IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD VALDEZ,** Defendant and Appellant.	S062180 **CAPITAL CASE**

Los Angeles County Superior Court No. BA108995
The Honorable George W. Trammell III, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

MICHAEL R. JOHNSEN
Deputy Attorney General
State Bar No. 210740

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2268
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Other Authorities

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD VALDEZ,** Defendant and Appellant.	S062180 **CAPITAL CASE**

INTRODUCTION

On April 22, 1995, Anthony "Dido" Moreno was killed in a professional-style hit at his sister's apartment in El Monte, in the San Gabriel Valley area of Los Angeles County. Four other people who happened to be present were also killed in the shooting: Gustavo "Tito" Aguirre; Maria Moreno (Anthony's sister); and two of Maria's children, five-year-old Laura Moreno and six-month-old Ambrose Padilla.

The hit had been ordered by a Mexican Mafia leader, Raymond "Heuro Shy" Shyrock, as punishment for Anthony Moreno's having dropped out of the Mexican Mafia about twelve years earlier. Shyrock delegated the organization of the hit to his lieutenant, Luis "Pelon" Maciel, a former El Monte Flores gang member who had recently risen into the ranks of the Mexican Mafia. Maciel in turn recruited members of the Sangra gang, from a neighboring area of the San Gabriel Valley, to carry out the hit. These Sangra gang members included appellant Richard "Primo" Valdez, appellant's codefendant Jimmy "Character" Palma, and their confederates who were later tried separately, Anthony "Scar" Torres, Danny "Tricky" Logan, and Jose "Pepe" Ortiz.

On the day of the murders, Maciel personally scouted the scene. Knowing that Anthony Moreno was a heroin addict, Maciel took a "gift" of

heroin to him as a pretext for the visit and to ensure that Moreno would be under the influence of the depressant at the time of the attack. Later that day, Maciel met with Palma and gave him some heroin to help the Sangra gang members gain entry to Moreno's apartment. Palma assured Maciel that he would "take care of business."

That night – according to a Sangra gang member who agreed to testify at trial – appellant, Palma, and their confederates met at Torres's house to prepare for the hit. They then proceeded to Moreno's apartment. Appellant and Palma went inside, while Torres stood guard outside with a shotgun and Logan remained at the wheel of the car. Ortiz acted as a lookout further down the street. As Palma showed Gustavo Aguirre the heroin, appellant shot Aguirre in the head. Anthony Moreno tried to flee, and appellant shot him also. Palma shot Maria Moreno as she pleaded for her life, and then shot her two children.

Police investigation linked the Sangra gang members to Maciel through telephone and pager records. In addition, bullets and shell casings found at the crime scene were scientifically matched to a bullet and shell casings found in appellant's residences. Coordination among the gang members following Palma's arrest further cemented their link.

Appellant and Palma were tried together and presented a reasonable doubt defense as to their participation in the killings. They argued mainly that the prosecution gang-member witnesses were accomplices who could not be believed and that other witnesses had not identified them as participants. They also pointed to a lack of such evidence as the murder weapons or fingerprints. Appellant argued that he was, at the time of the killings, distancing himself from the Sangra gang. In addition, appellant and Palma suggested that the murders may have been committed by drug dealers over a dispute with Gustavo Aguirre and Anthony Moreno.

Both appellant and Palma were convicted of the five murders with special circumstances and were sentenced to death. Palma was killed in prison shortly thereafter.

STATEMENT OF THE CASE

The District Attorney of Los Angeles County commenced grand jury proceedings against appellant Richard Valdez, Jimmy Palma, Anthony Torres, and Danny Logan on September 11, 1995. (1CT 5-301; 2CT 304-599; 3CT 600-899; 4CT 900-910.) On September 20, 1995, the grand jury returned a six-count indictment. Five of the six counts jointly charged the defendants with the murders (Pen. Code, § 187, subd. (a)) of Anthony Moreno, Gustavo Aguirre, Maria Moreno, Laura Moreno, and Ambrose Padilla. In addition, the indictment alleged, as to all of those counts, a multiple-murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)), as well as gang (Pen. Code, § 186, subds. (b)(1), (b)(2)) and weapon (Pen. Code, §§ 12022, subd. (a)(1), 12022.5, subd. (a)) enhancements. The remaining count charged Torres with a separate murder. (4CT 1135-1140.) The indictment was sealed to allow authorities time to arrest appellant. (4CT 911-915.)

The indictment was unsealed on September 28, 1995, and Palma, Torres, and Logan were arraigned. (4CT 1151.) Appellant was arraigned on October 26, 1995. He pleaded not guilty and denied all the allegations. (4CT 1165.)

On December 6, 1995, the district attorney commenced further grand jury proceedings against Raymond Shyrock, Luis Maciel, and Jose Ortiz, but the district attorney later decided not to proceed against Shyrock[1/]. (4CT 925-1123.) On December 12, 1995, the grand jury returned an amended indictment

---

1. Shyrock was facing federal charges at the time. (See 2BRT 508.)

containing the identical charges as the original indictment and adding Maciel and Ortiz as defendants in all counts except the one concerning Torres's separate murder. (4CT 1141-1147.) Maciel and Ortiz were arraigned on December 18, 1995. (1RT 120-127.)

On June 16, 1996, the district attorney's office announced that it would pursue the death penalty against all defendants. (5CT 1317.)

Defense motions for separate trials were granted on September 3, 1996. (6CT 1567-1569.) On September 11, 1996, appellant's and Palma's cases were transferred to the Honorable George W. Trammell, III for all further proceedings. (6CT 1571-1572.) On September 20, 1996, Judge Trammell ruled that appellant and Palma would be tried together before a single jury. (4RT 786-788.)

Jury selection began on September 30, 1996, and a jury was sworn on October 17, 1996. (6CT 1615-1616, 1618, 1633-1635.) Opening statements in the guilt phase were made on October 22, 1996, and, following the presentation of evidence, closing argument was heard on November 13, 14, and 15, 1996. (6CT 1646, 1680-1682.) The jury began deliberating in the guilt phase on November 18, 1996. (6CT 1685.) On November 25, 1996, the jury declared an impasse, and the court instructed the jury regarding further deliberations. (6CT 1696, 1698.) On November 27, 1996, the court excused a juror who declared that she was unable to deliberate and replaced the juror with an alternate. (6CT 1702.) On December 2, 1996,[2/] the court instructed the jury to begin deliberations anew. (6CT 1704.) On December 4, 1996, the jury returned verdicts of guilty on all counts and found all the allegations true. (7CT 1795-1834.)

The penalty phase began on December 9, 1996. (7CT 1842.) After the

---

2. No proceedings were held on November 28 or 29, 1996, because of the Thanksgiving holiday.

presentation of evidence, closing argument in the penalty phase was heard on December 11 and 12, 1996. (7CT 1844-1845.) The jury began deliberating on December 12, 1996. (7CT 1845.) On December 13, 1996, the jury returned verdicts of death. (7CT 1859-1884.)

On June 11, 1997, motions for a new trial and to modify the verdict were heard before the Honorable Robert W. Armstrong. The motions were denied, and, on the same date, the court sentenced appellant and Palma to death. (7CT 1943-1946, 1949-1956.)[3/]

Appellant's and Palma's appeals to this Court were automatic. (Pen. Code, § 1239.)

Palma was stabbed to death in San Quentin State Prison on October 13, 1997. On April 15, 1998, this Court ordered Palma's appeal permanently abated.

---

3. Logan and Ortiz were subsequently tried before the Honorable Charles Horan and sentenced to life imprisonment without parole. On August 31, 1998, their convictions were affirmed on appeal in case number B113206, and review was denied by this Court on December 16, 1998, in case number S073929. Torres was separately tried before Judge Horan and sentenced to life imprisonment without parole after the jury deadlocked on penalty. On March 9, 1999, his conviction was likewise affirmed on appeal in case number B113362, and review was denied by this Court on June 16, 1999, in case number S078034. Maciel was also separately tried before Judge Horan. He was sentenced to death, and his automatic appeal is currently before this Court in case number S070536.

STATEMENT OF FACTS

I.

GUILT PHASE

A. Prosecution

1. The Mexican Mafia Is Recorded Discussing The Murder Of "Dido," A Mexican Mafia "Dropout"; Sangra Gang Members Are Considered "Soldiers" of the Mexican Mafia

a. Gang Expert Richard Valdemar

Sergeant Richard Valdemar, a 25-year Los Angeles County Sheriff's Department veteran who had spent most of his career investigating gangs, testified as a gang expert at trial. (18RT 2236-2237; see also 18RT 2237-2248.) One of the gangs Sergeant Valdemar had investigated was the Mexican Mafia. The Mexican Mafia was formed as a prison gang in 1957, and by 1977 the gang controlled most of the prisons in California. (18RT 2251-2252.) In the 1970s, the Mexican Mafia began making efforts to move outside the prison system. (18RT 2252-2253.) Eventually, the Mexican Mafia came to exert control over virtually all Hispanic street gangs in Southern California, levying taxes and mediating inter-gang disputes. Hispanic gang members are, essentially, "soldiers" of the Mexican Mafia. They could be killed for refusing to act on Mexican Mafia orders. (18RT 2253, 2298-2299, 2306-2307.) The Mexican Mafia is a very sophisticated gang and also an extremely ruthless one. (18RT 2265-2266, 2272-2273, 2329.) At the time of trial, Sergeant Valdemar estimated that there were about 250 to 300 Mexican Mafia members. (18RT 2264.)

In 1994, Sergeant Valdemar was assigned to assist in a joint state-federal task force investigating the Mexican Mafia. Pursuant to a court order, the task force performed audio and video surveillance of Mexican Mafia meetings.

(18RT 2249-2250.) In January 1995, the task force monitored a meeting in which a Mexican Mafia leader named Raymond Shyrock, known as "Huero Shy," discussed killing a Mexican Mafia "dropout":

> I don't know if you have ever heard of this brother Dido. He dropped out a long time ago. He's in an apartment where I was living. The mother fucker was living right downstairs but never showed his face. All kind of people in the pad, bunch of young sisters and kids, all kinds of shit. So I'm trying to figure out how to – I need a silencer is what I need.

(18RT 2280-2281.)

Sergeant Valdemar explained that Mexican Mafia members are not permitted to leave the gang except by death. Moreover, vendetta is part of the Mexican Mafia lifestyle, and time does not mean much to the gang; waiting 10 or 15 years to exact revenge is routine. (18RT 2254-2258.)

After hearing the murder of "Dido" discussed, Sergeant Valdemar tried to determine his identity and to warn him of the threat, but was unable to find him. (18RT 2281-2282, 2299-2306.)

In April 1995, during one of the meetings monitored by law enforcement, Shyrock sponsored the induction of Luis Maciel, known as "Pelon," into the Mexican Mafia. (18RT 2259-2264, 2284.) Shyrock was responsible for controlling the San Gabriel Valley area for the Mexican Mafia. Maciel, in turn, was made responsible for El Monte, under the supervision of Shyrock. (18RT 2267.)

b. Gang Expert Dan Rosenberg

Sergeant Dan Rosenberg of the Los Angeles County Sheriff's Department testified at trial as an expert on the Sangra street gang. The Sangra gang is centered around the Temple City area in the San Gabriel Valley and has

been classified as a criminal street gang by the Los Angeles County Superior Court since 1990. In Sergeant Rosenberg's opinion, the Sangra gang would be willing to commit a crime at the behest of the Mexican Mafia, because doing so would increase Sangra's reputation and status in the gang community. (19RT 2505-2510.)

2. Luis Maciel, A Mexican Mafia Gang Member, Accompanied By Sangra Gang Members, Scouts Anthony "Dido" Moreno's Residence Hours Before Moreno's Murder

a. Witness 15 – Dido's Brother

Witness 15[4] was the brother of Anthony "Dido" Moreno. Anthony Moreno had joined the Mexican Mafia in 1973, while incarcerated at San Quentin. (15RT 1990-1991, 1999-2000.) He dropped out of the Mexican Mafia in 1983. (15RT 2001, 2030.)[5] After Anthony Moreno dropped out, the Mexican Mafia pressed Witness 15 for information on where he could be found. (15RT 2002.) According to Witness 15, people who drop out of the Mexican Mafia eventually get killed "one way or another." (15RT 2005.)

When Witness 15 was released from prison in January 1995, he moved in with his mother on Maxson Road in El Monte. Anthony Moreno was living with their mother as well at that time. (15RT 2003-2004.) Witness 15 and Anthony Moreno were both heroin addicts. (15RT 1995, 2006.) By coincidence, Raymond Shyrock, who had been in San Quentin when Anthony

---

4. Numerous witnesses were identified by number in the written record of the grand jury proceedings and trial, out of concern for their safety. (See Args. I-II, *post.*)

5. Because Mexican Mafia dropouts are subject to being killed, the California Department of Corrections (as then known) employs a rigorous procedure of debriefing and then separating dropouts. (15RT 2030-2031, 2057; 18RT 2255-2258.)

Moreno joined the Mexican Mafia, lived in a different apartment in the same building. Witness 15 saw Maciel visiting Shyrock often. He warned his brother that he and his family could be killed if the Mexican Mafia discovered where he was living. However, Anthony Moreno was blind to the danger as a result of his heroin addiction. (15RT 2000, 2004-2006, 2036, 2047.) Eventually, the apartment building was condemned, and Anthony Moreno moved in with his sister, Maria Moreno. She lived with her children in an apartment at the back of a house at 3843 Maxson Road. (15RT 1995, 2003, 2008-2010.)

On April 22, 1995, Witness 15 and Anthony Moreno went to Arcadia, where they stole property and then fenced it to get money to buy drugs. They then bought heroin at a trailer park in El Monte and took it back to Maria Moreno's apartment. They shot up the heroin in the bathroom of the apartment. This process was repeated about three times that day. (15RT 1991-1997, 2036-2038.)[6/]

At around 2:30 that afternoon, Maciel arrived at Maria Moreno's apartment while Witness 15 and Anthony Moreno were there. Witness 15 knew Maciel as a Mexican Mafia member from his days in prison. (15RT 1997-1998, 2011.)[7/] There were two "younger" men with Maciel. (15RT 2008.) They looked "clean cut," except that one had an El Monte Flores gang tattoo on his arm. (15RT 2027, 2051-2052.) Witness 15 was born and raised in El Monte and had been a member of the El Monte Flores gang, but he had

---

6. Witness 15 was in custody for commercial burglary at the time of trial. (15RT 2041.) He had previously been convicted of several robberies. (15RT 2058-2060.)

7. Witness 15 testified at trial that he did not actually see the car Maciel arrived in. (15RT 2010.) He explained that he might have previously told police that Maciel arrived in a white Cadillac because "I know what kind of car he drives around all the time." (15RT 2028-2029.)

never seen the two men around El Monte before. (15RT 2018.) When Maciel arrived, Gustavo "Tito" Aguirre, a fellow drug user, was also at the apartment. Aguirre ran inside and hid. Witness 15 knew that Aguirre had robbed several Hispanic drug dealers, including at least one who was paying taxes to the Mexican Mafia. This would have subjected him to being killed, "no question," by the Mexican Mafia. (15RT 2011, 2019-2020, 2037, 2041-2042, 2046.) Witness 15 also knew that Aguirre had robbed drug dealers associated with the Border Brothers, a violent drug syndicate. Witness 15, however, was most concerned about Mexican Mafia retaliation against his brother for dropping out. (15RT 2042-2044, 2048-2050.)

Witness 15 saw Maciel and the two men walk down the driveway toward them. Maciel approached Witness 15 and Anthony Moreno and talked to them for about 30 minutes. Maciel seemed nervous and unusually talkative. Witness 15 noticed that during the conversation, Maciel was facing the door of the apartment. From that vantage point, Maria Moreno could be seen inside watching television, and her children could be seen playing. Maciel periodically looked in the door of the apartment. He asked after Witness 15's family, and also asked where Tito was, which Witness 15 did not divulge. (15RT 2009-2010, 2014-2016.)

At some point, Maciel offered Witness 15 and Anthony Moreno some heroin. Witness 15 found this suspicious, as "people don't normally give away drugs." (15RT 2012-2013.) He initially thought it might be a "hot shot," meaning it was poisoned. But after trying a small sample, the brothers determined the heroin was clean and used the rest. (15RT 2021-2022.) Witness 15 explained that heroin is a "downer"; it has a relaxing effect on the user. (15RT 2007.)

b. Sangra Gang Member Victor Jimenez

Victor Jimenez was a member of the Sangra street gang. (13RT 1733-1734.) Jimenez owned a blue jeep. (13RT 1734-1735.) On April 21, 1995, Jimenez was discharged (other than honorably) from the Marines. (13RT 1735.) The next afternoon, on April 22, 1995, Jimenez drove his jeep to visit Anthony Torres, a fellow Sangra member known as "Scar." There were "a few people in and out" of Torres's house while Jimenez was there. (13RT 1736-1742; 14RT 1849-1850.) At some point, Torres borrowed the jeep and left for a period of time, up to 45 minutes. (13RT 1749, 1755-1760.)[8/] Jimenez denied that he himself took the jeep to Maxson Road that day. (13RT 1735.)

c. Witnesses 8 and 9 – The Neighbors

Witness 9 lived at 3847 Maxson Road. On April 22, 1995, she had a yard sale. That afternoon, while she was tending her yard sale, a car and a jeep pulled up.[9/] The jeep parked in front of her driveway and the car parked in front of the driveway of Maria Moreno's residence. Four tall, bald Hispanic men wearing white t-shirts got out of the car and walked toward Maria Moreno's apartment. One of the men had a tattoo on his neck.[10/] Another four men

---

8. At trial, Jimenez testified that Torres was gone for about 10 or 15 minutes. (13RT 1749.) He was impeached, however, with a prior police interview and his grand jury testimony, in both of which he had stated that Torres was gone for 30 to 45 minutes. (13RT 1760-1761.)

9. Witness 9 testified that the cars arrived around 12:00 or 12:30 that afternoon. (13RT 1685.) Both defense counsel conceded in argument that the timing testified to by Witness 9 was not critical. (28RT 3477, 3557.)

10. Palma had a "Sangra" tattoo on his neck. (18RT 2352-2354.) During closing argument, however, the prosecutor did not press the argument that appellant and Palma themselves were with Maciel during the visit. Instead, he emphasized that, at a minimum, he had proven that Sangra was involved because Jimenez's jeep was there. (27RT 3413-3414.)

stayed in the jeep with the engine running. After about 15 minutes, the four men who had walked to the back of 3843 Maxson Road returned, and the jeep and car both drove away. (13RT 1684-1702.) Witness 9 did not identify appellant or Palma at trial, nor was Witness 9 able to identify photographs of Jimenez's Jeep. (13RT 1692-1693, 1697.)

Witness 8 lived at 3849 Maxson Road. On April 22, 1995, she got home from work around 2:00 or 3:00 in the afternoon. She entered her house through the patio area, which was adjacent to the driveway leading to Maria Moreno's residence. She noticed about four people near Maria Moreno's residence. This made her nervous because she did not recognize the people and they were talking loudly. (13RT 1719-1725.)

3. Maciel Organizes The Hit Against Moreno With Sangra Gang Members; Appellant And Other Sangra Gang Members Meet And Prepare Shortly Before Carrying Out The Hit

a. Witness 14 - An El Monte Flores Gang Member

Witness 14 was a member of the El Monte Flores gang and was known as "Clown." (19RT 2471, 2475.)[11/] At around noon on April 22, 1995, Witness 14 left work and went to El Monte to buy some heroin. In El Monte, he ran into Maciel, a former fellow El Monte Flores gang member. Maciel invited Witness 14 to a christening party. (19RT 2465, 2475.) Witness 14 went to the party later that evening. At some point, Maciel asked Witness 14 for a ride to his house. Witness 14 drove Maciel and another gang member known as "Diablo" to Maciel's house. They went inside and Maciel retrieved a small amount of heroin, which he handed to Witness 14. They then waited

---

11. Witness 14 was incarcerated at the time of trial. (19RT 2464, 2485.) He did not receive any consideration from the prosecution in exchange for his testimony. (19RT 2494.)

outside the house for about 10 minutes. Eventually, a black Nissan Maxima pulled up.[12] Palma got out, and Maciel introduced Palma as "Character" to Witness 14 and Diablo. Maciel told Palma, "if anything happens to me, go ahead and contact Diablo." (19RT 2470-2471.) Palma said he was "going to take care of some business" for Maciel and that he was "strapping," meaning he was carrying a gun. (19RT 2472.) Maciel told Witness 14 to give Palma the heroin, which Witness 14 did. They then went back to the christening party. (19RT 2473.)

b. Witness 13 And Elizabeth Torres – The Sister And Mother Of Sangra Gang Member Anthony Torres

On April 22, 1995, Witness 13,[13] Anthony Torres's sister, went to her mother's house in Alhambra around 7:00 or 7:30 p.m. A short time later, two men came to the house looking for Anthony. One of the men had a "Sangra" tattoo on his neck and said his name was Jimmy. (15RT 2073, 2079-2081.)[14]

---

12. Witness 14 later identified Danny Logan's Nissan Maxima as this car. (19RT 2474.)

13. Witness13 was afraid to testify at trial and stated that she believed both she and her children would be killed. (15RT 2098-2099.) However, because the Maxson Road hit had involved children, Witness 13 went to police shortly after learning her brother was involved in the killings. (15RT 2073-2074.) Initially, she did not tell anyone in her family what she had done, and she told the police, the prosecutor, and the court that she wanted to remain anonymous. She did not want to relocate, but she moved prior to trial. Her cooperation with police likely became known after transcripts of the grand jury proceedings were provided to the defense. (15RT 2110-2113.) Even though she had changed jobs, the location where she worked had been shot at twice in the middle of the night. (15RT 2102.) She testified that her cooperation with police had split her family apart and that if she had it to do over again she would not cooperate because she was too scared. (14RT 2113-2114.)

14. On cross-examination, Witness 13 said she believed this person identified himself as "Jaime" and she did not remember if he had identified

At some point thereafter, Anthony arrived with appellant, a Sangra gang member known as "Primo." (15RT 2078-2079, 2089-2090, 2107.) They went into Anthony's room and began making phone calls. (15RT 2107.) Later, more Sangra gang members, including Danny Logan, known as "Tricky," arrived and went into Anthony's room. (15RT 2082, 2086, 2097, 2100, 2108.) Witness 13 left the house around 8:30 or 9:00 p.m. (15RT 2077.)

According to Elizabeth Torres, Anthony Torres's mother, Anthony lived with her in her house in Alhambra. (14RT 1891-1892.) Several of Anthony's friends, about ten total, arrived at the house beginning around 6:00 p.m. on April 22, 1995. (14RT 1879.) Appellant was one of the friends present. Also present was Danny Logan. They all went into Anthony's room, where they were drinking. They left around 9:00 p.m. (14RT 1882-1894.)

c. Witness 16 – A Sangra Gang Member

Witness 16 had been a Sangra gang member since he was 15 years old.[15/]

---

himself as "Jimmy." (15RT 2117-2118, 2194.) As noted, Palma had a "Sangra" tattoo on his neck. (18RT 2352-2354.) No evidence was introduced at trial concerning any other person who had a Sangra tattoo on his neck, except for testimony establishing that Richard Corriston, who had such a tattoo, was at a birthday party from around 12:00 p.m. to around 10:00 p.m. on April 22, 1995. (22RT 2918-2932.)

15. Witness 16 was granted immunity in exchange for his truthful testimony. When initially contacted by police, Witness 16 lied to them, saying he wasn't involved at all in the shootings. Witness 16 was later subpoenaed to testify at the grand jury proceedings. He invoked his Fifth Amendment privilege and refused to testify. He was subpoenaed a second time and again refused to testify, at which point the prosecution granted him immunity. Still, Witness 16 refused to testify because he was afraid for his own safety and for his family's safety. (During the investigation, police found a photograph of Sangra gang members, including Witness 16. Witness 16's image had been scratched out, and "187" written over it.) Witness 16 was jailed for contempt, and kept isolated. About a week later, after being assured of his safety, Witness

He was 23 a the time of trial. He knew both appellant and Palma. (20RT 2677.) On the afternoon of April 22, 1995, Palma called Witness 16 and asked for a ride to his sister's house. Witness 16 drove his red 1991 Thunderbird to pick up Palma. (20RT 2679-2680.) Palma said that he expected to receive a page later in the day and that they would have to go to Anthony Torres's house. That afternoon, they received the page. Palma said he had to "take care of something" for "the brothers."[16] (20RT 2681, 2683.)

At Torres's house, they joined fellow Sangra members Anthony Torres, appellant, Danny Logan, Jose "Pepe" Ortiz, and "Creepy"[17] in Anthony's room. There was a shotgun in the room. (20RT 2684-2685.) Witness 16 recalled that Ortiz used the telephone at least once and another person present was paged at least once. They were in Torres's room for about 40 minutes. (20RT 2686.) Ortiz said they had to go to El Monte to "take care" of something. Witness 16 took this to mean that they were going to kill someone. (20RT 2687-2696.) Ortiz seemed to be in charge of the situation. (21RT 2767.) Before they left, Palma shaved his head and Ortiz and Palma took methamphetamine. (21RT 2757, 2819.)

d. Telephone And Pager Records

Telephone and pager records established that calls were made from "Pepe" Ortiz's residence to Maciel's pager at 10:51 a.m., 12:20 p.m. and 8:44 p.m. on April 22, 1995. (20RT 2573-2576, 2608-2609; 23RT 3027.) Calls

---

16 agreed to testify. (20RT 2714-2722.)

16. As evident from the recordings of Mexican Mafia meetings, the Mexican Mafia referred to themselves as "brothers." (18RT 2280-2281.)

17. "Creepy" was never identified by his true name at trial. (See 20RT 2697.) He was referred to as Witness 12 during Grand Jury proceedings. (March 18, 1996 RT 237-238.)

were also made from Torres's residence to Maciel's pager at 9:21 p.m. and 9:22 p.m. on April 22, 1995. (20RT 2611-2614.)

e. Renee Chavez – The Girlfriend Of Sangra Gang Member Danny Logan

Renee Chavez was Danny Logan's girlfriend on April 22, 1995. She knew several of Logan's fellow Sangra gang members, including appellant, Palma, and Anthony Torres. (14RT 1948-1952.) Danny Logan drove a blue Nissan Maxima. (14RT 1949-1950.) At about 10:15 p.m. that day, she drove by Torres's house and saw Logan, Torres, and another person in the driveway near Logan's Maxima. (14RT 1949-1950, 1952-1955, 1971-1973.) It appeared that Logan was on his knees near the back door of the Maxima fixing something. (15RT 1961-1967.)[18] Chavez later noticed that the interior light in the car would stay off even if the back door was opened. (15RT 1956-1957; see also 14RT 1947.)

4. Appellant And Palma, Supported By Fellow Sangra Gang Members, Gun Down Moreno And His Family; The Sangra Gang Members Reconvene And Talk About the Murders

a. Witness 16

After meeting at Torres's house, the Sangra gang members proceeded in two cars to Maxson Road. Witness 16 drove in his Thunderbird with Ortiz and "Creepy," while Logan drove in his Nissan with Torres, Palma, and appellant. (20RT 2696-2698.) When they got to Maxson Road, the Nissan pulled into a driveway and turned off its headlights. Ortiz told Witness 16 to

---

18. At trial, Renee Chavez testified that she did not remember some of these details. She acknowledged that she had testified before the grand jury that she had seen Logan fixing the rear door. (15RT 1961-1967.)

keep driving, so he proceeded on a few blocks and then pulled over. (20RT 2699-2704.) After they pulled over, Ortiz got out of the car, walked back toward Maxson Road, and looked up and down the street. Eventually, Ortiz returned and said that the police were coming, "Let's go." (20RT 2705-2706.)

Witness 16 left in his Thunderbird with Ortiz and "Creepy." They initially went to appellant's house, but the others were not there. They then went back to Torres's house. The Nissan Maxima was in the driveway and Torres, Logan, Palma, and appellant were inside listening to a police scanner. (20RT 2707-2710.) They discussed the shooting. Palma said he had shown a man a piece of heroin and that appellant shot the man in the head while he was looking at it. Palma stated that "[t]he lady with the baby said that it wasn't her problem." He then pulled out a gun and shot the lady and "let off rounds on the kids." Appellant said that after he shot the first man he shot another one who was running away. Torres had waited by the door with the shotgun to make sure no one approached. Logan had waited in the car. (20RT 2711-2713.)

b. Witnesses 1, 2, 3, And 8 – The Neighbors

Witness 1 attended a party on Maxson Road on the night of April 22, 1995. As witness 1 was in a car leaving the party, sometime around 10:00 p.m., Witness 1 heard what sounded like firecrackers. Witness 1 looked toward the sound and saw about two people running out of a driveway toward a car. (14RT 1916-1919.) The car looked like a Nissan and was blue or some other dark color. (14RT 1919-1920.)

Witness 2 was visiting a house on Maxson Road on the night of April 22, 1995. (14RT 1924.) At some point, Witness 2 saw a car pull up in front of a driveway across the street. (14RT 1925.) The car looked like a

brown 1985 to 1987 Nissan Maxima. (14RT 1930-1931.)[19] Three Hispanic men got out of the car and went down the driveway of the house across the street. Witness 2 lost sight of the men. The car stayed parked in front of the driveway, with just the driver inside. (14RT 1925-1927.) Witness 2 heard six to eight gunshots and then saw the three men run back to the car. One of the men was holding a handgun. The car drove away without its lights on. (14RT 1928–1930, 1932-1933.)[20]

Witness 3 attended a party on Maxson Road on the night of April 22, 1995. (14RT 1935.) Witness 3 was acquainted with "Tito" Aguirre. At some point that night, Witness 3 saw Aguirre running down the street. He was being chased by a Nissan Maxima. The car did not have its lights on. Aguirre ran down a driveway. The Nissan parked in front of the driveway and three men got out. The men followed Aguirre, and the driver stayed in the car. Witness 3 heard seven or eight gunshots, and then saw the three men run back to the car. One of the men was carrying a handgun. The car left with its lights off. (14RT 1936-1942, 1946.)

Witness 8 was sitting on her patio, near the driveway to Maria Moreno's apartment, on the night of April 22, 1995. She heard Maria talking to someone by her door, and then heard someone run down the driveway, followed by several gunshots. After the first shot, Maria tried to close the door. Witness 8 retreated inside her own house. (13RT 1725-1730.) A short time later, Maria Moreno's 6- or 7-year-old son came to Witness 8's house. He was crying and screaming and covered in blood. He said his mother and siblings had been shot. Witness 8 called the police. (13RT 1730-1731.)

---

19. Witness 2 knew this because he had worked at an auto dealership. (14RT 1930-1931.)

20. Witness 2 testified that he would be unable to identify the men if he saw them again. (14RT 1935.)

c. Telephone And Pager Records

Calls were made from Torres's house to Maciel's pager at 10:59 p.m. and 11:00 p.m. on the night of April 22, 1995. (20RT 2614.) Between 11:05 p.m. and 12:00 a.m., five calls were made from Torres's house to a pager registered to Veronica Lopez, appellant's former girlfriend. (13RT 1659-1664; 20RT 2614-2616.)

At 9:35 a.m. on the morning of April 23, 1995, a call was made from Ortiz's residence to Maciel's pager. (20RT 2609.) Another two calls were made from Torres's house to Maciel's pager on April 23, 1995, at 12:52 p.m. and at 2:03 p.m. (20RT 2616-2617.) And three calls to Maciel's pager were made on that date from Palma's residence, at 2:47 p.m., 2:48 p.m., and 2:57 p.m. (20RT 2617-2618.)

5. Forensic Investigation

a. The Crime Scene

The El Monte Police Department received a 911 call from 3849 Maxson Road reporting the shooting at 10:34 p.m. (17RT 2198.) El Monte Police Officer Ronald Nelson was among the first to respond. He went to 3849 Maxson Road, where he saw Witness 8 and Maria Moreno's son, who was covered in blood. They directed him next door to Maria Moreno's apartment. (17RT 2197-2198.) At the apartment, Officer Nelson found Anthony Moreno lying on the ground in a pool of blood just outside the door. He went inside with his gun drawn to clear the apartment. Inside, Officer Nelson found Maria Moreno lying on the floor in a pool of blood. Next to her were five-year-old Laura Moreno, who was lying face-down in a pool of blood, and six-month-old Ambrose Padilla, who had been shot through the eye. There was a child's handprint in blood on the back of Maria Moreno's pants. Gustavo Aguirre was

lying on the ground between a bed and a wall. He had been shot in the head. Officer Nelson noticed a girl cowering in the corner toward the back of the apartment. He picked her up and took her out of the apartment. (17RT 2200-2205; 20RT 2628, 2633, 2639, 2648-2649, 2660; 22RT 2945-2946.)

Senior paramedic Christopher Cano arrived at the apartment at 10:44 p.m. (17RT 2220.) He pronounced the three adults dead at the scene. Resuscitation was begun on the two children and they were transported to separate hospitals, where they were pronounced dead a short time later. (17RT 2225-2231.)

b. The Autopsies

Anthony Moreno was killed by a single gunshot to the head. The bullet entered the skull near the right ear and exited on the left side. A contact wound to the skin of Anthony Moreno's head indicated that the gun was pressed against his head when it was fired. Death would have resulted very quickly. (20RT 2628-2632.)

Gustavo Aguirre also was killed by a single gunshot to the head. He was shot in the top of the head. The bullet did not exit his skull. Again, a contact wound indicated that the gun was pressed against his head when it was fired. Aguirre also had a non-fatal gunshot wound through the left shoulder. The position of Aguirre's body was consistent with his having been shot while he was lying at least partially on the bed. (20RT 2633-2639.)

Maria Moreno also was killed by a single gunshot to the head. The shot was fired from a few inches away, and the bullet lodged in her brain. In addition, Maria Moreno had a non-fatal gunshot wound to the right buttock. (20RT 2639-2644.)

Laura Moreno was killed by a single gunshot to the torso. The bullet entered her back, punctured her lung, and exited from her chest. She weighed

47 pounds at the time of death. Given the angle of the wound, it was likely that Laura was seated or lying down or slightly bent over when she was shot. (20RT 2648-2659.)

Ambrose Padilla was killed by a single gunshot through the eye. The bullet entered his right eye, traveled through his mouth, the base of his brain, and his spinal cord, and exited the back of his neck. Ambrose weighed 17 pounds at the time of death. Given that there was a hole in the pillow underneath Ambrose, it was likely that he was lying down on his back when he was shot. (20RT 2660-2664.)

c. Ballistics Evidence

During the autopsies, the medical examiner recovered .38- or .357-caliber[21] bullet fragments (Exhibit 66) from Aguirre's head. (19RT 2426-2428; 20RT 2638-2639; 22RT 2939-2940.) The medical examiner also recovered two expended .45-caliber bullets from Maria Moreno's body (Exhibit 67), one from her head and one from her buttock. (19RT 2432-2434; 20RT 2641; 22RT 2940.)

At the crime scene, investigators recovered an expended .38- or .357-caliber bullet (Exhibit 64) that was lodged in the bathroom wall of Maria Moreno's apartment. (19RT 2417-2423.) Several .45-caliber bullet fragments (Exhibit 68) as well as a complete .45-caliber bullet (Exhibit 69) were also recovered at the crime scene (19RT 2432-2439; 22RT 2938, 2940-2941), along with several .45-caliber shell casings (Exhibit 70) (19RT 2439-2440; 22RT

---

21. Ammunition designated .38-caliber and .357-caliber use identical projectiles. The difference between the two is in the cartridge case. Thus, when only expended bullets are found, without casings, the exact caliber cannot be determined. (19RT 2420-2421.)

2941-2942).[22/]

Appellant had lived in two residences around the time of the murders – a house on Greenleaf Drive in West Covina and a condominium on Peppertree Circle, also in West Covina. Appellant moved into the Peppertree condominium just before the murders, around April 4, 1995. When appellant vacated the Greenleaf house, there were bullet holes in the walls. (20RT 2578-2585; 21RT 2872-2878.) In a search of the Greenleaf house, investigators found an expended .38- or .357-caliber bullet (Exhibit 65). (19RT 2423-2424; 22RT 2938-2939.) In a search of the Peppertree condominium, police found a bag of unexpended ammunition of various calibers (Exhibit 59) in appellant's bedroom closet. (18RT 2356-2357, 2366-2367.)

Los Angeles County Sheriff's Department firearms examiner Dale Higashi determined that the .38- or .357-caliber bullet recovered from the bathroom at the crime scene (Exhibit 64), the .38- or .357-caliber bullet recovered from Aguirre's head (Exhibit 66), and the .38- or .357-caliber bullet recovered from the Greenleaf house (Exhibit 65) were all likely, but not conclusively, fired from the same revolver. (19RT 2429-2431.) Higashi conclusively determined that the .45-caliber bullets recovered from Maria Moreno's body (Exhibit 67) and the .45-caliber bullet (Exhibit 69) and bullet fragments (Exhibit 68) found at the crime scene had been fired from the same semi-automatic weapon. (19RT 2438-2439.) In addition, Higashi found, with "no doubt at all," that the .45-caliber shell casings found at the crime scene (Exhibit 70) had all been ejected from a single semi-automatic weapon, and that two of the unexpended rounds found at the Peppertree condominium (Exhibit 59) had been cycled through that same weapon. (19RT 2441-2447.)

---

22. Investigators were not able to detect any fingerprints on the shell casings. It would be unusual to find a usable fingerprint on an expended bullet or shell casing. (21RT 2748-2753.)

d. Gang Evidence

Also found in the Peppertree condominium were a list of Sangra gang members, a cardboard placard reading "Sangra - Touch This and You Die," and a Sangra photo album. (18RT 2360-2361, 2369; 1 Supp. 4 CT 71, 127.) In a search of Ortiz's house, police found Sangra drawings and a Sangra photo including appellant. (23RT 3027-3031; 1 Supp. 4 CT 54-55, 165, 167.) Police also recovered a number of photographs of Sangra gang members, including appellant and Palma, and including photographs in which some of those pictured were holding weapons or making gang signs. (1 Supp. 4 CT 62, 64, 66, 125, 146, 148.) Investigators took photographs of appellant's and Palma's gang tattoos. (1 Supp. 4 CT 108-123.)

6. Surveillance Of Sangra Gang Members Cements Their Connection And Roles

Los Angeles County Sheriff's Deputy Russell Sprague participated in surveillance of Palma's house on May 2, 1995. He saw Logan arrive in his Nissan at about 9:45 a.m. Appellant was in the passenger seat. They talked to Palma for about two minutes and then left. (22RT 2897-2900.) Later, Witness 16 arrived in his Thunderbird and picked up Palma. Sprague followed them. Witness 16 drove Palma around on various errands – including one during which Witness 16 waited in the car for about 30 minutes – and then returned Palma to his house. (22RT 2902-2912.)[23/]

---

23. An issue at trial was whether Witness 16 was an accomplice. The prosecution's theory was that he was "at the bottom of the ladder" and acted, essentially, as a chauffeur. (27RT 3454-3459.)

7. Sangra Gang Members Involved In The Murders Coordinate With Each Other After The Arrest Of Palma

Palma was arrested on May 15, 1995, at around 1:00 p.m. and taken to the Los Angeles County Jail. (22RT 2978-2980.)

At 3:14 p.m. on the same day, a four-minute collect call was made from the Los Angeles County Jail to appellant's Peppertree condominium. (20RT 2587-2589.) At 3:23 p.m., a two-minute collect call was made from the Los Angeles County Jail to Palma's residence. (20RT 2620.) At 3:51 p.m., a one-minute call was made from the Peppertree condominium to Danny Logan's residence in Pasadena. (19RT 2513; 20RT 2590-2591, 2601; 21RT 2880.) At 4:44 p.m., a two-minute collect call was made from the Los Angeles County Jail to the Peppertree condominium. (20RT 2589-2590, 2600.)

Police had the Peppertree condominium under surveillance at the time. At about 4:20 p.m., Anthony Torres left the Peppertree condominium in a blue jeep with one other person. Police followed. A pursuit ensued, and Torres was eventually able to abandon the jeep and flee on foot. (19RT 2498-2504; 2550-2553.) Police set up a perimeter. (19RT 2511, 2553.)

Torres went to the nearby home of his girlfriend, Jill Steele, where he used the telephone and hid in a closet. (19RT 2535-2540.) Steele was not home at the time, but her mother was. When Steele later tried to approach the house, police would not let her inside. She went to a payphone and called the house. At Torre's behest, she then called appellant. (19RT 2542-2546; 20RT 2603-2605.)

Meanwhile, Sergeant Dan Rosenberg of the Los Angeles County Sheriff's Department was assisting in patrolling the perimeter. At a fast food restaurant just outside the perimeter, Sergeant Rosenberg saw Danny Logan and Angel Anchondo, whom he knew as Sangra gang members. He thought this unusual because the restaurant was located in rival territory. Sergeant

Rosenberg stopped Logan and Anchondo and searched them and Logan's Nissan Maxima. They had less than $2 on them, and in the Maxima was a change of clothes. (19RT 2511-2516.)

Eventually, police searched Steele's house, where they found Torres and arrested him. (19RT 2541, 2553-2554.) The house was about two blocks from where Sergeant Rosenberg had stopped Logan and Anchondo. (19RT 2516.)

B. Defense

Appellant and Palma each presented a reasonable doubt defense at trial. On cross-examination, defense counsel attempted to highlight the lack of eyewitness identification and to undermine the other evidence connecting them to the murders. For example, they suggested that Jimenez was pressured into giving his statements to police (14RT 1819-1836), they called into question Witness 15 and Witness 14's character for truthfulness (15RT 2036-2041; 19RT 2484-2493), and they attacked Witness 13's identification of Palma (15RT 2117-2023; 17RT 2194-2195). In addition, they attacked Witness 16's motive in testifying for the prosecution (20RT 2790-2799) and they explored the possibility, in questioning Witness 14 and Sergeant Valdemar, that the Border Brothers would have had a motive to retaliate against Tito for robbing their drug dealers (15RT 2041-2045, 2048-2050, 2065; 18RT 2314-2328). It was also suggested that appellant was breaking away from the Sangra gang around the time of the murders. (13RT 1829, 1831-1832; 19RT 2521.)

In addition, appellant and Palma presented the following evidence.

1. Palma's Defense Case

David Hooker, a state prisoner, testified that he met Witness 14 on the exercise yard at Delano State Prison. Witness 14 told Hooker that he was in protective custody because he had a "green light" on him due to his

involvement in a murder in which children had been killed. Witness 14 explained that he had been dealing drugs in partnership with a Mexican Mafia member. One of their customers owed them money, so Witness 14 threatened him. When the customer still did not pay, Witness 14's Mexican Mafia partner "arranged to get some vatos from San Gabriel to take the puto out." (23RT 3103-3107.)

Palma also offered a stipulation that Elizabeth Torres was shown a photographic lineup with Palma's photo but said she did not recognize anyone. (23RT 3117-3118.)

2. Appellant's Defense Case

Randi Chavers, appellant's best friend, testified that he did not know appellant to own a gun and he had never seen appellant handle a gun, other than one time in 1993 when they had gone to a shooting range. (23RT 3133-3141.)

Appellant offered a stipulation that Elizabeth Torres did not identify him from a photographic lineup as one of the people at her house on the night in question. (23RT 3332-3333.)

In addition, appellant offered evidence in rebuttal to two minor points made during the Prosecution's case.

Sergeant Valdemar had testified on cross-examination during the prosecution's case that he thought the import of Shyrock's comments during the recorded Mexican Mafia meeting was that he wanted to "silence" the women and children in the apartment as well as Dido. There was some discussion of whether the Mexican Mafia would sanction such a killing. (18RT 2317-2320, 2327-2328, 2341-2342.) After that testimony, Valdez had the recording professionally enhanced. (See 19RT 2393-2409, 2476-2478, 2557-2565.) In his defense case, appellant called Sergeant Valdemar, who testified that, after listening to the enhanced recording, he did not believe that Shyrock intended

for the children to be killed. (23RT 3119-3122.)

In response to Russell Sprague's testimony that he saw appellant during surveillance of Palma's house on May 2, 1995, appellant called his stepfather, Trentt Hampton. Hampton testified that appellant was in Utah during the entire month of May 1995. (24RT 3172-3178.) The prosecution stipulated that a person named Richard Valdez flew from Ontario, California, to Salt Lake City, Utah, on April 30, 1995. (24RT 3331-3332.)

II.

PENALTY PHASE

A. Prosecution's Evidence

The only evidence offered by the prosecution in its initial case at the penalty phase was a stipulation that Palma had assaulted a California Youth Authority counselor in 1991 and was prosecuted for the incident. (38RT 3937-3939.)

B. Palma's Evidence

Palma's mother, sister, and aunt all testified in his behalf at the penalty phase. Generally, they attested to his good character in his youth. (38RT 3958-3979; 39RT 4019-4031.) A receptionist from an employment agency testified that Palma had a job in 1995 and had been very eager to work when he came to the agency. (38RT 3980-3989.) An eighth grade teacher of Palma's testified that Palma was an "at risk" student who had fallen under bad influences, but that Palma had never been a problem in class, about 10 years earlier. (38RT 3940-3957.)[24/]

---

24. The defense stipulated that Palma had been suspended twice during the eighth grade and stopped attending the school that year. (39RT 4017-4018.)

C. Appellant's Evidence

Appellant's father, Migel Valdez, testified to appellant's upbringing. Appellant's parents divorced when he was four years old, and appellant's mother moved appellant and his siblings away from his father. Appellant played little league baseball and participated in the Catholic Church when he was younger. However, he had a tumultuous high school career, attending four different schools and ultimately falling under the influence of gangs. Appellant moved in with his father for a period, but eventually left because of conflicts over grades and obeying his father's rules. Appellant's grades steadily declined as he progressed through high school. Appellant attempted to join the Navy Reserve, but ultimately that did not come to fruition. He held several jobs after high school and supported his elderly grandfather and his brother, who was a drug addict. (39RT 4044-4101.)

David Caspar, an electronics teacher at Baldwin Park High School, testified that appellant was in his class for two semesters, earning a B and an A, respectively. Appellant was a responsible and focused student. (40RT 4240-4242.)

Gary Timbs, director of education at ITT in West Covina, testified that appellant had been enrolled at ITT in 1992. He scored above average on his entrance exam. However, appellant ultimately dropped out because of absenteeism and because he was not able to produce a required high school diploma. (39RT 4033-4036.)

Jesus Avila testified that he was housed in a cell near appellant's at the Los Angeles County Jail. Appellant helped Avila by teaching him how to draw and assisting him with vocabulary and pronunciation. (40RT 4188-4201.)

Dr. Ronald Fairbanks, a psychologist, was appointed to examine appellant in an effort to identify mitigating factors. Dr. Fairbanks found

appellant to be of above-average intelligence. During testing, appellant proved very difficult to interview, as he seemed to have "his own agenda." In fact, appellant was so manipulative that Dr. Fairbanks was unable to rely on the test results. However, Dr. Fairbanks found this behavior consistent with appellant's self-reported history of suicide attempts. He thought that appellant had a self-destructive personality. (39RT 4102-4129.) Dr. Fairbanks did not find any mitigating factors "of major significance." (39RT 4138-4139.)

D. Prosecution's Rebuttal Evidence

In rebuttal, the Prosecution presented evidence that appellant was involved in a fight at San Gabriel High School in 1991. When a campus supervisor broke up the fight, appellant called him a "bitch" and said he would put a bullet in his head. The campus supervisor did not take the threat seriously, however. (40RT 4253-4257.)

ARGUMENTS I AND II
Pages 30 to 77
FILED UNDER SEAL

III.

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHIC GANG EVIDENCE

Appellant argues that the admission at trial of various photographs pertaining to his and Palma's gang membership "overshadowed the evidence that was actually relevant to the jury's determination of guilt" because it was "emotionally charged . . . inflammatory, cumulative, irrelevant, and far more probative than prejudicial," thereby violating Evidence Code section 352 and his federal constitutional rights. (AOB 117-138.) The claim is almost entirely forfeited. In any event, the trial court properly admitted the gang evidence because it was highly relevant not only to the charged gang enhancement but also to the underlying crimes, and, in the context of the whole case, it was not at all prejudicial.

A. Trial Court Proceedings

Prior to trial, the prosecution filed a written motion seeking a ruling regarding the admissibility of "gang related evidence." The prosecution argued that the evidence would be relevant to intent and motive under the facts of the case. Specifically, the prosecution stated:

> It is the People's theory that the very reason for the El Monte murders is gang related in that one of the victims was a Mexican Mafia prison gang "dropout" and another victim had robbed a narcotic dealer who was paying protection to the Mexican Mafia.
>
> Therefore, evidence that SHYROCK and MACIEL are members of the Mexican Mafia prison gang and evidence of the relationship of the Mexican Mafia prison gang with Los Angeles County Hispanic street gangs including the SANGRA street gang of which the defendants LOGAN, PALMA, TORRES, VALDEZ and ORTIZ are members [is]

highly relevant and admissible even over a Evidence Code section 352 objection.

(6CT 1547-1553.)[40/]

At a subsequent pretrial hearing on the motion (as well as numerous other motions), Judge Sarmiento stated:

> . . . This probably is better handled as a trial motion as well. I mean, it's law. Evidence of relationship of gang is admissible for identification. If those things do appear to be an issue at trial or they will be, then I think it's – the trial judge can make an appropriate ruling.
>
> As far as the request though, I mean, the law states it's possible as long as – as long as there's been sufficient foundation laid for it, that type of evidence would be admissible.
>
> So if you want a ruling on that, at this point to the extent I can, yes, gang evidence is admissible in trial given the appropriate facts with the state of the law in the state of California.

(2BRT 444.)

Subsequently, but still prior to trial, appellant made an oral "motion in limine as to what the photographs can be used, not be used by the prosecution." (11RT 1476; see also 10RT 1474.) The parties twice began to discuss the photographs, but Judge Trammell insisted that they first be marked for identification and then dealt with on an individual basis. (11RT 1478-1484; 12RT 1490-1503.)[41/] When the parties later returned to the issue of the gang photographs, the first exhibit discussed was a photograph of the gang tattoos on

---

40. Palma had earlier filed a motion to exclude evidence concerning the Mexican Mafia. (5CT 1342-1344.)

41. Some of this discussion was intertwined with appellant's objection to the crime scene and coroner photographs. (See 6CT 1636-1642; 12RT 1507-1521.)

appellant's back.[42] Counsel for appellant offered to stipulate that appellant was a Sangra gang member. Counsel for Palma similarly offered to stipulate to the fact that Palma was a gang member and that Sangra was a criminal street gang. The prosecutor countered that the stipulation did not cover everything he was obligated to prove under the gang enhancement statute and that the photos would be used "also to show motive and intent regarding the underlying offenses." (12RT 1521-1525.) The prosecutor then described a number of the photographs and maintained that they were relevant despite the offer to stipulate. (12RT 1525-1528.) Judge Trammell asked the defense for "[t]he nature of the objection." In response, counsel for appellant offered to stipulate to "the exact allegation in the information." (12RT 1528.) The court commented that the tattoos were relevant to showing a "substantial involvement" in the gang – a "life dedicated" to the gang – and therefore overruled the objection to the tattoo photograph. (12RT 1528.)[43]

Counsel for appellant then made an objection that the prosecution's gang photographs were cumulative and that there was one photograph he "vehemently" objected to because there was no indication that the people in the photograph were Sangra gang members. After some discussion, the court sustained the objection to the single photograph, subject to revisiting the issue at trial. (12RT 1529-1532.)[44]

---

42. Despite the court's earlier insistence, the photographs were not marked prior to this discussion. The description of the photograph, however, makes clear that the exhibit in question was the one later admitted at trial as Exhibit 57. (1 Supp. 4 CT 123.)

43. Although the prosecutor commented on various photographs during this discussion, it is clear from the court's ruling that the only objection under consideration at this time was to the tattoo photograph.

44. Again, the court's comments make clear that only one photograph was under consideration at this time. (12RT 1532.)

Counsel for Palma then objected to "nine photographs of my client . . . which show various tattoos on him."[45/] The court overruled the objection based on the reasoning stated with respect to the photograph of appellant's tattoos. (12RT 1532-1533.)

Appellant's attorney then said he was going to go over some additional photographs "real fast." He showed the court three photographs, without describing them for the record, all of which the court indicated would be admitted. The court, however, added:

> . . . [W]e have gone through a whole bunch of photos and in some instances we have referred to something that perhaps singles them out, but I think that at some point when they're marked and either we have a side bar conference and something else or before we bring the jury out is to make your record because then we'll have specific designations. I think we definitely need that.

(12RT 1533-1535.)

Counsel for appellant also objected to "pictures of the graffiti" that were recovered from appellant's photo album, on the ground that the prosecution could not establish that the "Primo" appearing in the graffiti referred to appellant. The prosecutor stated that he knew of no other active Sangra member using the moniker "Primo" and that the graffiti was found in appellant's own apartment. The court overruled the objection. (12RT 1535-1538.)

Appellant's attorney next objected to "others" from the photo album on the ground that they were cumulative. The court overruled the objection. (12RT 1541-1542.)

During his opening statement, the prosecutor referred to a series of

---

45. Seven photographs were later admitted at trial as Exhibits 50 through 56, showing Palma's tattoos. (1 Supp. 4 CT 108-121.)

photographs in explaining that the defendants were members of the Sangra gang. Although the photographs were not yet marked for identification, it appears from the prosecutor's comments that he may have been referring to what were later admitted as Exhibits 60 (1 Supp. 4 CT 127), 7 (1 Supp. 4 CT 64), 8 (1 Supp. 4 CT 66), 3 (1 Supp. 4 CT 62), and 58 (1 Supp. 4 CT 125). (12RT 1606-1608.)[46/]

At trial, the prosecutor used the following exhibits relating to the Sangra gang, which are now the subject of appellant's claim on appeal:

Exhibit 3, a photograph of six people, including appellant, some with guns (1 Supp. 4 CT 62), was introduced on redirect examination of Veronica Lopez; she identified appellant in the photograph (13RT 1673);

Exhibit 7, a photograph of seven people, including appellant and Torres, some with guns (1 Supp. 4 CT 64), was introduced on direct examination of Jiminez; he identified appellant and Torres in the photograph (13RT 1741-1743);

Exhibit 8, a photograph of a group of people, including appellant, at the "Sangra wall" (1 Supp. 4 CT 66), was introduced on direct examination of Jiminez; he identified appellant in the photograph and acknowledged that people in the photograph were making gang signs (13RT 1746); Witness 16, on direct examination, also identified appellant in the photograph and acknowledged that people in the photograph were making gang signs (20RT 2734);

Exhibit 12A, four photographs of various people, including appellant, taken from the Sangra photo album (1 Supp. 4 CT 71), was

---

46. The prosecutor also referred to a photograph of Sangra members with "Sangra Gang Kills" and "187" written on it. This photograph does not appear to have been used at trial. (12RT 1608.)

introduced on redirect examination of Jiminez; he identified appellant and acknowledged that some of the people pictured had weapons (14RT 1847);

Exhibits 50 through 57, photographs of appellant's and Palma's tattoos (1 Supp. 4 CT 108-123), were introduced on direct examination of Sergeant Valdemar; he explained the meaning of the tattoos in the context of gang culture (18RT 2275-2276); Sergeant Rosenberg, on direct examination, also explained the meaning of the tattoos (19RT 2523); and Chavers, on cross-examination, after disclaiming knowledge of appellant's gang moniker, admitted that he had seen the tattoos (23RT 3149-3151);

Exhibit 58, a photograph of a group of people on a staircase, including Witness 16, whose face is scratched out and "187" written over his chest (1 Supp. 4 CT 125), was introduced on direct examination of Sergeant Valdemar; he explained that this signified that Witness 16, and his family, could be killed (18RT 2285); Witness 16, on direct examination, identified himself in the photo after explaining that he feared for his life as a result of testifying (20RT 2720);

Exhibit 60, a handwritten sign reading "Sangra, touch this and you die . . ." (1 Supp. 4 CT 127), was introduced on direct examination of Sergeant View; he explained that the item was recovered in a search of appellant's residence (18RT 2359);

Exhibit 71, the district attorney's notice of determination that Sangra is a criminal street gang (1 Supp. 4 CT 53), was introduced on direct examination of Sergeant Rosenberg in the context of explaining that Sangra was a criminal street gang (19RT 2507);

Exhibits 72 and 73, photographs of Sangra graffiti (1 Supp. 4 CT 138, 140), were introduced on redirect examination of Sergeant

Rosenberg; he explained that Palma's moniker appeared in the graffiti (19RT 2525-2526);

Exhibit 78, a photograph of Palma with three other Sangra gang members (1 Supp. 4 CT 146), was introduced on direct examination of Witness 16; he identified Palma in the photograph (20RT 2755);

Exhibit 79, a photograph of several people, including appellant, in front of the Sangra wall (1 Supp. 4 CT 148), was introduced on direct examination of Witness 16; he identified appellant in the photograph (20RT 2755-2756);

Exhibit 91, a drawing depicting a drive-by shooting (1 Supp. 4 CT 54-55), was introduced on direct examination of Detective Davis; he explained that the item was recovered in a search of Ortiz's residence (23RT 3027-3028);

Exhibit 92, a drawing of the word "Sangra" (1 Supp. 4 CT 165), was introduced on direct examination of Detective Davis; he explained that the item was recovered in a search of Ortiz's residence (23RT 3028-3029); and

Exhibit 93, a photograph of a group of people, including appellant and Ortiz, and including a person whose image was scratched out (1 Supp. 4 CT 167), was introduced on direct examination of Detective Davis; he explained that the item was recovered in a search of Ortiz's residence (23RT 3029-3031).[47/]

The defense did not make any objections at the time these exhibits were marked during trial. The defense itself at trial offered several photographs of Sangra gang members in attempting to show that Witness 16 acted as an

---

47. In addition, the prosecution used Exhibits 9 and 10, a hand-written list of gang monikers (1 Supp. 4 CT 67-70; 14RT 1838; 18RT 2361), which appellant does not appear to challenge.

accomplice. (See Exhibits 80-83; 1 Supp. 4 CT 149-156; 21RT 2772-2774, 2829-2839.)

In closing argument, the prosecutor referred once to the photograph of appellant's tattoos (Exhibit 57; 1 Supp. 4 CT 123; 27RT 3456) and once to the photograph including Witness 16 with his image scratched out (Exhibit 58; 1 Supp. 4 CT 125; 29RT 3612).[48/]

After trial, the defense objected to Exhibit 91, the drawing of the drive-by shooting recovered in a search of Ortiz's residence, on the ground that it was prejudicial and not relevant, and on hearsay grounds. The court sustained the objection. (25RT 3274-3275.) The court asked if there were any further objections to the exhibits. The defense did not raise any, and all the rest of the gang exhibits were admitted. (25RT 3276.) The prosecution subsequently withdrew Exhibit 71, the notice of determination that Sangra is a criminal street gang. (26RT 3290-3292.)

B. Appellant's Statutory Claim Is Forfeited As To Nearly All Of The Challenged Exhibits; Appellant's Constitutional Claim Is Entirely Forfeited

In a capital case, as in any other case, a judgment may not be reversed based on the admission of evidence absent a timely and specific objection in the trial court. (See Evid. Code, § 353; *People v. Cain* (1995) 10 Cal.4th 1, 28; *People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Clark* (1992) 3 Cal.4th 41, 127-128; *People v. Green* (1980) 27 Cal.3d 1, 22, fn. 8.) Appellant did not object in the trial court to the majority of the exhibits he now challenges on appeal, even after the trial court made clear that specific objections were required. The record reflects, in fact, that counsel objected specifically only to

---

48. The prosecutor also referred once during argument to one of the photographs offered by the defense. (29RT 3646; see Exhibits 80-83; 1 Supp. 4 CT 149-156.)

the tattoo photographs (Exhibits 50-57; 12RT 1521–1528, 1532-1533), the unidentified photograph that the trial court excluded (12RT 1529-1532), and the "pictures of the graffiti" from the Sangra photo album, which do not appear to have been offered at trial (12RT 1535-1538; *see* Exhibit 12A, 1 Supp. 4 CT 71).[49] Counsel's objection to "others" was not specific, and the court particularly warned counsel to make a more specific objection during trial regarding the photographs. (12RT 1533-1535, 1541-1542.) Counsel never pursued a ruling at trial. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 680 [failure to pursue ruling has same effect as failure to make objection].) Accordingly, any objection to the remainder of the photographs has been forfeited.

Moreover, counsel made no constitutional objection at all in the trial court. His constitutional claim as to the admission of the photographs is therefore entirely forfeited. (*See People v. Riley* (1992) 2 Cal.4th 870, 891 [objection under Evidence Code section 352 does not preserve due process or confrontation issues]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-629 [collecting this Court's cases holding that "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal"].)[50]

---

49. Appellant objected to the admission of Exhibit 91 into evidence after trial; he did not object to its use at the time it was introduced during trial. (25RT 3274-3275.)

50. To the extent any specific Evidence Code section 352 objection was preserved, a "very narrow due process argument" may also be preserved to the effect that the erroneous admission of evidence under section 352 had the additional consequence of violating due process. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.)

C. The Trial Court Did Not Abuse Its Discretion In Admitting The Photographs

Regardless of whether appellant has forfeited his claim, there was no error because the trial court properly admitted the photographs, which were extremely relevant not only to the gang enhancement allegation but also to the underlying crimes. Appellant is incorrect that the challenged evidence was admitted only "for the ostensible purpose of proving the gang enhancement allegation." (AOB 127.) Rather, as the prosecutor specifically noted, the evidence was relevant "to show motive and intent regarding the underlying offenses." (12RT 1524.) Indeed, that was the primary theory advanced in the prosecution's written motion in limine. (6CT 1547-1553.) Because gang evidence can be highly inflammatory, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Champion*, *supra*, 9 Cal.4th at 922.) But where the evidence is relevant to explain the circumstances and motivation for a crime, it is admissible. (See *Id.* at pp. 922-923; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 175 [gang evidence properly admitted because shooting was committed as part of gang "turf battle"]; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 ["evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation-including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like-can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."].)

This case was saturated with gang evidence not because the prosecutor sought to admit prejudicial propensity evidence (see AOB 127-128), but precisely because the entire context and motivation of the crimes themselves were gang-related. This was a situation in which Sangra gang members had

been ordered by the Mexican Mafia to kill a former Mexican Mafia member, and appellant and his confederates followed that order because of their own gang allegiance. Thus, as the trial court observed, the gang evidence was probative to show the level of dedication of the Sangra gang members. (12RT 1528.)

For this reason, the defense offer to stipulate to the gang enhancement did not eliminate the relevance of the gang evidence. (See AOB 129-132.) And, indeed, even if the evidence *had* been relevant only to the gang enhancement, the prosecution was not obligated to accept the offer to stipulate. Generally, a trial court cannot compel a prosecutor to accept a stipulation that would deprive the state's case of its evidentiary persuasiveness or forcefulness. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 723, fn. 5; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) "[T]he criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1048.) To have eliminated the evidence would therefore have eviscerated the force of the prosecution's showing in this thoroughly gang-related case.[51/]

Nor was the probative value of the evidence substantially outweighed by the risk of undue prejudice so as to warrant exclusion under Evidence Code section 352. (See AOB 132-135.) A trial court enjoys broad discretion in making this determination, and its ruling will not be disturbed on appeal absent

---

51. This Court has identified one exception to the rule that the prosecution need not accept an offer to stipulate. That exception applies in the context of a charge of possession of a firearm by a felon. In such a case, the defendant may stipulate to his status as a felon and the prosecution may not introduce such evidence, absent certain exceptions. (*People v. Hall* (1980) 28 Cal.3d 143, 156, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415.) That type of charge, however, is an entirely different matter than a criminal street gang enhancement, which "is, by definition, inextricably intertwined with [the underlying] offense." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1048.)

an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) The fact that this case was so thoroughly gang related simultaneously made the gang evidence extraordinarily probative and not prejudicial. Appellant states that the facts that appellant and Palma were Sangra members and that Sangra was a criminal street gang were not contested at trial. (AOB 132-135.) But appellant's gang membership was contested to some extent: one of the arguments appellant made at trial was that he was essentially an inactive Sangra member at the time of the murders, or at least distancing himself from the gang. (14RT 1829-1832, 1858-1868; 19RT 2519-2522, 2529-2533; 28RT 3479-3480, 3515, 3520.) In any event, appellant is again incorrect that simple gang membership and the status of Sangra as a street gang were the only issues on which the gang evidence was probative. (See AOB 132-135.) As explained, the theory in this case – the entire framework of the prosecution – was that appellant and Palma had committed the murders as Sangra "soldiers" under the orders of the Mexican Mafia. The evidence was therefore very probative to show not only that appellant and Palma were mere members of a criminal street gang but that they were committed, dedicated, ruthless members of a criminal street gang who would unthinkingly obey an order to murder an individual and in carrying out that order kill his family as well. It was the prosecution's burden to prove its theory beyond a reasonable doubt; the prosecution thus did "need" this evidence. (See AOB 133.)

The challenged photographs were not unduly prejudicial, in the sense that they were not inflammatory in the context of the case. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [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].) Given the very nature of the crimes, and the their gang-related motivation, it simply could not have been

uniquely bias-inducing for the jury to have seen photographs of appellant and Palma with fellow gang members, or even with weapons and making gang signs. Nor would photographs of their gang tattoos have inflamed the jury – in fact, Palma's neck tattoo almost certainly would have been visible at trial. (See 1 Supp. 4 CT 109.) Indeed, the defense was not hesitant to introduce their own gang photographs when it suited their purpose of attempting to show that Witness 16 was an accomplice. (See Exhibits 80-83 [photographs of Witness 16 with various Sangra gang members, including appellant]; 1 Supp. 4 CT 149-156; 21RT 2772-2774, 2829-2839.) The photographs were not, in the context of all the evidence, particularly numerous or particularly emphasized. Accordingly, there was no abuse of discretion in admitting the photographs. (See *People v. Champion*, *supra*, 9 Cal.4th at p. 921 [gang evidence probative as to identity properly admitted over Evidence Code section 352 objection].)

There was also no federal constitutional violation. (See AOB 135-136.) Non-arbitrary application of the rules of evidence does not ordinarily infringe on a defendant's federal constitutional rights. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 56 [107 S.Ct. 2704, 97 L.Ed.2d 37]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 237]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) In particular, a state trial court's Evidence Code section 352 determination is a judgment call that is "unquestionably constitutional." (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013, 135 L.Ed.2d 361].) The admission of evidence may violate due process only if it is so prejudicial as to render the entire trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-72 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Partida*, *supra*, 37 Cal.4th at p. 439.) For all of the reasons explained herein, there was no due process violation.

D. Any Error Was Harmless

To the extent the court erred in admitting any of the challenged exhibits, the error was harmless under either the state or federal standard. (See *Chapman v. California, supra*, 386 U.S. at p. 24 [reversal based on federal constitutional error not warranted if error is harmless beyond a reasonable doubt]; *People v. Watson, supra*, 46 Cal. 2d at p. 836 [reversal based on state law error warranted only when it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of the error].) Any individual photographs that should have been excluded could not have been prejudicial in the context of the whole case, which involved three weeks of testimony. The challenged photographs were used comparatively briefly and were not particularly emphasized either during witness examination or during argument. And, as explained, the subject matter of the case was inextricably intertwined with gang evidence. The jury was specifically instructed not to be swayed by passion or prejudice. (CALJIC No. 1.00; 6CT 1709-1710.) There was no reasonable likelihood that the evidence would have misled the jury with respect to appellant's guilt. (See AOB 136.)

Appellant's assertion that "the fact that the jury deliberated at the guilt phase for more than 16 hours, over the course of six days, without reaching a verdict demonstrates that this was a close case" is highly misleading. (See AOB 137.) In fact, most of the deliberations were invalidated when it came to light that one of the jurors had been unable to appropriately participate in deliberations because of the nature of the case. (34RT 3819-3846; 6CT 1702.) After that occurred, the court instructed the jury to begin deliberations anew. (35RT 3847-3849; 6CT 1704.) And from that point, the jury required only about nine hours, over two full days and one partial day, to convict. (6CT 1704, 1706; 7CT 1825.) Assuming it is appropriate to infer anything from the length of deliberations alone (see *People v. Brown* (1985) 40 Cal.3d 512, 535

[long jury deliberations indication that jury may have sifted evidence carefully in light of the serious charges rather than indication of prejudice]; cf. *People v. Noguera* (1992) 4 Cal.4th 599, 643 [claim of prejudice based on rapid return of jury verdict "rests on unprovable speculation"]), nine hours of deliberation in a case of this magnitude and complexity surely does not indicate that the jury struggled. (See *People v. Cooper* (1991) 53 Cal.3d 771, 837 [lengthy deliberations in extensive capital case "not surprising"].) To the contrary, it suggests that this was not a close case. Accordingly, any error was harmless.

IV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING WITNESS INTIMIDATION

Appellant argues that his rights to due process, a fair trial, an impartial jury, and a reliable penalty determination were violated by the admission of evidence concerning pretrial intimidation against three witnesses. (AOB 139-159.) The court properly admitted the evidence because it was relevant to the credibility of the witnesses. In any event, any error was harmless.

A. Trial Court Proceedings

As noted (see fn. 13, *ante*), during the trial testimony of Witness 13, Anthony Torres's sister, she stated that she was afraid to testify and she believed both she and her children would be killed. (15RT 2098-2099.) She had approached the police when she found out the murders had involved children. (15RT 2073-2074.) Initially, she did not tell anyone in her family what she had done, and she told the police, the prosecutor, and the court that she wanted to remain anonymous. Ultimately, she had to relocate, against her wishes, because her cooperation with police likely became known after transcripts of the grand jury proceedings were provided to the defense. (15RT

2110-2113.) Moreover, even though she had changed jobs, the location where she worked had been shot at twice in the middle of the night. (15RT 2102.)[52] She testified that her cooperation with police had split her family apart and that if she had it to do over again she would not cooperate because she was too scared. (14RT 2113-2114.)

A second witness, David Sandate, testified at trial to establish Maciel's pager account history, a brief but key part of the prosecution case. (See 20RT 2573-2577.) During his testimony, the prosecutor asked four questions that elicited the facts that after Sandate had testified at the preliminary hearing an individual approached him at his workplace and asked why he was testifying against Maciel. (20RT 2575.)[53]

Finally, during Witness 16's testimony at trial, the prosecutor asked him a series of questions regarding the history of his cooperation with police from his initial status as a suspect and his strong resistance to cooperating to his eventual grant of immunity and agreement to testify after having been held in contempt. (20RT 2714-2718.) The prosecutor then asked several questions, which elicited that Witness 16's family lived in San Gabriel at the time he was granted immunity and he was afraid they would be killed if he cooperated with police. (20RT 2718-2719.)[54] The prosecutor also showed Witness 16 the photograph (Exhibit 58; 1 Supp. 4 CT 125) in which his face had been scratched out and "187" written across his chest. Witness 16 identified himself

---

52. Counsel for Palma objected to this testimony, but the court overruled the objection on the ground that "it goes to her state of mind as it affects her credibility." (15RT 2102.)

53. Counsel for appellant objected on the ground that the testimony was "irrelevant as to Mr. Valdez." The objection was overruled. (20RT 2575.)

54. Counsel for appellant objected to this testimony. The court overruled the objection on the ground that it "goes to his state of mind." (20RT 2719.)

in the photograph and stated that the photograph worried him. (20RT 2719-2721.)

B. The Evidence Was Relevant And Admissible

Evidence of a witness's fear in testifying is admissible because it bears on the general credibility of the witness. (Evid.Code, § 780; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Malone* (1988) 47 Cal.3d 1, 30.) For this purpose, it is not necessary to show that the witness's fear is directly linked to the defendant. (*People v. Burgener, supra*, 29 Cal.4th at p. 869; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.)[55/]

> A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. It could come from a person who perceives a social or political agenda to

---

55. As appellant notes, witness intimidation evidence may also be admissible to show consciousness of guilt if it is established that the defendant authorized or acquiesced in the intimidation. (AOB 147; see *People v. Hannon* (1977) 19 Cal.3d 588, 597-600, 601.) The court here, however, admitted the challenged evidence on the basis that it bore on witness credibility. No argument or instruction implied that the evidence could be used to show consciousness of guilt. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

have been advanced by the defendant's actions. It could come from a member of the witness's profession, religion, or subculture, who disapproves of the witness's involvement for some reason. It could come from a zealot of any stripe, large groups of whom seem ready to rally to virtually any cause these days.

Regardless of its source, the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial. The trial court acted well within its discretion in insuring the jury would have such evidence and would properly evaluate it.

(*People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369.)

The evidence of intimidation levied against Witness 13, Sandate, and Witness 16 was plainly relevant to their credibility. The evidence established their "personal stake" in testifying and thus made their testimony more credible. The jury was entitled to evaluate the testimony of these witnesses knowing the circumstances under which it was presented. (*People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369.)

Appellant, relying on cases such as *People v. Yeats* (1984) 150 Cal.App.3d 983 and *People v. Brooks* (1979) 88 Cal.App.3d 180, argues that before witness intimidation evidence may be admitted on the issue of credibility the witness's credibility must be at issue, in that the witness's testimony is inconsistent or otherwise suspect. (AOB 149-153.) In light of more recent

authority, however, it is unclear that a showing of a specific inconsistency or other suspect circumstance is a necessary prerequisite to the admission of witness intimidation evidence. (See, e.g., *People v. Sanchez*, *supra*, 58 Cal.App.4th at p. 1450; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369; but see *People v. Burgener*, *supra*, 29 Cal.4th at pp. 869-870 [observing, but not stating as a requirement, that intimidation evidence was relevant to explain differences between prior and current testimony].) In fact, the credibility of a witness is *always* relevant. (See Evid. Code, § 780; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Respondent maintains that the evidence of intimidation as to all three witnesses was properly admitted as relevant to their credibility generally.

In any event, even under the authority relied upon by appellant, the witness intimidation evidence was properly admitted here. The evidence was plainly admissible as to Witnesses 13 and 16 because significant credibility questions as to those witnesses were raised at trial. The whole context in which the prosecutor elicited evidence of Witness 13's fear was her retreat at trial from statements she had made earlier to police. Witness 13 repeatedly claimed that she did not remember details of what she told the police, including critical identifications she had made. (15RT 2085-2114.) The evidence of her fear was thus highly relevant to explaining her purported memory failures. As to Witness 16, an obvious point of attack against his credibility was the fact that he had agreed to testify in exchange for immunity from prosecution. Evidence of his fear of retribution was clearly relevant to counter the inference that he had a motive to testify favorably for the prosecution. In addition, Witness 16 admitted he had previously lied to investigators (20RT 2715), and the defense pressed him on specific inconsistencies in his testimony during cross-examination (20RT 2768-2770, 2774-2775, 2781-2784, 2790-2799, 2802-2806, 2810, 2857-2865, 2870-2871).

As for the testimony of Sandate, although there were no specific inconsistencies or credibility challenges raised with respect to his testimony, the threat evidence was still admissible even under the authority cited by appellant. *Brooks* and *Yeats* both suggest that the rule requiring the witness's credibility to be "material" turns significantly on the probative value of the witness's testimony, not just on whether the witness's credibility has been specifically called into question. (*See People v. Yeats*, *supra*, 150 Cal.App.3d at pp. 986-987 [". . . Hoover's testimony raised major questions about Preston's mental competence after the accident and hence his ability to identify defendant as the driver of the green Buick. Accordingly, we conclude that Hoover's credibility was a material issue . . ."]; *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187 [". . . furthermore, the fact evidence which this witness produced was likewise irrelevant. . . . the lack of relevancy of this witness' testimony strongly suggests the presentation of this witness was solely to call the jury's attention to the threat. "].) Although Sandate's testimony was brief (see AOB 150 [calling the testimony "perfunctory"]), it was a key aspect of the prosecution's case, in which appellant and Sangra were directly linked to Maciel precisely around the time of the murders through telephone and pager records. (See 27RT 3446-3450 [prosecutor's argument, in which he refers to this evidence as the "fingerprint" of the case].) Because the probative value of Sandate's testimony was high, his credibility was "material." (See *People v. Yeats*, *supra*, 150 Cal.App.3d at pp. 986-987.)

Appellant further argues that there was insufficient foundation to allow the prosecutor to question Witness 16 with regard to the photograph (Exhibit 58; 1 Supp. 4 CT 125) in which his face had been scratched out and "187" written across his chest because Witness 16 had never seen the photograph before trial and therefore it could not have caused him fear. (AOB 150.) No such foundational objection was made in the trial court, however, and the claim

is therefore forfeited. (Evid. Code, § 353.) Nonetheless, the questioning regarding the photograph was relevant because it *corroborated* the witness's statements regarding his fear of retaliation from Sangra. (See Evid. Code, §§ 210, 780.) Thus, the evidence was admissible even if it did not itself form the basis of Witness 16's fear. Appellant also argues that the attacks on Witness 13's workplace were irrelevant because they were not established to have been authorized by appellant or related to this case. As noted, however, where evidence of witness intimidation is admitted as relevant to the witness's state of mind, the source of the intimidation is immaterial, even under the authority relied upon by appellant. (*See People v. Burgener*, *supra*, 29 Cal.4th at p. 869; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369; *People v. Yeats*, *supra*, 150 Cal.App.3d at p. 986 ["the focus of the inquiry is on the witness' state of mind, not the defendant's conduct"].) Appellant additionally argues that Witness 13's testimony was not "inconsistent" because ultimately she reaffirmed her prior statements to police when pressed by the prosecutor at trial. (AOB 151-152.) But inconsistency is not the sine qua non of even the rule invoked by appellant. Rather, again, the high probative value of the evidence itself was sufficient to make Witness 13's credibility "material," and her repeated claims of lack of memory and clear reluctance to espouse her prior statements were plainly sufficient to render her testimony "otherwise suspect." (See *People v. Yeats*, *supra*, 150 Cal.App.3d at p. 986; see also *People v. Avalos* (1984) 37 Cal.3d 216, 232 [evidence of fear relevant to explain hesitation in in-court identification].)

The witness intimidation evidence as to all three witnesses was therefore relevant and admissible.

C. Appellant's Evidence Code Section 352 Objection Is Forfeited And Without Merit

Appellant also contends that the witness intimidation evidence was improperly admitted under Evidence Code section 352 because its probative value was substantially outweighed by the risk of prejudice. (AOB 153-155.) No such objection was made in the trial court, however. The argument is therefore forfeited. (*People v. Williams* (1997) 16 Cal.4th 153, 206.)

In any event, the contention fails. For the reasons explained, the probative value of the evidence was high. It bore directly on the general credibility of all three witnesses, and even more specifically on Witness 13's wavering espousal of her pretrial statements to police and Witness 16's motive in testifying for the prosecution. Conversely, the risk of prejudice was remote. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1121 [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].) The jury in this case heard extensive testimony about the Mexican Mafia, its sophisticated methods, and its culture of retribution. (18RT at 2236-2351.) As noted, the case was saturated with gang evidence by its very nature. It could not possibly have alarmed the jury to learn that, of the multitude of witnesses who appeared at trial, many of whom were referred to by number, three were subject to threats.

Nor was there a "likelihood that the jury will attribute the third party's conduct to the defendant, and infer from it that he is a bad man who is more likely than not guilty of the charged crime." (AOB 154-155.) Sandate was clear that the intimidation against him was specifically related to Maciel. (20RT 2575.) And the source of the intimidation testified to by Witness 13, the sister of a Sangra member, and Witness 16, a Sangra member, was clearly

implied and most likely to be, even if not explicitly stated to be, the Sangra gang itself. (20RT 2718-2721.) Inasmuch as appellant was undisputedly a Sangra gang member, some general connection between appellant and the intimidation was not prejudicial, in the sense of unfairly clouding the issues with emotion, in this gang-centric case. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1121.)

Accordingly, even assuming an Evidence Code section 352 objection had been raised, the challenged evidence would have been properly admitted over that objection. (See *People v. Avalos*, *supra*, 37 Cal.3d at p. 232 [no abuse of discretion under Evidence Code section 352 in admitting evidence of fear where witness hesitated in identification and it was clear fear was not attributable to defendant].)

D. The Trial Court Had No Sua Sponte Duty To Give A Limiting Instruction

Appellant further argues that the court should have given "appropriate admonitions and instructions" regarding the evidence of witness intimidation, even though none were requested by the defense. (AOB 155-158.) As appellant acknowledges, however, courts have no general sua sponte duty to give limiting instructions. (AOB 156, citing *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1051; see also Evid. Code, § 355.) There was therefore no error.

Appellant nonetheless argues that a limiting instruction should have been given under an exception applicable in "an occasional extraordinary case in which unprotested evidence . . . is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Hernandez*, *supra*, 33 Cal.4th 1040, 1051, citing *People v. Farnam* (2002) 28 Cal.4th 107, 163-164.) This is plainly not the "occasional extraordinary case" calling for application of such an exception. In contrast to

the requirements of the exception, the evidence was highly probative and minimally (if at all) prejudicial, as explained. Nor is it even remotely plausible to claim that the intimidation evidence was a "dominant theme" of the prosecution's case. (See AOB 156-158.) In the context of all the evidence presented in this extensive trial, the witness intimidation evidence was a decidedly minor component. There was therefore no instructional error.

E. Any Error Was Harmless

Any evidentiary or instructional error was harmless in any event, as there is no reasonable probability that the error affected the outcome of the case. (See Evid. Code, § 353; *People v. Burgener*, *supra*, 29 Cal.4th at p. 870; *People v. Falsetta* (1999) 21 Cal.4th 903, 924-925; *People v. Watson*, *supra*, 46 Cal. 2d at p. 836.)[56] The witness intimidation evidence could not have weighed very heavily in the jury's deliberations, given the violent and gang-oriented nature of the case. As explained, the jury heard extensive testimony regarding the Mexican Mafia and its culture, and, conversely, the challenged evidence was not particularly lengthy or emphasized. That witnesses would be intimidated was to be *expected* in a case such as this, regardless of who the particular defendants were, and would not have impacted the jury's determination of the issues in the case. Any error was therefore harmless.

---

56. Again, the application of state evidentiary and instructional law did not result in any federal constitutional violation, even if erroneous. (See AOB 159; *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 67-72; see also Arg. III.C., *ante*.) Nonetheless, the error is harmless even under the beyond-a-reasonable-doubt standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, for the reasons explained herein. And, for the same reasons, it is not reasonably possible that any error with respect to the witness intimidation evidence skewed the penalty determination. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

V.

THE TRIAL COURT PROPERLY ADMITTED SHYROCK'S RECORDED STATEMENT THAT HE WANTED DIDO KILLED

Appellant argues that the admission of evidence concerning Shyrock's recorded statement about "Dido" as a declaration against interest was erroneous and violated his federal constitutional right to confrontation. (AOB 160-178.) The claim is waived; the court properly admitted the statements; and any error was harmless.

A. Trial Court Proceedings

Before trial, the prosecution filed a motion to admit a variety of hearsay statements, including two statements by Shyrock that were surreptitiously recorded during Mexican Mafia meetings. The first, in January 1995, concerned Anthony Moreno, and the second, in April 1995, concerned Maciel's induction into the Mexican Mafia gang. The statements were as follows:

1. I don't know if you have ever heard of this brother 'Dido'. Dropped out a long time ago. He's in an apartment where I was living. The motherfucker was living right downstairs. Never showed his face. All kinds of people in the pad. Bunch of sisters and kids, all kind of shit. So I'm trying to figure out how to – I need a silencer is what I need.

2. He's been working with me for about a year, man. For a year I have been working real close with him. This dude has gone way and beyond the call of duty, man. This motherfucker is sharp. He takes care of business. Take my word for it, the motherfucker is down. I'm not just talking about violence, either. You know, he takes care of business real good and he has downed a lot of motherfuckers in the last year.

(6CT 1539.)

The prosecution argued that the statements qualified as declarations against interest and were therefore admissible under Evidence Code section 1230 and various California cases. The prosecution also argued that the statements were circumstantial evidence of the existence of a conspiracy. (6CT 1539-1544.)

A lengthy discussion on the issue was subsequently held before Judge Sarmiento. The prosecutor argued that the first statement was a declaration against penal interest because "a reasonable interpretation" of the statement was that Shyrock, a member of the Mexican Mafia, intended to kill Dido, or have him killed, because Dido was a "dropout." The prosecutor also stated that Shyrock was unavailable because he was involved in a federal criminal case and the federal authorities had refused to turn him over. Also, Shyrock had a Fifth Amendment privilege not to testify, which his attorney would verify would be invoked if he were called. Various defense attorneys made objections under Evidence Code section 352. (2BRT 503-513.) Appellant's own attorney, however, simply stated "submitted" when asked for comments. (2BRT 510-511.)

The court stated that the prosecution had not established unavailability but that the prosecution could make that showing at a later date. Subject to such a showing, the court ruled that the first statement was a declaration against penal interest and that the probative value of the statement outweighed any prejudice. (2BRT 513-517.) After further argument, the court ruled that the second statement was not a declaration against penal interest and excluded it on hearsay grounds. (2BRT 517-533.)

After the case was transferred to Judge Trammell, the court and counsel discussed various hearsay statements, but Shyrock's statements were not addressed and defense counsel made no objections to Shyrocks statements.

(4RT 764-790.)

At trial, Sergeant Valdemar testified regarding the January 1995 statement made by Shyrock during the Mexican Mafia meeting. There was no objection from the defense. (18RT 2280-2281.)

B. The Claim Is Waived, Or At Least Partially Forfeited

At the outset, respondent submits that the claim is forfeited. In general, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal. (*People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048; *People v. Sanders* (1990) 51 Cal.3d 471, 508.) Although several defense attorneys argued the matter in the trial court before Judge Sarmiento, appellant's counsel never raised an objection to the admission of Shyrock's statements, nor did he join in the arguments of co-counsel. Instead, when directly asked his position, appellant's attorney simply said, "Submitted at this time." (2BRT 510-511.)[57] Indeed, even when co-counsel addressed the issue, they argued relevance and Evidence Code section 352, not the Evidence Code section 1230 requirements that appellant now raises. (2BRT 508-517.) There was thus neither a timely nor a specific objection before Judge Sarmiento sufficient to preserve the issue for appeal. (Evid. Code, § 353.) And, as noted, there was never any objection at all subsequent to that hearing. Because appellant neither joined in the objections of his codefendants nor made an objection of his own, despite ample opportunity, his challenge to the admission of Shyrock's statements is waived.

However, even if not waived entirely, at the very least appellant's challenge to the prosecution's unavailability showing has been forfeited. At the

---

57. Counsel did subsequently object to the second of Shyrock's statements, which the court excluded, demonstrating that he certainly could have objected to the first statement as well. (2BRT 523-524.)

hearing before Judge Sarmiento, the court ruled the second of Shyrock's proffered statements admissible, subject to a later showing of unavailability based on the prosecution's proffer that Shyrock would refuse to testify. Specifically, the court stated that "the unavailability issue will be left for another time." (2BRT 517.) No subsequent objection was ever made on the basis of the unavailability requirement. The failure to pursue that issue plainly forfeited any challenge to the unavailability showing, particularly in light of the very specific discussion between the prosecutor and the court regarding the prosecution's proposed showing on the issue. (See 2BRT 508-515; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 680 [failure to pursue ruling has same effect as failure to make objection].)

Moreover, no constitutional objection was made to the admission of Shyrock's statements. Rather, counsel argued the matter on grounds of relevance and Evidence Code section 352. Appellant's constitutional claim is therefore also forfeited. (*See People v. Riley*, *supra*, 2 Cal.4th at p. 891 [objection under Evidence Code section 352 does not preserve due process or confrontation issues]; *People v. Rudd*, *supra*, 63 Cal.App.4th at pp. 628-629 [collecting this Court's cases holding that "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal"].)[58/]

C. The Statement Was Properly Admitted Under Evidence Code Section 1230

Evidence Code section 1230 provides:

Evidence of a statement by a declarant having sufficient knowledge of

---

58. Again, an Evidence Code section 352 objection may have preserved only a "very narrow due process argument." (See *People v. Partida*, *supra*, 37 Cal.4th at p. 435.)

> the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Evid. Code, § 1230.) A hearsay statement is admissible under this exception if its proponent can show: (1) that the declarant is unavailable; (2) that the declaration was against the declarant's penal interest when made; and (3) that the declaration was sufficiently reliable to warrant admission despite its hearsay character; the trial court's decision whether to admit a statement as a declaration against penal interest is reviewed for abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 584-585; *People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

1. Shyrock Was Unavailable

A witness is "unavailable" if the party offering his or her testimony has exercised due diligence to procure the person's attendance, but has been unable to do so. (Evid. Code § 240, subd. (a)(5).) Under this standard, a party is required to exercise a good faith effort to secure the presence of the witness, but futile acts not likely to produce the witness are not required. (*Ohio v. Roberts* (1979) 448 U.S. 56, 74 [100 S.Ct. 2531, 65 L.Ed.2d 597].) "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." (*Ibid.*, citing *California v. Green* (1970) 399 U.S. 149, 189 [90 S.Ct.1930, 26 L.Ed.2d 489].)

Here, in discussing the admissibility of Shyrock's statements before

Judge Sarmiento, the following colloquy occurred:

MR. MONAGHAN: – For the purpose of this proceeding I'd like the court to assume he's unavailable. What I will do if necessary – he is a defendant in a RICO case supposed to start trial in this district in October. He's in custody at the metropolitan detention center.

Clearly, he has a right not to testify. In this case he has a Fifth Amendment privilege. I have not yet contacted his attorney. But what I will do, because clearly I have to show unavailability, is I will have his attorney fill out a document indicating that if he was called to testify he would take the Fifth.

In addition, the U.S. Attorney's office has told me, although I'm just simply advising the court of this, that they would oppose any motion to bring him over here either as a witness or a defendant.

And he is not where I can subpoena him. The metropolitan detention center refuses to accept the subpoena by the county authorities as to Mr. Shyrock. So –

THE COURT: Are you attempted to subpoena him?

MR. MONAGHAN: I have talked to them and I was told if I attempted that's what I – what would happen.

So I understand the court's position, but I – I think clearly if the court looks at it carefully I will be able to show that Mr. Shyrock is unavailable, one, because the federal authorities refuse to release him, two, because he clearly has a Fifth Amendment privilege against self-incrimination.

(2BRT 508-509.)

The discussion picked up again later:

THE COURT: . . . Mr. Monaghan, it occurs to me that – I don't like to make rulings when they aren't ready to be made – at this point you

have not been able to establish unavailablity. I don't know.

MR. MONAGHAN: I can't argue with the court.

THE COURT: I mean, I am not going to rule. I don't want to – clearly, at this time as we sit here in court you have not established the unavailablity of Mr Shyrock so that these statements are admissible.

MR. MONAGHAN: I cannot argue.

What I would simply ask the court to do is put the matter of statements A and B over to next Monday the 9th, and I will take the steps between now and the 9th – I will take two steps. I will contact Mr. Shyrock's attorney, who I have not yet contacted, and I will also bring somebody in from the metropolitan detention center who will testify they either they will or will not accept a subpoena, and we can resolve the unavailablity issue next Monday and then either yourself or judge Czuleger can determine if the – if the statements are admissible.

MR. ESQUEDA [counsel for Maciel]: May I just add one quick footnote. Your honor, if it gets to that issue, I do intend to subpoena and call Mr. Raymond Shyrock, who I understand is willing to come here and testify. And the matter is real simple. This court can make a removal order and order him here.

MR. MONAGHAN: Well, your honor –

MR. ESQUEDA: So this garbage about not accepting a subpoena, your honor, I don't know where it's coming from.

MR. MONAGHAN: Your honor, Mr. Esqueda – I certainly wouldn't argue with him. I'm sure he's got a lot more experience than I do. But I recently spent nine months trying a case where we shipped the defendant back and forth between here and metropolitan detention center because he had a federal case going on. And it – it took a lot of work in that case.

And in that case the federal authorities wanted the state case to proceed; so they were willing to release the individual. It has been my experience – and again, I am certainly not going to argue with anybody – that the federal authorities do not accept subpoenas, will not unless they want to, while criminal cases are still pending against an individual. So that's a –

THE COURT: I don't want to spend a lot of time on that.

MR. MONAGHAN: Let's resolve it on Monday. Mr. Esqueda can have him subpoenaed for Monday.

THE COURT: Hold on. What we can do is this: I will let you be heard on the other arguments. As far as the unavailablity issue, I can make a ruling subject to whether or not he's available or not so at least you can have a ruling so all sides will know how to proceed on this issue.

(2BRT 513-515.)

Before any further hearing was held before Judge Sarmiento, however, the case was severed and transferred to Judge Trammell. (2BRT 567-599; 3RT 602; 6CT 1571-1572.) The unavailability issue was never raised before Judge Trammell. (4RT 764-790.)

Even though the matter was deferred in the trial court and never returned to, and assuming the issue has not been waived or forfeited, respondent submits that the record is sufficient to support an inference that Shyrock's was unavailable. It was uncontested that Shyrock was a high-ranking Mexican Mafia leader who was the target of a major investigation. (See 18RT 2259-2261.) As the prosecutor noted in the trial court, Shyrock was facing federal RICO charges at the time of trial. (18RT 2261; 6CT 1541-1542.) Further, according to the prosecutor, the United States Attorney's Office told him before trial that it would oppose any request to have Shyrock testify in state court, and

federal authorities at the Metropolitan Detention Center had told him that they would refuse to accept a subpoena for Shyrock. (2BRT 509.) Thus, this case is not like *Barber v. Page* (1968) 390 U.S. 719 [88 S.Ct. 1318, 20 L.Ed.2d 255], in which the state made no attempt to seek the out-of-state witness's presence. (*Id.* at p. 725.) To the contrary, the prosecutor here had already approached federal authorities and been rebuffed. (See *id.* at p. 724.) Moreover, given Shyrock's intimate connection with this case, the fact that he was awaiting his own federal trial, and the ruthlessness of the gang of which he was a high-ranking member, it is certain that he would have invoked his right not to incriminate himself by testifying to the statements, as the prosecutor indicated in the trial court. (2BRT 508-509.) He was unquestionably entitled to assert the privilege. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616-617.) Under these circumstances, respondent submits that unavailability was sufficiently shown on this record because, given the explicit discussion of unavailability, appellant's later silence on the issue can be viewed as a concession on that point.

2. The Statement Was Against Shyrock's Penal Interest And Was Sufficiently Reliable

A statement is against penal interest if it is "so far contrary to the declarant's interests that a reasonable man in his position would not have admitted it unless he believed it to be true." (*People v. Brown* (2003) 31 Cal.4th 518, 536, internal punctuation omitted; citing 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 146, p. 857; Evid.Code, § 1230.) This Court has emphasized the close relationship between the against-penal-interest and reliability requirements of Evidence Code section 1230:

> The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. In determining

> whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. Even when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. We have recognized that, in this context, assessing trustworthiness requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.

(*People v. Geier*, *supra*, 41 Cal.4th at pp. 584-585, citations and internal punctuation omitted.)

Appellant argues that Shyrock's statement identifying Dido as a dropout and stating that "I need a silencer" was not specifically disserving to Shyrock, nor was it against Shyrock's penal interest at the time it was made because no conspiracy had yet been formed and the comment was spoken only to fellow gang members in a private meeting. (AOB 171-172.) Appellant also argues that Shyrock's statement was not reliable because it is not evident that the statement pertained to this case. (AOB 173.) These arguments fail.

Shyrock's statement must, of course, be viewed in context. (See *People v. Geier*, *supra*, 41 Cal.4th at pp. 584-585; *People v. Lawley*, *supra*, 27 Cal.4th at p. 153; *People v. Duarte*, *supra*, 24 Cal.4th at p. 612.) As explained by Sergeant Valdemar at trial, the statement was made during a surreptitiously recorded meeting of Mexican Mafia members. (18RT 2280-2281.) Sergeant Valdemar also explained that Mexican Mafia members are not permitted to

leave the gang except by death and that vendetta is part of the Mexican Mafia lifestyle. (18RT 2254-2258.) In that context, Shyrock's identification of Dido as a dropout and his comment that he needed a silencer could only reasonably be taken to mean that Dido had to be killed. This brief statement was "specifically disserving" to Shyrock; no portion of the statement was exculpatory or could be interpreted as an attempt to shift the blame. (See *People v. Duarte*, *supra*, 24 Cal.4th at pp. 611-612.) The statement was also against Shyrock's penal interest. Even if, as appellant asserts, no conspiracy had yet been formed at the time the statement was made, the statement plainly marked the inception of a conspiracy to kill Dido. As such, it was such a clear and direct a statement of the intent and purpose of that conspiracy as to be "so far contrary to [Shyrock's] interests that a reasonable man in his position would not have admitted it unless he believed it to be true." (*People v. Brown*, *supra*, 31 Cal.4th at p. 536.) This is true even though the statement was made in a secret meeting. Indeed, this type of situation has been described as "the most reliable circumstance"; i.e., "one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.)

Thus, the circumstances and context of the statement demonstrate trustworthiness under the hearsay exception for statements against penal interest, and Shyrock's statement was properly admitted under that exception.

D. The Statement Was Properly Admitted Under The Federal Constitution

Under the Confrontation Clause, the analysis of whether a hearsay statement is admissible turns, at the threshold, upon whether the statement is testimonial or non-testimonial. In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that

the Confrontation Clause bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at p. 68.) If the statement at issue is not "testimonial," however, the former inquiry under *Ohio v. Roberts*, *supra*, 448 U.S. 56 applies. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) This inquiry asks whether a hearsay statement either constitutes a firmly rooted hearsay exception or contains particularized guarantees of trustworthiness. (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 66.)

The statement at issue here is not testimonial within the meaning of *Crawford*, as appellant concedes. (AOB 174.) Nor, as appellant notes, is the declaration against penal interest exception a "firmly rooted" one. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 134 [119 S.Ct. 1887, 144 L.Ed.2d 117].) Thus, to be admissible, the statements at issue here were required to bear "particularized guarantees of trustworthiness." This inquiry is equivalent to the reliability inquiry under Evidence Code section 1230. (*People v. Fuentes* (1998) 61 Cal.App.4th 956, 965 ["insofar as declarations against penal interest are concerned, the requirements of section 1230 . . . are identical to those of the confrontation clause."]; see also *People v. Greenberger*, *supra*, 58 Cal.App.4th at pp. 335-336; *People v. Wilson* (1993) 17 Cal.App.4th 271, 278.) As noted, Shyrock's statement was made under "the most reliable circumstance." (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 335.) Shyrock's clear, direct declaration to other Mexican Mafia members that he wanted Dido killed, keeping in mind that group's culture of retribution against dropouts, leaves no room for doubt that Shyrock meant what he said. And, in fact, the hit was later carried out by Maciel. The statement was unquestionably trustworthy.

E. There Was No Error Because The Statement Was In Fact Non-Hearsay

Regardless of the trial court's ruling that the statement qualified as a declaration against penal interest, the statement at issue here – in essence, that Shyrock wanted Dido killed – was properly admitted because, in fact, it is much better characterized as non-hearsay offered for the purpose of circumstantially showing that the Mexican Mafia was behind the murders, which was the motive of the crimes. The prosecution argued this theory in the trial court. (6CT 1543.) While the trial court did not address the theory, it may nonetheless support affirmance of the judgment. "If a ruling is correct on any theory sustainable under the record, it must be affirmed regardless of the considerations, which may have moved the trial court to its decision." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 65, citing *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

The prosecution never really sought to prove the *truth* of what Shyrock said – that he needed a silencer, or, interpreted more generally, that he himself wanted Moreno killed – which was beside the point as a matter of relevance.[59] The probative value of the evidence was instead in showing circumstantially that this was a Mexican Mafia-ordered hit against Moreno because he was a dropout. In this sense, the proffered statement is much more aptly characterized as non-hearsay that was relevant as circumstantial evidence of motive. (See *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1305.) The statement falls into the same category of statements that are admissible to show such things as their effect on the listener (see *People v. Duran* (1976) 16 Cal.3d 282, 295) or

---

59. Because the truth itself of Shyrock's statement was simply not relevant (and not inflammatory), no prejudice could have resulted from the absence of an instruction limiting admissibility of the statement to its non-hearsay purpose. In this case, the probative value of the statement was clearly in its non-hearsay purpose.

the formation of an oral agreement (see *People v. Dell* (1991) 232 Cal.App.3d 248, 261). Indeed, inasmuch as the prosecution's theory here was that the Mexican Mafia ordered the hit on Moreno, the import of Shyrock's statement as circumstantial evidence of that motive is also closely analogous to an instruction or command. "Evidence of a declarant's statement constituting words of instruction, command or order is Not hearsay evidence . . . ." (*In re Robert W.* (1977) 68 Cal.App.3d 705, 712.) Because the statement was not used at trial for the truth of what Shyrock said but as non-hearsay evidence of the impetus of the crimes, there was no error in admitting it.

F. Any Error Was Harmless

Regardless of its admissibility, the brief statement by Shyrock that appellant challenges here could not possibly have prejudiced him, and therefore any error was harmless under either the state or federal standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)[60] Shyrock's statement identifying Dido as a Mexican Mafia dropout and indicating that he wanted him killed was neither inculpatory of appellant nor particularly inflammatory in the context of the case. Instead, the statement simply provided background information regarding the source of the Mexican Mafia conspiracy to kill Dido. Even without that specific statement, the jury would have heard extensive evidence regarding the Mexican Mafia's organization and culture, and more specifically, of Maciel's Mexican Mafia membership and his direction of the hit against Dido, a Mexican Mafia dropout.

---

60. Nor did its admission violate Evidence Code section 352 (see AOB 176-177) for these same reasons. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1121 [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].)

This testimony was provided by Witness 15, Sergeant Valdemar, Witness 14, and the telephone and pager records. (15RT 1990-1991, 1997-2016, 2021-2022, 2030; 18RT 2251-2264, 2267, 2281-2282, 2284, 2299-2306; 19RT 2465, 2470-2475; 20RT 2573-2576, 2608-2609, 2611-2614, 2616-2618; 23RT 3027.) In the context of all of that evidence, the short and discrete statement from Shyrock simply could not have impacted the outcome of the case.

What may have been inflammatory about the evidence was not the statement itself but Sergeant Valdemar's initial opinion, elicited on cross-examination, that Shyrock intended for the children to be killed as well. (18RT 2317, 2341-2342.) However, if this was error it was invited, because appellant's own attorney elicited that opinion. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) Moreover, any prejudicial effect was negated when, during the defense case, Sergeant Valdemar retracted the opinion based on an enhanced copy of the recorded statement. (23RT 3119-3122.)

Accordingly, no prejudice could have resulted from any error in admitting Shyrock's statement as a declaration against penal interest.

VI.

THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY THAT WITNESS 16 WAS AN ACCOMPLICE AS A MATTER OF LAW

A salient issue at trial was whether Witness 16 was an accomplice in the charged murders. Appellant requested that the jury be instructed that Witness 16 was an accomplice as a matter of law. The court declined to so instruct the jury and instead allowed the jury to decide whether Witness 16 was an accomplice. Appellant argues that the ruling was erroneous. (AOB 179-209.) There was no error, and in any event the asserted error was harmless.

A. Trial Court Proceedings

At trial, Witness 16 testified that he drove Palma to Torres's house on the day of the murders, where they joined fellow Sangra gang members. Only on the way there did Palma mention that he had to take care of something for "the brothers." (20RT 2679-2683; 21RT 2761-2767.) Once at Torres's house, Ortiz said that they had to "take care" of someone in El Monte, which Witness 16 took to mean that they planned to kill someone, or at least there was a possibility that someone would be killed. This was the first moment he had heard of such a plan. (20RT 2684-2694; 21RT 2767-2777.)[61/]

Witness 16 drove Ortiz and another gang member to Maxson road in his car, while Logan, Torres, Palma, and appellant drove in Logan's car. Once there, Logan and the others pulled into a driveway; at Ortiz's direction, Witness 16 parked his car a few blocks away, and Ortiz got out of the car. Ortiz returned a short time later and told Witness 16 to leave because the police were coming. Witness 16 at this point did not know of any shootings. (20RT 2696-2705; 21RT 2778, 2784-2785.)

Witness 16 and his companions later rejoined the others at Torres's house, where they were listening to a police scanner. At Torres's house, Palma and appellant related how they had killed the five victims in Maria Moreno's apartment. Witness 16 testified that he had not been carrying a gun and he had felt pressured into accompanying his fellow gang members. (20RT 2708-2714; 21RT 2777, 2820-2821.)

Witness 16 related at trial that he had initially lied to police and had

---

61. Both defense counsel at trial cross-examined Witness 16 with respect to a statement he had made during an earlier police interview that he did not know at this time that the gang members intended to kill someone. Witness 16 said that what he had meant was that he did not *necessarily* know that someone would be killed. (21RT 2781-2783, 2802-2805, 2848-2851, 2858-2859.)

refused to cooperate, even after having been given immunity, because he was afraid for his family, but he agreed to cooperate after his family was provided protection. His immunity was conditioned on his telling the truth. (20RT 2716-2722; 21RT 2784, 2790-2799.)

Additional evidence was presented at trial that police had observed during surveillance that Witness 16 acted as a sort of chauffeur for Palma. (22RT 2902-2914.)

After the evidence was presented, the parties discussed the jury instructions, including the issue of accomplice instructions. The defense requested that the court instruct the jury, pursuant to CALJIC No. 3.16, that Witness 16 was an accomplice as a matter of law.[62/] Counsel for Palma argued that Witness 16 was an accomplice because he was present during the discussions at Torres's house preceding the murders and because he drove a backup car to the scene. The prosecutor countered that it would be well within the jury's discretion to find that Witness 16 was an accomplice, but the jury could also conclude otherwise on the basis that even if Witness 16 was present and had knowledge of the crime his actions did not amount to aiding and abetting. The court found that the evidence did not show beyond a reasonable doubt that Witness 16 was an accomplice and that the issue was one for the jury to decide. (25RT 3246-3261.)

The court thereafter instructed the jury with CALJIC No. 3.10 ("Accomplice - Defined"), CALJIC No. 3.11 ("Testimony of Accomplice Must be Corroborated"), CALJIC No. 3.12 ("Sufficiency of Evidence to Corroborate an Accomplice"), CALJIC No. 3.13 ("One Accomplice May not Corroborate Another"), CALJIC No. 3.14 ("Criminal Intent Necessary to Make One an Accomplice"), CALJIC No. 3.18 ("Testimony of Accomplice to be Viewed

---

62. At the outset of the hearing, the defense indicated that all instructional arguments would be joint. (25RT 3231.)

with Distrust"), and CALJIC No. 3.19, which provided:

> You must determine whether [Witness 16 is an] accomplice as I have defined that term.
>
> The defendants have the burden of proving by a preponderance of the evidence that [this witness is an] accomplice in the crimes charged against the defendants.

(27RT 3353-3356; 6CT 1714-1720.)

In closing argument, the prosecutor argued extensively regarding all of the evidence other than Witness 16's testimony and contended that the case was proven beyond a reasonable doubt even without the statements of Witness 16. (27RT 3388-3450.) He then argued that Witness 16, whose testimony "puts this case in perspective," should not be considered an accomplice because there was no evidence against him other than his own statements and that according to his own statements his actions were not sufficient to show that he aided and abetted in the murders. The prosecutor argued that Witness 16 was essentially a follower at the bottom of the gang "ladder" who never actually assisted in the crime. (27RT 3450-3458.) He also argued that Witness 16's testimony was corroborated in any event. (27RT 3458-3460.)

Appellant's trial counsel argued that Witness 16 was an accomplice because he "drove the backup car" at the direction of Ortiz, and that there was no evidence to corroborate his identification of appellant as a shooter. (28RT 3486-3488.) Counsel also argued that Witness 16, whom he described as the centerpiece of the prosecution's case, was untrustworthy. (28RT 3512-3514.)

Palma's attorney argued that Witness 16 was an accomplice as both an aider and abettor and a co-conspirator. He argued that Witness 16 was more than merely present because he knew a murder was going to take place when he and his fellow gang members left Torres's house and yet he still drove the "backup car" with Ortiz, the leader of the mission. He also argued that Witness

16's presence in the room during the discussion preceding the murders, and his subsequent driving of the backup car, made him a co-conspirator. (28RT 3536-3542.) Palma's counsel later extensively argued that there was no evidence corroborating Witness 16's testimony and the evidence independent of that testimony was insufficient to convict. (28RT 3556-3597.)

During the prosecution's lengthy rebuttal argument, the prosecutor touched on the accomplice issue briefly. He argued that Witness 16's driving to Maxson road did not really assist in the murders. He also argued, however, that even if the jury were to view Witness 16's testimony with distrust, the evidence was compelling enough to convict. (29RT 3663-3666.)

B. There Was No Error

Penal Code section 1111 provides that a defendant may be convicted on the testimony of an accomplice only if the accomplice's testimony is corroborated. (Pen. Code, § 1111.) In addition, where an accomplice offers testimony incriminating of the defendant at trial, the jury must be instructed to view the testimony with caution. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

An accomplice is a person who is subject to prosecution for the identical offense charged against the defendant "either by virtue of a conspiracy or by acts aiding and abetting the crime." (*People v. Ward* (2005) 36 Cal.4th 186, 212; *People v. Arias* (1996) 13 Cal.4th 92, 142-143; see also Pen. Code, § 1111; CALJIC No. 3.10.) An accomplice is derivatively liable for the charged offense as an aider and abettor if he aided the defendant's commission of the offense with the intent to facilitate it. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123; *People v. Hoover* (1974) 12 Cal.3d 875, 879.) An accomplice is derivatively liable for the charged offense as a co-conspirator where he specifically intended to, and did, agree with the defendant to commit

a crime, specifically intended to commit the crime, and undertook an overt act toward the commission of the crime. (*People v. Garcia* (2000) 84 Cal.App.4th 316, 326; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) In addition, liability extends to an accomplice not only where the accomplice directly aided and abetted or conspired to commit the charged offense, but also where the accomplice aided and abetted or conspired to commit a target offense and the charged offense was a natural and probable consequence of the target offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-262.)

"Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury unless the evidence permits only a single inference. Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are clear and undisputed." (*People v. Williams*, *supra*, 16 Cal.4th at p. 679, quotation marks and citations omitted; citing *People v. Fauber* (1992) 2 Cal.4th 792, 834; *People v. Sully* (1991) 53 Cal.3d 1195, 1227; *People v. Rodriguez* (1986) 42 Cal.3d 730, 759.) In other words, "[w]hether a person is an accomplice is a question of fact for the jury unless there is *no dispute* as to either the facts or the inferences to be drawn therefrom." (*People v. Fauber*, *supra*, 2 Cal.4th at p. 834, emphasis added.)

Here, while the jury undoubtedly would have been entitled to find that Witness 16 was an accomplice, that was not the only permissible inference. Given the testimony at trial, whether Witness 16 intended to facilitate any criminal activity[63/] leading to the murders or agreed to assist in the commission of such an activity could more than reasonably have been questioned. In light of the defense's own questioning, the record is ambiguous whether Witness 16

---

63. Witness 16 suggested in a police interview, and it was brought out at trial, that he thought it was possible that his fellow gang members were "going to box or get some money from some people." (21RT 2802.)

actually knew that criminal activity was afoot before leaving Torres's house. (21RT 2781-2783, 2802-2805, 2848-2851, 2858-2859.) Witness 16 was not present during the murders but simply drove where he was directed, parked some blocks away, and then drove Ortiz – not a direct perpetrator of the murders – back to Torres's house. That Witness 16 may not have amounted to an accomplice by intending to aid or facilitate any criminal activity was bolstered by the evidence suggesting that Witness 16's role in the Sangra gang was akin to that of a chauffeur. Witness 16 testified that he felt compelled to drive his companions to Maxson road on the night of the murders. (21RT 2775.) Appellant points out that that statement was self-serving and did not preclude criminal liability. (AOB 199.) But the point here is that the jury *could* reasonably have credited the statement. Indeed, on this record, the trial court indicated it would have granted a motion under Penal Code section 1118.1 had Witness 16 been on trial. (25RT 3260.)

Appellant's reliance on *People v. Solis* (1993) 20 Cal.App.4th 264 is misplaced. (AOB 197-198.) In that case, the issue was whether an instruction pertaining to the predicate offense underlying an aiding and abetting theory was required. The court held that the defendant was properly convicted in the absence of such an instruction. (*People v. Solis*, *supra*, 20 Cal.App.4th at pp. 269-276.) To begin with, this Court has expressly disapproved of the *Solis* decision on the instructional question. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 268 ["Contrary to *Solis*, a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified nefarious conduct."].) But, more importantly, the instructional issue addressed in *Solis* is far different from the question presented here: whether the evidence supports *no other conclusion* but that Witness 16 was an accomplice. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 679; *People v. Fauber*, *supra*, 2 Cal.4th at p. 834.) Thus, even if the jury *may* have found that

Witness 16 was an accomplice on the basis of a theory similar to that presented in *Solis*, that did not mandate an accomplice-as-a-matter-of-law instruction. As the prosecutor conceded in the trial court, the jury could more than reasonably have found that Witness 16 was an accomplice. (25RT 3247.) But it also could readily have found that Witness 16 was not an accomplice on the basis that he drove a car not to the crime scene but to a location several blocks away, that he did not transport any of the direct perpetrators, that he was not sure what his fellow gang members intended to do when they left Torres's house, and that, significantly, even if he did know what was going to happen he did not specifically agree to it or intend to facilitate it. (See *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1122-1123; *People v. Garcia*, *supra*, 84 Cal.App.4th at p. 326.) Accordingly, no accomplice-as-a-matter-of-law instruction was required.

C. Any Error Was Harmless

Even if the court should have instructed that Witness 16 was an accomplice as a matter of law in this case, the error was manifestly harmless. Error under Penal Code section 1111 is not of federal constitutional dimension. (*People v. Frye* (1998) 18 Cal.4th 894, 968.)[64] Thus, the failure to give accomplice instructions is harmless if it is not reasonably probable the jury would have reached a result more favorable to the defendant had the instructions been given. (*People v. Box* (2000) 23 Cal.4th 1153, 1209.) Reversal is not required if the record reveals sufficient evidence of corroboration, which need only be slight, may be entirely circumstantial, and need not establish every element of the charged offense. (*People v. Frye*, *supra*, 18 Cal.4th at p. 966; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 370.) The corroborating evidence is sufficient if it "tends to connect the

---

64. Even so, the error here, if any, is harmless even under the federal standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24).

defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." (*People v. Davis* (2005) 36 Cal.4th 510, 543.)

There was evidence in this case that tended to connect appellant to the crime in such a way as to lend credence to Witness 16's testimony. Appellant was identified by Witness 13 and Elizabeth Torres as present with the other Sangra gang members before they left to commit the murders. (14RT 1882-1894; 15RT 2078-2079, 2089-2090, 2107.) The crime scene evidence substantiated Witness 16's version of what he was told had happened. (17RT 2197-2198, 2200-2205; 20RT 2628, 2633, 2639, 2648-2649, 2660; 22RT 2945-2946.) And the ballistics evidence connected appellant directly to the crime: unexpended rounds found in appellant's recently-vacated residence had without doubt been used in one of the murder weapons (19RT 2441-2447), and a bullet found in appellant's current residence had "likely" been fired through the other murder weapon (19RT 2429-2431). This was more than sufficient corroboration. Appellant argues that "once Witness 16's testimony is eliminated from the case, there is insufficient evidence that appellant participated in the homicides or that he aided or abetted their commission." (AOB 202.) But that is not the standard. As explained, the corroborating evidence need only tend to connect appellant with the commission of the offense. (*People v. Davis*, *supra*, 36 Cal.4th at p. 543.) The corroborating evidence here more than *tends* to connect appellant with the crime, it does so to a near certainty. Indeed, Witness 16's testimony was not "the cornerstone of the prosecution's case," as appellant contends. (AOB 179.) At trial, the prosecutor devoted the bulk of his argument to explaining why all of the testimony aside from Witness 16's was sufficient to convict. (27RT 2288-3450.) That evidence – including the testimony of Witness 15, Elizabeth Torres, Witness 13, Witness 14, and the telephone and pager records, all

considered together – left no doubt that appellant was part of the Sangra group operating under orders from Maciel to undertake the hit. Thus, even without Witness 16's specific identification of appellant as a shooter, appellant was still liable as an aider and abettor and a co-conspirator. Accordingly, any error relating to the accomplice instructions was harmless.

VII.

INSTRUCTION OF THE JURY WITH CALJIC NO. 2.11.5 DID NOT PREJUDICE APPELLANT

The trial court instructed the jury with regard to unjoined perpetrators in the charged crimes, according to CALJIC No. 2.11.5, as follows:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which defendant is on trial.
>
> There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendants on trial.

(6CT 1754; 27RT 3380-3381.) Appellant complains that the instruction prejudiced him in that it prevented the jury from adequately assessing the credibility of Witness 16. (AOB 210-216.) The claim is forfeited, and, in any event, there was no prejudice.

A. The Claim Is Forfeited

Preliminarily, respondent notes that the claim is forfeited. During discussion of the jury instructions in the trial court, the defense made no objection to the giving of CALJIC No. 2.11.5. (25RT 3233.) Manifestly, the

instruction pertained to many other codefendants in the case who participated in the killings but whose trials had been severed. This Court has held that where the instruction is properly given as to some unjoined perpetrators but not others, the question really is whether a limiting instruction should have been given, and in the absence of a request for a limiting instruction the claim is forfeited. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1218.) Because no such request was made in this case, the claim is waived.

B. Any Error Was Harmless

In any event, there was no prejudice. As appellant points out (AOB 212), this Court has held that CALJIC No. 2.11.5 should not be given where the unjoined perpetrator is also a witness at trial. This is because, when an accomplice testifies, "the instruction might suggest to the jury that it need not consider the factors it otherwise would employ to weigh the credibility of these witnesses, such as the circumstance that the witness has been granted immunity from prosecution in return for his or her testimony." (*People v. Cornwell* (2005) 37 Cal.4th 50, 88, citing *People v. Williams*, *supra*, 16 Cal.4th at pp. 226-227; *People v. Price* (1991) 1 Cal.4th 324, 445-446; accord *People v. Sheldon* (1989) 48 Cal.3d 935, 946.) This Court has also repeatedly held, however, that error in giving CALJIC No. 2.11.5 is harmless where "[o]ther instructions adequately directed the jury how to weigh the credibility of witnesses." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 88.) The court here gave comprehensive, standard witness credibility instructions, including CALJIC No. 2.20, which informed the jury to keep in mind the existence of any "bias, interest, or other motive" on the part of a witness. (6CT 1772; see also 6CT 1771, 1773-1777; 29RT 3686-3691; CALJIC Nos. 2.13, 2.21.1, 2.22, 2.23, 2.27.) This Court has stated:

When [CALJIC No. 2.11.5] is given with the full panoply of witness

> credibility and accomplice instructions, as it was in this case, jurors will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses.

(*People v. Lawley*, *supra*, 27 Cal.4th at pp. 162-163, citing *People v. Cain*, *supra*, 10 Cal.4th at pp. 34-35; *People v. Price*, *supra*, 1 Cal.4th at p. 446; *People v. Sully*, *supra*, 53 Cal.3d at p. 1219; *People v. Cox* (1991) 53 Cal.3d 618, 668; *People v. Williams* (1988) 45 Cal.3d 1268, 1313.)

In this case, Witness 16 was extensively examined and cross-examined at trial, including on his history leading to the grant of immunity. (20RT 2676-2735; 21RT 2755-2871.) His credibility was also thoroughly argued to the jury. (27RT 3450-3460; 28RT 3481, 3486-3487, 3512-3517, 3521, 3529-3542, 3556-3557, 3592-3598, 3663-3671.) And, as noted (see Arg. VI, *ante*), there was substantial evidence of guilt other than Witness 16's testimony. Given these circumstances, in combination with the extensive accomplice and witness credibility instructions given at trial, there is no reasonable probability of a different outcome had a limiting instruction been given. (See *People v. Carrera* (1989) 49 Cal.3d 291, 312-313 [CALJIC No. 2.11.5 not prejudicial where witness was granted immunity and other testimony implicated witness, in light of all instructions given]; *People v. Sheldon*, *supra*, 48 Cal.3d at pp. 947-948 [CALJIC No. 2.11.5 not prejudicial where substantial evidence of defendant's guilt existed; defendant had opportunity to cross-examine witness; and instructions were given on accomplice liability]; *People v. Malone*, *supra*, 47 Cal.3d at pp. 50-51 [CALJIC No. 2.11.5 not prejudicial where jury had before it evidence, argument and instructions underscoring witness's possible motive to lie and jury's duty to view his testimony with distrust]; *People v. Fonseca*

(2003) 105 Cal.App.4th 543, 550 [where the jury receives all otherwise appropriate general instructions regarding witness credibility, there can be no prejudice from jury instruction pursuant to CALJIC No. 2.11.5: "There is no error in giving [the instruction] so long as a reasonable juror, considering the whole of his or her charge, would understand that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility."].)[65/]

VIII.

THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTION TO PRESENT AN UNCHARGED THEORY OF CONSPIRACY LIABILITY

At trial, the prosecution sought permission to present evidence of an uncharged conspiracy, which was granted without debate, and the court later instructed the jury on the law of conspiracy, along with other accomplice-liability instructions. (6CT 1554-1561; 2BRT 462; 3RT 687-691; 27RT 3351-3364.) Appellant now argues that it was error for the court to allow an uncharged conspiracy theory to be presented. Appellant is wrong.

A. There Was No Error

As appellant acknowledges (AOB 221-223), this Court has previously rejected such arguments:

> It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. (*People v. Lopez, supra,* 60 Cal.2d at p. 250 [uncharged conspiracy to

---

65. Even if there was state-law instructional error, there could have been no federal constitutional violation since the error was not prejudicial, for the reasons explained. (See *Estelle v. McGuire, supra,* 502 U.S. at pp. 67-72.)

commit burglaries admissible to prove identity of murderer]; *People v. Pike* (1962) 58 Cal.2d 70, 88 [uncharged conspiracy to commit robberies admissible to prove armed robbery culminating in murder].) "Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory (*People v. Washington* (1969) 71 Cal.2d 1170, 1174; *People v. Ditson* (1962) 57 Cal.2d 415, 447)." (*People v. Remiro* (1979) 89 Cal.App.3d 809, 842.)

(*People v. Belmontes* (1988) 45 Cal.3d 744, 788-789, parallel citations omitted; accord *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1134; see also *People v. Pulido* (1997) 15 Cal.4th 713, 724.)[66]

Appellant nonetheless urges that this Court reconsider those holdings and find that conspiracy as a theory of liability is invalid as a matter of law because it is not defined by statute. (AOB 220-223.) He argues that the statements concerning uncharged conspiracy principles in *Rodrigues* and *Belmontes* are dicta (and, presumably, therefore not subject to the principle of stare decisis). (AOB 221-222.) In *Rodrigues*, however, this Court simply found waiver but also decided to reach the merits of the claim "since [appellant] additionally contends that counsel was ineffective." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1134.) This was an alternative ground of decision, not dicta. (See *Bank of Italy National Trust & Savings Ass'n v. Bentley* (1933) 217 Cal. 644, 650.) In *Belmontes*, the Court acknowledged that appellant had not directly raised the issue, but noted that an uncharged conspiracy theory was

---

66. In *Belmontes*, the appellant had argued that uncharged conspiracy theories should be limited to, among other situations, cases against "complex criminal organizations." (*People v. Belmontes*, *supra*, 45 Cal.3d at p. 788.) That is exactly the scenario presented here.

permissible precisely because the principle was so patently clear. (See *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 788-789 [citing numerous cases].) This does not militate against stare decisis but, to the contrary, supports it. Under *Rodrigues* and *Belmontes*, conspiracy is plainly a valid legal theory.

Appellant further argues that the uncharged conspiracy theory created a mandatory presumption allowing the jury to find him guilty of the charged offenses once it found him a member of a conspiracy to commit those offenses. (AOB 223-224.) But, like aiding and abetting, conspiracy (as used here) is itself a *theory of liability*. As this Court has noted, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position." (*People v. Pulido*, *supra*, 15 Cal.4th at p. 724, citation and quotation marks omitted.) Thus, by definition, once the jury finds a conspiracy, liability follows. This is different from a mandatory presumption of the type addressed in *Sandstrom v. Montana* (1979) 442 U.S. 510 [99 S.Ct. 2450, 61 L.Ed.2d 39] and *Carella v. California* (1989) 491 U.S. 263 [109 S.Ct. 2419, 105 L.Ed.2d 218]. (See AOB at 224, citing *Sandstrom* and *Carella*.) In each of those cases, the United States Supreme Court found unconstitutional an instruction creating a presumption of intent from the defendant's acts, which lowered the prosecution's burden of proving the intent required to establish the charged crime. (*Carella v. California*, *supra*, 491 U.S. at p. 265; *Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 523-524.) The instructions given here did not tell the jury that it could presume any particular element of murder, including intent, based on proof of predicate facts. Instead, the instructions specified that, as an *alternative* to finding, based on all the elements of murder, that appellant himself committed or aided in the crime, it could find him responsible for the crime based on his participation in a conspiracy to commit murder. This correctly stated the law concerning conspiracy as an alternative theory of liability. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1134; *People v.*

Belmontes, supra, 45 Cal.3d at pp. 788-789.) Accordingly, there was no error.

B. Any Error Was Harmless

But even if the uncharged conspiracy theory of liability was invalid, the error was harmless under the facts of this case. The jury in this case found true allegations that appellant personally used a firearm in the commission of each offense. This means that the jury necessarily found that appellant was a direct participant in the murders and not merely a nonparticipating coconspirator, since the only evidence of weapon use was in the actual commission of the murders.[67] The evidence presented at trial allowed of only one factual scenario involving appellant as a direct participant in the murders: that he entered the apartment with Palma and that appellant shot Anthony Moreno and Gustavo Aguirre while Palma shot Maria Moreno and her children. Any error with respect to the uncharged conspiracy theory was unquestionably harmless, then, with respect to appellant's convictions for the murders of Anthony Moreno and Gustavo Aguirre.

The error was also harmless as to appellant's convictions for the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla, insofar as the jury may have reached those verdicts on the theory that the murders were a natural and probable consequence of the conspiracy to kill Anthony Moreno. Under the facts presented at trial – involving a choreographed, professional-style hit – no rational juror could have found appellant guilty of the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla as a natural and probable consequence of the conspiracy to kill Anthony Moreno without also concluding

---

67. The evidence is thus irreconcilable with appellant's position that "the jury could have found appellant guilty of all five murders if the jury concluded that he conspired with the other Sangra members and if a co-conspirator or co-conspirators committed the murders . . . ." (AOB 225.)

that those murders were a natural and probable consequence of appellant and Palma's aiding and abetting each other in the murder of Anthony Moreno. The facts supporting both scenarios were so closely intertwined that a finding of one scenario without a finding of the other would have been unreasonable. Accordingly, any error in presenting an uncharged conspiracy theory to the jury was harmless because the jury, even if it relied on that theory, necessarily also relied on a proper aiding and abetting theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [one way *Green* error has been found harmless is where other portions of the verdict show that the jury necessarily relied on a proper theory], discussing *People v. Green*, *supra*, 27 Cal.3d at p. 69 ["when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand."].)

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LAW OF CONSPIRACY

Appellant argues that, even assuming the uncharged conspiracy was a proper theory, the court misinstructed the jury on it by "failing to identify any overt acts, failing to identify the object or objects of the conspiracy, failing to require unanimous agreement on the object or objects and overall conspiracy, and failing to require proof beyond a reasonable doubt." This, he contends, violated his state statutory and federal constitutional rights. (AOB 227-228.) The claim is forfeited, and there was no instructional error.

A. The Claim Is Forfeited

Appellant's claim is forfeited. The court here fully instructed the jury

on the law of conspiracy using standard CALJIC instructions. (6CT 1722-1733.) Appellant made no objection to the instructions in the trial court. (25RT 3262-3264.) In fact, the court noted in discussing the conspiracy instructions:

> I am assuming you gentlemen have gone through the wording of all these instructions because what Mr. Monaghan has done he's used the computer and has inserted in certain places and he has deleted with the use of the computer certain things so we don't have any blanks that have to be filled in or things crossed out, and I'm assuming that the wording here is as all three of you want.

(25RT 3262-3263.) There was no comment by the parties. The court then stated, "I am assuming by your silence that nobody is objecting." (25RT 3264.)

Now, however, appellant argues that "[t]he conspiracy instructions were incomplete, vague and reasonably susceptible to misunderstanding by the jurors." (AOB 239.) But "[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 570, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218.) Appellant never requested the clarifying and amplifying language he argues for here. "If [appellant] believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions." (*People v. Dennis* (1998) 17 Cal.4th 468, 514, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) Accordingly, the claim is forfeited.

B. There Was No Instructional Error

The trial court gave the jury various standard instructions on the law of conspiracy, including CALJIC No. 6.10.5 ("Conspiracy and Overt Act -

Defined - Not Pleaded as a Crime Charged"), CALJIC No. 6.11 ("Conspiracy - Joint Responsibility"), CALJIC No. 6.12 ("Conspiracy - Proof of Express Agreement Not Necessary"), CALJIC No. 6.13 ("Association Alone Does not Prove Membership in Conspiracy"), CALJIC No. 6.14 ("Acquaintance with all Co-conspirators not Necessary"), CALJIC No. 6.15 ("Liability for Independent Acts of Co-conspirators"), CALJIC No. 6.16 ("When Conspirators not Liable for Act of Co-conspirator"), CALJIC No. 6.17 ("Conspirators not Bound by Act or Declaration of Non-conspirator"), CALJIC No. 6.18 ("Commission of Act in Furtherance of Conspiracy Does not Itself Prove Membership in Conspiracy"), CALJIC No. 6.19 ("Joining Conspiracy After its Formation"), CALJIC No. 6.22 ("Conspiracy - Case Must be Considered as to Each Defendant"), and CALJIC No. 6.24 ("Determination of Admissibility of Co-conspirator's Statements"). (6CT 1722-1733.)

Appellant first argues that the court was obligated to specify a particular overt act that the jury was required to find before the conspiracy theory of liability could be supported, even though the standard instructions did not call for such specification. (AOB 228-232.) He points out that Penal Code section 182, subdivision (b), requires that an overt act be alleged in the indictment when conspiracy is charged as a crime. (AOB 230-231.) But that statute pertains only to the way conspiracy must be *charged* as a crime, not how the jury should be *instructed* on the theory of conspiracy liability. No authority requires a trial court to instruct on specific overt acts in relation to an uncharged conspiracy. (*People v. Flores* (2005) 129 Cal.App.4th 174, 183-184.) Indeed, this Court has rejected the very argument raised here, observing that a court need not identify particular overt acts for the jury nor instruct that the jury must unanimously agree on an overt act, because unanimous agreement on a specific overt act is not required "as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance

of the conspiracy." (*People v. Prieto* (2003) 30 Cal.4th 226, 251, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1135.) Because the trial court properly instructed the jury on overt acts generally, there was no error. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 251; *People v. Flores*, *supra*, 129 Cal.App.4th at pp. 183-184.)

Appellant also argues that the trial court's instructions inadequately identified the target offense of the conspiracy. (AOB 232-234.) The standard instruction, CALJIC No. 6.10.5, as modified and given here, provided, "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit a public offense such as murder . . . ." (6CT 1722; 27RT 3356-2257.) Appellant claims that this language "failed to provide adequate guidance to the jury about how to determine the object or crime originally contemplated by the conspiracy." (AOB 233.) There is, however, no reasonable likelihood that the jury would have been confused. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525-526 [instruction attacked as incorrect examined to determine whether there is a reasonable likelihood the jury would have understood the instruction incorrectly].)

In this case, the "target offense," as that term has been used in the natural and probable consequences context (see AOB at 233, extensively citing *People v. Prettyman*, *supra*, 14 Cal.4th 248), was plainly the murder of Anthony Moreno. The prosecution never argued any other target offense. And the evidence overwhelmingly pointed to that target offense, while it may have only theoretically supported other target offenses. Since this was a charged offense, the jury was adequately apprised of the target of the conspiracy. As this Court stated in *Prettyman*, an instruction specifying a target offense "should be given whenever *uncharged* target offenses form a part of the prosecution's theory of criminal liability." (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 266-267, emphasis added.) And certainly the trial court had no duty to instruct on any

other"potential target offenses supported by the evidence, but only those that the prosecution wishes the jury to consider." (*Id.* at p. 269 & fn. 9.) Against that background, the court's instruction that the jury had to find an agreement to commit a public offense "such as murder" was more than adequate. (AOB 232-233; 6CT 722.) Given that instruction, the evidence in the case, and the arguments of the parties, there was no reasonable likelihood – indeed, there was absolutely no danger – that the jury would engage "in unguided speculation as to what kinds of criminal conduct are serious enough to warrant punishment as felonies" or rely merely on its "generalized belief that the defendant intended to assist and/or encourage unspecified nefarious conduct" in considering the conspiracy question. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 266, 268.) There was therefore no error in the trial court's failure to more specifically identify a "target offense."

Appellant finally argues that the court's conspiracy instructions were faulty because they failed to specify that the jury had to unanimously agree on a particular "object," or target offense. In particular, he points to unanimity language contained in a subsequent version of CALJIC No. 6.22[68] and to CALJIC No. 6.25, a unanimity instruction which was not given here. (AOB 234-238.) The contention again fails. The unanimity referred to in the instructional language cited by appellant is not required where conspiracy is used as a theory of liability rather than as a crime itself. "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918.) As this Court has explained:

---

68. Although appellant states that the court "omitted" a paragraph from CALJIC No. 6.22 (AOB 234), the cited paragraph was not contained in the version of the instruction that existed at the time of appellant's trial, in 1996. (See Former CALJIC No. 6.22.)

> The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a "particular crime" [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events," but not "where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event." [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.

(*People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135.)

Appellant attempts to circumvent this rationale by stating that conspiracy "is a separate crime and not merely a theory of liability." (AOB 237.) That is simply incorrect. As noted, conspiracy may be charged as a crime, but it may also be used as "merely a theory of liability." (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1134; *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 788-789.) Moreover, even when conspiracy is charged as a crime, unanimity as to the object of the conspiracy is not necessarily required. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 558-561 [where conspiracy was to commit various crimes, jury not required to agree on single object].) Because conspiracy was used only as a theory of liability in this case, the unanimity instructions pointed

to by appellant were not required.[69/]

C. Any Error Was Harmless

Even if the instructions were erroneous in some way, the error was harmless under either the state or federal standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Any deficiency in specifying overt acts or the object of the conspiracy could not have impacted the jury's decision in this particular case. Given the evidence presented and the arguments of the parties, it was abundantly clear here that the murder of Anthony Moreno was the object of the conspiracy. And the evidence established beyond cavil a multitude of overt acts. There is no reasonable doubt that the jury would have agreed on the object of the conspiracy and any one of the overt acts regardless of any additional specificity that should have been included in the instructions.

Moreover any error in instructing on conspiracy was harmless because, as explained (see Arg. VIII, *ante*), the jury necessarily found that appellant directly participated in the murders, as reflected by the personal firearm use findings. (7CT 1800-1804.) In turn, the jury necessarily concluded that appellant killed Anthony Moreno and Gustavo Aguirre. And given the evidence adduced at trial, the jury could not have found appellant liable for the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla as a natural and probable consequence of the conspiracy to kill Anthony Moreno without also concluding that those murders were a natural and probable consequence of appellant and Palma's aiding and abetting each other in the murder of Anthony Moreno. The verdicts were therefore necessarily based on a valid theory other

---

69. Because there was no state law instructional error, there could have been no federal constitutional violation. (See *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 67-72.)

than conspiracy.

X.

THERE WAS NO PREJUDICIAL BREACH OF JUDICIAL DECORUM

Appellant argues that Judge Trammell, in a brief episode in which he referred to the jurors by mock gang monikers they had invented, failed to maintain proper decorum and thereby "deprived appellant of his rights to a fair trial and a fair determination of penalty, in violation of the Sixth and Fourteenth Amendments." (AOB 241-250.) The claim is forfeited. Moreover, reasonable levity is not impermissible during the course of a trial; the episode here was brief and could not have undermined the fairness of the proceedings. And even if error occurred it was harmless.

A. Trial Court Proceedings

On October 25, 1996, several days into the trial, Judge Trammell commented outside the presence of the jury:

> . . . [Q]uite frankly, I have watched a lot of juries in my day. This is the most somber jury. I try to use a little bit of sarcasm and what I perhaps wrongly think is a little bit of humor in trials and try to get the jury to loosen up a little but. This jury won't loosen. They're just different and I don't think it's because of the pool. I think it's what they're listening to.

(16RT 2153.)

Two court days later, on October 29, 1996, before dismissing the jury for the day, Judge Trammell noted:

> I have ascertained one thing and that is that apparently one of you has now acquired a moniker. I am not going to tell you what it is but –

because if I were to tell you what it is you would know who it was, but maybe by the time we're through all 18 of you will have a moniker that's assigned to you out here unbeknownst to you. I'm not sure.

(18RT 2391.)

About a week later, on November 6, 1996, the following proceedings occurred in open court just before the testimony of a witness:

THE COURT: . . . I understand there's been some criticism with the way I open showing that the record will reflect who's present. So I am going to try it a little bit differently.

The record in this instance will reflect that Character is present with his attorney comet; Primo is present with his attorney Slippers; the district attorney is present in the person of Windex; the jury in the person of Incognito, Booky, Ill-Bit, Fidler, Coco, Eagle Scout, Sharpy, Rabbit, Curly, Tree, it's either V or 6, Sleepy, I know who that is, Foxy, Sharper, who didn't make it to Nordstrom's this morning, The Suit, Smiley, Snickers, and Dopey are all present along with Coach, Racer, Bambi, and Flash.

Do you have a moniker?

THE WITNESS [Detective Davis]: No, your honor.

THE COURT: Mr. Monaghan, or should I say Windex, I want to make sure that the record is clear.

MR. MONAGHAN: Yes, we do, your honor, we want to make sure that record is clear.

THE COURT: Lord, do we know that.

Incidentally, what you guys probably don't know why I was doing this, I got this from the jury this morning signed by each of their monikers and then I found out what your monikers are, but I did notice it has an evidence sticker and where it says type of hearing. Instead of

the word trial, now I don't know whether somebody just doesn't know how to spell trial or they are trying to send us a message but it says "trail." Secondly, Mr. Monaghan, this has been marked as an exhibit 14,391.

MR. MONAGHAN: That's probably because I lost count between number 9 and 14,391.

THE COURT: Okay. Go ahead.

(23RT 3014-3015.)

Later the same day, Judge Trammell commented, after discussing a scheduling request by a juror:

THE COURT: Who's Dopey? The last one I would have picked.

A JUROR: Thank you.

THE COURT: I was getting to where I was kind of worried because for the first two weeks I had never seen people who were expressionless and not responsive to anything. I said something to Flash over here "Were they still breathing?" And concerned because you take 18 people who are total strangers and put them in a little room without coffee and you have real problems, but I am glad to see that you have conquered all that and really do have pretty good sense of his humor among the collective group of you.

(23RT 3102.)

B. The Claim Is Forfeited

First, the defense never objected in the trial court to any of these comments. The claim is therefore forfeited. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; *People v. Freeman* (1994) 8 Cal.4th 450, 511.) As appellant points out (AOB 248), the contemporaneous objection requirement may be excused where an objection and admonition would not have cured the

prejudice of the misconduct or an objection would have been futile. (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1237.) This is not such a case. A timely objection here, if made early on, may easily have curtailed further comments from the court. Moreover, an objection made at any point may have prompted the court to reconsider its comments and to remind the jury not to take the circumstances of the crimes lightly. It is presumed that the jury would have followed such an admonition. (*See People v. Green*, *supra*, 27 Cal.3d at p. 29; see also *People v. Sanchez* (1995) 12 Cal.4th 1, 82.) Accordingly, because no objection was made, the claim is forfeited. (Compare *People v. Sturm*, *supra*, 37 Cal.4th at p. 1237 [objection would have been futile and counterproductive because "[g]iven the evident hostility between the trial judge and defense counsel during the penalty phase it would also be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal"].)

C. There Was No Error

This Court has cautioned that "[t]rial judges should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other." (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1237, citation and quotation marks omitted.) Thus, "[a] trial court commits misconduct if it persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge." (*Id.* at p. 1238.) Nonetheless, this Court has also noted that "[a]lthough a jury trial, especially for a capital offense, is obviously a serious matter, well-conceived judicial humor can be a welcome

relief during a long, tense trial. Obviously, however, the court should refrain from joking remarks which the jury might interpret as denigrating a particular party or his attorney." (*People v. Freeman*, *supra*, 8 Cal.4th at p. 511, citation and quotation marks omitted.)

Here, the court engaged in nothing more than a "good-natured repartee" with the jury. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 512.) The court's comments, moreover, grew from the court's concern that the jury was overly somber and seized on the jury's own sense of humor in an attempt to provide "relief during a long, tense trial." (*Id.* at p. 511.) In context, the challenged comments did not create an atmosphere of non-seriousness, nor did they denigrate counsel or indicate partiality for one party or another. Appellant vastly overstates the situation when he says that the court "held appellant up to the jury as an object of ridicule and derision." (AOB 249.) The court's comments did not focus on appellant at all, but instead simply consisted of playful banter with the jury based on a topic that the jury itself raised. In fact, the jurors' willingness to associate themselves with gang membership indicates only that that issue could *not* have been prejudicial. On the record as a whole, the court's limited attempt at humor in this way did not amount to error.

D. Any Error Was Harmless

Even if error occurred, however, it was harmless. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 512 [assessing claim of improper judicial comments for prejudice].)[70] In the context of the entire trial, the challenged

---

70. Appellant attempts to bootstrap his judicial misconduct claim into a judicial bias claim and thereby argue that the error was structural. (AOB 249-250.) While it is true that judicial bias appears on the "short and limited" list of recognized structural errors (see *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1172), appellant's claim of improper comments by the court is not the same as a claim of judicial bias. That type of error has typically been found

comments were brief and discrete. And they concerned only gang membership, an essentially non-controversial matter in this gang-focused case.[71/] The comments, contrary to appellant's apparent suggestion, did not mock appellant or even refer to him. As noted, the jury's adoption of gang monikers for themselves actually suggests that they were *not* prejudiced against appellant by the fact of his gang membership. Further, the comments do not reflect a "carnival atmosphere" (AOB 246; see also AOB 250) that was inappropriate to the case. To the contrary, the court's comments reflect that the jury was quite serious during the trial and that this bit of levity was an *anomaly*. (16RT 2153; 23RT 3102.) As a whole, the trial was conducted with "appropriate solemnity" (*People v. Freeman*, *supra*, 8 Cal.4th at p. 512), and the isolated comments appellant now points to could not have prejudiced the outcome.

XI.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING ITS DECLARED IMPASSE

Appellant argues that the trial court improperly responded to the jury's indication that it was deadlocked by instructing the jurors to continue to try to

---

where a judge had some preexisting bias that would have disqualified him or her from hearing the case, such as a conflict of interest where the judge stood to gain personally from the outcome. (See *Tumey v. State of Ohio* (1927) 273 U.S. 510, 532, 535 [47 S.Ct. 437, 71 L.Ed. 749].) The court's comments here, even if improper, did not reflect any preexisting, disqualifying bias. Improper comments during the course of a trial, a breach of judicial decorum, are reviewable for prejudice. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 512; *People v. Hefner* (1981) 127 Cal.App.3d 88, 95.)

71. Appellant and Palma's gang membership was not contested. Although appellant claimed he was withdrawing from the Sangra gang (see Arg. III, *ante*), it was established beyond any doubt that his and his Sangra confederates' commitment to the gang lifestyle was the reason they undertook the murders.

reach a consensus. He claims that the court's denial of the defense mistrial motion at that juncture and its instruction to the jury to continue deliberating "violated appellant's state and federal constitutional rights, including his rights to due process, to a jury trial, to a fair adversarial proceeding, and to an independently determined unanimous verdict." (AOB 251-267.) There was no abuse of discretion, and to the extent there was error it was harmless.

A. Trial Court Proceedings

The jury in this case began deliberating in the guilt phase on Monday, November 18, 1996, convening only in the morning that day. (29RT 3701; 6CT 1685.) The jury continued deliberating for four full days for the remainder of the week, making several requests for readback of testimony during that time. (6CT 1683, 1686-1695; 31RT 3740-3763; Nov. 22, 1996 RT 1-5.) On the afternoon of Monday, November 25, 1996, the jury sent a note to the court stating, "We are at an impasse . . . we cannot come to a unanimous decision on any count." (6CT 1696 [ellipsis in original], 1698.) The defense asked that the court declare a mistrial. (33RT 3789.) The court responded that it was "reluctant to do that" given the time already invested in the trial. Instead, the court indicated that it wanted to determine "if this, in fact, is the case whether or not there is anything that can be done by the way of re-read of additional testimony or testimony that's already been read once or any additional instructions" and to ascertain from the foreperson separately "whether or not in that person's mind everyone is deliberating in his opinion in a good faith attempt to reach a verdict." (33RT 3789-3790.)

The court summoned the jury and asked the foreperson whether any clarification of legal issues or re-reading of testimony would assist them. The foreperson individually, and then the rest of the jurors, responded in the negative. (33RT 3793-3794.) The court then asked the foreperson, out of the

presence of the rest of the jurors, whether any of the other jurors was "not deliberating in a good faith attempt to reach a verdict." The foreperson reported, "I think we have all deliberated in good faith." (33RT 3794-3795.)

Out of the presence of the jury, the defense again requested that a mistrial be declared. (33RT 3795-3796.) The court denied the request, stating, "I am not willing to accept at this point – even though I wasn't here last week[72/] I just don't believe in a two-month case that the jury has put in enough time and I am going to order that they continue their deliberations." (33RT 3796.)

The court again summoned the jury and stated:

> I don't know how you are divided numerically and I am not – my – it is not my place at this point to be inquiring. I am going to assume only because statistical probabilities favors my assumption that you are not deadlocked 6-6, that it's some other numerical division. I am not at this time going to stop this trial or declare a mistrial. I am ordering you to continue with your deliberations. I am not convinced that you have put in enough time, especially when I had been told the amount of time that has been utilized in rereads. And I am not minimizing those rereads. As a matter of fact, in this case I think it's probably very important. But it would appear we lost a half day last Monday and I understand there were two substantial days last week, Tuesday and Wednesday, in which most of the day was consumed in read back and a fair portion of this morning.
>
> I say this to you: those of you in the minority, if I am right that it is not just 6-6, I ask that you listen to the arguments of those in the majority, reweigh your positions, and I also ask that you, those of you in

---

72. In the court's absence, a different judge had handled the readback requests from the jury the preceding week. (31RT 3740-3763.)

the minority, continue to argue the positions that you believe to convince those in the majority. And I say the same thing to the majority. I ask that you reweigh your positions in the light of all the arguments to see whether or not those of you in the majority still feel the way you have voted and, at the same time, ask that you, each of you as a part – the deliberation process is not only listening to others with an open mind toward reevaluation, if you believe it's appropriate, but it's also taking an active part in sharing what you feel and how you feel and perhaps how you arrive at your feelings. And I say to both the majority and the minority that that's what deliberations are and I ask that both – I don't want to call it sides because then all of a sudden it becomes confrontational and it shouldn't be that way.

At the same time, I would say this to you, this is not a labor negotiation. In a labor negotiation we always know when the baseball players go on strike there's going to come a time when somebody is going to have pressure and they're going to yield, economic pressure. There's obviously no economic pressure here. You're all well paid. But I want to emphasize that this is not a matter of compromise. One should not compromise just for the purpose of reaching a verdict. But, at the same time, I expect from each one of you, we all expect that you are going to in good faith be engaging in the deliberation process, sharing your views of the evidence, and how you got there with the others with a mind toward convincing them of your position and that's whether you're in the minority or the majority, and then the opposite that you have an open mind, each of you, whichever side you're on, to reevaluating.

At this time I order that you return to the jury deliberation room, continue your deliberations. If at any time – and I don't want anybody

to be hesitant about asking even if you had it read once to have it re-read a second time the testimony or any clarification what you feel is necessary to any points of law. If you'll continue your deliberations.

(33RT 3797-3799.)

Appellant's counsel objected to this instruction after it was given. (33RT 3799-3800.)

The jury continued to deliberate for a short period that same day and deliberated all day the following day, Tuesday, November 25, 1996. (6CT 1698, 1701.) On the morning of Wednesday, November 26, 1996, a juror sent a note to the court stating that over the course of deliberations she had become convinced that she was "incapable of sentencing another human being to death" and that that had colored her deliberations in the guilt phase in that she could not view the evidence objectively. (34RT 3819-3820.)[73] The court summoned the juror and questioned her. The juror indicated that she did not think she could ever vote for the death penalty no matter the facts presented. When asked by the court whether that would prevent her from convicting a defendant in spite of evidence beyond a reasonable doubt, she stated that she was "wrestling" with the issue and that "I honestly am not sure what's happening in my mind and I think that it's preventing me from being able to make my judgment. So I guess my answer would be yes." She did not feel that she could continue to deliberate impartially. (34RT 3825-3838.) The defense again requested a mistrial. The court denied the request and instead made a finding of "misconduct at least in the technical legal sense" and ordered that the juror be replaced with an alternate. (34RT 3838-3846.)

On Monday, December 2, 1996, following the Thanksgiving break, the

---

73. A copy of the note itself does not appear to be contained in the appellate record, but the court's reading of the note is reflected in the reporter's transcript.

court instructed the jury to begin deliberations anew. (35RT 3847-3849.) The jury deliberated that day and all day the following day, Tuesday, December 3, 1996. (6CT 1704, 1706.) On the morning of Wednesday, December 4, 1996, the jury returned its verdicts. (7CT 1825.)

B. There Was No Abuse Of Discretion

Penal Code section 1140 states:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

(Pen. Code, § 1140; see also *People v. Wash* (1993) 6 Cal.4th 215, 247-248.) "The determination of the jurors' state of mind, and whether further deliberations will result in a unanimous verdict, lies within the sound discretion of the trial judge in view of all the circumstances." (*People v. Wash*, *supra*, 6 Cal.4th at p. 248; *People v. Price*, *supra*, 1 Cal.4th at p. 467.) When the court directs the jury to continue to deliberate despite a declared impasse, it "must exercise great care to avoid the impression that jurors should abandon their independent judgment in favor of considerations of compromise and expediency." (*People v. Price*, *supra*, 1 Cal.4th at p. 467.) "Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case." (*People v. Pride* (1992) 3 Cal.4th 195, 265.)

Appellant makes two arguments as to why the court's response to the jury's declared impasse was wrong. Neither argument is persuasive.

1. The Trial Court Did Not Improperly Rely Solely On The Length Of Deliberations

First, appellant contends that the trial court improperly relied solely on the length of deliberations in deciding that the jury should continue to deliberate. (AOB 261-263.) He argues that the trial court was obligated to give "controlling weight" to the jury's indication that further deliberation would not be productive (AOB 261), and, citing *People v. Caradine* (1965) 235 Cal.App.2d 45, 50, he states that the length of deliberations cannot be the sole controlling factor in deciding whether to discharge the jury (AOB 262-263). *Caradine* itself defeats appellant's argument. In that case, the defendant argued that the trial court improperly discharged the jury because the deliberations had lasted only a short period of time. The court of appeal rejected that argument, noting that "the judge must make his assessment of reasonable probability of the jury reaching a verdict on a number of factors, of which the period of deliberation is just one. Discretion must be viewed from all of the circumstances." (*People v. Caradine*, *supra*, 235 Cal.App.2d at p. 50.) The *Caradine* court also noted:

> The judge is not bound to take as final the statement of the jury that they cannot agree upon a verdict, but when such a statement is made, the court below, familiar with the nature of the evidence, and probably the temperaments of the men who compose the jury, is better qualified to say whether there is a reasonable probability of an agreement than the appellate court; certainly the latter ought not to interfere with the ruling, except in cases of clear abuse of discretion.

(*Ibid.*)

Thus, there is no support for appellant's argument that the jury's statement that it was at an impasse deserved "controlling weight." (AOB 261.) Rather, that was only one of a number of factors, including the length of

deliberations, the judge could consider. (See *People v. Caradine*, *supra*, 235 Cal.App.2d at p. 50; see also *People v. Wash*, *supra*, 6 Cal.4th at p. 248; *People v. Price*, *supra*, 1 Cal.4th at p. 467.) Nor can appellant's suggestion that the judge relied *solely* on the length of deliberations be accepted. Although that was the factor the court pointed to in briefly rejecting the defense motion for a mistrial, the court was not required to give any detailed explanation of its ruling. In such a circumstance, the general rule is that a trial court is presumed to have been aware of and followed the applicable law. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Here, the trial court was familiar with the nature of the evidence in the case and the temperament of the jury. (See *People v. Caradine*, *supra*, 235 Cal.App.2d at p. 50.) The court was not required to accept the jury's statement that further deliberations would be futile. (*Ibid.*) After questioning the jury, the court was entitled to conclude, despite the jurors' answers, that the deliberations had not been long enough in light of the magnitude of the case. (See *People v. Price*, *supra*, 1 Cal.4th at p. 467 ["because the penalty trial had lasted over three weeks and the entire trial (excluding jury selection) over seven months, the trial court could reasonably determine that the jury had not deliberated sufficiently on the voluminous evidence presented to it, and that a finding of deadlock would be premature"].) As the court noted, the trial had lasted two months and the jury had deliberated only one week, with substantial interruptions for readback of testimony. (33RT 3796-3797.) Accordingly, there was no "clear abuse of discretion" warranting reversal on appeal. (See *People v. Caradine*, *supra*, 235 Cal.App.2d at p. 50.)

2. The Trial Court Did Not Give An Improper *Allen* Instruction

Second, appellant argues that the court's directions to the "minority" and "majority" necessarily encouraged the jury to consider their numerical division in reexamining their views, urging them toward compromise and expediency

in violation of *People v. Gainer* (1977) 19 Cal.3d 835, 852. (AOB 263-266.) The analogy to the instruction disapproved of in *Gainer* is unavailing.

In *Gainer*, the so-called "dynamite charge" or "*Allen* instruction"[74] given to the deadlocked jury included the following language:

> And, on the other hand, if much the larger of your panel are for a conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression on the minds of so many men or women equally honest, equally intelligent with himself or herself, and [who] have heard the same evidence with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath.
>
> And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

(*People v. Gainer*, *supra*, 19 Cal.3d at p. 841.) This Court found that the "most questionable feature" of the instruction was "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views." (*Id.* at p. 845.) The Court observed that the fact itself that other jurors had decided differently was "both rationally and legally irrelevant to the issue of guilt" and that neither minority nor majority jurors had any duty to "reexamine" their views simply because of a deadlock. (*Id.* at p. 848 & fn. 10.) The Court disapproved the instruction because it amounted to "excessive pressure on the dissenting jurors to acquiesce in a verdict" without reaching an

---

74. See *Allen v. United States* (1896) 164 U.S. 492 [17 S.Ct. 154, 41 L.Ed.2d 528].

independent judgment. (*Id.* at p. 850; *People v. Engelman* (2002) 28 Cal.4th 436, 444.) The Court further noted, in a footnote, "Since recognition of the existence of a majority or minority faction on the jury is irrelevant to the issue of guilt, such reference is erroneous, even if contained in an arguably noncoercive, 'balanced' *Allen* charge which explicitly admonishes the majority as well as the minority to reconsider their views." (*People v. Gainer, supra*, 19 Cal.3d at p. 850, fn. 12.)

There is a distinction between an exhortation to consider capitulating to other jurors' views in spite of one's own view and an admonishment simply to "listen to your fellow jurors." (*People v. Boyette* (2002) 29 Cal.4th 381, 437; see also *People v. George* (1980) 109 Cal.App.3d 814, 821.) Nowhere in the instruction given in this case did the trial court urge jurors to abandon their independent judgment. (See *People v. Engelman, supra*, 28 Cal.4th at p. 444.) Nor did the trial court tell the jurors to take into account the fact itself that other jurors had decided differently. Rather, the court instructed the jurors to continue to try to convince each other of their positions – in other words, to simply continue to engage in the deliberative process. Indeed, the court was careful here to admonish the jurors "that this is not a matter of compromise" and that each side should continue to try to persuade the other and also keep an open mind. (33RT 3797-3799.) Viewed as a whole, this was an instruction not suggesting capitulation but simply reminding all sides to "listen to your fellow jurors." (See *People v. Boyette, supra*, 29 Cal.4th at p. 437.)

The instruction given in this case was analogous to the one approved in *People v. Moore* (2002) 96 Cal.App.4th 1105. There, the trial court instructed the jury, which had announced a deadlock, to continue deliberating. In addition to rereading several standard instructions, the court's charge included the following:

Your goal as jurors should be to reach a fair and impartial verdict if

you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so.

It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors.

In the course of your further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine theirs. You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest to other jurors change their views if you are convinced they are wrong.

Fair and effective jury deliberations require a frank and forthright exchange of views.

(*Id.* at p. 1118.)

Reviewing these instructions, the *Moore* court found that "nothing in the trial court's charge was designed to coerce the jury into returning a verdict. Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation." (*People v. Moore*, *supra*, 96 Cal.App.4th at p. 1121.) The court added:

[T]he jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement. In short, it is clear the trial court took great care in exercising its power "without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency. . . . Nothing in the trial court's comment in the present case properly may be construed as an

attempt to pressure the jury to reach a verdict . . . ."

(*Id.* at p. 1121, ellipses in original, citing *People v. Proctor* (1992) 4 Cal.4th 499, 539.)

The same is true here. The court did not instruct the jurors to take into account the fact that other jurors had decided differently, or in any other way exert pressure to return a verdict at the cost of independent judgment, but simply urged the jurors to continue properly deliberating in an attempt to reach agreement. The jurors would have understood that "the court's intent was to provide an opportunity for them to enhance their understanding of the case rather than to coerce them to abandon the exercise of individual judgment." (*People v. Price, supra*, 1 Cal.4th at p. 467.) In short, the language used by the court here did not amount to "the devastating coercive charge" (*People v. Engelman, supra*, 28 Cal.4th at p. 445) "in favor of consideration of compromise and expediency" (*People v. Gainer, supra*, 19 Ca.3d at p. 850) given in *Gainer*. There was no error.

C. Any Error Was Harmless

In any event, under the particular circumstances of this case, any error in the court's handling of the jury's declared impasse was necessarily harmless.[75] After the jury was instructed to continue deliberating, and perhaps because it had been instructed to do so, it came to light that one of the jurors was unable to deliberate in a capital case and could not objectively evaluate the

---

75. An *Allen* instruction does not violate federal constitutional principles. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-238 [108 S.Ct. 546, 98 L.Ed.2d 568]; see also *Early v. Packer* (2003) 537 U.S. 3, 6 [123 S.Ct. 362, 154 L.Ed.2d 263].) Therefore, prejudice is assessed under the state-law standard. Nonetheless, any error in this case was harmless under any standard. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

facts. That juror was appropriately removed – appellant does not argue otherwise. (See *People v. Collins* (1976) 17 Cal.3d 687, 692-696.) The trial court then selected an alternate and properly instructed the jury to begin deliberations over again from scratch. (35RT 3847-3849; see *People v. Collins*, *supra*, 17 Cal.3d at pp. 692-693.) This effectively vitiated any previous error in the court's instructions regarding further deliberations because at that point the jury was obligated to "disregard the earlier deliberations as if they had not taken place," to start fresh, with no majority or minority, and to re-evaluate all of the evidence together. (35RT 3847-3848, reading CALJIC No. 17.41; *People v. Collins*, *supra*, 17 Cal.3d at pp. 692-693.)

In *Gainer*, this Court held that an error in instructing minority jurors to re-evaluate their views in light of the fact that the majority had reached an opposite conclusion was not subject to harmless error review, because traditional evidentiary harmless error review would be inadequate given the difficulty of assessing the impact of the instruction on the deliberative process since such an instruction "distorts the very process by which all the evidence is weighed." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 854.) That reasoning does not hold, however, in a situation where, subsequent to the giving of such an instruction upon an announced deadlock, the jury is told to "disregard the earlier deliberations as if they had not taken place." This puts the jury back in the position it was *before* the challenged instruction was given, thereby eliminating its impact on the deliberative process.

Appellant argues that the court's instruction was prejudicial because, according to appellant's rather speculative interpretation of the record, it forced a juror favorable to him to be removed from the jury. (AOB 266-267.) But the juror was properly removed for "misconduct" in that she was unable to effectively deliberate. Appellant cannot invoke misconduct in his favor as a basis for prejudice. A harmless error analysis must "exclude the possibility of

arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232, citations and alterations omitted; accord *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

Accordingly, the court's instructions regarding further deliberations could not have resulted in any prejudice under the circumstances of this case.

XII.

THE TRIAL COURT PERMISSIBLY RESTRICTED THE SCOPE OF DEATH-QUALIFICATION VOIR DIRE

Appellant argues that the penalty determination must be reversed because the trial court improperly, and unconstitutionally, restricted voir dire of prospective jurors regarding their views on multiple murder and child victims in the context of capital punishment. (AOB 268-285.) The court permissibly limited voir dire in this case to avoid prejudgment and did not compromise the identification of jurors whose ability to follow the law would be impaired. But in any event, to the extent there was an abuse of discretion, it was not prejudicial.

A. Trial Court Proceedings

Jury selection in this case was conducted in two stages. During the first stage, the court determined excuses for hardship, based principally on a questionnaire the venirepersons were asked to fill out but based also on some limited oral questioning of the prospective jurors. (5RT 814-895; 6RT 899-1045.) During the second stage, the remaining venirepersons were asked to fill out a more lengthy questionnaire (6CT 1579-1614), which included death-

qualification questions. The court, with some participation of counsel, then conducted an oral death-qualification inquiry, and challenges for cause on that basis were entertained. The parties were then permitted to question the jurors on general voir dire and to exercise their peremptory challenges. For this second stage, an initial group of 22 jurors was seated. After each subsequent 10 excusals, a new group of 10 jurors was seated. (7RT 1045-1104; 8RT 1113-1199; 9RT 1200-1348; 10RT 1383-1460; see also 3RT 624-625, 696-699; 4RT 741-753.)[76/]

During discussions leading up to jury selection, the trial court indicated that it was wary of revealing too many specific facts of the case to the prospective jurors:

> One of the things that I find where I have problems in death qualifying . . . is that the lawyers on both sides of the issue want to try to get a juror to commit themselves that they would or they would not impose the death penalty on a certain set of hypothetical facts. And usually try to bring them to where they have meaning because they're a part of the case and, therefore, you're getting a prejudging of what a juror would do. I think that's improper.
>
> To that extent, I – my inclination, and I am just trying to let you think or letting you see where I'm going, is to not actually other than telling the jury that it is a, quote, murder case, whatever that means, and that the – tell them what the circumstance is, multiple murder, I assume that's the

---

76. The jurors ultimately seated in this case were: Juror 192 (seat 1), Juror 21 (seat 2), Juror 179 (seat 3), Juror 93 (seat 4), Juror 163 (seat 5), Juror 25 (seat 6), Juror 40 (seat 7), Juror 12 (seat 8), Juror 67 (seat 9), Juror 128 (seat 10), Juror 45 (seat 11), and Juror 27 (seat 12). The alternate jurors were: Juror 143 (alternate 1), Juror 189 (alternate 2), Juror 185 (alternate 3), Juror 157 (alternate 4), Juror 136 (alternate 5), and Juror 125 (alternate 6). During deliberations (see Arg. 11, *ante*), Juror 128 was excused and replaced with Juror 125.

only one.

MR. MONAGHAN [the prosecutor]: That's correct.

THE COURT: As to not get into the specifics at all. I've had multiple murders before and one of the things, of course, the lawyers want to see if where – there's a dividing line at some point where even the most hardened juror who disfavors the death penalty is going to say there comes a point where factually they would vote the death penalty but, otherwise, they wouldn't.

It seems to me that telling the jury that there are five charges when we're death qualifying really gets them into applying those charges as to whether or not they would in this case. I mean, it's one thing in my mind to have two murders. It's another thing to have five. It's another thing that somebody, I think, had six alleged against him at one point.

My inclination is to not let the jury know how many murder charges there are until we actually have a jury picked.

And the same being with respect to I think most jurors would view, shouldn't, but they would view the killing of an adult a lot differently than they would the killing of a child. Even in this case I think we have a six-month-old or nine-month-old baby.

MR. MONAGHAN: Six-month-old and a five-year-old.

THE COURT: I don't think that that's something the jurors should be told with respect to the factual background in this case.

(3RT 691-693.)

Later, but still before jury selection had begun, counsel for Palma asked the court to reconsider the issue and requested that the venirepersons be told "the numbers of people who are dead, the sexes of the people who are dead, and also the ages of them" because that information would have a "substantial impact" on death qualification. (4RT 749.) The court responded:

Oh, absolutely, I agree with you, and that's why unless the three of you agree, I would not allow that. The special circumstance here is multiple murder. In the instant case . . . the defendant has been convicted of one count of first degree murder and a second count of either first or second degree murder. You go any further beyond that and you are . . . asking them to prejudge the facts. Absolutely the fact that a six-month-old baby was executed, if that's what it was, I don't know. Maybe it got in the way of a bunch of wild shots, but that's a fact and you're starting to give them some of the factors in aggravation. I assume that's a factor in aggravation. I assume that a five-year-old is a factor in aggravation.

For the same reason, I would be excluding . . . psychiatric evidence that tends to be evidence in mitigation, helping your defendants, to give them that and say, you know, do you feel that you could impose the death penalty or do you feel you always would or could you impose life imprisonment or would you always? You're then getting the jury – you're asking them to prejudge the evidence, and I think that's wrong.

My intent would be – but again, I don't want to the extent I can get three lawyers to agree to anything unless I just think it's somebody has blown their advocacy situation, and this will be throughout the trial, I am not going to interfere. In other words, this is not going to be Judge Trammell's this is how you're going to try the case. If you gentlemen can agree and, frankly, you're doing pretty good. I have been asked to do very little. I think there's a good working relationship here and I am sure still a very strong advocacy.

The three of you agree to read the charges and give that information, despite the fact I think it is wrong, I am not going to come in and interfere with your trial of the case.

So the default is it won't be done. I won't even read the charges. I merely indicate that it is . . . a case involving murder charges, period, and that's it.

But it's not cast in stone. You three agree. And this is, I don't care who is the one that wants something done or not done, I ask all the way through here that you guys talk before you make an issue because I honestly believe if lawyers talk about things sometimes issues don't become issues.

So you three people talk about that and if, in fact, you want that divulged and all three agree to it, that's fine.

(4RT 749-751.) The court later stated in passing, "frankly, to the extent that I can, I want to keep as much information about this case away from the jurors until once they become jurors." (4RT 763-764.)

During the first stage of jury selection – the hardship stage – defense counsel inquired of the court what the procedure at the second stage – the death-qualification and general voir dire stage – would be. (5RT 866.) The following discussion occurred:

THE COURT: . . . What I intend to do is lay out as I understand it what's involved in a death penalty case in determining which of the two penalties, explain how it's done, and I don't intend to go into the facts of the case. I don't think that's proper. But to indicate that this is what is called a murder trial and that it is a capital case and tell them what the nature of the capital – of the special circumstance is.

MR. UHALLEY [counsel for Palma]: Your honor, at this time then I would be requesting that the court do go into the facts and limited that there are deaths of children involved in the case because I believe that is substantially going to determine how the people are going to answer the three questions.

MR. BESTARD [counsel for appellant]: I would join in that.

THE COURT: I will not and I prohibit counsel from going into the facts of the case. You are then giving them – the only thing that the jury is supposed to know at the beginning of the case are the charges and for the purposes of the death penalty, the circumstance is that in the same proceeding a defendant has been convicted of two or more counts of murder, whether it be of the first or second degree. And my feeling is that that's the special circumstance, multiple murders. And you start adding in the numbers then you're starting to get a prejudgment on the facts and that's not right.

In other words, where are they going to draw the line? I have had lawyers try to do that and I don't think that's right. And certainly, absolutely, children are going to play a big factor. And, again, you are supplying to the jurors facts that are part of the factors in aggravation and I don't think it's right to do that.

MR. UHALLEY: That's over the objection of the defense.

THE COURT: I understand that. That happens in every special circumstance I've had, the defense lawyers do want to go into it because they want to get a prejudgment and I don't blame you and I just think it's improper.

(5RT 866-868.)

At the outset of the second stage of jury selection, in the presence of the venire, the court read the indictment, which included the five murder charges and the names of the five victims, thereby revealing their number and genders. (7RT 1065-1068.) In the course of generally instructing the venirepersons about the case, the court also stated, "Now, you know that this case involves

five counts of murder." (7RT 1085.)[77] Nonetheless, before death-qualification questioning and general voir dire began, the court reminded counsel that any questioning had to be "inquiry for cause" and that the court did not want "indoctrination" or "prejudgment of any of the evidence." (8RT 1115.) During questioning of the prospective jurors, the court referred to the case as involving only "multiple murder." (8RT 1120-1199; 9RT 1200-1348; 10RT 1383-1460.)

During voir dire, the following exchange occurred:

> MR. UHALLEY: Now, Juror 99, you've indicated that you have some concern about the fact of multiple murder and that you would lean more toward the death penalty as a result of the multiple murder. Multiple murder is sort of a generic term. We are talking about five murders here. Is that going to change on that –
>
> THE COURT: That you are asking about prejudgment. A special circumstance is not five murders. The special circumstance is more than one murder. You're referring to the facts in this case, that's improper.
>
> MR. UHALLEY: Well, your honor, may we be heard on that?
>
> THE COURT: No. We have hashed this out before we even got into jury selection. You may not derive her opinion with respect to five murders.
>
> MR. UHALLEY: Your honor, I respectfully ask the court to be heard on this issue.
>
> THE COURT: You may not. I will hear you at the recess. You may make your record then.

(9RT 1286-1287.)

Shortly thereafter, the following exchange occurred:

---

77. Out of the presence of the rest of the venire, Jurors 199, 94, 161, 200, and 28 told the court that they had been exposed to news coverage of the case and knew that the case involved child victims. (7RT 1099-1104.) None of those prospective jurors was ultimately selected.

MR. BESTARD: Number 99 I will try to get to you a little bit. I loved your scale when the judge started 1 to 10. Multiple murders, does the scale go farther up the more murders there are or do they stay at six?

PROSPECTIVE JUROR: No. I feel, first of all, killing a person is a wrong, we all know that, and to go ahead and kill more than one, whether it's two or five or ten, I feel that – well, it's just as wrong but even more so.

MR. BESTARD: Now, my question was again, will the scale go beyond six?

PROSPECTIVE JUROR: No.

MR. BESTARD: For the 11, do any of you have – any of you thought of it that way from zero to ten? Will any of you because it's more than one, more than two, will your scale go up closer to the ten level because it is more than one?

THE COURT: Again, I am going to prohibit that question. You are trying to take the particular facts of this case and get them to prejudge the evidence. That's improper.

(9RT 1290-1291.)

At the next recess, defense counsel again objected to the court's ruling:

MR. UHALLEY: Your honor, at this time I am going to be moving for a mistrial. I believe that the court has been overly restrictive in allowing us to voir dire the jury on the issue of multiple murder as well as the issue of the ages of the children or that there were children involved in this – victims in this crime.

I think it was illustrated by the questioning of juror number 66[78], I believe it was, who indicated that a multiple murder would weigh more on her mind and she would be more inclined to administer the death

---

78. This appears to be a mistaken reference to Juror 99.

penalty in a case of multiple murder, and I believe that that illustrates that not being allowed to voir dire on the number of murders as well as that there were children involved in the case skews the jury selection process in terms of the pool that we are going to get who would more than likely, I believe, answer the question "would you always under certain circumstances give the death penalty where there are children involved?" and I just don't think that we are getting a fair representation of a jury panel as to that question.

I think that if they were to know the number of people and the ages of the people that they would answer that question differently, the majority of them would answer that question, maybe not the majority but at least some of them would answer that question differently; and, therefore, I believe that under those circumstances those people are being – could be excused for cause and they're being excluded from it because they don't have sufficient information to answer that question.

I don't believe that it is a prejudging of the facts in the case by allowing that bit of information, and I would submit it, your honor.

And I know that we did discuss that matter before and the court has ruled on that and that I do apologize to the court for the question that I asked that the judge – that the court objected to.

THE COURT: Well, you know, I don't think it takes anyone – I don't think you have to be a rocket scientist to know that if you compare somebody that kills an adult with somebody that kills a six-month-old child and say which are you more inclined, everything being equal, to give the death penalty, it will be with respect to the child. I don't think it takes a rocket scientist that if somebody personally kills three instead of two that anybody's going to look at that as being – everything else being equal, being worse. And those are factors in aggravation the

district attorney is going to argue I'm sure.

There is no special circumstance of murdering six month olds, there is no special circumstance of murdering children, there is no special circumstance of murdering three people. The special circumstance here is more than one murder. And by going into the number, going into the ages, or the sexes you are starting to go into the facts of the case that in going into factors that the jury can take into consideration to get the jury to prejudge the evidence and that's just not proper. The special circumstance is more than one and that's as far as it goes.

Well, I have done this so many times where I have had multiple murders that I am totally confident that that's a valid ruling. You can't go into the facts of the case.

I had ruled on that I think twice before we got in here and I now order all parties to stay away from that issue.

(9RT 1309-1312.)

B. There Was No Error

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) ___ U.S. ___ [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014] (2007).) A state similarly "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Ibid.*) "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Ibid.*) The standard is whether the juror's views, either for or against the death penalty, "would prevent or substantially impair the

performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424[105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Danielson* (1992) 3 Cal.4th 691, 712-713; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting *Witt* standard as test for right to impartial jury under article I, section 16 of California Constitution].)

The trial court has broad discretion over the number and nature of questions on voir dire about the death penalty. (*People v. Stitely* (2005) 35 Cal.4th 514, 540.) Nonetheless,

> death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

(*People v. Cash* (2002) 28 Cal.4th 703, 721-722.) Thus, this Court has repeatedly held that "the trial court may limit voir dire couched in terms of the facts expected to be proved." (*People v. Sanders* (1995) 11 Cal.4th 475, 539, citation omitted; see, e.g., *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1122 [prohibition on questioning jurors about condition of dead body not abuse of discretion]; *People v. Clark* (1990) 50 Cal.3d 583, 596-597 [prohibition on inquiry about prospective jurors' attitudes toward evidence of infliction of serious burn injuries not an abuse of discretion].) On the other hand, in *People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722, this Court held that a prohibition on asking prospective jurors about the defendant's prior double-murder during death qualification was an abuse of discretion. The Court observed that a trial court attempting to negotiate the "two extremes" of death-qualification voir dire may not "strike the balance by precluding mention of any general fact or

circumstance not expressly pleaded in the information." (*Ibid.* at p. 722.) The trial court erred, this Court concluded, because the prior double-murder, which "was likely to be of great significance to prospective jurors," was "a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." (*Id.* at p. 721.)

Appellant, relying on *Cash*, argues in part that the trial court improperly restricted voir dire on the issue of multiple murder. (AOB 281-283.)[79] Here, the venire was informed, through the reading of the information, that appellant and Palma were charged with the murders of Anthony Moreno, Gustavo Aguirre, Maria Moreno, Laura Moreno, and Ambrose Padilla. The venire was further informed that the murders were allegedly gang-related and that the defendants were alleged to have used guns in committing the murders. (7RT 1065-1068.) Although the court limited subsequent voir dire on the facts of the case, any reasonable prospective juror would have had this information in mind – including the number and genders of the victims – when asked about "multiple murder." In this context, there could have been no prejudicial error resulting from the trial court's denial of the defense request to ask the prospective jurors about their views on specific multiple-murder scenarios. In *People v. Vieira*, 35 Cal.4th 264, this Court held that, under *Cash*, it would have been[80] error to prohibit death-qualification voir dire entirely on multiple

---

79. *Cash* was decided after the trial in this case. At the time of trial, this Court's then-recent decision in *People v. Medina* (1995) 11 Cal.4th 694, 746, had appeared to sanction a restriction of death-qualification voir dire related on multiple murder. (See *People v. Vieira* (2005) 35 Cal.4th 264, 285-286; *People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

80. Ultimately, in *Vieira*, this Court found no error because the defendant was permitted to ask about the issue on general voir dire. (*People v. Vieira*, *supra*, 35 Cal.4th at pp. 286-287.)

murder because "[m]ultiple murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors.'" (*Id.* at p. 286, citing *People v. Cash*, *supra*, 28 Cal.4th at p. 721.) There, the defendant was charged with four murders, but there was no suggestion that voir dire should have been permitted as to the specific number of murders; rather, this Court sanctioned voir dire only on "multiple murder." (*Id.* at pp. 284-287.) The trial court here, consistent with *Vieira*, permitted voir dire on multiple murder, and nothing required the court to allow a more detailed inquiry based on the prospective jurors' feelings about particular numbers of murder victims. This is particularly so since the jurors necessarily knew the specific number (and the genders) of the victims in this case when they were asked questions about their views on "multiple murder." There was no abuse of discretion in this respect.

Appellant also argues that the trial court improperly restricted voir dire on the issue of child victims. (AOB 281-283.) As recounted, over defense objection, the prospective jurors in this case were not informed that two of the victims in the charged murders were children. This Court has at least twice suggested, without holding, that the fact that a case involved child victims might be a fact a trial court could not properly exclude from death-qualification voir dire. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1122 & fn. 6, citing *People v. Box*, *supra*, 23 Cal.4th at pp. 1178-1180 and *People v. Earp* (1999) 20 Cal.4th 826, 851; *People v. Roldan* (2005) 25 Cal.4th 646, 694.) It would be wrong, however, to construe those statements as a categorical rule. As the Court explained in *Cash* – upon which both *Roldan* and *Zambrano* relied – a trial court must carefully tread the path between the two "extremes" of voir dire that, on the one hand, could lead to prejudgment of the case and, on the other, is too vague to allow identification of jurors who would not follow the law. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722.) Avoiding these extremes

necessarily depends on the factual context of each individual case. In other words, whether a particular fact might be of "great significance" with respect to a juror's inclination to vote for the death penalty (see *People v. Cash*, *supra*, 28 Cal.4th at p. 721) will vary depending on the context in which it is presented.

In this case, as noted, the prospective jurors knew at the outset of voir dire that the defendants were charged with the gang-related shooting deaths of three males and two females – what could only have been assumed by the jurors, correctly, to have been a wanton group slaughter. In that context, the additional fact that two of the victims were children, while not without force, would have added little to the overall picture of the case. In a different context – for example, in a case involving a single victim and no attendant enhancements – such information could affect jurors' overall impression of the case in a comparatively major way. But here, the child-victim information, in context, was more akin to the dismemberment information withheld from the jury in *Zambrano*. In *Zambrano*, this Court noted that the jurors had been made aware of "several of the specific circumstances of the case" and that the defense was restricted in its voir dire on only a single issue: the gruesome condition of the body of one of the victims when found. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1122.) In that context, the Court observed:

> A normal juror could not fail to be affected by the condition in which Reyna's body was found, as by any brutal circumstance of a criminal homicide. But the fact of dismemberment, in and of itself, does not appear so potentially inflammatory as to transform an otherwise death-qualified juror into one who could not deliberate fairly on the issue of penalty.

(*Id.* at p. 1123.)

Similarly, in this case, while the fact that two of the victims were

children could affect jurors' attitudes towards imposition of the death penalty, it nonetheless was not so significant, in the context of the other information the jurors had, to pose a death-qualification problem. Death qualification "seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." (*People v. Clark, supra*, 50 Cal.3d at p. 597.) "Many persons whose general neutrality toward capital punishment qualifies them to sit as jurors might, if presented with the gruesome details of a multiple-murder case, conclude that they would likely, if not automatically, vote for death." (*People v. Mason* (1991) 52 Cal.3d 909, 940.) The information given to the jury in this case, and the voir dire allowed, were sufficient together to adequately allow the parties to ascertain whether the prospective jurors had an open mind about imposition of the death penalty in the abstract, even though the child-victim information would also have impacted jurors' views about the case.

The exclusion of questions about child victims was not at all like the exclusion of information about the defendant's prior double-murder in *Cash*, this Court's "only reversal of a death penalty judgment for failure to allow sufficient inquiry into jurors' death penalty attitudes about particular facts." (*People v. Zambrano, supra*, 41 Cal.4th at p. 1121.) The prior double-murder there was a fact wholly unrelated to the charged crimes and therefore one that carried its own significance apart from, and above and beyond, the circumstances of the charged crimes. The fact would have been "of great significance to prospective jurors" (*People v. Cash, supra*, 28 Cal.4th at p. 721) because it represented categorically an independent aggravating circumstance that directly bore on punishment. In contrast, the child-victim information here, because it would have simply added to the information the jurors already knew about the circumstances of the crime, was far closer to accomplishing "two of

the evils against which [this Court has] warned: educating the jury panel to the particular facts of the case and compelling the jurors to commit themselves to vote a particular way." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 539, original alteration indications omitted.) The trial court had broad discretion in managing voir dire so as to avoid those evils. Its exclusion of the child-victim information was appropriately tailored to prevent prejudgment of the case, and the remainder of the information provided to the jurors – that the defendants were charged with the gang-related shooing deaths of three males and two females – was sufficient to allow identification of those jurors who could not keep an open mind with respect to penalty. The trial court did not abuse its discretion.

C. Any Error Was Harmless

In *Cash*, as appellant points out (AOB 285), this Court observed that the conviction had to be reversed because the trial court's error made it impossible to determine from the record whether any of the jurors ultimately seated held a disqualifying view about the death penalty. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 722-723.) Even if there was error in limiting voir dire on the child victims here, there is a significant difference in this case. Here, two defendants were on trial. And it was clear from the evidence that Palma killed Maria Moreno and her children and that appellant killed Anthony Moreno and Aguirre. It was also clear, by the end of the trial, that the Mexican Mafia had not ordered the killing of the children. (23RT 3119-3122.) Thus, even though appellant was liable for the murders of the two children, and even though the prosecutor did not specifically limit his penalty-phase argument with respect to the killing of the children to Palma (40RT 4264, 4271-4273, 4292-4293, 4298-4299), the jury necessarily knew that it was Palma who had personally killed the children and to whom that fact would apply much more directly as an aggravating circumstance. Indeed, appellant's counsel stressed this point in

argument at the penalty phase. (41RT 4334.) Accordingly, the error, if any, in this case did not substantially affect appellant. In other words, the trial court's restriction of voir dire does not lead to doubt that, *with respect to appellant*, the jury was empaneled in compliance with the Fourteenth Amendment. (See *People v. Cash, supra*, 28 Cal.4th at p. 723.) Reversal is therefore not required.

XIII.

THE TRIAL COURT PROPERLY ADMITTED THE PROSECUTION'S PENALTY-PHASE REBUTTAL EVIDENCE

Appellant argues that the penalty determination must be reversed because the trial court abused its discretion in allowing the prosecution to present rebuttal evidence at the penalty phase concerning threats appellant had made to a high school official. (AOB 286-306.) There was no abuse of discretion. In any event, if there was error it was harmless.

A. Trial Court Proceedings

During appellant's penalty-phase case, evidence was introduced concerning appellant's youth and school career. The evidence established, among other things, that he attended Catholic grade school and played little-league baseball; that he attended several different high schools and that his grades declined throughout high school; that he nonetheless received good grades in his high school electronics course; that after high school he applied to ITT, receiving an above-average score on the entrance examination; and that he had also attempted to join the Navy after high school. (39RT 4033-4036, 4044-4101; 40RT 4240-4242.) In rebuttal, the prosecution offered evidence that appellant was involved in a fight while in high school and had threatened a campus supervisor who broke up the fight. Appellant called the supervisor

a "bitch" and said he would put a bullet in his head. (40RT 4253-4257.)

Defense counsel objected that the threat evidence was improper rebuttal. The prosecutor explained that he was offering the evidence in response to

> extensive testimony regarding school records, extensive testimony regarding Mr. Valdez's background and opportunities that he had to serve our country in the Navy, to go to ITT and become a productive citizen, little league, the fact that his mother was a team mother and so forth and even had the doctor testify that reasons for a lot of schools was perhaps moving around a lot, the parents moving around, there was never any talk about possible reason is suspension and so forth.
>
> . . . .
>
> I think it's appropriate where the defense has put on a great deal of evidence regarding school records, had the doctor testify that reasons for moving – the reasons he gave did not include anything that might look the negative fashion upon Mr. Valdez. . . . I think that it's admissible both as impeachment and I also think it's admissible pursuant to the instructions the court's going to give the jury where one of the factors the jury can consider is a situation where somebody has threatened violence or used violence.

(40RT 4231-4236.) The defense responded that the evidence did not rebut anything because the reasons for appellant's school changes had simply not been addressed during the defense case. The court overruled the objection. (40RT 4237-4239.)

After the testimony was presented, the defense renewed its objection and moved to strike the testimony. The court responded that there was "no question" the evidence would have been admissible as "Factor B" evidence had it been admitted in the prosecution's case-in-chief. Over further defense objection, the court found that there was no prejudice to the defense by the fact

that the evidence had been presented in rebuttal rather than during the prosecution's case-in-chief. The court noted that the defense had not turned over the report of the incident until the eve of the penalty phase (see 40RT 4277 [prosecutor explains that the relevant documents reflecting the threat evidence were buried in a stack of reports turned over just before the penalty phase started]) and that although appellant had restricted counsel's penalty-phase presentation (see 39RT 4106-4107, 4116-4117) that could not be held against the prosecution. (40RT 4274-4280.)

B. The Threat Evidence Was Properly Admitted In Rebuttal

Appellant renews his objection here that the threat evidence amounted to improper rebuttal. (AOB 294-303.) The evidence was properly admitted. The scope of allowable penalty-phase rebuttal evidence is committed to the sound discretion of the trial court and the exercise of that discretion will be reversed only when there is "palpable abuse." (*People v. Raley* (1992) 2 Cal.4th 870, 912; see also *People v. Mickey* (1991) 54 Cal.3d 612, 688; *People v. Kelly* (1990) 51 Cal.3d 931, 965.) This Court has held that when a defendant places his good character in issue, the prosecution is "entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*People v. Daniels* (1991) 52 Cal.3d 815, 883, citing *People v. Rodriquez* (1986) 42 Cal.3d 730, 792.)[81] Rebuttal evidence is also properly admitted to correct "a misleading impression" left by the defense case. (*People v. Mason*, *supra*, 52 Cal.3d at pp. 960-961.)

Appellant presented penalty-phase evidence painting a picture of a church-going little league player who aspired to a Naval or electronics career

---

81. Such evidence need not meet the standard of *People v. Boyd* (1985) 38 Cal.3d 762, upon which appellant relies (AOB 295, 299). (*People v. Daniels*, *supra*, 52 Cal.3d at p. 883.)

but who, by virtue of circumstances, was caught up in the gang lifestyle during his high-school years. In particular, evidence was presented showing that despite dropping out of high school appellant was intelligent – he earned high marks in his electronics course and on the ITT entrance examination – and that even after dropping out, he maintained a responsible lifestyle – he worked several jobs to care for his grandfather and brother. The strong impression left by this evidence was of a generally decent and smart person who simply became the victim of gang culture; that really he was not a "gangster" at heart. Given that portrayal, the prosecution was entitled to introduce evidence of appellant's belligerent behavior and threats of violence in high school in order to balance the picture of his personality and to correct the misleading impression left by the defense case that appellant was himself a victim of circumstances. The admission of similar rebuttal evidence has routinely been approved. (See, e.g., *In re Ross* (1995) 10 Cal.4th 184, 205-209 [evidence of criminal behavior as juvenile admissible to rebut evidence that defendant was a caring person who had been abused as a child and grew up in a violent neighborhood]; *People v. Clark* (1993) 5 Cal.4th 950, 1026-1027 [evidence of juvenile criminality and suspensions from school admissible to rebut defense mitigation case that left overall impression of "a trustworthy, peaceable person, who had risen above his deprived childhood"]; *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1071-1074 [acts of juvenile delinquency, including incidents of violence, admissible to rebut defense mitigation evidence that defendant was a good student and respectful person in his youth].)

Appellant frames the issue much too narrowly in arguing that the prosecutor sought admission of the rebuttal evidence in response to questions asked of appellant's father on cross-examination, to which he responded that he was not aware of the threat incident. (AOB 297-299.) As the prosecutor himself argued, the rebuttal evidence was directed to the bulk of the defense

mitigation case generally – to "extensive testimony regarding Mr. Valdez's background and opportunities that he had to serve our country in the Navy, to go to ITT and become a productive citizen, little league, the fact that his mother was a team mother and so forth . . . ." (40RT 4234.) Properly placed in that context, the threat evidence was permissible rebuttal, and there was no "palpable abuse" in admitting it. (See *In re Ross*, *supra*, 10 Cal.4th at pp. 205-209; *People v. Clark*, *supra*, 5 Cal.4th at pp. 1026-1027; *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1071-1074.)[82/]

C. Any Error Was Harmless

Error in the admission of aggravating or rebuttal penalty-phase evidence is subject to harmless error review. (*People v. Martinez* (2003) 31 Cal.4th 673, 694-695; *People v. Pinholster* (1992) 1 Cal.4th 865, 962 [noting that admission of irrelevant aggravating evidence is rarely reversible error].) The standard is whether there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Wright* (1990) 52 Cal.3d 367, 428; accord *People v. Avena* (1996) 13 Cal.4th 394, 439.) There is no such reasonable possibility because the challenged evidence was not a significant part of the penalty-phase case.

The evidence presented during the penalty phase was overwhelmingly defense evidence. The prosecution in its case-in-chief offered no evidence relating to appellant, and in rebuttal offered only the brief testimony of Tony France (totaling five reporter's transcript pages, including cross-examination) relating the threat appellant had made while in high school. (40RT 4253-4257.) The prosecutor's argument, accordingly, focused mainly on the defense penalty-phase evidence and the evidence adduced at trial. The prosecutor argued that

---

82. The admission of the rebuttal evidence under Penal Code section 190.3, subdivision B, is discussed in the next argument. (See Arg. XIV, *post.*)

appellant and Palma came from decent backgrounds but had turned their backs on other opportunities in favor of the gang lifestyle (40RT 4261-4267), that the crime was a calculated attack, not a rash outburst of violence (40RT 4267-4270), that appellant was a "cold, cunning criminal" who was now – particularly through the testimony of Jesus Avila and Dr. Fairbanks – trying to manipulate the jury to escape responsibility (40RT 4270-4271), and that the fact that Anthony Moreno could be viewed as unsympathetic did not amount to mitigation, especially in light of the other victims (40RT 4271-4273). The prosecutor then discussed the Penal Code section 190.3 factors, addressing each one in turn and stressing that no mitigating circumstances had been shown in this case. (40RT 4285-4297.) During the course of that discussion, the prosecutor argued (in less than three reporter's transcript pages) that appellant's high school threat incident and his pronounced gang tattoos, photographs of which had been introduced during the guilt phase, showed "the real Richard Valdez," in contrast to the portrayal of appellant at trial. (40RT 4285-4288.) The prosecutor closed by reminding the jury of the horrific nature of the crimes. (40RT 4297-4300.)

In claiming that the challenged evidence played an "extensive" role in the prosecutor's argument, appellant unduly focuses only on the single discrete reference made to that evidence by the prosecutor. (AOB 303-305.) But properly viewed in context, the prosecutor's mention of the evidence was only a minor part of an extensive argument. And the point the prosecutor was making at the time – that the incident showed the "real" appellant – was based not only on the challenged threat evidence but also on the trial evidence showing that appellant had large gang tattoos. (40RT 4285-4288.) Moreover, the aggravating case here was much stronger than the mitigating case. Appellant's penalty-phase case focused mainly on appellant's character as a youth, before he was involved in the gang lifestyle. (39RT 4044-4101, 4033-

4036, 4102-4129; 40RT 4188-4201, 4240-4242.) But that evidence was not particularly persuasive because, as the prosecutor correctly argued, appellant's subsequent life as a dedicated gang member – a lifestyle he chose – was a different person. He was manipulative, calculating, and ruthless. On the other hand, the aggravating case was compelling: the facts of the crime showed a merciless, cold-blooded, and violent attack against five victims; a horrific slaughter committed in the name of mere gang allegiance. Even appellant's own expert witness, Dr. Fairbanks, viewed appellant as manipulative and testified that he could find no mitigating circumstances "of major significance" here. (39RT 4137-4139.)[83]

As in *People v. Pinholster*, even though the prosecutor argued the challenged evidence to the jury, in light of the bulk of the penalty-phase evidence and the relatively small role played by the challenged evidence, and in light of the circumstances of the charged crimes, "there can be no reasonable possibility that any improperly admitted evidence was prejudicial." (*Id.*, *supra*, 1 Cal.4th at pp. 962-963; see also *People v. Wright*, *supra*, 52 Cal.3d at pp. 427-429, citing *People v. Burton* (1989) 48 Cal.3d 843, 864, and *People v.*

---

83. It also cannot be ignored that appellant threw a Kleenex box at, and used profanity at, a juror during the penalty phase. (41RT 4348-4349, 4356-4365.) As the trial court noted, the incident wrecked "one of the more moving arguments I have heard and I have tried a lot of death penalty cases and it was eloquent." (41RT 4359.) The court also noted that, in contrast to the guilt phase, where the defendants were "properly attired," the defendants appeared at the penalty phase with shaved heads. The court characterized this as "one of the more stupid things you've done because this jury's going to get the idea you're a gangbanger, you always will be." (41RT 4358.) These self-defeating circumstances undoubtedly injured the defense case. At the same time, they cannot support reversal on appeal. (Cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1227-1228 [where defendant went pro per at penalty phase and refused to offer any mitigating case, and instead bolstered the aggravating case and then asked jury to impose death sentence, reversal would be counterproductive because it would provide incentive for self-sabotage in order to create "error" supporting eventual reversal of death verdict].)

Brown, *supra*, 46 Cal.3d at p. 449.)

XIV.

ANY ERROR IN ADMITTING EVIDENCE UNDER PENAL CODE SECTION 190.3, SUBDIVISION B, WAS HARMLESS

Appellant argues that the penalty determination must be reversed because the trial court improperly allowed the prosecution to argue that the penalty-phase rebuttal evidence, concerning appellant's threats against a high-school official, could be considered as "factor (b)" evidence (see Pen. Code, § 190.3, subd. (b); CALJIC No. 8.85) since the rebuttal evidence was inadmissible for that purpose. Appellant also argues that the court improperly failed to instruct the jury on the reasonable doubt requirement pursuant to CALJIC No. 8.87 once the threat evidence was admitted under Penal Code section 190.3, subdivision (b). (AOB 307-323.) Any error in this regard could not have resulted in prejudice here.

A. Trial Court Proceedings

The trial court proceedings set forth in the preceding argument are relevant to this claim also. (See Arg. XIII.A., *ante*.) In addition, as pertinent here, the prosecutor argued to the jury in the penalty phase regarding Penal Code section 190.3 and CALJIC No. 8.85 as follows:

> B. The presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried [i]n these proceedings which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> . . . .
>
> As to that particular factor, there was also the testimony this morning

of Mr. France regarding Mr. Valdez and what happened at the San Gabriel High School.

And I am well aware, ladies and gentlemen, that Mr. France is honest with you, as well he has an obligation to be that he didn't take that seriously. That's not the point. The point is there's two sides to Mr. Valdez. The side when he wants to manipulate or get what he wants to get and the side that is the Sangra gang member who carries on activities on behalf of his gang and at the behest of the Mexican Mafia.

And when he got involved in this one incident in San Gabriel High School, the true Richard Valdez came out with the language, and I will not repeat the language that he used to the one security counselor in telling the other security counselor who's merely doing his job, breaking up a fight. That's all he's doing, he's doing his job, "I'll put a bullet in your head."

I know Mr. France didn't take that seriously but after looking at some of the things that were done on Maxson Road that night you may realize that when Mr.Valdez makes that kind of statement he means business.

. . . .

We know now Mr. Valdez had tattoos on his back. You saw the tattoo. The death head is holding what appears to be a sawed-off type of shotgun on his back. That's the real Richard Valdez, the real Richard Valdez who tells a security counselor who's merely doing his job, "you're my bitch." That's the real Mr. Valdez, the manipulative Mr. Valdez that wants to intimidate. That statement that day, whether Mr. France took it seriously or not, tells you, ladies and gentlemen, quite a bit about Mr. Valdez.

How many times have you been in a dispute or a fight even as

children where you make that kind of statement to a security counselor and then tell another security counselor you are going to put a bullet in his head? No, ladies and gentlemen, the actions that day clearly show Mr. Valdez. They show him in his element, and his element is an element that he chose willingly and knowingly. It's an element where he is a member of a gang and will carry out whatever benefits that gang. (40RT 4285-4288.)

The Court later read to the jury CALJIC No. 8.85:

In determining which penalty is to be imposed on each defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider and take into account and be guided by the following factors if applicable:

(a) The circumstances of the crimes of which the defendants were convicted in the present proceeding and the existence of any special circumstance found to be true;

(b) The presence or absence of criminal activity by the defendant other than the crimes for which the defendants have been tried in the present proceedings which involve the use or attempted use of force or violence or the express or implied threat to use force or violence;

(c) The presence or absence of any prior felony convictions other than the crimes for which the defendants have been tried in the present proceedings;

(d) Whether or not the offenses were committed while the defendants were under the influence of extreme mental or emotional disturbance;

(e) Whether or not the victims were a participant in the defendant's homicidal conduct or consented to the homicidal act;

(f) Whether or not the offenses were committed under circumstances in which the defendants reasonably believe to be a moral justification or

extenuation for their conduct;

(g) Whether or not the defendants acted under extreme duress or under the substantial domination of another person;

(h) Whether or not at the time of the offense the capacity of a 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 effects of intoxication;

(i) The age of the defendant at the time of the commission of the crimes;

(j) Whether or not a defendant was an accomplice to the offense in his participation in the commission of the offenses was relatively minor;

(k) Any other circumstance which extenuates the gravity of the crimes, even though it is not a legal excuse for the crimes or 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. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(41RT 4346-4350; 7CT 1850-1851.)

The court also read to the jury instructions on assault with a deadly weapon against a peace officer, which pertained to a prior conviction Palma stipulated to at the penalty phase. (7CT 1852-1853; 38RT 3937-3939; 40RT 4285, 4288.) The court did not read instructions pertaining to any crime based on appellant's threat against the high-school official, nor did the court read CALJIC No. 8.87.

B. Any Error Was Harmless

As appellant notes, when evidence is presented under Penal Code section 190.3, subdivision (b), the penalty-phase instructions must make clear that an individual juror may consider evidence of other violent crimes in aggravation only if the juror is satisfied beyond a reasonable doubt that the defendant committed those crimes. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55, 60-62; accord *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1052.) Concomitantly, although the court has no sua sponte duty to instruct the jurors on the particular elements of an offense alleged under Penal Code section 190.3, subdivision (b), (*People v. Guerra* (2006) 37 Cal.4th 1067, 1147; *People v. Anderson*, 25 Cal.4th at p. 589, fn. 4; *People v. Barnett* (1998) 17 Cal.4th 1044, 1175), the evidence must establish that some violation of the Penal Code was actually committed (*People v. Jurado*, *supra*, 38 Cal.4th at p. 136). (See AOB 309-310.) Here, the court did not instruct the jurors that they were required to find beyond a reasonable doubt that a crime under Penal Code section 190.3, subdivision (b), had been committed. (See AOB 318-320.) Appellant argues that this was error and that, additionally, the evidence presented by the prosecution was insufficient to establish that an actual crime was committed. (AOB 309-317.) But even in light of the first error, and assuming the second, there was no prejudice in this case.

As appellant acknowledges (AOB 320), instructional error with respect to Factor B evidence is subject to harmless error review under the standard whether it is reasonably possible that the failure to instruct affected the verdict. (*People v. Avena*, *supra*, 13 Cal.4th 394, 429-432.) As noted (see Arg. XIII.C., *ante*), the same standard applies to the erroneous admission of aggravating penalty-phase evidence. (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 694-695; *People v. Avena*, *supra*, 13 Cal.4th 394, 439; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 962; *People v. Wright*, *supra*, 52 Cal.3d at p. 428.) Here, Penal

Code section 190.3, subdivision (b), was only one of the grounds discussed as a possible basis for admission of the challenged evidence. (See 40RT 4275 ["It's Factor B . . . it's admissible had it come in in [the] case in chief."].) As the prosecutor argued, the evidence was admissible principally as rebuttal to the "extensive testimony regarding Mr. Valdez's background and opportunities that he had to serve our country in the Navy, to go to ITT and become a productive citizen, little league, the fact that his mother was a team mother and so forth . . . ." (40RT 4231-4236.) For this purpose, the evidence was properly admitted to balance the picture of appellant's personality presented by the defense. (See Arg. XIII.B., *ante*; *People v. Mason*, *supra*, 52 Cal.3d at pp. 960-961; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 792; *People v. Daniels*, *supra*, 52 Cal.3d at p. 883.) And this was the way the evidence was actually presented to the jury during argument. Although the prosecutor addressed the evidence under the "heading" of Penal Code section 190.3, subdivision (b), the substance of his argument was that the high-school threat, in combination with appellant's prominent gang tattoos, revealed the "real" appellant, in contrast to the image that had been portrayed by the defense for the purpose of trial. (40RT 4285-4288.) The jury was not instructed by the court to consider the evidence under Penal Code section 190.3, subdivision (b). Thus, even if the challenged evidence did not fall under that section, it was not actually used that way, but instead was used for a different, permissible purpose, and there could have been no prejudice.

Moreover, as explained, the challenged evidence was not a significant part of the prosecution's penalty-phase case, and the aggravating case here far outweighed the mitigating case. The egregious circumstances of the crimes themselves and the testimony of appellant's own expert that he could find no significant mitigating circumstances played an overwhelmingly greater role than did the high-school threat evidence. (See Arg. XIII.C., *ante*.) In this context,

"there can be no reasonable possibility that any improperly admitted evidence was prejudicial." (*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 962-963.) Nor is it tenable to characterize the introduction of the challenged evidence as having resulted in a spectacle of trivial incidents. (AOB 317, citing *People v. Boyd*, *supra*, 28 Cal.3d at p. 774.) Reversal is therefore not required.

XV.

THE TRIAL COURT DID NOT ERR BY OMITTING A RE-READING OF GENERAL GUILT-PHASE INSTRUCTIONS AT THE PENALTY PHASE

Appellant argues that the trial court erred by failing to read to the jury at the penalty phase CALJIC No. 8.84.1, along with general guilt-phase instructions such as CALJIC Nos. 1.02, 2.20, 2.27, and 2.60, and by instead instructing the jury that, with certain exceptions, it should adhere to the guilt-phase instructions previously read. (AOB 324-332.) There was no error in this regard, and if there was error it was harmless.

A. Trial Court Proceedings

Before the start of the penalty phase, the court briefly instructed the jury as to the nature of that part of the proceedings:

> This is a penalty phase and the law requires that the jury that finds a defendant guilty of murder in the first degree and further finds any one of those 19 special circumstances to be true that that jury then must determine what the penalty will be.
>
> There are only two choices as I indicated to you that if we got to this phase. One is the sentence of life imprisonment without the possibility of parole or the imposition of the death penalty. Those are the only two choices that you have.

In making the determination, I will give you instructions at the end of the penalty phase as to how you approach that. I think I pretty well touched upon it in my opening explanations three months ago or something like that. And that will come in my jury instructions at the end of the evidentiary portion.

Basically, in determining what the penalty will be, you have a right to consider the evidence in the first phase unless you're instructed to the contrary in my instructions. You may consider all of that evidence. We don't rehash it.

Secondly, you may consider the evidence that you receive in this particular phase also.

(38RT 3932-3933.)

During the penalty-phase, the parties and the court discussed the penalty-phase instructions. The majority of the discussion centered on a modification of CALJIC No. 8.85 proffered by appellant (see 38RT 3995; 7CT 1839-41) and on CALJIC Nos. 8.86 and 8.87. (39RT 2998-4009.) The parties again addressed the instructions toward the end of the penalty phase, this time discussing several modifications proffered by Palma concerning the standard of proof. (40RT 4180-4187.) Finally, before reading the penalty-phase instructions to the jury, the following discussion occurred:

THE COURT: Am I correct that all of the jury instructions given in the first phase would apply to the second phase with two exceptions: one that in the first phase they were instructed that sympathy could not be considered and that is something they may consider now and also they were instructed that in coming to in determining the issues of guilt phase they could not consider penalty or punishment and that, obviously, is the whole purpose of this phase? My belief is that all the other instructions to the extent that they apply, there may be some that don't, but I don't

think it's confusing to just tell the jury that all the previous instructions do apply with those two exceptions.

MR. MONAGHAN: Your honor, I don't think the reasonable doubt instruction applies at this point.

THE COURT: You're right. That's three. Thank you. That's the whole reason for my inquiring.

MR. MONAGHAN: Also, I think probably, at least from the defense perspective, the circumstantial evidence instruction doesn't apply because of the standards set up if you find two reasonable –

THE COURT: That's true.

MR. MONAGHAN: But I would have no objections to the court just simply telling the jury because I believe in the one instruction you basically indicate the mitigating or aggravating do not need to be found beyond a reasonable doubt. Just simply telling them that they certainly can now consider sympathy and they certainly can consider penalty or punishment and that they can consider the rest of the instructions that have previously been given as they feel they apply.

THE COURT: All right.

MR. MONAGHAN: If no one else has an objection to it.

MR. UHALLEY: I agree with that.

MR. MONAGHAN: Do you agree with that, Mr. Bestard?

MR BESTARD: I agree with that.

(41RT 4330-4332.)

The court then instructed the jury, in relevant part:

Generally speaking, all of the instructions I gave you in the first phase you may consider to the extent that they're applicable in this phase and I am not going to re-read all of those instructions. There are several areas that don't apply. For instance, I told you in the first phase that you

could not consider sympathy for a defendant in determining guilt. In this phase you may if you deem it to be appropriate, consider sympathy in selecting your verdict.

In the first phase I told you that you could not in determining the guilt or innocence of a defendant consider or take in – any way take into consideration punishment. Obviously, that's the whole focus of your attention in this case.

And I also told you of the standard of proof in the first case was proof beyond a reasonable doubt. That instruction does not apply to this phase. And there may be a couple of others that you'll find by just applying common sense or are just not applicable.

(41RT 4344-4345.) The court then proceeded to read to the jury CALJIC Nos. 8.84 (penalty phase introduction), 8.85 (penalty phase factors for consideration), 9.20 (assault with a deadly weapon against peace officer), 9.02 (great bodily injury), 8.88 (penalty phase concluding instruction), and special instructions regarding sympathy, lingering doubt, and deterrence. (7CT 1848-1858.)

B. The Claim Is Waived

Insofar as appellant challenges the court's decision not to re-instruct the jury with guilt-phase instructions such as CALJIC Nos. 1.02, 2.20, 2.27, and 2.60, the claim is waived because when the court and the prosecutor suggested omitting a re-reading of those instructions, counsel expressly agreed to the procedure. (41RT 4330-4332; *People v. Holloway* (2004) 33 Cal.4th 96, 152-153.) Relying on *People v. Moon* (2005) 37 Cal.4th 1, 36-39, appellant argues that counsel did not necessarily waive a re-reading of the applicable guilt-phase instructions because counsel only "agreed with the trial court that it had identified several specific guilt-phase instructions which were not applicable to

the penalty phase" but did not invite the court to omit other guilt-phase instructions. (AOB 331-332.) This argument is not supported by the record. The trial court, in initially raising the topic, stated, "I don't think it's confusing to just tell the jury that all the previous instructions do apply with those two exceptions." (41RT 4331.) And the prosecutor stated, "I would have no objections to the court just simply telling the jury . . . that they certainly can now consider sympathy and they certainly can consider penalty or punishment and that they can consider the rest of the instructions that have previously been given as they feel they apply." (41RT 4331.) In direct response to the prosecutor's statement, counsel for appellant said, "I agree with that." (41RT 4331-4332.) Given that conversation, there could have been no confusion that the court intended not to re-read the guilt-phase instructions and to instead simply tell the jury to consider the instructions previously given, albeit with certain exceptions. This case is therefore unlike *Moon*, where defense counsel acquiesced only in retrieving the written copies of guilt-phase instructions from the jury and there was no request that the court refrain from re-reading guilt-phase instructions. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 36-39.) Because here the matter was explicitly addressed and counsel agreed with the procedure, appellant's claim is waived. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 152-153.)

C. There Was No Error

In any event, there was no error here. It is well settled that a trial court need not re-read guilt-phase instructions at the penalty phase and that an admonition, such as the one given here, that the jury consider the guilt-phase instructions with the exception of inapplicable ones, is proper. (*People v. Rodgers* (2006) 39 Cal.4th 826, 904; *People v. Smithey* (1999) 20 Cal.4th 936, 1003-1004; *People v. Sanders*, *supra*, 11 Cal.4th at p. 561; *People v.*

Danielson, supra, 3 Cal.4th at p. 722; *People v. Wharton* (1991) 53 Cal.3d 522, 600.) In particular, such an instruction does not run afoul of this Court's discussion in *People v. Babbitt* (1988) 45 Cal.3d 660, 718 & fn. 26 or the use note to CALJIC No. 8.84.1, both of which appellant relies on heavily. (*People v. Steele* (2002) 27 Cal.4th 1230, 1255-1257.)

In *People v. Steele*, the trial court told the jury, in pertinent part, that it should:

> apply any of the instructions given previously during the guilt phase of this case which are pertinent to the determination of penalty. You are to disregard any such previous instructions which do not apply to the determination of penalty. Should any of the instructions now being given in the penalty phase conflict with those previously given during the guilt phase you are instructed that the penalty phase instructions will control and supersede those previously given. In this regard, you will recall that you were instructed in the guilt phase that you could not be swayed nor affected by considerations such as sympathy. That prohibition does not apply to your deliberations in the penalty phase. You are allowed to consider sympathy, pity, compassion or mercy to the extent that you feel it warranted.

(*People v. Steele*, *supra*, 27 Cal.4th at p. 1256, fn. 7.) There is no material difference between the instruction approved in *Steele* and the instruction given in this case. The court here told the jury to consider the guilt phase instructions "to the extent that they're applicable in this phase" and with the specific exceptions of the prohibitions against considering sympathy and punishment and with the exception of the reasonable-doubt standard. (41RT 4344-4345.) Appellant faults as confusing the court's admonition that "there may be a couple of others that you'll find by just applying common sense or are just not applicable." (AOB 329-330.) But this admonition was no different, in effect,

than the charge in *Steele* that "[y]ou are to disregard any such previous instructions which do not apply to the determination of penalty" (*People v. Steele*, *supra*, 27 Cal.4th at p. 1256, fn. 7), which also "left the jurors to their own devices" (AOB 330) to determine which guilt-phase instructions were inapplicable. In short, there was no error here because a "trial court is not required to reinstruct on general principles at the penalty phase when the guilt phase instructions were not limited to use at the guilt phase[84/] and none of the penalty phase instructions contradict the guilt phase instructions." (*People v. Rodgers*, *supra*, 39 Cal.4th at p. 904.)

D. Any Error Was Harmless

In any event, the error, if any, was harmless. Even where the jury is told to completely disregard the guilt-phase instructions, that error is harmless unless the appellant can establish a reasonable possibility that the error affected the penalty-phase verdict. (*People v. Harris* (2008) 43 Cal.4th 1269, 1320; *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) The court here highlighted the principal guilt-phase instructions that did not apply at the penalty phase, including instructions on the consideration of penalty and sympathy. To the extent the court should have been more clear in specifying guilt-phase instructions that were applicable or inapplicable at the penalty phase, the error could not have affected the verdict because there were no guilt-phase instructions about whose applicability the jury would have been confused that

---

84. CALJIC No. 8.84.1, which appellant argues should have been given here, would have told the jurors to disregard the guilt-phase instructions and required the court to re-read applicable instructions from the guilt phase. (CALJIC No. 8.84.1.) This Court has declined to endorse CALJIC No. 8.84.1, which was promulgated in response to the decision in *People v. Babbitt*, *supra*, 45 Cal.3d 660. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1255-1256 ["In the new version of CALJIC No. 8.84.1, the Committee departed somewhat from our suggestion [in *Babbitt*]."].)

would have had an impact on its decision. (See 6CT 1763-1794.) Nothing would have signaled to the jury that general instructions such as CALJIC Nos. 1.01, 1.02, 1.03, and the evidentiary instructions were inapplicable. And more specific instructions, such as the definitions of the charged crimes (see, e.g., CALJIC No. 8.10, 8.11, 8.20, 8.30, 8.31, 8.71, 8.74), plainly did not apply as a matter of "common sense," since guilt had already been decided. Appellant points to only one example of an instruction that may have confused the jury: CALJIC No. 2.60 (jury not to draw adverse inference from defendant's failure to testify), which he claims jurors might have improperly construed as being applicable only at the guilt phase. But nothing in the language of that instruction suggests that it was inapplicable in the penalty phase. The instruction plainly and categorically states, "You must not draw *any inference* from the fact that a defendant does not testify." (CALJIC No. 2.60, emphasis added.) No reasonable juror would have been confused as to the applicability of this instruction.

Moreover, the penalty-phase evidence in this case was straightforward, focusing essentially on the personal histories of each defendant. The testimony came mainly from family members, teachers, and appellant's psychologist, and the jury was tasked, essentially, with deciding whether the defendants' personal histories warranted sympathy despite the atrociousness of the crimes. No asserted vagueness in the trial court's charge to the jury concerning the applicability of guilt-phase instructions could have affected the outcome of the proceeding, given the uncomplicated nature of the evidence. (See *People v. Harris*, *supra*, 43 Cal.4th at p. 1320; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1221-1222.)

XVI.

THE REVIEWING JUDGE WAS SUFFICIENTLY FAMILIAR WITH THE TRIAL RECORD TO RULE ON THE APPLICATION FOR MODIFICATION OF THE VERDICT

Appellant argues that remand is required for rehearing of the automatic application for modification of the verdict because the matter was heard by a judge who had not presided at trial and who was not sufficiently familiar with the trial record. (AOB 333-348.) There was no error and, to the extent there was error, it was harmless.

A. Trial Court Proceedings

Penalty-phase verdicts were returned in this case on December 13, 1996. Sentencing was set for February 19, 1997. (42RT 4370-4380; 7CT 1859-1884.) On January 10, 1997, facing an investigation by the Commission on Judicial Performance arising from an unrelated matter, Judge Trammell, who had presided over the trial, retired. (7CT 1891; see Inquiry Concerning Judge George W. Trammell III, No. 146; Decision and Order Imposing Public Censure, http://cjp.ca.gov/CNCensure/Trammell%20Censure%20Bar%2001-05-99.pdf.)

On February 19, 1997, Judge Armstrong, to whom the case was transferred, continued the sentencing to March 24, 1997, upon the request of the defense. (43RT 4380.1-4380.5.) On March 24, 1997, the defense again moved to continue the sentencing. The court voiced its concern that since the verdicts there had been "absolutely nothing filed of a substantive nature in this case. There are no motions of any kind." The court observed that, rather than focusing on a new trial motion, the parties appeared to be preoccupied with "the problems that Judge Trammell is confronted with." (43RT 4383.) After a discussion of the proceedings relating to Judge Trammell, Judge Armstrong

urged counsel "to prepare your motions on the basis of any errors that you claim occurred in the trial." The court then set sentencing for June 11, 2007, but also stated that an in camera hearing could be held on June 4, 1997, if the defense wished to develop any issue with respect to Judge Trammell. (43RT 4383-4391.)

The parties appeared before Judge Armstrong on June 4, 1997, and received transcripts of a proceeding relating to the inquiry concerning Judge Trammell. (43RT 4392-4393.) Judge Armstrong again expressed concern that no new trial motion had yet been filed and noted that counsel had had ample time to develop any grounds for new trial. The court continued:

> [I]f you are putting all of your eggs in one basket and saying that the sole motion for the new trial is an alleged incompetence of the trial judge because of what happened in an unrelated case, then so be it. But if that – if you did not file your motion for new trial, then it seems to me that it's a concession that the entire trial of the matter of Palma and Valdez was free of error and you're not claiming any error in the proceedings that occurred in that trial.
>
> You remember that I said before that if you claim that any ruling that was made was erroneous or any instruction given was inappropriate, I wanted my attention directed to that because I have the full transcript of the proceedings, some thousands of pages of the trial itself.
>
> And so now we're nine months down the line since the conclusion of the trial and there's been no motion filed alleging any error in the trial itself.
>
> So what I propose to do is this: Next week on the eleventh the sentencing is going to proceed as scheduled, and, if after careful review of all of the matters, the transcript [relating to Judge Trammell] and everything else, you feel that there is something, that the sentence should

not have been pronounced, then under 1170(d) you would have an opportunity 120 days later to ask the Court to set aside the sentence because of some new matters that you weren't able to bring up on the eleventh. But I expect the sentencing is going to proceed on the eleventh.

And if there's no other motion for new trial, then I think this is going to have to be – we're going to have to make a record that this is to be deemed by the Court to be a concession by your part that there is no basis for a new trial other than the matters that were heard [in the proceeding relating to Judge Trammell].

. . . .

[T]wo and a half months ago we had this same discussion and I directed you at that time that if you had any other claims of error in the trial itself, that you were to file a motion for new trial. Because all I have so far is a notice of motion for new trial. I don't have a single page of alleged error or anything else in all of these intervening months.

So all of these matters could have been addressed. You could have done a full brief on the trial itself while we've been awaiting to have this other matter addressed. So – and you were given ample notice when we set this matter in March that the sentencing was going to be on the eleventh, and it's my intention to proceed with sentencing next week. . . . And I do – the defendants will be ordered, and I expect both of you to be here. And of course I'll give you every opportunity to be heard on that date. But I would expect something to have been filed by that time.

(43RT 4393-4396.)

Palma subsequently filed a two-page motion for new trial (7CT 1925-1926) and a seven-page motion for modification of the verdict (7CT 1927-1933). Both defendants also filed requests for a further continuance. (7CT

1922-1924, 1934-1938.)

The parties again appeared before Judge Armstrong on June 11, 1997. At the outset of the hearing the court noted that it had received Palma's motion for a new trial, but also observed the following:

> [A] daily transcript was prepared for counsel's benefit, so that any claimed errors that happened during the time of the trial could have been marked by counsel as the trial progressed and would have been available for inclusion in any motion for new trial so that the particular page and line could be cited to the Court, and, in the six months since this time, no such work has been done by either of the attorneys.

(43RT 4399.) A discussion of matters relating to Judge Trammell then ensued, and the court denied the defense continuance request on that basis. (43RT 4400-4403.)

The court then addressed Palma's new-trial motion at length. The written motion raised four issues (apart from an issue concerning Judge Trammell): (1) whether Witness 16 should have been deemed an accomplice as a matter of law; (2) whether the pre-trial rulings regarding confidentiality of witness identities were correct; (3) whether Palma's pretrial request to represent himself had been improperly denied; and (4) whether the court should have declared a mistrial when the jury announced it was deadlocked. (7CT 1926.) The parties argued each of those issues. At the conclusion of the argument, the court denied the new trial motion. (43RT 4404-4415.)[85/]

The court went on to address the motion to modify the verdict. The written motion cursorily discussed each factor under Penal Code section 190.3, and argued that, as to Palma, each factor was neutral, with the exception of subdivision (g) (the defendant acted under duress), subdivision (i) (the age of

---

85. Appellant's counsel indicated during the discussion that appellant that he wished to join Palma's argument on the fourth issue. (43RT 4411.)

the defendant), and subdivision (k) (any other circumstances), which were mitigating. (7CT 1929-1933.) The court stated:

> . . . counsel, Mr. Uhalley, has prepared a motion and cited points and authorities in this matter pointing out that the Court has the obligation to review the special circumstances, the findings.
>
> The Court has read the transcript of the proceedings in which the – on penalty phase of the trial, and I've also read the material that's been submitted by Mr. Uhalley.
>
> And the factors that Mr. Uhalley suggested were either neutral or mitigating factors.
>
> Do you have anything to add to what you filed in this regard . . . ?

(43RT 4415-4416.) Counsel for Palma submitted on the written motion. The prosecutor then made a brief argument closely tracking his argument to the jury at the penalty phase: that the circumstances of the crimes were "awful"; that Palma was on parole at the time and had previously attacked a Youth Authority counselor; and that both defendants had had opportunities in life but had shunned them for the gang lifestyle. (43RT 4416-4418.) Counsel for appellant joined in Palma's motion for modification of the verdict. (43RT 4419.)

The court ruled as follows:

> The principal thrust of [the] argument seems to be that because the defendants were members of the Mexican Mafia, that they were acting under duress.
>
> But, of course, that contention would be better supported if there were people there so that if they didn't carry out this hit that they were supposed to, that they would immediately be executed themselves. And that simply isn't supported.
>
> They're obviously – this was a Mexican Mafia situation, but the defendants had free will. And particularly the killing of the baby just

seems to be so outside of the pale of anything, that showed a wantonness, as far as these defendants were concerned, to wipe out a family. The baby and the child were certainly not the objects of the wrath of the Mexican Mafia people.

So I think that reviewing all of the evidence that was taken at the hearing, it just seems to the Court that it would be almost impossible for any responsible jury in this situation to come to any other verdict other than the verdict of death.

And the Court finds no basis for setting aside or for modifying the finding to life without possibility of parole in keeping with the special circumstances. And, therefore, the motion to modify is denied.

(47RT 4419-4420.)

The court denied a further continuance request based on issues relating to Judge Trammell, and then proceeded to pronounce the judgment and sentence. (43RT 4421-4432.)

B. There Was No Error

Penal Code section 190.4, subdivision (e), provides that a judge ruling on an application for modification of the verdict shall "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances [and] make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." This does not require an independent, de novo determination. Rather, the reviewing judge "independently reweighs the aggravating and mitigating evidence to decide whether in the judge's independent judgment, the weight of the evidence supports the jury verdict." (*People v. Lewis* (2004) 33 Cal.4th 214, 225, quotation marks and citations omitted.) Such a motion need not be heard by the

judge who presided over trial if that judge is unavailable; in such a case, "necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record." (*Id.* at p. 226, citing *People v. Ezpinoza* (1992) 3 Cal.4th 806.)

Here, the record shows that Judge Armstrong was sufficiently familiar with the case to be able to determine whether the aggravating and mitigating evidence supported the jury's verdict. In addressing the motion for new trial and the application for modification of the verdict, the court stated twice that it had read the penalty-phase transcripts. (43RT 4408, 4416.) The court later, in addressing issues relating to Judge Trammell, stated that it had reviewed "the rulings that the judge made and the conduct in the case." (43RT 4422.) Unless the record affirmatively shows otherwise, the court is presumed to have been familiar with the record upon which it based its rulings. (*People v. Almond* (1965) 239 Cal.App.2d 46, 50, disapproved on another ground in *People v. Doherty* (1967) 67 Cal.2d 9, 15.)

In an effort to overcome this presumption, and Judge Armstrong's statements on the record that he had reviewed the relevant portions of the record, appellant points to the judge's comment that he had not "read them line by line," arguing that this demonstrates that Judge Armstrong was, in fact, not familiar with the trial record. (AOB 341, citing 43RT 4408.) But that statement was made in the context of a specific discussion about the trial court's handling of the jury's declared impasse during guilt-phase deliberations, and in particular its instruction to continue deliberating, which was relevant to the new trial motion. In response to counsel's question whether he was familiar with the transcripts, Judge Armstrong stated:

> I have reviewed them. I haven't read them line by line. I begged counsel since March to cite some lines of the transcript to me, because it is rather voluminous. But I have read the parts that had to do with

penalty, and I have read the parts that had to do with deliberation . . . . [¶] And the word "compromise" was used? I'm sure I would have picked that up. Because obviously that would have been an improper instruction.

(43RT 4408-4409.) Thus, contrary to appellant's suggestion, Judge Armstrong's comments, in context, reflect that he had read the transcripts of that particular part of the trial, while perhaps not "line by line," closely enough to have known that the trial court did not instruct the jury to consider compromise after it declared an impasse. (See 33RT 3797-3799.)

Judge Armstrong did not specifically state that he had read the guilt-phase transcripts, but, as noted, in the absence of an affirmative indication to the contrary, it is presumed that the court was familiar with them. (*People v. Almond*, *supra*, 239 Cal.App.2d at p. 50.) Moreover, Judge Armstrong's manifest familiarity with the record in making his ruling denying the application for modification of the verdict demonstrates that he was familiar with that part of the record. For example, Judge Armstrong noted the wantonness of the crimes and the fact that the Mexican Mafia had not ordered the killings of the children. (47RT 4419-4420; see *People v. Almond*, *supra*, 239 Cal.App.2d at p. 50, fn. 3.)

Appellant argues that Judge Armstrong's comment that the "thrust of [the] argument seems to be that because the defendants were members of the Mexican Mafia, that they were acting under duress" (43RT 4419) shows that the trial court was not familiar with the guilt-phase evidence because the defendants were not, in fact, Mexican Mafia members but Sangra members. (AOB 341-344.) The comment appellant points to was made in passing and was not directly pertinent to the point the court was making, which was that even though the defendants had been ordered to commit the killings, there was no duress in the sense of an immediate physical threat. Indeed, just after that

comment, Judge Armstrong made reference to "a Mexican Mafia situation" and "the Mexican Mafia people," reflecting clearly that he appreciated that the defendants had been ordered by Mexican Mafia leaders to commit the crimes and that appellant and Palma were themselves lower-level functionaries. (43RT 4419-4420.) He also expressly stated that the Mexican Mafia seemed not to have ordered that the children be killed. (43RT 4420.) The record directly refutes, therefore, appellant's claim that he was prejudiced by the court's lack of familiarity with the record on the basis that whether the Mexican Mafia ordered the children to be killed made a critical difference in assessing appellant's culpability. (AOB 343-344, citing 19RT 2404; see also 43RT 4417 [prosecutor recaps that it was Palma who shot the children].)

In the many months leading up to the hearing on the application for modification of the verdict, Judge Armstrong had repeatedly urged the defense to file detailed written papers. (43RT 4383-4391, 4393-4396.) At the hearing itself, he noted that no detailed papers had been filed. (43RT 4399.) Nonetheless, given the cursory arguments put forward by the defense and the court's comments at the hearing, the record here shows that Judge Armstrong was at least familiar enough with the record of the case to be able to independently assess the aggravating and mitigating evidence and to gauge witness credibility as best he could from the record. (See *People v. Lewis*, *supra*, 33 Cal.4th at p. 225.) There was therefore no error.

C. Any Error Was Harmless

Even assuming Judge Armstrong was deficient in some way in his review of the trial record, that error was harmless beyond a reasonable doubt because further review of the record would not have altered his ruling. (See *People v. Daniels*, *supra*, 52 Cal.3d at p. 893 [remand not warranted where statement of decision made it apparent that trial court did not consider the issue

of penalty to be a close one]; *People v. Mincey* (1992) 1 Cal.4th 408, 478 [assuming reasonable doubt standard applies to harmless error review of application to modify verdict]; *People v. Allison* (1989) 48 Cal.3d 879, 912.) It is clear that Judge Armstrong, at the very least, was familiar with the penalty-phase record (43RT 4408, 4416) and with "the rulings that the judge made and the conduct in the case" (43RT 4422). No mitigating factors were alleged by the defense as deriving from the guilt-phase evidence, with the exception of Penal Code section 190.3, subdivision (g), having to do with duress. (7CT 1929-1933.) As noted, the record here affirmatively shows that the Judge Armstrong was familiar with the facts pertinent to that argument. (43RT 4419-4420.)

Had Judge Armstrong further reviewed the guilt-phase record, that review would only have supported even more strongly his denial of the application to modify the verdict, which was largely based on the heinousness of the crimes. (47RT 4419-4420.) As explained, the aggravating case here, which was premised almost entirely on the guilt-phase record, was much stronger than the mitigating case, with respect to which even appellant's own psychological expert admitted he was unable to identify any significant mitigating factors. Closer review of the record would only have highlighted this disparity. The one respect in which appellant claims he was prejudiced by the court's lack of familiarity with the record is actually refuted by the record, which shows that the court knew the Mexican Mafia had not ordered the children killed and that Palma had killed them. (43RT 4419-4420.) There is therefore no doubt here that, assuming Judge Armstrong's review of the trial record was deficient in some way, further review of the record would not have altered his ruling. Reversal is not required.

XVII.

CALIFORNIA'S CAPITAL PUNISHMENT SYSTEM IS CONSTITUTIONAL

Appellant raises a variety of constitutional challenges to California's capital punishment system, recognizing that this Court "has consistently rejected cogently phrased arguments pointing out these deficiencies" but wishing to preserve the claims for federal review. (AOB 349-366.) Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, respondent addresses each claim summarily. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

This Court has previously rejected the argument that Penal Code section 190.3, factor (a), is overbroad (AOB 349-351; Argument 17(A)). (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1052; see also *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

This Court has previously rejected the argument that a capital-sentencing jury must be required to find that aggravating factors outweigh mitigating factors beyond a reasonable doubt (AOB 351-353; Argument 17(B)(1)). (*People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127; *People v. Holt* (1997)15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Nothing in the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct.2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], or *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] compels a different result than previously reached by this court. (*People*

v. Mendoza (2007) 42 Cal.4th 686, 707; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward*, *supra*, 36 Cal.4th at p. 221.)

This Court has previously rejected the argument that a burden of proof must be allocated in a capital sentencing proceeding (AOB 353-354; Argument 17(B)(2)). (*People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Jones*, *supra*, 30 Cal.4th at p. 1127.)

This Court has previously rejected the argument that a capital-sentencing jury must find aggravating factors unanimously (AOB 354-355; Argument 17(B)(3)(a)), and nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* compels a different result than previously reached by this court. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morisson* (2004) 34 Cal.4th 698, 731.)

This Court has previously rejected the argument that it is improper to use unadjudicated criminal activity as an aggravating factor (AOB 356; Argument 17(B)(3)(b)). (*People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Michaels*, *supra*, 28 Cal.4th at pp. 541-542.) Nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* affects those holdings because that line of cases has "no application to the penalty phase procedures of this state." (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 700-701.)

This Court has previously rejected the argument that the phrase "so substantial" in CALJIC No. 8.88 is impermissibly vague (AOB 356-357; Argument 17(B)(4)). (*People v. Carter*, *supra*, 30 Cal.4th at p. 1226.)

This Court has previously rejected the argument that the word "warrants" in CALJIC No. 8.88 is impermissibly ambiguous or imprecise (AOB 357-358; Argument 17(B)(5)). (*People v. Boyette*, *supra*, 29 Cal.4th at p. 465.)

This Court has previously rejected the argument that CALJIC No. 8.88

impermissibly fails to inform the jury that it must return a sentence of life without parole if it determines that the aggravating factors do not outweigh the mitigating factors (AOB 358-359; Argument 17(B)(6)). (*People v. Catlin* (2001) 26 Cal.4th 81, 174.)

This Court has previously rejected the argument that CALJIC No. 8.88 impermissibly fails to inform the jury that it may return a sentence of life without parole even if it determines that the aggravating factors outweigh the mitigating factors (AOB 359-360; Argument 17(B)(7)). (*People v. Smith* (2005) 25 Cal.4th 334, 370.)

This Court has previously rejected the argument that a capital-sentencing jury must be instructed as to burden of proof and unanimity with respect to mitigating factors (AOB 360-361; Argument 17(B)(8)). (*People v. Lewis* (2008) 43 Cal.4th 415, 534; *People v. Rodgers*, *supra*, 39 Cal.4th at p. 897.)

This Court has previously rejected the argument that a capital-sentencing jury must be instructed as to a "presumption of life" (AOB 361-362; Argument 17(B)(9)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 271.)

This Court has previously rejected the argument that a capital-sentencing jury must return written findings (AOB 362-363; Argument 17(C)). (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

This Court has previously rejected the argument that CALJIC No. 8.85 impermissibly employs restrictive adjectives (AOB 363; Argument 17(D)(1)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276.)

This Court has previously rejected the argument that a trial court is required to delete inapplicable sentencing factors from CALJIC No. 8.85 (AOB 363; Argument 17(D)(2)). (*People v. Taylor* (2001) 26 Cal.4th 1155, 1179-1180.)

This Court has previously rejected the argument that a capital-sentencing

jury must be told that certain factors enumerated in CALJIC No. 8.85 are relevant only as mitigating factors (AOB 364; Argument 17(D)(3)). (*People v. Farnam*, *supra*, 28 Cal.4th at p. 191.)

This Court has previously rejected the argument that California's capital-punishment system violates the Equal Protection Clause (AOB 365; Argument 17(F)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

And finally, this Court has previously rejected the argument that California's capital-punishment system unconstitutionally violates international norms (AOB 366; Argument 17(G)). (*People v. Snow*, *supra*, 30 Cal.4th at p. 43.)

Appellant provides no compelling argument as to why these issues should be revisited. Accordingly, they should all be summarily rejected.

XVIII.

THERE IS NO CUMULATIVE PREJUDICE IN THIS CASE

Appellant argues that reversal is required based on the accumulated prejudice arising from multiple errors, even if those errors individually could be deemed harmless. (AOB 367-370.) 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*, *supra*, 1 Cal.4th at p. 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*, *supra*, 23 Cal.4th at pp. 1214, 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. (See AOB 368-370.) 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.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and the penalty of death be affirmed in their entirety.

Dated: August 5, 2008

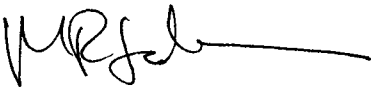
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General



MICHAEL R. JOHNSEN
Deputy Attorney General

Attorneys for Respondent

LA1997XS0010
60322732.wpd

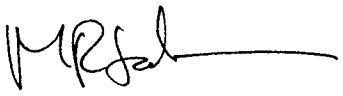
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 62,957 words.

Dated: August 5, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



MICHAEL R. JOHNSEN
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Richard Valdez**
Case No.: **S062180**

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 and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 6, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Gary Garcia [2 copies]
Deputy State Public Defender
Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105

Superior Court of California
County of Los Angeles
Stanley Moss Courthouse
111 North Hill Street
Los Angeles, CA 90012-3014

John Monaghan
Deputy District Attorney
L. A. County District Attorney's Office
210 West Temple Street, Suite 17-1140
Los Angeles, CA 90012

Death Penalty Coordinator
Los Angeles County Superior Court
210 West Temple Street, Rm. M-3
Los Angeles, CA 90012

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 6, 2008, at Los Angeles, California.

K. Amioka
Declarant

Signature

LA1997XS0010
60322756.wpd