is not synonymous with 'damaging,' but

refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320 . . . ; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016 . . . .)" (*Kipp, supra,* 26 Cal.4th at p. 1121.) A reviewing court must determine the risk of evoking emotional bias rather than the prejudice "that naturally flows from relevant, highly probative evidence."' [Citations.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 148.)

Appellant's primary contention is that the probative value of the letter was diminimus in contrast to its risk of shocking the jury, because the letter could be interpreted as an effort to enhance his chance of getting a death sentence (AOB 198-201). The fact that the statements were subject to several interpretations did not render them unduly prejudicial. More importantly, the great weight of the evidence corroborating the substance of appellant's statements made an inference of premeditation and deliberation the more reasonable one, which was consistent with the court's pronouncement that the letter "screams premeditation and deliberation." (6RT 1445.) Appellant even highlighted his sincerity about every statement he made in the letter. (Peo. Exh. 8B; Peo. Exhs. 8 & 8A.) And the statements in the letter were certainly no more inflammatory or shocking than appellant's recorded confession or callous testimony at trial.

The letter, thus, provided insight into appellant's state of mind and corroboration of his cold, unprovoked, and calculated intent to kill, without having a tendency to invoke the emotional bias of the jury. The trial court engaged in a thorough review of the letter and in no way made an arbitrary or capricious decision to admit the redacted version. It follows that the trial court's ruling to admit the redacted version did not constitute an abuse of discretion.

Even if the trial court's evidentiary ruling was erroneous, this Court should not find the error reversible absent a showing that appellant suffered a miscarriage of justice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As this Court held in *Watson*, "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.) Appellant has not made and cannot make a showing that had the trial court excluded the letter he would have obtained a more favorable result. As detailed above, the evidence against appellant was overwhelming and more than sufficient to support his convictions. Appellant confessed before trial, and his testimony was not truly exculpatory. It would be difficult to find a case less likely to have been affected by a purported erroneous evidentiary ruling. This Court may reject appellant's argument on this basis as well.

C. The Letter As Redacted Was Admissible During the Penalty Phase

Not only was the letter as redacted admissible during the guilt phase, but also it was admissible during the penalty phase. Although the trial court lacks discretion under Evidence Code section 352 to exclude entirely evidence made admissible by section 190.3, it does have discretion to exclude evidence "based on the form of the evidence . . . ." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1206.) The court here did not abuse, but carefully exercised, that discretion. (*People v. Crittenden* (1994) 9 Cal.4th 83, 135.)

Although emotion must not "reign over reason" at the penalty phase (*Haskett, supra*, 30 Cal.3d at p. 864; see *Edwards, supra*, 54 Cal.3d at p. 836; *Frank, supra*, 51 Cal.3d at p. 734), the prosecution was permitted to introduce evidence supporting the factors set forth by section 190.3. First,

the letter provided evidence of the "circumstances of the crime[s] of which the defendant was convicted in the present proceeding." (§ 190.3, subd. (a).) As detailed above, it demonstrated that appellant premeditated and deliberated before the killings.

Second, the letter provided evidence of "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (§ 190.3, subd. (b).) In fact, appellant expressly stated in the letter that he was not suffering from a mental disorder at the time of the offenses and was aware of his mental faculties. (Peo. Exh. 8B.)

Third, the letter provided evidence of "[w]hether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." (§ 190.3, subd. (e).) Indeed, in the letter appellant called his victims cowards, stated he was robbing Apodaca at the time of the killing, and omitted any mention of a sudden quarrel or other provocation justifying the killings. (Peo. Exh. 8B; Peo. Exhs. 8 & 8A.) This evidence showed that neither of appellant's victims participated in or consented to appellant's conduct.

Fourth, the letter provided evidence of "[w]hether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." (§190.3, subd. (f).) For the same reasons the evidence was relevant to factor (e) above, it also was relevant to factor (f). Moreover, the letter could reasonably be interpreted to show that appellant believed he was justified in killing his victims because he stated in it that his victims got what they deserved. (Peo. Exh. 8B; Peo. Exhs. 8 & 8A.) This statement was pertinent to factor (f).

Fifth, the letter provided evidence of "[w]hether or not defendant acted under extreme duress or under the substantial domination of another

person." (§ 190.3, subd. (g).) Again, the letter plainly established the absence of duress or domination and showed quite the opposite. It showed that appellant dominated his victims.

Sixth, the letter provided evidence of "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication." (§ 190.3, subd. (h).) Appellant's statements that he had no mental disease or defect and was not under the influence were obviously relevant to this factor.

Given the substantial support the letter offered to establishing all of the above factors, the trial court acted well within its discretion by admitting the redacted letter. Its redaction of the letter following a lengthy consideration of its contents evidenced a thoughtful consideration of its discretion. As stated previously, there was nothing objectionable about the form of the evidence, i.e., a letter written by appellant's own hand, that would have justified its exclusion.

In any event, any error in admitting the letter was harmless given the other aggravating evidence the prosecution presented. (*Frank*, *supra*, 51 Cal.3d at p. 734.) For example, aside from the charged offenses, the prosecution presented several instances of heinous criminal conduct appellant had engaged in, including a previous murder, assault with a deadly weapon even when confined in prison, and armed robbery. From this evidence alone, the jury would have found the death penalty appropriate. For all of the above reasons, this Court should reject appellant's claim.

XI. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT SUA SPONTE ON THE RESPONSIBILITY TO DECIDE INDEPENDENTLY THE APPROPRIATENESS OF THE DEATH PENALTY DESPITE APPELLANT'S STATED DESIRE FOR A DEATH SENTENCE

Appellant's eleventh argument on appeal is that the trial court erred by failing to fulfill its sua sponte duty of instructing the jury on the responsibility to decide independently the appropriateness of the death penalty despite his stated desire for a death sentence. (AOB 210-213.) This Court has already rejected a similar claim in *People v. Guzman* (1988) 45 Cal.3d 915, 962, and should similarly reject appellant's claim here.

In *Guzman*, the defendant detailed his life of tragedy and violent crime and urged the jury to impose death to spare him from what he believed was an intolerable sentence of life imprisonment. This testimony was given over his counsel's objection. Notably, the defendant presented no other mitigating evidence. In rejecting any notion that the penalty verdict was "unreliable," this Court reaffirmed that a competent defendant "has a fundamental right to testify in his own behalf, even if contrary to the advice of counsel." (*Guzman, supra*, 45 Cal.3d at p. 962, citing *People v. Robles* (1970) 2 Cal.3d 205, 215.) *Guzman* suggested that to the extent a defendant's preference for death might mislead the jury as to its sentencing responsibility, the trial court *may*, "in appropriate cases," inform the jury that it "remains obligated" to independently weigh aggravation and mitigation and determine the appropriate penalty "despite the defendant's testimony." (*Guzman, supra*, 45 Cal.3d at p. 962.) This Court held that such an instruction was not required sua sponte in *Guzman* because the jury otherwise fully understood its sentencing duty under the instructions and argument presented in that case.

Despite this Court's holding in *Guzman*, appellant attempts to distinguish the case from the instant matter. First, he claims that because

Guzman was decided well before his trial, the trial court was on notice that a sua sponte instruction would be appropriate. (AOB 211.) But nothing in *Guzman* mandated a sua sponte instruction. Rather, *Guzman* held that an instruction was permissible under certain circumstances. (*Guzman*, *supra*, 45 Cal.3d at p. 962.)

Second, appellant suggests that those circumstances warranting a sua sponte instruction exist here because the prosecution made appellant's letter to former District Attorney Garcetti, which contained appellant's request for the death penalty, the "central theme of its argument for the death penalty." (AOB 212.) Appellant's characterizing the letter as the "central theme" is quite the exaggeration.

The prosecution's closing argument made up approximately 30 pages of the reporter's transcript. (11RT 2949-2979.) Of this 30 pages worth of argument, the prosecution only made a brief reference to the letter on a single page of the reported closing argument. (11RT 2957.) More importantly, unlike the defendant in *Guzman* who begged for the death penalty to spare him from the cruelty of a life sentence, appellant was not requesting sympathy in his letter. He, instead, was demonstrating his pleasure in committing heinous murders absent remorse or regard for human life and announcing his willingness to kill again if he was allowed to live. (11RT 2957.) The prosecution permissibly used this statement to show that appellant did not accept responsibility for his past crimes and could not be stopped, so that it could rebut any mitigating evidence appellant introduced under section 190.3. (11RT 2956-2957.) The letter was far from the central theme of the prosecution's closing. The central theme, instead, was that appellant was a brutal murderer who killed because he liked violence and domination of others, and could not even be stopped when he was previously imprisoned. (11RT 2959-2960, 2966, 2969.) Additionally, unlike the defendant in *Guzman*, appellant presented

mitigating evidence and did not ask for the death penalty in his trial testimony. The aforementioned distinctions demonstrate that this case is one in which sua sponte instruction was even less warranted under the circumstances than in *Guzman*.

Appellant additionally relies on *People v. Webb* (1993) 6 Cal.4th 494, 535, but his reliance on that case offers him no greater support than *Guzman*. This Court in *Webb* reiterated that the type of instruction appellant claims he should have received is not mandatory. It is permissive where appropriate. (*Webb*, *supra*, 6 Cal.4th at p. 535.) This Court in no way analyzed the propriety of the instruction. This Court's ruling was limited to the defendant's right to testify and whether his testimony should be excluded because it undermined the reliability of the penalty verdict by allowing him to testify in favor of a death sentence. (*Id.* at pp. 534-535.) Because the facts of *Webb* were nearly identical to those of *Guzman*, *Webb* also does not establish that the trial court erred here by failing to instruct sua sponte.

Further without merit is appellant's claim that failing to instruct sua sponte could not be called a harmless error because it is reasonably possible that the verdict would have been more favorable to him had the court given the instruction. (AOB 213.) First, the trial court expressly instructed the jury that it had the choice of finding that either death or life without the possibility of parole was the appropriate penalty. (11RT 2920, 2936.) Second, it instructed the jury that it must not be swayed by bias nor prejudice against appellant, and must consider all of the evidence of aggravating and mitigating circumstances. (11RT 2920, 2936-2937.) In other words, the court made the jury well are of its responsibility to weigh the evidence and reach a finding of the appropriate penalty based on such evidence irrespective of any bias or prejudice appellant could have potentially interjected via the letter. Thus, there was no need for further

clarifying instructions. Third, in light of the compelling evidence of aggravating circumstances and lack of evidence supporting mitigating circumstances, the jury would not have returned a more favorable verdict had the court instructed the jury as now argued by appellant. Simply put, the jury knew it had the responsibility of determining the appropriate penalty where the evidence showed appellant was a cold-blooded killer who did not discriminate as to his victims and continued killing with no regard for human life and no remorse. (11RT 2949-2979.)

XII. THE TRIAL COURT DID NOT ERR BY ALLOWING THE PROSECUTION TO IMPEACH APPELLANT WITH THE ROTHENBURG MURDER

Appellant's twelfth argument on appeal is that the trial court erred by allowing the prosecution to impeach him with a constitutionally invalid 30-year-old second degree murder conviction. (AOB 214-224.) Respondent will not reiterate here the propriety of the conviction for the Rothenburg murder because it is discussed at length above in Argument I. Assuming this Court accepts respondent's argument there, the trial court did not abuse its discretion when it allowed the prosecution to impeach appellant with the Rothenburg murder. Although the murder occurred 30 years in the past, it was a link in a chain or series of crimes, which was more probative of appellant's willingness to perjure himself than a single crime would have been. The conviction was additionally admissible to refute appellant's claim that he killed for money or any other noble or defensible motives. Admission of the prior conviction did not keep appellant from testifying. And the details of the offense were not admitted during the guilt phase. These circumstances coupled with appellant's admitting to the charged crimes further rendered any purported error harmless.

A. The Relevant Trial Court Proceedings

Following Detective Durazo's testimony, the defense notified the court that appellant wished to testify during the guilt phase. The defense moved to sanitize appellant's 30-year-old murder conviction. The defense argued the prosecution could impeach appellant with multiple other convictions other than a stabbing that occurred in 1969, when appellant was 16 years old. It was the defense's position that the conviction was too prejudicial. (6RT 1505.)

The prosecution responded that appellant was taking the risk of being impeached with the conviction by testifying. The prosecution added that the conviction was not too remote in time. It explained that remoteness pertained to the time elapsed between the past and current crime and the absence of other crimes in between. Because appellant had an ongoing history of convictions between the current offenses and the 1969 murder, remoteness did not warrant exclusion of the conviction. As such, the prosecution clarified that the real issue before the court was whether impeaching appellant with the 1969 murder denied him a fair trial. According to the prosecution, impeachment in that manner would not do so because it was probative as to bias and appellant's ability to testify truthfully. (6RT 1506.)

The prosecution added that appellant was an experienced criminal defendant who knew that if he received the death penalty, he would not be executed for years. It was the prosecution's position that appellant wanted the death penalty so that he would be placed on death row where he would be safe from other inmates and able to continue selling drugs in prison as he had been doing already. In other words, he wished to be housed elsewhere because he had burned his bridges in the prison where he was currently in custody. The prosecution explained that appellant, thus, was not testifying in a pursuit of suicide by jury. (6RT 1510.) And appellant's 1969 murder

conviction would help show just how manipulative appellant would be when he testified. (6RT 1511.) The prosecution further argued that the full panoply of convictions he suffered showed he would not follow any laws. (6RT 1514.)

The court proceeded to discuss precedent supporting the admission of the conviction to impeach appellant. (6RT 1513.) The parties discussed several cases before the prosecution argued that admission of the conviction showed appellant's ability to lie and his readiness to do evil. In general, introduction of the conviction was directly relevant to appellant's credibility. (7RT 1579.)

The court found that the 1969 murder conviction involved a crime of moral turpitude. (7RT 1580-1581.) It was not too remote in time because appellant's pattern of criminal conduct continued from that time until the currently charged offenses. There was no break in his criminal history rendering the conviction too remote. The court did not believe the nature of the crime had to be sanitized due to its similarity to the other killings and added that admitting the conviction to impeach appellant was not going to deter him from testifying. As a result, the court denied the defense's request to exclude the 1969 conviction and, appellant testified regardless. (6RT 1581-1582.)

B. Appellant Has Forfeited This Argument By Failing To Raise It In The Trial Court

Appellant may not assert this claim of error for the first time on appeal. As discussed in Arg. I, *supra*, appellant never challenged the admission of his prior conviction on the ground that it was constitutionally invalid based on the purported violation of double jeopardy protections. On appeal, "reviewing courts will not consider a challenge to the admissibility of evidence absent '"a specific and timely objection in the trial court on the ground sought to be urged on appeal."'" (*People v. Champion* (1995) 9

Cal.4th 879, 918, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860.) Because appellant did not assert a specific objection based on double jeopardy as he does now on appeal, he has forfeited his constitutional claim for appellate purposes. In any event, this claim lacks merit as discussed previously in Argument I.

C. Evidence Code Section 352 Did Not Compel The Exclusion Of The Prior Conviction

Appellant's contention that Evidence Code section 352 compelled the exclusion of the prior conviction for the Rothenburg murder (AOB 222-224) is incorrect. Since the 1982 enactment of article 1, section 28 of the California Constitution (Proposition 8), a testifying defendant may be impeached with prior conduct that involves moral turpitude (i.e., a readiness to do evil). (*People v. Castro* (1985) 38 Cal.3d 301, 306, 313-316; *People v. Wheeler* (1992) 4 Cal.4th 284, 290-297, & fn. 7.)[23] Impeachment based on prior convictions involving moral turpitude is premised on the recognition that "[m]isconduct involving moral turpitude may suggest a willingness to lie." (*Wheeler*, *supra*, 4 Cal.4th at p. 295.) Before Proposition 8, only felony convictions were available for impeachment; after Proposition 8, any misconduct involving moral turpitude is available for impeachment, subject to the trial court's exercise of its discretion under Evidence Code section 352 to balance probative value against undue prejudice. (*Id.* at pp. 290-297, & fn. 7.)

Additionally, prior to Proposition 8, this Court had established a "black letter rule of exclusion" for impeachment under which "'identical prior offenses may not be used; [and] similar prior convictions should be

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[23] Article 1, section 28, subdivision (f) states that any prior felony conviction may be used for impeachment. Article 1, section 28, subdivision (d) states that relevant evidence shall not be excluded in criminal proceedings, subject to several statutory exceptions.

used only sparingly.'" (*People v. Foreman* (1985) 174 Cal.App.3d 175, 180, quoting *People v. Barrick* (1982) 33 Cal.3d 115, 126.) Proposition 8 repudiated this inflexible black letter rule; thus, the fact that a prior conviction is the same or similar to a charged offense does not compel its exclusion, and similarity is only one factor to consider when the court balances relevancy and prejudice. (*Id.* at pp. 180-182; *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590; *People v. Green* (1995) 34 Cal.App.4th 165, 183.)

When evaluating whether to admit a prior conviction for impeachment, relevant factors to consider include whether the prior conviction reflects adversely on honesty or veracity, the nearness or remoteness of the prior conviction, whether the prior conviction is for the same or similar conduct as the charged offense, and the effect if the defendant does not testify because of fear of impeachment with the prior conviction. (*Green*, *supra*, 34 Cal.App.4th at p. 182.) These factors should not be applied rigidly and other relevant circumstances may also be considered. (*People v. Collins* (1986) 42 Cal.3d 378, 391-392; *Foreman*, *supra*, 174 Cal.App.3d at p. 181.)

Although numerous prior convictions involving conduct similar to the charged offense can increase the risk of prejudice and support their exclusion, a trial court may reasonably exercise its discretion to admit numerous similar priors based on such factors as the high probative value of the priors and the need to prevent the defendant from testifying before the jury with a false aura of veracity. (See *Green*, *supra*, 34 Cal.App.4th at p. 183; *People v. Muldrow* (1988) 202 Cal.App.3d 636, 646-647; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695; *People v. Stewart* (1985) 171 Cal.App.3d 59, 66; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138-1139 [court did not abuse its discretion in permitting impeachment based on prior conviction for assault with a deadly weapon on an officer in

case charging attempted murder of officer]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 459 [no abuse of discretion to permit impeachment based on unsanitized murder conviction in case charging murder].)

On appeal, a reviewing court reviews the trial court's decision to admit such prior convictions under an abuse of discretion standard. (*People v. Clair* (1992) 2 Cal.4th 629, 655; *Stewart, supra*, 171 Cal.App.3d at p. 65.) And the trial court does not abuse its discretion unless its determination "exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*Clair, supra*, 2 Cal.4th at p. 655 ; accord, *Green, supra*, 34 Cal.App.4th at pp. 182-183.)

Appellant claims the prior conviction was too remote in time given that it occurred in 1969. (AOB 222.) Respondent does not dispute that the remoteness or staleness of a prior conviction is a proper factor to consider as part of an Evidence Code section 352 analysis. (*People v. Harris* (1998) 60 Cal.App.4th 727, 739.) However, "convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.)

The 30-year duration between the prior conviction and appellant's testimony was not an issue here because appellant led a life a crime since the Rothenburg murder. In other words, had he lead a blameless life since the prior conviction, it might be unfairly prejudicial to rehash a 30-year-old conviction and drag his character through the mud to secure a conviction. But here, no such concern existed, and the remoteness did not warrant exclusion. (See, e.g., *Green, supra*, 34 Cal.App.4th at p. 183 [20-year-old felony prior conviction admissible to impeach despite remoteness because the witness "did not subsequently lead a blameless life"].)

Appellant's next complaint is that because the prior conviction was assaultive in nature, it did not weigh as heavily in favor of admissibility. (AOB 222.) What this complaint ignores is that admission of the prior conviction, which was admittedly assaultive in nature, refuted appellant's testimony. Indeed, appellant contended that he only killed Facundo because he was paid to do so and felt the need to protect Charlene from Facundo's assaults, and killed Apodaca because he was just going along with Salazar's plan and helping Salazar who was being beaten by Apodaca. The admission of a prior conviction for murder, along with the other prior convictions used to impeach, including two counts of assault with a deadly weapon in 1977, and one count of attempted murder in 1979 (7RT 1705), showed his moral turpitude and undermined the credibility of this testimony. This point shows that appellant's complaint that the evidence lacked probative value (AOB 222) is also without merit.

Muldrow, *supra*, 202 Cal.App.3d 636, is instructive. There, the Court of Appeal held it was not an abuse of discretion for a court to admit burglary priors in a burglary trial, along with prior convictions for petty theft, rape, and auto theft. (*Id.* at p. 649.) Although the petty theft was the most recent conviction (and auto theft the most remote), *Muldrow* held that all six priors could be admitted for impeachment because "the systematic occurrence of [defendant's] priors over a 20-year period create[d] a pattern that [was] relevant to his credibility." (*Id.* at p. 648.) Admitting the most remote prior along with a series of other assaultive prior convictions prevented the jury from receiving the jury the false impression that appellant had "otherwise led a law-abiding life," thus casting him in a """false aura of veracity."""" (*Id.* at p. 647.) Likewise, *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297, held that a "series of crimes evidencing moral turpitude is more probative of a defendant's willingness to give perjured testimony than a single such offense." As such, the trial court did

not abuse its discretion when it admitted the prior conviction for the Rothenburg murder following a careful consideration of all of the factors.

Appellant, nevertheless, contends that admitting the prior murder carried with it a high risk of unfair prejudice given that appellant was on trial for two murders. (AOB 223.) His suggestion that admission of the prior murder would cause the jury to infer criminal propensity is ridiculous. As mentioned above, the jury would have learned of appellant's numerous prior crimes irrespective of the admission of the prior for the Rothenburg murder because he was impeached with convictions for two counts of assault with a deadly weapon in 1977 and one count of attempted murder in 1979. (7RT 1705.) Also, the prosecution did not even introduce any details of the prior murder that would have shocked the jury in a manner that spurred it to convict appellant absent consideration of the evidence of the charged offenses, confused the jury, and consumed judicial resources. Furthermore, even without the priors, the jury heard appellant's own admission that he murdered Facundo and Apodaca, which obviously evidenced a criminal propensity and overwhelmingly established his guilt for the charged offenses without any consideration of priors. The court even reduced any risk of prejudice by instructing the jury that the prior convictions could only be used for purposes of assessing appellant's credibility. (5CT 1117.) This Court presumes the jury followed this instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

The above discussion showing that the admission of the evidence was not unduly prejudicial also establishes that any alleged error in admitting the prior murder was harmless. Ordinarily, an error in admission of evidence, including a prior conviction for impeachment, is governed by the state law miscarriage of justice standard, namely whether it is reasonably probable that in the absence of the error, a result more favorable to the defendant would have occurred. (*People v. Gurule* (2002) 28 Cal.4th 557,

608-609.) Appellant, nevertheless, asks this Court to reverse his conviction either under that standard or as a due process violation. (AOB 224.) As appellant concedes (AOB 224), the admission of relevant evidence amounts to a due process violation only if the trial was rendered fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Based on the discussion above and in light of the overwhelming evidence of guilt, it cannot be said that trial in this case was fundamentally unfair. For this reason, this Court should apply the state standard of prejudice, which respondent has shown appellant has not met. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XIII. THE TRIAL COURT DID NOT ERR WHEN IT EXCLUDED THE UNRELIABLE HEARSAY EVIDENCE CONTAINED IN THE PROBATION REPORTS AND SCHOOL RECORDS

Appellant's thirteenth argument on appeal is that the trial court improperly prevented the defense from presenting his juvenile probation reports and school records as evidence in mitigation of the death penalty, in violation of the Eighth and Fourteenth Amendments. (AOB 225-250.) The trial court, however, committed no error because appellant did not have an unfettered right to present mitigating evidence. Without a doubt, the actual probation reports and school records were inadmissible. Furthermore, appellant was not permitted to use other witnesses or documentary evidence to introduce the opinions and conclusions of other physicians and experts unavailable for cross-examination. Regardless, the necessary mitigating evidence regarding appellant's medical and psychological history, as well as his placements and familial history, was introduced into evidence. Additional evidence would have had no bearing on the jury's finding that the death penalty was appropriate, particularly in light of the overwhelming amount of aggravating evidence.

A. The Relevant Trial Court Proceedings

During the penalty phase, the defense attempted to admit the probation reports while Kocourek was on the stand. The prosecution objected that the reports were inadmissible because they contained inadmissible hearsay. (9RT 2423.) The prosecution had no objection to the defense's using the reports to refresh the witness's recollection. But the prosecution was particularly concerned about purported medical test results and diagnoses contained in the reports that lacked sufficient indicia of reliability. The prosecution was further concerned about the fact that Kocourek was not the probation officer assigned to appellant at the time the test results and diagnoses were reached. (9RT 2424.)

The prosecution also objected to the defense's attempt to use the reports to introduce appellant's placement history. The court sustained the objection on hearsay grounds, and the defense argued that the evidence was still admissible because it was reliable. (9RT 2431.) The court explained it would be hearsay, for example, to introduce that appellant was placed in a certain facility called Sycamores if Kocourek received the information from someone else. (9RT 2432.) The defense informed the court that Sycamores no longer existed and, thus, getting its official records would be impossible. The court inquired as to the relevance of appellant's placement in Sycamores, and the defense explained the evidence would show appellant was in custody from 1962 through 1965. (9RT 2433.) The prosecution countered that the evidence was neither trustworthy nor reliable because the jury would only learn that appellant was in custody. The jury would not hear about any treatment appellant received or how he was being cared for, and no witness existed for the prosecution to cross-examine on the subject. (9RT 2433.)

Having considered the arguments of the parties, the court ruled that the defense could not ask Kocourek about appellant's placements unless he

had personal knowledge of the placement, the facility, and what the facility was like. (9RT 2434.) The defense, however, urged the court to reconsider given that the evidence was relevant to show that appellant was not living with his parents. (9RT 2434-2435.) The court replied that the defense would have to lay the requisite foundation to establish that the information, although hearsay, was highly relevant and reliable. (9RT 2435.) And the court added that just because a probation report was a court document did not mean that the information contained therein was necessarily reliable. (9RT 2436.) The court concluded that the defense could ask Kocourek if appellant was placed under a suitable placement order at the Sycamores. (9RT 2437.)

When Dr. Cherkas was on the stand, the defense inquired about a child guidance clinic mentioned in a May 22, 1962 probation report. The prosecution objected that the matter was irrelevant. At sidebar, the defense indicated that the information was from a document from Dr. Brooks Fry, the chief psychiatrist, and indicated appellant had brain damage. According to the defense, Dr. Cherkas worked at the same facility as Dr. Fry and could talk about the type of input that went into the report. (10RT 2482-2483.) The defense wanted the jury to know the type of exam appellant underwent and the findings from the exam based on Dr. Cherkas' opinion. The court confirmed with the defense that it was seeking to elicit that Dr. Cherkas was relying on the probation report to render his own opinion. (10RT 2484.) The defense explained that the information was relevant to appellant's condition in 1967. (10RT 2485.)

The court ruled that the defense could ask Dr. Cherkas if he had reviewed certain materials and whether he was able to render an opinion as a result. The court would not permit the defense to explore the specifics of the actual report. (10RT 2486.) The defense clarified that Dr. Cherkas would testify as to appellant's brain damage in 1966 and 1967, as well as

the type of medications appellant was on at the time and why he was on them. (10RT 2486-2487.) The court ordered the defense to inquire whether Dr. Cherkas reviewed the materials at issue and to lay a foundation as to what went into the studies performed on appellant. (10RT 2487-2488.)

The prosecution informed the court that it did not have the materials the defense was talking about, including the alleged studies on appellant. The prosecution further noted that no documents in the file referred to brain damage and that, consequently, the prosecution could not effectively cross-examine the witness. (10RT 2488.)

The court found that it was irrelevant to explain to the jury how the test results were achieved or what was involved with administering the test. The court advised the defense to ask Dr. Cherkas if he reviewed certain documents and if based on his review he reached any conclusions. (10RT 2489.)

The defense also moved to admit appellant's school records and juvenile probation reports under Evidence Code section 1280 as evidence of his medication history. (10RT 2726.) The defense claimed that appellant's mental and physical history as a young person was highly relevant, and that related portions of the probation reports were reliable. (10RT 2728.) The court decided that it wanted to read all of Kocourek's reports before ruling. (10RT 2729.) The defense asked the court to review also appellant's school records to see if they corroborated the information in the probation reports. (10RT 2730.)

The prosecution objected that Kocourek had already testified and put forth all the information from the probation reports as to which he had personal knowledge. The prosecution asked the court to exclude the reports as a result. The court expressed concern over the reports being cumulative evidence and ruled that it would not admit the actual reports. (10RT 2737.)

The court explained to the defense that the reports did not qualify for admission under Evidence Code section 1280. (10RT 2738.) The court was troubled by the fact that the reports were full of information from a variety of sources and, thus, Kocourek could only testify as to what he actually did in connection with appellant. (10RT 2739-2740.) The prosecution added that it believed the reports were not trustworthy and contained multiple levels of hearsay. The court then determined that it would have to read the reports to make a final determination as to their trustworthiness. (10RT 2741.)

Following Diana's penalty phase testimony, the court revisited the issue of Kocourek's probation reports and reviewed them in chambers with counsel present. (11RT 2795, 2797.) The prosecution contended that doctors' opinions in the reports were inadmissible, but the defense argued that even if the opinions constituted hearsay, they were admissible if they were both relevant and reliable. (11RT 2798-2799, 2801.) The defense added that the reports were admissible as business records. (11RT 2801.) The defense stressed that appellant's mental and familial history were both highly relevant. On this point, the court agreed. The defense also emphasized that appellant's school records corroborated the information in the probation reports. (11RT 2803.)

Having heard the parties' arguments, the court turned to the actual reports. The court began with the December 24, 1965 report. (11RT 2804.) The defense wanted admitted a statement about appellant's brain damage, and the prosecution believed the statement should not come into evidence. The court noted that Dr. Cherkas had testified test results showed appellant had minimal brain damage. It concluded that if Kocourek relied on those test results then the statement was admissible. (11RT 2806.) The court addressed a statement that read that appellant's "[h]istory of brain damage is unsubstantiated." (11RT 2807.) The court would not read the

statement to the jury because Dr. Cherkas testified that test results showed minimal brain dysfunction. (11RT 2807.) The court then allowed a statement about appellant's hyperactivity and a statement about appellant's attendance at Lincoln High School and grades because both arose from Kocourek's personal observations by contacting the school. (11RT 2808.) The court also admitted lines 1 through 15 on page four of the report. (11RT 2808-2809.)

With respect to the November 22, 1966 report, the court admitted lines 1 through 10 and 15 through 17 on page one, lines 14 through 29 on page four, all of page five, lines 26 through 29 on page six, lines 1 through 12 and line 20 through the end of the page on page seven, lines 1 through 19 on page eight, and line 14 on page nine. The court deleted a statement about brain syndrome history on line 25 on page eight. (11RT 2808-2810, 2812-2814.) The prosecution objected to a portion about a lesion in appellant's brain. The court stated that the lesion was already testified about, but the prosecution claimed the statement should not come in because it was based on someone interpreting a test and then providing the information to the probation officer. Based on this argument, the court stated it would ask Kocourek how he got the information and exclude the statement if the statement was obtained as the prosecution represented. (11RT 2810-2812.) The court admitted lines 13 through 26 on page three. (11RT 2815.)

The defense withdrew the request regarding the statement about appellant's report card on page two of the February 14, 1967 report. (11RT 2815.) On page three of the report, the court admitted lines 1 through 10 and 28 until the end of the page. (11RT 2817.) The court was concerned about a statement on page four regarding appellant's brain damage appearing to explain his impulsive character. The defense wanted the court

to admit the portion about a repeated diagnosis of brain damage, but the court rejected the request. (11RT 2820-2821.)

With respect to the May 11, 1967 report, the court admitted lines 27 through 29 on page four, line 26 on page six, and lines 1 through 13 and 16 through 24 on page seven. (11RT 2821-2823.)

As to the June 1, 1967 report, the court admitted lines 6 through 8 that were at issue. (11RT 2823.)

As to the June 15, 1967 report, the court admitted lines 7 through 8 that were at issue. (11RT 2823.)

As to the September 13, 1967 report, the court admitted line 25 on page two, and lines 4 through 14 on page four. (11RT 2823.)

As to the October 13, 1967 report, the court admitted lines 11 through 13 that were at issue. (11RT 2823.)

As to the October 20, 1967 report, the court excluded line 9 on page six. (11RT 2824.)

As to the February 16, 1964 report, the court admitted lines 15 through 23 on page two, lines 2 through 14 on page three, and lines 14 through 17, 19 through 21, and 22 through 28 on page four. The court excluded lines 20 through 29 on page three because there was no evidence of what the probation officer relied on in making those statements, but found portions that could be admitted. (11RT 2825-2828.)

As to the July 16, 1964 report, the court admitted lines 15 through 20 on page two and the two paragraphs that followed. (11RT 2828.) The court also admitted lines 1 and 2 on page three. (11RT 2828.)

As to the January 8, 1965 report, the court admitted lines 5 through 7 on page one, lines 1 through 3 on page three, and the first six sentences on page four. (11RT 2829.)

As to the January 18, 1965 report, the court admitted line 6 on page one, the entire paragraph under the word "report" on page two, as well as

the following paragraph and the final paragraph on page two, lines 1 through 3 and 7 through 10 on page three, and lines 1 through 5 on page four. (11RT 2829-2831.)

Finally, as to the September 24, 1965 report, the court admitted lines 1 through 8 on page two, lines 6 through 14 and 21 through 29 on page three, and lines 1 through 2 on page four. (11RT 2831.)

After making its rulings, the court explained to the jury that it would be reading into evidence portions of probation reports prepared by Kocourek and Ikemoto that contained information from various sources. (11RT 2832.)

Following the reading to the jury of the probation reports, the court considered school records from the Pasadena Unified School District. The prosecution was concerned with a portion regarding appellant's progress record and referring to his psychiatric care and medication. (11RT 2864.) The prosecution objected to medical information being taken from one source and then used to reach a diagnosis. (11RT 2865-2866.) The court did not think the November 1963 school record at issue was reliable because it failed to indicate the individual responsible for the representations about appellant's psychiatric care and medication. The court explained that the report would be reliable if, for example, a school nurse had made the record. The record, however, in no way indicated what information had been relied on in preparing it. (11RT 2867-2868.) The court further stated that the jury had already heard sufficient evidence showing that appellant had psychiatric difficulties and was treated with medications. (11RT 2870.) As such, not only did the court find that the record was not reliable, it further found that the information contained in the record was cumulative. On similar grounds, the court also refused to admit a note about fevers and delusions appellant allegedly suffered. (11RT 2870, 2875.)

B. Appellant Was Not Allowed To Use Testifying Witnesses As An End-run Around The Ordinary Rules Of Evidence

Appellant's claim that evidence within the probation reports and school records was admissible under Evidence Code sections 801, 802, 1271 and 1280 ignores the ordinary rules of evidence prohibiting testifying witnesses from introducing the conclusions and opinions of non-testifying experts on direct examination. As a preliminary matter, it is indisputable that the actual probation reports and school records were inadmissible. (AOB 240, fn. 11.) The documents are hearsay, and the business records and official records exceptions to the hearsay rule do not apply. (Evid. Code, §§ 1271, 1280.)

To qualify as a business or official record, a document must be created by an employee of the business or the public entity, "at or near the time of the act, condition or event" referred to in the document, and "[t]he sources of information and method and time of preparation [must be] such as to indicate its trustworthiness." (Evid. Code, §§ 1271, subd. (b), 1280, subd. (c); *People v. Young* (1987) 189 Cal.App.3d 891, 911-912.) In *People v. Reyes* (1974) 12 Cal.3d 486, this Court held that a psychiatric evaluation did not qualify as a business record because:

> [t]he psychiatrist's opinion that the [patient] suffered from a sexual psychopathology was merely an opinion, not an act, condition or event within the meaning of [Evid. Code, § 1271]. "'. . . In order for a record to be competent evidence under that section it must be a record of an act, condition or event; a conclusion is neither an act, condition or event . . . . Whether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath . . . .'"

(*Id.* at p. 503, quoting *People v. Williams* (1960) 187 Cal.App.2d 355, 365; see also *Young*, *supra*, 189 Cal.App.3d at p. 912; *Hutton v. Brookside Hospital* (1963) 213 Cal.App.2d 350, 355.)

For the same reasons, the probation reports and school records did not qualify as business or official records. The prosecution was particularly concerned about the diagnoses and testing conclusions made by physicians and reflected in the probation reports, which the defense attempted to introduce through Kocourek. (9RT 2423-2424.) For example, the defense tried to introduce the conclusion of Dr. Brooks Fry that appellant suffered from brain damage, which was contained in one of the probation reports. (10RT 2482-2483.) The defense tried to introduce similar conclusions based on non-testifying experts' interpretations of medical tests. (11RT 2808-2814, 2820-2821.) As set forth above, these types of opinions from non-testifying experts were not admissible through a testifying one.

A similar concern existed with respect to the school records. The records contained medical information regarding appellant's psychiatric care and medications, but failed to indicate in any way what information was relied on to prepare the record and who provided the information, including certain diagnoses. (11RT 2865-2868.) For example, the reports contained conclusions and diagnoses about fevers and delusions appellant allegedly suffered. (11RT 2870, 2875.) As a result, the reports and records could not come into evidence as official or business records given their contents.

This conclusion in no way conflicts with the holding of *People v. Beeler* (1995) 9 Cal.4th 953. There, this Court limited the evidence of diagnoses to statements of fact, i.e., a record of what the person making the diagnosis had seen. This Court found that a diagnosis was not an admissible statement of fact where the diagnosis "'is the reasoning of the

person making it arrived at from the consideration of many different factors.' [Citations.]" (*Id.* at pp. 980-981.)

In anticipation of this result, appellant suggests the evidence was still admissible under Evidence Code section 801 and 802 via Dr. Cherkas because those statutes permitted him as an expert to testify as to the basis of his opinions. (AOB 240-241.) Respondent does not dispute that *People v. Miller* (1994) 25 Cal.App.4th 913, 918, held that a probation report, while hearsay, is sufficiently reliable to allow an expert to rely upon it in rendering an opinion in an MDO trial. *Miller*, however, did not hold that the report itself is admissible. (*Ibid.*) This Court, therefore, is solely tasked with determining whether the trial court improperly restricted the scope of Dr. Cherkas' testimony about the basis of his opinion. It did not.

As *People v. Campos* (1995) 32 Cal.App.4th 304, 307-308, made clear, mental health experts may rely upon reliable hearsay, which includes statements of the patient and other treating professionals, in forming their opinion concerning a patient's mental state. (Evid. Code, § 801, subd. (b); *Young*, *supra*, 189 Cal.App.3d at p. 913; *In re Torres* (1986) 180 Cal.App.3d 1159, 1163; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525; see also *Miller*, *supra*, 25 Cal.App.4th at pp. 917-919.) On direct examination, the expert witness may state the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion. (*People v. Coleman* (1985) 38 Cal.3d 69, 92.)

An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by non-testifying experts. (*Campos*, *supra*, 32 Cal.App.4th at p. 308.) """The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse."'" (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 894, quoting *Lynch Meats of Oakland, Inc. v. City of Oakland* (1961) 196 Cal.App.2d 104, 112;

see also *Reyes*, *supra*, 12 Cal.3d at p. 503.) As a result, Dr. Cherkas was permitted to testify as to the reports and materials he relied on in forming his own opinion. But the defense was not allowed to use his testimony on direct examination as a means of introducing the conclusions and opinions of other physicians. (see Witkin, Cal. Evidence (2d ed. 1966) § 410, pp. 368-369; *Whitfield*, *supra*, 10 Cal.3d at p. 895 ["but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury"]; see also *Young*, *supra*, 189 Cal.App.3d at p. 913 ["[t]he rule which allows an expert to state the reasons upon which his opinion is based may not be used as a vehicle to bring before the jury incompetent evidence."].)

This rule did not preclude the cross-examination of an expert witness on the content of such reports. As the court noted in *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 864, "[p]rocedurally, if an expert does rely in part upon the opinions of others, the expert may be cross-examined as to the content of those opinions. It is improper, however, to solicit the information on direct examination if the statements are inadmissible. [Citations.]" The trial court, thus, did not err when it ruled that the defense could ask Dr. Cherkas if he had reviewed certain materials and whether he was able to render an opinion as a result, but could not explore the specifics of the actual report. (10RT 2486.)

C. The Trial Court Was Not Required To Admit The Reports And Records Despite Their Violation Of This State's Hearsay Rules Simply Because They May Have Contained Mitigating Evidence In A Capital Case

Appellant also argues that, even if the court properly excluded the evidence under California law, its exclusion violated his rights to due process and to present mitigating evidence under the United States Constitution. (AOB 243-246; see *Skipper v. South Carolina* (1986) 476 1,

4 [106 S. Ct. 1669, 90 L. Ed. 2d 1]; *Green v. Georgia* (1979) 442 U.S. 95, 99 [S.Ct. 2150, 60 L.Ed.2d 738].) Respondent disagrees.

"[N]either this court nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code." (*People v. Edwards* (1991) 54 Cal.3d 787, 837.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Exclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if only the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable. (*People v. Kaurish* (1990) 52 Cal.3d 648, 704.)

Green, supra, 442 U.S. 95, which appellant heavily relies on (AOB 244-246), is factually distinguishable and does not stand for the broad proposition that application of the hearsay rule to exclude evidence beneficial to the defendant is a violation of due process. During the penalty phase of a capital case, the trial court in *Green* excluded a codefendant's admission to a friend that he was solely responsible for the crime. (*Ibid.*) In concluding that exclusion of the statement violated the defendant's due process rights, the United States Supreme Court found that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [citation] and substantial reasons existed to assume its reliability." (*Ibid.*) The statement was made spontaneously to a close friend, there was ample corroborating evidence that led to the codefendant's conviction and capital sentence, the statement was against the codefendant's interest, and it was used against the codefendant in his own capital case. (*Ibid.*) The court held that "[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" (*Ibid.*, quoting

Chambers v. Mississippi (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

Chambers, *supra*, 410 U.S. p. 284, which involved the combined application of evidentiary rules leading to the exclusion of key witnesses and preventing the impeachment of another, has a similarly limited holding. The ruling in *Chambers* was based on the specific "facts and circumstances" of the case and "does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." (See *United States v. Scheffer* (1998) 523 U.S. 303, 316 [118 S.Ct. 1261, 140 L.Ed.2d 413], citing *Chambers*, *supra*, 410 U.S. at pp. 302-303.)

Here, the facts and circumstances present in *Green* and *Chambers*, which warranted the finding that the evidentiary exclusion was in error, are not present. Unlike in *Chambers*, neither key witnesses nor critical impeachment evidence was excluded. The facts here are even more distinguishable from those in *Green*. In *Green*, exclusion of the evidence prevented the defendant from showing that he was not present and did not participate in a killing. (*Green*, *supra*, 442 U.S. at p. 97.) And the statement was one against penal interest, which brought it within a clear exception to the hearsay rule. It was also made by the defendant's codefendant and tested in the codefendant's case by being used against him. (*Id.* at p. 95.) Here, however, the statements did not fall within a hearsay exception as already explained. Some were even unattributable to a specific declarant. And others not only carried with them no corroborating evidence, but even conflicted with Dr. Cherkas' conclusions. Under the circumstances, the evidence here was materially distinguishable from that in *Green* and *Chambers*. The trial court, thus, was not required to disregard this state's evidentiary rules by permitting the admission of the evidence.

D. Any Purported Error Was Harmless Given The Substantial Aggravating Evidence And The Fact That The Jury Heard Ample Evidence Regarding Appellant's Familial, Placement, and Medical History

What is most defeating to appellant's claim of error is the fact that even if the trial court erred by excluding the evidence, such error would have been harmless given the substantial aggravating evidence and the fact that the jury heard ample evidence regarding his familial, placement, and medical history. His contention otherwise (AOB 246-250) ignores the record.

From appellant's own half-sister, the jury learned that appellant came from a father who beat his mother, and a mother who was very cold and kept her feelings to herself. (9RT 2295, 2300, 2332, 2350.) The jury learned that the family lived in poverty. (9RT 2310.) Appellant's half-sister testified that appellant was a hyperactive child who would have to be tied to a door to keep from running away. (9RT 2302.) And she admitted causing a head trauma to appellant when he was a small child. (9RT 2304, 2347.) The jury was made well aware that appellant was no longer living in the home as of the time he was eight or nine years old, and that he mostly remained out of the home thereafter. In fact, the jury was informed that appellant's half-sister and mother visited him in correctional centers. (9RT 2312.) The jury was also told that appellant's mother did not give him medication. (9RT 2314.)

Appellant's half-sister's testimony was expounded upon by his uncles. One uncle informed the jury that he heard Slotnick hit appellant when he was young. (9RT 2395.) The same uncle confirmed that appellant's father beat his mother and that appellant was hyperactive and violent as a child. (9RT 2384, 2386.) Another uncle also confirmed the beatings by appellant's father, as well as appellant's hyperactivity. (10RT 2678-2680.)

The same uncle revealed that appellant required medications as a child. (10RT 2681.)

Appellant's cousin recounted similar tales of appellant's upbringing and youth. Like the other family members, one cousin testified that appellant was hyperactive and getting in trouble as a child. (9RT 2408-2409.) His aunts also confirmed the beatings of appellant's mother. (10RT 2671, 2684.)

Appellant's probation and parole officers supplied even greater detail of appellant's childhood. Kocourek explained appellant was taken by the state from his parents as a child. (9RT 2420.) He detailed appellant's placements, including at the Sycamores, and the difficulties in finding suitable placements given appellant's records of brain damage, hyperactivity, and inappropriate behavior, documented as early as when appellant was three and a half years old. (9RT 2420-2422, 2428-2429, 2439-2440, 2443-2445, 2456; 10RT 2463-2465, 2468-2469, 2474.) He detailed appellant's need for psychiatric medications and placements in psychiatric care as a child. (9RT 2428, 2463.) Kocourek added that he thought appellant suffered from attention deficit disorder and was impulsive. (10RT 2453-2454.) He even testified as to appellant's problems in school. (10RT 2466-2467.)

Kocourek laid out the details regarding encephalographs performed on appellant and the results, including findings of a brain lesion or brain damage. (10RT 2458, 2460.) He even opined that because of the brain dysfunction, appellant had an emotionally impulsive type of reaction. (10RT 2462.) Kocourek also detailed the difficulties appellant experienced living at home, which even caused appellant to run away from home. (9RT 2446, 2457; 10RT 2466-2467.) And Kocourek let the jury know that appellant's father was a convict, in and out of custody, who took appellant to some woman who introduced him to sex at an early age. (9RT 2447.)

The court also put before the jury substantial and detailed portions of the probation reports at issue. In these reports, appellant's school performance was documented. (11RT 2833-2834.) His suspensions were noted, as well as his seeing a psychiatrist and school psychologist as a youth. (11RT 2834-2835, 2838-2839, 2840-2841.) So too was appellant's poor family history noted. (11RT 2836-2837.) And the reports also laid out appellant's institutionalization and continued need for psychotherapy. (11RT 2841-2842, 2848-2849.) The reports further set forth appellant's medication and his psychological history, as well as his suffering from seizures. (11RT 2846, 2853.) They also reiterated that his brain damage made placement in a boy's home unavailable and that he suffered from a brain syndrome. (11RT 2850, 2853.)

The court even read probation reports to the jury that indicated that appellant was referred to a psychiatric clinic at 13 years old and had suffered a long history of impulsive behavior and trouble in school. (10RT 2494-2495.) The reports showed that appellant had been diagnosed with emotional instability, mild, manifested by incorrigibility and attention seeking devices in a child struggling with anxiety about parental rejection. (10RT 2496.) He had a history of provocative behavior and some borderline organic results on electroencephalogram examinations. He also had been treated for psychomotor epilepsy. (10RT 2495.) Electroencephalogram and neurological evaluations had been done. They gave some indication of abnormal results with signs of a minor cerebral injury, compensated, all causing the recommendation that appellant be medicated. (10RT 2497.) Dr. Cherkas confirmed the brain disturbance (10RT 2498), seizures (10RT 2500), and medications other physicians prescribed to treat appellant (10RT 2501-2502).

Given all of this evidence, it is unbelievable that appellant can suggest that the jury was deprived of the opportunity to hear that "he was taken into

state custody at the age of nine", he was acting out and running away from home as early as age eight, he had a father who was incarcerated, he was not attending or performing well in school, he suffered seizures as a child, he was referred to a psychiatric clinic as a child due to brain damage, testing showed he suffered from some brain damage, and he was placed outside of the home. (AOB 247.) His claim is in direct conflict with the record. On this basis alone, not only was there no error by the court in excluding cumulative or prejudicial and unreliable evidence, but also any perceived error was harmless under any standard. And when considered with the substantial aggravating evidence, including Jenah's recounting his being robbed at gunpoint by appellant (8RT 1907-1908), Self's testimony about the heinous assault he suffered in prison at the hands of appellant (8RT 1947), Ortiz's recounting of the robbery and stabbing by appellant (8RT 1979-1980), Campos' testimony about appellant's robbing him at gunpoint, twice (8RT 1994-1996), Arreola's and Chin's testimony about being robbed under the threat of a gun, twice (8RT 2000, 2003, 2008-2009), Joiner's and Gaxiola's recounting how appellant stabbed Gaxiola in prison (8RT 2101, 2115), it simply cannot be said that any purported error impacted the jury's penalty phase verdict.

XIV. THE TRIAL COURT CONDUCTED A SUFFICIENT INQUIRY INTO THE ALLEGED JUROR MISCONDUCT

Appellant's fourteenth argument on appeal is that the trial court erred by failing to conduct an adequate hearing to resolve disputed issues of fact concerning juror misconduct. He claims this error violated his rights to an impartial jury and reliable sentencing determination. (AOB 251-258.) The court, however, conducted a sufficient inquiry and acted within its discretion in finding that no further inquiry was required.

A. The Relevant Trial Court Proceedings

Following jury instruction during the penalty phase, the court was given a cartoon from a newspaper entitled, "In the Bleachers," which depicted a courtroom with a judge seated behind a bench, counsel seated at counsel table, and a female with a hockey stick pinning another person against a wall next to a witness stand. The cartoon read, "Objection sustained. Counsel will refrain from body-checking the witness and slamming him against the doors." (11RT 2939.) The cartoon was from the September 21, 1999 edition of the Los Angeles Times. The court was informed that Juror 12 gave the cartoon to the bailiff and asked the bailiff to give it to the prosecution to read. The bailiff than gave the cartoon to both the prosecution and defense. (11RT 2940.)

The defense alleged that the juror had committed misconduct by trying to communicate with the prosecution, and requested that the court ask the jurors if they discussed the matter. (11RT 2940-2941.) The prosecution argued that no misconduct had occurred because the juror was simply smiling and walking out of the courtroom when the juror decided to share the cartoon. (11RT 2941-2942.) The defense moved to excuse the juror. (11RT 2944.)

The court agreed with the defense that the juror had engaged in a form of communication and, thus, called the juror out to ask her about the cartoon. (11RT 2942-2943.) Juror 12 admitted to the incident, but explained that the jury thought the cartoon was funny and, therefore, wanted to give it to the bailiff. (11RT 2944-2945.)

The defense requested an evidentiary hearing based on the conflict between the bailiff's and the juror's versions of the incident. (11RT 2945-2946.) The court found that the evidence was sufficient to show that the juror did not have the intention of communicating with a specific party and that the comic was not meant specifically for the prosecution. (11RT

2946.) The prosecution then argued than no evidentiary hearing was required because all the parties were in the courtroom, and the juror simply wanted to pass around something funny she found. The court accepted the juror's representation and denied the defense's motion. (11RT 2948-2949.)

B. The Court Conducted A Sufficient Inquiry Into The Alleged Juror Misconduct, And Appellant's Claim To The Contrary Is Based On Speculation And Surmise

Although appellant suggests that the trial court should have questioned the other jurors and the bailiff under oath, the court's inquiry into the alleged misconduct was sufficient. A criminal defendant has a constitutional right to a trial by a jury where no juror has been improperly influenced by outside factors and is capable and willing to decide the case solely on the evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Section 1089 provides that "[i]f at any time . . . upon other good cause shown to the court [a juror] is found to be unable to perform his or her duty . . . the court may order the juror to be discharged . . . ." In construing this statute, this Court has held that "'[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821; see also *People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

Not every incident regarding juror conduct requires further investigation. "'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 478, quoting *People v. Ray* (1996) 13 Cal.4th 313, 343.) "'[A] hearing is required only where the court

possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.'" (*Ibid.*) "Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review." (*Burgener*, *supra*, 41 Cal.3d at p. 520.) However, "[t]he court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) Here, the court conducted a sufficient inquiry and acted within its discretion in finding that no further inquiry was required.

As soon as the trial court received the cartoon at issue, it read the cartoon into the record, as well as the allegation that Juror 12 gave the cartoon to the bailiff and asked that the bailiff pass it along to the prosecution. (11RT 2939-2940.) Despite the prosecution's argument that no misconduct occurred, the trial court acted in an abundance of caution and in appellant's favor by calling Juror 12 into the courtroom to testify under oath regarding the incident. (11RT 2940-2944.) The court asked Juror 12 about the cartoon, and Juror 12 stated that the jury only wished to provide the bailiff with it. (11RT 2944-2945.) The court then balanced Juror 12's explanation with the bailiff's and found based on its contemporaneous observation of both that Juror 12's explanation was credible. (11RT 2946.) In other words, it reviewed the stories of both sides before reaching its ruling rather than only hearing a single side and ruling based on a "stacked evidentiary deck." (See *People v. Barber* (2002) 102 Cal.App.4th 145, 153-154.) The court's decision was sound and within the court's discretion as it was in the best position to receive statements from both the bailiff and Juror 12 and resolve the issue given the circumstances as they existed at the time of trial. (See *People v. Seaton* (2001) 26 Cal.4th

598, 676 ["specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion"].)

Appellant, nevertheless, contends that further inquiry of each and every juror was required. He, however, offers no explanation as to how a further inquiry would have resolved the issue in his favor. Instead, appellant's claim is based on rank speculation and surmise. Nowhere in the record is a single motion for new trial with even one declaration from a juror supporting appellant's theory that the cartoon infected the deliberations and demonstrated a jury biased on behalf of the prosecution. Furthermore, additional inquiry may have improperly invaded the jurors' state of mind about the evidence or the attorneys' performance. The trial court, therefore, acted appropriately when it made its finding based on the circumstances as they existed at the time of the incident.

Despite the above facts, appellant attempts to analogize this case to *Wellons v. Hall* (2010) __ U.S. __ [130 S.Ct. 727, 175 L.Ed.2d 684], in support of his claim that the trial court erred in its handling of the alleged misconduct. (AOB 257-258.) As a preliminary matter, the procedural posture of *Wellons* was uniquely distinguishable from the posture here. There, the matter was before the United States Supreme Court following the rejection of a federal habeas petition. And the high court only remanded to determine if the petitioner was entitled to an evidentiary hearing in federal court because the claim that he was entitled to a hearing was previously ruled uncognizable. It did not hold that further inquiry was required or that the trial court erred. *Wellons*, thus, does not compel a finding that the trial court should have conducted a further inquiry.

As if this distinction was not enough to distinguish *Wellons*, the facts of *Wellons* are even more distinguishable. In *Wellons*, the defense did not learn until after trial "that there had been unreported ex parte contacts between the jury and the judge, that jurors and a bailiff had planned a

reunion, and that 'either during or immediately following the penalty phase, some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts,' 554 F.3d 923, 930 (C.A.11 2009)." (*Wellons*, *supra*, 130 S.Ct. at p. 729.) The trial court did not report a single one of these incidents to the defense. (*Ibid.*) As such, no inquiry at all was conducted regarding the juror contact. Here, however, the trial court immediately notified the parties and conducted an inquiry eliminating the specter of misconduct or bias that was present in *Wellons*.

Even more alarming in *Wellons* was that because the record contained no discussion of the juror contact, he was precluded from relief on his related appellate and habeas claims on the basis that the claims were procedurally barred. (*Wellons*, *supra*, 130 S.Ct. at p. 729.) This risk is not present here. The trial court ensured that a record existed regarding the cartoon, appellant's counsel raised appropriate and timely objections to the court's handling of the cartoon, and appellant now and in the future can assert his related claims both on appeal and habeas.

In addition, unlike in *Wellons*, the meaning of the cartoon was clear here. The jury obviously felt comfortable enough with the bailiff to share its humorous take on the prosecution's zealous cross-examination of the witnesses. No further inquiry was required to determine the purpose of providing the cartoon to the bailiff. From the above explanation, it is apparent that *Wellons* does not assist appellant at all.

In any event, even if this Court accepts appellant's allegation that there was juror misconduct without sufficient inquiry by the court, it should conclude there was no substantial likelihood of bias or prejudice. (*In re Hamilton* (1999) 20 Cal.4th 273, 296 [the verdict will not be disturbed if the entire record indicates "there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant"].) At worst, the jurors believed the prosecution's

cross-examination was humorously aggressive based on trial events, as opposed to extrajudicial evidence. Certainly, the alleged misconduct did not involve outside influences that might have impacted the jury's deliberations. The incident involved nothing more than a brief exchange of a cartoon completely unrelated to the evidence at trial. No evidence suggested that the cartoon caused the jurors to become biased against appellant. Furthermore, substantial evidence of aggravating factors, discussed above, supported the imposition of the death penalty.

XV. THE JURY INSTRUCTIONS DURING THE PENALTY PHASE DID NOT PRECLUDE THE JURY FROM GIVING EFFECT TO MITIGATING EVIDENCE OF AN UNREASONABLE BELIEF THAT KILLING FACUNDO WAS NECESSARY

Appellant's fifteenth argument on appeal is that the penalty phase instruction on moral justification (CALJIC No. 8.85) imposed a higher standard to establish the mitigating circumstance than is required for the guilt phase defense of imperfect defense of another. He claims this error prevented the jury from considering relevant mitigating evidence, in violation of the Eighth Amendment. (AOB 259-264.)

Appellant, nevertheless, acknowledges that this Court has already rejected this claim. (AOB 261-262.) In *People v. Murtishaw* (1989) 48 Cal.3d 1001 (*Murtishaw II*) this Court held that the jury instruction was sound as follows:

> The jury was instructed that a defendant's reasonable belief in moral justification was a mitigating circumstance [citation], thus possibly raising the negative inference that an unreasonable belief was not a proper consideration. However, the jury was also instructed to consider in mitigation "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." [Citation.] Had the jury believed defendant's evidence that he harbored an honest but unreasonable belief in the need for self-defensive action, the

> instructions permitted consideration of that information as a mitigating factor under [§ 190.3,] factor (j)-(k). [Citation.]

(*Murtishaw II*, *supra*, 48 Cal.3d at p. 1017.) For the same reason, this Court rejected the claim that the defendant's Fifth and Eighth Amendment rights were violated because the trial court's failure to instruct on imperfect self-defense prevented him from arguing lingering doubt as a factor in mitigation. This Court found no error because "[t]he factor (j)–(k) instruction given at the second penalty trial allowed the sentencer to consider any 'lingering doubts' about the culpability of defendant's conduct." (*Id.* at p. 1018.)

In this case, as in *Murtishaw II*, the trial court's jury instructions during the penalty phase included section 190.3, factor (k), allowing the jury, in determining the appropriate sentence, to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (5CT 1193.) Just as in *Murtishaw II*, instructing the jury with this factor permitted the jury to consider appellant's imperfect self-defense claim in determining the appropriate sentence. Accordingly, under the well settled principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456), appellant is foreclosed from asserting this argument on appeal.

XVI. THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTION OF THE JURY REGARDING AGGRAVATING AND MITIGATING EVIDENCE AND THE JURY'S SENTENCING DISCRETION

Appellant's sixteenth argument on appeal is that the trial court erred by refusing to give legally accurate instructions regarding the scope of aggravating and mitigating evidence and the jurors' sentencing discretion.

He claims this error violated state law and his right to a fair and reliable penalty determination. (AOB 265-277.) As is detailed below, none of appellant's specific claims of instructional error have any merit.

A. The Trial Court Did Not Err When It Declined To Give Appellant's Proposed Special Instruction No. 13 Regarding The Definition Of a Mitigating Circumstance

Appellant's first claim of instructional error during the penalty phase is that the trial court should have instructed with his Proposed Special Instruction No. 13, which read as follows:

> A mitigating circumstance is any circumstance arising from the evidence which does not constitute a justification or excuse for killing, or which (does not) reduce it to a lesser degree of crime than first degree murder, but which nevertheless may be considered as extenuating or reducing the moral culpability of the killing, or which makes this murder less deserving of extreme punishment than other first degree murders with special circumstances.

(AOB 267-270; 5CT 1231.) In essence, he claims that this instruction was necessary to cure deficiencies in CALJIC No. 8.88 and cites studies in support of his claim. (AOB 268-269.) He, nevertheless, concedes that this Court has previously rejected the same challenge. (AOB 269, fn. 88.) He has offered no persuasive reason why this Court should reexamine its previous decisions and, therefore, this Court should reject his claims and uphold its holdings in *People v. Welch* (1999) 20 Cal.4th 701, 773, and *People v. Lee* (2011) 51 Cal.4th 620, 652.

B. The Trial Court Did Not Err When It Declined To Instruct With Special Requested Instruction Nos. 15, 27, And 45

Appellant's second claim of instructional error during the penalty phase is that the court should have given requested instructions concerning the limitations of aggravating circumstances. (AOB 271-276.) He initially

alleges that the court should have instructed with Special Requested Instruction No. 27, which would have advised the jury that it could not "double count" the facts underlying a special circumstance as an aggravating factor. (AOB 271; 5CT 1248; 11RT 2907.) Although the trial court should have admonished the jury as requested, its failure to do so does not compel reversal. (See *People v. Jones* (2012) 54 Cal.4th 1, 77.) The trial court instructed the jury concerning the consideration of aggravating and mitigating circumstances pursuant to CALJIC No. 8.85, which incorporates section 190.3, subdivision (a). In *People v. Melton* (1988) 44 Cal.3d 713, this Court recognized a "theoretical problem" (*id.* at p. 768) with the literal language of factor (a), in that it instructs the jury to consider both the "'circumstances of the crime'" and "'the existence of any special circumstances.'" (*Id.* at p. 763.) Because "the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so." (*Id.* at p. 768.) This Court, however, has repeatedly recognized "'that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor.' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1225-1226.) Appellant has not even suggested, let alone argued with citation to the record, that the prosecution here did anything to mislead the jury in this respect. As such, it follows that "there is no reasonable likelihood that the jury unconstitutionally applied CALJIC No. 8.85." (*Id.* at p. 1226.)

Appellant next alleges that the trial court should have instructed with Special Instruction No. 45, which provided that aggravating circumstances are limited to those enumerated in the statute, while there is no such limit on mitigating evidence. (AOB 271; 5CT 1271-1272; 11RT 2908.) Citing *Hitchcock v. Dugger* (1987) 481 U.S. 393 [107 S.Ct. 1821, 95 L.Ed.2d

347], appellant contends that the trial court's failure to give the proposed instruction prevented the jury from understanding the scope of the factors they might consider in mitigation. (AOB 271-272.) *Hitchcock* is not apposite.

There, a Florida trial court had instructed a jury to consider only the mitigating evidence that fell within a restrictive set of statutory mitigating factors; the trial court thus erroneously precluded the capital sentencing jury from considering other constitutionally relevant mitigating evidence. (*Hitchcock, supra*, 481 U.S. at pp. 398-399; see *Skipper, supra*, 476 U.S. at p. 4.) In contrast, the jury in the case before us was properly instructed with CALJIC No. 8.85 to consider "[a]ny other circumstance" proffered as mitigating evidence. (See 5 CT 1192-1193; 11RT 2929-2931; § 190.3, factor (k).)

Finally, appellant alleges that the trial court should have instructed with Proposed Special Instruction No. 15, which provided that the absence of mitigating circumstances may not be considered aggravating. (AOB 272; 5CT 1233; 11RT 2904.) A trial court is not required to amend the standard jury instruction regarding the sentencing determination, CALJIC No. 8.85, specifically to inform the jury that mitigating factors must be considered only in mitigation and the absence of proof of a mitigating factor cannot be considered an aggravating factor. (*People v. Gamache* (2010) 48 Cal.4th 347, 406; *People v. Jackson*, (2009) 45 Cal.4th 662, 695.) Thus, this claim, like the others regarding above, is without merit.

C. The Trial Court Did Not Err When It Declined To Instruct With Proposed Special Instruction Nos. 22, 31, 34, 46, 58, 59, and 61

Appellant's third claim of instructional error during the penalty phase is that the trial court erred by refusing to give legally accurate instructions concerning the weighing process. (AOB 273-276.) He specifically alleges

that the court should have instructed with Proposed Special Instruction No. 58 ("you are never required to return a verdict of death . . . unless you conclude as a matter of your own independent moral judgment that death is the only appropriate penalty" (5CT 1283)), Proposed Special Instruction Nos. 22, 31, 59, and 61 (any one mitigating circumstance could be sufficient by itself to warrant a life sentence, even if several aggravating circumstances were found (5CT 1243, 1256, 1284, 1288)), and Proposed Special Instruction Nos. 34 and 46 (the defendant's life could be spared for any reason, even if aggravating circumstances outweighed the mitigating circumstances that were found to be present (5CT 1259, 1273)).

This Court has already rejected the claim that a trial court is required to instruct the jury that one mitigating factor could outweigh multiple aggravating factors, explaining that "the standard jury instructions . . . 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citations.]" (*People v. Kelly* (2007) 42 Cal.4th 763, 799; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1316 [same].) The other standard instructions that were given, including CALJIC No. 8.88, which instructed the jury that a mitigating factor may be "any fact, condition, or event" and that jurors could assign to each factor any moral or sympathetic value they deem appropriate, "amply covered the point." (*People v. Cook* (2007) 40 Cal.4th 1334, 1364.) Moreover, a "trial court may properly refuse as argumentative an instruction that one mitigating factor may be sufficient for the jury to return a verdict of life imprisonment without possibility of parole." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1150.) The instructions given were sufficient to convey to the jury its responsibility in deciding the appropriate punishment, and the proposed instructions were unnecessary. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 456-457 [trial court did not err in refusing a proposed instruction regarding the jury's moral responsibility to

determine the appropriate penalty because it was duplicative of CALJIC No. 8.88].)

Appellant, nevertheless, cites *People v. Sanders* (1995) 11 Cal.4th 475, in support of his argument. (AOB 274-275.) *Sanders* does not assist his argument.

There, this Court expressed approval of an instruction advising the jury, in part, that one mitigating factor may be sufficient to determine that life without the possibility of parole is the appropriate punishment, finding that the instruction, as a whole, reduced the risk that the jury would misapprehend "the nature of the penalty determination process or the scope of their discretion to determine through the weighing process whether death or life imprisonment without possibility of parole was the appropriate punishment." (*Sanders*, *supra*, 11 Cal.4th at p. 557.) This Court did not impose an obligation upon a trial court to instruct the jury that a single mitigating factor could outweigh all other aggravating factors. It, instead, has repeatedly held that the standard jury instructions, specifically CALJIC No. 8.88, adequately instruct the penalty phase jurors as to the nature and scope of their determination. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181.) Appellant has not presented a single persuasive reason that this Court should revisit its previous decisions.

D. The Trial Court Did Not Err When It Declined To Instruct With Proposed Special Instruction No. 30

Appellant's fourth claim of instructional error during the penalty phase was that the trial court erred by refusing to instruct accurately the jury that it could consider sympathy and mercy in deciding whether to impose the death sentence. He specifically alleges that the court should have instructed the jury with Proposed Special Instruction No. 30, which read as follows:

> If a mitigating circumstance or an aspect of the defendant's background or his character arouses sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and opt instead for life without possibility of parole.

(AOB 276-277; 5CT 1255.) This Court has previously held that a trial court properly refused a defense instruction "that any aspect of defendant's background or character could be considered as a mitigating factor." (See *People v. Carter* (2003) 30 Cal.4th 1166, 1228-1229.) Additionally, to the extent the proposed instruction would have directed the jury to consider all evidence in mitigation or instructed the jury that emotions such as sympathy, empathy, and compassion were legitimate mitigating factors, they were duplicative of the instructions given, such as CALJIC No. 8.85 (5CT 1192-1193) and CALJIC No. 8.88 (5CT 1205-1206). (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 791; *People v. Leonard* (2007) 40 Cal.4th 1370, 1420; *People v. Ramirez* (2006) 39 Cal.4th 398, 470; *People v. Hinton* (2006) 37 Cal.4th 839, 911-912; *People v. Gurule* (2002) 28 Cal.4th 557, 659.) Appellant, therefore, is not entitled to appellate relief on this claim.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant's seventeenth argument on appeal is that California's death penalty statute as interpreted by this Court and applied at his trial violated the federal constitution. (AOB 278-295.) First, he contends that section 190.2 is impermissibly broad. (AOB 278-279.) The list of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad. (*People v. Dykes* (2009) 46 Cal.4th 731, 813.)

Second, he claims that the broad application of section 190.3, subdivision (a) violated his constitutional rights. (AOB 279-280.) This Court has already rejected this claim. (*People v. Jones* (2011) 51 Cal.4th 346, 380-381, and cases cited therein.)

Third, he claims that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 281-283.) This Court has rejected this claim as well. (*Jones*, *supra*, 51 Cal.4th at pp. 380-381, and cases cited therein.)

Also rejected in the past by this Court is his fourth argument that some burden of proof is required or the jury should have been instructed that there was no burden of proof (AOB 283-284). (*Jones*, *supra*, 51 Cal.4th at pp. 380-381.)

His fifth claim that his death verdict was not premised on unanimous jury findings (AOB 284-286) was similarly rejected by this Court when asserted by other capital defendants. (*Jones*, *supra*, 51 Cal.4th at pp. 380-381; *People v. Ward* (2005) 36 Cal.4th 186, 221-222.)

This Court has also already rejected his sixth claim that the instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard (AOB 287). (*People v. Carter* (2003) 30 Cal.4th 1166, 1226.)

And it has rejected his seventh claim that the instructions failed to inform the jury that the central determination is whether death is the appropriate punishment (AOB 287-288). (*People v. Boyette* (2002) 29 Cal.4th 381, 465.)

His eighth claim that the instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (AOB 288-289) has never persuaded this Court when raised previously. (*People v. Medina* (1995) 11 Cal.4th 694, 782; see *People v. Ray* (1996) 13 Cal.4th

313, 356 ["By stating that death can be imposed in only one circumstance—where aggravation substantially outweighs mitigation—the instruction clearly implies that a sentence less than death may be imposed in all other circumstances."]; see also *People v. Dement* (2011) 53 Cal.4th 1, 56; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1097.)

This Court has also rejected his ninth claim that the instructions violated his constitutional right by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances (AOB 289-290). (*People v. Streeter* (2012) 54 Cal.4th 205, 268.)

This Court has found no merit in appellant's tenth argument that the penalty jury should be instructed on the presumption of life either (AOB 290-291). (*People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Lomax* (2010) 49 Cal.4th 530, 594-595.)

This Court has further rejected his eleventh claim that his right to meaningful appellate review was violated by the failure to require the jury to make written findings (AOB 291-292). (*People v. Scott* (2011) 52 Cal.4th 452, 496; *People v. McKinnon* (2011) 52 Cal.4th 610, 693.)

Appellant's twelfth claim regarding the use of restrictive factors in the list of potential mitigating factors has been found to be without merit (AOB 292). (*People v. Hoyos* (2007) 41 Cal.4th 872, 927.)

Appellant's thirteenth claim regarding the trial court's failure to delete purportedly inapplicable sentencing factors likewise has been found to be without merit (AOB 292). (*People v. Cook* (2006) 39 Cal.4th 566, 618.)

In his fourteenth claim, appellant similarly asserts another argument previously rejected by this Court, i.e., that the trial court failed to instruct the jury that certain sentencing factors were only relevant as mitigators (AOB 293). (*People v. Farnam* (2002) 28 Cal.4th 107, 191.)

In his fifteenth claim, appellant suggests that the failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment (AOB 294), but this Court has already determined that this claim lacks merit. (*People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Appellant's sixteenth claim that the California capital sentencing scheme violates the equal protection clause has been rejected by this Court (AOB 294). (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Appellant's seventeenth and final claim that California's use of the death penalty as a regular form of punishment falls short of international norms has also been rejected by this Court (AOB 295). (*Cook, supra*, 39 Cal.4th at p. 620.)

XVIII. NO CUMULATIVE PREJUDICE EXISTS IN THIS CASE

Appellant's eighteenth argument on appeal is that this Court must reverse his convictions and death sentence based on the cumulative effect of all the errors he has alleged, which undermined the fundamental fairness of the trial and reliability of the death judgment. (AOB 296-299.) But where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1219.) For the reasons explained, there was no error in this case, and even if there was error it was harmless. The several alleged errors, or small groups of related errors, that appellant points to are all discrete and unrelated, and therefore have no accumulating effect. Thus, even considered in the

aggregate, the alleged errors could not have affected the outcome of trial. There was no miscarriage of justice, and reversal is not required on this ground.

XIX. APPELLANT'S CLAIM THAT THIS CASE SHOULD BE REMANDED FOR THE LIMITED PURPOSE OF CLARIFYING THE SENTENCE IMPOSED AND DEEMED TO BE COMPLETED UPON APPELLANT'S DEATH APPEARS TO HAVE MERIT

Appellant's nineteenth and final argument on appeal is that this Court must remand the matter so that the abstract of judgment can be corrected to reflect the legally authorized sentence of 15 years to life on count 2. (AOB 300-303.) His claim appears to have merit.

At the time of trial, the court orally pronounced that as to count 2, it was imposing "one additional year consecutive for the use of a dangerous or deadly weapon" plus "35 years consecutive for . . . seven, five-year priors within the meaning of Penal Code section 667(a)." (12RT 3078.) The minute order reflecting the sentence stated the same. (5CT 1313-1314.) Yet the abstract of judgment imposed a base term of 25 years to life as to count 2 (5CT 1327), which could not have been the base count because under section 190, subdivision (a), and *People v. Turk* (2008) 164 Cal.App.4th 1361, 1365, 15 years to life was the appropriate base term for a second degree murder conviction. Thus, the trial court failed to orally pronounce a base term as to count 2, the minute order contained the same omission, and the abstract of judgment contained an incorrect base term.[24] This Court, therefore, should remand the matter for the limited purpose of clarifying the base term imposed on count 2 and the amount of custody

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[24] As appellant has also noted, similar confusion exists as to his custody credits (5CT 1311, 1327A; AOB 303), and the matter should be remanded for clarification of the correct amount of credits to be awarded.

credits. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.)

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court order a limited remand for the purpose of clarifying appellant's sentence on count 2 and the amount of custody credits awarded, and otherwise affirm the judgment in its entirety.

Dated: November 14, 2012

Respectfully submitted,

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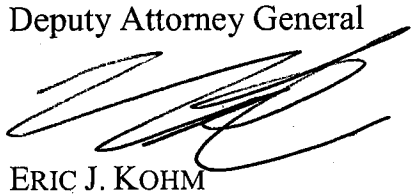

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 61,895 words.

Dated: November 14, 2012

KAMALA D. HARRIS
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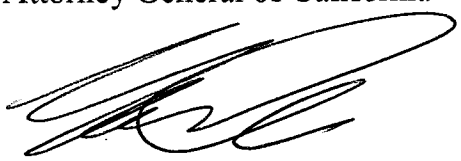

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S083594**

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.

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On **November 15, 2012**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, 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 **November 15, 2012**, at Los Angeles, California.

Lupe Zavala
Declarant

Signature

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