SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LUIS MACIEL,

Defendant and Appellant.

S070536

CAPITAL CASE

Los Angeles County Superior Court No. BA108995
The Honorable Charles E. Horan, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

On April 22, 1995, at approximately 10:30 p.m., 44-year-old Anthony "Dido" Moreno, 38-year-old Maria Moreno, 35-year-old Gustavo "Tito" Aguirre, 5-year-old Laura Moreno, and 6-month-old Ambrose Padilla were brutally gunned down at 3843 Maxson Road in El Monte. All but one of the victims were shot in the head with large-caliber handguns.

Appellant Luis "Pelon" Maciel, a member of the Mexican Mafia, or "La Eme," acted as a self-described "middle man" who recruited street gang members Anthony "Scar" Torres, Richard "Primo" Valdez, Daniel "Tricky" Logan, Jimmy "Character" Palma, and Jose "Pepe" Ortiz to murder Anthony Moreno, a Mexican Mafia "drop out" who had disassociated himself from the gang, and Aguirre, who had robbed area drug dealers loyal to La Eme. The gunmen were told "they weren't supposed to leave any witnesses. If anybody got in the way, . . . they had to take care of them." Palma, who met with appellant shortly before proceeding to the victims' residence, assured appellant that he was "strapped," or carrying a gun; Palma also stated that "he was going to take care of business. Not to worry about it."

At a party at Torres's house shortly after the shootings, the men bragged about their respective roles in the murders. Palma told others that he "had killed

the kids and the lady." Valdez indicated that he "had shot two guys": Anthony Moreno, whom he shot inside the house; and Aguirre, whom he pursued and shot outside, on the front lawn. Torres stood by the door of the residence with a shotgun "just watching out to make sure nobody would run up from behind." Logan drove the getaway car, while Ortiz acted as a lookout.

Telephone and pager records establish that six calls to appellant's pager were made from the Torres and Palma residences the day of the murders. Four calls were made to appellant's pager from those same residences the following day.

Palma's shooting of the two children -- which violated the unwritten "policy" of the Mexican Mafia -- provoked anger and swift retribution; after his trial and death sentence, Palma was himself murdered at San Quentin State Prison. During a police interview following his arrest, appellant expressed fear for his family because of his role in the murders and stated, "My kids, my wife, I mean they'll all be all fucked up, because of me."

STATEMENT OF THE CASE

In grand jury proceedings commenced on September 11, 1995, the Los Angeles County District Attorney obtained a six-count indictment against Anthony Torres, Richard Valdez, Daniel Logan, and Jimmy Palma, four of appellant's five original codefendants. Five of the six counts jointly charged the codefendants with the murders of Anthony Moreno, Maria Moreno, Laura Moreno, Gustavo Aguirre, and Ambrose Padilla during a single incident on April 22, 1995. (1-5 1SCT, *passim.*)[1/] The codefendants (with the exception of Valdez, who was at large at the time) pleaded not guilty to all murder counts, and denied the multiple-murder special circumstance allegation and firearm and

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1. "SCT" refers to the Supplemental Clerk's Transcript.

criminal street gang enhancements. (1 SRT 1-7.)[2/]

The grand jury was reconvened on December 6, 1995, to consider capital murder charges against appellant and codefendant Jose Ortiz. (6 1SCT 982.)[3/] On December 12, 1995, the grand jury returned an amended indictment, charging appellant and codefendants Torres, Valdez, Logan, Palma, and Ortiz with the murders of the Moreno family members, as well as Gustavo Aguirre and Ambrose Padilla. (1 CT 103-109A; 6 1SCT 982-1194.) It was also alleged that: (1) the murders charged in counts 2 through 6 constituted a special circumstance, multiple murder, within the meaning of Penal Code section 190.2, subdivision (a)(3);[4/] (2) the murders were committed for the benefit of, at the direction of, or in association with, a criminal street gang and/or with the specific intent to assist in criminal conduct by gang members pursuant to section 186.22, subdivisions (b)(1) and (b)(2); (3) in the commission of the murders a principal was armed with a handgun, within the meaning of section 12022, subdivision (a)(1); and (4) in the commission of the murders, each of the defendants personally used a firearm, within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (c)(8). (1 CT 103-109.)

Appellant was arraigned, pleaded not guilty to the murder charges, and denied the special circumstance allegation and all enhancements. (1 CT 110; 1 RT 120-126.)[5/] Appellant was initially represented by court-appointed

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2. "SRT" refers to the Supplemental Reporter's Transcript. Although respondent's copy of the cited Reporter's Transcript is not entitled "Supplemental," the transcript was prepared on November 19, 2004, in connection with record correction proceedings in this case and will therefore be referred to throughout as SRT.

3. "CT" refers to the Clerk's Transcript.

4. All subsequent statutory references are to the Penal Code, unless otherwise indicated.

5. "RT" refers to the Reporter's Transcript.

counsel, Joseph Borges; Edward Esqueda was subsequently retained and entered his first appearance on February 14, 1996. (1 CT 103-109A, 136; 1 1SCT 110; 6 1SCT 982-1194; 1 RT 164-166.) On June 13, 1996, the prosecution announced its intention to pursue the death penalty as to all defendants. (1 CT 193; 2 RT 335-346.)

On September 3, 1996, a hearing was held before the Honorable Cesar Sarmiento to address all pending pretrial motions. (2 CT 473-474; 3 RT 504-522.) At that hearing, Judge Sarmiento severed appellant's trial from that of his codefendants. (2 CT 475; 3 RT 585-599.) On November 17, 1997, less than two months before jury selection, appellant moved to discharge retained counsel and substitute court-appointed counsel; that motion was denied without prejudice by the Honorable Charles E. Horan, the trial judge in this case. (8 1SCT 1595-1609; 49 RT 7467-7468, 7470.) On December 12, 1997, Judge Horan denied appellant's renewed motion to discharge retained counsel. (8 1SCT 1616; 50-1 RT 7497-7554.)

Jury selection commenced on January 5, 1998.[6] (3 CT 631; 51 RT

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6. Appellant was the last of the codefendants to be tried. Codefendants Palma and Valdez were tried by a single jury before the Honorable George W. Trammell III, and received sentences of death. Palma was murdered while on death row at San Quentin State Prison. Codefendants Logan and Ortiz were tried before Judge 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. Codefendant 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. (See http://appellatecases.courtinfo.ca.gov/; see also 61 RT 9525-9526.) This Court may take judicial notice of the transcripts and court files in those cases. (See *People v. Lawley* (2002) 27 Cal.4th 102, 116, fn.2; Evid. Code, §§ 452, subd. (d) [judicial notice may be taken of the records of any court of this state], 452.5 [pertaining to court records relating to criminal convictions].)

7577.) During trial, the prosecution dismissed the criminal street gang enhancement. (61 RT 9538-9539.) On January 30, 1998, the jury found appellant guilty as charged on all counts and found true the special circumstance of multiple murder as to counts 2 through 5; the jury also found true the principal-arming allegations as to all counts. (3 CT 734-748; 62 RT 9790-9799.)

The penalty phase of trial began on February 2, 1998. (3 CT 750; 63 RT 9821.) On February 5, 1998, the trial court granted Juror No. 1's request to be excused, based upon her representation that she was unable to continue with deliberations "due to emotional distress." (3 CT 754-755; see also 65 RT 10165-10184, 10191.) Appellant's motions to set aside the guilt phase verdicts, to begin deliberations anew, and for mistrial were denied. (3 CT 754; 65 RT 10201-10208.) On February 11, 1998, the jury found that the aggravating circumstances substantially outweighed the mitigating circumstances and that the appropriate penalty was death on counts 2 through 5. (3 CT 811-814; 65 RT 10217-10221.)

On May 8, 1998, the trial court denied appellant's motions for a new trial, to strike the special circumstances finding, and to reduce the death penalty, and sentenced appellant to death on counts 2 through 5.[7] (3 CT 830-851, 875-895, 898-902, 904; 66 RT 10245-10270.)

This appeal is automatic.

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7. The trial court imposed a sentence of 25 years to life, plus one year for the principal-arming enhancement, on count 6. That sentence, as well as the sentences imposed for the principal-arming enhancements on the other counts, were stayed pending execution of the death sentences. (3 CT 896-897, 902-904; 66 RT 10270-2721.) Appellant was awarded custody credits of 1,000 days, including 130 days of good time/work time. (3 CT 897, 903-904.)

STATEMENT OF FACTS

I. Guilt Phase

A. Prosecution

1. The Events On Maxson Road Prior To The Murders

In April 1995, Witness No. 8[8/] lived at 3849 Maxson Road in El Monte with her children, her cousin Witness No. 11, and her aunt and uncle. (55 RT 8606-8608, 8618.) When Witness No. 8 returned from work between 1:00 and 2:00 p.m. on Saturday, April 22, 1995, she saw three or four gang members with shaved heads and tattoos on the back of their necks in the yard of 3843 Maxson Road. (55 RT 8609-8610, 8626.) Later that day, at around 6:00 or 7:00 p.m., Witness No. 8 spoke with Gustavo Aguirre across the fence of that property. Aguirre said that "the Mafia was going to come." (55 RT 8615.) Witness No. 8 subsequently heard someone run down the driveway of the residence and the sound of a gunshot. (55 RT 8616-8617.) She went into the home and found a little boy wearing a blood-soaked shirt. The boy told Witness No. 8 that "his mom . . . had been shot." (55 RT 8617.)

Witness No. 11 also saw three men at the rear of 3843 Maxson Road. Two of the men had tattoos: one had letters on the back of his neck, while the other had a tattoo on his hand. (55 RT 8628-8632, 8638.) The men were talking to Anthony Moreno. (55 RT 8640, 8643.) At some point, Aguirre "got close to" Witness No. 11 and said that he "was going to leave there because . . . [¶] the Mafia had arrived and he didn't want to have any problems with them." (55 RT 8636.) Aguirre also told Witness No. 11 that "the carnals are here and there's problems with drugs;" he emphasized, "there [was] going to

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8. Numerous witnesses were identified by number during the grand jury proceedings and at trial, out of concern for their safety.

be a really big problem there." (55 RT 8636-8637, 8642.)

Witness No. 9 lived at 3847 Maxson Road. (55 RT 8645-8646.) On April 22, 1995, she held a yard sale at her residence, which started at 9:00 a.m. and ended at 5:00 p.m. At about noon, Witness No. 9 saw a blue Jeep park in front of the house next door, with its motor running. (55 RT 8647-8649; 56 RT 8660, 8667.) A second car parked behind the Jeep, and "around four" men got out. (55 RT 8649.) The men had close-cropped hair and wore white T-shirts; Witness No. 9 saw a tattoo on the back of one man's neck. The men walked toward the residence. (56 RT 8656, 8658.) They eventually returned to their car and left. The blue Jeep drove away at the same time. (56 RT 8657-8658.)

The same evening, Witness No. 1 and her boyfriend attended a party on Maxson Road. (56 RT 8851-8853.) As Witness No. 1 was leaving the party in her boyfriend's truck, she heard what she thought were firecrackers. (56 RT 8853.) She subsequently saw two people running down a driveway towards a blue-colored Nissan. (56 RT 8854-8857.)

Witness No. 2 was visiting his brother, Witness No. 3, who lived at 3840 Maxson Road. (56 RT 8858-8861.) A Nissan Maxima stopped across the street,[9/] blocking the driveway of 3843 Maxson Road; three Hispanic males exited. The driver, also Hispanic, remained behind the wheel. (56 RT 8862-8863.) The three men walked purposefully to the back of the house, where Witness No. 2 lost sight of them. Witness No. 2 subsequently heard 10 to 15 gunshots, fired from two different guns. (56 RT 8864-8865, 8868-8869.) The men emerged from the house hurriedly and got back into the Nissan, which drove away. (56 RT 8866-8868.) One man wore a black sweater with denim

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9. Witness No. 2 subsequently identified a light blue Nissan Maxima at the Temple City Sheriff's Station as similar to the car he saw on the night of the murders. (56 RT 8869-8872.) Detective Stephen Davis of the Los Angeles County Sheriff's Department testified that the Maxima belonged to Daniel Logan. (60 RT 9451-9452.)

pants and carried a chrome semi-automatic handgun in his hand. (56 RT 8867.)

Prior to the shootings, Witness No. 3 saw Aguirre running down the street, towards the residence. There was a Nissan Maxima nearby.[10] (57 RT 8876-8881.) Aguirre ran up the driveway to the back of the house; as he did so, the Nissan stopped in front of the driveway and three men got out of the car while the driver remained behind. (57 RT 8881-8882.) The men also went to the back of the house. "Less than a minute" later, Witness No. 3 heard gunshots. (57 RT 8882-8884.) The men returned to the Nissan, running, and the car drove away quickly with the lights off. (57 RT 8884-8885.)

2. The Crime Scene

On April 22, 1995, Officers Gary Gall and Ronald Nelson of the El Monte Police Department went to 3847 Maxson Road in response to a radio call they received at 10:34 p.m.; the broadcast indicated that "a small child had run to a neighbor's house saying that his mother had been shot." (58 RT 9086-9088, 9090, 9095-9096.) The officers spoke with the residents of that address, as well as a young boy about five or six years of age. The boy was "nervous, shaking[, a]nd there was a considerable amount of blood all over the shirt he was wearing." He confirmed "that his mother had been shot." At the boy's direction, Officers Gall and Nelson walked next door to the rear of the home at 3843 Maxson Road. (58 RT 9087-9089, 9096-9098.)

As the officers approached the residence, they saw Gustavo Aguirre lying on the ground outside "in a . . . pool of blood"; he appeared to have been shot in the head. (58 RT 9098, 9101.) Inside the home, officers found Anthony Moreno's body wedged between a mattress and a wall, with one leg draped over the bed. (58 RT 9102.) They found the body of Maria Moreno on the

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10. Like his brother, Witness No. 3 subsequently identified the same light blue Nissan Maxima at the Temple City Sheriff's Station as similar to the car he saw on the night of the murders. (57 RT 8885; 60 RT 9451-9452.)

living room floor, along with two children -- Laura Moreno and Ambrose Padilla. (58 RT 9102-9107, 9110.) There was a child's bloody handprint near Maria Moreno. (58 RT 9173.) Expended .45 caliber shell casings were also found at the scene, as well as various bullet fragments. (58 RT 9163-9169.) After searching the residence for several minutes, the officers discovered an uninjured little girl "no more than two or three years old," cowering in a corner, sobbing. (58 RT 9108-9109.)

Christopher Cano, a senior paramedic with Med Trans Ambulance,[11] attended to the victims. (58 RT 9112-9114.) Mr. Cano confirmed that the three adults were dead; "[t]hey all had brain matter showing." (58 RT 9115-9116.) He transported the children to the hospital, however, because "[u]nder L.A. County protocols and procedures, [they] did not meet the criteria to pronounce them dead at the scene." In fact, Laura Moreno was still breathing. (58 RT 9110, 9116-9117.) Attempts to save the children were unsuccessful, and they later died at the hospital. (58 RT 9117-9120.)

At the time of their deaths, Gustavo Aguirre was 35 years of age, Anthony Moreno was 44, Maria Moreno was 38, Laura Moreno was 5, and Ambrose Padilla was 6 months old. (56 RT 8710-8711.)

3. The Coroner's Evidence

Dr. Lakshmanan Sathyavagiswaran, the Chief Medical Examiner and Coroner for the County of Los Angeles, reviewed the autopsy reports for the victims in this case. (58 RT 9124-9128, 9133-9134.) The three adults all died of gunshot wounds to the head. (58 RT 9136-9137.) Anthony Moreno suffered a contact wound to the right ear, with the bullet exiting the left side of

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11. At the time of trial, Mr. Cano was a police officer with the El Monte Police Department. (58 RT 9113.)

his head.[12/] (58 RT 9137-9141.) Maria Moreno was shot at intermediate range on the left side of the head, near the ear; she also suffered a non-fatal gunshot wound to the right buttock. (58 RT 9142-9147, 9155.) Gustavo Aguirre was shot at close range on the top right-hand side of his head, and had a through-and-through gunshot wound to the left shoulder. (58 RT 9147-9149.)

Ambrose Padilla was killed by a gunshot wound to the right eye, which went through his head and into his spinal cord. (58 RT 9150-9153.) Laura Moreno was shot in the chest. (58 RT 9153-9154.)

4. The Ballistic Evidence

Dale Higashi, a Senior Criminalist with the Los Angeles County Sheriff's Department, went to the crime scene on April 26, 1995, and recovered an expended .45 caliber bullet from the bathroom wall of the residence. (59 RT 9234, 9236-9239, 9246.) He also examined expended .45 caliber shell casings found at the scene. Mr. Higashi compared the expended shell casings with 13 live .45 caliber cartridges subsequently recovered from the home of Richard Valdez, and concluded that at least two of the expended cartridges "had the same marks of being worked through the action [of a semi-automatic handgun as] two of the live rounds that were submitted . . . ." (59 RT 9239-9242; see also *id.* at pp. 9234-9235, 9240-9250.)

Mr. Higashi also compared the bullet he recovered from the bathroom wall with a bullet recovered from the body of Maria Moreno, and concluded that they were both fired from the same .45 caliber handgun, a Randall Firearms semi-automatic. (58 RT 9146; 59 RT 9246-9247.) Finally, Mr. Higashi compared a .38 Special/.357 magnum bullet recovered from the body of Gustavo Aguirre with a spent bullet found at Valdez's residence, and concluded

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12. Further examination revealed that Moreno had a tattoo on the ring finger of his right hand that said "'E-M-E.'" (58 RT 9142.)

that both rounds "could have been fired from the same firearm." (58 RT 9149-9150; 59 RT 9243-9245.)

5. Victor Jimenez And Witness Nos. 14 And 16 (The Gang Witnesses)

Victor Jimenez was a member of the Sangra street gang in San Gabriel; he went by the moniker "Mugsy" and had tattoos on his stomach, arms, and back. (56 RT 8668-8669, 8681-8683, 8686.) Jimmy Palma, Daniel Logan, Anthony Torres, and Richard Valdez were also members of the gang. (56 RT 8670-8672; see also *id.* at pp. 8685-8686.) The Sangra gang had about 500 members. (56 RT 8683-8684.)

On April 21, 1995, Jimenez was discharged from the Marine Corps and went to his brother's house in Temple City.[13/] The next day, Jimenez took LSD at a park in San Gabriel and drove to Torres's house in Alhambra in his blue Jeep. (56 RT 8672-8678.) Torres borrowed the Jeep to buy some beer. Jimenez waited at the house because he "didn't want to get pulled over or harassed by the police." (56 RT 8675-8676.) Torres returned with the Jeep about 15 minutes later. (56 RT 8677-8678.)

On the evening of May 14, 1995, Jimenez parked his Jeep at Valdez's home in West Covina; he left the keys with Valdez. When he returned the next day, the Jeep was gone. (56 RT 8678-8679.) Jimenez disclosed the foregoing events to law enforcement because he "wanted to be honest with them," and "had nothing to hide . . . ." (56 RT 8696.) As a Sangra gang member, Jimenez knew that he was not supposed to testify against other gang members in court. (56 RT 8698.)

Detective Stephen Davis was one of the investigating officers assigned to this case. (58 RT 9157-9163.) Detective Davis interviewed Jimenez on May

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13. Jimenez was discharged for drug use. (56 RT 8688.) At the time of trial, he was in a "drug recovery home." (56 RT 8689.)

18, 1995, in the presence of Sergeant John View of the Sheriff's Department Homicide Bureau. (56 RT 8699-8700.) During the course of the interview, Detective Davis asked Jimenez "approximately how long . . . Torres . . . was gone with . . . Jimenez's Jeep on April 22nd, 1995[.]" Jimenez told Detective Davis that Torres "took the Jeep and was gone for approximately 30 to 45 minutes." (56 RT 8700-8701.) Jimenez also told Detective Davis and Sergeant View that Valdez would shoot guns inside his residence in West Covina. (58 RT 9185.)

Witness No. 16 was also former member of the Sangra street gang. (57 RT 8887-8888, 8921.) He knew Palma, Valdez, Torres, and Logan. (57 RT 8889-8890.) Witness No. 16 was granted immunity in return for his complete and truthful testimony at trial. (57 RT 8890-8891.) Witness No. 16 was told by the District Attorney's Office that his failure to comply with those conditions would result in his prosecution for murder. (57 RT 8891.)

On the afternoon of April 22, 1995, Witness No. 16 received a telephone call from Palma; Palma asked to be picked up in Witness No. 16's red 1991 Thunderbird. (57 RT 8891-8892.) Palma lived in Temple City. (57 RT 8893.) Palma told Witness No. 16 that he would be receiving a page from Torres and that Witness No. 16 would have to drop him off at Torres's house. Palma said that "he had to do a favor for the [carnals]," or Mexican Mafia. (57 RT 8894-8895.) After Palma was paged, Witness No. 16 drove him to Torres's house, where they joined Torres, Valdez, Logan, Jose Ortiz, and Witness No. 14. (57 RT 8895-8896.) Witness No. 16 saw a shotgun at the foot of Torres's bed. (57 RT 8896.)

Witness No. 16 stayed there "[a]bout an hour or two." "People were doing speed and cutting their hair, shaving their heads." (57 RT 8897.) Ortiz made a telephone call and several pagers went off. Ortiz said that the group needed an extra car to go to El Monte and "take care of some business." (57

RT 8897-8898, 8917.) Witness No. 16 agreed to drive, and took Ortiz and Witness No. 14 in his Thunderbird. Logan drove Palma, Torres, and Valdez in his Nissan Maxima. (57 RT 8897-8905.) Witness No. 16 lost sight of the Nissan about a block from appellant's residence before spotting it again as it turned into a driveway on Maxson Road; Witness No. 16 drove past the residence and parked his Thunderbird about two blocks away. (57 RT 8903-8906; 58 RT 9188.) Ortiz got out of the car, walked to the corner, and stood there as a lookout. (57 RT 8906.)

A police car behind Witness No. 16's Thunderbird turned on its lights and drove in the direction of the Nissan. (57 RT 8907-8908.) Ortiz got back into the car, and directed the group to Valdez's apartment in Covina. (57 RT 8908-8909.) They stayed there "briefly," before they went to Torres's home in Alhambra; Torres, Palma, Valdez, and Logan were there, drinking beer and listening to a police scanner. (57 RT 8909-8910.)

Later that night, the group discussed the murders. Palma said that he "had killed the kids and the lady." Valdez indicated that he "had shot two guys"; one man was shot in the head inside the house, the other man was pursued and shot outside. Torres stood by the door with a shotgun "just watching out to make sure nobody would run up from behind." The victims were tricked into believing the shooters were there to purchase drugs. One of the male victims was shot in the head as he was shown a rock of heroin. Witness No. 16 left Torres's home after midnight. (57 RT 8911-8914, 8918.)

Witness No. 16 was contacted by law enforcement about a month or two after the murders. (57 RT 8918.) At first, Witness No. 16 lied and refused to testify during grand jury proceedings, despite a grant of immunity. After he was held in contempt and jailed for eight days, Witness No. 16 consulted with his attorney and agreed to cooperate. (57 RT 8919-8921.) Witness No. 16 was reluctant to testify initially, because he "was scared of, you know, just, you

know, the people that we are dealing with aren't very nice people." (57 RT 8920.) Witness No. 16 was shown People's Exhibit 81, consisting of a photograph of Sangra gang members; Witness No. 16 appeared at the bottom of the photograph, in the middle. Witness No. 16's face had been scratched out, and the number "187" was written across his chest. (57 RT 8924-8925.) The defacement indicated that Sangra gang members "want[ed] to kill [him] . . . [f]or testifying." (57 RT 8925.)

Witness No. 14 was a member of the El Monte Flores street gang; his gang moniker was "Clown." (57 RT 8979-8980.) At the time of trial, Witness No. 14 was incarcerated in state prison for kidnapping and robbery. His prior felony convictions involved the sale of marijuana and cocaine. Witness No. 14 received no consideration by the District Attorney's Office in exchange for his testimony, with the exception of a promise to assist in his transfer to an out-of-state federal facility for "[s]afety concerns." (57 RT 8980-8982; see also 58 RT 9059-9060.) Witness No. 14 agreed to testify because, in his words, "I want to testify and because of these kids dying along with their mother and that is why I am testifying." (58 RT 9041; see also *id.* at pp. 9063-9064.)

A few days before the murders, appellant, whom Witness No. 14 knew as "Pelon," told him to stay away from Gustavo Aguirre because Aguirre was no good. (57 RT 8985, 8998-8999.) Witness No. 14 knew appellant to be a member of the Mexican Mafia. (57 RT 8986.)

At noon on April 22, 1995, Witness No. 14 left work at the Metropolitan Transportation Authority and went to a trailer court in El Monte to purchase heroin in drug territory controlled by appellant. (57 RT 8983-8984, 9007.) He saw appellant down the street. (57 RT 8985.) Appellant invited Witness No. 14 to a baptismal party in Montebello. (57 RT 8985.)

Witness No. 14 arrived at the party between 8:00 and 9:00 p.m. with a girl named "Denise." Appellant was there with some other men, including

Carlos "Diablo" de la Cruz, watching a videotaped boxing match. (57 RT 8986-8989; 60 RT 9332; 1 CT 2.) At some point, appellant received a page and left the room. (57 RT 8989.) Appellant subsequently asked Witness No. 14 to drive him and de la Cruz to appellant's apartment in El Monte. (57 RT 8989-8990.) They got there between 9:00 and 9:30 p.m. and waited inside for about 15 minutes. (57 RT 8991, 8993.) While there, appellant gave Witness No. 14 one piece of heroin outright, and told him to "hold on" to the second piece. (57 RT 8992.) They then went outside and, after about 10 more minutes, a Nissan Maxima drove by and parked at the corner; Jimmy Palma got out and spoke with appellant. (57 RT 8993-8994.) Appellant introduced Palma as a Sangra gang member to Witness No. 14 and de la Cruz, and said, "This is my homeboy, Clown and my homeboy, Diablo. If anything happens to them, contact my homeboy, Diablo." (57 RT 8995-8996.)

Palma told appellant "he was going to take care of business. Not to worry about it. He was going to take care of business." Palma also said that he was "strapped," which meant that he was carrying a gun. (57 RT 8996.) Appellant told Witness No. 14 to give Palma the second piece of heroin. (57 RT 8996-8997.) Palma pocketed the drug and left. (57 RT 8997.) Witness No. 14 returned to the party with appellant and de la Cruz. (57 RT 8997.)

Detective Davis interviewed Witness No. 14 on June 21, 1995. Witness No. 14 made no mention of a baptismal party in Montebello on April 22, 1995. (58 RT 9198.) It was not until March 12, 1996, after yet another interview, that Witness No. 14 first mentioned the party. (58 RT 9200-9201.) Detective Davis drove from the location of the party to appellant's residence, observing the posted speed limit, and completed the trip in approximately 18 minutes. (58 RT 9189-9191.)

6. Deputy District Attorney John Monaghan

Los Angeles County Deputy District Attorney John Monaghan was the prosecutor in four prior proceedings at which Witness No. 14 testified; he "was on this case until August of [1997] when [Deputy District Attorney Anthony Manzella] took over this particular prosecution." (58 RT 9070-9071, 9075.) Neither Mr. Monaghan nor anyone else involved in the prosecution intervened on behalf of Witness No. 14 in any way to reduce or influence the charges filed against him. (58 RT 9072-9073.) Mr. Monaghan merely spoke with high-ranking officials of the California Department of Corrections for the purpose of having Witness No. 14 "housed at a specific institution within the California Department of Corrections so that he would be safe." (58 RT 9073-9074.) Mr. Monaghan also told Witness No. 14 that when Witness No. 14 finished testifying, he "would do what [he] could to have the federal government house [Witness No. 14] within a Federal Bureau of Prisons where he would . . . be safe . . . ." (58 RT 9074.)

7. Witness No. 13 (Anthony Torres's Sister) And Elizabeth Torres

Witness No. 13 is Anthony Torres's sister. (57 RT 8949-8950.) On the Saturday before the murders, while Witness No. 13 was visiting her mother in Alhambra, six to eight Sangra gang members showed up at the house to see Torres; among them were Jimmy Palma and Daniel Logan. (57 RT 8950-8952, 8955.) Palma had the word "Sangra" tattooed across his neck. The men talked in Torres's room. (57 RT 8952.) When Witness No. 13 left after 10:00 p.m., she saw cars parked in the driveway, including a red Thunderbird. (57 RT 8953-8955.)

On April 24, 1995, after Witness No. 13 learned of the murders on the television news, she spoke with her brother. (57 RT 8956-8957.) Torres told her he had been at the scene of the killings, but waited in the car; he claimed

that Palma and Richard Valdez had done the shootings. (57 RT 8957-8959.)

An audiotape of Witness No. 13's prior testimony was played for the jury.[14] (57 RT 8963, 8965.) In it, Witness No. 13 testified that she saw her brother and Valdez at her mother's house between 7:45 and 8:00 p.m. on April 22, 1995. (8 1SCT 1618-1619.) Torres's pager went off, and he made two telephone calls. Logan subsequently came by, along with an older man and a young "kid." (8 1SCT 1620-1621.) Two more men appeared -- one with a "Sangra" tattoo around his neck -- and they all went into Torres's room. (8 1SCT 1621-1622.) Witness No. 13 left; as she walked back to her house, she noticed a Nissan Maxima parked in her mother's driveway. (8 1SCT 1624-1625.)

At around 10:00 that evening, Witness No. 13's mother visited. She said that Torres "was acting weird, that he was kissing her and hugging her and telling her that . . . he loved her and this and that." He also said that "he was told to do something by the [Mexican] Mafia." (8 1SCT 1626.) When Witness No. 13's mother returned to her own house at 11:00 p.m., she saw Torres there, "just being quiet," and not "really saying anything." (8 1SCT 1627.)

Early the next morning, Sunday, Witness No. 13 read about the murders in the newspaper, and discussed them with her mother. The mother indicated that when she said to Torres, "'they killed two little -- two little innocent kids,'" he replied, "'Well, there weren't supposed to be any kids there.'" (8 1SCT 1628.) Torres told her he was there, but that he did not have anything to do with any of the killings or what happened in the house. (8 1SCT 1629.) Torres also said that Valdez and Palma had done the shootings, and that Palma had shot a baby in the mother's arms. (8 1SCT 1629-1630, 1640-1641.)

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14. The audiotape was received in evidence as People's Exhibit 74; a court reporter's transcription of the testimony was provided to the jury and received in evidence as People's Exhibit 74A. (59 RT 9301; see also 8 1SCT 1618-1641.)

Witness No. 13 spoke with her brother about the shootings on Monday. (8 1SCT 1631-1632.) Torres told her that he and his companions were supposed to kill "one guy," but that "they weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them." He confirmed that Valdez and Palma had done the shootings. (8 1SCT 1632.) Torres told Witness No. 13 that because Palma had killed two children, "they were going to take care of him." (8 1SCT 1633.)

Witness No. 13's mother told her that she had noticed a plastic storage tub in the living room that same day. She opened it and found a gun inside. (8 1SCT 1634.) When she confronted Torres about it, "[h]e said that he was . . . going to take care of it, and for her not to worry about it." (8 1SCT 1635.) Torres subsequently moved out of his mother's house to a location in West Covina with a girl named "Lilly." (8 1SCT 1635-1636.)

Elizabeth Torres lived at 323 North Third Street in Alhambra. (57 RT 8974-8975.) On the evening of April 22, 1995, several of her son's friends arrived at the house. They were gone by the time Mrs. Torres left at 9:15 or 9:30 p.m. to sleep at the home of Witness No. 13. (57 RT 8977-8978.)

8. Witness No. 15 (Anthony Moreno's Brother)

Witness No. 15 is the brother of Anthony Moreno and a member of the El Monte Flores street gang. (56 RT 8703, 8712-8713, 8715, 8796.) Witness No. 15 had been an associate, but was never a member, of the Mexican Mafia. (56 RT 8715, 8795-8796.) In 1985, he was "debriefed" while in the county jail in Chino and thereafter stopped associating with the Mexican Mafia. (56 RT 8797-8798, 8802.) Witness No. 15 had been put on a "hit list" as a result of the debriefing, and La Eme subsequently put "hard candy" under his name as a result of his cooperation in this case, meaning "they want[ed him] dead"; there was nothing he could do to "lift" the decree. (56 RT 8799-8800.) Witness No. 15 was the object of five stabbing attempts while in county jail. (56 RT 8832-

8833, 8835.) At the time of trial, Witness No. 15 was in protective custody, "fighting a Three Strikes case . . . ." He was not "offered any help by the District Attorney's Office" in return for his testimony.[15/] (56 RT 8712, 8810-8811, 8813-8815, 8832-8833.)

Moreno used to belong to the El Monte Hays street gang; he had been to prison at least three times. (56 RT 8714-8715.) During one period of incarceration in 1969, Moreno began associating with the Mexican Mafia. He became a member in 1972, while in San Quentin. Witness No. 15 was his cell mate at that time. (56 RT 8715.)

Witness No. 15 knew Raymond Shyrock, or "Huero Shy"; Witness No. 15 was in San Quentin with Shyrock from 1972 through 1977, when Witness No. 15 was paroled. Shyrock became a member of the Mexican Mafia in 1972, the same time as Moreno. (56 RT 8716-8717.) Moreno dropped out of the Mexican Mafia in 1983 and terminated his activities with the gang. (56 RT 8716, 8800-8801.) According to Witness No. 15, "[a]nybody who drops out, it is a mandatory death sentence." (56 RT 8760.) Witness No. 15 had warned Moreno "that something was going to happen," but Moreno insisted that "Shyrock was not a threat to him because he knew him for so many years." (56 RT 8761.)

Witness No. 15 also knew appellant. Appellant "used to be a personal friend of [Witness No. 15's] family at one time." (56 RT 8715.) His street name was "Pelon." (56 RT 8721.) Shyrock "put [appellant] in [the Mexican Mafia] in 1995"; appellant "told all the homeboys from the neighborhood several times." (56 RT 8721.) Appellant was proud of being a member and said he was "going to put in a lot of work." (56 RT 8721-8722.)

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15. Witness No. 15 was eventually sentenced in his Three Strikes case to credit for time served. (66 RT 10246-10247.)

In January 1995, Witness No. 15 was paroled from state prison and returned to his home on Loma Street in South El Monte, where he lived with his wife and children. (56 RT 8717.) From the day Witness No. 15 was released until the day his brother was murdered, the two men "would run around together . . . ." Moreno lived in a house on Maxson Road with his sister Maria Moreno and her five children. (56 RT 8718-8719.) Shyrock lived two apartments away, on the same street. (56 RT 8719.) Prior to that time, Moreno lived in the same apartment building as Shyrock, with two younger brothers, a "little sister," and his mother and father. When Witness No. 15 visited, he would see Shyrock "every morning at 7:00 or 8:00 . . . ." (56 RT 8720.) Witness No. 15 also saw appellant and Shyrock together "[p]eriodically from time to time." (56 RT 8722.)

Moreno and Witness No. 15 injected heroin, and committed crimes to support their addictions; Moreno would receive money for his stolen goods from a "fence" who operated a barber shop in Arcadia, across the street from an Edwards movie theater. (56 RT 8722-8727, 8764, 8745, 8767-8774.) Gustavo Aguirre, "a personal friend of [the] family," was also addicted to heroin. (56 RT 8723.) On April 22, 1995, at about 2:30 p.m., appellant and two men between the ages of 19 and 21, wearing oversize T-shirts, tennis shoes, and baggy jeans visited Moreno and Witness No. 15 at Moreno's Maxson Road residence. (56 RT 8727-8729, 8802-8807.) One of the men had an "EMF" tattoo on his arm and was presumably an El Monte Flores gang member. (56 RT 8729, 8807.) Appellant and Witness No. 15 talked near a sliding door to the garage of the home. (56 RT 8729-8731.) The other men were "very quiet," but appeared to be "casing out the location." (56 RT 8739-8740.)

Appellant told Witness No. 15 that he had come by "just to greet [the family] and ask . . . how [they were] doing . . . ." He gave Witness No. 15 and Moreno each a quarter gram of heroin and his pager number. (56 RT 8735.)

The heroin had a street value of 25 to 35 dollars. (56 RT 8736.) Aguirre was in the house, watching television with Maria Moreno and three of her children. Two other children -- Jose, 12 years old, and Laura Moreno, 5 years old -- were in the back yard "playing on the swings." (56 RT 8733-8734, 8738-8739.)

Witness No. 15 and Moreno, who had been "fencing" stolen property all day, told appellant they had "r[u]n out of money" and would pay him as soon as possible. (56 RT 8737-8738, 8767-8769.) Appellant said "don't worry about it[, they] didn't ow[e] him anything." Witness No. 15 found appellant's generosity "very unusual." (56 RT 8737-8738.) Witness No. 15 was afraid the heroin might be a "hot shot" containing poison, so he tried a small quantity first, with no ill effect. (56 RT 8792-8793.)

Witness No. 15 was aware of Aguirre's activities "with regard to drug dealers and the El Monte area," and knew that Aguirre and Tony Cruz, also known as "Cruzito," were robbing drug connections periodically. (56 RT 8741-8742, 8825-8826.) Those drug dealers paid "taxes" to the Mexican Mafia. (56 RT 8743-8744, 8829-8830.) Shyrock told Witness No. 15 that "he was tired of both of them disrespecting him and robbing dope connections and that sooner or later they were going to pay for that." (56 RT 8744, 8751-8752.)

At 6:00 p.m., Witness No. 15 drove Moreno and Maria to Covina Community Hospital to visit a niece, who was being treated for a throat infection. (56 RT 8759.) They stayed at the hospital until 9:00 p.m., and returned to the Maxson Road residence at 10:00 p.m. (56 RT 8759-8760.)

The morning after the murders, Witness No. 15 attended a meeting with Shyrock in Lambert Park; the meeting was arranged by Officer Marty Penny of the El Monte Police Department. (56 RT 8752, 8816-8818.) Witness No. 15's brother, Joseph Moreno also attended. (56 RT 8753.) Officer Penny told the men:

I'm going to let you guys talk in privacy [sic] if you can work this thing out because I want you to know that I don't want you having bad feelings whether he did this or not.

I want you talk to Huero Shy . . . .

(56 RT 8753-8754.)

Out of the officer's earshot, Witness No. 15 asked Shyrock if he had anything to do with the murders and Shyrock said "that he was sorry to hear about that and he seen [sic] it on the news that morning at 5:00." (56 RT 8755.) Shyrock offered his condolences and said he "would have done it in another way, if he had something to do with it." Shyrock told Witness No. 15 that he did not regret the killing of Aguirre, however, and remarked, "That bastard. He was forcing me to kill him or do something to him so I don't feel bad about him dying." (56 RT 8755-8756.) Witness No. 15 "knew" Shyrock "was lying at the time" when he denied involvement in the murders. (56 RT 8818.)

9. Gang Expert Testimony

Sergeant Richard Valdemar was a Sergeant with the Los Angeles County Sheriff's Department, assigned to the Special Investigation Bureau, Prison Gang Section. (55 RT 8485-8486, 8495) Sergeant Valdemar and his colleagues investigated the four largest prison gangs in Southern California: the Mexican Mafia, the Nuestro Familia, the Aryan Brotherhood, and the Black Guerilla Family. The term "Mexican Mafia" is a term given to that gang by the members themselves. (55 RT 8486.) At the time of trial, the Mexican Mafia had about 250 active members. (55 RT 8513.)

During the course of his 27-year career with the Sheriff's Department, Sergeant Valdemar interviewed "[m]aybe a thousand" gang members. (55 RT 8486, 8506.) Sergeant Valdemar taught other law enforcement officers about prison gangs, lecturing as a staff member at the Los Angeles County Sheriff's Department Advance Officer Gang School. (55 RT 8504.) Sergeant Valdemar

also lectured about prison gangs to other law enforcement agencies, including the San Bernardino and Orange County Sheriff's Departments, the California Department of Corrections, the California District Attorney's Association, and the California Narcotics Officers Association; in addition, he taught the subject at schools and colleges throughout the United States. (55 RT 8504-8505.) Sergeant Valdemar wrote the introduction to Gangs, Understanding Street Gangs, a book authored by Al Valdez, an investigator with the Orange County District Attorney's Office, and was mentioned in the credits of Barrio Gangs, written by Dr. James Diego Vigil of the University of California at Los Angeles. (55 RT 8505.)

Sergeant Valdemar was also deputized as an agent for the Federal Bureau of Investigation ("FBI"), and worked with the Metropolitan Gang Task Force, which was comprised of members of the FBI, the Los Angeles Police Department, the Sheriff's Department, and the California Department of Corrections. In 1994, the Task Force was responsible for the prosecution of 22 members and one "close associate" of the Mexican Mafia; Sergeant Valdemar testified as the prosecution's expert witness in that case. (55 RT 8497-8498.)

The Mexican Mafia, or "La Eme," has "standards that all members are expected to obey." (55 RT 8509.) Members must show loyalty to the gang above anything else, including their own street gang, their family, and God. In addition, members may not show weakness or cowardice; may not criticize fellow members; may not cooperate with law enforcement; and may not disclose their membership to others. (55 RT 8509-8510.) There is only one rank in the Mexican Mafia, and that rank is "carnal," which is Spanish for brother. (55 RT 8510, 8535.) A member sponsors an individual's entry into the Mexican Mafia by "raising his hand." (55 RT 8527-8528.) The sponsor pays close attention to his charge, and instructs the recruit how to conduct himself as a member of the Mexican Mafia. (55 RT 8527.) In addition to its

members, the Mexican Mafia has an "army" of "associates," consisting of the various Hispanic street gangs under its control; an associate is commonly referred to as "camarada," or comrade. (55 RT 8510, 8520-8521.) Finally, there are sympathizers consisting of friends and family, who relay messages, take money, and deliver drugs on behalf of the gang. (55 RT 8521.) Sergeant Valdemar would expect such sympathizers to take the witness stand and lie on behalf of Mexican Mafia members accused of crimes. (55 RT 8521-8522.)

There are several community gang organizations that hire ex-gang members to head their programs. Sergeant Valdemar discovered that such ex-gang members often have not disassociated themselves from the gang, and support the position of the Mexican Mafia. (55 RT 8538.) One such organization, "The CAUSE," is led by Albert Juarez, a Mexican Mafia associate released from Pelican Bay state prison, who claimed to intervene in and mediate gang disputes. (55 RT 8538-8539.)

The Mexican Mafia is funded by "taxes" imposed on Hispanic street gang members and drug dealers who operate in Mexican Mafia territory. With respect to drug dealers, the tax typically amounts to one-third of the dealer's income; it may also be paid in drugs, weapons, or vehicles. (55 RT 8511-8512.) Drug dealers operating under the protection of the Mexican Mafia would expect to be free from robbery or other violence perpetrated by street gang members. The sanction for violating that protection would be death. (55 RT 8512.) The Mexican Mafia also orchestrates the transfer of drugs from the street to prisons and jails throughout California and the Southwest. (55 RT 8512.)

In Sergeant Valdemar's experience, the term "drop out" refers to a person who has been a member of a prison gang and wishes to disassociate himself from that gang. (55 RT 8501.) Prison correctional staff familiar with gangs typically debrief such individuals at length, and then share any

information obtained with law enforcement officials. (55 RT 8502-8503.) The Mexican Mafia does not permit its members to drop out; its slogan is, "Blood in. Blood out." According to Sergeant Valdemar, that means "you spill blood to come in and your blood will be spilled if you try to leave." (55 RT 8510.) People who attempt to disassociate themselves from the Mexican Mafia wind up on a "hit list or green light list," which means they are "fair game" for any Mexican Mafia member who has the means to kill them. (55 RT 8510-8511.) "Once a person is put on the green light list, he is there for life unless he can do something to amend it," such as "killing somebody else . . . ." (55 RT 8517.) A Mexican Mafia member may be killed only by another member. (55 RT 8510.) A member of La Eme who has an opportunity to kill someone on the hit list, but does not take action, risks being placed on the list himself. (55 RT 8516, 8568.) The passage of years does not reduce the obligation of a gang member to kill someone on the hit list. (55 RT 8517.)

The Mexican Mafia sometimes uses a person who is being considered for membership, or a new member, to commit murder as a test of the person's fortitude, courage, and fighting ability. If a member is unavailable, close associates are called upon to carry out killings as a way of earning their "bones," or status with the prison gang. (55 RT 8525.) The gang frequently directs that such murders be carried out using "overkill," as in, for example, multiple wounds inflicted by multiple assailants. (55 RT 8524.) The Mexican Mafia also engages in extreme brutality, such as close-range gunshots, "to send a message to anyone who would dare disrespect the Mafia in the future." (55 RT 8524, 8540.) La Eme often uses friends or family members of the victim to accomplish the killing; sometimes the victim is drugged in order to compromise his awareness and ability to resist. (55 RT 8524.)

Although the Mexican Mafia is a relatively small gang, its influence over Hispanic street gang members in Southern California is profound and wide-

ranging. Sergeant Valdemar had seen Mexican Mafia members "enter into rival gang areas and confront hundreds of opposing or rival gang members and walk with im[p]unity through them, slap them, embarrass them, point guns at them, without repercussion." (55 RT 8513-8514.) Membership in the Mexican Mafia is a "quantum leap" above membership in a street gang; Mexican Mafia members are "able to order and command street gang members throughout Los Angeles, which constitutes . . . about 84,000 Hispanic gang members." (55 RT 8514.) The Mexican Mafia exercises such influence because "[e]very Hispanic street gang member expects in his gangster career to probably be arrested and have to do time in . . . either . . . a juvenile, county or state facility. [¶] And he knows that the juvenile, state or county facility is completely controlled by the Mexican Mafia. [¶] So if he offends the Mexican Mafia or does anything in contrast as opposed to the power and respect of the Mexican Mafia, he can expect to be dealt with in that facility." (55 RT 8515.) In fact, during his investigation of prison gangs in 1994, Sergeant Valdemar often heard Mexican Mafia members refer to the Los Angeles County Jail as "headquarters." (55 RT 8515-8516.)

In Sergeant Valdemar's opinion, the Mexican Mafia was using Hispanic street gangs to carry out its directives in the San Gabriel Valley in 1995. Those directives included murder. (55 RT 8518.) During an investigation that culminated in April 1995, Sergeant Valdemar and the Metropolitan Gang Task Force surreptitiously videotaped 18 meetings of Mexican Mafia members; most of those meetings occurred in hotel rooms. (55 RT 8519-8520.) Sergeant Valdemar personally monitored 12 to 14 of the meetings. (55 RT 8519, 8571-8573.) The Task Force used informants to book hotel rooms adjacent to the meetings so that electronic videotaping equipment could be installed. (55 RT 8520, 8525-8526.)

One such gang participant was Raymond Shyrock, also known as "Huero Shy." Sergeant Valdemar had known Shyrock for approximately 15 years, having come in contact with him while a police officer. (55 RT 8528-8529.) Shyrock was one of several non-Hispanic members of the Mexican Mafia, and was responsible for the San Gabriel Valley, including El Monte. (55 RT 8531.) A videotape of a Mexican Mafia meeting that Sergeant Valdemar electronically monitored on January 4, 1995, was played for the jury.[16] (55 RT 8555-8556.) The transcription reads in relevant part:

> U And, you know that -- I don't know if ever heard of this brother named like Dido from, uh, Puente ***.
>
> U Who?
>
> U Dido.
>
> U Dido or Dino?
>
> U Dido.
>
> U Dido.
>
> U He dropped out a long time ago. Anyway, where I was living, we were in a monthly apartment, before I moved. The mother fucker was living right downstairs, all right, in an apartment -- and -- and I never -- he never came up.
>
> Well, after I moved, and he started showing his face, so somebody seen him and told me about it. So -- but, there's all kinds of people in the pad. There's a whole bunch of youngsters. And -- and kids. And all kinds of shit.
>
> So, I'm trying -- I got to figure out how to, uh -- I -- I -- well, I need a silencer is what I need.

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16. A portion of the videotape was received in evidence as People's Exhibit 118; the transcription of that portion of the videotape was provided to the jury and received in evidence as People's Exhibit 118A. (59 RT 9301; see also 8 1SCT 1642-1643.)

U What do you what? I got a ***.

U And then that dude -- he's hanging around with that girl Corzito from Norwalk.

U What's he doing with her?

U Yeah, I know that. And he's hanging with Corzito, man, in Norwalk, eh.

U Hi. ***, yeah.

U There both -- their hangout is right.

U That's where he lives at -- El Monte. El Monte, yeah.

U ***. But, the thing is, I think I should get ***. ***.

I never. See, now, I don't want to -- I just want to kill him, not the little kids.

(Unintelligible background voices are heard.)

U Now, I got Pico ***.

U Whatever it takes.

U Get ahold of Batos.

U Did they cut you loose that day, ***?

U Whatever it takes, and --

U Together in September. You can get ***.

U Hey, Tony?

U Yeah.

U I want -- *** wants to rate your papers.

T For what, Holmes?

U Twenty.

U It -- uh, depending on -- on the -- on the quality of ***, you know --

U Oh, ***.

U -- it's a name brand.

U Yeah.

U And after that, it really doesn't matter. Uh, 200, 250 for each gun. 300.

. . . . . .

(8 1SCT 1642-1643, asterisks in original.)

Sergeant Valdemar identified Shyrock as the individual in the videotape who stated, "I just want to kill [Anthony 'Dido' Moreno]." (55 RT 8528, 8556.) After the meeting, Sergeant Valdemar sought unsuccessfully to determine the identity of the "Dido" mentioned by Shyrock; he belatedly learned after Moreno's murder that Dido was Moreno's alias. (55 RT 8561.) Shyrock's explicit directive that the children living with Moreno not be harmed was consistent with the Mexican Mafia's policy since 1991, which prohibited the killing of innocent women and children.[17] (55 RT 8584, 8594-8595.) A street gang member who participated in an act which resulted in the death of a child would be placed on a "hit list." (55 RT 8585.) Jimmy Palma, the "trigger man" in this case, was convicted of murder and sentenced to death. (55 RT 8585-8586, 8603.) Palma himself was murdered while on death row at San Quentin State Prison. (55 RT 8586.)

Sergeant Valdemar first became aware of appellant, also known as "Pelon,"[18] when appellant walked into an electronically-monitored meeting that occurred on April 2, 1995; appellant was a member of the El Monte Flores street gang. (55 RT 8530, 8559.) A videotape of the meeting was played for

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17. A hit that resulted in the deaths of innocent people, including women and children, would be considered a "dirty hit," and would not be "in keeping with the supposed positive image of the Mexican Mafia . . . ." (55 RT 8593.)

18. "Pelon" means bald-headed. (56 RT 8721.)

the jury, during which Shyrock raised his hand as appellant's sponsor.[19] (55 RT 8556-8558.) Unidentified participants voiced concern that they did not know appellant well enough to admit him, and also objected that the group had closed its ranks to new members. Shyrock countered that appellant had already taken care of a "lot of business" for the gang, and had "downed a whole bunch of mother fuckers." He also indicated that appellant had "taken care of" one of his own "homies" who had killed a one-year-old baby. (See 55 RT 8559.) While the meeting was in progress, appellant arrived and was asked to wait outside while his membership was discussed. The transcription of the meeting reads in relevant part:

> . . . [¶] U Let me -- let me talk -- want to say something 'cause ***
>
> U All right, go ahead.
>
> U So I wanna get that out of the way real quick. There's this dude, Pelon. Pelon has been working with me for about --
>
> U ***
>
> U Yeah. And the *** is the one that cut me into him. When I got out *** got busted. This is the Vato[20] that he *** For a year I've been working real close with him, and this dude has gone way above and beyond the call of duty. Man, this mother

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19. The videotape was received in evidence as People's Exhibit 119; the transcription of the videotape was provided to the jury and received in evidence as People's Exhibit 119A. (59 RT 9301; see also 8 1SCT 1644-1672.)

20. Sergeant Valdemar testified to various phrases that were used during the course of the videotaped meeting that have particular meaning to prison gangs and Hispanic street gangs. The word "Vato" means "guy." (55 RT 8534-8535.)

fucker is sharp, he's taken care of a lot of business[21/] and I wanna make ***

I don't raise my hand[22/] for a lot of dudes. You know, it's not something I just go around doing, and when I do it ta -- it takes somebody, it takes something special.

I'm not saying everybody I raised my hand for is still around. There's a -- there's a couple of them that have dropped out, 'cause, I mean, you know, I haven't raised my hand for that many for it.

I -- I know the Vatos don't know him, but take my word for it, the mother fucker's down.[23/] I'm not talking about just violence either. Okay, you know, he takes care of business real good and he's downed a whole lot of mother fuckers in the last year. And he went against his whole neighborhood for us.[24/] He's been fighting with them and downed them. And when -- when that one-year-old baby, one of his homies killed that one-year-old baby a few months ago, he's the one that took care of them.

U *** brother.

U This, year, you know. So I'm raising -- he's on his way

---

21. The phrase, "taken care of a lot of business," means that the person has engaged in gang activity in furtherance of the gang. (55 RT 8535.)

22. The phrase, "raise my hand for," signifies that a member is giving his word for, or sponsoring a potential recruit. (55 RT 8535.)

23. The phrase, "down," means that the person is involved in gang life and does things to further that lifestyle. (55 RT 8535-8536.)

24. If a gang member "went against his whole neighborhood," he took a position that benefitted the Mexican Mafia, but was contrary to the interests of his own gang. (55 RT 8536.)

down here right 'cause I want everybody to meet him face to face and not --

U Well, who is this guy?

U His name is Pelon.

U Pelon from ***

U ***

U Okay, but there's one thing that, you know, I'm not gonna rock nothing. I already told you how I felt when we talked. A brother just came down from Pelican Bay, he brought the word down here that *** they want us *** with them, they wanna *** right now.

But, you know, we don't have to do -- we do what we wanna do out here 'cause we're brothers[25/] out here. *** they don't run our programs and we don't run their programs, you know.[26/]

. . . . . .

U Okay. But -- and I agree with it. I agree with it. But -- and I'm not saying that, okay, well, I should get any special treatment, but I'm saying this dude has asked for nothing. And, you know, he's not ready to say anything, he just does what he does because he's here, you know. And I ***

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25. The term "brothers" refers to Mexican Mafia members. (55 RT 8537.)

26. The phrases "run their program" and "run our program" refer to the fact that the Mexican Mafia gives people confined in a particular facility autonomy to run that facility. (55 RT 8537.)

So I'm just asking for a vote to make him a *** and then if who wanna talk about closing the votes,[27/] we can do that.

U Yeah, I was gonna saying something about that *** Yeah, I got -- I'm not saying yeah or no to it, but what I am saying, though, this decision, if we say yes to it, you know, it -- it's happening before we decide on that on closing the votes, anyway. You know what I mean? It, you know, came up before that, so I just feel, you know *** in or not, we should put the vote up first before we decide on closing the book, because this came up first.

U Well, let me -- let me explain to you, Vatos, what's happening over there *** why it came out like that. Okay, I don't know if you brothers are aware of it, but over there in Pelican Bay *** he's got within *** There's dudes that are making brothers, you know, just -- it be like the way that guy came this year, you know. There's a -- there's a couple incidents, a dude -- a dude, made a dude a brother, and it's the guys in another pod, you know, hey dude *** this guy. *** Well, yeah, you know. And the brothers still said there's brothers that are building a clique around them, you know what I'm saying? And there's dudes that are being -- that are being made brothers and the other people that all the rest of us don't know, you know, and guys that are home boys know 'em, you know. It's just *** for six months, and, you know, and he likes the way the dude talks, you know, and everything, but he makes them a brother.

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27. The phrase, "closing the votes," or "closing the books" means that the Mexican Mafia is not accepting new members. (55 RT 8536-8537.)

There's dudes up there in Pelican Bay that they're with us for ten, fifteen, twenty years, and they ain't even brothers, and they got – they got a lot more *** And a lot of them Vatos ***.

And, you know, and there's a -- a few brothers, there's no -- there's no need for me to mention their names, but everywhere they go they're *** three and four brothers. You know what I'm saying? A guy goes to county jail and meets two brothers, *** a couple brothers. A guy goes to -- to Tehachapi, he leaves a brother there, a couple brothers.

Every place these dudes, I mean, he's making these *** brothers, you know.

And then there's dudes' names, that are being named brothers that have already been considered and -- and *** and *** And then there's -- and then there's a couple other dudes *** behind 'em, you know -- you know, none of them serious hits, like *** you know, material. *** you know, dudes are making 'em brothers.

So if they wanna -- if they wanna hook up with all of us, and *** all of us to hook up with them, and when somebody -- when we consider somebody, everybody should get -- you know, get –

U ***

U But the main thing is there's a few dudes that hates you that are brothers right now that -- that -- that *** were a mistake.

. . . . . .

U But -- but we can go back to -- I don't agree, 'cause the way things are right now, how -- how can we -- how can we go back to having everybody go with the way Pelican Bay is. It

takes three or four months just for somebody to get -- get a --

U Or sometimes not at all, man.

U -- a -- a, you know. Yeah, sometime *** get 'em ***

U Yeah.

U So *** it needs to start.

U *** Can we turn that T.V. off?

U That's Pelon.

U ***

(Blank in tape).

(Unintelligible voices).

U Another ***.

U ***

U It is ***

Yeah, we're -- we're -- we're discussing something right now, so if you wanna go on out or just come back later.

U All right.

U *** business.

U Yeah.

U There's a bar downstairs.

. . . . . .

U Be- -- because remember before when we used to know the dude, we knew him from Y.A.,[28/] we knew his track record. You know, we know when he was in *** and all like that, before he even got to the pen everybody knew him or knew something about him or heard about him, you know.

U Yeah.

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28. "Y.A." refers to the California Youth Authority. (55 RT 8537-8538.)

U And now we got dudes, man, we don't even know about 'em, nobody heard about, you know. But a guy -- a guy goes in the county jail and a guy's got girls and, you know, he's *** real good right there in the county jail, but now I'm gonna make him my brother, you know.

U Where the mother fucker stabbed somebody one time and all of a sudden ***

. . . . . .

U Okay. Well, anyway, that's another issue. Like -- well, like I said right now, I would like to bring this dude in because I've brought it up before this came up and I would like to -- and -- and I think he would an asset to us, not just because of any violence, any violence that he's done, he's got to go ahead. And he don't need nobody to hold his hand. You know, I don't have to hold his hand.

U But how about if given *** how many brothers here know the guy?

U Nobody here knows him.

U Well, see, that's the thing. How about giving some of these other brothers a chance to -- to know the dude?

. . . . . .

U -- one of the problems, your brothers are not getting a chance to meet these other dudes, you know what I'm saying. Before a dude was a brother, four or five brothers knew him. You know, ***?

. . . . . .

U Well -- see, this -- this is another thing of -- of -- of voting against somebody, you know, because -- just because you don't

know him. But the -- the -- the point here I'm trying to *** here is give us a chance, the rest of the brothers a chance to know him.

U Yeah, well, by then the votes are gonna be closed.

U The votes is supposed to be closed now.

U Not -- not out here they aren't. ***

. . . . . .

U No, what I'm saying is, okay, everybody say, well, let's make this dude *** let a few brothers get to know him *** then it'll come to a vote.

. . . . . .

U I have said what I can say towards the Vato, you know. All -- all I can do now is let you Vatos decide. So let's vote.

. . . . . .

U His deeds. Know about his deeds, know about the person what -- what he's about.

U *** running with him.

U ***

U *** his deeds or what he's --

U Yeah, he doesn't have to *** anything else anymore *** You know, he's earned enough.

U Because he's -- he's earned everything. I never would have brought it up ***

. . . . . .

U *** looked at things like that. It's like, you know *** The person that's bringing somebody in, you know, *** you know.

U ***

U What the brother right here is saying is exactly what I told

Huero Shy before everybody got here. I told Huero Shy that all -- all of these *** the way I respect Huero.

U Uh-huh.

U If Huero says he's a helluva mother fucker, then he's a helluva mother fucker. *** that's -- that's me. You know, he's got my vote, I already gave it to him and I'm not gonna take it back.

U ***

U Huero's been running around with him for a year, Frankie's been running around with him before x-amount of time *** talk to him before *** the -- the meetings before about this dude ***

. . . . . .

U This dude, he does -- I do know a lot of people that know him. Nobody in this room, of course. And he -- he -- the guy was recommended to me by other carnals, a couple of them, and I've been watching him and doing things with him for a year myself. And I'm basing what I'm saying, not just on what he's did over this year with me but on things that I know about him from the past from other people, you know. And -- and I -- I think it's time, the dude deserves it, man, he's got it coming. And I'm not just going on -- on things he's done for the violence. Yeah, he's downed a whole bunch of mother fuckers, he's got a good head on his shoulders.

U All right. So -- so we don't go over the issues over and over, over again. Like he said, let's go ahead and *** decide on -- on that now.

(8 1SCT 1644-1664, asterisks in original.)

Appellant was eventually invited back inside and welcomed into the Mexican Mafia. (8 1SCT 1671-1672.)

10. Telephone And Pager Records

a. Appellant's Pager Records

Pager records for Expo Electronics were introduced into evidence, showing a pager contract for the number (818) 710-4921, in the name of Luis Maciel.[29/] The pager was activated on March 29, 1995, and was operative the entire month of April 1995. (59 RT 9228-9233.)

b. Telephone Records Of Calls From The Gomez Residence

On April 22, 1995, three telephone calls were made to appellant's pager from the home of Soccoro Gomez, Jose Ortiz's mother. The calls were placed at 10:51 a.m., 12:20 p.m., and 8:44 p.m. (59 RT 9212-9218.) On April 23, 1995, two calls were made to appellant's pager, at 9:30 a.m. and 9:35 a.m., respectively.[30/] (59 RT 9218.)

c. Telephone Records Of Calls From The Torres Residence

Five telephone calls were made to appellant's pager from the home of Elizabeth Torres, Anthony Torres's mother, on April 22, 1995, at 9:21 a.m., 9:22 a.m., 9:30 a.m., 10:59 a.m., and 11:00 a.m. (59 RT 9218-9219.) On April 23, 1995, calls were made to appellant's pager at 12:52 p.m. and 2:53 p.m.[31/]

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29. The pager contract was received in evidence as People's Exhibit 131. (59 RT 9229, 9301.)

30. A record of the telephone calls from the Gomez residence was received in evidence as People's Exhibit 130A. (59 RT 9214, 9301.)

31. A record of the telephone calls from the Torres residence was received in evidence as People's Exhibit 130B. (59 RT 9214, 9301.)

(59 RT 9219.)

d. Telephone Records Of Call From The Palma Residence

On April 22, 1995, a telephone call was made to appellant's pager from the home of Valerie Palma, Jimmy Palma's sister, at 2:47 p.m. Calls were made to the pager the next day at 2:48 p.m. and 2:57 p.m.[32] (59 RT 9220.)

11. The Interview Of Anthony Torres

Sergeant John Laurie of the Los Angeles County Sheriff's Department interviewed Anthony Torres on May 16, 1995. (59 RT 9255-9256.) Torres told Sergeant Laurie that he had gone to the victims' house on the day of the murders and given them some "carga," which Torres explained was heroin. Torres saw children at the house and told the residents that he would be back later to sell them heroin. (59 RT 9262-9263.)

12. The Audiotaped Interview Of Appellant

Sergeant Laurie also interviewed appellant on December 16, 1995, following appellant's arrest; Detective Davis was present during the interview. A redacted audiotape of appellant's interview was played for the jury.[33] (60 RT 9309-9311, 9314.)

Appellant went by the name "Pelon." He admitted that he was a member of the El Monte Flores street gang, but denied being a "carnal," or member of the Mexican Mafia. (8 1SCT 1675, 1679-1680.) According to appellant, he

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32. A record of the telephone calls from the Palma residence was received in evidence as People's Exhibit 130C. (59 RT 9214, 9301.)

33. The redacted audiotape was received in evidence as People's Exhibit 132; the redacted transcription of the interview was provided to the jury and received in evidence as People's Exhibit 132A. (60 RT 9305, 9314; see also 8 1SCT 1673-1704.)

merely ran "little errands here and there for [the Mexican Mafia]," such as paying for lawyers' fees. (8 1SCT 1675; see also *id.* at p. 1677.) Appellant told Sergeant Laurie that his "name came up in a list" to be "taken out" at one point because the Mexican Mafia believed he had falsely claimed to be a member. (8 1SCT 1677-1678.)

Appellant acknowledged that he knew Raymond Shyrock "real good, he's a friend of mine." Appellant would do favors for Shyrock "if he needs a couple things for him and that's about it." (8 1SCT 1679.)

Appellant was "in an organization call[ed] 'The CAUSE,'" an acronym for "Cultural Awareness United Special Efforts." (8 1SCT 1676, 1701.) According to appellant, CAUSE had "nothing to do with [La Eme]," but was instead involved "in meetings with the street gangs . . . [trying] to [c]ut down the violence . . . ." (8 1SCT 1676-1677.) Appellant was aware of most street gangs in the San Gabriel Valley, was friends with a "homeboy" named "Diablo," and also knew a member of the Sangra gang. (8 1SCT 1678, 1680-1681.)

Appellant denied that he had ever met Anthony Torres, Jimmy Palma, Jose Ortiz, or Daniel Logan, and claimed that he was not "involved in that [Maxson] shit." Appellant said that Palma's name in particular was "all fucked up all over the streets," and that he was "up there with . . . some of [appellant's] friends . . . in the 'high power.'" (8 1SCT 1682, 1685-1686.)

Appellant was supposed to meet with Richard Valdez in connection with a "peace treaty" after a Sangra member had been killed by a member of the El Monte Flores gang; however, the meeting never took place. (8 1SCT 1687-1688.) Appellant had also talked to Torres on the telephone at the beginning of April, after Torres contacted him through his pager. (8 1SCT 1689-1690.) Appellant had "heard of [Torres and Valdez]" and knew they were "running the neighborhood . . . ." (8 1SCT 1688.)

Appellant denied committing or arranging the murders; he told Sergeant Laurie, "fuck I ain't draw -- I ain't falling for this shit," when questioned about his involvement. (8 1SCT 1673; see also *id.* at pp. 1675, 1682, 1690, 1696, 1699-1700.) Appellant claimed he was baptizing his son that day. (8 1SCT 1682-1683, 1691.) Appellant learned of the murders after he returned home between 10:30 and 11:00 p.m. (8 1SCT 1683-1684.) He was close with the "whole family," including "Joe Moreno, Barbara, the kids, . . . 'Dido,' . . . the mom, the uncle, the son, everybody." (8 1SCT 1683.) Appellant spoke the next day with several of the surviving family members and "got some money together, [and] gave it to the family for the funeral thing." (8 1SCT 1684.)

Appellant eventually admitted, however, that he was a "middle man," who was told "[t]o get a hold of this person to tell them that they know what and that's it." "Just ask me to get a hold of these people, you, you know and they know you don't gotta do nothing, just tell them that I said that's it, alright homes, homie told me to tell you this and this and this and that, you know -- yeah, we know -- and that's it." (8 1SCT 1696.) Appellant refused to disclose any more information about the murders because, as he stated, "My kids, my wife, I mean they'll all be all fucked up, because of me." (8 1SCT 1698.)

Toward the end of the interview, Sergeant Laurie and Detective Davis warned appellant that he should "give . . . some real thought to [his] own personal safety, because . . . [they had] talked to some folks about [his] affiliation and . . . some people [were] pissed off at [him]." (8 1SCT 1694.) Sergeant Laurie remarked that appellant had "got[ten himself] into a real bind." (8 1SCT 1695.)

B. Defense

1. Maria Maciel

Maria Maciel is appellant's sister. (60 RT 9317-9318.) She was not a gang member or affiliated with any gang. (60 RT 9323.) On April 22, 1995, Ms. Maciel was living with appellant, his wife Monique, and their three sons in El Monte. (60 RT 9318.) At 7:00 a.m. that day, Ms. Maciel was awakened by appellant and his wife "making kind of a lot of racket," getting their child ready for his baptism. (60 RT 9319-9321.) Appellant departed between 9:00 and 9:30 a.m., and Ms. Maciel was "left . . . baby sitting . . . the two older boys." (60 RT 9320-9321.)

Appellant did not receive any pages before he left, nor did Ms. Maciel have a telephone in her residence. (60 RT 9321-9322.) Ms. Maciel did not see appellant again until about 2:00 p.m. at the godparents' house in Montebello, where the baptism party was held. (60 RT 9322.) She was picked up and driven there by Carlos de la Cruz. (60 RT 9323.) At the party, appellant "was barbecuing and Monique was . . . feeding everybody . . . ." (60 RT 9324.) There were "10 or so" children, and "20 or so" adults. (60 RT 9325.) Ms. Maciel left the party at approximately 8:30 p.m. Appellant was there the entire time. (60 RT 9325-9326.)

During the party, appellant used the house telephone several times, in an attempt to determine why Ms. Maciel's mother and sisters had not made it to the party. Ms. Maciel learned that her sister had accidentally run over her niece and taken her to the hospital. (60 RT 9327-9329.) Ms. Maciel did not see appellant use a cellular telephone. (60 RT 9340.) Ms. Maciel was never introduced to Witness No. 14, nor did she see any of appellant's friends that she did not know. (60 RT 9330.) Ms. Maciel did not know a girl by the name of "Denise." (60 RT 9331.)

Ms. Maciel was engaged to Jimmy Palma "way after" the murders and up to the time of his death; she met him while visiting appellant in jail. (60 RT 9331-9332, 9341.) Ms. Maciel knew that Palma was a member of the Sangra street gang. (60 RT 9331-9332.) Ms. Maciel knew that de la Cruz "[c]ould be" a member of the El Monte Flores street gang, with the street name "Diablo." (60 RT 9332.) Ms. Maciel also knew that appellant was a member of the same gang, with the street name "Pelon." (60 RT 9333-9334.) Appellant never informed Ms. Maciel of his gang activity, because "[t]hat [was] something that [she] wouldn't want to know." (60 RT 9335-9336.) She would not "expect [appellant] to tell [her] anything that has to do with gangs." (60 RT 9339.)

Ms. Maciel was aware that appellant used cellular telephones, and that he possessed two or three such telephones at his residence in April 1995. (60 RT 9333.)

2. Monique Pena

Monique Pena is appellant's former wife; they have three children. (60 RT 9386-9387.) They lived in an apartment on Rose Avenue in El Monte, until appellant moved out in November 1995, due to "marital problems." (60 RT 9387, 9409.)

On April 22, 1995, Ms. Pena and appellant baptized their youngest son at St. Marianne's Catholic Church in Pico Rivera. (60 RT 9337-9338.) The baptismal ceremony started sometime between 11:00 and 11:30 a.m., and lasted until about 12:30 or 1:00 p.m.. (60 RT 9388-9389.) Ms. Pena's "Uncle Mike" videotaped the service. (60 RT 9389.)

On the morning of the baptism, Ms. Pena got up at 6:30 or 7:00 a.m., and left the apartment with appellant and their son at about 9:30 a.m. to go to the home of her "Aunt Maria" in Montebello. (60 RT 9390-9392.) Appellant was with Ms. Pena the entire time their son was dressed for the ceremony by his godparents. (60 RT 9393.) At about 10:30 or 10:45 a.m., appellant drove Ms.

Pena and their son directly to church. (60 RT 9392, 9394-9395.) They arrived at the church between 11:00 and 11:45 a.m. (60 RT 9395.)

Following the ceremony, appellant drove Ms. Pena and their son directly to Aunt Maria's house, where they arrived at about 1:30 p.m. (60 RT 9396.) The house had a working telephone. (60 RT 9402-9403.) Appellant used the telephone several times to check on Ms. Pena's niece, who had been hit by a car. (60 RT 9406-9407.) Appellant did not have a cellular telephone in his possession on April 22, 1995, although there were "two or three" inactive cellular telephones at their residence. (60 RT 9405.) Appellant never left the party, but participated in a barbecue, jumped on the "Moon Bounce," broke a pinata, threw money for the children, opened gifts, and helped clean and load the car. (60 RT 9404, 9416-9417.) Most of the guests left between 9:00 and 9:30 p.m. (60 RT 9405.) A home videotape showing scenes from the party was played for the jury.[34/] (60 RT 9409, 9412-9414.) Appellant was never out of Ms. Pena's sight for more than 10 minutes. (60 RT 9418.) Carlos de la Cruz was at the party, but there was no woman named "Denise" present. (60 RT 9416.)

After the party, appellant left with Ms. Pena, their three sons, two neighbor boys, and Ms. Pena's best friend, Angie Hernandez. They dropped Angie off in San Gabriel, dropped off the neighbor boys next door, and arrived home at 11:00 or 11:30 p.m. (60 RT 9407-9408.) Appellant and Ms. Pena unpacked the car and went to bed together, where appellant stayed until the next morning. (60 RT 9407-9408.) Appellant did not use the telephone before going to bed. (60 RT 9409.)

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34. The videotape was received in evidence as Defense Exhibit A; a transcription of the videotape was not prepared. (61 RT 9471.)

Ms. Pena knew Witness No. 14; he arrived at the party around 9:00 p.m., right before the presents were opened. (60 RT 9414-9415.) Ms. Pena knew that Witness No. 14 was an El Monte Flores gang member. She also knew that de la Cruz was a member of that gang, as was appellant. (60 RT 9419.) Ms. Pena was "sure" that El Monte Flores gang members committed illegal acts. According to Ms. Pena, she "stayed away from that." (60 RT 9420.) She never spoke to appellant about his gang activities. (60 RT 9421.) If appellant had engaged in gang activities in April 1995, Ms. Pena would have expected him "to keep that from [her] . . . ." (60 RT 9422.)

3. Nora Ledezma

Nora Ledezma is Monique Pena's mother. (60 RT 9435-9436.) Ms. Ledezma attended the baptismal party on April 22, 1995; she arrived at about 2:30 p.m. (60 RT 9436-9437.) Appellant was there, barbecuing. (60 RT 9437.) Ms. Ledezma kept her eye on appellant the whole time, because she wanted to make sure that he did his share of the work. (60 RT 9438.) When Ms. Ledezma left, appellant and Ms. Pena were still there, "cleaning up the mess from the party." (60 RT 9439.)

Ms. Ledezma did not know that appellant was a member of a street gang, nor did she know that he was also a member of the Mexican Mafia. (60 RT 9440.) Ms. Ledezma did not approve of gangs, and she therefore would have expected appellant to "hide" any gang activities from her. (60 RT 9442-9444.) Ms. Ledezma did not know that it "would become important to know whether [appellant] left that party on one or two occasions" until he was arrested more than eight months later. (60 RT 9444-9445.)

4. Witness No. 12

Witness No. 12 was formerly affiliated with the Sangra street gang. He was given immunity by Deputy District Attorney John Monaghan in return for

testifying truthfully as a prosecution witness at a trial in Los Angeles concerning the April 22, 1995, murders. (60 RT 9344-9346; see also 6 1SCT 1191-1193.)

Witness No. 12 did not know appellant "[p]ersonally," nor did he speak with him on April 22, 1995 (60 RT 9346-9347.) On that day, Witness No. 12 met Jose Ortiz and Daniel Logan at Leo's Liquor Store and eventually rode with them in Logan's Maxima to the residence of Anthony Torres; the group arrived between 8:45 and 9:00 p.m. (60 RT 9347-9351, 9353-9354, 9383.) On the way there, Ortiz said, "we have to go take care of some business." (60 RT 9351-9352.) Witness No. 16 was at Torres's home, as were Torres, Jimmy Palma, and Richard Valdez. (60 RT 9355-9356.) "[E]verybody was drinking," and some people -- including Palma and Torres -- were "doing speed." (60 RT 9357-9358.) Witness No. 12 saw a shotgun, what he believed to be a nine-millimeter pistol, and a .357 magnum revolver "all laying [sic] around." (60 RT 9359, 9384.)

Torres picked up the shotgun and said that they "were going to go hit a connection." Witness No. 12 asked if he could go along. (60 RT 9360.) Ortiz and Logan debated the request "for a minute" before agreeing to allow Witness No. 12 to accompany them. (60 RT 9352.) Nobody said anything about killing a "drop out" or children in a home. (60 RT 9361.)

The group left approximately 10 to 15 minutes after Torres received a telephone call. (60 RT 9384.) Witness No. 16 drove his red Thunderbird, with Witness No. 12 and Ortiz as passengers; Ortiz told Witness No. 16 where to drive. (60 RT 9363-9364, 9384.) Torres, Logan, and Valdez left in the Maxima, with Logan driving. (60 RT 9364-9365, 9382-9383.) The two cars stopped for gas in Alhambra at one point, and proceeded to Maxson Road, where they were supposed to meet. Along the way, Witness No. 12 lost sight of the Maxima, and did not see it again until about two hours later. (60 RT

9365-9372.) Witness No. 16 parked the Thunderbird on Maxson, near Ramona, and waited for the Maxima to flash its lights, indicating "that they were going to do the hit that they were supposed to do, but the light never came." (60 RT 9373.) When police cars approached "from all kinds of directions going towards Maxson Street [sic]," Ortiz said, "Let's go. Let's get out of here." (60 RT 9373-9374.)

The group drove to Valdez's apartment in West Covina. They waited for 45 minutes to an hour before heading to Torres's residence. (60 RT 9375-9376.) When they arrived, "it seemed like everybody [inside the house] was excited with a lot of energy." (60 RT 9377.) Palma, Logan, and Valdez were there, and Palma bragged about shooting some "mother fucker" in the head. (60 RT 9377-9378.) Witness No. 12 "figured the less [he] kn[e]w about it, the better," and left with Witness No. 16 and Ortiz. (60 RT 9378-9379.) Before Witness No. 12 departed, Torres received a telephone call. (60 RT 9380.)

Witness No. 12 was aware appellant was a member of the Mexican Mafia. (60 RT 9385.)

5. Stefanos Kaparos

Stefanos Kaparos owned the "Shrimp Ahoy" restaurant at 4488 East Live Oak, in Arcadia. (61 RT 9467.) The restaurant was directly across the street from an Edwards drive-in theater. In the 19 years that Mr. Kaparos owned the restaurant, there was never a barber shop near the theater. (61 RT 9468-9469.)

II. Penalty Phase

A. Prosecution

1. The September 3, 1993, Beating Of Nathaniel Lane

Nathanial Lane, who was in custody on a pending murder charge, was brought into the courtroom and refused to testify. (63 RT 9822, 9825-9842.)

Officer Santos Hernandez of the El Monte Police Department testified that at 11:45 p.m. on September 3, 1993, he saw Lane at 116226 Garvey in El Monte with appellant, Carlos de la Cruz, and Genaro Muro, known members of the El Monte Flores street gang. (63 RT 9845-9848.) Lane had his back against a wall and was being punched in the face by de la Cruz and Muro. (63 RT 9848.) As Officer Hernandez pulled his marked patrol car over and approached the group, de la Cruz and Muro held Lane's arms while appellant struck Lane three times in the stomach and legs with a wooden baseball bat. (63 RT 9848-9849.)

Officer Hernandez pointed his gun at the men, and appellant dropped the baseball bat and climbed over a fence; Officer Hernandez detained de la Cruz and Muro. Appellant was subsequently apprehended. (63 RT 9850.) One of Lane's eyes was bleeding, his forehead was swollen, and he was "just really in pain" and could not stand. (63 RT 9850-9851.) Officer Hernandez summoned medical care. (63 RT 9851.)

2. The August 30, 1994, Stabbing Of Witness No. 17

Witness No. 17 was a member of the El Monte Flores street gang. (63 RT 9853-9854.) At 6:00 p.m. on August 30, 1994, after Witness No. 17 finished his shift at a bakery in South El Monte, Carlos "Squeaky" Arroyo, a fellow El Monte Flores gang member, told Witness No. 17 that he was taking him to a party where Arroyo intended to "finish" a fight with a fellow gang member. (63 RT 9854-9857.) On the way there, Arroyo's pager started to beep

and he stopped at a pay telephone to make a call. (63 RT 9857.) After speaking on the telephone less than five minutes, Arroyo drove to the Klingerman Apartments in El Monte. (63 RT 9858.)

Arroyo parked in an alley behind the apartment complex, where appellant, Carlos de la Cruz, and Witness No. 14 were waiting. (63 RT 9859-9862.) Arroyo spoke with appellant and de la Cruz while Witness No. 14 stood by. One of the men suggested that they go into a nearby garage, but Witness No. 17 refused. Arroyo eventually summoned Witness No. 17 to accompany him and appellant as they drove to a dead-end street near the San Gabriel river; de la Cruz followed separately. (63 RT 9861-9866.) The men walked down to the river bank and stopped. (63 RT 9867-9868.) Appellant, de la Cruz, and Witness No. 14 "started beating [Witness No. 17] up," while Arroyo watched. (63 RT 9868-9869.)

Appellant pulled out a knife and stabbed Witness No. 17 in the eyebrow and right eye. Witness No. 17 fell to the ground on his stomach, and appellant got on top of him and stabbed him in the back, the shoulder, and the hands "[c]lose to like 37 or 38 times." (63 RT 9869-9870.) Witness No. 17 still had scars from the stabbing. (63 RT 9870-9872.) Before losing consciousness, Witness No. 17 heard someone say, "cut [his] throat[.]" (63 RT 9873.)

When Witness No. 17 awoke, he saw a man on a horse who returned with paramedics. Witness No. 17 was transported to a hospital, where he was treated for two days before being released. (63 RT 9873-9875.) Witness No. 17 refused to identify his assailants when first questioned, "because of the gang culture." (63 RT 9874-9877.)

Witness No. 17 believed he was attacked because fellow El Monte Flores gang members thought he was involved in the shooting death of a little girl one or two weeks earlier. (63 RT 9877-9879.) Witness No. 17 was prepared to testify for the prosecution in that case, but the defendants "pled

guilty by themselves." (63 RT 9879.) Witness No. 17 merely returned the murder weapon "to the guy who dropped it off at [his] house." (63 RT 9885.) He knew the individuals who were involved in the shooting "[j]ust a little bit." (63 RT 9888.) At defense counsel's request, it was stipulated that appellant was not charged in connection with the shooting. (64 RT 10034-10035.)

3. Appellant's Conduct In County Jail

On Saturday, September 27, 1997, Deputy Robert Poindexter of the Los Angeles County Sheriff's Department was working as a "Prowler" at the Men's Central Jail on Bauchet Street. (63 RT 9890-9891, 9896; see also *id.* at p. 9936.) In that capacity, Deputy Poindexter patrolled the floors, watched the hallways, and "back[ed] up the officers responsible for the "modules," or housing areas of the jail. (63 RT 9891.) As Deputy Poindexter escorted an inmate named Wishum past appellant's cell, appellant stabbed Wishum in the stomach three times with a six-foot long spear device with a shank, or jail-house knife, at the end. (63 RT 9892-98993.) Appellant was using a roll-away telephone at the time; he employed the spear through his cell's tray slot. (63 RT 9894.) Wishum suffered two puncture lacerations to the right side, which bled "moderately." Deputy Poindexter took Wishum to the clinic. (63 RT 9895.) When Deputy Poindexter subsequently searched appellant's cell, neither he nor other deputies were able to find the shank; it was never recovered. (63 RT 9895-9896.)

Deputy Paul Cruz of the Los Angeles County Sheriff's Department was also assigned to the county jail. (63 RT 9916-9917.) On December 6, 1997, Deputy Cruz was responsible for the module where appellant was housed in a single-person cell. (63 RT 9917.) As Deputy Cruz supervised the feeding of the inmates, assisted by an inmate named Raymond Velasquez, appellant reached through his cell's tray slot and struck Velasquez in the right shoulder with "some type of stabbing device wrapped in white cloth." (63 RT 9918-

9920.) Velasquez suffered a puncture wound to his right shoulder blade. (63 RT 9920.) Deputy Cruz searched appellant's cell but was unable to find the device. (63 RT 9920-9921.)

On December 18, 1997, Deputy Sheriff Thomas Looney assisted another deputy in the strip search of appellant, prior to transferring appellant to a different module; this was standard procedure. (63 RT 9898-9900.) Appellant handed the deputies his shower thongs, which were not issued by the jail. The thongs were tied together. Inside one thong was an eight-inch piece of metal, sharpened to a point. (63 RT 9900-9901.) The deputies discovered a second, seven-inch piece of sharpened metal in the other thong. The shanks appeared to be constructed from cell-vent grating.[35/] (63 RT 9901-9904.) Shanks are used to commit assaults on other inmates and/or deputies; they are offensive tools rather than defensive tools. (63 RT 9939; see also *id.* at pp. 9937-9938.)

On January 28, 1998, between 7:00 and 8:00 a.m., Deputy Sheriff Craig Wiggins was preparing to transport appellant to court. (63 RT 9924-9926.) Appellant was moved to the shower, where he was "waist chained," strip searched, and then allowed to dress. (63 RT 9926.) When Deputy Wiggins opened the shower door to place appellant in leg shackles, appellant lunged at Deputy Wiggins, and attempted to head-butt him. (63 RT 9926-9927.) Appellant managed to hit Deputy Wiggins in the chest and shoulder area. During the ensuing struggle, Deputy Wiggins fell to the ground. (63 RT 9927.)

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35. The shanks were shown to the jury and received in evidence as People's Exhibits 133 and 134. (63 RT 9902, 9904, 9943.)

B. Defense

1. Esperanza Maciel

Esperanza Maciel is appellant's mother. (64 RT 9947-9948.) Appellant is one of nine children, and was never violent with his siblings; in fact, he attempted to "get [his sisters] away from the kind of company of people that are involved with gangs." (64 RT 9948-9949.) Appellant attended Arroyo High School and worked various jobs, including a job with his father at a metal polishing company. (64 RT 9951-9952; see also *id.* at pp. 9958-9959.) He was never a problem at home. (64 RT 9952.)

Ms. Maciel did not know that appellant was involved in gangs. (64 RT 9952.) Appellant has three sons, and was a "very good father." (64 RT 9953-9954.) According to Ms. Maciel, appellant was not "capable of [the crimes of which he was convicted]." (64 RT 9954.)

2. Monique Pena

Monique Pena, appellant's former wife, testified that appellant "is the best father. Those boys [his sons] are his world. [¶] They love him." (64 RT 9956-9957.) Appellant was also a good provider, who "always . . . made sure that [his family] had what [they] needed," even when appellant and Ms. Pena separated. (64 RT 9957-9958.)

Appellant did not use drugs at home, nor did he drink to excess. Appellant did not have his "gang friends" visit the house; Ms. Pena did not "know that side of [appellant]." (64 RT 9959.) Ms. Pena wanted the jury to know "that they have only heard bad things. They don't know the good things." (64 RT 9959-9960.)

3. Martha Maciel

Martha Maciel is appellant's sister. Appellant was a "very good brother," as well as a friend and advisor. (64 RT 9961.) Ms. Maciel believed appellant was "a people person. He looks out for other people. He thinks about other people before himself." Appellant's gang activity was "never brought around [the] home." (64 RT 9962.) Appellant acted like a second father to Ms. Maciel's daughter; according to Ms. Maciel, appellant "is a loving man." (64 RT 9963-9964.) Ms. Maciel had the following words for the jury:

> There's a side of my brother that unfortunately you never had a chance to see.
>
> He is a wonderful brother.
>
> A wonderful friend and a father.
>
> He doesn't deserve to be here.
>
> He doesn't deserve to die.
>
> Unfortunately, that is the way the world is.

(64 RT 9965.)

4. Maria Maciel

Maria Maciel is also appellant's sister. (64 RT 9983-9984.) She lived with appellant and his family for almost three years, and viewed appellant "more like a father" than a brother; appellant picked her up when she went to school, paid for her living expenses, and attended school functions with her. (64 RT 9984-9985.) Appellant was also a good father who "put down everything, and anything . . . to do for his kids . . . ." (64 RT 9986.) Appellant held several jobs over the years and was a hard worker. (64 RT 9986-9987.) "He has always been the type of person who would think of everybody else before himself." (64 RT 9987.) Ms. Maciel testified that it was "breaking [her] heart . . . to see that he is going to sit there and suffer for something I can't

believe him of doing." (64 RT 9989.)

5. Boyd Sorensen

Boyd Sorensen owned a metal polishing business in El Monte, and employed appellant and his father. Appellant worked there under his father's supervision for about three years. (64 RT 10009-10010.) Appellant was "very good," had a "good personality," did not drink, and did not cause any disturbances. (64 RT 10011-10012.) Appellant's wife took their children to work to have lunch with appellant. (64 RT 10012-10013.) Sorensen trusted appellant so much that he gave appellant the keys to his shop. (64 RT 10013-10014.)

6. Felipe Ayala

Felipe Ayala is appellant's cousin. They grew up together in Mexico. Appellant came to the United States first; when Ayala came to this country at the age of 11 or 12, appellant "was the one showing [him] around . . . ." (64 RT 10015.) The two men spent a lot of time together while growing up, although they attended different high schools. Ayala and appellant maintained a friendly rivalry over their schools' respective sports teams. (64 RT 10016.) Appellant was a good father whose children respected him. (64 RT 10018.)

Ayala read about the charged crimes in the newspaper. (64 RT 10019-10020.) Ayala testified, "At times it was like it can't be true. I knew this guy. If he did or if he was out there on the street, he kept it away from the family." (64 RT 10020.) Appellant had his children baptized because "[h]e believed in God and he wanted his kids to be baptized and grew up as [his family] did, all Catholics." (64 RT 10021.)

7. Leonzo Moreno

Leonzo Moreno was an "inactive" Baldwin Park North Side gang member who worked as an equipment operator for the Covina Valley Unified School District. (64 RT 9968-9970.) Moreno gave advice to fellow gang members and mediated disputes. (64 RT 9970-9971.) He was not a member of the Mexican Mafia, but had heard of it in the newspapers. (64 RT 9976.)

Prior to 1994, there were many drive-by shootings, including one in which Moreno's only brother was killed. Moreno subsequently met with appellant and several other gang members who wanted to stop the violence. (64 RT 9971-9972.) Appellant and the others assembled almost all of the gangs in the San Gabriel area and held meetings among the gangs; appellant and Raymond Shyrock were among the participants. (64 RT 9972-9973, 9975-9976.)

Moreno was also affiliated with The CAUSE, and worked for the organization in its Toys for Tots program and blood drive. (64 RT 9976-9977.) The primary objective of The CAUSE was to stop gang violence. (64 RT 9977.) Appellant's activities in conjunction with The CAUSE "did a very good job" of reducing the violence. (64 RT 9987-9979.)

Moreno acknowledged, however, that he was not aware that appellant had stabbed a man "37 or 38 times in August of 1994[.]" (64 RT 9980.) If true, Moreno would no longer consider appellant a non-violent person. (64 RT 9981.) He also admitted that if he had known Shyrock had ordered the killing of Anthony Moreno, he would not "still think that . . . Shyrock was trying to stop the violence[.]" (64 RT 9980-9981.)

8. Robin Egland

Rubin Egland was an inmate in the Los Angeles County Jail at the time

of appellant's trial.[36] (64 RT 9993-9995.) He had been convicted of, and was sentenced for, assault with a deadly weapon. (64 RT 9994.)

On the Thursday before his testimony, at approximately 7:00 a.m., Egland overheard Deputy Sheriff Craig Wiggins arguing with an inmate named Oscar Lopez; Deputy Wiggins said, "You Mexican. You piece of shit." (64 RT 9995-9996; see also *id.* at p. 9997.) Lopez got angry and threw a box of orange juice at Deputy Wiggins, who threw it back. (64 RT 9996.) Appellant was exiting the shower at the time and asked, "Why are you doing this stuff to us?" (64 RT 9997-9998.) Deputy Wiggins grabbed appellant by the neck in a head lock and threw him to the ground while another deputy held appellant's leg shackles. (64 RT 9998-9999.)

Egland also testified that appellant attempted to "keep the peace" between Blacks and Hispanics. (64 RT 10000.) One day, however, a jail trustee named Raymond Velazquez, who is Black, was delivering meals; he spit in appellant's food and threw it at appellant. Velazquez also called appellant a "fucking Mexican and wetback," and threw a punch at appellant. (64 RT 10001-10004.) Appellant punched back in self-defense. Egland did not see anything in appellant's hand. (64 RT 10004.)

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36. Prior to Egland's testimony, the trial court indicated that "it ha[d] come to the Court's attention through the Sheriff's Department that there may be problems between Mr. Egland and [appellant] of a rather serious nature that will require [appellant] to be shackled during Mr. Egland's period of time in the courtroom." (64 RT 9991.) Defense counsel told the trial court that Egland had said to him, "Say hello to Luis and tell him I love him." (64 RT 9991; see also *id.* at p. 9992.)

ARGUMENT

PART 1: GUILT PHASE ARGUMENTS

I.

THERE IS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS OF FIVE FIRST-DEGREE MURDERS, AS WELL AS THE JURY'S FINDING IN SUPPORT OF THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE

In his first claim of error involving proceedings during the guilt phase of trial, appellant contends that the evidence "was incredible, unreasonable and unreliable, and thus constitutionally insufficient" to prove that he either aided and abetted, or participated in a conspiracy to murder, anyone other than Anthony Moreno. (AOB 38-50.) Appellant also claims the trial court erroneously denied his motions for acquittal and to dismiss the special circumstance finding of multiple murder. (AOB 51-52.) To the contrary, there is ample evidence to support the convictions, as well as the trial court's denial of appellant's motions.

A. Applicable Law

1. Standard Of Review

"An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) Stated somewhat differently, "'[t]o determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value,

from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Jurado* (2006) 38 Cal.4th 72, 118, quoting *People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) In doing so, "[a] reviewing court may not substitute its judgment for that of the jury. It must view the record favorably to the judgment below to determine whether there is evidence to support the [verdict], not scour the record in search of evidence suggesting a contrary view." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1143, citing *People v. Perez* (1992) 2 Cal.4th 1117, 1126; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 387.)

If a reviewing court determines "that a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15 of the California Constitution [citation]." (*People v. Memro* (1995) 11 Cal.4th 786, 861.) As the United States Supreme Court has observed, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

2. The Prosecution's Theory Of The Case

The prosecution's theory of the case was that appellant, at the behest of his Mexican Mafia sponsor, Raymond Shyrock, arranged to have Anthony Moreno murdered by Sangra gang members. (See 61 RT 9520-9522; 62 RT 9660, 9662, 9669.) Moreno was targeted for murder because he had violated La Eme's rule by dropping out of the gang in 1983, and it was the practice of the Mexican Mafia to have "dropouts" killed, no matter how much time had

passed. (See 55 RT 8501-8502, 8510-8511, 8517; 56 RT 8797-8799; see also 8 1SCT 1642-1643.) Murder victim Gustavo Aguirre was also a target, because he had been robbing drug dealers who paid "taxes" to the Mexican Mafia in territory controlled by Shyrock. (See 55 RT 8511-8512; 56 RT 8741-8744, 8755-8756; 57 RT 8998-8999.)

The prosecution argued in the alternative that adult victims Aguirre and Maria Moreno were murdered because the codefendants who had carried out the killings were instructed not to leave any witnesses. The murders of the two children -- Laura Moreno and Ambrose Padilla -- were the natural and probable consequence of those crimes. (See 61 RT 9520-9521; 62 RT 9654-9662, 9669.)

To that end, jury instructions were provided on aiding and abetting, as well as conspiracy. Specifically, the jury was instructed pursuant to CALJIC No. 3.10, which defines an accomplice as "a person who [was] subject to prosecution for the identical offenses charged [in Count[s] 2-6] against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy]", as well as CALJIC No. 3.11, which speaks to the requirement that an accomplice's testimony or out-of-court statements be "corroborated by other evidence that tends to connect [the] defendant with the commission of the offense"; other relevant instructions included CALJIC Nos. 3.00 (defining principals), 3.01 (defining aiding and abetting), 3.02 (discussing principals' liability for natural and probable consequences), 6.10.5 through 6.24 (discussing conspiracy), and special instructions on the prosecution's theories of criminal liability and the definition of the natural and probable consequence doctrine. (3 CT 683-693, 698-708, 716-718; 62 RT 9596-9604, 9623-9624.)

B. The Evidence Is Sufficient To Prove That Appellant Both Aided And Abetted The Murders Of, And Participated In A Conspiracy To Murder, Anthony Moreno And Gustavo Aguirre

It is well settled that "an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 561; see also *People v. Lee* (2003) 31 Cal.4th 613, 624.) Where such intent is established, an aider and abettor "may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman, supra*, 14 Cal.4th at p. 261, citing *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Although an aider and abettor "shares the guilt of the actual perpetrator," the mental state necessary for conviction as an aider and abettor is that of intending to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.)

"Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; see also *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [same]; *People* v. *Mitchell* (1986) 183 Cal.App.3d 325, 330 [evidence was sufficient to support aiding and abetting finding, where "all of the probative factors relative to aiding and abetting [were] present -- presence at the scene of the crime, companionship and conduct before and after the offense, including flight"]; cf. *People v. Montoya* (1994) 7 Cal.4th 1027, 1040-1048 [aiding and abetting liability may be established by conduct

following the commission of robbery].)

"'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.'" (*People v. Jurado*, *supra*, 38 Cal.4th at p. 120, quoting *People v. Morante* (1999) 20 Cal.4th 403, 416; accord, *People v. Russo* (2001) 25 Cal.4th 1124, 1131.) "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, 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. Russo*, *supra*, 25 Cal.4th at p. 1135; see also *People v. Jurado*, *supra*, 38 Cal.4th at p. 120.) As with aiding and abetting, a conspirator is liable for the natural and probable consequence of the target crime. (See *People v. Roberts* (1992) 2 Cal.4th 271, 322 ["A result cannot be the natural and probable cause of an act if the act was unforeseeable"].)

The record shows that appellant participated in a conspiracy that commenced on January 4, 1995, when Raymond Shyrock, a high-ranking member of the Mexican Mafia, met with other members of that criminal organization to discuss the murder of Anthony "Dido" Moreno, a Mexican Mafia "dropout." Evidence was presented that members who attempt to disassociate themselves from the gang become "fair game" for any other gang member who has the means to kill them. (55 RT 8510-8511.) During the January 4 meeting -- which was clandestinely videotaped by federal authorities -- Shyrock stated that Moreno had been living for some time in the same apartment complex with "all kinds of people in the pad. There's a whole bunch of youngsters. And -- and kids." (8 1SCT 1642-1643; see also 55 RT 8519-

8520, 8571-8573.)

On April 2, 1995, less than three weeks before the murders, appellant was made a member of the Mexican Mafia at the behest of Shyrock, who "raised his hand" for appellant. During that meeting -- which was also videotaped -- Shyrock informed his companions that appellant had already done a "lot of business" for the gang, and had "downed a whole bunch of mother fuckers." (8 1SCT 1644-1664; see also 55 RT 8530, 8556-8559.) After being admitted to La Eme, appellant was informed by one member, "there's certain guidelines that we go by. . . . I'm pretty sure [Shyrock is] gonna run 'em down to you and like stay with you, man. And we're real serious about it, you know. Real serious about [it]." (8 1SCT 1671.)

Sergeant Richard Valdemar of the Los Angeles County Sheriff's Department testified as the prosecution's expert witness on criminal street gangs. In Sergeant Valdemar's experience, the sponsor of a newly-inducted Mexican Mafia member pays close attention to his charge, and instructs the recruit how to conduct himself as a member of the gang. (55 RT 8527.) According to Sergeant Valdemar, "somebody who is placed in a membership has a learning period and so he would pay great attention to his sponsor, the person who . . . 'raises his hand[.]'"[37/] (55 RT 8526-8527.)

Evidence of appellant's involvement in facilitating Shyrock's wishes was established in part through the testimony of Witness No. 15, Anthony Moreno's brother, and a former associate of the Mexican Mafia. (56 RT 8703, 8712-8713, 8715, 8796.) Witness No. 15 testified that his brother had become a member of the Mexican Mafia in 1972, while in San Quentin; Witness No. 15 was his cell mate at the time. (56 RT 8714-8715.) Witness No. 15 was in

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37. The trial court's ruling regarding the admissibility of this statement is the subject of a separate claim of error, which Respondent addresses in Argument VI.C, *infra*.

San Quentin with Shyrock from 1972 through 1977, when Witness No. 15 was paroled. Shyrock became a member of the Mexican Mafia in 1972, the same time as Moreno. (56 RT 8716-8717.) Moreno dropped out of the Mexican Mafia in 1983 and terminated his activities with the gang. (56 RT 8716, 8800-8801.) According to Witness No. 15, "[a]nybody who drops out, it is a mandatory death sentence." (56 RT 8760.) Witness No. 15 had warned Moreno "that something was going to happen," but Moreno insisted that "Shyrock was not a threat to him because he knew him for so many years." (56 RT 8761.)

Witness No. 15 also knew appellant. Appellant "used to be a personal friend of [Witness No. 15's] family at one time." (56 RT 8715.) When Shyrock "put [appellant] in [the Mexican Mafia] in 1995," appellant "told all the homeboys from the neighborhood several times." (56 RT 8721.) Appellant was proud of being a member and said he was "going to put in a lot of work." (56 RT 8721-8722.)

In January 1995, Witness No. 15 was paroled from state prison. (56 RT 8717.) Moreno lived for some time in the same apartment building as Shyrock, with two younger brothers, a "little sister," and his mother and father. When Witness No. 15 visited, he would see Shyrock "every morning at 7:00 or 8:00 . . . ." (56 RT 8720.) Witness No. 15 also saw appellant and Shyrock together "[p]eriodically from time to time." (56 RT 8722.)

Moreno and Witness No. 15 injected heroin; Aguirre, "a personal friend of [the] family," was also addicted to heroin. (56 RT 8722-8727, 8764, 8745, 8767-8774.) Aguirre and a companion were known to rob drug connections to support their habits. (56 RT 8741-8742, 8825-8826.) Those drug dealers paid "taxes" to the Mexican Mafia, which prompted Shyrock to tell Witness No. 15 that "he was tired of both of them disrespecting him and robbing dope connections and that sooner or later they were going to pay for that." (56 RT

8743-8744, 8751-8752, 8829-8830.)

On April 22, 1995, at 2:30 p.m., appellant and two men visited Moreno and Witness No. 15 at the Maxson Road residence. (56 RT 8727-8729, 8802-8807.) Appellant and Witness No. 15 talked near a sliding door to the garage of the home. (56 RT 8729-8731.) The other men were "very quiet," but appeared to be "casing out the location." (56 RT 8739-8740.)

Appellant told Witness No. 15 that he had come by "just to greet [the family] and ask . . . how [they were] doing . . . ." He gave Witness No. 15 and Moreno each a quarter gram of heroin and his pager number. (56 RT 8735.) Aguirre was in the house, watching television with Maria Moreno and three of her children. Two other children were in the back yard "playing on the swings." (56 RT 8733-8734, 8738-8739.) Witness No. 15 told appellant he had "r[u]n out of money" and would pay him as soon as possible. (56 RT 8737-8738, 8767-8769.) Appellant said "don't worry about it[, they] didn't ow[e] him anything." Witness No. 15 found appellant's generosity "very unusual." (56 RT 8737-8738; see also 59 RT 9262-9263 [Torres told detectives following his arrest that he saw children at the house and told the residents that he would be back later to sell them heroin].)

The morning after the murders, Witness No. 15 attended a meeting with Shyrock in Lambert Park; Witness No. 15's surviving brother, Joseph Moreno also attended. (56 RT 8752-8753, 8816-8818.) At the meeting, Shyrock expressed his condolences over the murder of Anthony Moreno, but told Witness No. 15 that he did not regret the killing of Aguirre, stating, "That bastard. He was forcing me to kill him or do something to him so I don't feel bad about him dying." (56 RT 8755-8756.)

Evidence was also presented by appellant's fellow gang members and accomplices. Witness No. 16, a former member of the Sangra street gang, testified that on the afternoon of the murders he received a telephone call from

codefendant Jimmy Palma, who asked him for a ride. (57 RT 8887-8888, 8921, 8891-8893.) Palma told Witness No. 16 that he would be receiving a page from codefendant Anthony Torres and that Witness No. 16 would have to drop him off at Torres's house. Palma said that "he had to do a favor for the [carnals]," or Mexican Mafia. (57 RT 8894-8895.) After Palma was paged, Witness No. 16 drove him to Torres's house, where they joined codefendants Torres, Richard Valdez, Daniel Logan, and Jose Ortiz, as well as Witness No. 14, a member of the El Monte Flores street gang. (57 RT 8979-8980, 8895-8896.) Witness No. 16 saw a shotgun at the foot of Torres's bed. (57 RT 8896.)

Witness No. 16 stayed there "[a]bout an hour or two," during which time Ortiz made a telephone call and several pagers went off. Ortiz said that the group needed an extra car to go to El Monte and "take care of some business." (57 RT 8897-8898, 8917.) Witness No. 16 agreed to drive, and took Ortiz and Witness No. 14 in his Thunderbird. Logan drove Palma, Torres, and Valdez in his Nissan Maxima. (57 RT 8897-8905.) Witness No. 16 lost sight of the Nissan about a block from appellant's residence before spotting it again as it turned into a driveway on Maxson Road; Witness No. 16 drove past the residence and parked his Thunderbird about two blocks away. (57 RT 8903-8906; 58 RT 9188.) Ortiz got out of the car, walked to the corner, and stood there as a lookout. (57 RT 8906.)

After returning to Torres's home in Alhambra, the group discussed the murders. Palma said that he "had killed the kids and the lady." Valdez indicated that he "had shot two guys"; one man was shot in the head inside the house, the other man was pursued and shot outside. Torres stood by the door with a shotgun "just watching out to make sure nobody would run up from behind." The victims were tricked into believing the shooters were there to purchase drugs. One of the male victims was shot in the head as he was shown a rock of heroin. (57 RT 8909-8914, 8918.)

Witness No. 14 presented evidence regarding Aguirre, the "other" target of the conspiracy, which corroborated Witness No. 15's account that Aguirre had run afoul of the Mexican Mafia. Specifically, Witness No. 14 testified that he had been warned by appellant several days before the murders to stay away from Aguirre, because Aguirre was "no good." (57 RT 8985-8986, 8998-8999.)

At noon on the day of the murders, Witness No. 14 went to a baptismal party with appellant in Montebello. (57 RT 8985.) At some point, appellant received a page and left the room. (57 RT 8989.) Appellant subsequently asked Witness No. 14 to drive him and Carlos "Diablo" de la Cruz to appellant's apartment in El Monte. (57 RT 8989-8990.) While there, appellant gave Witness No. 14 one piece of heroin outright, and told him to "hold on" to the second piece. (57 RT 8992.) A Nissan Maxima eventually drove by and parked at the corner; Palma got out and spoke with appellant. (57 RT 8993-8994.) Appellant introduced Palma as a Sangra gang member to Witness No. 14 and de la Cruz, and said, "This is my homeboy, Clown and my homeboy, Diablo. If anything happens to them, contact my homeboy, Diablo." (57 RT 8995-8996.)

Palma assured appellant "he was going to take care of business. Not to worry about it. He was going to take care of business." Palma also said that he was "strapped," or carrying a gun. (57 RT 8996.) Appellant told Witness No. 14 to give Palma the second piece of heroin. (57 RT 8996-8997.) Palma pocketed the drug and left. (57 RT 8997.) Witness No. 14 returned to the party with appellant and de la Cruz. (57 RT 8997.)

Witness No. 13, codefendant Torres's sister, provided evidence regarding the involvement of her brother in the murders, as well as the directives provided to the codefendants in carrying out the murders. Witness No. 13 testified that she saw her brother and Valdez at her mother's house

between 7:45 and 8:00 p.m. on the evening of the murders. (8 1SCT 1618-1619; see also 57 RT 8949-8950.) Torres's pager went off, and he made two telephone calls. Logan subsequently came by, along with an older man and a young "kid." (8 1SCT 1620-1621.) Two more men appeared -- one with a "Sangra" tattoo around his neck -- and they all went into Torres's room. (8 1SCT 1621-1622.) Witness No. 13 left; as she walked back to her house, she noticed a Nissan Maxima parked in her mother's driveway. (8 1SCT 1624-1625.)

Witness No. 13 spoke with her brother about the shootings two days later. (8 1SCT 1631-1632.) Torres told her that he and his companions were supposed to kill "one guy," but that "they weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them." (8 1SCT 1632.)

Telephone records revealed that calls were made to appellant's pager from the homes of three of the codefendants before and after the murders. On April 22, 1995, five telephone calls were made to appellant's pager from the Torres residence, three calls were made from the Ortiz residence, and one call was made from the Palma residence. (59 RT 9212-9220.) The next day, appellant was paged twice from each of those locations. (59 RT 9212-9220.)

Following his arrest on December 16, 1995, appellant admitted to detectives that he was a "middle man," who was told "[t]o get a hold of this person to tell them that they know what and that's it." "Just ask me to get a hold of these people, you, you know and they know you don't gotta do nothing, just tell them that I said that's it, alright homes, homie told me to tell you this and this and this and that, you know -- yeah, we know -- and that's it." (8 1SCT 1696; see also 60 RT 9309-9311, 9314.) Near the end of the interview, appellant lamented, "My kids, my wife, I mean they'll all be all fucked up, because of me." (8 1SCT 1698.)

Despite such overwhelming evidence of appellant's direct involvement in a conspiracy to kill Moreno and Aguirre, and his facilitation of that plan as a self-described middle man, appellant argues at length that Witness No. 14 was an "inherently unbelievable informant," that Witness No. 15 was "highly incredible," and that Witness No. 16 was "unreliable." (AOB 40-44; see also *id.* at pp. 43-44 [describing purported inconsistencies in Witness No. 14's grand jury and trial testimony].) He accordingly contends that "[n]one of the testimony given by these witnesses . . . inspires the kind of confidence that is necessary to pass constitutional muster[.]" (AOB 45.)

Yet, because any weaknesses in the witnesses' testimony were exposed to the jury through vigorous cross-examination, appellant's contention amounts to nothing more than an invitation to reconsider the jury's factual findings and determinations. As this Court has observed, however, an appellate court may not "reweigh evidence or reevaluate a witness's credibility." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Id.* at p. 1141, quoting *People v. Maury* (2003) 30 Cal.4th 342, 403.)

In sum, viewing the record in the light most favorable to the judgment (*People v. Jurado*, *supra*, 38 Cal.4th at p. 118; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1143), there is more than sufficient evidence to support appellant's convictions for the murders of Moreno and Aguirre on conspiracy *and* aiding and abetting theories of liability; appellant's contention should therefore be rejected. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 120; *People v. Mendoza*, *supra*, 18 Cal.4th at p. 1123; *People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.)

C. The Evidence Supports The Jury's Implied Findings That The Murders Of Gustavo Aguirre And Maria Moreno Were Committed In Furtherance Of A Mexican Mafia Conspiracy To Kill Anthony Moreno, And That The Murders Of Laura Moreno And Ambrose Padilla Were The Natural, Probable, And Foreseeable Consequence Of That Conspiracy

Appellant also contends that "[t]he prosecution's own evidence contradicts the jury's implied finding that the killings of Aguirre, Maria Moreno and the two children were the natural, probable, and foreseeable consequence of a Mafia-engendered [sic] conspiracy to murder Anthony Moreno," purportedly because Shyrock explicitly told his cohorts that he wanted Moreno killed, "'not the little kids.'" (AOB 48.) Appellant misconstrues the prosecution's theory of the case.

Indeed, during a discussion of proposed jury instructions, the prosecutor informed the trial court:

> . . . [W]e know . . . Anthony Torres told his sister . . . that the instructions from Eme . . . were to kill any witnesses. . . . [¶] That would include the adults. . . .
>
> I'm not arguing that they had -- that they were instructed to kill the children.
>
> So you could say that the original conspiracy, and it uses the word "originally" in that last paragraph, was to kill Dido.
>
> Then I will argue that the killing of the two other adults was in furtherance of the conspiracy in that and that the killing of the children was a natural and probable consequence of going into a one room house and killing -- and shooting at three people, the kids were bound to be hurt, if not killed.
>
> That is the way I am going to do it. . . . [¶] Just put, you know, that Dido is the original person that was to be killed and that the other four were in furtherance of the conspiracy.

(61 RT 9520-9522.)

In *People v. Prettyman*, *supra*, 14 Cal.4th at page 248, this Court reviewed the principles of aider and abettor liability for a crime that is the natural and probable consequence of the target offense and noted:

> At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a "natural and probable consequence" of the crime aided and abetted. [Citation.]

(*Id.* at p. 260.)

The *Prettyman* court described the natural and probable consequence doctrine as follows:

> "[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury." (*Id.* at p. 12, fn.5.) Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the "natural and probable consequence" of the target crime.

(*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.)

The *Prettyman* court also set out the elements of liability under the natural and probable consequence doctrine:

> . . . [T]he trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.

(*People v. Prettyman*, *supra*, 14 Cal.4th at p. 262, fn. omitted.)

In *People v. Mendoza*, *supra*, 18 Cal.4th at page 1114, this Court elaborated on the test for determining whether the crime committed was the natural and probable consequence of the intended target crime. "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*Id.* at p. 1133, citing *People v. Prettyman*, *supra*, 14 Cal.4th at pp. 260-262.)

Under *Prettyman* and *Mendoza*, therefore, the prosecution was not required to prove that appellant directed his codefendants to shoot and kill Aguirre, Maria Moreno, and the two children. Rather, the prosecution was required to prove merely that the deaths of those victims were reasonably foreseeable during the commission of the so-called target offense. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11.) Respondent submits that the

evidence amply supports that conclusion.

Specifically, appellant knew of Aguirre's presence at the Maxson Road residence, *as well as the fact that Maria Moreno and her children lived there*; indeed, appellant had visited the home on the afternoon of April 22, 1995, and offered Witness No. 15 and Anthony Moreno heroin, with a promise of more later in the day. (56 RT 8735, 8737-8738; see also 59 RT 9262-9263.) Appellant was accompanied by several men -- presumably the codefendants -- who paid especial attention to the residence, as if they were "casing out the location." (56 RT 8739-8740.) Following the murders, codefendant Torres told his sister that he and his companions were supposed to kill "one guy," but that "*they weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them.*" (8 1SCT 1632, italics added.) Codefendant Palma acknowledged to others that he had carried out that directive by shooting two children -- one of them in its mother's arms. (8 1SCT 1629-1630, 1640-1641.) As the prosecutor reminded the jury during closing argument:

> . . . [T]he Court told you . . . a conspirator is liable for the natural and probable consequences of any act of a co-conspirator in furtherance of the object of the conspiracy even though the act was not intended as a part of the agreed upon objective[.]
>
> Even though the act was not intended. In other words, even if the act of killing the children was not intended by this defendant.

(62 RT 9659.)

"'A natural and probable consequence is a foreseeable consequence[.]'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107, quoting *People v. Fabris* (1995) 31 Cal.App.4th 685, 698, disapproved on another ground in *People v. Atkins* (2001) 25 Cal.4th 76, 90, fn. 5.) Based upon the foregoing, the murders of Aguirre and Maria Moreno were committed in furtherance of the conspiracy to kill Anthony Moreno, and the murders of the two children were

the natural and probable consequence of that conspiracy -- whether or not appellant specifically intended that such additional murders be committed. Appellant's contention should therefore be rejected.

D. There Is Sufficient Evidence To Support The Jury's Multiple-Murder Special Circumstance Finding As To Victims Gustavo Aguirre, Maria Moreno, And Laura Moreno

Appellant contends that because the jury was instructed that only murder convictions in which "the defendant had the intent to kill" could be counted toward the multiple-murder special circumstance, "the jury must have found that [he] intended the deaths of Gustavo Aguirre, Maria Moreno and five-year-old Laura Moreno," convictions on which the jury expressly based its special circumstance finding. (AOB 49, italics omitted; see also 3 CT 739.) Appellant maintains in particular that "there was no admissible evidence, much less credible evidence of solid value, to suggest that [he] intended the deaths of Maria and Laura Moreno," and argues that only "[i]nadmissible hearsay evidence of statements" by Shyrock and codefendant Torres (through Witness No. 13) support that implied finding. (AOB 49-50, italics omitted.) Not so.

As set forth at length in Arguments VII, VIII, and X, *infra*, the challenged statements were properly admitted as declarations against interest and/or as coconspirator statements. And, as explained previously, those statements support the jury's implied finding that the murders of Aguirre and Laura Moreno were committed in furtherance of the conspiracy to kill Anthony Moreno, and that the murders of the two children were the "natural and probable consequence[s] of the intended crime[s]," whether or not appellant specifically intended those murders to be committed. (See *People v. Mendoza*, *supra*, 18 Cal.4th at p. 1133.)

Appellant nevertheless claims that CALJIC No. 8.80, which speaks to the multiple-murder special circumstance, appears to require that an aider and

abettor have the "intent to kill" as to any conviction considered "toward [that] . . . special circumstance." (See 3 CT 719) He insists that "the murders of Maria and the children were not intentional," and therefore "the special circumstance findings for counts 2 through 5 must be reversed." (AOB 50.) This Court rejected an identical challenge to the multiple-murder special circumstance in *People v. Hardy* (1992) 2 Cal.4th 86, 192, and held that where a "jury [finds a defendant] was an aider and abettor, . . . it necessarily [finds] he intentionally aided and abetted the actual killer[s], who [were themselves] motivated by the intent to kill." (See also *People v. Maury*, *supra*, 30 Cal.4th at p. 432 ["if the jury believed . . . that [the defendant] intentionally aided and abetted the actual killer, as required by the challenged instruction, it necessarily found, under the instructions and evidence given, that he knew he was aiding in an intentional killing"]; cf. *People v. Williams* (1997) 16 Cal.4th 635, 689 [trial court erred in failing to instruct on intent to kill under the multiple-murder special-circumstance theory when the defendant was an aider or abettor].) Here, Torres told his own sister that he and the other codefendants "weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them." (8 1SCT 1632.) *Hardy* mandates the rejection of appellant's claim.

E. The Trial Court Properly Denied Appellant's Motion For Acquittal Under Section 1118.1

At the conclusion of the prosecution's case-in-chief, appellant informed the trial court, without stating anything further, "[t]here will be an 1118[38/]

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38. Section 1118.1, under which appellant presumably made his motion, provides:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one

motion." (59 RT 9301.) The trial court denied the motion, ruling in relevant part as follows:

> There is fairly clear evidence of a conspiracy to commit murder. The issue, it seems to me, for the jury, will be the following, among others:
>
> Either on a theory of conspiracy or aiding and abetting, the issue seems to come down to this, as to three of the victims, they being the mother, Ms. Moreno, and the two children.
>
> And it will be whether or not those murders were a natural and probable consequence of the conspiracy to kill, arguably one or two male individuals, or the defendant's alleged aiding and abetting in one or both of those murders.
>
> . . . . . .
>
> . . . [I]f you buy the prosecution's theory that the defendant engaged street gang members to kill one guy even in a particular residence wherein it was known that children and others resided, it is certainly within the realm of probability that others in the house might be killed.
>
> . . . . . .
>
> One could certainly not trust Mr. Logan and Mr. Torres and Mr. Pepe Ortiz and Mr. Character and all the rest of the guys to be meticulous in their activities.
>
> So, yes, I think this jury may find if Mr. Maciel was in for a penny, he is in for a pound.

(59 RT 9301-9302.)

> or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

Appellant contends on appeal that the trial court's ruling "was erroneous, and resulted in an unconstitutional death judgment." (AOB 51.)

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ""'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'"" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.)

Applying that standard here, the trial court properly denied appellant's motion for reasons set forth previously in sections A through D.

F. The Trial Court Properly Denied Appellant's Motion To Dismiss The Multiple-Murder-Special-Circumstance Finding

Prior to sentencing, appellant filed a motion to dismiss the multiple-murder special-circumstance finding, in which he argued that the murders of Gustavo Aguirre, Maria Moreno, Laura Moreno, and Ambrose Padilla "were unforeseeable and not the natural and probable consequences of the conspiracy." (3 CT 835-842; see also *id.* at pp. 858, 861-862.) In denying the motion, the trial court declared that the jury's factual findings were "amply supported by substantial evidence." (3 CT 863.) Appellant again contends "the trial court could have, and should have, stricken the multiple murder special circumstance finding on the ground that there was insufficient evidence as a matter of law to prove that [he] intended the deaths of any victim other than Anthony Moreno." (AOB 52, italics omitted.)

For reasons set forth previously in sections B, C, and D, the trial court's finding of "substantial evidence" is supported by the record; appellant's

contention is therefore without merit.[39/]

G. Even If Any Of The Murder Convictions Comprising The Multiple-Murder Special Circumstance Is Set Aside, The Death Penalty Should Still Stand

Finally, appellant contends that "[t]he fact that any single murder was not reasonably foreseeable, or was completely unintended would clearly fall within the rubric of factors permissibly considered by the jury in selecting the penalty of death"; he accordingly maintains that "the jury's erroneous factfinding in [his] case dramatically increased the risk of an erroneous death judgment based on unproven facts." (AOB 52, 54, italics omitted.)

Yet, even if it were assumed for the sake of argument that only those convictions which involve an *intended* killing may be applied toward the multiple-murder special circumstance -- as appellant appears to allege -- the sole conviction affected would be the murder of Laura Moreno, leaving three remaining murder convictions to comprise the special circumstance. (See *Brown v. Sanders* (2006) 546 U.S. 212, 224-225 [126 S.Ct. 884, 163 L.Ed.2d 723] [setting aside the weighing/non-weighing dichotomy in analyzing California's death penalty law and holding that "the jury's consideration of . . . invalid 'special circumstances' gave rise to no constitutional violation," because the remaining special circumstances were "sufficient to satisfy [the constitutional] narrowing requirement, and alone rendered Sanders eligible for the death penalty"]; *People v. Sanders* (1995) 11 Cal.4th 475, 562 ["as we have repeatedly held, '"consideration of . . . excessive multiple-murder special-circumstance findings where, as here, the jury knows the number of murders on

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39. In addition, under section 1385.1, which was added to the Penal Code by Proposition 115 on June 5, 1990 and concerns crimes committed after that date, a trial court "shall *not* strike or dismiss any special circumstance which is . . . found by a jury or court as provided in [s]ections 190.1 to 190.5, inclusive." (Italics added.)

which they were based, is harmless error"""]; *People v. Beardslee* (1991) 53 Cal.3d 68, 117 [same]; *People v. Gallego* (1990) 52 Cal.3d 115, 201 ["The jury had before it one valid multiple-murder special circumstance"]; see also *People v. Miller* (1990) 50 Cal.3d 954, 1001-1002; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1180-1181; *People v. Hernandez* (1988) 47 Cal.3d 315, 357-358; *People v. Odle* (1988) 45 Cal.3d 386, 409-410, 421-422; *People v. Lucky* (1988) 45 Cal.3d 259, 301; *People v. Williams* (1988) 44 Cal.3d 1127, 1146; *People v. Kimble* (1988) 44 Cal.3d 480, 504; *People v. Allen* (1986) 42 Cal.3d 1222, 1273, 1281-1282; *People v. Rodriguez* (1986) 42 Cal.3d 730, 787-788; *People v. Harris* (1984) 36 Cal.3d 36, 66-67.) Reversal is not warranted.

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S UNTIMELY REQUESTS TO DISCHARGE RETAINED COUNSEL AND APPOINT NEW COUNSEL

On November 17, 1997, almost two years after appellant retained Edward Esqueda as counsel, and only one month prior to the scheduled trial date, appellant sought to have the trial court discharge Esqueda and appoint new counsel. The court denied that motion, as well as appellant's renewed motion on December 12, 1997. Appellant claims that in denying his requests, the trial court relied upon "an improper standard [set forth in] *People v. Marsden* [(1970)] 1 Cal.3d 118, rather than the standard applicable when a defendant seeks to discharge retained counsel." Appellant also maintains the trial court made "inapplicable" findings that "retained counsel was not incompetent, [and] that there had been no irremediable breakdown in the attorney-client relationship." (AOB 57, italics omitted.) To the contrary, the record shows the trial court properly denied appellant's untimely and ill-conceived requests.

A. Proceedings Below

Appellant was indicted on December 12, 1995, and was initially represented by court-appointed counsel Joseph Borges after the public defender declared a conflict of interest. Erick Larsh was substituted in place of Borges as private counsel on January 30, 1996. On February 7, 1996, Larsh declared a conflict of interest and Edward Esqueda entered his first appearance as retained counsel on February 14, 1996. (1 CT 103-109A, 110, 126, 130, 136; 6 1SCT 982-1194; 1 RT 120, 128-129, 147-148, 164-166.) At the time of his withdrawal, Larsh advised the court that appellant was "indigent at this point," but otherwise declined to elaborate regarding the reasons for his withdrawal,

other than to say he had a "conflict of interest." (1 RT 147.)

On October 16, 1997, with the case initially set for trial on October 20, 1997, Esqueda filed a "Motion to Continue," declaring that he was engaged in a three- to four-week death penalty trial in another case. (8 1SCT 1588-1591.) The court ordered appellant's trial in this matter continued to November 17, 1997, with appellant's consent. (8 1SCT 1593; 49 RT 7452-7455, 7464-7465.)

On November 27, 1997, Esqueda again asked to continue trial, declaring that he had started jury selection in another case, which was "estimated to last approximately . . . four weeks . . . ." (8 1SCT 1594-1594D; 49 RT 7466, 7468-7470.) Appellant contemporaneously filed a sealed ex parte motion seeking to dismiss Esqueda and have substitute counsel appointed. (See AOB 58 [describing contents of sealed transcript at 8 1SCT 1595-1608].) At the hearing on the motion, Esqueda stated that when he had met with appellant at the jail the previous Friday, he understood at that time that they "had resolved everything":

> . . . [W]hen I left there, it was my understanding that everything had been resolved.
>
> I arrived here this morning and the first word[] out of his mouth is:
>
> I'm getting rid of you.
>
> So I don't know what is going on.

(49 RT 7467.)

Appellant responded that although Esqueda believed he could complete his remaining pretrial investigation in 30 days, appellant "need[ed] more time than that." (49 RT 7467-7468.) Appellant also stated:

> Not only that, I don't think he is ready and prepared to do my case.
>
> I have been thinking about it.
>
> He [Esqueda] came on Friday morning and I didn't think about the case that much. But over the weekend I did a lot of thinking and I feel

strongly that Esqueda will not be prepared on this case for me.

(49 RT 7468.)

The trial court denied the motion to discharge counsel without prejudice, ruling in relevant part as follows:

It is untimely in the extreme.

You have had a couple of different attorneys on the case and you have had this attorney for many moons, many months.

This case has been continued several times.

Witnesses have been inconvenienced as they are again today and are in this courtroom.

Some of them have testified three times, at least, and some probably more than that, four or five times, due to the severences [sic] of the trial.

Two have been tried in this Court, two trials, one other trial in another jurisdiction, plus other hearings, I would assume, preliminary hearings or grand jury. . . . [¶] . . . And witnesses are reluctant, obviously, in a case like this due to the nature of the charges and the players to come forward to give testimony.

The longer the case goes, the more that reluctance hardens and the more difficult it becomes to obtain the testimony of witnesses.

More witnesses are in jeopardy, in the Court's opinion, given what I know about the case.

And if I grant your request, what I am doing, in effect, is continuing the case for probably a year.

I say that because it is a death penalty case.

I can't grab some lawyer out of the blue . . . . [¶] Obviously, any competent counsel must, if I did that, must get familiar with not only this case but with the other cases. . . . [¶] . . . So you have to look -- probably want to look at transcripts of the other proceedings that have been had.

There are 10's and 10's [of] thousands of pages of documentation and videotapes, trial testimony, et cetera, et cetera.

So I have to weigh that into the mix.

If it is a case where somebody can get ready in 30 days, that is one thing.

If it is a case where somebody cannot get ready for six months or a year, that is another thing.

That is apparently how long it will take on a case like this for most counsel to get up to speed.

(49 RT 7468, 7472-7474.)

After reminding appellant that he had "many, many, many appearances" during which he could have brought the motion, the trial court nevertheless invited appellant to "[c]ome back . . . on the 12th of December with any items that you want to show the Court, or any testimony that you wish to give the Court in camera, and we will hear it on that date." (49 RT 7474, 7476.) The court also informed appellant that he could ask trial counsel to bring any transcripts or other "matters that you think [the Court] need[s] to see or be made aware of on the 12th," and the court "[would] look at them." (49 RT 7478; see also 8 1SCT 1609.)

On December 12, 1997, Esqueda informed the court he was still engaged in trial in another matter; trial in this case was accordingly continued to December 29, 1997, again with appellant's permission. (50-1 RT 7489, 7491; see also 8 1SCT 1612-1616.)

The trial court then convened outside the presence of the prosecutor for a hearing on appellant's renewed motion to discharge retained counsel. (50-1 RT 7495-7495.) At that hearing, appellant informed the trial court:

. . . There are certain things on the investigation that need to be done. I advised Mr. Esqueda certain things about the investigation, but he

hasn't even gone forward on it. And there's also a lot of subpoenas. I'd like to subpoena people about certain things and events of the case.

Also, there's a lot of photographs that needs [sic] to be taken of the crime place, and also of some of the residents, the people that live there.

(50-1 RT 7497.)

Trial counsel responded that appellant was "correct about not seeing discovery, because of the court orders made in this case."[40] He explained:

. . . Prior to that I was providing Mr. Maciel with some discovery, and then subsequently at the request of Mr. Monaghan the Court made very strict orders that nothing, absolutely nothing was to be provided to Mr. Maciel. And I have strictly and literally abided by those court orders.

(50-1 RT 7499.)

Trial counsel nevertheless noted, contrary to appellant's claim, that there were "some aerial photographs" of the crime scene, which were "introduced at one of the previous trials." (50-1 RT 7501.) And, counsel pointed out that "[Isaac] Guillen ha[d] taken photographs of [Raymond Shyrock's apartment complex]," in response to appellant's complaint that no such investigation had been undertaken. (50-1 RT 7502-7504.) Esqueda represented to the court that he had even spoken with Cynthia Shyrock, Shyrock's wife, "and she was going to testify in this case." (50-1 RT 7506.)

The trial court subsequently addressed appellant's additional complaint that Esqueda had refused to file certain motions on his behalf, claiming they were frivolous; one such motion concerned the prosecution's failure to present allegedly exculpatory evidence during grand jury proceedings regarding the identities of the shooters. (50-1 RT 7507-7509.) The court observed in that

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40. The nondisclosure orders to which counsel referred are the subject of a separate claim of error, which respondent addresses in Argument IV, *infra*.

regard:

> Your guilt or lack thereof is not premised upon you being there. Your guilt or lack thereof is premised upon things that occurred prior to the homicide. In other words, for you to be convicted, if you are to be convicted this jury would have to believe that there was a conspiracy, that you were part of a conspiracy to set these guys up, and you sent some people over to dispatch one or more inhabitants of that dwelling
>
> . . . .

(50-1 RT 7509.)

The trial court reminded appellant that "when it gets down to the nitty-gritty the attorney's got to decide what motions to bring." (50-1 RT 7510.) Trial counsel countered that appellant had misconstrued his reluctance to file certain motions:

> Mr. Maciel I'm sure will agree that we have had countless discussions about various, various motions, and I'm sure the Court is mindful of the fact that many of these in custody individuals hear from all the jailhouse lawyers and all the rumors -- and if you file this and file that -- and we've talked about that. And I told him, and somehow it's been misconstrued. I've always told Mr. Maciel that I have never and never will file what I perceive as frivolous or senseless motions just for the sake of filing motions.

(50-1 RT 7512; see also *id.* at pp. 7513-7515 [counsel states that appellant's request to file a "*Pitchess*" motion had "been discussed repeatedly"]; *id.* at pp. 7515-7524 [counsel responds to appellant's complaints about a witness' purported lack of veracity and indicates that he had obtained the work records of that witness, which dispelled the witness' claim that he was working the day of the murders]; *id.* at pp. 7526-7528 [counsel informs court that he had told appellant "questions [regarding a witness' credibility] will come out during

cross-examination before the jury"].)

Trial counsel also explained the diminishing frequency of his jail-house visits:

> . . . I do with [appellant] as I do with all of my clients that are in custody when I first get a case, and Mr. Maciel will verify this, I visited him almost every week for several months.
>
> The Defendant: Several months.
>
> Mr. Esqueda: Okay. Until I got a handle on this case. Once I get his version of the case, once I know the facts of the case, once I get a handle on the case, then I don't -- I no longer need to visit him on a weekly basis. He again has misconstrued that as losing some interest in this case. And basically I told him, and I have flat out told him myself, I don't have time to go down to the jail and hold your hand once a week. And sometimes I go there, and when I get the information that I need after 10, 15, 20 minutes, or whatever, I'm out of there. And he gets upset because I don't sit there for two hours speaking to him.

(50-1 RT 7530-7531; see also *id.* at pp. 7532-7533 [trial court tells appellant his attorney will "have to decide which folks it might be profitable to interview," in response to appellant's claim that counsel ignored his requests to interview various in-custody witnesses]; *id.* at pp. 7534-7538 [counsel informs trial court he told appellant, "I can't just be bringing your buddies down here to get them out of Pelican Bay"].)

Appellant nevertheless insisted that he wished to discharge his retained counsel and have the trial court appoint counsel on his behalf:

> . . . I want to dismiss Mr. Esqueda and get myself a State appointed -- the Court issuing a State appointed [lawyer]. I'm not trying to -- we've been trying to go to trial for the longest, because he felt that we were ready. I felt that we were ready at the beginning. We've been trying to

go to trial, and we've been getting put on and put on and put on, and I guess by being put on Mr. Esqueda has been going to other trials and other penalty phases, so he hasn't really got a chance to view my case as good as he's supposed to be doing it.

(50-1 RT 7542-7543.)

After hearing trial counsel's detailed response to appellant's claims (see 50-1 RT 7544-7546), as well as further argument by appellant (see 50-1 RT 7546-7548), the trial court again denied appellant's motion:

The Court: All right. Well, your motion for -- at this point in time your motion to have me, in effect, discharge Mr. Esqueda and appoint a different attorney is denied for the following reasons:

Number one -- these are not [in] any particular order.

But number one: The case has been pending -- through no fault of anybody's, you know, necessarily -- but the case has been pending for a long period of time. It's been sitting in this Court for probably about a year already. . . . [¶] If I were to substitute in another attorney on the case it seems to me that any competent counsel is going to require, I don't know exactly how long, but I would hazard a guess, 6 months to get up to speed on the case from ground zero to try the case.

Mr. Esqueda: Minimum.

The Court: Pardon me?

Mr. Esqueda: Minimum.

The Court: Well, you know, it's a long period of time. . . . It's not a two bit case where I substitute in somebody, what's the difference, we'll just wait a month or two, and we don't have any real problem, we can do it. It's not. It's a great delay if I grant your request. . . .

. . . . . .

. . . [S]ome of these things, if it's been as bad as you maintain,

certainly before 3 weeks ago, whenever the first time you brought this to my attention -- the record will reflect when it was -- but 2, 3 weeks, I guess -- you've been up here a long time in this Court floating around. Now, some of these things must have been surfacing in your mind prior to 2 or 3 weeks ago. The fact that the matter is brought to my attention right on the eve, literally, of a trial date, again, makes me think it's not the most timely request I've ever had. You know, at some point in the last year if Mr. Esqueda is not getting it all ready one might think, well, Mr. Maciel, do something about it, don't wait for a year . . . .

Another thing is, this is the difficulty in getting these witnesses down here. You know what kind of case this is. The witnesses are scared. I've heard the case twice, I know how the witnesses are, they get up there knock-kneed. They are afraid to get hurt. I don't think they are ridiculous to feel that way, necessarily.

The bottom line is, again, it's not a case where all these witnesses are dying to come into court and volunteer their services. You have to keep ordering these guys back every day under the threat of death, practically, to get them down here, some of them. So, again, the longer the case goes the more difficult it is to ever get the case tried.

I have to balance all those things against my belief as to whether you can or cannot get a fair trial if you go with Mr. Esqueda on the case. I'm convinced you can . . . .

(50-1 RT 7548-7552.)

After suggesting appellant and counsel "both ha[d] to give a little bit" (50-1 RT 7552), the trial court observed that Esqueda had not abandoned appellant, nor was he incompetent; the court also noted that there had not been a breakdown of the attorney-client relationship to the point where there was an "actual conflict of interest where [appellant and Esqueda were] going to kill

each other[.]" (50-1 RT 7553.)

The case remained set for trial on December 29, 1997. (50-1 RT 7555.) Jury selection commenced on January 5, 1998. (3 CT 631; 51 RT 7602.)

B. The Law Governing Discharge Of Retained Counsel — The *Ortiz* Decision

In *People v. Ortiz* (1990) 51 Cal.3d 975, this Court resolved a conflict of decisions regarding the ability of an indigent defendant to discharge his retained counsel. In doing so, this Court observed:

> The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state . . . . The right to discharge retained counsel is based on "'necessity in view both of the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust.'" In order to ensure effective assistance of counsel, a nonindigent defendant is accorded the right to discharge his retained attorney: "the attorney-client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty." Thus, we conclude that the right to counsel of choice reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.

(*Id.* at p. 983, citations omitted.)

This Court also concluded that the right of an *indigent* defendant to discharge retained counsel is coextensive with the right of a *nonindigent* defendant to do so; a trial court may not "require an indigent criminal defendant

to demonstrate inadequate representation by his retained attorney, or to identify an irreconcilable conflict between them, before it will approve the defendant's timely motion to discharge his retained attorney and obtain appointed counsel." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984; see also *id.* at p. 987; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 423 ["we held [in *Ortiz*] that a criminal defendant who has retained counsel but becomes indigent may discharge his or her retained counsel and seek appointment of counsel without demonstrating that retained counsel is ineffective"].)

Nevertheless, there are limits on the ability of a defendant to discharge his attorney under such circumstances. "A . . . defendant's right to discharge his retained counsel . . . is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation] , or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.)

> . . . [T]he "fair opportunity" to secure counsel of choice provided by the Sixth Amendment "is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time.'"

(*Id.* at pp. 983-984.)

C. The Trial Court Properly Denied Appellant's Motions

1. The Trial Court Applied The Correct Legal Standard In Ruling On Appellant's Motions

In denying appellant's initial motion to discharge retained counsel, the trial court concluded the motion was "untimely in the extreme" and, if granted,

would result in a continuance of trial "for probably a year," making it extremely "difficult . . . to obtain the testimony of witnesses." (49 RT 7472-7473.) The trial court reiterated those concerns in denying appellant's subsequent motion in camera, noting that "the matter [had been] brought to [the court's] attention right on the eve, literally, of a trial date," and that it would take a newly-appointed attorney a minimum of "6 months to get up to speed . . . from ground zero to try the case." (50-1 RT 7549, 7551.) The court also pointed out that the nature of the case and the potential threats to witnesses required it "to keep ordering [the witnesses] back every day under the threat of death, practically," with each delay making it "more difficult . . . to ever get the case tried." (50-1 RT 7552.)

Although the trial court, *after* denying the second motion, made certain observations regarding retained counsel's competence and the absence of any conflict of interest or breakdown in the attorney-client relationship (see 50-1 RT 7552-7553), those observations in no way formed the basis of the court's ruling.[41] Thus, contrary to appellant's claim that the trial court applied "the wrong standard . . . in ruling on the motion[s]" (AOB 61), the record plainly shows the court was cognizant of the criteria identified in *Ortiz* and applied those criteria correctly. As set forth in *Ortiz*, "[t]he trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant, or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.'" (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983, citations omitted.) The trial court denied appellant's motions on those very grounds, as

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41. And, contrary to appellant's contention, the trial court characterized appellant's second request to discharge retained counsel as a "*Marsden* motion" not because it misunderstood its obligations under *Ortiz* (see AOB 61), but simply for lack of a better description:

> . . . [T]he Court has denied the -- *we'll call it a Marsden motion.* That request has been denied. . . .

(50-1 RT 7554, italics added.)

discussed in greater detail below.

2. The Trial Court Properly Found That Discharge Of Retained Counsel Would Cause "Significant Prejudice" To Appellant And "Disruption Of The Orderly Processes Of Justice"

Appellant maintains the trial court's "articulated concern about the poor timing of the motion[s] was not synonymous with a finding that discharging counsel "would cause 'disruption of the orderly processes of justice.'" (AOB 63.)

Yet, as set forth previously, the record shows the trial court considered the vast quantity of evidence that any newly-appointed counsel would have to master prior to trial ("10's and 10's [of] thousands of pages of documentation and videotapes, trial testimony, et cetera, et cetera"), the inability of such counsel to render competent representation given the amount of time remaining before trial ("It's not a two bit case where I substitute in somebody, what's the difference, we'll just wait a month or two, and we don't have any real problem, we can do it"), and the likelihood that witnesses would become unavailable or unwilling to testify if trial was delayed ("Another thing is, this is the difficulty in getting these witnesses down here. You know what kind of case this is. The witnesses are scared"). (40 RT 7473; 50-1 RT 7549, 7551.) The trial court's statements, taken together, were therefore tantamount to a finding that the discharge of retained counsel would "result in 'significant prejudice' to [appellant], or . . .'disruption of the orderly processes of justice.'" (See *People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.)

3. The Trial Court Properly Found That The Motions Were Untimely

Relying primarily upon federal authority, appellant also argues the trial court's "untimeliness finding is 'not fairly supported by the record.'" (AOB 63-

64.) Aside from the fact that such authority is not binding on this Court,[42] the record shows that appellant first moved to discharge Esqueda on November 27, 1997, almost *two years* after appellant retained him as counsel on February 14, 1996, and only *one month* before the scheduled start of trial. (See 1 CT 136; 49 RT 7467-7468.)

Again, the trial court denied appellant's first motion, finding it to be "untimely in the extreme," and requiring a delay "for probably a year" if granted. (40 RT 7472-7473.) The court found as to the second motion that "the matter [had been] brought to [the court's] attention . . . on the eve . . . of a trial date," "was not the most timely request," and that it would take a newly-appointed attorney a minimum of "6 months to get up to speed . . . from ground zero to try the case," *an estimate with which retained counsel agreed.* (50-1 RT 7549, 7551-7552.) Thus, the appointment of new counsel would not have led to a "somewhat longer delay [than the eventual commencement of trial on January 5, 1998]," as appellant contends (AOB 64), but, rather, to the postponement of trial *for at least six months*, as judged by the court *and* retained counsel.

As such, *Bland v. California Department of Corrections* (9th Cir. 1994) 20 F.3d 1469,[43] *People v. Lara* (2001) 86 Cal.App.4th 139, and *People v.*

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42. It is well settled that decisions from federal courts other than the United States Supreme Court are not binding on California courts even as to federal constitutional issues. (See *People v. Seaton* (2001) 26 Cal.4th 598, 653 ["Decisions of the federal courts of appeal are not binding on this court"]; *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320; *Rohr Aircraft Corporation v. County of San Diego* (1959) 51 Cal.2d 759, 764, revd. on other grounds (1960) 362 U.S. 628, 636 [80 S.Ct. 1050, 1054-1055, 4 L.Ed.2d 1002]; see also *People v. Proby* (1998) 60 Cal.App.4th 922, 930 [declining to apply out-of-state law]; cf. *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 56.)

43. Overruled on other grounds in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025 (finding that while "[a] particular abuse of discretion by a state

Stevens (1984) 156 Cal.App.3d 1119 -- authorities upon which appellant relies -- are inapposite. In *Bland*, *supra*, 20 F.3d at page 1476, the trial court denied the defendant's motion to discharge retained counsel where the grant of such motion, in the face of retained counsel's admitted unpreparedness for trial, would not have caused significant delay.[44/] *Lara*, *supra*, 86 Cal.App.4th at pages 163-164, involved the trial court's denial of a motion to discharge retained counsel, where the trial court erroneously treated the motion as a *Marsden* motion and failed to make any findings regarding timeliness, leading the reviewing court to remark, "there is no way to determine whether allowing a continuance would have been prejudicial to the prosecution and disrupted the orderly processes of justice." Finally, in *Stevens*, *supra*, 156 Cal.App.3d at pages 1125-1129, the trial court refused to discharge a "volunteer" attorney whose drinking problem led to missed court appearances, based upon the court's "mistaken belief that [the defendant] was required to show constitutionally inadequate representation [before it could do so]."

The fact that "numerous continuances of . . . trial had been granted at the request of both prosecution and defense counsel" (AOB 65) in the instant matter does not dictate a contrary conclusion.[45/] The seriousness of the charges

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court may amount also to a violation of the Constitution, . . . not every state court abuse of discretion has the same effect").

44. In granting relief, the Ninth Circuit nevertheless acknowledged that "[i]t is within the trial court's discretion to deny a motion to substitute made on the eve of trial where substitution would require a continuance." (*Bland v. Department of Corrections*, *supra*, 20 F.3d at p. 1476, citing *United States v. Walker* (9th Cir. 1990) 915 F.2d 480, 482.)

45. Indeed, many of the continuances were requested by appellant or his codefendants; the codefendants eventually moved for separate trials, occasioning further delays. (See 1 CT 136; 2 CT 473-476, 483-485, 487, 489-490, 493, 502-503, 516, 525, 529-531, 541-542, 551, 596, 598; 1 RT 165-166; 3 RT 585-606; 4 RT 615, 641-642, 645-650, 673; 5 RT 687, 701, 767; 6 RT 813; 7 RT 847; 8 RT 857-905; 16 RT 2290-2304; 26 RT 3863-3889; 28 RT

and the procedural complexity of this case mandated such continuances; however, when appellant's first motion was made on November 17, 1997, trial was set for December 29, 1997, a date that was ultimately extended by *only one week*. Moreover, as evidenced by the trial court's inquiry into appellant's complaints regarding retained counsel, such complaints were either patently meritless or involved mere differences of opinion concerning trial strategy and tactics (see 50-1 RT 7497-7548). (Compare *People v. Ortiz, supra*, 51 Cal.3d at pp. 984-987 [defendant's motion to discharge *unpaid* retained counsel "reluctantly serving on a pro bono basis," which was "made after the mistrial and *well before* any second trial, was sufficiently timely"].) No error can be shown.

4. The Trial Court Properly Evaluated Retained Counsel's Performance And Appellant's Claims

a. Appellant Was Not Denied Meaningful Discovery By A Standing Pretrial Nondisclosure Order

Appellant complains that a "standing order barred all counsel from sharing with the defendants grand jury transcripts, prior trial transcripts, investigative reports, witness statements, and generally anything that ran the risk of disclosing the identities of prosecution witnesses." (AOB 68.) According to appellant, "[t]he denial of discovery deprived [him] of the possibility of presenting additional evidence of counsel's ineptitute[.]" (AOB 69.)

As set forth in Argument IV, *infra*, however, the identities of the witnesses subject to that nondisclosure order were readily ascertainable *prior to trial*. Three witnesses were fellow gang members who either participated in the murders or were known to appellant, six witnesses lived next door to or across the street from the murder scene, and one witness was the sister of

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3902-3916; 40-1 RT 6081-6082; 42 RT 6583-6605; 45 RT 7165; 47 RT 7428-7435; 49 RT 7452-7465.)

codefendant Anthony Torres. And, it would appear that appellant nevertheless knew the identity of at least two of those witnesses, as he referred to those witnesses *by name* during the hearing on his second motion to discharge retained counsel. (See 50-1 RT 7523, 7527, 7534-7536.) It should also be noted that Esqueda had, by that time, given appellant redacted transcripts of trial testimony in one of the severed cases (see 26 RT 3893-3896), which presumably assisted appellant in ascertaining the identities of witnesses in this case, *despite* the nondisclosure order. The nondisclosure order did not prejudice appellant.

b. Appellant Was Not Denied A Fair Hearing By The Exclusion Of Isaac Guillen, An Unlicensed "Investigator"

Appellant also contends that his retained "investigator" Isaac Guillen, who was awaiting the results of the California bar examination at the time of trial (see AOB 69-70), was improperly prevented from visiting appellant in jail; he further contends that the trial court "had no legitimate reason to exclude Guillen from the in camera hearing." (AOB 70, italics omitted.)

Yet, as the record shows (and as appellant acknowledges), Guillen was an unlicensed "investigator" who attempted to visit appellant in jail, was prevented from doing so because of his unlicensed status, and was eventually arrested. (AOB 70; see also 49 RT 7479-7481.) The trial court denied appellant's request to have "a full hearing on the issue" (49 RT 7479), ruling:

> The Court: Mr. Guillen is going to get himself in trouble.
>
> He is not an attorney. He is not a licensed investigator.
>
> Mr. Guillen, therefore, has no more status than any other civilian.
>
> It is like if somebody else wanted to come in here and act in a certain capacity, they cannot do that due to the laws and the rules over there.
>
> I will not have a hearing. That will not help me resolve this case.

(49 RT 7480; see also 8 1SCT 1609.)

The trial court suggested that appellant instead select a licensed investigator from the "2- or 300 . . . on [the court's approved] panel"; appellant, however, declined the court's suggestion, as well as the court's offer to appoint an investigator for him ("I am not asking you to appoint nobody"). (49 RT 7481-7482.) Prior to the hearing on appellant's second motion to discharge retained counsel, the trial court concluded that Guillen's presence "would constitute probably a waiver," because of his status as an unlicensed investigator. (50-1 RT 7496.) At that hearing, Esqueda voiced his own concerns regarding Guillen's rather unusual role in the case:

> I'd also like to just add briefly that Mr. Maciel and I have always had the best rapport possible. There's never been any problems. He's never shown anything but the utmost respect for me. He's always congenial, courteous, and likewise I have exchanged that respect to him. There's never, ever been a problem with us until Mr. Guillen came into this case.
>
> And I'll tell this Court that about two weeks ago Mr. Guillen came to my office, I asked him to do certain things, and that meeting with Mr. Guillen escalated to probably one of the wors[t] verbal confrontations I've ever had in my office, and I thought that at any moment it could turn into a physical altercation.[46/]

(50-1 RT 7544-7545.)

Despite appellant's claim that the trial court failed to conduct a "meaningful inquiry" into the circumstances that had led appellant "to feel he

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46. Esqueda also indicated that appellant had not expressed any dissatisfaction with his representation until Guillen had been retained:

> . . . [I]n a nutshell, there's never been a problem. There's never been an issue of me not being prepared or not ready, or any of these things being done until Mr. Guillen came in this case. And I think Mr. Maciel is being misled or misinformed by Mr. Guillen.

(50-1 RT 7546.)

needed to hire an inexperienced law school graduate, whom counsel obviously did not like, to investigate his case" (AOB 73), the record shows the court patiently and painstakingly considered each of appellant's complaints regarding retained counsel. (See 50-1 RT 7497-7551.) The trial court also properly excluded Guillen from the in camera hearing on appellant's second motion to discharge retained counsel; because Guillen was neither a licensed investigator nor an attorney, statements made in his presence arguably would not come within the purview of Evidence Code section 954, subdivision (c), which protects confidential communications between a client and "[t]he person who was the lawyer at the time of the confidential communication . . . ." (See also Evid. Code, § 912 [discussing waiver of privilege].)

Moreover, there is no support in the record for appellant's claim that "[t]he court knew that counsel was possibly laboring under a severe conflict of interest, brought about by his engagement in an extremely complicated death penalty case for which he had arguably been paid far too little . . . ." (AOB 73.) To the contrary, Esqueda indicated his eagerness to try this case on appellant's behalf, representing to the court at one point, "I'll do the things that [appellant] requested, and I think that I'm ready for trial, and I will zealously represent [appellant], and he's going to get the best representation and the best and fairest trial that he's entitled to." (50-1 RT 7546.) Indeed, Esqueda assured the court that he would "work with anyone, . . . do anything . . . necessary to meet the ends and what's in the best interests of Mr. Maciel . . . , [a]nd . . . work with Mr. Guillen and do whatever is necessary to prepare this case for trial." (50-1 RT 7545-7546.)

Appellant's contention should therefore be rejected.

5. The Trial Court Properly Found That There Had Been No Irremediable Breakdown Of The Attorney-Client Relationship

In a related contention, appellant maintains the trial court's purportedly inadequate inquiry into "Esqueda's failure to hire a licensed investigator[47/], his unprofessional treatment of Guillen, and the reasons why [appellant] felt compelled to fund his own investigator" all allegedly contradict "the court's finding that there had been no breakdown in the attorney-client relationship to the point of creating an actual conflict of interest[.]" (AOB 73-74.)

As set forth previously, however, the trial court conducted a meaningful inquiry into appellant's complaints with retained counsel, and properly found them to be either patently meritless or to involve mere differences of opinion concerning trial strategy and tactics. (See 50-1 RT 7497-7548.) And, Esqueda assured the court that he would "do the things that [appellant] requested," and that he would " work with Mr. Guillen and do whatever is necessary to prepare this case for trial." (50-1 RT 7545-7546.) Appellant's contention is belied by the record.

6. The Trial Court Properly Determined There Was No Merit To Appellant's Complaints About Retained Counsel

a. The Trial Court Conducted A Meaningful Inquiry Into Appellant's Complaints About Counsel's Purported Lack Of Guilt-Phase Investigation

1. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Investigation Of Witness No. 15

During the hearing on his second motion to discharge retained counsel, appellant complained that counsel's investigation of Witness No. 15, the

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47. Appellant acknowledges earlier, however, that *he* was the one who hired Guillen. (See AOB 71.)

brother of murder victim Anthony Moreno, was inadequate in that counsel had not taken photographs of the apartment complex where Witness No. 15 had lived, had not uncovered the true location of Witness No. 15's residence in that complex, and had not investigated whether Witness No. 15 had obtained any leniency in a pending Three Strikes case in return for his testimony against appellant.[48] (See 50-1 RT 7503, 7526-7527.)

As set forth previously, however, retained counsel represented that, contrary to appellant's claim, there were "some aerial photographs" of the crime scene, which were "introduced at one of the previous trials." (50-1 RT 7501.) And, counsel pointed out that "Guillen ha[d] taken photographs of [Shyrock's apartment complex]." (50-1 RT 7502-7504.) At trial, Esqueda questioned Witness No. 15 about his brother's residence and its proximity to Shyrock's apartment. (See 56 RT 8830-8831.) Moreover, as to any consideration Witness No. 15 purportedly received in return for his testimony, Esqueda indicated he had told appellant that "questions [regarding a witness' credibility] will come out during cross-examination before the jury"; Esqueda in fact raised such questions during his cross-examination of Witness No. 15 at trial, and later brought Witness No. 15's subsequent sentence of time served on his pending Three Strikes case to the attention of the trial court during the penalty phase. (See 50-1 RT 7526-7528; 56 RT 8810-8815; 66 RT 10246-10247.) Finally, despite his accusations of counsel's inadequate preparation, appellant *himself* acknowledged, "I don't really know that much about the whole case, or about the whole strategy on this case[.]" (50-1 RT 7528.) The trial court properly denied appellant's second motion based upon appellant's baseless complaints regarding Esqueda's pretrial preparation. (Compare *Bland*, *supra*, 20 F.3d at

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48. The sentence Witness No. 15 eventually received in his Three Strikes case is the subject of a separate claim of error, which respondent addresses in Argument XV, *infra*.

page 1476 [erroneous denial of timely motion to discharge where counsel acknowledged "he had not had an opportunity to prepare [for trial] because he had just received the file the week before"].)

2. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Investigation Of Witness No. 14

Appellant also maintains that the trial court did not adequately inquire into his dissatisfaction with retained counsel's investigation of Witness No. 14, who provided "testimony from which the jury may have inferred that [appellant] was the mastermind for the murders." (AOB 76.) At the hearing on the second motion, appellant complained that counsel did not obtain work records from the Metropolitan Transit Authority (MTA), where Witness No. 14 was employed, or accident records from the Walnut Sheriff's Station, to contradict Witness No. 14's claim that he had worked the day of the murders and had driven appellant from the baptismal party in his car. (See 50-1 RT 7523-7525.)

As Esqueda pointed out at that hearing, however, even if "[t]here [were] work records that [indicated Witness No. 14] wasn't at work that day," such records would not "move the ball one way or the other," a point with which the trial court appeared to agree. (50-1 RT 7524.) Indeed, the central feature of Witness No. 14's testimony concerned codefendant Jimmy Palma's statement to appellant shortly before the murders that he was "strapped" and "going to take care of business. Not to worry about it." (57 RT 8995-8996.) Witness No. 14's presence or absence at work that day was, therefore, only marginally relevant to the issues at hand.

Nor were accident records regarding Witness No. 14's car relevant. According to appellant, such records would show that Witness No. 14's "girlfriend crashed his vehicle in the freeway for under the influence of PCP,

so the car was totaled."[49] (50-1 RT 7524.) Appellant also claimed (without any supporting documentation) Witness No. 14 had testified during codefendant Anthony Torres's trial (but not at the other trials) that he picked up appellant at the baptismal party in his black Stanza. (50-1 RT 7524-7525.) At appellant's trial, however, Witness No. 14 testified that he used his company car, a Lumina, which was provided by the MTA. (57 RT 9002-9003.)

Despite appellant's contention that "impeaching the credibility of [Witness No. 14] would clearly have 'moved the ball' in [appellant's] favor," at trial Esqueda cross-examined Witness No. 14 exhaustively about more far more compelling matters, including his arrangement with the prosecution to provide testimony, his heroin use, his participation in other crimes, and his prior inconsistent testimony before the grand jury. (See 57 RT 9000-9015; 58 RT 9018-9055, 9064-9067.)

3. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Failure To File A *Pitchess* Motion

In support of his second motion to discharge retained counsel, appellant in addition complained Esqueda was refusing to file a *Pitchess*[50] motion "in regards of some of the officers lying, you know what I mean, on the stand or whatever." (50-1 RT 7513.) Esqueda informed the trial court that he had "repeatedly" told appellant that "credibility issues are best addressed before the jury, and that . . . [in his] opinion . . . not only several witnesses, but also officers ha[d] made prior inconsistent statements in this case, and that those will be brought out before the jury." (50-1 RT 7515.) Further inquiry revealed that

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49. Esqueda indicated that he had asked Guillen to "look into" those records; appellant stated Guillen could "get nothing without a subpoena." (50-1 RT 7525.)

50. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

appellant was, in actuality, seeking a trial transcript from the "Manriquez case out of Pomona," in which he claimed Detective Stephen Davis, one of the investigating officers in this case, admitted lying under oath about his identification of the defendant. (See 50-1 RT 7515-7522.) The trial court responded, "If there's a transcript out there somewhere in the world wherein the investigating officer on your case admitted before a jury to lying under oath, I think that is something that counsel ought to look into, and I'm sure Mr. Esqueda will do so, now that you've mentioned that to him." (50-1 RT 7522.)

Thus, contrary to appellant's contention that "the court's failure to inquire was apparently based on its fundamental misunderstanding of the scope of discovery authorized by law" (AOB 79), the record establishes that appellant was not, in fact, requesting the disclosure of "prior citizen complaints against the investigating officer[] for making false arrests, falsifying police reports, planting evidence, or engaging in other forms of dishonest conduct" (AOB 78); instead, appellant was merely seeking a *transcript* of the officer's trial testimony in another case. The court's inquiry was clearly adequate under the circumstances.

4. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Failure To File A Motion To Dismiss The Indictment

Appellant asked retained counsel to file a motion to dismiss the indictment pursuant to *People v. Johnson* (1975) 15 Cal.3d 248, on the ground that the prosecution withheld certain exculpatory evidence from the grand jury, including a statement by one victim's nine-year old nephew that he had "overheard an argument that he thought was related to drugs," before a man in a mask started shooting. (See 50-1 RT 7507-7508.) In inquiring into appellant's complaints regarding counsel's failure to do so, the trial court reminded appellant, "Your guilt or lack thereof is not premised upon you being

there." The court also pointed out: "[T]he fact that some kid says the guy came in with a mask and they were arguing about narcotics, I don't know if that does much for you." (50-1 RT 7509-7510.) Appellant responded, "*It doesn't.* But the thing I was trying to get at is I asked Esqueda, regardless, if the motion was on my behalf or against my behalf, if he could just file it for me." (50-1 RT 7510, italics added.) The court advised appellant that "when it gets down to the nitty-gritty the attorney's got to decide what motions to bring. . . . If you've got counsel, those are counsel's decisions." (50-1 RT 7510-7511.)

In view of the foregoing, appellant's claim of error regarding the court's inquiry into retained counsel's justifiable refusal to file what appellant *himself* acknowledged to be a frivolous motion should be rejected out of hand.

5. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Failure To Take Crime Scene Photographs

Appellant complained that he had asked Esqueda to take photographs of the Maxson Road duplex, because he believed there were obstructions which would have made it impossible for witnesses to have seen him walk up the driveway toward the back of the residence on the afternoon of the murders. (50-1 RT 7497-7502.) Subsequent to appellant's request, the duplex was torn down. (50-1 RT 7498.)

Esqueda informed the court that "there [were] photographs of the location," as well as "some aerial photographs" that were "introduced at one of the previous trials." (50-1 RT 7501.) He explained that, despite appellant's contention, a witness "could . . . actually see in front of the driveway." (50-1 RT 7502.) Esqueda also reminded the court that he had not provided appellant with discovery because of the nondisclosure order "that nothing, absolutely nothing was to be provided to Mr. Maciel," an order with which Esqueda had "strictly and literally abided[.]" (50-1 RT 7499.)

Nevertheless, the only witness who testified to appellant's presence at the Maxson Road address was Witness No. 15, Alex Moreno's brother, who described how appellant had given him and Moreno free heroin on the afternoon of April 22, 1995. (See 56 RT 8727-8740, 8767-8769, 8802-8807.) *No* witness testified that he had seen appellant walk up the driveway of the residence on the day of the murders. (See RT, *passim*.) Appellant's contention that the trial court "did not conduct an investigation reasonable in scope" with regard to this issue (AOB 82) is therefore without merit.

6. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Failure To Subpoena Telephone Records

At the hearing, appellant also informed the trial court that Esqueda had not yet complied with his request to subpoena telephone records for calls made from the baptismal party in connection with the murders. Appellant claimed that the prosecution "got the phone records from the house, but they never turned them over to Esqueda." (50-1 RT 7540.)

As appellant acknowledges, however, "[n]o phone company records were introduced by the prosecution regarding telephone calls made from the residence where the baptismal party was held." (AOB 82, fn. 29.) As with the preceding contention, appellant's complaint regarding the trial court's investigation of counsel's alleged shortcomings is without merit.

7. The Trial Court Properly Inquired Into Appellant's Complaints About Counsel's Failure To Interview Witnesses In Jail

Appellant informed the trial court there were two witnesses in county jail and three in state prison whom he had asked Esqueda to contact; in particular, appellant indicated that he wanted Esqueda "to talk to the guy [who] was with [Witness No. 14] in the same holding cell[.]" (50-1 RT 7532, 7535.) The trial court advised appellant, "assuming your attorney does ask the Court to bring anybody down, or anyone else does, I will have to be convinced that they have material and . . . [¶] important information, or they are not coming down. I just got burned too many times dragging guys down here from different joints." (50-1 RT 7537-7538.) Esqueda added:

> . . . [T]hat's precisely what Mr. Maciel has been told. I said, once we get this thing set for trial and I can ask the Court to issue removal orders -- and I have told Mr. Maciel, and I'll be very candid, because some of these witnesses that he wants brought down . . . I've told him, listen, I can't just be bringing your buddies down here to get them out of Pelican Bay. I says, once you tell me precisely what they could testify to, and if in fact the Court deems them to be material witnesses, we'll have them ordered down.

(50-1 RT 7538.)

Appellant answered, "Right," before proceeding to complain that Esqueda had failed to take statements from unnamed witnesses while they were in county jail, before they were transferred to state prison. (50-1 RT 7538-7539.)

Appellant faults the trial court because it "did not ask for the names of the witnesses in question." (AOB 84.) But it was *appellant's* burden to provide the court with the names of the witnesses he sought, as well as their relevance to this case. Moreover, Esqueda *did* interview in-custody witnesses,

as evidenced in part by his reliance during the defense case on Witness No. 12 (an immunized witness originally identified as a prosecution witness), whose testimony was favorable to appellant. (60 RT 9344-9385.) Esqueda also sought a removal order for Shyrock, who was in federal custody. (See 3 RT 508, 512-517 ["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"].) In sum, appellant has failed to establish that any of the unnamed witnesses were in possession of relevant, material evidence, or that the trial court "did not conduct an investigation reasonable in scope." (See AOB 82.)

8. The Trial Court Properly Inquired Into Counsel's Obligations In Other Cases

Appellant complains that the trial court did not adequately inquire into Esqueda's obligations in other cases, "especially during the months preceding appellant's trial." (AOB 84.) Appellant maintains that "some inquiry into counsel's ability to prepare was warranted," because Esqueda purportedly "was too busy with his other cases to properly investigate [t]his case." (AOB 84-85.)

The record shows, however, that appellant did *not* complain about Esqueda's obligations in other cases; instead, it was the trial court that informed appellant, "[Y]ou know, everybody . . . is spread pretty thin, including this Court and including your lawyer." (50-1 RT 7543.) Nevertheless, as set forth previously, Esqueda voiced no concerns over his workload, and assured the court that he would "work with anyone, . . . do anything . . . necessary to meet the ends and what's in the best interests of Mr. Maciel . . . , [a]nd . . . work with Mr. Guillen and do whatever is necessary to prepare this case for trial." (50-1 RT 7545-7546.)

b. The Trial Court Was Under No Obligation To Investigate Whether Counsel Was Investigating Potential Mitigating Evidence In Anticipation Of A Penalty Phase

Lastly, appellant complains that retained counsel's "failure to anticipate and prepare for a possible penalty phase should have been a source of concern to the court." (AOB 86.)

Contrary to appellant's complaint, there is nothing to suggest Esqueda had failed to "conduct any mitigation investigation" (AOB 85), nor is there anything to suggest appellant voiced any "discontent" over such purported failure. (See 50-1 RT 7497-7554.) Indeed, the record shows Esqueda mounted a vigorous penalty phase defense, calling appellant's mother, sisters, cousin, and wife as witnesses, as well as appellant's former employer; Esqueda also called upon reformed gang member Leonzo Moreno to describe appellant's role as a peacemaker between warring street gangs. (See 64 RT 9947-9965, 9968-9976, 9983-9989, 10009-10021.) And, once again, Esqueda informed the court that in preparing for trial, he "visited [appellant] almost every week for several months." (50-1 RT 7530-7531.) This contention, like the preceding contentions, should be rejected.

III.

APPELLANT'S CONSULAR RIGHTS CLAIM IS NOT COGNIZABLE ON APPEAL, NOR ARE THERE "EXCEPTIONAL CIRCUMSTANCES" THAT WOULD WARRANT REMAND FOR AN EVIDENTIARY HEARING; ALTERNATIVELY, APPELLANT'S CLAIM IS WITHOUT MERIT

Despite the absence of anything in the record suggesting appellant disclosed the alleged fact of his Mexican citizenship to law enforcement, the court, or his attorneys, appellant nevertheless contends that "pursuant to Rule 22[51/] of the [California] Rules of Court, the decision of the International Court of Justice [("ICJ")] in the *Avena*[52/] case, and the President's memorandum of February 28, 2005, concerning compliance with the *Avena* decision, this Court should refer this matter for an evidentiary hearing to determine whether the proven violation of appellant's consular rights was prejudicial."53/ (AOB 90,

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51. Rule 22 of the California Rules of Court has recently been renumbered as rule 8.252. As relevant here, rule 8.252(c) provides:

> (1) A party may move that the reviewing court take evidence.
>
> (2) An order granting the motion must:
>
> (A) State the issues on which evidence will be taken;
>
> (B) Specify whether the court, a justice, or a special master or referee will take the evidence; and
>
> (C) Give notice of the time and place for taking the evidence.

52. *Avena and Other Mexican Nationals* (*Mexico v. United States*) 2004 I.C.J. No. 128 (Mar. 31); 2004 I.C.J. LEXIS 11 ("*Avena*").

53. Appellant refers to briefs filed in connection with *Medellin v. Dretke* (2004) 543 U.S. 1032 [125 S.Ct. 686, 160 L.Ed.2d 518], in which the United States Supreme Court considered the effect of *Avena* on state-court criminal judgments. (See AOB 92-94; see also Brief of the United States as Amicus Curiae, *Medellin v. Dretke* (U.S. No. 04-5928), 2004 LEXIS U.S. Briefs 5928 ("United States *Medellin v. Dretke* Supreme Court Br."); Brief of the United States as Amicus Curiae, *Ex Parte Medellin* (Tex.Crim.App. No. AP-75,207)

footnotes omitted.) Appellant's contention is not cognizable on appeal as a result of his failure to raise this ground at trial. In any event, this case does not involve the required "exceptional circumstances" which this Court has found necessary before any remand for an evidentiary hearing may be ordered. Alternatively, appellant's contention is without merit.

A. Appellant's Contention Is Not Cognizable On Appeal

The record shows that no objection was voiced below based upon a lack of consular notification under the Vienna Convention on Consular Relations ("Vienna Convention" or "VCCR"). (See RT, *passim.*) As such, appellant's contention is not cognizable on appeal.

("United States *Medellin* Texas Court Br.").) The first brief was filed in *Medellin*, a case which the Supreme Court subsequently dismissed (*Medellin v. Dretke* (2005) 544 U.S. 660 [125 S.Ct. 2088; 161 L.Ed.2d 982] [*per curiam*]). The second brief was filed in *Ex Parte Medellin* (Tex.Crim.App., Nov. 15, 2006) ___ S.W.3d ___ (2006 Tex.Crim.App. LEXIS 2236), a case in which the Texas Court of Criminal Appeals held that the ICJ's *Avena* decision and the Presidential Memorandum did not preempt the state's procedural bars. A four-judge plurality of the Texas Court ruled that the Presidential Memorandum exceeded the President's constitutional authority by intruding into the independent powers of the judiciary. (*Id.* at *45-46, 86-87.) The plurality specifically rejected the arguments set forth by the United States in its *amicus* brief and now recycled by appellant in his own brief. (*Id.* at *66-87.) Presiding Judge Keller "concurred in the judgment with regard to the analysis of the President's Memorandum," and in her concurring opinion, concluded the Presidential Memorandum violated principles of federalism. (*Id.* at * 104-115 (conc. opn., Keller, P.J.).) Judge Cochran also filed a concurring opinion, concluding that a separation of powers analysis was unnecessary because "binding federal law . . . can[not] be accomplished through a Presidential press release of a private memorandum directed to the Attorney General." (*Id.* at * 101-104 (conc. opn., Cochran, J.).) On January 16, 2007, Medellin filed a petition for a writ of certiorari in the United States Supreme Court asking the Court to review the Texas Court's decision. (*Medellin v. Texas*, Supreme Court Docket No. 06-984.) That petition was granted on April 30, 2007, and the matter is now pending before the high court.

> Under section 1538.5, as in the case of any other motion, defendants must specify the precise grounds for suppression of the evidence in question . . . . The degree of specificity that is appropriate will depend on the legal issue the defendant is raising and the surrounding circumstances. Defendants need only be specific enough to give the prosecution and the court reasonable notice. *Defendants cannot, however, lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked.*

(*People v. Williams* (1999) 20 Cal.4th 119, 130-131, italics added; see also *People v. Michaels* (2002) 28 Cal.4th 486, 511 ["defendant's failure to raise this issue [regarding an alleged involuntary confession] in the trial court bars him from asserting it on appeal"]; cf. *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 118 ["Marlow failed to object at trial [to the prosecutor's comment on his post-arrest silence] and therefore has forfeited the contention for purposes of this appeal"].)

In *Breard v. Greene* (1998) 523 U.S. 373, 375-376 [118 S.Ct. 1352, 140 L.Ed.2d 529] [*per curiam*], the United States Supreme Court held that the Vienna Convention does not prevent application of procedural default rules to VCCR claims. Although the ICJ in *Avena* found that the Vienna Convention guaranteed individually enforceable rights, the ICJ's interpretation of the Convention is not binding on United States courts and is only entitled to "respectful consideration." (See *Sanchez-Llamas v. Oregon* (2006) ___U.S.___ [126 S.Ct. 2669, 2683-2686, 165 L.Ed.2d 557].) Indeed, the Vienna Convention itself counsels against finding that individual rights are created by the treaty. The Preamble to the Vienna Convention states:

> Believing that an international convention on consular relations, privileges, and immunities would also contribute to the development of friendly relations among nations, irrespective of

> their differing constitutional and social systems, realizing that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts . . . .

(Italics added; see also *United States v. Jiminez-Nava* (5th Cir. 2001) 243 F.3d 192, 198; Vienna Convention, Art. 36(1) [provisions of Article 36 were adopted "with a view to facilitating the exercise of consular functions"].)

Appellant nevertheless argues that a February 28, 2005, Presidential Memorandum *requires* state courts to review and reconsider the effect of the consular rights violations in all of the 51 cases named in the *Avena* judgment. (AOB 93.) According to appellant, the President's "decisions in that realm must command particular respect; state procedural bars must give way if they impair the effective exercise of national foreign policy." (AOB 108; see also *id.* at p. 107 ["*Avena* declares that procedural default rules may not be invoked to prevent review"].) Respondent disagrees.

1. The Presidential Memorandum Of February 28, 2005, Is Not A Mandatory Order Requiring Suspension Of State-Court Procedural Rules In Cases Brought By *Avena* Litigants And Creates No New Legal Rights Or Obligations

In *Avena*, the Republic of Mexico alleged violations of the Vienna Convention with respect to 51 Mexican nationals facing the death penalty in the United States. The March 2004 decision in *Avena* concluded that the Vienna Convention guaranteed individually enforceable rights and that the United States had violated those rights; it required that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals" to determine whether the violations "caused actual prejudice," without allowing procedural default rules to bar such review. (*Avena*, *supra*, ¶¶ 121-122, 153; see *Medellin v. Dretke*, *supra*, ___ U.S. at p. ____ [125 S.Ct. 2088, 2089-2090].)

On February 28, 2005, President George W. Bush issued a memorandum stating that the United States would discharge its international obligations under *Avena* by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." (George W. Bush, Memorandum for the Attorney General, App. 2 to United States *Medellin v. Dretke* Supreme Court Br. Brief; also available at http://www.asil.org/inthenews/avenamemo050308.html.)

Just one week later, however, on March 7, 2005, the United States withdrew from the ICJ's jurisdiction, terminating the ICJ's authority over future disputes. Secretary of State Condoleeza Rice submitted a letter to the United Nations withdrawing the United States from the Optional Protocol of the Vienna Convention, the portion of the treaty (proposed by the United States in 1963) providing that "disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the [ICJ]" (21 U.S.T. 326).[54/]

State Department spokesperson Darla Jones said on March 9, 2005, "The [ICJ] has interpreted the Vienna Consular Convention in ways that we had not anticipated that involved state criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system." She added that withdrawal from the Optional Protocol is a way of "protecting against future [ICJ] judgments that might similarly interpret the [Vienna Convention] or disrupt our domestic criminal system in ways we did not

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54. The letter states: "This letter constitutes notification by the United States of America that it hereby withdraws from the [Vienna Convention's Optional Protocol]. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the [ICJ] reflected in that Protocol." (Kirgis, Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights, available at http://www.asil.org/insights/2005/03/insights050309a.html.)

anticipate when we joined the convention." (Lane, *U.S. Quits Pact Used in Capital Cases*, Washington Post (March 10, 2005) p. A01.)

In view of the foregoing, if the Presidential Memorandum is an "order" to state courts, it is an odd one, as it contains none of the hallmarks one would expect from an order intending to take the unprecedented step of superseding state laws. The Presidential Memorandum is directed to the Attorney General of the United States, an officer of the federal Executive. The Memorandum is not addressed to the state courts, and it is not styled as a directive.

Likewise, if the Presidential Memorandum were meant to carry the full force and effect of an Executive order, creating binding federal law on the state courts, one would expect it to be promulgated and published in the normal, accepted manner. Presidential proclamations and Executive orders, except those not having general applicability or legal effect or those only effective against federal agencies, are drafted, reviewed, and promulgated in a specific manner, then published in the Federal Register.[55] (See 44 U.S.C. § 1505, subd. (a)(1); 1 C.F.R. 19.1-19.3 (2007).) The Presidential Memorandum addressing the *Avena* decision is not written or published in the manner prescribed for Executive orders. Instead, it is written in a private memo style, is not published in the Federal Register, and is located only by accessing the White House Internet website under "Press Releases." (*Ex Parte Medellin, supra*, 2006 Tex.Crim.App. LEXIS 2236, *103 (conc. opn. of Cohran, J.); http://

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55. "Documents having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations . . . ." (44 U.S.C. § 1505, subd. (a)(1).)

The Code of Federal Regulations, at 1 C.F.R. § 19.1-19.3 (2007), stipulates the specific manner in which proposed Executive orders are to be prepared, printed, and published. The Presidential Memorandum of February 28, 2005, carries none of those hallmarks.

www.whitehouse.gov/news/releases/2005/02/20050228-18.html.) It is highly unlikely that "binding federal law," designed to supersede state procedural rules and reopen criminal convictions, "can be accomplished through a Presidential press release of a private memorandum directed to the [United States] Attorney General." (*Ex Parte Medellin, supra*, 2006 Tex.Crim.App. LEXIS 2236, *103 (conc. opn. of Cohran, J.).)

The Presidential Memorandum also contains no mandatory language and acknowledges that general principles of comity apply to the United States' discharge of its international obligations. The Memorandum merely provides that the United States will comply with *Avena* """by having State courts give effect to the [ICJ] decision in accordance with general principles of comity . . . ."" (AOB 93.) Relationships founded in "comity" do not exist within a "hierarchy"; they bespeak no authority of one element to "order" about the other. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." (*Societe Nationale Industrielle Aerospatiale v. United States District Court* (1987) 482 U.S. 522, 543, fn. 27 [107 S.Ct. 2542, 96 L.Ed.2d 461].) By calling upon state courts to give effect to the *Avena* decision "in accordance with general principles of comity," the President's Memorandum does not purport to bind state courts to do any particular act but instead merely requests the states exercise whatever discretion they may have in such a way as to comply with the ICJ's ruling. Nothing in the Presidential Memorandum compels consideration of such a claim on appeal where, as here, California law limits the discretion of the appellate courts to hear matters not raised first in the trial courts.

The Presidential Memorandum is best read as a statement that the United States will comply with the *Avena* decision in the same way it complies with the Vienna Convention generally, i.e., by relying upon the good faith

understanding of state and local officials, and is at most a request by the President to the state courts to "give effect" to the *Avena* decision to the extent state procedural rules and laws permit them to do so. The Vienna Convention *itself* states that consular notification rights "shall be exercised in conformity with the laws and regulations of the receiving [nation]." (Vienna Convention, Art. 36(2).) Since the treaty recognizes the signatories would have their own procedural rules, and the treaty was not intended to undercut those rules, respecting Federal-State comity considerations is entirely consistent with the United States fulfilling its obligations under international law.

Notably, the United States Supreme Court recently held that ICJ decisions are entitled only to "respectful consideration," are *not binding* on United States courts, and are subject to the procedural rules of domestic law. (*Sanchez-Llamas v. Oregon*, *supra*, ___U.S.___ [126 S.Ct. at pp. 2683-2686] [holding Art. 36 claims and ICJ decisions are subject to state procedural rules].) In concluding that the ICJ incorrectly interpreted the Vienna Convention as requiring judicial review of the *Avena* litigants' claims without regard to state procedural rules, the Supreme Court in *Sanchez-Llamas* undercut any Executive decision that would purport to enforce a contrary interpretation of the treaty. Certainly, the Memorandum should not be read gratuitously to set the Supreme Court and the President on a collision course. In fact, the United States Supreme Court has also held that ICJ decisions are subject to *federal* procedural limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. (*Breard v. Greene*, *supra*, 523 U.S. at pp. 375-376 [118 S.Ct. at pp. 1354-1355].)

Likewise, the Executive's decision to withdraw from the Vienna Convention's Optional Protocol a mere week after the issuance of the Presidential Memorandum strongly indicates the Executive's unwillingness to bind United States courts to ICJ decisions. As stated by the United States

Supreme Court in *Sanchez-Llamas*, "it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction is no longer recognized by the United States." (*Sanchez-Llamas v. Oregon*, *supra*, ___U.S.___ [126 S.Ct. at p. 2685].) Similarly, it is highly unlikely that the President intended his Memorandum to override state procedural bars and bind state courts to the *Avena* decision, when only a week later, he no longer recognized the ICJ's jurisdiction.

Furthermore, the discretionary language used in the Presidential Memorandum comports with the position of the United States in its amicus curiae brief in *Breard v. Greene*, where it asserted:

> [T]he measures at [the United States'] disposal are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion -- such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution -- and not legal compulsion through the judicial system. That is the situation here.

(Brief for the United States as Amicus Curiae, *Breard v. Greene* (U.S. Nos. 97-1390 & 97-8214), 1997 LEXIS U.S. Briefs 1390 at p. 51.)

Accordingly, it would be inconsistent with the language of the Memorandum, the treaty itself, Supreme Court precedent, and prior Executive interpretation of the treaty to construe the Presidential Memorandum to override state procedural rules.

Moreover, longstanding canons of construction counsel against construing a Presidential Memorandum in a manner that would purport to *compel* this Court to consider appellant's contention on its merits. Federal courts have exercised the "utmost caution" before construing the federal law to

require a state court to hear a claim on the merits notwithstanding "a neutral state rule regarding the administration of the courts." (*Howlett v. Rose* (1990) 496 U.S. 356, 372 [110 S.Ct. 2430, 110 L.Ed.2d 332].) Whenever "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460 [111 S.Ct. 2395, 115 L.Ed.2d 410], quoting *Will v. Mich. Dept. of State Police* (1981) 491 U.S. 58, 65 [109 S.Ct. 2304, 105 L.Ed.2d 45].) Construing the Presidential Memorandum as an unprecedented Executive order to the state courts would require altering the constitutional balance between states and the federal government.[56]

As interpreted by appellant, the Presidential Memorandum presents a more problematic intrusion upon state sovereignty given that the states are not directly represented, as they would be if affected by congressional action. The need for unmistakable clarity of action is even more compelling if the action comes solely from the Executive Branch of the federal government. Acts of Congress are enacted pursuant to constitutionally-authorized processes, and are signed into law by the President before ever being reviewed by the courts. No such process applies to issuance of a Presidential Memorandum.

Any ambiguity in an Executive order that fails to state its meaning explicitly is resolved against the government. (*Cole v. Young* (1956) 351 U.S. 536, 557 [76 S.Ct. 861, 100 L.Ed.2d 1396].) As set forth previously, none of

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56. If the Presidential Memorandum were construed as appellant suggests, the President would be intruding on state sovereignty in contravention of the "anti-commandeering doctrine," which precludes the federal government from issuing directives that require the states to address a particular problem, or to administer or enforce a federal regulatory program. The doctrine recognizes that such commands "are fundamentally incompatible with our constitutional system of dual sovereignty." (*Printz v. United States* (1997) 521 U.S. 898, 935 [117 S.Ct. 2365, 138 L.Ed.2d 914].)

the process applicable to Presidential proclamations and Executive orders with legal effect was followed in issuing the Presidential Memorandum upon which appellant now relies. Consistent with those principles of interpreting enactments of Congress and Executive orders, the Presidential Memorandum should not be construed as a mandatory order to state courts to act upon the merits of Vienna Convention consular-rights claims without regard to the states' own procedural rules.

Finally, it is a maxim of statutory construction to avoid an interpretation that raises serious constitutional problems unless such construction is plainly contrary to Congress' intent. (See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 575 [108 S.Ct. 1392, 99 L.Ed.2d 645].) An order compelling state courts to hear claims in violation of their nondiscriminatory state procedural rules, under circumstances where no similar obligation is imposed on the federal courts, would be a major intrusion upon state sovereignty in contravention of a long line of jurisprudence on federalism. (See, e.g., *Printz v. United States*, *supra*, 521 U.S. at p. 898 [117 S.Ct. at p. 2367].) By parity of reasoning, the Presidential Memorandum should not be construed in a manner that raises significant questions regarding its constitutionality.

In sum, the Presidential Memorandum is not an order to the states, and it creates no new legal rule that could, in itself, form the basis for an appellate claim. The Memorandum is a simple statement reiterating how longstanding rights covered by the Vienna Convention will be enforced, and does not create any *new* rights or obligations. For those reasons, and because appellant did not object on this ground below, this Court should summarily reject appellant's contention. (*People v. Michaels*, *supra*, 28 Cal.4th at p. 511.)

B. This Case Does Not Involve "Exceptional Circumstances" That Would Justify Remand For An Evidentiary Hearing On Appeal

In the event appellant's contention may nevertheless be considered for the first time on appeal, remand for an evidentiary hearing would not be warranted, because there are no "exceptional circumstances" that would justify such additional fact-finding.

As set forth previously, rule 8.252(c)(1) of the California Rules of Court permits a party to "*move* that the reviewing court take evidence." (Italics added.) When such a motion is granted, the reviewing court must "[s]pecify whether the court, a justice, or a special master or referee will take the evidence . . . ." (Cal. Rules of Court, rule 8.252(c)(2)(B).)

Even if appellant's request in his *opening brief* may be deemed a *motion* to take evidence, as contemplated by rule 8.252, this Court explained in *In re Zeth S.* (2003) 31 Cal.4th 396, that such motions are disfavored except in the most unusual situations:

> It has long been the general rule and understanding that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In re James V.* (1979) 90 Cal.App.3d 300, 304 . . . .) This rule reflects an "essential distinction between the trial and the appellate court . . . that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law. . . ." (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263 . . . .) The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal. "Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule [8.252] of the California Rules of Court, the authority

should be exercised sparingly. (*De Angeles v. Roos Bros., Inc. v. American Cas. Co.* (1966) 244 Cal.App.2d 434, 443 . . . .) *Absent exceptional circumstances, no such findings should be made.* (*Green v. American Cas. Co.* (1971) 17 Cal.App.3d 270, 273 . . . .)" (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 13 . . . ; see also *In re Brittany H.* (1988) 198 Cal.App.3d 533, 554 . . . .)

(*Id.* at p. 405, italics in original; see also *id.* at p. 406 ["The facts of this case are tragic but unexceptional; they afforded no basis for the Court of Appeal to deviate from the settled rules on appeal in the manner in which it did"].)[57/]

Although the facts of this case are likewise tragic, they are also unexceptional; appellant has failed to point to any legitimate basis that would warrant remand for an evidentiary hearing on appeal. His contention should therefore be rejected.

1. Consideration Of This Claim Should Be Deferred Pending The Filing Of A Habeas Corpus Petition

Appellant maintains, however, that "[p]ractical considerations weigh in favor of a [r]ule [8.252] evidentiary hearing over deferring review until a state habeas corpus petition is filed," purportedly because: (1) the current absence of evidence in support of his claim on direct appeal may bar him from seeking relief on habeas corpus under *In re Waltreus* (1965) 62 Cal.2d 218; (2) delay in the appointment of habeas corpus counsel may "unnecessarily impede his ability to establish the prejudice resulting from the . . . denial of consular assistance"; and (3) the "'review and reconsideration'" required by *Avena* differs from the standard of review this Court would employ in a habeas corpus proceeding. (AOB 100-106.)

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57. For the same reasons, appellate courts generally refuse to take judicial notice of evidence not presented or available to the trial court. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207; *In re Utz* (1989) 48 Cal.3d 468, 480.)

Notwithstanding appellant's argument, it is well settled that "[a]ppellate jurisdiction is limited to the four corners of the record on appeal." (*People v. Waidla* (2000) 22 Cal.4th 690, 743-744.) And, contrary to appellant's contention that his ability to seek relief would be compromised if he was forced to await the filing of a habeas corpus petition, in *In re Martinez* (S141480) this Court recently issued an Order to Show Cause in a capital habeas corpus proceeding requiring the Director of the Department of Corrections to address, inter alia, "whether petitioner suffered actual prejudice as a result of the violation of his rights under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77." It is of particular significance that the order was issued *four years* after this Court handed down its opinion in Martinez's *direct appeal.* (See *People v. Martinez* (2003) 31 Cal.4th 673.) Clearly, any delay in presenting the issue on habeas corpus did not "unnecessarily impede [Martinez's] ability" to seek relief.

On May 23, 2007, further briefing was stayed in that proceeding until "30 days after the finality of the United States Supreme Court's decision in *Medellin v. Texas*, 06-984." As set forth previously, the high court granted a petition for a writ of certiorari in *Medellin* on April 30, 2007; accordingly, this issue will most likely be resolved *prior* to the completion of briefing in this direct appeal. Thus, consideration of appellant's claim at this stage of the proceedings would not only be premature but also, quite possibly, unnecessary. Regardless, appellant has failed to present any compelling reason why this issue should not be deferred until the filing of a habeas corpus petition, as is customary with non-record claims.[58/] (See *In re Clark*, *supra*, 5 Cal.4th at pp.

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58. Appellant's conclusory allegations would not warrant any relief even on habeas corpus. To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and "[i]f the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists." (§ 1474, subd. 2.) The petition should

763, 766-767; see also *People v. Gray* (2005) 37 Cal.4th 168, 211 [because "such information is not part of this appellate record . . . , we reject this claim, which is more appropriately raised in a petition for a writ of habeas corpus"].)

C. Appellant's Contention Is Without Merit, Because Suppression Of His Statements To Investigators Is Not Required Under The Vienna Convention

The Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, is an international treaty drafted in 1963 and ratified by the United States in 1969. Mexico is also a signatory. (*People v. Corona* (2001) 89 Cal.App.4th 1426, 1428-1429; *Ex Parte Medellin, supra*, 2006 Tex.Crim.App. LEXIS 2236, at *20.) Article 36 of the treaty requires signatory nations to advise every arrested foreign national of his right to have his national consulate notified of the arrest.[59] (*Ex Parte Medellin, supra,* 2006 Tex.Crim.App. LEXIS

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both state fully and with particularity the facts on which relief is sought (*People v. Karis* (1988) 46 Cal.3d 612, 656; *In re Swain* (1949) 34 Cal.2d 300, 304), and include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. (*In re Harris* (1993) 5 Cal.4th 813, 827, fn. 5; *In re Clark* (1993) 5 Cal.4th 750, 791, fn. 16.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis*, *supra*, 46 Cal.3d at p. 656; see also *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

59. In California, this requirement was codified in 1999 in Penal Code section 834c, which provides in relevant part:

> . . . [E]very peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except as provided in subdivision (d). If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

(Stats. 1999, ch. 268, § 1.)

2236, at * 21-23.)

Appellant claims that as a citizen of Mexico he was entitled to be advised of his "right" to contact the Mexican consulate under the treaty at the time of his arrest in 1995. (See AOB 91.) Yet, the first page of the probation report in the instant matter indicates under "Citizenship Status" that appellant is a *United States* citizen.[60] (3 CT 905.) There appears to be no evidence reflecting appellant's alleged Mexican citizenship on the face of this record; nor is there any evidence that appellant communicated the fact of such alleged citizenship to arresting officers or to his own trial attorney. Contrariwise, there is nothing to suggest that the Mexican consulate was *not* contacted, as purportedly required. (See CT, *passim*; RT, *passim*.) Nevertheless, and as set forth previously, it remains unclear whether appellant even has an individual right to assert under the Vienna Convention. Moreover, even if it were assumed arguendo that such a right exists, appellant would not be able to make the necessary showing of prejudice flowing from the alleged denial of consular notification.

Although the ICJ in *Avena* found that the Vienna Convention guaranteed individually enforceable rights, the ICJ's interpretation of the Convention is not binding on United States courts and is only entitled to "respectful consideration." (See *Sanchez-Llamas, supra,* ___ U.S. ___ [126 S.Ct. at p. 2685].) Indeed, the Vienna Convention itself counsels against finding that individual rights are created by the treaty. Again, the Preamble to the Vienna Convention states:

> Believing that an international convention on consular relations, privileges, and immunities would also contribute to the development of

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60. The probation report indicates elsewhere that appellant "came to the United States from Mexico in 1972 and was raised by his parents in the Los Angeles area." (3 CT 919.)

> friendly relations among nations, irrespective of their differing constitutional and social systems, Realizing that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts . . . .

(Italics added; see *United States v. Jiminez-Nava* (5th Cir. 2001) 243 F.3d 192, 198.)

The first sentence of Article 36 states that its provisions are adopted "with a view to facilitating the exercise of consular functions." (See Vienna Convention, Art. 36(1).) Notably absent is any declaration of individual rights.

The United States Supreme Court has not directly addressed whether the Vienna Convention confers an individual right to consular assistance following arrest. In dicta, however, the high court has noted the treaty "arguably confers" such a right. (*Breard v. Greene*, *supra*, 523 U.S. at p. 376 [118 S.Ct. at p. 1355].) It remains an open question whether the Vienna Convention confers an individual right to *notification* of consular rights upon arrest.[61] (See *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 885; *Cornejo v. County of San Diego* (9th Cir., Sept. 24, 2007, 05-56202) ___ F.3d ___ [2007 U.S. App. LEXIS 22616] ["no private right is unambiguously conferred on individual detainees such that they may pursue it through [42 U.S.C.] § 1983"].)

Many federal and state courts have held that the Vienna Convention does not create judicially enforceable individual rights. (See, e.g., *Cardena v. Dretke* (5th Cir. 2005) 405 F.3d 244, 253; *United States v. Emuegbunam* (6th Cir. 2001) 268 F.3d 377; *United States v. Jiminez-Nava*, *supra*, 243 F.3d at p. 198;

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61. The United States Supreme Court was presented with an opportunity to interpret the decision of the International Justice Court when it granted review in *Medellin v. Dretke, supra,* 543 U.S. at page 1032 [125 S.Ct. at page 686]. The Court, however, subsequently dismissed the acceptance of certiorari as improvidently granted. (*Medellin v. Dretke, supra,* 544 U.S. at p. 660 [125 S.Ct. at p. 2088].)

Cauthern v. State (Tenn.Crim.App. 2004) 145 S.W.3d 571, 626; *Gomez v. Commonwealth* (Ky.App. 2004) 152 S.W.3d 238, 242; *State v. Navarro* (Wis.App. 2003) 659 N.W.2d 487, 491 [2003 WI App. 50]; but see *Jogi v. Voges* (7th Cir. 2007) 480 F.3d 822.)

Even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty. (See *Sanchez-Llamas, supra,* ___U.S.___ [126 S.Ct. at p. 2682] [the Vienna Convention does not mandate suppression or any other remedy for an Art. 36 violation, but instead expressly leaves Art. 36's implementation to domestic law, and United States domestic law does not support suppression];*United States v. Minhares-Alvarez* (10th Cir. 2001) 264 F.3d 980, 986 [suppression is not an appropriate remedy for violation of Article 36 of the Vienna Convention, therefore court need not address whether Vienna Convention creates individual enforceable rights]; *United States v. Li* (1st Cir. 2000) 206 F.3d 56, 61 [Art. 36 does not create -- explicitly or otherwise -- fundamental rights on par with right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel]; *Waldron v. United States* (2d Cir. 1993) 17 F.3d 511, 518 ["the privilege of communication with consular officials . . . is not [a] fundamental right derived from the Constitution or federal statutes"].)

No relief would be warranted here, in any event, for the *Avena* decision itself requires a defendant to demonstrate that denial of such rights caused him

prejudice. (See *Breard v. Greene*, *supra*, 523 U.S. at p. 377 [118 S.Ct. at p. 1355] ["it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial"]; see also *Medellin v. Dretke*, *supra*, 544 U.S. at p. 665 [125 S.Ct. at p. 2091] [observing that lower court had found no "causal connection" between the lack of consular notification and Medellin's confession].) The requirement of prejudice flowing from the denial of consular notification is also clear from Ninth Circuit precedent. (See, e.g., *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 530; *United States v. Calderon-Medina* (9th Cir. 1979) 591 F.2d 529, 532.)

No prejudice could be shown even if appellant would have refused to talk to investigators in reliance upon any advice provided by the Mexican consulate. As set forth previously, the evidence of appellant's guilt was compelling, and the complained-of interview constituted but a small (and somewhat equivocal) piece of that evidentiary puzzle. In addition, the aggravating circumstances, including the nature of the murders themselves and appellant's in-custody assaults on a deputy and fellow inmates, far outweighed any mitigating circumstances.[62/] Thus, the alleged error would be harmless under either the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, for assessing the prejudicial effect of state error or the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], for

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62. It is entirely speculative whether any consular assistance would have resulted in the discovery of "significant exculpatory or mitigating evidence," as appellant maintains (see AOB 99), or that such evidence -- even if it exists -- would have made any difference in appellant's case. (See *Breard v. Greene, supra*, 523 U.S. at p. 377 [118 S.Ct. at p. 1355] ["Breard's asserted prejudice -- that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty -- is far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error"].)

evaluating the prejudicial effect of federal constitutional error.[63/] (See *People v. Cage* (2007) 40 Cal.4th 965, 979, fn. 8 [relying upon *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 [111 S.Ct. 1246, 113 L.Ed.2d 302] for the proposition that the "erroneous admission of evidence is mere 'trial error,' not amounting to a 'structural defect[] in the constitution of the trial mechanism,' and is thus subject to evaluation for harmlessness"].)

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63. Appellant acknowledges that his "waiver of *Miranda* rights [would] remain[] a factor which this Court [could] consider in its assessment of prejudice caused by violation of the VCCR." (AOB 99.) Respondent submits it is highly unlikely that appellant -- who had knowingly and voluntarily declined the services of an *attorney* -- would have chosen to speak to a consular representative.

IV.

THE TRIAL COURT PROPERLY LIMITED PRETRIAL DISCLOSURE OF THE NAMES OF CERTAIN WITNESSES

Prior to appellant's indictment, the superior court issued orders granting the prosecution's motions to redact the names of certain witnesses from investigative reports and from transcripts of grand jury proceedings held in September 1995 that resulted in the indictments of appellant's four codefendants. (See 1 RT 120-123.) Defense counsel were also ordered not to release "discovery, copies of the indictment or copies of the transcripts . . . to any defendant or anybody other than an investigator approved by [the court]." (1 RT 123-124.) After appellant was indicted on December 12, 1995, the court directed that previously-issued orders prohibiting defense counsel from disclosing such information to the codefendants were to remain in effect and apply to appellant; the court nevertheless required the prosecution to make the witnesses available for interview by the defense and to release the names of the witnesses at trial. (1 CT 103-109A, 128-129, 186-188; 6 1SCT 982-1194; 2 RT 289.)

Appellant maintains that the non-disclosure orders violated his "fundamental constitutional rights to counsel, confrontation, due process and a reliable death judgment . . . ." (AOB 109.) The record shows, however, that the court narrowly tailored the orders at issue to achieve the proper balance between safeguarding appellant's constitutional rights and protecting witnesses from physical harm or intimidation. Moreover, the identities of those witnesses -- many of whom were fellow gang members referred to by their gang monikers in police reports or grand jury transcripts -- would have been readily apparent to appellant and his counsel *prior* to trial, despite the nondisclosure orders.

A. Proceedings Below

On September 2, 1995, nine days before the indictment of four of appellant's five codefendants, an in camera hearing was held before the Honorable James A. Bascue, during which Judge Bascue ordered the names of 13 of 37 grand jury witnesses redacted from grand jury transcripts. On October 19, 1995, Judge Bascue issued supplemental orders regarding the nondisclosure of the identities of grand jury witnesses. (See 1 CT 116 [declaration of Deputy District Attorney John Monaghan]; see also 5 1SCT 945-946, 963-965 [amending order to allow defense investigators to review redacted documents]; 1 RT 123-124.)

On November 7, 1995, the prosecution presented evidence at an in camera proceeding held pursuant to section 1054.7[64] before the Honorable Robert A. Dukes, for the purpose of extending Judge Bascue's orders. (1 RT 54; see also 1 CT 116; 5 1SCT 967-975.) At that proceeding, Detective Stephen Davis and Sergeant Mike Salvatore of the Los Angeles County Sheriff's Department described in detail the potential dangers faced by certain

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64. Section 1054.7 provides in relevant part:

> The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.
>
> Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

grand jury witnesses. Detective Davis testified that when he served a search warrant on codefendant Jose Ortiz's residence in connection with this case, he found a preliminary hearing transcript containing the testimony of a "protected witness" in another murder case, who had been relocated by the Los Angeles County District Attorney's Office and the Pomona Police Department. (Aug. RT 57-58, 63-64 [formerly sealed transcript].)[65/] Detective Davis also recovered a letter from one of the defendants in that case, which referred to the witness as testifying for the prosecution. In addition, Detective Davis found a photograph of eight or nine men in gang attire, with the face of one of the men "obliterated"; Detective Davis identified the man as the murder victim. (Aug. RT 58-59.)

Shortly after the murders in this case, Detective Davis interviewed Witness No. 13, the sister of codefendant Anthony Torres. (See Aug. RT 59 [Witness No. 13 is referred to as a "relative" of Torres].) Witness No. 13 was "extremely fearful for the safety of not only herself but mainly for her children and other family members." (Aug. RT 60.) Witness 13 nevertheless agreed to appear before Judge Gustavson and provide sworn testimony concerning her brother's involvement and the involvement of the other codefendants in the El Monte murders; Witness No. 13 also testified before the grand jury. When Witness No. 13 told her mother that she had testified, her mother called her a "snitch," and relayed that information to others. (Aug. RT 60-62.) Witness No. 13 asked to be relocated immediately. (Aug. RT 62.)

Detective Davis subsequently interviewed Torres, who indicated that his mother would confirm that he had been at home on the night of the murders. (Aug. RT 62.) When Detective Davis informed Torres that his mother had failed to corroborate his alibi, and played a tape-recorded message from her urging him "to tell the truth," Torres told Detective Davis that "as far as he was

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65. "Aug. RT" refers to the Augmented Reporter's Transcript.

concerned she was dead to him." (Aug. RT 62-63.) Detective Davis interpreted Torres's statement to mean that his own mother "would be killed." (Aug. RT 63.)

Detective Davis testified about the killing of witnesses in other cases. In 1993, Detective Davis was involved in the investigation of a murder of a female witness in the City of Industry. Detective Davis believed that the Mexican Mafia was involved in the killing, following the identification of the witness in court. (Aug. RT 67-68.)

Detective Davis also testified about the murder of Angel Carranza, a member of the El Monte Flores criminal street gang, and the brother of a witness who testified before the grand jury in this case. Carranza identified Torres and codefendant Richard Valdez as having been involved in a drive-by shooting that resulted in the death of an individual named Johnny Dominguez. Carranza was ordered to return to court in that matter on October 26, 1995. (Aug. RT 64-65.) On October 19, 1995, Carranza was shot to death; Detective Davis learned from an investigator that Carranza was murdered because "he was a witness in a murder case." (Aug. RT 65-66.) "Almost every individual" Detective Davis interviewed indicated that "they [were] fearful for the safety of themselves and their family as a result not only of giving testimony in court but of in fact just talking to the police about this particular investigation." (Aug. RT 67.)

Sergeant Mike Salvatore was assigned to a multi-jurisdictional task force in 1993, which was created to investigate criminal activities of the Mexican Mafia, "by far the largest and strongest prison gang within the California penal system." (Aug. RT 73-74.) The Mexican Mafia had recently expanded beyond its prison activities, to exert influence over criminal street gangs, particularly in the San Gabriel Valley. (Aug. RT 75.) In Sergeant Salvatore's opinion, "any witness associated with the case [was] in imminent danger of being hit by the

Mexican Mafia to prevent their testimony and possible convictions of the suspects associated with the case"; according to Sergeant Salvatore, "[t]heir li[ves] wouldn't be worth a nickel." (Aug. RT 77, 79.) Sergeant Salvatore had the opportunity to "debrief" several associates and known members of the Mexican Mafia in the past, and was able to prevent approximately 40 contract murders both inside state facilities, "as well as hits called for out on the street on individuals." The subjects of the contracts were known to be "'snitches'" or "'informants.'" (Aug. RT 77-78.) In fact, one of the murder victims in this case was the subject of a contract by the Mexican Mafia. (Aug. RT 78.)

Even though Mexican Mafia members would be able to determine the identity of a particular witness who was referred to only by number, Sergeant Salvatore believed it would still be important to redact the witness' name from police reports and grand jury testimony:

> . . . The Mexican Mafia has what I refer to in my own terms [as] a network. They have an intelligence network sometimes quite more sophisticated than the network we currently have in place.
>
> They do have people who do have access to official police reports. They have sympathizers or family members that work within police departments, clerical positions. We know that they have people in places like in Department of Motor Vehicle positions where they have access to information.

(Aug. RT 80-81.)

At the conclusion of the in camera hearing, the prosecutor and the court discussed the parameters of any nondisclosure order:

> The Court: It appears the primary concern actually –
>
> Actually it appears that to a substantial extent most of these witnesses at some point or other are going to be known to one or more of the defendants; that part of the concern is as you've just expressed,

however, by keeping their names redacted from the various documents and transcripts it offers some measure of protection.

There appears to be a few of the bystander witnesses that may in fact be strangers to the defendants and possibly could remain that way for some period of time.

Mr. Monaghan: I think witnesses one through four, eight, nine, ten and eleven are strangers.

There is no doubt a thorough attorney investigator can start figuring that some of the witnesses, eight, nine, ten and eleven, have to live in a certain area, a general area. But it -- it -- I really believe that one through four, eight, nine, ten and eleven, are completely unknown and that I think it is important that they stay that way.

The Court: Can they be made available without identifying the name and location, they be made available for interview by the attorney or the investigator for the defendants?

Mr. Monaghan: Absolutely.

And if the defense does make a motion for live lineups, I believe it is a motion that would be well-founded, if they wanted that done and witnesses one through four, and eight, nine, ten and eleven, if so ordered, would be brought to whatever live lineups are ordered.

(Aug. RT 89-90, italics added.)

Judge Dukes ultimately ordered that "the names and addresses of the previously redacted witnesses [were] not to be disclosed"; he further "directed [the People] to make the witnesses available to Defendants' counsel and/or Defendants' investigators for purposes of interview, line-ups, etc., without disclosure of the names and addresses."[66] (5 1SCT 976; see also Aug. RT 91,

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66. In doing so, Judge Dukes noted:

For the purposes of those examining the record, I want to

97 [court states that prosecutor can give defense counsel "all the records he wants as long as it doesn't have identifying information on it"].)[67]

On December 18, 1995, six days after the grand jury returned an indictment against appellant and Ortiz (see 1 CT 103-109A; 6 1SCT 982-1194), appellant and Ortiz were arraigned before the Honorable Theodore D. Piatt, and entered pleas of not guilty to all charges and allegations. (1 CT 110; 1 RT 120-122.) Following arraignment, Deputy District Attorney John Monaghan asked that the prior nondisclosure orders issued as to the four previously-indicted codefendants remain in place and apply to both appellant and Ortiz:

> Mr. Monaghan: Your Honor, while there's a pause, Judge Dukes and Judge Bascue have both previously signed orders that no discovery, copies of the indictment or copies of the transcripts are to be released by the attorneys to any defendant or anybody other than an investigator approved by Judge Dukes.
>
> I know Judge Dukes is not here today, but I would ask that that order as to these two defendants remain in effect.
>
> There's been several in camera hearings where extensive testimony was presented, and if counsel want to challenge that, we can set it for

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> make it clear this is being made based upon 1054.7 of the Penal Code. Also the authority that has been cited in Mr. Monaghan's supporting document, [*Clark v. Ricketts* (9th Cir. 1991) 958 F.2d 851], and also [*United States v. Rangel* (9th Cir. 1976) 534 F.2d 147]. [¶] I am cognizant of the mandates of [*Smith v. Illinois* (1968) 390 U.S. 129 [88 S.Ct. 748, 19 L.Ed.2d 956]] which is cited in both those cases.

(Aug. RT 99.)

67. Prior to conducting the in camera hearing, Judge Dukes considered a request by the San Gabriel Valley Tribune to photograph the codefendants. (Aug. RT 39.) After hearing argument on the matter, Judge Dukes observed that the proceedings were no longer public and granted the request. (5 1SCT 976; see also Aug. RT 39-45.)

any day that Judge Dukes comes back and I'd be prepared to proceed with another in camera hearing.

The Court: He has already advised me of this. Judge Dukes told me about this case coming in this week, the nature of this case, the fact that there were additional indictments being returned today, so I was prepared to deal with it and I was informed by Judge Dukes of what you just said.

Consequently, absent an in camera hearing request, that order will become the order of Court and should be included in the minute order, as well as the Court Reporter's notes.

If, in fact, the defendants wish to have an in camera hearing, we can set one in this department at a future date. That would probably be conducted again by Judge Dukes, because he will only be gone this week.

In the meantime, absent a request for an in camera hearing or even with a request for an in camera hearing, that will be the order pending any further hearing.

(1 RT 123-124.)

Judge Piatt subsequently issued a minute order directing that "copies of [the] indictment [and] all discovery [were] not to be disclosed to anyone except defense counsel or [their] investigator[s]." (1 CT 110.)

On January 24, 1996, Judge Bascue granted the prosecution's in camera motion to redact the names of Witness Nos. 14 and 15 and to remove references to another witness from transcripts of the December 1995 grand jury proceedings. (1 CT 114-124; see also *id.* at p. 128.) On January 30, 1995, appellant's then-counsel orally joined in a codefendant's objection to the redaction of "statements" before Judge Dukes. Judge Dukes declined to rule on the objection pending consideration of the issue by the Honorable J. Stephen

Czuleger, "who [would] be taking over the matter for all purposes"; the next day, Judge Dukes directed that "the previous court order of non-disclosure of names and addresses of redacted witnesses [would] also remain[] in full force and effect." (1 RT 138-140-1, 144-146; 1 CT 128.)

At a February 7, 1996, hearing before the Honorable J. Stephen Czuleger, appellant's appointed counsel declared a conflict, and appellant indicated that he would be "retaining a lawyer." (1 CT 130; see also 1 RT 147-148.) At that same hearing, Judge Czuleger announced that "[p]revious orders made in this case [were] to remain outstanding." (1 CT 130; see also 1 RT 148-150, 153, 156-158.) Appellant retained Edward Esqueda as counsel on February 14, 1996. (1 CT 103-109A, 136; 1 1SCT 110; 6 1SCT 982-1194; 1 RT 164-166.)

On March 5, 1996, counsel for codefendant Daniel Logan moved the court to release "unredacted transcripts of the grand jury testimony and names and addresses of all people testifying before the grand jury," and to allow counsel to "discuss the facts relating to this case with . . . Logan."[68] (7 1SCT 1237-1243.) At the prosecution's request (1 RT 168-177; see also 1 CT 141), an in camera hearing was held in response to the motion on March 18, 1996, outside the presence of defense counsel.[69] (1 CT 174; see also 1-A RT 186

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68. That same date, the San Gabriel Valley Tribune moved to unseal redacted versions of the grand jury transcripts; the motion was denied on March 18, 1996. (7 1SCT 1244-1265; see also 1 CT 141, 175-183, 188.)

69. Judge Czuleger noted at the March 18 in camera hearing:

> . . . We only have one motion from defense. I am sorry, two motions.
>
> Mr. Monaghan: I am assuming they all joined, Judge. I think this, this was pretty much of a --
>
> The Court: The one is from the media. The other one is just from Mr. Tyre [Logan's defense counsel].
>
> Mr. Monaghan: Yes.
>
> The Court: But they have not filed a written joinder at

[sealed transcript].)

At the hearing, Michael Scott, a homicide investigator with the Los Angeles County Sheriff's Department, testified about the murder of Angel Carranza. An informant advised Deputy Scott that Carranza was murdered "because he was considered a rat and because of his knowledge and information about the El Monte Five as they [were] referred to." (1-A RT 188-190.)

Sergeant John Laurie of the Los Angeles County Sheriff's Department investigated the Maxson Road murders. (1-A RT 191-194.) In Sergeant Laurie's experience dealing with Latino criminal street gangs, "witnesses have been attacked, beaten, threatened, forced to leave the area and their families and including brothers, sisters, mothers, fathers have been attacked all in an effort to get them to not testify or leave prior to the court proceeding." (1-A RT 195-197.)

During the course of his investigation into the murders, Sergeant Laurie was advised that the Sangra criminal street gang would "kill witnesses to keep . . . the prosecution from being successful in this case." (1-A RT 197.) Sergeant Laurie determined that codefendants Torres, Ortiz, Valdez, and Jimmy Palma were all Sangra members; appellant was a member of the Mexican Mafia. Sergeant Laurie was of the opinion that the Mexican Mafia used Sangra gang members to carry out the murders in this case. (1-A RT 198.)

During Sergeant Laurie's service of a search warrant on Ortiz's residence, Laurie discovered a partial transcript of a preliminary hearing on the front seat of a vehicle parked in the driveway. The preliminary hearing was held in a murder case in the Pomona branch court against three Sangra gang members; Sergeant Laurie was informed that the victim -- a Sangra gang

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this point, so we will just see what happens.
(1-A RT 273-274.)

member himself -- had been killed because he informed on the defendants. (1-A RT 198-199, 202.) The recovered transcript contained the testimony of another Sangra gang member who had testified as a witness for the prosecution in that case. (1-A RT 200.) A letter written by one of the defendants was also found, in which the defendant made reference to the prosecution witness. (1-A RT 201.) The witness was subsequently relocated. (1-A RT 200-201.) Finally, a photograph was recovered of six or more Hispanic males wearing gang attire. The face of one of the men in the photograph had been scratched out. (1-A RT 202-203.) The man whose picture had been defaced was the murder victim in that case. (1-A RT 203.)

On the day that appellant was arrested in this case, Sergeant Laurie undertook a permissive search of appellant's motel room, and recovered a portion of a Huntington Park Police Department report regarding a murder that occurred on August 23, 1989. The report contained the names, addresses, dates of birth, telephone numbers, and statements of a number of eyewitnesses to the crime. (1-A RT 204-205.) Sergeant Laurie also found an investigation request by the Los Angeles County Public Defender's Office concerning a murder case in the Norwalk branch court; the request contained a synopsis of the prosecution's case, as well as the names, addresses, and telephone numbers of certain eyewitnesses. (1-A RT 205.) A preliminary hearing transcript in another murder case was recovered, which contained the testimony of both a gang member who witnessed the murder, and the gang investigator who had arrested the defendant in that case. (1-A RT 205-206.) When Sergeant Laurie spoke with the gang investigator, the investigator informed Laurie that the defendant had threatened to kill him for making the arrest. (1-A RT 205-207.) A letter recovered from appellant's residence referred to an individual in county jail as a "rat" or informant, and spoke in "code" with regard to other contemplated gang activities. (1-A RT 208-210.)

Sergeant Laurie monitored codefendant Palma's jail-house mail following Palma's arrest in this case. (1-A RT 213-214.) Jail personnel intercepted a letter from Palma to a Sangra gang member named Frank Gonzalez regarding codefendant Torres's statements to police. (1-A RT 215-217.) Sergeant Laurie subsequently placed Torres in protective custody. (1-A RT 217.) Jail personnel also recovered a letter from an inmate housed next door to Palma, and recovered from appellant, which included a copy of Palma's parole report and the El Monte Police Department report for this case. (1-A RT 218.)

Torres's jail-house mail was likewise monitored. A letter Torres wrote to a fellow gang member referred to as Witness No. 12 in this case stated: "'Did you hear about Creeps? Yeah, they made that shit on him, and he went for it. Oh, well.'"[70] (1-A RT 220, 237.) Another letter Torres wrote to his brother Ralph referred to Witness No. 13 and complained: "'I miss Elisabeth and Danielle, but their mother -- it hurts deep to know that they could lie so good and for these people. Man, Ralph, I can't believe this shit, my own blood.'" (1-A RT 221.)

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70. Sergeant Laurie acknowledged that appellant and his codefendants would be able to determine the identity of Witness No. 12 by reviewing police reports and grand jury testimony; he nevertheless believed it was important to redact identifying information, because legal documents containing Witness No. 12's true name would be used as "'paperwork'" by the Mexican Mafia and criminal street gangs for "'validation'" of the witnesses's cooperation with police. (1-A RT 238-239.) Other gang members would then act on a request to "take care of this guy, take him for a drive, kill him, make sure nothing happens, and it absolves them of any intergang rivalry because they had the paperwork, it is documented the man is an informant." (1-A RT 239-240.) According to Sergeant Laurie, it would be much like a "peace officer . . . assum[ing] that other officer[s are] going to serve my warrant. They will act on this documentation." (1-A RT 240.) Gang members told Witness No. 12's brother that "[t]hey [were] waiting on the paperwork, [and] when it [came] through . . . he [was] going to be hit just because he is related to his brother . . ." (1-A RT 241.)

Sergeant Laurie described the percipient witnesses in this case and testified that those witnesses would be in danger if their identities were revealed: "I think that if their identity bec[a]me known and what they observed bec[a]me known it would certainly encourage those that we have been unable to identify so far to attempt to silence them so their identity would never become known." (1-A RT 230-231.)

Sergeant Laurie testified to the danger that in-custody Witness Nos. 14, 15, and 16 would face if their names were revealed. Witness No. 14 was introduced by appellant on the night of the murders to codefendant Palma. (1-A RT 243-244.) Witness No. 15 was the brother of murder victim Alex Moreno. (1-A RT 244-246.) Witness No. 16 was in the back-up vehicle with Ortiz, and was given immunity to testify at trial. (1-A RT 246-250.)

At the time of the in camera hearing, defense attorneys had been provided with redacted grand jury transcripts, police report interviews, and investigative interviews for all witnesses at issue, with the exception of Witness No. 16. (1-A RT 250-252.)

Sergeant Richard Valdemar of the Los Angeles County Sheriff's Department also testified. Sergeant Valdemar had been assigned to a task force which investigated the criminal activity of the Mexican Mafia. On April 29, 1995, as a result of the task force's investigation, 22 Mexican Mafia members were indicted on federal racketeering charges. (1-A RT 253-257.) Sergeant Valdemar testified to Raymond Shyrock's activities within the Mexican Mafia and his sponsorship of appellant's membership in the gang. (1-A RT 257-259.) Appellant was "one of the primary organizers and orchestrators of criminal activity in the county jail . . . for the Mexican Mafia." (1-A RT 267.) He was, in addition, a conduit between certain members of the gang who were in federal custody and other members who were "both on the street and in the Los Angeles County Jail system[.]" (1-A RT 268-269.)

Sergeant Valdemar also explained the Mexican Mafia's policy of killing members who had "dropped out" of the gang, "be it five years, 10 years, 15 years [later.]" (1-A RT 260-264, 271-272.) In Sergeant Valdemar's opinion, the murders in this case were sponsored by the Mexican Mafia because Moreno had dropped out of the gang. (1-A RT 265-267.) Eyewitnesses and gang members who testified about the murders would be in jeopardy if their identities were disclosed; their families and even their children could be killed. (1-A RT 270-271.)

On March 29, 1996, a hearing was held before Judge Czuleger for the purpose of addressing, among other things, Palma's motion to modify "access to discovery and . . . to join all motions pending in regard to discovery"; appellant and the other codefendants orally joined in the motion.[71] (7 1SCT 1272-1278; see also 1 CT 188; 2 RT 278-279, 281-282, 289, 292, 298, 300.) During the hearing, the following colloquy occurred between the prosecutor and the trial court regarding the scope of the nondisclosure order:

> Mr. Monaghan: Judge, . . . [the] order clearly indicates that counsel for each charged defendant, . . .and their investigators for each charged defendant *may review the police reports, court transcripts and grand jury transcripts with their clients*, but may not provide or give any defendant or any other person any of the above without prior order of this Court. So clearly in the proposed order they can discuss the police reports, the redacted grand jury transcript[s].
>
> And as I have indicated all along, it is my belief, and that's one reason that some of the orders cover items that might not normally be covered, that a review of the unredacted portion of the grand jury

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71. Judge Czuleger informed appellant's trial counsel that if "[he] want[ed] to join in a motion [he would need to file] a written joinder." (2 RT 282.)

transcript in many ways point[s] to who these people potentially are.

The Court: I have no doubt they are going to be able to figure out under some circumstances.

Mr. Monaghan: I don't either.

The Court: What about that, talking to their client and saying, you know, "I think this is John Smith. I think this is your 5th grade teacher. What kind of grades did you get when you were in 5th grade? Does this guy have a motive to lie?"

Mr. Monaghan: *Why, I don't have, and I never really have had a quarrel with that.* What my concern has been, and I think that we provided substantive evidence of it in the in camera hearing of efforts made by these defendants in this case and others to secure paperwork that has people's names on it, or which could lead to their identification, send it throughout the jail system and to gang members on the street for the sole purpose of having those people assaulted or killed. I think we provided substantial evidence of that, and that is my concern. . . .

(2 RT 284-285, italics added.)

Appellant's trial counsel voiced concern about the redaction of the percipient witnesses' testimony regarding their respective locations when they observed various individuals fleeing the Maxson Road residence the evening of the murders:

Mr. Esqueda [defense counsel]: . . . I wanted to respond to what counsel said about the stranger witnesses. *I have no problem with maintaining anonymity of those witnesses.* I understand it. I understand his perspective, and I can live with that.

What I can't live with is the portions that have been redacted that would give me any indication as to where those witnesses may have been on the occasion where they claim they saw certain things.

(2 RT 289, italics added.)[72]

At the conclusion of the hearing, Judge Czuleger ordered the prosecutor to make the witnesses available for interview, without disclosing their identities to the defense. (See 2 RT 289.) Judge Czuleger also suggested that the prosecutor and defense counsel work out the details of any discovery issues informally:

> [The Court:] And I will ask you, Mr. Monaghan, again, this is a work in progress as this case progresses. I am not saying err in favor of danger to witnesses, but one of my largest concerns is that these defendants be adequately represented and be able to adequately defend themselves in this case.
>
> . . . . . .
>
> Mr. Esqueda: To save a motion perhaps I can work it out informally. *If he wants to redact that, that's fine*, but at least give me the information, give me the pages and redact it, and if he doesn't, then I will file my motion.

(2 RT 301, italics added.)

Judge Czuleger nevertheless denied Palma's motion for full disclosure of the names and addresses of witnesses, recognizing that his ruling would not be "the definitive statement on the issue." (2 RT 315-316.) In a written order issued at the conclusion of the hearing, Judge Czuleger directed that the identities of Witness Nos. 1 through 13 remain "non-disclosed at this time," with each witness' identity to be "made available *at the time the witness*

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72. The prosecutor subsequently remarked, "[defense counsel] will be given an opportunity to interview the stranger witnesses. If at the conclusion of the interviews they believe that they need additional information in order to adequately prepare this case for trial, nothing stops them from coming back to this Court . . . in camera and outside of my presence, laying out to this Court why they need certain information. [¶] I have no objection to that." (2 RT 295.)

testifies"; only the addresses and telephone numbers of those witnesses were ordered "permanently non-disclosed." (1 CT 185.) The identities of Witness Nos. 7, 12, and 14 through 16 were likewise ordered nondisclosed "*until such time before trial* as the court shall direct"; however, their home and work addresses and telephone numbers were withheld temporarily, "until further order" of the court. The prosecution was directed to make all witnesses "available on one occasion at a time mutually agreeable for interview by any counsel for the defendants," with a prosecutor and investigator to be present during the interview only "if [a witness] so request[ed]." (1 CT 186, italics added.) The prosecution was also "ordered to provide to each counsel for the defendants a record of any misdemeanor or felony conviction[] suffered by [Witness Nos. 1 through 16]." Judge Czuleger nevertheless permitted defense counsel to "disclose the identity of the witnesses to their client[s] if such disclosure [was] necessary to adequately represent their client[s]." (1 CT 186-187.) Previous court-ordered redactions of grand jury transcripts were "continued in effect until further order by [the] court." (1 CT 187; see also *id.* at p. 188.)

On June 28, 1996, appellant's trial counsel filed a motion for pretrial discovery of, among other things, "[t]he names, addresses, and telephone numbers of all persons who were percipient witnesses to the offense," as well as "[t]he names, addresses, and telephone numbers known to the People of all witnesses or individuals who have knowledge of, or who have claimed to have knowledge of the crimes alleged herein or the events leading to the commission thereof. . . ." (2 CT 311-369, underlining omitted.) At a July 26, 1996, hearing originally scheduled on the motion, appellant's trial counsel informed the court that he "fil[ed] that motion for the record, but . . . [did not] believe that anything was forthcoming." (2 RT 408, 411.) The hearing was eventually continued to September 3, 1996. (2 RT 417-419-3; 3 RT 420-424.)

On July 30, 1996, Logan filed a motion for discovery of "any and all tape recordings that were made by the police for the prosecution and not turned over to the defense," including "tapes done in the initial part of the investigation at the state prison and phone taps done during the initial part of the investigation." (7 1 SCT 1375-1381.) In a declaration provided in support of the motion, Logan's counsel averred that he "believe[d]" he could not be precluded "from divulging [the identities of prosecution witnesses] to [Logan] so that [counsel] may find out if the information [provided by such witnesses] is true or false." (7 1SCT 1381.)

A hearing on that motion, as well as on all pending motions, including appellant's motion for disclosure of witnesses' identities, was held on September 3, 1996, before the Honorable Cesar Sarmiento.[73] (2 CT 473-475; 3 RT 424-427.) Judge Sarmiento concluded "under section 1054 of the Penal Code that [the] tapes [were] discoverable copies and should be provided to the defense," subject to any subsequent assertion of "concerns regarding safety of witnesses" by the FBI. (3 RT 479-480; see also 2 CT 474.) Judge Sarmiento deferred ruling on appellant's motion, before granting a codefendant's motion for severance of trial. (2 CT 474-475; 3 RT 481, 585-599.)

On November 20, 1996, appellant's case was transferred to the Honorable Charles E. Horan "for all further proceedings." (2 CT 490.) On March 6, 1997, during a discussion of various pretrial matters, the prosecutor noted that two 18th Street gang members had given appellant transcripts of testimony in one of the severed cases:

Mr. Monaghan: Judge, one other thing.

I would once again ask that you order all counsel not to provide their clients with any transcripts of tapes of police reports in this case.

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73. Appellant's trial counsel again orally joined "in any motions." (3 RT 495.)

Transcripts, and I don't know who they got them from, were taken from 2 unrelated people that had nothing to do with this case, 2 18th Street gang members that are in custody for their own murders. They had transcripts of this case.

The Court: When?

Mr. Monaghan: Within the last week and a half.

The Court: Transcripts of the trial that we did?

Mr. Monaghan: Transcripts of discovery, tapes in discovery. . . [¶] . . . And I see Mr. Maciel has a number of police reports or transcripts with him.

I just think that under the circumstances of this case, it is inappropriate.

The Court: I tend to agree.

. . . . . .

Mr. Esqueda: Your Honor, I have always complied with the order.

What I handed Mr. Maciel are redacted transcripts of Case No. 2.

I told this Court, in fact, I was certain that I didn't pick up anything until it was redacted by Mr. Monaghan. And that is what he has, redacted versions of Trial No. 2, the transcripts.

The Court: Mr. Monaghan, wish to be heard?

Mr. Monaghan: I just --

Under the circumstances of this -- within the last month, 2 more hit lists have been recovered from the jail and they had the name of 2 witnesses that testified before you on it and they were listed as priority. And they had [a witness'] name also listed although not under priority.

And since the -- since the case ended in this Court, they have received some information that there was a direct attempt to have an additional witness killed.

For example, a letter was recovered at one of the jail facilities that listed a name of a witness that testified before you and the street that she has been -- she has moved to since she was initially contacted on this case.

. . . . . .

The Court: No defendant in this case is to have any transcripts of any description redacted or undredacted.

That includes police reports and anything else that is generated by way of discovery.

Counsel, if you need to discuss the matter with your client, discuss it and you can sit down and go over matters, trial matters and transcripts, with your client at the jail.

They are not to be under the circumstances given any copies.

Do you have any transcripts with you today?

Defendant Maciel: Yes.

The Court: Please take them out of your bag.

Those are for counsels' use and not the defendant.

(26 RT 3893-3896.)

On May 9, 1997, appellant filed a motion for discovery pertaining to case number BA109466, an attempted murder case on which he had been recently indicted, and which the prosecution planned to introduce during the penalty phase of trial. (2 CT 552-595; see also 42 RT 6589-6591.) Appellant's trial counsel told Judge Horan he did not "intend to [have that motion] hear[d] right away," but instead hoped to "resolve it" with the cooperation of the prosecutor. (42 RT 6598; see also *id.* at p. 6601 ["Counsel and I will try to resolve these issues"].)

No further discovery motions were filed by appellant, nor did appellant pursue a final ruling on his June 28, 1996, motion regarding the disclosure of

witness names, addresses, and telephone numbers in this case. Likewise, appellant did not apply ex parte to "disclos[e] . . . the identity of [Witness Nos. 1 through 13]," or seek the issuance of any order to "provide or give any defendant or any other person any of the [police reports, court transcripts, or grand jury transcripts]," as contemplated by the March 29, 1996, nondisclosure order. (See RT, *passim*.)

B. Appellant's Claim Of Error Regarding The Operative Nondisclosure Order Is Forfeited

As evidenced by the foregoing, appellant did not file a written joinder to the discovery motions of his codefendants (see 2 RT 282 [Judge Czuleger states that if "[appellant] want[ed] to join in a motion [he would need to file] a written joinder"]) and did not press for a ruling on his *own* discovery motion concerning the scope of the operative March 29, 1996, nondisclosure order (see 2 CT 474-475; 3 RT 481 [Judge Sarmiento defers ruling on appellant's motion until Judge Czuleger's return, because "he [Judge Czuleger] will be more familiar and able to deal with it to be consistent with the previous orders he's made regarding discovery"]). Indeed, the record is devoid of anything to suggest appellant attempted to modify the complained-of order to release the identities of any witnesses prior to trial or to obtain permission to review personally the "police reports, court transcripts, or grand jury transcripts" pursuant to the terms of that order. (Cf. *People v. Prince* (2007) 40 Cal.4th 1179, 1234 [""[b]ecause defendant's claim is dependent upon evidence and matters not reflected in the record on appeal, we decline to consider it at this juncture""], quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 952.) This, despite the fact that the court indicated the nondisclosure order was, in effect, a "work in progress" (2 RT 301), and subject to change. (See 2 RT 316 ["I have no hopes that it is the definitive statement on the issue"].) *And, appellant's trial counsel did not even object to the redaction of the percipient*

witnesses' identities, stating at one point, "I have no problem with maintaining anonymity of those witnesses. I understand it. I understand [the prosecutor's] perspective, and I can live with that." (2 RT 289.)

Under the circumstances, appellant's failure to pursue a final ruling on his motion, or to seek any modification of the nondisclosure order, constitutes a forfeiture of this issue on appeal.[74] (*People v. Holloway* (2004) 33 Cal.4th 96, 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"]; see also *People v. Morris* (1991) 53 Cal.3d 152, 190 ["Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353"]; cf. Evid. Code, § 353 [a verdict or finding shall not be set aside on the basis of the erroneous admission of evidence unless there was "an objection . . . that was timely made and so stated as to make clear the specific ground of the objection"].) Appellant's contention should therefore be rejected.[75]

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74. Although the loss of the right to challenge a ruling on appeal because of the failure to object or pursue the matter in the trial court is often referred to as a "waiver," the correct legal term is "forfeiture." In contrast, a waiver is the "'intentional relinquishment or abandonment of a known right.'" (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.)

75. Appellant's contention may also have been forfeited as a result of his failure to file a writ regarding the complained-of nondisclosure order. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1130 [noting that the defendant in that case sought "writ review of the trial court's [nondisclosure] order"].)

C. The Law Governing Nondisclosure Orders – The *Alvarado* Decision

In *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at page 1121, this Court discussed the scope and effect of judicial nondisclosure orders. The case arose out of the stabbing death of a county jail inmate, allegedly at the behest of the Mexican Mafia. Three other inmates who witnessed the murder testified before a grand jury, and identified photographs of the victim's attackers. (*Id.* at pp. 1126-1127.)

The prosecution provided the defense with grand jury transcripts and information regarding the witnesses' criminal histories, but withheld the names and photographs of the witnesses. During the course of the investigation, a witness was attacked and warned not to testify. The prosecution subsequently obtained an order from the trial court authorizing it to withhold the identities of the witnesses permanently, and directing defense counsel not to disclose the names of witnesses to the defendants; the prosecution was required to make the witnesses available for interview by defense counsel 30 days before trial. (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp. 1128-1130.)

In analyzing the defendant's federal constitutional challenge to the nondisclosure order, this Court observed:

> With regard to the first issue -- i.e., disclosure of the witnesses' identities before trial -- section 1054.7 establishes that a trial court has discretion to deny, restrict, or defer disclosure for good cause. Good cause, as defined in the statute, expressly includes "threats or possible danger to the safety of a victim or witness." (*Ibid.*) Petitioners have cited no authority that suggests that the statute, in this respect, is unconstitutional under either the confrontation clause or the due process clause. (See generally *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 [107 S.Ct. 989, 999, 94 L.Ed.2d 40] (plur. opn. of Rehnquist, C.J.) ["the right to confrontation is a trial right" (italics omitted)]; *Weatherford v.*

Bursey (1977) 429 U.S. 545, 559 [97 S.Ct. 837, 845-846, 51 L.Ed.2d 30] ["It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]] did not create one . . . ."]; *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [93 S.Ct. 2208, 2212, 37 L.Ed.2d 82] ["[Although] the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded [citation], it does speak to the balance of forces between the accused and his accuser."]; *People v. Hammon* (1997) 15 Cal.4th 1117, 1124-1128 . . . ["we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information"]; cf. 4 LaFave et al., Criminal Procedure (2d ed. 1999) § 20.3 (m), pp. 883-884 & fn. 231 [citing several cases in which "state courts have occasionally found due process violated where the prosecution's failure to disclose certain critical portions of its evidence before trial deprived the defendant of an adequate opportunity to prepare to meet the prosecution's case"].) Like California, other states that generally authorize pretrial discovery of the identities of witnesses whom the prosecution intends to call at trial provide at the same time for an exception in instances in which disclosure may pose a danger to a witness's safety (see 4 LaFave et al., *supra*, § 20.3 (h), pp. 869-870 & fns. 150-153), and we are unaware of any case that suggests that the denial of pretrial disclosure in such circumstances is constitutionally impermissible.

(*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp. 1134-1135; see also *People v. Prince*, *supra*, 40 Cal.4th at p. 1234, fn. 10 ["To the extent defendant's claim concerns pretrial discovery and is based upon the confrontation or compulsory process clauses of the Sixth Amendment, it is on a weak footing"]; *People v. Anderson* (2001) 25 Cal.4th 543, 577, fn. 11 ["the high court has never held that the confrontation clause requires more than the opportunity to *ask the witness* questions pertinent to his or her credibility"].)

This Court accordingly concluded that "the challenged order clearly [was] valid insofar as it authorize[d] the prosecution to refrain from immediately disclosing the inmate witnesses' identities to the defense." (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1136.)

In contrast, this Court found the trial court's order allowing *permanent* nondisclosure of the witnesses' identities violated the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him. After reviewing relevant state and federal authorities -- including *Smith v. Illinois* (1968) 390 U.S. 129 [88 S.Ct. 748, 19 L.Ed.2d 956], and *Alford v. United* States (1931) 282 U.S. 687 [51 S.Ct. 218, 75 L.Ed.2d 624] (see *id.* at pp. 1139-1146) -- this Court held:

> We already have explained that the order presently on review, insofar as it relates to *pretrial* discovery, represents a reasonable exercise of discretion under section 1054.7 and a "conscientious effort" [citation] to balance the defense's need for information before trial against the realistic danger to the witnesses inherent in premature disclosure. At *trial*, however, the confrontation clause imposes greater demands upon the prosecution in that defendants must be afforded an adequate opportunity to confront and cross-examine effectively the witnesses who testify against them. . . . [W]ithout access to either the witnesses' names or their photographs, defense counsel are unlikely to be able to conduct

an adequate investigation of the witnesses or of the veracity of their testimony, or challenge the accuracy of the information concerning the witnesses provided by the prosecution, including their prior criminal records or the benefits that may have been provided to them in return for their testimony.

(*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1148, italics in original.)

D. The Operative Nondisclosure Order Complied With Appellant's Constitutional Rights

Appellant maintains that the "trial court's nondisclosure orders impaired [his] access to information regarding three categories of witnesses": (1) "'stranger' witnesses [including Witness Nos. 1 through 3 and 9] . . . who were unacquainted with appellant . . . and observed events from properties adjacent to, or across the street from the victims' home"; (2) "material fact witnesses [including Witness Nos. 14 through 17], who were more akin to informants"; and (3) Witness Nos. 8, 11, and 13, who either knew victim Gustavo Aguirre, or were related to codefendant Torres. (AOB 116-119.) Appellant's contention amounts to, in effect, nothing more than a claim that his *pretrial* discovery rights were violated.

Here, unlike in *Alvarado*, the identities of *all* witnesses *were* disclosed at the time of trial. (See 1 CT 185-188.) Indeed, it was only the *addresses and telephone numbers* of the so-called "stranger" witnesses that were ordered permanently withheld.[76] (1 CT 185.) But appellant *did not object* to that procedure, stating at one point, "I have no problem with maintaining anonymity

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76. In *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at page 1142, this Court discussed cases which upheld similar nondisclosure orders "involv[ing] factual situations in which the only information withheld from the defense was the residential address of the witness or other identifying information deemed to be inconsequential to the defendant's right to a fair trial under the facts presented." (Italics omitted.)

of those witnesses. I understand it. I understand [the prosecutor's] perspective, and I can live with that." (2 RT 289.)

Nevertheless, percipient Witness Nos. 1 through 3 and 9 identified themselves at trial, *and provided their home addresses* on the date of the murders and/or their *respective locations* when they heard gunshots and witnessed individuals running from the Maxson Road residence. (See 55 RT 8645-8646; 56 RT 8655, 8851-8853, 8858-8861; 57 RT 8876-8881.) In any event, as appellant acknowledges elsewhere in his opening brief (see AOB 8), *none of those witnesses identified appellant as being present during the time of the murders*. (See also 2 1SCT 187, 328-358 [grand jury testimony of Witness Nos. 2 and 3]; 4 1SCT 541, 543-549 [grand jury testimony of Witness No. 1].)

Witness Nos. 14 through 17 -- *all of whom were either El Monte Flores or Sangra gang members* -- likewise identified themselves at trial. (See 56 RT 8703, 8712-8713, 8715, 8796; 57 RT 8889-8918, 8979-8980; 63 RT 8953-9873.) Witness No. 14 was an El Monte Flores gang member whom appellant *knew* and referred to as his homeboy, "Clown."[77] (57 RT 8995-8996, 58 RT 9018; see also 56 RT 8848-8850 [trial counsel refers to Witness No. 14 by his real name as well as gang moniker during cross-examination of Witness No. 15].) Witness No. 15 was also an El Monte Flores gang member and the *brother of murder victim Alex Moreno*, who was the object of the "hit." (56 RT 8703, 8712-8713, 8715, 8796.) In fact, Witness No. 15 and his surviving brother, Joseph Moreno, discussed the murders the next day *with appellant's Mexican Mafia sponsor*, Raymond Shyrock. (56 RT 8752-8753, 8816-8818.) Witness No. 16 was a former member of the Sangra gang, who knew codefendants Palma, Valdez, Torres, and Logan, *and participated as a lookout*

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77. Indeed, it would appear that appellant knew Witness No. 14's identity *prior* to trial, as appellant referred to the witness by name during a hearing on appellant's motion to discharge retained counsel. (See 50-1 RT 7523, 7534-7536.)

the evening of the murders, along with Ortiz and Logan. (57 RT 8887-8918.) Witness No. 17, an El Monte Flores gang member, testified during the penalty phase that *appellant*, with the assistance of Witness No. 14, stabbed him 37 to 38 times and left him for dead, apparently because they thought he had been involved in the shooting death of a child. (63 RT 9853-9873.)

Finally, Witness Nos. 8, 11, and 13 either knew victim Gustavo Aguirre, or were related to codefendant Torres. (See 55 RT 8606-8610, 8615-8618, 8628-8643; 57 RT 8949-8965.) Witness Nos. 8 and 11 were cousins, *and provided their residence addresses at trial.* (55 RT 8606-8608, 8628.) Both women saw tattooed gang members at the Maxson Road residence the day of the murders; victim Gustavo Aguirre confided to Witness No. 11 that "the Mafia had arrived and he didn't want to have any problems with them." (55 RT 8636.) Witness No. 13, *Torres's sister*, described her brother's statements regarding his involvement in the murders. (57 RT 8949-8965.) All three witnesses testified in much the same manner before the grand jury. (See 2 1SCT 187, 311-327; 3 1SCT 361, 363-392; 5 1SCT 720, 852-873; see also 8 1SCT 1618-1641 [Witness No. 13's testimony before Judge Gustavson].)

As demonstrated by the foregoing, the identities of the witnesses at issue were disclosed *no later than* trial; moreover, the witnesses' identities were readily ascertainable *prior to trial* despite the March 29, 1996, nondisclosure order. Indeed, three witnesses were fellow gang members who either participated in the murders or were known to appellant, six witnesses lived next door to or across the street from the murder scene, and one witness was the sister of a codefendant who was identified as an informant by her *own mother.* (Compare *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1148 ["[W]ithout access to either the witnesses' names or their photographs, defense counsel are unlikely to be able to conduct an adequate investigation of the witnesses or of the veracity of their testimony"].)

In addition, the danger those witnesses faced if their identities were revealed prior to trial was well documented. In fact, appellant even "assumes for purposes of this argument, that the testimony at the [March 18, 1996, in camera] hearing provided sufficient justification for the trial court's determination that some measures ought to be taken to prevent harm to the material witnesses in the case." (AOB 112.)

And indeed it did. One witness in another case -- Angel Carranza -- was murdered "because he was considered a rat *and* because of his knowledge and information about the El Monte Five as [appellant and his codefendants were] referred to." (1-A RT 188-190, italics added.) During a search of codefendant Ortiz's residence, a transcript was recovered which contained the testimony of a Sangra gang member who had appeared as a witness for the prosecution in that case; a letter written by one of the defendants in that case was also found, in which the defendant made reference to the prosecution witness. (1-A RT 200-201.) Following appellant's arrest in this case, deputies recovered transcripts and reports in other cases involving witnesses who had informed or testified against fellow gang members. A letter was also found in appellant's possession which referred to an individual in county jail as an informant and spoke in "code" with regard to other contemplated gang activities. (1-A RT 204-205, 208-210.) One law enforcement witness described appellant as a conduit between certain members of the Mexican Mafia who were in federal custody and other members who were "both on the street and in the Los Angeles County Jail system[.]" (1-A RT 268-269.)

Thus, unlike in *Alvarado*, where the complained-of nondisclosure order was based upon the trial court's finding of a generalized danger "posed by the Mexican Mafia," the court's nondisclosure order in the instant matter was premised upon "the danger to the witnesses . . . *by the individual defendants* in this case." (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1149, fn. 13,

italics added.)

"[T]he order presently on review, insofar as it relates to pretrial discovery, represents a reasonable exercise of discretion under section 1054.7 and a 'conscientious effort' [citation] to balance the defense's need for information before trial against the realistic danger to the witnesses inherent in premature disclosure." (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1148, italics omitted.) As this Court has cogently observed:

> Particularly in a capital case, where pretrial preparation and investigation often extend over a considerable period of time, early disclosure of the identity of a vulnerable and threatened witness greatly may increase the danger of "the elimination of an adverse witness or the influencing of his testimony."

(*Id.* at p. 1136, quoting *People v. Lopez* (1963) 60 Cal.2d 223, 247.)

In sum, "the trial court clearly had discretion to permit the prosecution to withhold pretrial disclosure of the witnesses' names . . . ." (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1136.) Moreover, the nondisclosure order did not unreasonably impair appellant's ability to prepare and present a defense at trial, as appellant cross-examined the witnesses thoroughly, and was able to uncover Witness No. 15's sentence of time served on a pending Three Strikes case[78] and to call Witness No. 12, one of the so-called "informant" witnesses, as his *own* witness in the defense case. (See 55 RT 8618-8627, 8637-8644; 56 RT 8659-8666, 8763-8831, 8834-8837, 8840-8850, 8872-8873; 57 RT 8886-8887, 8926-8942, 8966-8967, 9000-9015; 58 RT 9018-9055, 9064-9067; 60 RT 9344-9384; 63 RT 9882-9889; 66 RT 10246-10247.) It should also be noted that appellant was given redacted transcripts of *trial*

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78. During a hearing on appellant's motion to discharge retained counsel, appellant identified Witness No. 15 by name and claimed the witness had testified in another trial that "Monaghan was going to help him out for him to get a deal on his [Three Strikes] case . . . ." (50-1 RT 7527.)

testimony in one of the severed cases (see 26 RT 3893-3896), which presumably assisted him in ascertaining the identities of witnesses in *this case*, despite the nondisclosure order. Appellant has "cited no authority that suggests that the statute [authorizing the nondisclosure order], in this respect, is unconstitutional under either the confrontation clause or the due process clause." (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1136; see also *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 52 [107 S.Ct. at p. 999]; *Weatherford v. Bursey*, *supra*, 429 U.S. at p. 559 [97 S.Ct. at pp. 845-846].) His contention should therefore be rejected.

E. The Operative Nondisclosure Order Did Not Violate Appellant's Federal Constitutional Rights To Due Process, Effective Assistance Of Counsel, And Confrontation

Again, because appellant's contention concerns the *pretrial* nondisclosure of the identities of certain witnesses, no valid claim of error regarding the alleged violation of his federal due process or confrontation rights can be made. (See *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp. 1134-1135; see also *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 52 [107 S.Ct. at p. 999]; *Weatherford v. Bursey*, *supra*, 429 U.S. at p. 559 [97 S.Ct. at pp. 845-846].) Nor can appellant demonstrate any denial of his right to effective assistance of counsel, for reasons set forth previously in Argument II, *ante*.

F. Appellant's Contention Regarding The Denial Of His Eighth Amendment Right To The Reliability Of The Death Judgment Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the nondisclosure order deprived "the judgement of the heightened reliability demanded by the Eighth Amendment [of the federal Constitution]." (AOB 125.)

Because appellant did not raise that claim below, however, it is forfeited. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029.) In any event,

as set forth previously, it is also without merit, because there is no federal constitutional right to pretrial discovery. (See *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp. 1134-1135; see also *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 52 [107 S.Ct. at p. 999]; *Weatherford v. Bursey*, *supra*, 429 U.S. at p. 559 [97 S.Ct. at pp. 845-846].) Moreover, the identities and addresses of the witnesses were revealed at trial, thereby satisfying any constitutional concerns. (See *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp. 1134-1136.)

V.

THE TRIAL COURT PROPERLY ADMITTED A REDACTED AUDIOTAPE OF APPELLANT'S INTERVIEW WITH INVESTIGATORS

Appellant contends that the trial improperly admitted a redacted audiotape of his December 16, 1995, interview with Los Angeles County Sheriff's investigators. Specifically, appellant maintains the trial court committed prejudicial error when it: (1) "overruled defense counsel's objections to tape-recorded statements or questions by investigators which clearly implied that unidentified informants had reported that [appellant] was responsible for setting up the murders, and was in danger because children had been killed"; and (2) "admit[ted] statements expressing investigators' personal opinions that [appellant] was guilty[.]" (AOB 129, 132.) Contrary to appellant's contention, the trial court properly admitted the audiotape in question.

A. Proceedings Below

On December 15, 1995, Sergeant John Laurie and Detective Stephen Davis of the Los Angeles County Sheriff's Department conducted an audiotaped interview of appellant.[79] (60 RT 9309-9310.)

At trial, the following discussion occurred regarding the admissibility of the audiotape:

The Court: All right.

Let the record reflect that the jurors and alternates are absent.

You are going to play a tape of Mr. Maciel.

Mr. Manzella [the prosecutor]: Yes.

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79. As set forth previously, the redacted audiotape was received in evidence as People's Exhibit 132; the redacted transcription of the interview was provided to the jury and received in evidence as People's Exhibit 132A. (60 RT 9305, 9314; see also 8 1SCT 1673-1704.)

My offer of proof is that I will be playing a tape of the conversation between the defendant and the two investigating officers.

Mr. Esqueda [defense counsel]: There will be an objection to that, Your Honor.

The Court: I will hear it.

Mr. Esqueda: Your Honor, Mr. Maciel in that tape, in fact, waived his Fifth Amendment right.

The Court: Did or did not?

Mr. Esqueda: Did.

There is no question as to a *Miranda*[80/] issue.

However, he will invoke his Fifth Amendment rights in this proceeding and will not testify as he has an absolute right to do.

He never --

In my opinion the tape is not a confession or admission in any way whatsoever.

He adamantly denies being involved in any way whatsoever with these murders.

Therefore, I think the tape is inadmissible in light of the fact that he is denying any involvement and will not be testifying during these proceedings.

Now I don't know why counsel wants to play the entire tape, because there are portions in there that I think should not go before the jury.

(59 RT 9265-9266.)

Defense counsel also argued that the investigators' references to appellant's prior incarceration and involvement in other murders were "substantially more prejudicial" than probative. (See 59 RT 9268-9271.) In

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80. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

denying defense counsel's request to exclude the audiotape in its entirety, the trial court ruled in relevant part:

> The Court: In terms of the defense motion to keep the tape out, that motion is denied.
>
> That interview is rife with damaging admissions.
>
> You may not think so, but yes, it is not a confession of the murder, but he gets so very close, even offering to turn over the real killers.
>
> He shows knowledge of the event and knowledge of affiliation with the Mexican Mafia, although he denies it and is back and forth.
>
> I am. I'm not. I am a go between, et cetera, et cetera, all of which is relevant to this case.
>
> He admits knowing some individuals that are absolutely involved, according to the evidence, denies knowing others where there is evidence to contradict him on the record.
>
> . . . . . .
>
> No question that the tape is material and relevant.

(59 RT 9271-9272.)

The trial court agreed, however, that certain portions of the audiotape were subject to redaction:

> [The Court:] In terms of the portion that you have objected to, the rulings are as follows:
>
> We will do it backwards.
>
> Page 19, I don't see any argument that the People could have, nor have they proffered one, that refers to this other murder.
>
> . . . . . .
>
> It is referring to seven murders.
>
> I don't know if they are trying to include -- if he is talking about five plus a couple other ones or seven other murders.

I think that needs to come out.

That would ask the jury to speculate too much, it seems to me, about prior criminal activity.

The request at page 13, that will remain over objection, where it says:

People are saying you set it up.

I will tell the jury, as I often do in these situations, that the questions posed by the officers are not evidence.

The police say things to try to get people to say things in response.

. . . . . .

I you wish, I will give the jury a limiting instruction that they may not assume to be true any question asked by the detectives or any insinuation contained in the question like I will tell them about attorney questions.

. . . . . .

In terms of page 10 and page 11, same statement:

Your name is up there . . . .

. . . . . .

I think the jury is entitled to hear the accusation to make sense of the denial.

. . . . . .

Page 2. Lines 25 through the top of page 3.

The rationale is the same, however, the ruling will be different.

I will sustain your objection.

The reason being they are talking about other offenses. They are accusing him of some other murders.

. . . . . .

So I will have them delete it.

Page 2, line 25 through page 3, line 3.

That needs to come out.

. . . . . .

Then on page 2, lines 3 through 5, that should also go out.

It refers to the defendant having been in jail.

. . . . . .

Lines 3 through 5 on page 2 will have to come out as well.

(59 RT 9272-9276; see also *id.* at pp. 9281-9297 [redacting additional portions of the audiotape].)

Prior to the introduction of the audiotape, the trial court admonished the jury as follows:

[The Court:] Ladies and gentlemen, one more admonition re the tapes, or the tape, I should say.

From time to time on the tape you will see [sic] the officers making statements to the defendant and he give a response, or they make an allegation of information that they have.

Keep in mind the following:

That the --

This is true of all taped interviews, not just the one in this case.

The police are entitled to and allowed to make statements and allegations toward a suspect.

They may tell them, not in this case, but the police may say in a burglary case, they may tell the suspect:

We have your fingerprints at the scene of the burglary.

And that is in an attempt to get somebody to say:

I was there. You're right.

They may or may not have fingerprints.

See what I am saying?

The point is when you see an allegation made in the transcript, that is not received for the truth of any allegation but because it is part of the statement and helps you judge the response of the defendant.

Everybody clear on what I have said?

(The jurors answered in the affirmative.)

(60 RT 9311-9313; see also 61 RT 9464-9465; 3 CT 663 [CALJIC No. 2.09 -- "Evidence Limited as to Purpose"].)

The redacted audiotape was subsequently played for the jury and a transcription was simultaneously provided (see 60 RT 9314), which includes, as relevant to this issue, the following statements:

A [by appellant] I ain't involved in that shit, man.

Q [by Sergeant Laurie] You're [sic] name is up there.

. . . . . .

A . . . I mean I ai -- I ain't get involved [sic] in that shit, man.

Q Well you're [sic] name is up there.

. . . . . .

A I'm not involved in this, I know.

Q People are saying --

A I ain't gonna fall for that shit.

Q -- that you setting [sic] it up.

A I said it what?

Q People are saying that you set it up.

. . . . . .

A Uh, the shit you guys are trying to put on me with "Scar" and all them fools that did that shit.

Q I'm not trying to put anything on you that doesn't fit.

Q . . . Uhm, I think you oughta give it some real thought to your own personal safety, because I'll tell you, uh, we've talked to some folks

about your affiliation and like you say you've had some letter -- you've had some letters and -- and -- and some people have kind of in -- giving you little inklings that, uh -- that some people are pissed off at you. I know you got some tight friends and I know you think you might have some power, but let me just tell you --

A I don't --

Q -- you're going to a place -- and I know you've been in the County Jail, and I -- and I'm not saying this for any other reason, but I don't know if "Pelon" is gonna come out of this thing alive . . . .

A I haven't done nothing.

Q No, no, no, I'm not even talking about -- I'm not talking about cops, I'm talking about people know what you've been up to.

A Where?

INV. DAVIS: People on the street.

. . . . . .

Q [by Sergeant Laurie] What you get out of it, is perhaps the ability to do time where you don't have to look over your shoulder. You know you're gonna do time.

A For what?

Q It's just beginning. For all the shit -- all the shit you've been involved in.

(8 1SCT 1682-1683, 1685, 1690-1691, 1694-1696.)

B. The Audiotape Was Sufficiently Redacted To Protect Appellant's Constitutional Rights

1. Accusatory Statements By The Investigators Were Properly Admitted

Appellant argues that accusatory statements by the investigators regarding his role in the murders "clearly implied that unidentified informants

had reported that [he] was responsible"; appellant maintains that such accusations were "plain hearsay," irrelevant, and therefore inadmissible. (AOB 129.) Not so.

In *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995 -- authority upon which appellant *himself* relies (see AOB 130-131) -- an en banc panel of the Ninth Circuit Court of Appeals rejected a similar challenge raised by way of a habeas corpus proceeding. In *Dubria*, an *unredacted* tape (and transcript) of the petitioner's police interview were admitted at trial, in which a detective "challenged [the petitioner] about his explanation of events and repeatedly told him that no judge or jury would believe him if he stuck to his story." (*Id.* at p. 1000.) In rejecting the petitioner's claim of constitutional error, the Ninth Circuit held:

> Dubria claims . . . that certain portions of the tape and transcript should have been redacted. He argues that Detective Detar's comments and questions contained statements of disbelief of Dubria's story, opinions concerning Dubria's guilt, elaborations of the police theory of [the victims'] death, and references to Dubria's involvement in the crime. Viewed in its entirety, however, the tape and transcript show what the state appellate courts quite properly described as an "unremarkable interview." The questions and comments by Detective Detar placed Dubria's answers in context, much like a prosecutor's questions at trial. There was nothing in Detective Detar's statements that suggested evidence or theories of the case that were not presented at trial.
>
> Nor do we find conclusive the argument that the jury impermissibly gave the comments added weight because they were made by a law enforcement officer. Although we have cautioned that testimony of law enforcement officers "'often carries an aura of special reliability and

trustworthiness,'" [citations] we examine officers' statements in context to determine whether they fundamentally affect the fairness of the trial [citation]. Here, Detective Detar's statements were questions in a pretrial interview that gave context to Dubria's answers. They were not the types of statements that carry any special aura of reliability. [Citations.]

(*Id.* at pp. 1001-1002, footnotes omitted.)

Likewise, in *People v. Maury*, *supra*, 30 Cal.4th at page 342, this Court held that statements the defendant made to police officers and others were properly admitted, because

these statements were parts of interviews or conversations in which defendant made admissions establishing consciousness of guilt or made false statements as part of his attempt to evade detection and deceive the police. Evidence Code section 356 permits introduction of statements "on the 'same subject'" or which are necessary for the understanding of the statements already introduced. [Citation.] The isolated statements defendant cites were themselves either admissions or necessary to understand the context of defendant's admissions, and were relevant to show a culpable state of mind. . . .

(*Id.* at pp. 419-420.)

Here, as the trial court cogently observed, "[appellant] shows knowledge of the event and knowledge of affiliation with the Mexican Mafia, although he denies it and is back and forth. [¶] . . . [¶] He admits knowing some individuals that are absolutely involved, according to the evidence, [and] denies knowing others where there is evidence to contradict him on the record." (59 RT 9271.) Indeed, elsewhere on the audiotape, appellant acknowledged that he knew Raymond Shyrock "real good," and would do favors for him when "he need[ed] a couple things . . . ." (8 1SCT 1679.) Appellant also indicated that

he had "heard of [Torres and Valdez]" and knew they were "running the neighborhood . . . ." (8 1SCT 1688.) Toward the end of the interview, appellant eventually admitted that he was a "middle man" for the Mexican Mafia. (8 1SCT 1696.) The interview concluded when appellant refused to disclose any more information about the murders, lamenting, "My kids, my wife, I mean they'll all be all fucked up, because of me." (8 1SCT 1698.)

Thus, "[t]he questions and comments by [the investigators] placed [appellant's] answers in context, much like a prosecutor's questions at trial. There was nothing in [the investigators'] statements that suggested evidence or theories of the case that were not presented at trial." (*Dubria v. Smith*, *supra*, 224 F.3d at p. 1001.) As such, "[t]he isolated statements [appellant] cites were themselves either admissions or necessary to understand the context of [appellant's] admissions, and were relevant to show a culpable state of mind." (*People v. Maury*, *supra*, 30 Cal.4th at p. 420; see also Evid. Code, § 356 ["Where part of an act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence"]; compare *People v. Staker* (1957) 154 Cal.App.2d 773, 784-785 [finding prejudicial error resulting from admission of numerous accusatory statements which the defendant steadfastly denied]; *People v. Butler* (1953) 118 Cal.App.2d 16, 21 [finding prejudicial error resulting from admission of prior plea which court had set aside as involuntary].)

In any event, the complained-of statements were *not* offered for a hearsay purpose. Evidence Code section 1200 provides that hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*" (Italics added; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1113-1114 [trial court's hearsay ruling will not be disturbed "unless the trial

court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"]; *People v. Boyette* (2002) 29 Cal.4th 381, 429 ["evidence of threats would not have been barred by the hearsay rule, for such evidence would not have been offered for its truth (i.e., that Thomas or Johnson actually intended to retaliate against defendant or his family), but for a different purpose: to show the effect of the statements on defendant"].)

The trial court instructed the jury prior to the introduction of the audiotape that "when you see an allegation made in the transcript, *that is not received for the truth of any allegation* but because it is part of the statement and helps you judge the response of the defendant." (60 RT 9312, italics added.) The trial court reinforced that admonition at the end of the guilt phase by providing CALJIC No. 2.09, which directed the jury not to "consider [evidence admitted for a limited purpose] for any purpose except the limited purpose for which it was admitted." (3 CT 663.) And, the record shows that the prosecutor did not rely upon the investigators' statements for the truth of the matter asserted during closing argument, or at any other point during trial. (See RT, *passim*.)

Simply put, appellant's contention is without merit.

2. Statements Reflecting The "Personal Opinions" Of The Investigators Were Properly Admitted

Appellant also argues that the trial court erred by admitting "statements by investigators which did not incorporate hearsay from unknown sources, but nevertheless amounted to expressions of personal opinion that [appellant] was guilty of setting up the Maxson Street killings." (AOB 132-133.)

Again, as the trial court instructed the jury, the investigators' comments were not offered "for the truth of any allegation but because [they were] part of the statement and [would] help[] . . . judge the response of the defendant." (60

RT 9312.) Although appellant insists the comments were tantamount to a prosecutor "express[ing] his personal opinion regarding a defendant's guilt" (AOB 133-134), respondent is unaware of any decision that stands for the proposition that prosecutorial "vouching" may occur indirectly through statements made by *investigators* during an *interrogation*. Indeed, the record shows that Sergeant Laurie and Detective Davis -- who appeared as prosecution witnesses at trial -- did not express their personal belief in appellant's guilt during their *testimony*. (See 56 RT 8699-8701, 58 RT 9157-9179, 9184-9201, 59 RT 9254-9264, 60 RT 9309-9311, 9450-9452.)

"The questions and comments [at issue merely] placed [appellant's] answers in context" (*Dubria v. Smith*, *supra*, 224 F.3d at p. 1001), and were nontestimonial in nature. (Compare *People v. Kirkes* (1952) 39 Cal.2d 719, 725-726 [*prosecutor* stated in closing argument that he knew defendant was guilty "prior to the time that [he] became associated in this particular prosecution"]; *People v. Ahrends* (1957) 155 Cal.App.2d 496, 507-508 [*testifying prosecutor* stated it was his "considered opinion that the defendant was guilty"]; *United States v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1210 [*testifying former prosecutor* described plea negotiations with codefendant, stated he "felt that at that time the Government had an excellent case," and characterized the codefendant as "least culpable of all"]; *Martinez v. State* (Fla. 2000) 761 So.2d 1074, 1078-1081 [investigating officer *testified* as to his opinion of defendant's guilt].)

In sum, the complained-of comments were neither made by the prosecutor, nor did they suggest the existence of extra-record evidence supporting appellant's guilt. (See *People v. Frye* (1998) 18 Cal.4th 894, 971 ["A *prosecutor* is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a *prosecutor* permitted to place the

prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial," italics added].)

C. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the trial court's admission of the complained-of statements violated his "Sixth Amendment confrontation rights, as well as his right to due process of law and a reliable death judgment" under the state and federal Constitutions.[81] (AOB 135.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1029.) Indeed, as the record shows, appellant's "objections referred not to the federal Constitution but only to Evidence Code section 352, a state law authorizing a trial court to exclude evidence when 'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' Thus, . . . [appellant] may not now claim denial of federal constitutional rights . . . ." (*People v. Sapp* (2003) 31 Cal.4th 240, 275.)

Nevertheless, as set forth previously, appellant cannot reasonably claim a denial of his right to confrontation, as "the [investigators' recorded statements were] not hearsay. For the same reason, [they] did not violate [appellant's] rights under the confrontation clause of the Sixth Amendment to the federal Constitution." (*People v. Davis* (2005) 36 Cal.4th 510, 550; see also *Crawford*

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81. In *People v. Lewis and Oliver, supra*, 39 Cal.4th at page 970, this Court observed, "Consistent with recent cases . . . , we note that defendants urge that this and almost every other error alleged on appeal infringed their constitutional rights to a fair and reliable trial." (*Id.* at p. 990, fn. 5.)

v. Washington (2004) 541 U.S. 36, 59, fn. 9 [124 S.Ct. 1354, 158 L.Ed.2d 177] ["the [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"].) And, both investigators testified at trial and were subject to cross-examination. (See 56 RT 8699-8701, 58 RT 9157-9179, 9184-9201, 59 RT 9254-9264, 60 RT 9309-9311, 9450-9452.)

"Furthermore, even if it was error to admit the tapes and transcripts without redacting [the investigators'] statements, any error was cured by the judge's two cautionary instructions." (*Dubria v. Smith*, *supra*, 224 F.3d at p. 1002.) Again, the trial court admonished the jury before the audiotape was played that when it saw "an allegation made in the transcript, that is not received for the truth of any allegation but because it is part of the statement and helps . . . judge the response of the defendant." (60 RT 9312.) The trial court also instructed the jury pursuant to CALJIC No. 2.09 that it was not to "consider this evidence for any purpose except the limited purpose for which it was admitted." (3 CT 663.)

"This is not a case in which the statements at issue are so clearly prejudicial that a curative instruction could not mitigate their effect." (*Dubria v. Smith*, *supra*, 224 F.3d at p. 1002.) Instead, "[a]ny impression that the jury may have had that it could consider [the investigators'] statements to be true was specifically and timely corrected by the trial judge." (*Ibid.*) As this Court held in a similar context, "we cannot conclude [their] admission caused a miscarriage of justice (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b)) or rendered [appellant's] trial so 'fundamentally unfair' (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 . . .) as to constitute a deprivation of due process." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 128.) No prejudice can be shown.

VI.

THE TRIAL COURT PROPERLY OVERRULED OBJECTIONS TO TESTIMONY BY THE PROSECUTION'S EXPERT WITNESS ON GANGS

Appellant contends that the trial court erroneously overruled two objections to the testimony of Sergeant Richard Valdemar, the prosecution's gang expert. According to appellant, the trial court erred by: (1) "admitting testimony that even a son of a murder victim would commit perjury to aid the Mexican Mafia"; and (2) "admitting testimony implying that a new Mexican Mafia recruit would do his sponsor's bidding." (AOB 140.) Appellant's contention is without merit.

A. Proceedings Below

Prior to Judge Cesar Sarmiento's severance of appellant's trial from that of his codefendants (see 2 CT 475; 3 RT 585-599), the prosecution filed a motion "to admit gang related evidence." (2 CT 426-427.) In the motion, the prosecution announced its intention to introduce:

> evidence that defendants LOGAN, PALMA, TORRES, VALDEZ and ORTIZ are all members of the SANGRA street gang; [¶] . . . evidence that RAYMOND SHYROCK and defendant LUIS MACIEL are members of the Mexican Mafia prison gang and that MACIEL is a member of the EL MONTE FLORES street gang; [¶] . . . evidence that victim ANTHONY "Dido" MORENO was a Mexican Mafia prison gang "dropout"; [¶] . . . evidence that victim VICTOR AGUIRRE had robbed a drug dealer who was "protected" in the Mexican Mafia; [¶] . . . evidence of the relationship between the Mexican Mafia prison gang and Hispanic street gangs in Los Angeles County including the SANGRA street gang; [¶ and] . . . evidence that the defendants TORRES and ORTIZ attended certain Mexico [sic] Mafia meetings on

behalf of the SANGRA street gang.

(2 CT 422; see also *id.* at pp. 421-427.)

Counsel for codefendants Jimmy Palma and Jose Ortiz argued that "a foundation [should] be laid prior to any of that evidence being introduced." (See 3 RT 427-428, 443-444; see also *id.* at pp. 428-444; cf. 1 CT 213-214.) Judge Sarmiento ruled as follows:

> The Court: All right. 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.

(3 RT 444.)

Appellant subsequently joined in the codefendants' discovery motions regarding various photographs and police reports.[82/] (3 RT 494-495.) After the severance of appellant's case from that of his codefendants and the transfer of the case to the Honorable Charles E. Horan for trial, no motion was filed regarding the admissibility of gang-related evidence. (See RT, *passim.*)

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82. Although appellant states that he joined in codefendant Palma's request for an "*in limine* hearing and orders limiting introduction of gang-related evidence not directly connected with the defendants" (AOB 139), the record suggests that appellant orally joined in only the above-mentioned *discovery* motions. (See 3 RT 427-442, 494-495; see also 2 CT 311-369 [appellant's motion for discovery].)

Appellant rests his present claim of error on two objections that were overruled by the trial court during Sergeant Valdemar's testimony.

B. The Trial Court Properly Overruled Appellant's Objection To The Prosecutor's Inquiry Into Whether The Son Of A Murder Victim Would Commit Perjury To Aid The Mexican Mafia

The following colloquy occurred during testimony regarding the potential actions of sympathizers of the Mexican Mafia:

> Q [by the prosecutor] Can you give us --
>
> Would you tell us who would be included within the term sympathizer with regard to the Mexican Mafia?
>
> A [by Sergeant Valdemar] Except for the coalition of Maravilla gangs, Hispanic gang members from Southern California are all sympathizers to the Mexican Mafia.
>
> Not only that, the Mexican Mafia also has people who are family, relatives, especially wives and mothers of Mexican Mafia members, who can be considered sympathizers in that they do much of the business for the Mexican Mafia in relaying messages, taking money, delivering drugs.
>
> And, also, they have various people in professional life that are sympathizers with the Mexican Mafia and do their bidding.
>
> Q When you say "do their bidding" would that include coming into court to lie for the members of the Mexican Mafia who are being accused and prosecuted for crimes?
>
> A Yes, sir.
>
> Q Let me ask you this.
>
> In your opinion, would the son of a murder victim come into court to lie for a Mexican Mafia member being tried for murder?

(55 RT 8521-8522.)

At this point, appellant objected that "credibility [was] in the sole discretion of the jury." The trial court acknowledged the objection, reminded both parties to avoid "speaking objections,"[83] and restated the question as follows: "Is that something in your experience with the Mexican Mafia would be a possible thing to happen?" When Sergeant Valdemar answered in the affirmative, the trial court overruled the objection and let Valdemar's answer stand. (55 RT 8522.)

Appellant contends on appeal that, "[s]ince no son of a victim testified at the trial, the objectionable question and answer had no conceivable purpose but to communicate to the jury Valdemar's opinion that the influence of Eme was so extremely strong that any witness at the trial whose testimony favored [appellant], or the Mexican Mafia, was lying either in self-preservation, or to protect the Mafia." (AOB 140.) Appellant's contention proves too much.

First, to the extent appellant's present contention has been preserved by his rather vague objection below, the fact that "no son of a victim testified at the trial," as appellant notes (AOB 140), means that the jury was never called upon to make such a credibility determination *in the first place*. As such, appellant's claim of error is, at best, moot.

Moreover, matters affecting a witness' credibility are relevant and properly put before a jury, *even through the use of expert testimony*. (See *People v. Brown* (2004) 33 Cal.4th 892, 906-908 [upholding use of expert testimony to explain domestic violence victim's recantation of prior accusation]; see also *People v. Sapp*, *supra*, 31 Cal.4th at p. 301, citing Evid. Code, § 780; *People v. Warren* (1988) 45 Cal.3d 471, 481; cf. *People v. Guerra*, *supra*, 37 Cal.4th at p. 1142 [discussing threats as affecting credibility]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369 [same].) Indeed, Evidence Code

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83. Appellant's claim that the trial court committed judicial misconduct with regard to this admonition is addressed separately in Argument XIII, *infra*.

section 780, subdivision (f), provides that a jury "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony," including "[t]he existence or nonexistence of a bias, interest, or other motive."

Furthermore, "this [C]ourt and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) "The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) In *People v. Gonzalez*, *supra*, 38 Cal.4th at page 932, a case involving expert testimony regarding gang intimidation, this Court observed that even though such testimony, "if found credible, might, together with other evidence, lead the jury to find the witnesses were being intimidated, *which in turn might cause the jury to credit their original statements rather than their later repudiations of those statements*," that "circumstance [would] make[] the testimony probative, not inadmissible." (*Id.* at p. 947, italics added, citing *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 ["This evidence, coupled with the evidence that appellant was a gang member, may have led the jury to the ineluctable conclusion that appellant intended to kill Cruz, but that does not render it inadmissible"].)

Finally, contrary to appellant's assertion that Sergeant Valdemar's "sweeping *opinion* was beyond the permissible scope of [his] testimony" (AOB 140, italics added), the record shows instead that Valdemar responded based upon his *experience*. (See 55 RT 8522 ["Is that something in your *experience* with the Mexican Mafia would be a possible thing to happen? [¶] . . . Yes, Your Honor"], italics added.) In sum, Sergeant Valdemar's testimony did not constitute the expression of expert opinion on the credibility of a particular witness, nor did it improperly encroach upon the fact-finding province of the

jury. (Compare *People v. Smith* (2003) 30 Cal.4th 581, 628 ["Credibility questions are generally not the subject of expert testimony, or at least a court could so conclude in a given case"] with *People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1012 ["The doctor's statement of his own belief that Bayles was not intentionally lying or deceiving him during the psychiatric interview was relevant to the reliability of the doctor's conclusions"].)

C. The Trial Court Properly Overruled Appellant's Objection To The Prosecutor's Inquiry Into Whether A Newly-inducted Member Of The Mexican Mafia Would Honor The Wishes Of His Sponsor

As set forth previously, appellant's membership in the Mexican Mafia, his association with Raymond Shyrock, and Shyrock's plan to murder Anthony Moreno, were established in part through the admission of videotaped recordings of gang meetings that took place on January 4, 1995, and April 2, 1995.[84] (See 59 RT 9301; see also 8 1SCT 1642-1672.)

During Sergeant Valdemar's testimony, the prosecutor inquired into the relationship between a newly-inducted member of the Mexican Mafia and his sponsor:

> Q [by the prosecutor] Would there be any, in your opinion, any special relationship between say an Eme member and someone he recruits for Eme and succeeds -- and successfully sponsors for Eme.
>
> Would there be any special relationship between those people?
>
> A Absolutely.
>
> Q What would that be?
>
> A Sort of mentor and student.
>
> Q And what effect would that have on the new member's --

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84. The videotapes were received in evidence as People's Exhibits 118 and 119; transcriptions of the videotapes were provided to the jury and received in evidence as People's Exhibits 118A and 119A. (59 RT 9301.)

Withdraw that.

What effect would that have on the way the new member would view, in your opinion, would view the wishes of his mentor or his sponsor into Eme?

Mr. Esqueda [defense counsel]: Your Honor, I will object to the question.

Calls for speculation.

The Court: Overruled.

Go ahead.

The Witness: Well, of course, somebody who is placed in a membership has a learning period and so he would pay great attention to his sponsor, the person who they call "raises his hand".

(55 RT 8526-8527.)

Appellant contends that admission of the foregoing testimony amounted to "reversible error," purportedly because it "was akin to testimony that [appellant] -- Shyrock's 'student' -- was the person guilty of arranging the murders." (AOB 141.)

"This testimony was quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 945.) Again, "it is true that this testimony, if found credible, might, together with other evidence, lead the jury to find that [appellant arranged the murders because of his relationship with Shyrock]. But this circumstance does not render the testimony inadmissible." (*Id.* at p. 947; see also *People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1551 ["The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible"].) That is especially true where, as here, "[t]he witness did not express an opinion about whether [*appellant* had, in fact, arranged the

murders]." (*Ibid.*) As such, appellant's objection based upon "speculation" was properly overruled. (Compare *People v. Brown* (1981) 116 Cal.App.3d 820, 829 [trial court erred in allowing drug expert to testify that in his opinion the *defendant* had performed the role of a "runner" in a drug transaction; this "was tantamount to an opinion that Brown was guilty of the charged crime"].)

D. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the trial court's admission of the complained-of testimony violated his rights "to due process, freedom of association, and to a reliable death judgment" under the state and federal Constitutions. (AOB 142-143.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1029.)

In the event appellant's "constitutional claim[s were] properly preserved on appeal [citation], no constitutional or other error occurred." (*People v. Samuels* (2005) 36 Cal.4th 96, 123.) As set forth previously, Sergeant Valdemar's testimony was "probative, not inadmissible" (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 947), and merely facilitated -- but did not usurp -- the jury's fact-finding responsibilities (*People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1551).

Nevertheless, any error would be harmless. The testimony constituted only a small evidentiary portion of a lengthy and complex trial. Thus, the alleged error would be non-prejudicial under either the standard enunciated in *People v. Watson*, *supra*, 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California*, *supra*, 386 U.S. at page 18 [87 S.Ct. at page 824]. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 821 [evaluating alleged error in

admitting statements under Evidence Code section 1250 under both standards].)

VII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY INTRODUCING STATEMENTS MADE BY RAYMOND SHYROCK DURING A VIDEOTAPED MEXICAN MAFIA MEETING REGARDING APPELLANT'S CRIMINAL ACTS IN FURTHERANCE OF THE GANG

Appellant contends that the "prosecutor committed misconduct by playing for the jury a version of the [Mexican Mafia] videotape which directly violated Judge [Cesar] Sarmiento's [pre-]trial ruling by including [Raymond] Shyrock's references to prior violent or illegal acts allegedly committed by [appellant] for Eme." Specifically, appellant assigns prosecutorial misconduct to the "[t]he playing of a videotape which included hearsay statements by Shyrock arguing that [appellant] should be admitted to Eme due to his commission of numerous prior acts of violence on the group's behalf . . . ." (AOB 146.) Contrary to appellant's contention, Judge Sarmiento issued nothing more than a tentative ruling on appellant's pretrial objection to the admission of the challenged evidence; because appellant did not pursue and obtain a ruling on this point at trial, and because he did not object to the admission of the evidence at trial, his contention is forfeited. Alternatively, it is without merit.

A. Proceedings Below

Prior to Judge Sarmiento's severance of appellant's trial from that of his codefendants (see 2 CT 475; 3 RT 585-599), a hearing was held on September 3, 1996, regarding the prosecution's motion to introduce certain statements Shyrock made regarding appellant's acts in furtherance of the Mexican Mafia during the videotaped meeting in question. (3 RT 424-425, 504; see also 2 CT 414-417.) The following colloquy occurred in that regard:

[The Court:] So I would like to start out with -- then what I plan to do is just go statement by statement as proferred [sic] by the People so we can keep this in some sort of logical fashion.

All right. First of all, the statements that would be testified to by Officer [sic] Valdemar, and in this regard we have two statements: first of all, the statement that Dido dropped out and about the silencer, which is the January '95 statement. The second statement is a statement Valdemar will testify to by Shyrock --

Am I pronouncing that correctly?

Mr. Monaghan [the prosecutor]: Yes.

The Court: -- Shyrock regarding Maciel, who was not present, that he takes care of business, that he's down.

(3 RT 504.)

After a brief discussion regarding the admissibility of the statements as declarations against interest (3 RT 504-508), Judge Sarmiento inquired into Shyrock's availability to testify:

The Court: All right.

Is he unavailable?

Mr. Monaghan: Your Honor --

The Court: You indicate he's --

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[85] 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

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85. Racketeer Influenced Corrupt Organizations Act.

attorney fill out a document indicating that if he was called to testify he would take the Fifth.

(3 RT 508-509.)

Appellant's codefendants objected that the statements were more prejudicial than probative under Evidence Code 352[86] (see 3 RT 511-512), an objection in which appellant joined (see 3 RT 512). Appellant also argued:

Mr. Esqueda [defense counsel]: Mr. Monaghan told you, Your Honor, that in 1974 Dido was released from prison, dropped out of the Mexican Mafia in 1974. No one has ever established he was a Mafia member. So they have a foundational problem there.

And we need Raymond Shyrock, who I say is available and who is willing to come to this Court and testify that he never intended to make those statements. Mr. Monaghan has asserted his Fifth Amendment right for him, but I will bet you that Raymond Shyrock will come here and testify precisely to what he said and what he meant by any statements that he ma[y] have made.

(3 RT 512-513.)

Judge Sarmiento deferred ruling on the statements until the prosecution established Shyrock's unavailability:

The Court: All right.

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 unavailability. I don't know.

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86. Evidence Code section 352 provides:

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

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 unavailability of Mr. Shyrock so that these statements are admissible.

(3 RT 513.)

Judge Sarmiento nevertheless entertained the prosecutor's argument in support of the motion, pending a determination of unavailability:

[The Court:] Now, let's move on to the second statement, again, the unavailability issue, leaving that for another time.

. . . . . .

Mr. Monaghan: I think that when [Shyrock] says that [appellant] has gone above and beyond the call of duty:

"He's been working with me for about a year, man. For a year I've been working real close with him . . . He takes care of a lot of business . . . I am not talking about just violence either."

I think those are things that certainly would subject Mr. Shyrock to various criminal prosecutions in both state court and in federal court.

Clearly, he's admitted many, if not all, of the what you would need to prove a conspiracy. He's indicating that he's working very closely with Maciel, that he has done this for about a year, that Maciel has gone above and beyond the call of duty, takes care of a lot of business.

And, clearly, when he is sitting there with other Mexican Mafia members and they're discussing Mexican Mafia business a reasonable inference to draw from his statement "He takes care of a lot of business" is the fact that they're talking about Mexican Mafia business which is illegal, which can subject one to a RICO prosecution, as these very statements have subjected Mr. Shyrock to a RICO prosecution. That's what he's in custody for and this is one of the statements that will be

played at his federal RICO trial.

So clearly is that a statement that he made that would subject him to a specific prosecution for a murder in state court? Obviously not, Your Honor. And it's not my position that it would. But I think that when one carefully considers what he said, that clearly it does subject Mr. Shyrock to criminal prosecution. And it shows the relationship between Mr. Shyrock and Mr. Maciel, and we are talking about within three weeks of these murders.

(3 RT 517-518, 520-521.)

After hearing argument from the codefendants (see 3 RT 522-526, 532), Judge Sarmiento tentatively ruled:

The Court: All right. I am not comfortable with this statement as a declaration against interest.

. . . . . .

. . . I am not ruling -- all I am ruling on is the statement I don't think is a declaration against interest. . . . [¶] . . . The statement is the only thing I am considering. . . . [¶] Nobody argued it but given your offer of proof here this might even be cumulative evidence given the purpose it's being offered for. But I don't think it's a declaration against interest. I don't think it meets the requirement of being against the interest of the declarant, Mr. Shyrock.

(3 RT 532-533; see also 2 CT 475 ["People's request for admission of statements is heard and ruled on as more fully reflected in the notes of the court reporter"].)

No further references were made to Shyrock's unavailability, nor did appellant pursue a final ruling on the admissibility of the challenged

statements.[87] (See RT, *passim*.)

At trial, Sergeant Richard Valdemar, the prosecution's gang expert, testified that he first became aware of appellant, also known as "Pelon," when appellant walked into an electronically-monitored Mexican Mafia meeting on April 2, 1995. (55 RT 8530, 8559.) In the absence of any objection, a videotape of the meeting was played for the jury (see 55 RT 8557) and a transcription was simultaneously provided,[88] which includes, as relevant to this issue, the following statements by Shyrock:

> U So I wanna get that out of the way real quick. There's this dude, Pelon. Pelon has been working with me for about –
>
> . . . . . .
>
> U Yeah. And the *** is the one that cut me into him. When I got out *** got busted. This is the Vato that he *** For a year I've been working real close with him, and this dude has gone way above and beyond the call of duty. Man, this mother fucker is sharp, he's taken care of a lot of business and I wanna make ***
>
> I don't raise my hand for a lot of dudes. You know, it's not something I just go around doing, and when I do it ta -- it takes somebody, it takes something special.
>
> . . . . . .
>
> I -- I know the Vatos don't know him, but take my word for

---

87. At the time of appellant's trial, Shyrock had been convicted in a federal RICO case, and was imprisoned in Marion, Illinois. (50-1 RT 7505.)

88. The videotape was received in evidence as People's Exhibit 119; the transcription of the videotape was provided to the jury and received in evidence as People's Exhibit 119A. (59 RT 9301; see also 8 1SCT 1644-1672.) The videotape was replayed for the jury during the prosecutor's closing argument in the guilt phase of trial. (62 RT 9651, 9763.)

it, the mother fucker's down. I'm not talking about just violence either. Okay, you know, he takes care of business real good and he's downed a whole lot of mother fuckers in the last year. And he went against his whole neighborhood for us. He's been fighting with them and downed them. And when -- when that one-year-old baby, one of his homies killed that one-year-old baby a few months ago, he's the one that took care of them.

. . . . . .

U Okay. Well, anyway, that's another issue. Like -- well, like I said right now, I would like to bring this dude in because I've brought it up before this came up and I would like to -- and -- and I think he would an asset to us, not just because of any violence, any violence that he's done, he's got to go ahead. And he don't need nobody to hold his hand. You know, I don't have to hold his hand.

. . . . . .

U This dude, he does -- I do know a lot of people that know him. Nobody in this room, of course. And he -- he -- the guy was recommended to me by other carnals, a couple of them, and I've been watching him and doing things with him for a year myself. And I'm basing what I'm saying, not just on what he's did over this year with me but on things that I know about him from the past from other people, you know. And -- and I -- I think it's time, the dude deserves it, man, he's got it coming. And I'm not just going on -- on things he's done for the violence. Yeah, he's downed a whole bunch of mother fuckers, he's got a good head on his shoulders.

(8 1SCT 1644-1645, 1654, 1664, asterisks in original.)

B. Legal Principles Of Prosecutorial Misconduct

"A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Harrison* (2005) 35 Cal.4th 208, 242, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44; see also *People v. Stanley* (2006) 39 Cal.4th 913, 950, 958; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) To violate the federal Constitution, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108 [96 S.Ct. 2392, 49 L.Ed.2d 342].) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under California law only if it involves ""'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"" [Citation.]" (*People v. Samoyoa* (1997) 15 Cal.4th 795, 841; see also *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A claim of prosecutorial misconduct may be forfeited in the absence of "[a] timely objection and request for admonition at the first sign of any purported misconduct . . . ." (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244, citing *People v. Dennis* (1998) 17 Cal.4th 468, 521; see also *People v. Stanley*, *supra*, 39 Cal.4th at p. 959.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct [at trial]. [Citation.]" (*People v. Samoyoa*, *supra*, 15 Cal.4th at p. 841; see also *People v. Box* (2000) 23 Cal.4th 1153, 1215.)

"A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.]

In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; see also *People v. Harrison*, *supra*, 35 Cal.4th at pp. 243-244.)

C. Appellant's Claim Of Prosecutorial Misconduct Regarding The Admission Of Shyrock's Videotaped Statements Is Forfeited

The previously-quoted portions of the record demonstrate that any ruling regarding the admissibility of Shyrock's challenged statements was merely tentative in nature; as Judge Sarmiento stated at the commencement of the hearing, "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 unavailability of Mr. Shyrock so that these statements are admissible. (3 RT 513, italics added.) Therefore, Judge Sarmiento's subsequent observation, "I don't think [the statement] . . . meets the requirement of being against the interest of the declarant, Mr. Shyrock" (3 RT 533), *cannot* properly be viewed as a final ruling on appellant's objection.

Appellant's failure to pursue a final ruling on this matter constitutes a forfeiture of the issue on appeal. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"]; see also *People v. Morris*, *supra*, 53 Cal.3d at p. 190 ["Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353"]; cf. Evid. Code, § 353 [a verdict or finding shall not be set aside on the basis of the erroneous admission of evidence unless there was "an objection . . . that was timely made and so stated as to make clear the specific

ground of the objection"].) Appellant's contention should be rejected for that reason alone.

Appellant's failure to object at trial to the introduction of the challenged statements also precludes consideration of this issue on appeal. Again, the record shows that the videotape of the meeting was played for the jury not once -- *but twice* -- without any objection; it was also admitted into evidence without objection. (See 55 RT 8556-8558, 59 RT 9297-9301, 62 RT 9651, 9763; compare 62 RT 9564-9565 [objection to the jury's use of *transcriptions* of the videotapes during deliberations].) Indeed, appellant *himself* concedes that "no on-the-record objection" was ever made. (AOB 153.) And, contrary to appellant's contention (see AOB 154), there is *nothing* to suggest that "a timely objection . . . would [have been] futile." (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) In sum, appellant's contention regarding alleged prosecutorial misconduct is forfeited as a result of his failure to interpose "[a] timely objection and request for admonition at the first sign of any purported misconduct . . . ." (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244; see also *People v. Huggins* (2006) 38 Cal.4th 175, 251-252.)

D. Shyrock's Statements Were Admissible As Declarations Against Interest

No prosecutorial misconduct can be shown, in any event, because Shyrock's statements were admissible as declarations against his penal interest. Evidence Code section 1230 provides in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . , that a reasonable man in his position would not have made the statement unless he believed it to be true.

A statement may subject the declarant to the risk of criminal liability by, for instance, describing his role in the crime "or by leading the police to additional evidence against [him]." (*People v. Lawley*, *supra*, 27 Cal.4th at p. 174 (conc. opn. of Brown, J.).) "[H]earsay statements identifying coconspirators constitute declarations against penal interest if the statements are 'an integral part of the statement in which' the declarant 'implicated himself' [citation], and do not shift blame or minimize the declarant's role in the crime [citation]." (*Ibid.*)

Appellant relies in part upon *Lawley*, wherein proffered statements were found to be inadmissible, in support of his contention that Shyrock's statements did not fall within the purview of Evidence Code section 1230, purportedly because they were "collateral assertions within declarations that [were] broadly self-inculpatory." (AOB 148.) In *People v. Samuels*, *supra*, 36 Cal.4th at page 96, this Court addressed a similar contention. There, the defendant claimed that the trial court erroneously admitted the testimony of David Navarro regarding statements made to him by James Bernstein implicating the defendant in a murder-for-hire scheme; the defendant maintained that Bernstein's statements were self-serving and therefore constituted inadmissible hearsay. In rejecting that contention, this Court held:

> This case is distinguishable from *People v. Lawley*[, *supra*,] 27 Cal.4th [at pp.] 151-154 . . . , upon which defendant relies, for Bernstein's facially incriminating comments were in no way exculpatory, self-serving, or collateral. Defendant argues that Bernstein's assertion "that [defendant] had paid him" for the killing was either collateral to his statement against penal interest, or an attempt to shift blame. We disagree. This admission, volunteered to an acquaintance, was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing -- a particularly

heinous type of murder -- and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to defendant incorporated within this admission as itself constituting a collateral assertion that should have been purged from Navarro's recollection of Bernstein's precise comments to him. Instead, the reference was inextricably tied to and part of a specific statement against penal interest. (See *People v. Wilson* (1993) 17 Cal.App.4th 271, 277 . . . .) Moreover, the differences between the trustworthiness of the statements involved in this case and those excluded in *People v. Lawley*, *supra*, 27 Cal.4th at pages 151-154 (in which we found no abuse of discretion in the trial court's exclusion, following an offer of proof, of proposed testimony recounting a prisoner's assertions that the Aryan Brotherhood was involved in a homicide he claimed to have committed) are palpable. In any event, even had the trial judge erred, any such error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

(*Id.* at pp. 120-121.)

Likewise, Shyrock's statements were facially incriminating and identified his role in criminal conduct; as the prosecutor aptly noted, "these very statements have subjected Mr. Shyrock to a RICO prosecution." (3 RT 521.) Moreover, the statements were "inextricably tied to and part of a specific statement against penal interest." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 121.) Indeed, those statements, *made in the presence of his fellow gang members*, were specifically disserving to Shyrock's interests in that they intimated that he had, at the very least, "participated in a . . . conspiracy to commit murder." (*Ibid.*) In particular, Sergeant Valdemar testified that Shyrock's reference during the meeting to appellant having "taken care of a lot of business," signified that appellant had engaged in criminal activity (including

"down[ing] a whole bunch of mother fuckers") on behalf of the Mexican Mafia. (55 RT 8535; see also 1 8SCT 1664.) Shyrock assured fellow gang members during that same meeting, "I've been watching [appellant] and doing things *with him* for a year *myself*." (8 1SCT 1664, italics added.) Finally, because of the circumstances in which the statements were made (again, during a Mexican Mafia meeting), "the differences between the trustworthiness of the statements involved in this case and those excluded in . . . *Lawley* . . . are palpable." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 121; see also *People v. Duarte* (2000) 24 Cal.4th 603, 614 ["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"'"]; compare *People v. Hogan* (1982) 31 Cal.3d 815, 846 [conviction reversed where it was "conceded by respondent that the jury's receipt of evidence which was not admitted [was] error which create[d] a presumption of prejudice to the appellant"], disapproved on this ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

E. Appellant's Contention That The Trial Court Erred By Failing To Provide A Limiting Instruction Sua Sponte Is Forfeited

Appellant also contends that the alleged "error of the prosecutor was compounded by the trial court's failure to give any limiting instruction."[89] (AOB 150.) As appellant acknowledges, however, "this Court has generally held that a trial court has no sua sponte duty to instruct on the limited admissibility of evidence of past criminal conduct . . . ." (AOB 150, italics omitted.)

Indeed, in *People v. Smith* (2007) 40 Cal.4th 483, the defendant raised a similar claim of error. There, the defendant's minor accomplice, Joseph,

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89. Appellant fails to specify precisely what type of limiting instruction should have been given. (See AOB 150-151.)

testified during the prosecution's case-in-chief that the defendant had told him in jail that "he planned to bring forward a witness that would say Joseph had admitted killing [the two murder victims]." Although Joseph never told anyone that he had killed the two victims, the defendant purportedly told him that a witness named "Alfred" would be testifying at trial to that effect. In fact, no witness named Alfred ever testified. (*Id.* at p. 514.) On appeal, the defendant maintained, inter alia, that the trial court should have instructed the jury sua sponte that his statement to Joseph "'was offered for a limited purpose and that they could only rely on the statement if the fact was corroborated.'" (*Id.* at p. 516.)

In rejecting the defendant's contention, this Court held:

> Even assuming that defendant is correct in noting that the evidence should only have been admitted for a limited purpose, the trial court had no sua sponte duty to give a limiting instruction. "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355.) However, as this court has noted, "absent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction." (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3 . . . ; see also *People v. Farnam* (2002) 28 Cal.4th 107, 154 . . . .)

(*Id.* at p. 516; see also *People v. Stanley*, *supra*, 39 Cal.4th at p. 935 ["there is no merit to defendant's further claim that the court had a sua sponte duty to give the jury a limiting instruction as to what it could or could not do regarding cross-admissibility between the evidence relating to the capital and noncapital counts"], citing *People v. Hawkins* (1995) 10 Cal.4th 920, 942; *People v. Collie* (1981) 30 Cal.3d 43, 63-64 ["Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua*

sponte to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony"]; cf. *People v. Milner* (1988) 45 Cal.3d 227, 251-252 ["We believe the holding in *Collie* . . . is equally applicable to this case"].)

Appellant's contention should be rejected for the same reason.

F. Appellant's Contention That The Trial Court Erred By Failing To Instruct The Jury That Shyrock Was An Accomplice As A Matter Of Law Is Forfeited; Alternatively, It Is Without Merit

Appellant notes that "the court gave cautionary instructions on the need for corroboration" as to Anthony Torres, Jose Ortiz, Jimmy Palma, and Daniel Logan, and maintains that the trial court's failure similarly to instruct the jury as to Shyrock was error. (AOB 151-152.)

It is settled that when a defendant fails to request that an instruction otherwise correct in law should be clarified in a particular case, his claim of error regarding that instruction is forfeited. (See *People v. Young* (2005) 34 Cal.4th 1149, 1202.) A trial court is required to instruct sua sponte on the general principles of law that are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 609.) It need not, however, give instructions on specific points or special theories (commonly called "pinpoint" instructions), unless a defendant has requested clarifying or amplifying language. (5 Witkin & Epstein, *supra*, §610.) "'Generally, 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* (1998) 18 Cal.4th 558, 570, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

Because appellant did not request clarification/amplification of the accomplice instructions provided by the trial court, or request his own instruction addressing matters which he now raises, his contention is forfeited.[90] (Cf. *People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [no sua sponte obligation to give CALJIC No. 8.73, a pinpoint instruction]; *People v. Mayfield* (1997) 14 Cal.4th 668, 778-779 [because "instruction as given was adequate . . . , and because defendant did not ask the trial court to clarify or amplify it, defendant may not complain on appeal that the instruction was ambiguous or incomplete"]; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1037 ["Oliver has forfeited his claim. Because he did not seek clarification of the instructions concerning the 'threats' and uncharged acts, he cannot complain about their lack of clarity on appeal"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 687 [defendant "argues that the issue has not been forfeited because any request for a limiting instruction would have been futile. We disagree"]; *People v. Boyer* (2006) 38 Cal.4th 412, 466 [finding that a defendant's failure to request a specific instruction in the trial court "forfeits a direct appellate claim that it should have been given"].)

In the event this Court nevertheless believes it may consider the absence of a more specific instruction as affecting appellant's "substantial rights" (§ 1259; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 669, fn. 3; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 381), no error could be shown.

In addressing a claim of instructional error, a reviewing court decides whether there is a reasonable likelihood that the jury misconstrued or

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90. During a discussion of proposed jury instructions, the trial court and the parties agreed to instruct the jury that "Anthony Torres, Jimmy Palma, [and] Danny Logan were accomplices as a matter of law." (61 RT 9490; see also 62 RT 9603; 3 CT 691.) Appellant did not request a similar instruction as to Shyrock.

misapplied the terms of the instruction. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248, quoting *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "We must look to the entire charge, rather than merely one part, to determine whether error occurred." (*People v. Chavez* (1985) 39 Cal.3d 825, 830; see also *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248.)

Here, the jury was properly instructed on accomplice testimony pursuant to CALJIC No. 3.18:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

(3 CT 692; 62 RT 9603-9604.)

In addition, the jury was instructed pursuant to CALJIC No. 3.10, which defines an accomplice as "a person who [was] subject to prosecution for the identical offenses charged [in Count[s] 2-6] against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy]", as well as CALJIC No. 3.11, which speaks to the requirement that an accomplice's testimony or out-of-court statements be "corroborated by other evidence that tends to connect [the] defendant with the commission of the offense"; other relevant instructions included CALJIC Nos. 3.00 (defining principals, 3.01 (defining aiding and abetting), and 3.02 (discussing principals' liability for natural and probable consequences). (3 CT 683-693; 62 RT 9596-9604.) Finally, the jury was instructed pursuant to CALJIC No. 1.01 to "[c]onsider the instructions as a whole and each in light of all the others." (3

CT 656; 62 RT 9572.)

Thus, there is no reasonable likelihood that the lack of an instruction specifically naming Shyrock as an accomplice resulted in any prejudice with regard to the jury's consideration of Shyrock's statements. (See *People v. Musselwhite, supra*, 17 Cal.4th at p. 1248; *People v. Castillo, supra*, 16 Cal.4th at p. 1016; *People v. Chavez, supra*, 39 Cal.3d at p. 830.) Nor is there any possibility that the jury would have believed it was *not* free to conclude that Shyrock was, in fact, an accomplice to the charged murders, and to evaluate his testimony accordingly.

G. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the trial court's admission of the complained-of statements in the videotape violated his rights to "confrontation and due process rights, and his right to association" under the state and federal Constitutions. (AOB 154-155.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1029; see also *id.* at p. 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"].)

In the event appellant's "constitutional claim[s were] properly preserved on appeal [citation], no constitutional or other error occurred." (*People v. Samuels, supra*, 36 Cal.4th at p. 123.) As set forth previously, the challenged statements were relevant and admissible to establish Shyrock's role in the murders as well as his long-standing relationship with appellant; they also served to underscore appellant's obligation to Shyrock as a newly-inducted member of the Mexican Mafia, as testified to by Sergeant Valdemar.

Nevertheless, any error would be harmless. The statements constituted a relatively small evidentiary portion of the prosecution's case. Thus, the alleged error would be non-prejudicial under either the standard enunciated in *People v. Watson*, *supra*, 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California*, *supra*, 386 U.S. at page 18 [87 S.Ct. at page 824].[91] (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 821; see also *People v. Samuels*, *supra*, 36 Cal.4th at p. 121.)

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91. Appellant makes much of the fact that one of the jurors, following the return of verdicts in the guilt phase, "articulated her fear of retribution to the court"; appellant appears to suggest that such fear arose from "[t]he terrifying effect this videotape must have had on the jury . . . ." (AOB 155.) Although the record shows that one juror expressed some reluctance to "go forward" with the penalty phase of trial (see 63 RT 9810-9811, [Juror No. 5 stated that she was "kind of" hesitant to proceed]), the record also shows that the juror's reluctance stemmed not from any statements in the videotape regarding appellant's criminal acts or membership in the Mexican Mafia, but, rather, from her fear of retribution by appellant's "*family members* . . . following [her] to [her] car or following [her] home." (63 RT 9815-9816, italics added; see also *id.* at p. 9816 ["That was my *only* concern"], italics added.) Upon assurances by the trial court that appropriate precautions would be taken, if necessary (see 63 RT 9815-9816), the juror indicated her willingness to continue:

> [The Court:] We need jurors that can do their duty, whatever that is, however it turns out, for or against the defendant, without reference to any concerns.
>
> Do you believe you can do that?
>
> Juror No. 5: I believe I can.
>
> The Court: Any doubt about it in your mind?
>
> Juror No. 5: *No*.

(63 RT 9818, italics added.)

VIII.

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY RAYMOND SHYROCK DURING A VIDEOTAPED MEXICAN MAFIA MEETING REGARDING HIS PLAN TO KILL ANTHONY MORENO

Appellant contends that the admission of Raymond Shyrock's statements during a videotaped Mexican Mafia meeting that took place on January 4, 1995, "violated state hearsay rules, as well as appellant's constitutional rights to due process, to confrontation, and to a reliable death judgment." (AOB 159.) Specifically, appellant finds fault with the court's admission of the following statements: (1) Shyrock's mention of "Dido from . . . Puente," who "dropped out" of La Eme "a long time ago"; (2) Shyrock's statement to his fellow gang members that Dido was living downstairs in the same apartment building, but only started "showing his face" after Shyrock moved; (3) Shyrock's indication that there were "all kinds of people in the pad," including "a whole bunch of youngsters"; (4) Shyrock's reference to a "dude" who lived in El Monte, who was "hanging around with that girl Corzito from Norwalk"; and (5) Shyrock's statement that he needed a "silencer" to "kill him, not the little kids."[92] (1 8SCT 1642-1643; see also AOB 159.)

A. Proceedings Below

As set forth previously, prior to Judge Cesar Sarmiento's severance of appellant's trial from that of his codefendants (see 2 CT 475; 3 RT 585-599), a hearing was held on the prosecution's motion to introduce the challenged statements made by Shyrock during the videotaped Mexican Mafia meeting in question. (3 RT 424-425; see also *id.* at pp. 501, 503-504; 2 CT 414-417.) The

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92. Again, a portion of the videotape was received in evidence as People's Exhibit 118; the transcription of that portion of the videotape was provided to the jury and received in evidence as People's Exhibit 118A. (59 RT 9301; see also 8 1SCT 1642-1643.)

prosecutor advanced the following rationale in support of their admission:

Mr. Monaghan [the prosecutor]: We will be able to show that Dido -- the "Dido" referred to in that statement is one of the victims in this case. We can show that by several reasons: one, by the moniker; two, by the fact that Dido was a Mexican Mafia dropout.

In addition, we have the testimony of Dido's brother, who testified before the grand jury, and he basically indicates that when his brother got out of prison in late '94/early '95 he was living at a specific location and that Shyrock and Shyrock's wife, Bunny, were living in the same apartment building. It was not a large building -- there were, I believe, eight units -- and that he voiced some concern to his brother about, what are you doing living here? Shyrock's around. You're a dropout, et cetera.

So we can show that what Shyrock says about his fellow Mexican mafia members in January about Dido is in fact -- we can show Dido was living in the same apartment building as -- as was Shyrock at the time that statement was made. That statement goes to motive.

And while there may be more than one motive for -- for a crime, you have a statement made by a Mexican Mafia member that this individual is a dropout. We put on expert testimony before the grand jury and will again at trial to indicate that when somebody is a dropout, if a member knows where he's at, he must make an effort to kill him.

That statement goes to motive. It goes to the identity at least of who would be involved in the conspiracy, that is, the Mexican Mafia, and why they wanted -- wanted these people killed.

Again, you have Shyrock – and the Court has said assuming it's an admission against penal interest –

The Court: Declaration.

Mr. Monaghan: Declaration against penal interest, you have him talking to other members of the Mexican Mafia. Clearly, that's the kind of time where he's going to be honest, above board. He's not going to believe that what he says is going to be repeated.

(3 RT 505-507.)

The prosecutor accordingly argued that the following statements were admissible:

Mr. Monaghan: . . . But when you have somebody say:

"I don't know if you 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. So I am trying to figure out how to -- I need a silencer is what I need."

The reasonable interpretation or a reasonable interpretation of that statement is that Raymond Shyrock as an active member of the Mexican Mafia was going to make an effort to have this dropout killed, that he was aware that there were a number of people in the apartment. He found out. He knew where he was living and that in order to -- to carry out the murder in such a way that he or whoever he had do it was not caught he talked about the fact that he needed a silencer.

(3 RT 507-508.)

Appellant joined in his codefendants' objection that the statements were more prejudicial than probative under Evidence Code section 352 (see 3 RT 511-512):

Mr. Esqueda [defense counsel]: . . . I join in [the codefendant's objections]. I think there's a real 352 issue here, but more importantly I think the Court is acutely aware of the fact that Raymond Shyrock is not a defendant in this case. So what relevance is there as to a

declaration against interest if he is not being prosecuted in this case?

What the People want you to do is to realize that 21 years ago one of the victims dropped out in 1974. Raymond Shyrock resided in the same complex. 21 years later he makes some statements, allegedly makes some statements at a Mexican Mafia meeting, and 21 years later now he decides to have this Mexican Mafia dropout murdered.

(3 RT 512; see also *id.* at pp. 513-516.)

At the conclusion of argument, Judge Sarmiento conditionally granted the prosecution's motion, and ruled as follows:

The Court: All right.

First of all, as to whether or not it meets the requirements as a declaration against interest, again, the unavailability issue will be left for another time.

But at this point I am going to find that assuming that the prosecution can find that -- can determine the defendant is unavailable, I find it is a declaration against penal interest. Now, having said so then it would be admissible as a hearsay exception. It is a hearsay statement. It would be admissible under the exception to the hearsay rule.

Now, as to the 352 analysis I am going to find that it is more probative than prejudicial. The nature of all evidence in a criminal trial, again, it's going to have some prejudicial value against the defendants. But the issue is whether or not the prejudicial value outweighs the probative value or it's misleading to the jurors.

I don't think so in this situation given . . . my understanding of the case, the way it's going to be presented, the previous rulings I have made regarding expert testimony. I don't see any problem here with limiting instructions with the fact that the -- I do think in [the] exercise of my discretion I think the probative value does outweigh the

prejudicial value.[93/]

(3 RT 516-517.)

B. Shyrock's Statements Were Admissible As Declarations Against Interest And/or As Coconspirator Statements

Shyrock's statements were properly admitted as declarations against his penal interest. As set forth previously, Evidence Code section 1230 provides in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . , that a reasonable man in his position would not have made the statement unless he believed it to be true.

As in the preceding argument, appellant relies upon *Lawley* in support of his contention that Shyrock's statements did not fall within the purview of Evidence Code section 1230, purportedly because they were self-serving and thus "could not, realistically, have subjected him to criminal liability for murder at the time they were uttered." (AOB 161; see also *id.* at p. 162.) This Court's holding in *People v. Samuels*, *supra*, 36 Cal.4th at page 96, which bears repeating, effectively disposes of appellant's contention:

> . . . Defendant argues that Bernstein's assertion "that [defendant] had paid him" for the killing was either collateral to his statement against

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93. As appellant notes (and as the trial court's ruling indicates), "unavailability was also an issue at the *in limine* hearing." (AOB 160, fn. 50; see also 3 RT 508, 512-517.) As set forth previously, the record shows that, by the time of appellant's trial, Shyrock had been convicted in a federal RICO case, and was imprisoned in Marion, Illinois. (50-1 RT 7505].) The record contains no further discussion of Shyrock's unavailability. (See RT, *passim.*)

> penal interest, or an attempt to shift blame. We disagree. This admission, volunteered to an acquaintance, was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing -- a particularly heinous type of murder -- and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to defendant incorporated within this admission as itself constituting a collateral assertion that should have been purged from Navarro's recollection of Bernstein's precise comments to him. Instead, the reference was inextricably tied to and part of a specific statement against penal interest. [Citation.] Moreover, the differences between the trustworthiness of the statements involved in this case and those excluded in *People v. Lawley*, *supra*, 27 Cal.4th at pages 151-154 . . . are palpable. In any event, even had the trial judge erred, any such error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

(*Id.* at pp. 120-121.)

Here, Shyrock's statements were facially incriminating, identified his role in the planning of the murders, and were "inextricably tied to and part of a specific statement against penal interest." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 121.) Moreover, those admissions, *volunteered to his fellow gang members*, were specifically disserving to Shyrock's interests in that they intimated that he had "participated in a . . . a particularly heinous type of murder . . . and in a conspiracy to commit murder." (*Ibid.*) Finally, because of the circumstances in which the statements were made, "the differences between the trustworthiness of the statements involved in this case and those excluded in . . . *Lawley* . . . are palpable." (*Ibid*; see also *People v. Duarte*, *supra*, 24 Cal.4th at p. 614.)

Appellant nevertheless contends that Shyrock's statements "were ambiguous and did not clearly refer to the murder victim, Anthony Moreno." (AOB 160.) Contrary to appellant's contention, compelling evidence was presented that Shyrock's mention of a Mexican Mafia dropout named "Dido" could only have referred to Anthony "Dido" Moreno.[94]

Witness No. 15, Moreno's brother and a former Mexican Mafia member himself (see 56 RT 8703, 8712-8713, 8715, 8796) testified that Moreno (whose gang moniker was "Dido") joined La Eme in 1972, while in San Quentin. (56 RT 8715.) Moreno dropped out of the gang in 1983. (56 RT 8716, 8800-8801.) According to Witness No. 15, dropping out of the Mexican Mafia carries with it "a mandatory death sentence." (56 RT 8760.) And, consistent with Shyrock's description of "Dido's" living arrangements, Witness No. 15 testified that Moreno at one time lived in the same apartment building as Shyrock, with two younger brothers, a "little sister," and his mother and father; when Witness No. 15 visited, he would see Shyrock "every morning at 7:00 or 8:00 . . . ."[95] (56 RT 8720.) Finally, Sergeant Richard Valdemar, the prosecution's gang expert, confirmed that Moreno was in fact the dropout

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94. Nevertheless, appellant's claim "'concerns only the weight of this evidence, not its admissibility, which does not require complete unambiguity.'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1122, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 438.)

95. Appellant contends that Witness No. 15's testimony was "intrinsically unreliable[.]" (AOB 161.) As set forth previously, however, an appellate court may not "reweigh evidence or reevaluate a witness's credibility." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129, citing *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Id.* at p. 1141, quoting *People v. Maury*, *supra*, 30 Cal.4th at p. 403.)

named "Dido" to whom Shyrock referred. (See 55 RT 8501, 8510, 8528, 8556, 8561.) In sum, Shyrock's statements, when viewed against the backdrop of the foregoing evidence, were relevant to prove appellant's complicity in the charged murders.

Shyrock's statements would also be admissible as coconspirator statements. Evidence Code section 1223 speaks to statements of coconspirators and provides in relevant part:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
>
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy[.]

Appellant acknowledges that "[t]he court did not rely on the coconspirator exception" (see AOB 161, fn. 51); nor did appellant object to the admission of Shyrock's statements on that ground. (See 3 RT 501-517.) Thus, his present claim of error in that regard has been forfeited. (*People v. Hinton* (2006) 37 Cal.4th 839, 902 ["We note, preliminarily, that defendant failed to object on this basis below and has thus forfeited the claim"]; cf. *People v. Smith*, *supra*, 40 Cal.4th at p. 508 ["Defendant has not identified, nor is the court aware of, any portion of the record showing that any other objection was made to this disclosure during the suppression hearing. Accordingly, defendant's other grounds for appealing the disclosure have been forfeited"].)

Nevertheless, Shyrock's statements demonstrated his involvement in the planning of the crimes, as well as the commencement of the conspiracy to kill

Moreno.[96] (See *People v. Williams*, *supra*, 16 Cal.4th at p. 681 [the trial court "could reasonably conclude that the comment about killing everyone reflected planning activity"].) And, even if it were assumed that Shyrock's statements were made before *appellant* had entered into the conspiracy, as appellant maintains (see AOB 163), Evidence Code section 1223 expressly permits the admission of statements made by a coconspirator "*prior to* . . . the time that the *party* was participating in that conspiracy[.]" (Italics added; see also *People v. Hinton*, *supra*, 37 Cal.4th at p. 895 ["it is irrelevant that some of the coconspirator statements allegedly preceded defendant's involvement in the conspiracy"].) No error can be shown.

C. Shyrock's Statements Were More Probative Than Prejudicial

Appellant contends in the alternative that, even if it were assumed "the nexus between Shyrock's statements and the murder of Moreno was clear, or that any ambiguity should have been left for the jury to determine," the statements "should have been excluded as more prejudicial than probative." (AOB 164.)

"The trial court is vested with wide discretion in determining the admissibility of evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609, citing *People v. Babbitt* (1988) 45 Cal.3d

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96. Although appellant asserts that the prosecutor "maintained that the conspiracy to kill Moreno began [when appellant went to the victims' residence on the day of the murders]" (see AOB 163), the record instead reflects that the prosecutor merely represented that *appellant's* involvement in the conspiracy began *no later than* that time. (See 3 RT 535.) In contrast, the conspiracy *itself* commenced three months earlier, when Shyrock discussed his plan to kill Moreno during the videotaped January 4, 1995, meeting.

660, 688.) Appellate courts will not disturb a trial court's decision regarding the admissibility of proffered evidence absent a manifest abuse of discretion resulting in an injustice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *People v. Jones* (1998) 17 Cal.4th 279, 304; *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Milner* (1988) 45 Cal.3d 227, 239.)

No abuse of discretion can be shown here. As the court observed, "I don't think [the evidence is unduly prejudicial] in this situation given . . . my understanding of the case, the way it's going to be presented, the previous rulings I have made regarding expert testimony. I don't see any problem here with limiting instructions with the fact that the -- I do think in [the] exercise of my discretion I think the probative value does outweigh the prejudicial value. (3 RT 516-517.)

Indeed, as set forth previously, expert testimony was presented explaining the meaning of Shyrock's statements and confirming that Moreno was in fact the dropout named "Dido" to whom Shyrock referred; that testimony also described the obligation owed by a newly-inducted member of the Mexican Mafia to his sponsor. (See 55 RT 8501, 8510, 8516, 8525-8528, 8556, 8561, 8568; see also 56 RT 8716, 8779.) Moreover, "threaded through the discussion of the admissibility of [Shyrock's] statement[s] was the prosecution's contention that, because the statement[s] had been [made by someone who shared a special relationship with appellant, they] were generally admissible on the issue of [motive]." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 820.) Finally, the jury was admonished pursuant to CALJIC No. 3.18 as follows:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in

the case.

(3 CT 692; 62 RT 9603-9604.)

In view of the foregoing, the court acted well within its discretion in overruling appellant's objection. Appellant's contention should therefore be rejected.

D. Appellant's Contention That The Trial Court Erred By Failing To Instruct The Jury That Shyrock Was An Accomplice As A Matter Of Law Is Forfeited; Alternatively, It Is Without Merit

Appellant reiterates his claim of error asserted in the preceding argument and contends that while "cautionary instructions were given with respect to other alleged accomplices and coconspirators, by name," the trial court's failure similarly to instruct the jury as to Shyrock was error. (AOB 165.)

As set forth previously, when a defendant fails to request that an instruction otherwise correct in law should be clarified in a particular case, his claim of error regarding that instruction is forfeited. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1202.) Although a trial court is required to instruct sua sponte on the general principles of law that are closely and openly connected with the evidence and necessary for the jury's understanding of the case (*People v. St. Martin*, *supra*, 1 Cal.3d at p. 531; 5 Witkin & Epstein, Cal. Criminal Law, *supra*, § 609), it need not give pinpoint instructions unless a defendant has requested clarifying or amplifying language (5 Witkin & Epstein, *supra*, §610; see also *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Andrews*, *supra*, 49 Cal.3d at p. 218.)

Because appellant did not request clarification/amplification of the accomplice instructions provided by the trial court, or request his own instruction addressing matters which he now raises (see 61 RT 9490; see also 62 RT 9603; 3 CT 691), his contention is forfeited. (Cf. *People v. Rogers*, *supra*, 39 Cal.4th at pp. 877-880; *People v. Mayfield*, *supra*, 14 Cal.4th at pp.

778-779; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1037; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 687; *People v. Boyer*, *supra*, 38 Cal.4th at p. 466.)

Again, in the event this Court nevertheless believes it may consider the absence of a more specific instruction as affecting appellant's "substantial rights" (§ 1259; *People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 6; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 669, fn. 3; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 381), no error could be shown.

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248; see also *People v. Castillo*, *supra*, 16 Cal.4th at p. 1016; *People v. Clair*, *supra*, 2 Cal.4th at p. 663.) A reviewing court looks "to the entire charge, rather than merely one part, to determine whether error occurred." (*People v. Chavez*, *supra*, 39 Cal.3d at p. 830; see also *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248.)

As part of that charge, the jury was instructed on accomplice testimony pursuant to CALJIC No. 3.18:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

(3 CT 692; 62 RT 9603-9604.)

The jury was also instructed pursuant to CALJIC No. 3.10, which defines an accomplice, as well as CALJIC No. 3.11, which speaks to the need for corroboration of an accomplice's out-of-court statements; other relevant instructions included CALJIC Nos. 3.00 (defining principals), 3.01 (defining

aiding and abetting), and 3.02 (discussing principals' liability for natural and probable consequences). (3 CT 683-693; 62 RT 9596-9604.) Finally, the jury was instructed pursuant to CALJIC No. 1.01 to "[c]onsider the instructions as a whole and each in light of all the others." (3 CT 656; 62 RT 9572.)

Thus, there is no reasonable likelihood that the lack of an instruction specifically naming Shyrock as an accomplice resulted in any prejudice with regard to the jury's consideration of Shyrock's statements. (See *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248; *People v. Castillo*, *supra*, 16 Cal.4th at p. 1016; *People v. Chavez*, *supra*, 39 Cal.3d at p. 830.) And, more specifically, there is nothing to suggest that the jury believed it was *not* free to conclude that Shyrock was, in fact, an accomplice to the charged murders.

E. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the trial court's admission of the complained-of videotape violated his rights "to due process, a fair trial, confrontation, and a reliable death judgment" under the state and federal Constitutions. (AOB 166.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1029; see also *id.* at p. 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"].)

In the event appellant's "constitutional claim[s were] properly preserved on appeal [citation], no constitutional or other error occurred." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 123.) As set forth previously, the videotaped meeting was relevant and admissible to establish the commencement of the conspiracy to murder Moreno (and others), as well as to foreshadow appellant's involvement in that conspiracy, to explain his motive in arranging the murders,

and to underscore his obligation to Shyrock as a newly-inducted member of the Mexican Mafia.

Nevertheless, any error would be harmless. The complained-of videotape represented but one piece of a compelling evidentiary puzzle assembled by the prosecution. Thus, the alleged error would be non-prejudicial under either the standard enunciated in *People v. Watson*, *supra*, 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California*, *supra*, 386 U.S. at page 18 [87 S.Ct. at page 824]. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 821; see also *People v. Samuels*, *supra*, 36 Cal.4th at p. 121.)

IX.

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY GUSTAVO AGUIRRE THAT "THE MAFIA WAS GOING TO COME" AND THAT "THERE WAS GOING TO BE TROUBLE"

Appellant contends that the testimony of Witness Nos. 8 and 11 regarding Tito Aguirre's statements that "the Mafia was going to come" and that "there was going to be trouble" were "pure hearsay, subject to no exception." (AOB 171.) Appellant accordingly maintains that their admission "violated hearsay rules as well as [his] constitutional rights to due process, a fair trial, confrontation, and a reliable death judgement." (AOB 170.) Not so.

A. Proceedings Below

1. The Trial Testimony Of Witness No. 8

Witness No. 8 lived at 3849 Maxson Road in El Monte with her children, her cousin Witness No. 11, and her aunt and uncle. (55 RT 8606-8608, 8618.) When Witness No. 8 returned from work between 1:00 and 2:00 p.m. on Saturday, April 22, 1995, she saw three or four gang members with shaved heads and tattoos on the back of their necks in the yard of the victims' home. (55 RT 8609-8610, 8626.)

Later that day, at around 6:00 or 7:00 p.m., Witness No. 8 spoke with Gustavo Aguirre across the fence of that property. (55 RT 8615.) When the prosecutor asked Witness No. 8 what Aguirre had said to her, defense counsel objected on "[h]earsay" grounds. (55 RT 8611.) The following colloquy occurred:

The Court: What is your offer?

Mr. Manzella [the prosecutor]: My offer of proof is that she is going to testify that Tito Aguirre said to her:

There is going to be trouble.

The Mafia was here.

I am offering it not for the truth of the matter, but to explain his actions.

The testimony will be later on that a call went out.

When what we claim was the car carrying the shooters drove down Maxson Road, Tito Aguirre was seen running by neighbors down the street and into -- and then down the driveway of 3843 Maxson Road to the back of the house where Dido Moreno was living.

And this explains his conduct in doing so.

This explains his conduct in doing so.

The Court: Do you want to be heard?

Mr. Esqueda [defense counsel]: Yes, Your Honor.

Certain people can testify to seeing him running and what his actions were on the day of the murder. But what he may have said preceding the actual shooting is clearly hearsay and there is no exception.

The Court: It is not hearsay unless it is offered for the truth of the matter.

What they were saying is that they want to offer it not for the truth of the matter asserted and have me instruct the jury that it cannot be considered for its truth but only to explain, if it does, some later action of Tito Aguirre, one of the victims.

I am trying to remember the testimony from the other trial about what he did immediately prior to the homicide.

I guess there was a car coming up the street.

There may have been a difference in testimony at the two trials.

One was that he was walking fast and one said that he was running and the car was coming behind him.

Mr. Esqueda: Wasn't that after shots were fired?

Mr. Manzella: No.

The Court: No. It was when these guys were arriving allegedly.

Anything further?

Mr. Manzella: No.

The Court: I will allow it.

I will explain to the jury that they cannot consider it for the truth but only as it may lead to the actions by Mr. Aguirre that we will hear from another witness.

(55 RT 8611-8613.)

The trial court then instructed the jury as follows regarding statements attributable to Aguirre:

The Court: Ladies and gentlemen, I am going to --

You will hear testimony in a moment, a statement attributed to Tito Aguirre, one of the alleged victims.

The following is true of this evidence:

It comes in for what is known in the law as a limited purpose.

That is, the statement that you are about to hear is not one that you may consider for the truth of any matter asserted in the statement, but you may consider it only as it may tend to explain actions of Mr. Aguirre that you may hear about later in the trial from another witness.

Is everybody clear on that?

(The jurors answered in the affirmative.)

The Court: Any questions about that?

(The jurors answered in the negative.)

(55 RT 8614.)

Witness No. 8 subsequently testified that Aguirre had told her that "the Mafia was going to come."[97] (55 RT 8615.)

2. The Trial Testimony Of Witness No. 11

Witness No. 11 also saw three men at the rear of the victims' residence. Two of the men had tattoos: one had letters on the back of his neck, while the other had a tattoo on his hand. (55 RT 8628-8632, 8638.) The men were talking to Anthony Moreno. (55 RT 8640, 8643.) The prosecutor inquired into statements Aguirre said to Witness No. 11 during that time, which prompted the following objection and discussion:

Mr. Esqueda: Objection. Hearsay.

The Court: Let me ask a question first.

Where were you and Tito when he said this?

The Witness: We were sitting there on the porch and a little couch when he arrived.

The Court: Without inviting counsel back up to the bench, would your offer be the same as last time?

And would your argument be the same as last time?

Mr. Manzella: My argument would be substantially the same.

The Court: Come on up.

(The following proceedings were held at the bench:)

The Court: We are at side bar.

Mr. Manzella: It is similar, but not identical because this happens earlier in the day while the people are there.

With the other witness it happened after they had gone.

My offer of proof is that she will testify that Tito referred to the

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97. Defense counsel renewed his hearsay objection to the testimony. (55 RT 8615.)

carnals, which is slang for brothers in her experience, and at one point the visitors and the two people she knew were laughing together.

Tito told her, this witness, that they, meaning the victims, that the brother and the friend should not be laughing because one does not play with that. It's not a game.

The Court: What is the relevance?

Mr. Manzella: I am offering it for the same reason that I offered the other testimony; to show that in Tito's mind, in Tito's mind, it was serious and explained why he ran when that car was coming down the road later that night.

I am offering it for the same reason to explain his conduct.

Mr. Esqueda: Your Honor, same objection.

This is being offered for the truth of the matter that he is saying that these were Mafia members that were there and not for his actions.

It is clear hearsay and I have no way of cross-examining Tito.

The Court: The issue is this is a relevant non-hearsay purpose, it seems to me.

If the --

If one of the ambiguous factors of the case is why is this guy running as this car rolls up, i.e., or is he running because he thinks he is going to get run over by the car or is he running coincidentally or is he running because he is going to get robbed or is he running because it's somebody that he has a problem with and made that fact known earlier, it would explain or make clear that there is a reason for his conduct and the fact that he associated with the car.

You read the transcripts, but in the last trial I remember, one of the two trials, I can't remember if it was the first or second one, but there was some discrepancy and some ambiguity whether the guy ran in

response to the car coming.

Mr. Manzella: Yes.

Mr. Esqueda: Yes.

Mr. Manzella: It is very ambiguous.

The Court: It is a way to explain his conduct and one explanation for why he ran.

And I will show it and give the same instruction to the jury.

(55 RT 8632-8635.)

The trial court accordingly instructed the jury that Aguirre's statement to Witness No. 11 could "not be considered . . . for the truth of anything asserted in the statement but only as it may tend to explain conduct of his that you may hear later from another witness." (55 RT 8635-8636.) The jury again affirmed its understanding of the instruction. (55 RT 8636.)

When testimony resumed, Witness No. 11 stated that Aguirre "got close to" her and said that he "was going to leave there because . . . [¶] the Mafia had arrived and he didn't want to have any problems with them."[98] (55 RT 8636.) Aguirre also told Witness No. 11 that "the carnals are here and there's problems with drugs;" he emphasized, "there [was] going to be a really big problem there."[99] (55 RT 8636-8637.)

B. Aguirre's Statements To Witness Nos. 8 And 11 Were Not Offered For A Hearsay Purpose; In Any Event, They Were Admissible As Contemporaneous Statements And To Explain Aguirre's State Of Mind

Appellant contends that "[t]he court appears to have ruled Aguirre's

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98. Defense counsel renewed his hearsay objection to this testimony, as well. (55 RT 8636.)

99. On cross-examination, Witness No. 11 confirmed that Aguirre had used the words "carnals" and "Mafia" interchangeably. (55 RT 8641-8642.)

statements admissible under Evidence Code section 1241, the 'contemporaneous statement' exception to the hearsay rule, or alternatively, Evidence Code section 1250, the 'then existing mental or physical state' exception." Appellant maintains that neither exception applies. (AOB 171.)

The record demonstrates, however, that the complained-of statements were *not* offered for a hearsay purpose. (See 55 RT 8611-8613, 8632-8635.) Evidence Code section 1200 provides that hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*" (Italics added; see also *People v. Guerra, supra*, 37 Cal.4th at pp. 1113-1114.) As the prosecutor stated in response to defense counsel's initial hearsay objection, "I am offering [the statement] not for the truth of the matter, but to explain [Aguirre's] actions." (55 RT 8612; see also *id.* at p. 8634 ["I am offering it for the same reason that I offered the other testimony"].) Appellant's contention that the statements were improperly offered for a hearsay purpose is therefore patently without merit.

Nevertheless, the trial court acted well within its discretion in determining that the statements were both relevant and admissible under a well-settled exception to the hearsay rule. "The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 264 . . . .) This standard is particularly appropriate when, as here, the trial court's determination of admissibility involved questions of relevance, the state-of-mind exception to the hearsay rule, and undue prejudice. (*Ibid.*) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez*[, *supra*,] 20 Cal.4th [at pp.] 9-10 . . . .)" (*People v. Guerra, supra*,

37 Cal.4th at p. 1113.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Although appellant surmises that the trial court's ruling may have been based in part upon Evidence Code section 1241,[100] which concerns contemporaneous statements (see AOB 171), it would appear that the trial court instead tendered its ruling under Evidence Code section 1250, which provides:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

"Evidence of the murder victim's fear of the defendant is admissible when the victim's state of mind is relevant to an element of an offense." (*People v. Guerra, supra*, 37 Cal.4th at p. 1114, citing *People v. Waidla, supra*, 22 Cal.4th at p. 723 [victim's statements indicating fear of defendants were

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100. Evidence Code section 1241 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
>
> (b) Was made while the declarant was engaged in such conduct.

relevant to prove lack of consent in the burglary and robbery related to her murder].) Evidence of a murder victim's fear is also relevant "when the victim's conduct in conformity with that fear is in dispute." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 819.)

"'A murder victim's fear of the alleged killer may be in issue when . . . the victim has behaved in a manner inconsistent with that fear [citation].' [Citation.] An instance of the former is where the victim's statement that she feared the defendant was relevant to whether the victim would have consented to the defendant's entry into her residence where burglary and robbery special circumstances were alleged. 'Lack of consent was material to burglary because it was material to the element of entry [citation], and was also material to robbery because it was material to the element of taking by means of force or fear [citation].' [Citation.]" (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 820.)

In *People v. Crew* (2003) 31 Cal.4th 822, the defendant contended that a witness' testimony that murder victim Nancy Andrade had told her before agreeing to meet defendant, "'If you don't hear from me in two weeks, send the police,'" was inadmissible hearsay. (*Id.* at p. 840.) In rejecting that contention, this Court held:

> The statement was admissible under Evidence Code section 1250, subdivision (a)(2) to explain Nancy's conduct. The defense presented the theory that Nancy disappeared of her own accord because she was a troubled person suffering from stress and depression. Nancy's statement to [the witness] to send the police if she was not heard from in two weeks was admissible as evidence that Nancy did not disappear on her own. (*People v. Noguera* (1992) 4 Cal.4th 599, 620-622 . . . .) Because the statement was evidence of Nancy's state of mind to explain her conduct concerning going with defendant, it was also relevant. (Evid. Code, § 210.)

(*Ibid.*)

In *People v. Cox* (2003) 30 Cal.4th 916, a witness testified on direct examination that several days before the disappearance of murder victim Debbie Galston, the defendant's wife and Debbie argued about the defendant, and the defendant said to Debbie, "'I'm going to get you.'" The witness also testified that in the month after Debbie's sister Denise was murdered, Debbie appeared to be afraid of the defendant. Another witness testified regarding three instances in which Debbie hid from the defendant. In the defense case, testimony was elicited that Debbie "'would get into a car with a stranger.'" (*Id.* at p. 957.)

On appeal, this Court held that the testimony was properly admitted under the state-of-mind exception to the hearsay rule:

> In the present case, the prosecutor's theory was that defendant drove Debbie to the murder scene in his vehicle. The circumstances surrounding Debbie's entry into defendant's car -- whether she would enter the car voluntarily or whether defendant may have overcome any resistance by force -- were at issue. In *People v. Sakarias* (2000) 22 Cal.4th 596, 628-629 . . . , we stated that evidence that the murder victim feared the defendant was admissible to show that she would not have voluntarily given him any of her personal property and thus it could be inferred the property was obtained by force. Here, evidence that Debbie had acted as though she feared defendant was admissible to show that she would not have voluntarily entered defendant's car and thus he may have forced her into his vehicle the night she disappeared.

(*Id.* at p. 958.)

Aguirre's stated fear of the Mexican Mafia was likewise admissible to explain why he fled upon seeing the Nissan Maxima containing appellant's accomplices, whom he presumably recognized as associates of that gang. (See

55 RT 8616-8617; 57 RT 8876-8882.) As the prosecutor explained during closing argument:

> Even Tito knew that it was more than an old friend showing up that afternoon to give them some free heroin for old times sake.
>
> Tito told both (Witness No. 8) and (Witness No. 11) that it was the Mafia.
>
> And it is consistent with what Tito -- Tito's described conduct later that night, I think it was by one of the (Witness No. 2, 3) brothers who said that he saw Tito running down south on Maxson being followed by the Nissan Maxima and Tito ran down the driveway to the back of the house.
>
> Do you remember?
>
> Tito ran from the Nissan Maxima.
>
> Tito knew. He had a premonition of what was going to happen.
>
> The Mafia shows up giving free heroin and then he sees what he must have realized were gang members in that Nissan Maxima and he ran from them. He ran from them.
>
> And it is consistent with what he said earlier in the day to the (Witness No. 8, 11) women, that the Mafia was there. The Mafia had been there and it was going to be trouble.
>
> All of that is consistent.

(62 RT 9737-9738.)

In sum, the trial court properly admitted the statements in question.[101] (See *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1114-1115; *People v. Crew*, *supra*, 31 Cal.4th at p. 840; *People v. Cox*, *supra*, 30 Cal.4th at pp. 957-958;

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101. Indeed, even defense counsel acknowledged that there was "some ambiguity whether [Aguirre] ran in response to the car coming." (See 55 RT 8635.)

compare *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 818-821 [victim's fear of defendant was erroneously admitted because it was not relevant to any disputed issue; error was nevertheless harmless].)

C. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Appellant contends that the admission of the complained-of evidence deprived him of his state and federal "constitutional rights to due process, a fair trial, to confrontation and cross-examination, and a reliable death judgment." (AOB 178.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1029; see also *id.* at p. 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"].)

In the event appellant's "constitutional claim[s were] properly preserved on appeal [citation], no constitutional or other error occurred." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 123.) As set forth previously, Aguirre's statements were relevant and admissible to explain his conduct immediately before the murders.

Nevertheless, any error would be harmless. The complained-of statements represented only a small evidentiary portion of the prosecution's case. "Further, the court specifically admonished the jurors not to consider [Aguirre's] statements as proof [of the matter asserted]. We presume jurors follow limiting instructions (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120 . . .), and [appellant] has not rebutted that presumption." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1115.)

Thus, "[t]o the extent [Aguirre's] statements were erroneously admitted under Evidence Code section 1250, in light of the overwhelming evidence of [appellant's] guilt, the error was harmless under either the *Watson* standard . . . for assessing the prejudicial effect of state error or the *Chapman* standard . . . for evaluating the prejudicial effect of federal constitutional error." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 821; see also *People v. Cox*, *supra*, 30 Cal.4th at p. 958 [applying *Watson* standard to similar claim of error].

X.

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY ANTHONY TORRES TO WITNESS NO. 13 REGARDING HIS INVOLVEMENT IN THE MURDERS

Appellant contends that the trial court erroneously admitted Anthony Torres's statements to Witness No. 13 regarding his involvement in the murders; appellant maintains that the statements constituted inadmissible hearsay and were irrelevant. (AOB 185-188.) According to appellant, the admission of such statements "violated state hearsay rules, as well as appellant's right to counsel, to confrontation, due process, a fair trial, and a reliable death judgment." (AOB 181.) Respondent disagrees.

A. Proceedings Below

1. The Trial Testimony Of Witness No. 13

Witness No. 13, Torres's sister, was called by the prosecution to testify to events prior to the murders, as well as statements and admissions Torres had made to her after the murders. (57 RT 8950.) Witness No. 13 testified that Torres at first admitted he was at the scene of the killings, but claimed he was waiting outside in the car:

> Q [by the prosecutor] At any time after you learned of the murders in El Monte, the five murders in El Monte, did you question your brother, Anthony, about whether he had been involved in them?
>
> A I don't think I questioned it. I think we talked.
>
> Q About the murders?
>
> A Yes.
>
> Q And when did you talk about the murders with your brother, Anthony?
>
> A I don't remember.

Q Was it within a few days of the murder[s]?

A It could have been.

Q And what did you say to Anthony and what did he say to you?

Mr. Esqueda [defense counsel] Objection. Hearsay.

The Court: Overruled.

The Witness: I really don't remember.

By Mr. Manzella [the prosecutor]:

Q Did Anthony tell you that he had been there at the scene of the killings?

A I think so.

Q And did he tell you at first that he waited in the car?

A I believe that is what was said.

(57 RT 8957.)

The prosecutor continued his inquiry into statements Torres had made to Witness No. 13 about the murders:

Q [by the prosecutor] Did your brother ever tell you before that he had been involved in a murder?

Mr. Esqueda: Objection. Relevance.

The Court: Overruled.

The Witness: Before what?

The Court: Before this one.

By Mr. Manzella:

Q You know the point that I am making?

Your brother is involved in a murder.

That is something that you'd remember, isn't it?

A He didn't tell me that he killed anybody.

Q But he told you eventually that he was inside room where those people were killed.

A No. He didn't tell me he was in the room.

I'm sorry.

Q But he told you that Jimmy and Primo had done the shooting?

A I believe, yes.

Q And he told you that the Mafia wanted it done.

Mr. Esqueda: Objection. Leading.

The Court: Overruled.

Go ahead.

The Witness: I don't think he said it was the Mafia.

All I remember is that is was something that it had to be done.

That is all I remember.

By Mr. Manzella:

Q And did he tell you that they were supposed to kill just one guy?

A I think that is what it was.

Q And did he tell you, however, that they were also told:

Don't leave any witnesses.

A I don't remember that. I don't recall.

(57 RT 8958-8960.)

2. The Prior Audiotaped Testimony Of Witness No. 13

The prosecutor subsequently played an audiotape of Witness No. 13's prior testimony before Judge Gustavson; the jury also received the court reporter's transcription of the testimony. (57 RT 8960-8963, 8965; 8 1SCT 1618-1641; People's Exhibits 74 and 74A.)[102] Witness No. 13 identified the voice on the audiotape as hers, and admitted that her answers had been truthful.

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102. As set forth previously, the audiotape was received in evidence as People's Exhibit 74; the court reporter's transcription of the testimony was received in evidence as People's Exhibit 74A. (59 RT 9301; see also 8 1SCT 1618-1641.)

(57 RT 8965-8966.)

Witness No. 13 testified that she saw her brother and Richard Valdez at her mother's house between 7:45 and 8:00 p.m. on April 22, 1995. (8 1SCT 1618-1619.) Torres's pager went off, and he made two telephone calls. Daniel Logan subsequently came by, along with an older man and a young "kid." (8 1SCT 1620-1621.) Two more men appeared -- one with a "Sangra" tattoo around his neck -- and they all went into Torres's room. (8 1SCT 1621-1622.) Witness No. 13 left; as she walked back to her house, she noticed a Nissan Maxima parked in her mother's driveway. (8 1SCT 1624-1625.)

At around 10:00 that evening, Witness No. 13's mother visited. She said that Torres "was acting weird, that he was kissing her and hugging her and telling her that . . . he loved her and this and that." He also said that "he was told to do something by the [Mexican] Mafia." (8 1SCT 1626.) When Witness No. 13's mother returned to her own house at 11:00 p.m., she saw Torres there, "just being quiet," and not "really saying anything." (8 1SCT 1627.)

Early the next morning, Sunday, Witness No. 13 read about the murders in the newspaper, and discussed them with her mother. The mother indicated that when she said to Torres, "'they killed two little -- two little innocent kids,'" he replied, "'Well, there weren't supposed to be any kids there.'" (8 1SCT 1628.) Torres told her he was there, but that he did not have anything to do with any of the killings or what happened in the house. (8 1SCT 1629.) Torres also said that Valdez and Jimmy Palma had done the shootings, and that Palma had shot a baby in the mother's arms. (8 1SCT 1629-1630, 1640-1641.)

Witness No. 13 spoke with her brother about the shootings on Monday. (8 1SCT 1631-1632.) Torres told her that he and his companions were supposed to kill "one guy," but that "they weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them." He confirmed that Valdez and Palma had done the shootings. (8 1SCT 1632.)

Torres told Witness No. 13 that because Palma had killed two children, "they were going to take care of him." (8 1SCT 1633.)

Witness No. 13's mother told her that she had noticed a plastic storage tub in the living room that same day. She opened it and found a gun inside. (8 1SCT 1634.) When she confronted Torres about it, "[h]e said that he was . . . going to take care of it, and for her not to worry about it." (8 1SCT 1635.) Torres subsequently moved out of his mother's house to a location in West Covina. (8 1SCT 1635-1636.)

3. The Trial Testimony Of Elizabeth Torres

Following the testimony of Witness No. 13, the prosecution called Elizabeth Torres. Mrs. Torres identified Witness No. 13 as her daughter and Anthony Torres as her son. (57 RT 8975-8976.) Mrs. Torres lived at 323 North Third Street in Alhambra. (57 RT 8974-8975.) On the evening of April 22, 1995, several of her son's friends arrived at the house. They were gone by the time Mrs. Torres left at 9:15 or 9:30 p.m. to sleep at the home of Witness No. 13. (57 RT 8977-8978.)

B. Appellant's Claim Regarding The Erroneous Admission Of Torres's Statements As Described In Witness No. 13's Audiotaped Testimony Is Forfeited; Alternatively, It Is Without Merit

The record shows that, during Witness No. 13's trial testimony, appellant objected to the prosecutor's inquiry into statements Torres made to her regarding his involvement in the murders. (See 57 RT 8957 ["And what did you say to Anthony and what did he say to you? Mr. Esqueda: Objection. Hearsay"].) The record also shows, however, that appellant failed to object in any way to the subsequent admission of Witness No. 13's prior audiotaped testimony on that same point. (See 57 RT 8960-8965.) In fact, shortly after the audiotape was played for the jury, defense counsel cross-examined Witness No. 13 regarding her recorded account of Torres's statements. (See 57 RT 8966-

8967.)

Appellant's failure to renew his objection to the admission of Torres's statements, introduced through a materially different form of evidence (the audiotape), constitutes a forfeiture of the issue. (See *People v. Morris*, *supra*, 53 Cal.3d at p. 190 ["Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353"]; see also Evid. Code, § 353 [a verdict or finding shall not be set aside on the basis of the erroneous admission of evidence unless there was "an objection . . . that was timely made and so stated as to make clear the specific ground of the objection"]; cf. *People v. Holloway*, *supra*, 33 Cal.4th at p. 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"].) Appellant's contention should be rejected for that reason alone.

In the event this Court nevertheless concludes that appellant's initial hearsay objection was sufficient to preserve the issue, the statements were properly admitted. Appellant argues that, because "the trial court did not explain its reasons for overruling counsel's objection," Torres's statements were presumably admitted as either coconspirator statements, or as declarations against penal interest. Appellant contends that the statements were "not admissible" under either exception to the hearsay rule. (AOB 185.)

It is well settled that although a "'conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated,'" the circumstances of a particular case "'may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the

conspirators in pursuance of the objectives of the conspiracy[.]'" (*People v. Leach* (1975) 15 Cal.3d 419, 431, quoting *People v. Saling* (1972) 7 Cal.3d 844, 852.) It is "'for the trier of fact -- considering the unique circumstances and the nature and purpose of the conspiracy of each case -- to determine precisely when the conspiracy has ended.'" (*Ibid.*)

Here, Torres's statements to Witness No. 13 after the murders were admissible under Evidence Code section 1223. Torres -- whom the trial court instructed the jury was an accomplice "as a matter of law" (see 3 CT 691) -- made the remarks at issue to family members in an apparent "attempt to maintain the secrecy and thus the integrity of the criminal enterprise. So viewed, it follows that they were [also] made in furtherance of the conspiracy within the meaning of Evidence Code section 1223 , subdivision (a)." (*People v. Hardy* (1992) 2 Cal.4th 86, 147; see also *id.* at p. 153 [holding that "the conspiracy was a continuing one that did not end with the death of the victims, and that statements by coconspirators made after the killings but before trial could be admitted at trial pursuant to Evidence Code section 1223"].)

In *People v. Manson* (1976) 61 Cal.App.3d 102, Charles Manson and two other "family" members were charged with seven counts of murder (the Tate-LaBianca murders) and one count of conspiracy; another family member was charged with two murder counts and a conspiracy count. (*Id.* at pp. 123-126.) On appeal, the defendants argued that it was error for the trial court to have admitted evidence that Manson ordered a family member to commit murder after the Tate-LaBianca murders as coconspirator statements because the murders that were the object of the conspiracy had already been committed. (*Id.* at p. 155.) The *Manson* court rejected this argument as the relevant conspiracy -- Manson's plan for race war and the Manson family's subsequent domination of the victors in that race war, i.e., "Helter-Skelter" -- was much greater than the charged conspiracy to commit the Tate-LaBianca murders; thus,

the conspiracy had not terminated at the time the statement was made, and the prosecution was entitled to introduce evidence, including coconspirator statements, pursuant to that conspiracy:

> Here the rule of *Leach* is inapplicable. [¶] The conspiracy in which appellants were engaged was broader than the substantive crime of murder. Circumstantial evidence proves the overriding purpose of appellants and their coindictees -- the fomentation of the race war Manson characterized as Helter-Skelter. *Boundaries of a conspiracy are not limited by the substantive crimes committed in furtherance of the agreement.*

(*Id.* at p. 155, italics added, footnote omitted.)

The *Manson* court further noted that the scope of a conspiracy can be indeterminate:

> "It is furthermore possible for the object dimension, like the party dimension, to be of indeterminate scope. 'Murder Incorporated' would be a group contemplating the commission of other than a definite number of crimes. Each member of it therefore 'takes his chances,' and is a party to a conspiracy whose object dimension includes the offenses in fact undertaken." (Developments in the Law - Criminal Conspiracy (1959) 72 Harv. L.Rev. 920, 930.)

(*People v. Manson*, *supra*, 61 Cal.App.3d at p. 155, fn. 38.)

Torres's statements were thus properly admitted as statements of a coconspirator, through the audiotaped prior testimony of Witness No. 13. Based upon the evidence in this case -- including the subsequent murder of Jimmy Palma, presumably for his role in the shooting deaths of the children -- it was for the jury "'to determine precisely when the conspiracy . . . ended.'"[103/]

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103. The prosecutor told the jury during closing argument, "That is the inference that you can draw from that, that Palma was killed because he killed

(*People v. Leach*, *supra*, 15 Cal.3d at p. 431.)

Torres's statements were also admissible as declarations against his penal interest. As set forth previously, Evidence Code section 1230 provides in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . , that a reasonable man in his position would not have made the statement unless he believed it to be true.

A statement may subject the declarant to the risk of criminal liability by, for instance, describing his role in the crime "or by leading the police to additional evidence against [him]." (*People v. Lawley*, *supra*, 27 Cal.4th at p. 174 (conc. opn. of Brown, J.).) "[H]earsay statements identifying coconspirators constitute declarations against penal interest if the statements are 'an integral part of the statement in which' the declarant 'implicated himself' [citation], and do not shift blame or minimize the declarant's role in the crime [citation]." (*Ibid.*)

Appellant again relies upon *Lawley*, wherein proffered statements were found to be inadmissible, in support of his contention that Torres's statements did not fall within the purview of Evidence Code section 1230, purportedly because they "suggest that he wanted to minimize his degree of culpability, and blame others, particularly for the deaths of the children[.]" (AOB 186.) As stated previously, in *People v. Samuels*, *supra*, 36 Cal.4th at page 96, this Court rejected a similar contention; appellant's contention should also be rejected. (See *id.* at p. 121.)

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the children." (62 RT 9725.)

Likewise, Torres's statements to Witness No. 13 were facially incriminating, correctly identified his role in the murders (a role for which he was convicted and sentenced to state prison for life without the possibility of parole), and were "inextricably tied to and part of a specific statement against penal interest." (*People v. Samuels*, *supra*, 36 Cal.4th at p. 121.) Indeed, this admission, *volunteered to his own sister*, was specifically disserving to Torres's interests in that it intimated that he had "participated in a . . . a particularly heinous type of murder . . . and in a conspiracy to commit murder." (*Ibid.*) Finally, "the differences between the trustworthiness of the statements involved in this case and those excluded in . . . *Lawley* . . . are palpable." (*Ibid.*) As such, Torres's statements were also properly admitted as declarations against his penal interest.

C. Appellant's Contention That Statements Made By Torres To His Mother Were "Triple" Hearsay Is Forfeited; Alternatively, The Statements, Which Were Incorporated Into Witness No. 13's Prior Audiotaped Testimony, Were Relevant To Explain The Circumstances Leading To Witness No. 13's Confrontation Of Torres Regarding The Murders

Appellant also contends that "the lion's share of [Witness No. 13's] recorded statements involved inadmissible triple hearsay," consisting of statements made by Torres to his mother. He maintains that such statements "did not qualify for admission against [him] under any hearsay exception," whether they "were made before or after the offense." (AOB 187, italics omitted.)

Even if appellant's hearsay objection during Witness No. 13's *trial* testimony regarding Torres's statements was sufficient to preserve his present hearsay contention regarding Torres's statements contained in Witness No. 13's prior *audiotaped* testimony, appellant *never* objected to the admission of statements made by Torres to his *mother*, and recounted by Witness No. 13 in

that same audiotaped testimony. Appellant's claim of error involving those statements is therefore forfeited. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028 ["we agree with the Attorney General that the claim is forfeited because defendants failed to object to this evidence"], citing Evid. Code § 353, subd. (a); *People v. Cook* (2006) 39 Cal.4th 566, 594-595 ["Although defendant now complains that the prosecutor's question invited Sabin to vouch for Johnson's veracity, he did not object at trial, and accordingly he has forfeited the claim"]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-20, fn. 4 ["We conclude defendant forfeited the issue of the evidence's admission by his failure to make a timely objection on this ground"]; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1117 ["Counsel's objection to this testimony on the sole ground of relevance, however, did not preserve for appeal his present contention that the testimony was improper character evidence"]; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894 ["Although defendant objected successfully on hearsay grounds to the prosecution's inquiry into Cunningham's first contact with Barnes, he made no objection to any actual coconspirator statements once the prosecution elicited the fact of the conspiracy through independent evidence. We thus conclude that defendant has forfeited his objections"]; *People v. Samuels*, *supra*, 36 Cal.4th at p. 122 ["Because defendant failed to make a specific and timely objection on hearsay grounds, she failed to preserve this claim for review"]; cf. *People v. Dolly* (2007) 40 Cal.4th 458, 466 ["because defendant never argued below that the officers lacked knowledge of the contents of the 911 call, thereby denying the People the opportunity to offer contrary evidence, he has forfeited any challenge to the use of the caller's statements"].)

Appellant's contention is nevertheless without merit. Witness No. 13 testified that she confronted Torres only after learning about Torres's role in the murders from her mother, who had read about the crimes in the newspaper the

following morning. (See 8 1SCT 1628-1633, 1640-1641.) Taken in context, Witness No. 13's testimony merely explained the basis of her confrontation with Torres pursuant to Evidence Code section 1250.

In *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at page 970, the defendant Lewis objected to testimony of his estranged wife's mother, in which she described a rental car Lewis and his codefendant had been seen driving several days before the charged murders:

> Iva Worthen, [Cynthia] Mizell's mother, testified that the red Mustang Oliver drove on July 19, 1989, after being ejected from Lewis's house by the police, was distinctive, because a neighbor had told Worthen that a similar car was used by the person who torched Worthen's Ford Tempo. Defendants objected on hearsay grounds. (Evid. Code, § 1200, subds. (a), (b).) However, Worthen did not testify about the truth of what her neighbor had seen, but about the reason she noticed and remembered the red Mustang, i.e., a relevant state of mind. This was not impermissible hearsay. (*Id.*, § 1250, subd. (a)(2).) The court did not err in overruling the defense objection.

(*Id.* at pp. 1025-1026; see also *People v. Samuels*, *supra*, 36 Cal.4th at p. 122 ["In any event, Detective Daley's testimony was not hearsay or irrelevant. It was not used to prove that Mike Silva killed Robert Samuels. Instead, the testimony was used to explain Detective Daley's reasons for obtaining search warrants and contacting Mike Silva -- subsequent action by a law enforcement officer during his investigation into a murder"].)

So, too, here, Witness No. 13's testimony about her mother's conversation with Torres was relevant to explain Witness No. 13's confrontation of Torres and the subsequent action she undertook (including contacting police). (See 8 1SCT 1631-1632, 1635.) The challenged testimony was properly admitted because it was not offered for a hearsay purpose, i.e., to

establish Torres's role in the murders, but, rather, to explain Witness No. 13's state of mind and course of conduct. (See *People v. Samuels*, *supra*, 36 Cal.4th at p. 122.)

D. Appellant's Contention That Witness No. 13's Testimony Regarding Torres's Admission To The Murder Of A Rival Gang Member Was Irrelevant Is Forfeited; Alternatively, It Is Without Merit

Witness No. 13 was also questioned by the prosecutor about her purported inability to recall her conversation with Torres regarding the murders:

Q [by the prosecutor] You don't remember what your brother had told you, that he had been involved in a murder?

A I remember we talked, but I don't remember all the details.

Q Did your brother ever tell you before that he had been involved in a murder?

Mr. Esqueda: Objection. Relevance.

The Court: Overruled.

The Witness: Before what?

The Court: Before this one.

By Mr. Manzella:

Q You know the point that I am making?

Your brother is involved in a murder.

That is something that you'd remember, isn't it?

A He didn't tell me that he killed anybody.

Q But he told you eventually that he was inside the room where those people were killed.

A No. He didn't tell me he was in the room.

I'm sorry.

(57 RT 8958-8959.)

Later, during the cross-examination of Witness No. 13, defense counsel inquired into Torres's role in a prior, drive-by shooting:

Q [by defense counsel] Now [Torres] also told you about another murder that he may have been involved in.

Correct?

A The drive by retaliation?

Q Yes.

A I think so, yes.

Q In fact, he told you that an El Monte gang had killed one of his homeboys?

A I believe that is what it was. Yes.

Q And then in retaliation, Sangra, the San Gabriel Valley gang, went and shot and killed someone from El Monte?

A I believe that is what it was. Yes.

(57 RT 8966-8967.)

No objection was voiced to Witness No. 13's prior audiotaped testimony regarding Torres's involvement in the drive-by shooting. (See 57 RT 8960, 8963, 8965.) As with appellant's preceding claim of error, this newly-presented contention is therefore forfeited as well. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028; *People v. Cook*, *supra*, 39 Cal.4th at pp. 594-595; *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 19-20, fn. 4.)

Moreover, as the record demonstrates, it was *defense counsel* who questioned Witness No. 13 about what appellant now characterizes as "evidence of a completely unrelated crime[.]" (AOB 189.) It is well settled that, "[h]aving introduced the evidence himself, [a] defendant may not . . . complain [on appeal about its admissibility]." (*People v. Visciotti* (1992) 2 Cal.4th 1, 72; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1011 [doctrine of invited error estops a defendant from challenging a trial court's

ruling].) Appellant's contention should therefore be rejected outright.

It is also without merit. The prosecutor did not question Witness No. 13 about Torres's role in a *prior* murder, but instead suggested that she was not being truthful as to her professed lack of recollection about Torres's statements regarding the *charged* murders. (See 57 RT 8958-8959 ["You know the point that I am making? [¶] Your brother is involved in a murder. [¶] That is something that you'd remember, isn't it?"].) Indeed, as stated previously, it was defense counsel who questioned Witness No. 13 about Torres's involvement in the drive-by shooting. (57 RT 8966-8967.)

E. Appellant's Contention Regarding The Denial Of His State And Federal Constitutional Rights Is Forfeited; Alternatively, It Is Without Merit

Finally, appellant contends that the admission of the complained-of evidence deprived him of his "state and federal constitutional rights to due process, a fair trial, to confrontation[104] and cross-examination, and a reliable death judgment." (AOB 190.)

Because appellant did not raise those claims below, however, "[e]xcept for due process, the constitutional claims and the [state-law error] claim[s] are forfeited." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1029; see also *id.* at p. 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"].)

To the extent appellant's "constitutional claim[s were] properly preserved on appeal [citation], no constitutional or other error occurred."

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104. In support of his confrontation-clause claim, appellant relies upon *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]. (See AOB 191.) As set forth in Argument XI.E.2, *infra*, this Court noted in *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at page 970, that "[i]n *Crawford v. Washington*[, *supra*,] 541 U.S. [at page 36 [[124 S.Ct. at page 1354]] . . . , the high court repudiated *Ohio v. Roberts* . . . ." (*Id.* at p. 1028, fn. 19.)

(*People v. Samuels*, *supra*, 36 Cal.4th at p. 123.) For reasons previously set forth, the evidence was either correctly admitted by the trial court in connection with the prosecution's case-in-chief, or was introduced by the defense itself.

Nevertheless, any error would be harmless. The statements at issue concerned codefendants Torres, Logan, and Palma *only*, and did not mention or directly implicate appellant. (See 8 1SCT 1618-1641.) Moreover, Witness No. 13 -- who provided the account of Torres's statements -- was *herself* subjected to cross-examination in that regard. (See 57 RT 8966-8967.) Finally, the totality of the evidence establishing appellant's guilt was strong, and the nature of the crimes heinous. Thus, under any standard of harmless-error review, "it is neither reasonably possible [citation] nor reasonably probable [citation] that the evidence or its treatment altered the [guilt or] penalty phase outcome at defendant's capital trial." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 301; see also *Chapman v. California*, *supra*, 386 U.S. at p. 24 [87 S.Ct. at p. 828] [applying harmless-beyond-a-reasonable-doubt standard to alleged federal constitutional errors]; *People v. Watson*, *supra*, 46 Cal.3d at pp. 836-837 [applying reasonably-probable standard to alleged state-law errors]; cf. *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028 [applying *Watson* standard of review to claim of erroneous admission of hearsay evidence].)

XI.

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY RAYMOND SHYROCK TO WITNESS NO. 15 REGARDING GUSTAVO AGUIRRE

Appellant contends that the trial court erroneously admitted Raymond Shyrock's statements to Witness No. 15 regarding Shyrock's hatred of Gustavo Aguirre. (AOB 194-196.) According to appellant, the admission of such statements "violated state hearsay rules as well as appellant's state and federal rights to confrontation, due process, and a reliable death judgment." (AOB 194.) Not so.

A. Proceedings Below

During the direct examination of Witness No. 15, the prosecutor inquired into the witness' conversation with Shyrock about drug dealers "sometime before the murders[.]" Defense counsel objected on the ground that the question was "[v]ague as to time." (56 RT 8745.) After the trial court confirmed that the prosecutor's inquiry concerned statements made before the murders (56 RT 8745-8746), the prosecutor asked, "Sometime before the murders, did you -- did Huero Shy tell you something with regard to the drug dealers?" Witness No. 15 answered, "Yes," and defense counsel objected on hearsay grounds. (56 RT 8746.) A sidebar conference ensued:

> Mr. Manzella [the prosecutor]: . . . [¶] Let me make the offer of proof first.
>
> That he would testify a few weeks before the murder that Huero Shy told him that dope dealers were paying protection and that he did not like the fact that Tito was robbing them.
>
> The Court: All right.
>
> Mr. Manzella: Huero Shy said -- and that --

And, also, to make another offer of proof, that after the murders, Huero Shy expressed his condolences for the death of the family but said he was not sorry about Tito because he was going to kill Tito anyway because Tito was showing him disrespect.

I am offering that on motive.

The Court: Do you want to be heard.

Mr. Esqueda [defense counsel]: Submit.

(56 RT 8746-8747.)

After defense counsel clarified that the evidence was "being offered for motive and intent and not the truth" (56 RT 8747), the trial court issued the following ruling:

The Court: Well, it may well be admissible under [sections] 1250 and 1251[105] of the Evidence Code which has to do with existing state of mind, and so forth, when that is an issue in the case.

That is an issue in this case.

If the theory is that Mr. Shyrock was part of a conspiracy involving Mr. Maciel and others to kill these individuals, likewise under [section] 1251 it would seem that it would be admissible.

(56 RT 8748.)

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105. Evidence Code section 1251 provides:

Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Following the trial court's ruling, defense counsel objected under Evidence Code section 352 that "the statement [did] not involve Mr. Maciel and [was] more prejudicial, substantially more prejudicial, than probative to Mr. Maciel's involvement." (56 RT 8748.) Defense counsel also objected that any statement made after the murders would not be "in furtherance of the conspiracy." The trial court overruled the objection on the following grounds:

> [The Court:] But is it not also a fact that we have testimony in this case in the form of expert testimony so far that there is a special relationship between the sponsor and new admittee?
>
> So the wishes of the sponsor might well be carried out and, therefore, the wishes of the sponsor have some relevance in this case, it would seem to me.
>
> Mr. Esqueda: But all of that opinion is in a generic form.
>
> There is nothing specific.
>
> The Court: There is about to be.
>
> Mr. Esqueda: Right.
>
> The Court: Objection is overruled.

(56 RT 8749.)

The trial court nevertheless instructed the jury, at defense counsel's request, that the statements at issue were "coming in for a limited purpose and that they be considered only . . . as [they] may bear upon Mr. Shyrock's intentions toward Mr. Aguirre." (56 RT 8750-8751.)

Witness No. 15 subsequently testified that he was aware of Aguirre's activities "with regard to drug dealers and the El Monte area," and knew that Aguirre and Tony Cruz, also known as "Cruzito," were robbing drug dealers who were protected by the Mexican Mafia. (56 RT 8825-8826, 8829-8830.) Shyrock told Witness No. 15 that "he was tired of both of them disrespecting him and robbing dope connections and that sooner or later they were going to

pay for that." (56 RT 8751-8752.)

The morning after the murders, Witness No. 15 attended a meeting with Shyrock in Lambert Park. The meeting was arranged by Officer Marty Penny of the El Monte Police Department. (56 RT 8752, 8816-8818.) Out of the officer's earshot, Witness No. 15 asked Shyrock if he had anything to do with the murders. Shyrock said "that he was sorry to hear about that and he seen [sic] it on the news that morning at 5:00." (56 RT 8755.) Shyrock offered his condolences and said he "would have done it in another way, if he had something to do with it." Shyrock told Witness No. 15 that he did not regret the killing of Aguirre, however, and remarked, "That bastard. He was forcing me to kill him or do something to him so I don't feel bad about him dying." (56 RT 8755-8756.)

B. Shyrock's Statements Were Admissible As Conspirator Statements

At a conference regarding proposed jury instructions, the prosecutor explained that one theory he planned to argue concerned a conspiracy to kill the adult victims at 3843 Maxson Road. He elaborated:

> Mr. Manzella: I will tell the Court and counsel how I am planning on arguing it.
>
> The original conspiracy was to kill -- according to the evidence, or based on the evidence that we have, it seems that the original conspiracy was to kill Dido.
>
> The Court: Just Dido?
>
> Mr. Manzella: To kill just Dido.
>
> However, we know from what Anthony Torres told his sister is that the instructions from Eme, however, were to kill any witnesses.
>
> Don't leave [¶] witnesses.
>
> That would include the adults.
>
> So --

I'm not arguing that they had -- that they were instructed to kill the children.

So you could say that the original conspiracy, and it uses the word "originally" in that last paragraph, was to kill Dido.

Then I will argue that the killing of the two other adults was in furtherance of the conspiracy in that and that the killing of the children was a natural and probable consequence of going into a one room house and killing -- and shooting at three people, the kids were bound to be hurt, if not killed.

That is the way I am going to do it.

. . . . . .

Just put, you know, that Dido is the original person that was to be killed and that the other four were in furtherance of the conspiracy.

(61 RT 9520-9522.)

The trial court suggested that the jury instead be instructed on "aiding and abetting and natural and probable consequences," as the jury was instructed in the trial of Anthony Torres. (61 RT 9522.) The trial court ultimately acceded to the prosecutor's request, however, and instructed the jury on conspiracy. (See 3 CT 697-708.) As part of those instructions, the jury was required to determine, pursuant to CALJIC No. 6.11, "whether the crimes alleged [in Count[s] 3-6] were perpetrated by co-conspirator[s] in furtherance of that conspiracy and [were] a natural and probable consequence of the agreed upon criminal objective of that conspiracy].]" (3 CT 699.)

Thus, despite appellant's assertion that "no conspiracy to kill Aguirre was alleged" (AOB 196), the prosecutor argued (see 62 RT 9656-9664; see also 2 CT 428-435 [prosecution's motion in support of admission of evidence of "uncharged conspiracy"]), and the jury was expressly instructed (see 3 CT 716), that one of the four theories of liability involved a conspiracy to murder the

adult victims of the residence (3 CT 698-699). (See *People v. Remiro, et al.* (1979) 89 Cal.App.3d 809, 842 ["Although conspiracy was not charged, the case was tried on a conspiracy theory. 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"], citing *People v. Pike* (1962) 58 Cal.2d 70, 88; see also 3 RT 462 [in granting the prosecution's motion to introduce evidence of an uncharged conspiracy, Judge Cesar Sarmiento states, "I think the law is clear. Conspiracy does not have to be charged in order to produce evidence of a conspiracy"].)

Although, as set forth previously, a "'conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated,'" the circumstances of a particular case "'may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy[.]'" (*People v. Leach*, *supra*, 15 Cal.3d at p. 431; see also *People v. Manson*, *supra*, 61 Cal.App.3d at p. 155.) It is the role of the trier of fact, "'considering the unique circumstances and the nature and purpose of the conspiracy of each case,'" to determine precisely when the conspiracy has ended. (*Ibid.*)

Here, Shyrock's statements to Witness No. 15 both before and after the murders were admissible under Evidence Code section 1223. Shyrock's warning that Aguirre was "going to pay for [robbing drug dealers]" (56 RT 8751-8752), was evidence of his involvement in the planning of the crimes. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 681.) And, Shyrock's post-shooting remarks disclaiming responsibility (56 RT 8755-8756), were "made in an attempt to maintain the secrecy and thus the integrity of the criminal enterprise. So viewed, it follows that they were [also] made in furtherance of

the conspiracy within the meaning of Evidence Code section 1223 , subdivision (a)." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 147; see also *id.* at p. 153; cf. *People v. Hinton*, *supra*, 37 Cal.4th at p. 895.)

Moreover, the jury was instructed that Shyrock's statements could be considered only if they were "made while the [declarant] . . . was participating in the conspiracy and . . . the person against whom [they were] offered was participating in the conspiracy before or during that time[.]" (3 CT 708 [CALJIC No. 6.24].) In sum, the statements "in the aggregate were probative of the question whether the two men [Shyrock and appellant] . . . conspired to kill [Aguirre]," and were thus properly admitted. (*People v. Morales* (1989) 48 Cal.3d 527, 552; see also *People v. Hinton*, *supra*, 37 Cal.4th at pp. 894-895 [finding no error where the jury "was instructed that the coconspirator statements could not be considered without a determination, from independent evidence, that a conspiracy existed"].)

C. Shyrock's Statements Were Admissible To Show State Of Mind

Appellant also contends that Shyrock's statements, even if "relevant to prove Shyrock's animus toward Aguirre," were nevertheless irrelevant "to prove that [appellant] aided and abetted the killing of, or conspired to kill Moreno." (AOB 196-197.)

Evidence Code section 210 provides that relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." On appeal, this Court "review[s] a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 821, citing *People v. Heard* (2003) 31 Cal.4th 946, 973.)

In *People v. Morales*, *supra*, 48 Cal.3d at page 527, the defendant raised a similar contention. The defendant's accomplice, Ortega, was tried separately from the defendant. Ortega's former girlfriend, Christina Salaices, was allowed

to testify at the defendant's trial that, five months prior to the murder of victim Terri Winchell, Ortega indicated that he was planning to kill Randy Blythe (Ortega's male lover, who had begun a sexual relationship with Winchell). Salaices testified that Ortega expressed his intent to go to Blythe's house, ring his doorbell, stab him when he opened the door, and "'turn the knife in him to see the expression on his face.'" Ortega also told Salaices that "'Mikey (defendant Morales) would be with him because Mikey wouldn't let him stop. Mikey would help him and Mikey wouldn't let him stop, that Mikey would be there.'" Finally, Ortega informed Salaices that "'if Terri [victim Winchell] was there, that she was gonna get it, too.'" (*Id.* at p. 551.)

On appeal, the defendant argued in part that Ortega's statements were inadmissible under Evidence Code section 1250. (*People v. Morales*, *supra*, 48 Cal.3d at p. 552.) This Court rejected that contention and held:

> As for the state-of-mind exception, section 1250, subdivision (a), of the Evidence Code creates a hearsay exception for relevant statements "of a declarant's then existing state of mind . . . (including a statement of intent, plan, motive . . .)," when the evidence is offered (1) to prove the declarant's state of mind at that time or any other time, or (2) to explain his acts or conduct. Defendant contends that Ortega's intentions or state of mind were irrelevant to the case against defendant. The People, on the other hand, assert that, in light of the conspiracy charges against defendant, Ortega's statements were admissible to show his earlier intent or plan to draw defendant into a conspiracy involving the killing of Blythe, and possibly Winchell.
>
> We agree with the People. Winchell's admitted plan to kill Blythe, his stated assumption or expectation that defendant would help or encourage him in doing so, and his remark that if Winchell were present she would "get it too," in the aggregate were probative of the question

whether the two men later conspired to kill Winchell.

(*Ibid.*)

Here, as discussed previously, the prosecutor argued (see 62 RT 9656-9664), and the jury was instructed (see 3 CT 716), that appellant entered into a conspiracy to kill *all* the adult victims of the Maxson Road residence, *including* Moreno. (3 CT 699.) The evidence supports that determination. (See, e.g., 8 1SCT 1632 [Anthony Torres told Witness No. 13 that he and his companions were supposed to kill "one guy," but that "they weren't supposed to leave any witnesses. If anybody got in the way, that they had to take care of them"].)

In addition, appellant's role as a coconspirator in those murders was established in detail through the videotaped meeting of Mexican Mafia members (including appellant at one point) discussing the planned "hit" on Moreno (55 RT 8530, 8556-8559; 8 1SCT 1644-1672); the testimony of Witness No. 14, describing his encounter with appellant on the day of the murders, and Jimmy Palma's statement to appellant shortly before the murders that he was "strapped" and "going to take care of business" (57 RT 8996); telephone and pager records establishing that appellant had received numerous calls from the homes of several codefendants before and after the murders (59 RT 9212-9220); and, finally, appellant's audiotaped police interview, in which he admitted his role as "middle man" and stated at one point, "My kids, my wife, I mean they'll all be all fucked up, because of me." (60 RT 9309-9311, 9314; 8 1SCT 1675, 1696, 1698.)

And, again, the jury was required to determine, pursuant to CALJIC No. 6.11, "whether the crimes alleged [in Count[s] 3-6] were perpetrated by co-conspirator[s] in furtherance of that conspiracy and [were] a natural and probable consequence of the agreed upon criminal objective of that conspiracy].]" (3 CT 699.) As such, the trial court did not abuse its discretion

in admitting the challenged statements. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 821.)

D. Shyrock's Statements Were More Probative Than Prejudicial

Appellant maintains that the trial court "abused its discretion by overruling the defense objection [to the admission of Shyrock's statements] under Evidence Code section 352." (AOB 198.) The following exchange occurred in that regard:

> The Court: . . . [¶] Specifically as to the 352 objection, do you want to be heard further on that?
>
> What is it about that evidence that is so prejudicial or time consuming or misleading that I should keep it out?
>
> Mr. Esqueda: Well, it goes to a statement made by Huero Shy and not Mr. Maciel.
>
> Mr. Maciel is not mentioned in that statement.
>
> I think it prejudices Mr. Maciel's case and has no probative value as to his involvement in this.
>
> It has to be made in furtherance of the conspiracy and the statement made after is not in furtherance of the conspiracy.

(56 RT 8748-8749.)

The trial court overruled the objection, noting that "that we have . . . expert testimony so far that there is a special relationship between the sponsor and new admittee," and concluding that "the wishes of the sponsor might well be carried out and, therefore, the wishes of the sponsor have some relevance in this case . . . ." (56 RT 8749.)

As set forth previously, a "trial court is vested with wide discretion in determining the admissibility of evidence." (*People v. Karis*, *supra*, 46 Cal.3d at p. 637.) "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value

against the dangers of prejudice, confusion, and undue time consumption." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 609; *People v. Babbitt*, *supra*, 45 Cal.3d at p. 688.) Appellate courts will not disturb a trial court's decision regarding the admissibility of proffered evidence absent a manifest abuse of discretion resulting in an injustice. (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 9; *People v. Jones*, *supra*, 17 Cal.4th at p. 304; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 201; *People v. Milner*, *supra*, 45 Cal.3d at p. 239.)

No abuse of discretion can be shown here. As the trial court correctly determined, the statements were admissible for the purpose of showing Shyrock's state of mind toward at least one of the intended victims, as well as the scope and objective of the conspiracy. Moreover, "threaded through the discussion of the admissibility of [Shyrock's] statement[s] was the prosecution's contention that, because the statement[s] had been [made by someone who shared a special relationship with appellant, they] were generally admissible on the issue of [motive]." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 820.) And, as the trial court aptly noted, expert testimony had been introduced explaining the obligations owed by a newly-inducted member of the Mexican Mafia to his sponsor. (See 55 RT 8516, 8525-8528, 8568.) In view of the foregoing, the trial court acted well within its discretion in overruling appellant's objection. Appellant's contention should therefore be rejected.

E. The Admission Of Shyrock's Statements Did Not Violate Appellant's State Or Federal Constitutional Rights

1. Appellant's Confrontation Clause Claim Is Forfeited; Alternatively, Shyrock's Statements Were Not "Testimonial" Under *Crawford v. Washington*

Appellant argues that Shyrock's meeting with Witness No. 15 "was a plot or device by which officers hoped to gather evidence to 'establish or prove past events potentially relevant to later criminal prosecution.'" (AOB 200-201.)

Appellant accordingly maintains that Shyrock's statements were "testimonial" under *Crawford v. Washington*, *supra*, 541 U.S. at page 36 [124 S.Ct. at page 1354], and that their admission, without the "opportunity to cross-examine Shyrock," violated appellant's state and federal constitutional rights to confrontation. (AOB 201.)

As the record shows, appellant objected to the admission of the statements on hearsay grounds, but did not raise any state or federal confrontation clause claim. (See 56 RT 8746.) In *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at page 970, this Court found that a similar claim had been forfeited for failure to object at trial: "We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below." (*Id.* at p. 1028, fn. 19, citing *People v. Partida* (2005) 37 Cal.4th 428, 435.) Appellant's claim is therefore forfeited for the same reason.

Nevertheless, Shyrock's statements were admissible under *Crawford*, because, as argued previously, they constituted statements of a coconspirator, concerned Shyrock's state of mind, and, in any event, were not testimonial in nature. (See *Crawford v. Washington*, *supra*, 541 U.S. at p. 56 [124 S.Ct. at p. 1367] ["Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy"]; *id.* at p. 74 [124 S.Ct. at p. 1377] (conc. opn. of Rehnquist, J.) ["We have recognized, for example, that co-conspirator statements simply cannot be replicated, even if the declarant testifies to the same matters in court. Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission actually furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth-determining process in criminal trials," quotation marks and citations omitted]; *United States v. Reyes* (8th Cir. 2004) 362 F.3d 536, 540, fn. 4 ["*Crawford* does not support his

argument, however, because co-conspirator statements are nontestimonial" and "*Crawford* did not provide additional protection for nontestimonial statements"]; see also *Bourjaily v. United States* (1987) 483 U.S. 171, 183 [107 S.Ct. 2775, 97 L.Ed.2d 144] [hearsay exception for coconspirator statements is firmly rooted and thus a court need not independently inquire into the reliability of such statements]; *United States v. Inadi* (1986) 475 U.S. 387, 395 [106 S.Ct. 1121, 89 L.Ed.2d 390] [same]; *Tennessee v. Street* (1985) 471 U.S. 409, 415 [105 S.Ct. 2078, 85 L.Ed.2d 425] [same]; *People v. Morales*, *supra*, 48 Cal.3d at p. 552 ["because Ortega's statements were properly admitted under the well recognized state-of-mind exception to the hearsay rule, the federal confrontation clause would likewise permit admission of such evidence"]; cf. *Whorton v. Bockting* (2007) ___ U.S. ___ [127 S.Ct. 1173, 167 L.Ed.2d 1] [*Crawford* is not retroactively applicable to cases already final on direct appeal].)

Moreover, Shyrock's statements were made to Witness No. 15 *outside the presence of Officer Marty Penny* (see 56 RT 8755-8756) and, as such, were not made in the course of a police interrogation whose "primary purpose . . . [was] to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) ___ U.S. ___ [126 S.Ct. 226, 2274, 165 L.Ed.2d 224]; see also *People v. Cage*, *supra*, 40 Cal.4th at p. 970 [finding statement of victim to physician to be nontestimonial because it "lacked those attributes of testimony by a witness that are the concern of the confrontation clause"].)

Finally, Shyrock's statements were not admitted for their truth. (See 56 RT 8747; see also *id.* at pp. 8750-8751 [trial court instructs jury that the statements at issue were "coming in for a limited purpose and that they be considered only . . . as [they] may bear upon Mr. Shyrock's intentions toward Mr. Aguirre"].) In *Crawford*, the high court explicitly stated that "the [Confrontation] Clause . . . does not bar the use of testimonial statements for

purposes other than establishing the truth of the matter asserted." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9 [124 S.Ct. at p. 1369], citing *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425]; see also *People v. Davis*, *supra*, 36 Cal.4th at p. 550 [finding that non-hearsay testimony "did not violate defendant's rights under the confrontation clause of the Sixth Amendment to the federal Constitution"].) Thus, even if it were assumed for the sake of argument only that Shyrock's statements were *not* made in furtherance of a conspiracy and/or did not concern his state of mind, no error under the state or federal Constitutions could be shown.

2. The Admission Of Shyrock's Nontestimonial Statements Did Not Violate Appellant's Rights To Due Process, Confrontation, And A Reliable Death Judgment

Appellant contends in the alternative that, "[e]ven if *Crawford* does not apply, under the analysis of *Ohio v. Roberts*, *supra*, 448 U.S. 56 [[100 S.Ct. 2531]], introduction of Shyrock's statements still violated appellant's confrontation rights." (AOB 201.)

Crawford, however, *does* apply; it is *Ohio v. Roberts* that does *not* apply. As this Court observed in *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at page 970, "In *Crawford v. Washington* . . . , the high court repudiated *Ohio v. Roberts* . . . , which had permitted hearsay evidence in criminal cases if it fell within a traditional exception or was particularly trustworthy." (*Id.* at p. 1028, fn. 19.)

Yet, as stated previously, even if appellant's constitutional claims have been preserved in full or in part (compare *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 990, fn. 5 [where trial claims are sufficiently similar to constitutional claims first presented on appeal, "new constitutional arguments are not forfeited"] with *id.* at p. 1029 ["Except for due process, the

constitutional claims . . . are forfeited"]),[106] no error could be shown. Shyrock's statements were consistent with other evidence presented regarding his animus toward both Aguirre and Moreno, and were made under circumstances establishing their trustworthiness. Moreover, Witness No. 15 -- who provided the account of Shyrock's statements -- was *himself* subjected to cross-examination in that regard. (See 56 RT 8816-8821.) Finally, appellant suffered no prejudice from the allegedly improper admission of the statements, because they formed only a small evidentiary portion of the prosecution's case. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24 [87 S.Ct. at p. 828]; *People v. Farnam* (2002) 28 Cal.4th 107, 187, 190; *People v. Roberts* (1992) 2 Cal.4th 271, 308.) Appellant's contention is therefore without merit.

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106. Appellant contends that his "right to assert a denial of due process was preserved by his objection that the evidence was more prejudicial than probative under Evidence Code section 352." (AOB 203, fn. 55, citing *People v. Partida*, *supra*, 37 Cal.4th at pp. 433-439.)

XII.

APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.11.5 IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

Appellant contends that the trial court erroneously instructed the jury pursuant to CALJIC No. 2.11.5, because Witness Nos. 12 and 16 testified under a grant of immunity from prosecution; he argues that "[t]he use of [the instruction] would only have been proper if limited to exclude those accomplices who testified under a grant of immunity." (AOB 205.) Appellant maintains that the alleged error "violated [his] right to a reliable death judgment guaranteed by the Eight Amendment, and article I, section 17 of the state [C]onstitution." (AOB 207.) As appellant acknowledges, however, no objection was voiced to the complained-of instruction; consequently, his contention is forfeited. In any event, the contention is without merit.

A. Proceedings Below

Prior to the presentation of testimony by the last defense witness, the trial court discussed proposed jury instructions with both parties. (See 61 RT 9463-9465.) The trial court informed counsel:

> [The Court:] The fact that I pass some [instructions] up in the packet do[es] not mean that they are not being given.
>
> We will have to discuss it.
>
> . . . . . .
>
> . . . Likewise, the fact that I mention an instruction now does not preclude counsel at a later point from arguing it should not be given.

(61 RT 9464.)

Defense counsel indicated his understanding of the foregoing by stating, "All right." (61 RT 9464.) The trial court then went on to list a number of

instructions it intended to provide to the jury, including CALJIC No. 2.11.5. (61 RT 9464-9465.) Appellant did not voice an objection to CALJIC No. 2.11.5 at that time or at any other time during trial. (See RT, *passim*.)

B. Appellant's Contention Is Forfeited

Appellant's "fail[ure] to make any objection whatever based on any federal constitutional provision" precludes him from raising such newly-asserted claim of error at this advanced stage. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 991 ["'[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct'"]; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894 ["Defendant also failed to preserve his constitutional claims by failing to object on any of these grounds in the trial court]; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Davis* (1995) 10 Cal.4th 463, 532, fn. 29, 533; cf. *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508] [constitutional rights may be forfeited in criminal trial by failure to make timely assertion of right]; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [appellate court will not consider erroneous rulings where an objection could have been, but was not, presented to the lower court].) Appellant's claim of federal constitutional error is therefore forfeited. And, appellant's state-law claim is also forfeited for the same reason.[107] (See *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1153, 1167; *People v. Clark* (1993) 5 Cal.4th 950, 1026;

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107. Appellant's failure to raise a timely objection also means that this claim is procedurally barred. (*People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173; see also *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371-372.) Respondent respectfully requests that this Court explicitly rule on the waiver issue in this argument, as well as in other arguments throughout this brief, even if this Court decides, alternatively, that appellant's contention fails on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].)

People v. Gates (1987) 43 Cal.3d 1168, 1182-1183; *People v. Ghent* (1987) 43 Cal.3d 739, 766.)

C. In The Alternative, Appellant's Contention Is Without Merit

In the event this Court nevertheless believes it may address the challenged instruction as affecting appellant's "substantial rights" (§ 1259; *People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 6; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 669, fn. 3; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 381), no error could be shown.

CALJIC No. 2.11.5, as given in the instant matter, provided:

> There has been evidence in this case indicating that persons other than defendant were or may have been involved in the crime for which the defendant is on trial.
>
> There may be many reasons why those persons are not here on trial. Therefore, do not discuss or give any consideration as to why the other persons are not being prosecuted in this trial or whether they ha[ve] been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial.

(3 CT 665; 62 RT 9581-9582.)

Contrary to appellant's contention, the record shows that CALJIC No. 2.11.5 addressed the absence of appellant's *codefendants*, and not the testimony of Witness Nos. 12 and 16. Indeed, the trial court provided separate accomplice instructions regarding Witness Nos. 12 and 16, *at the suggestion of the prosecution*:

> Mr. Manzella [the prosecutor]: For one thing, I was thinking (Witness No. 12), his name should go.
>
> The Court: In [CALJIC No.] 3.19?
>
> It is interesting.
>
> Certainly as to --

You have to separate the real world from the courtroom world.

In the real world, it is more than possible that (Witness No. 16) and --

Mr. Manzella: (Witness No. 12).

The Court: -- (Witness No. 12), who said that he took the defendant to a particular location and he gave heroin --

Mr. Esqueda [defense counsel]: That was (Witness No. 14).

Mr. Manzella: (Witness No. 12) was in the red car, red Thunderbird, being driven by (Witness No. 16).

Mr. Esqueda: That is (Witness No. 12).

The Court: Yes.

As to all three of those, it is not improbable that they may be murderers in the real world.

(61 RT 9484-9485; see also *id.* at pp. 9485-9488.)

Defense counsel agreed, and stated:

Mr. Esqueda: I understand. I understand precisely what the Court is saying.

I was going to request that they be put in there because it doesn't fly in the face of my theory.

I am saying they did it, but you can't believe everything that they have said.

The Court: Right.

Mr. Esqueda: None of the shooters or anybody that was actually present ever got up and admitted being there or being -- participated in it.

They are all lying and denying.

(61 RT 9488; see also *id.* at pp. 9488-9490.)

After the trial court and the parties agreed to instruct the jury that "Anthony Torres, Jimmy Palma, [and] Danny Logan were accomplices as a matter of law" (61 RT 9490; see also 62 RT 9603; 3 CT 691), defense counsel asked that the names of Witness Nos. 12 and 16 be mentioned as potential accomplices whose testimony would be subject to corroboration:

The Court: Let's go back on our accomplice issue.

Mr. Esqueda, you indicate that your thinking now is that you would like the accomplice instructions given and you would like them to include [Witness No. 16].

Correct?

Mr. Esqueda: Do you want me to give you the names?

The Court: Go ahead.

Mr. Esqueda: . . . (Witness No. 16) --

The Court: You mean (Witness No. 16)?

Mr. Esqueda: Is it --

That's right.

I have it the other way.

(Witness No. 16).

(Witness No. 14).

The Court: (Witness No. 14).

Okay.

Mr. Esqueda: And in all fairness (Witness No. 12) should be there also.

The Court: All right.

(61 RT 9498-9499.)

The trial court considered the prosecutor's argument that "[t]here [was] no evidence from which [the jury] could conclude that [Witness No. 14] was an accomplice" (61 RT 9499-9504), "sustain[ed] the objection" to his inclusion

(61 RT 9504), and ultimately instructed the jury pursuant to the following modified version of CALJIC No. 3.19:

> You must determine whether [Witness Nos. 12 and 16] were accomplices as I have defined that term.
>
> The defendant has the burden of proving by a preponderance of the evidence that these witnesses were accomplices in the crimes charged against the defendant.

(3 CT 693; 62 RT 9604.)

The trial court also instructed the jury that codefendants Torres, Ortiz, Palma, Logan, and Valdez were accomplices as a matter of law, pursuant to the agreed-upon modification of CALJIC No. 3.16:

> If the crime of murder was committed by anyone, Anthony Torres, Jose Ortiz, Jimmy Palma, Danny Logan, and Richard Valdez were accomplices as a matter of law and evidence relating to their statements is subject to the rule requiring corroboration.

(3 CT 691; 62 RT 9603.)

Finally, the trial court admonished the jury pursuant to CALJIC No. 3.18:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

(3 CT 692; 62 RT 9603-9604.)

Appellant maintains that "when there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices." (AOB 205.) As demonstrated by the foregoing, the trial court did just that. Appellant's claim

of error is therefore patently without merit.

Moreover, the trial court's resort to CALJIC No. 2.11.5 was proper in this case. As set forth previously, the complained-of instruction clearly applied only to the absent codefendants. Appellant's claim in effect "amounts to an assertion that the instruction, although properly given based on the evidence, was too general to the extent it could be viewed as applying to [testifying witnesses]." (*People v. Sully* (1991) 53 Cal.3d 1195, 1218.) Appellant, like the defendant in *Sully*, "however, requested no limiting instruction. He has, therefore, waived any assignment of error." (*Ibid.*)

Nevertheless, the trial court instructed the jury that the testimony of Witness Nos. 12 and 16 "should [be] viewe[ed] with distrust," in the event the jury determined that they were accomplices. (3 CT 692-693; 62 RT 9603-9604.) In *People v. Hinton, supra*, 37 Cal.4th at page 839, this Court recently rejected a similar contention in a case where accomplice instructions were *not* provided:

> Finally, we reject defendant's claim that the absence of appropriate instructions concerning accomplice testimony would have led the jury, erroneously, to interpret CALJIC No. 2.11.5 to bar consideration of the fact that Cunningham (or Santiago, for that matter) had testified under a grant of immunity. CALJIC No. 2.11.5 provides: "There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial. There may be many reasons why such person is not 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 duty is to decide whether the People have proved the guilt of the defendant on trial." Because the instruction applied to Hicks [an absent codefendant], it was properly

given in this case. Moreover, the jury was also instructed that it may consider "the fact that the witness testified under a grant of immunity" in assessing that witness's credibility. We thus perceive no reasonable likelihood the jury would have misconstrued the instruction in the manner defendant imagines.

(*Id.* at p. 881, citing *People v. Crew*, *supra*, 31 Cal.4th at p. 845; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 782-783.)

Here, as in *Hinton*, no error can be shown. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 881.)

D. Any Error Would Be Harmless

Even if it were assumed that the trial court erroneously provided CALJIC No. 2.11.5 in this case, no prejudice could be shown. As set forth previously, the jury was instructed on accomplice testimony pursuant to CALJIC Nos. 3.00 through 3.19 (3 CT 683-693; 62 RT 9596-9604), and was also advised pursuant to CALJIC No. 2.20 that "[i]n determining the believability of a witness [it could] consider *anything* that has a tendency to prove or disprove the truthfulness of the testimony," including "[t]he existence . . . of a bias, interest, or other motive;" "[a] statement previously made by the witness that is . . . inconsistent with the testimony of the witness" (brackets omitted); "[a]n admission by the witness of untruthfulness;" and "[t]he witness' prior conviction of a felony." (3 CT 667-668, italics added; 62 RT 9583-9585.) Moreover, the jury was instructed pursuant to CALJIC No. 1.01 to "[c]onsider the instructions as a whole and each in light of all the others." (3 CT 656; 62 RT 9572.) Finally, Witness Nos. 12 and 16 both acknowledged at trial that they were testifying under a grant of immunity. (57 RT 8890; 60 RT 9345.)

In *People v. Cornwell* (2005) 37 Cal.4th 50, this Court concluded that any error resulting from the improper use of CALJIC No. 2.11.5 was harmless under similar circumstances:

> We conclude . . . that the error was harmless. Other instructions adequately directed the jury how to weigh the credibility of witnesses. (See CALJIC Nos. 2.20 [weighing credibility and considering such factors as the existence of bias, interest, or other motive to lie], 3.00-3.11 [specific instructions on accomplice testimony].) The court also specifically informed the jury to keep in mind any sentencing benefits received by a witness in the jury's evaluation of the witness's credibility. As our cases recognize, such instructions adequately channel the jury's consideration of the testimony of possible accomplices even in the face of error in instructing pursuant to CALJIC No. 2.11.5. (See *People v. Crew*[, *supra*,] 31 Cal.4th [at p.] 845 . . . ; *People v. Williams*, *supra*, 16 Cal.4th at p. 227.)

(*Id.* at p. 88.)

Although appellant contends that this case is distinguishable from *Cornwell* because "the jury [in that case] was instructed to keep in mind any sentencing benefits received by witnesses in assessing credibility" (AOB 206), there is nothing to suggest that the jury in this matter would "have construed the instruction to mean that the immunity grant was irrelevant to determining . . . credibility . . . ." (AOB 207.) In sum, "it is [not] reasonably likely that, taken as a whole, the instructions misled the jury in the manner claimed by defendant or that they relieved the prosecution of any part of its burden of proof. (See *People v. Cole*[, *supra*,] 33 Cal.4th [at p.] 1212 . . . [standard of review for comparable asserted instructional error is whether the instructions as a whole were reasonably likely to mislead the jury]; *People v. Catlin* (2001) 26 Cal.4th 81, 151 . . . [same].) In the present case, the instructions as a whole supplied adequate direction concerning the process of evaluating the testimony of the witnesses." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 88.)

XIII.

APPELLANT'S CONTENTION REGARDING ALLEGED JUDICIAL MISCONDUCT IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

Appellant contends that the trial court "engaged in a prejudicial pattern of misconduct during the guilt phase of trial," and points to a number of instances in which he maintains the trial court "interjected commentary from the bench in a way which either credited prosecution witnesses, and/or discredited defense counsel, thereby discrediting the defense." (AOB 208.) Appellant argues that he "was denied the right to a fair trial and reliable guilt and penalty judgments [under the state and federal Constitutions] by the cumulative effect of [such] judicial misconduct." (AOB 215-216.) The record shows, however, that appellant did not object to the alleged judicial misconduct or request curative instructions; consequently, his contention is forfeited. Alternatively, it is without merit.

A. Legal Principles Of Judicial Misconduct

"A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." *(People v. Carpenter, supra*, 15 Cal.4th at p. 353; see also *Withrow v. Larkin* (1975) 421 U.S. 35, 46 [95 S.Ct. 1456, 43 L.Ed.2d 712]; *People v. Bell* (2007) 40 Cal.4th 582, 603.) In *People v. Harris* (2005) 37 Cal.4th 31, this Court observed:

> . . . The role of a reviewing court "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. (*United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.)" [Citation.]

(*Id.* at p. 347.)

A claim of error involving judicial misconduct may be forfeited by the defendant's failure to object. (*People v. Bell, supra*, 40 Cal.4th at p. 603, fn.7.) "As defendant concedes, he failed to object to any of the [alleged instances of judicial misconduct] he now challenges on appeal. He has thereby forfeited his objections." (*People v. Monterroso* (2004) 34 Cal.4th 743, 761; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1108 ["counsel neither objected nor did he request the jury be admonished. Accordingly, defendant waived the issue for appeal"].)

Appellant claims the trial court committed the following instances of misconduct.

1. The Trial Court's Admonishment Of Defense Counsel For Making A "Speaking Objection"

During the prosecutor's direct examination of Sergeant Richard Valdemar, the following colloquy occurred:

Q [by the prosecutor] Let me ask you this.

In your opinion, would the son of a murder victim come into court to lie for a Mexican Mafia member being tried for murder?

Mr. Esqueda [defense counsel]: Your Honor, I will object to that question.

Credibility is in the sole discretion of the jury. And I think counsel by that question is trying to elicit testimony.

The Court: Don't make a speaking objection.

Just make an objection, gentlemen, when you make one, if you do.

State a legal ground rather than argue in front of the jury.

I think I understand your objection.

Is that something in your experience with the Mexican Mafia would be a possible thing to happen?

The Witness: Yes, Your Honor.

The Court: Overruled.

Answer will stand.

(55 RT 8522.)

2. The Trial Court's Comments Regarding Defense Counsel's Inquiry Into Grand Jury Proceedings

Defense counsel subsequently cross-examined Sergeant Valdemar about his testimony during the grand jury proceedings in this matter, which led to the following exchange:

Q [by defense counsel] Do you recall testifying at the grand jury in these proceedings?

A Yes, sir.

Q Tell us what you told the grand jury about a silencer.

The Court: Well, I would prefer that if counsel -- if you want him to tell you something about a silencer, rather than what he told somebody else somewhere else, ask him what you want to know.

Okay?

Mr. Esqueda: I want to know what he told the grand jury --

The Court: Well, I don't want to know what he told the grand jury.

Mr. Esqueda: For impeachment.

The Court: Unless you have an offer of proof.

Did you make a different offer in front of the grand jury?

The Witness: Yes.

The Court: What did you say?

The Witness: That I thought he needed the silencer so he could kill the children without screaming and noise and that type of thing.

(55 RT 8592-8593.)

3. The Trial Court's Admonishment Of Defense Counsel For Calling Witness No. 15 A "Down And Out Hype"

During defense counsel's lengthy cross-examination of Witness No. 15 regarding his heroin use, counsel at one point characterized Witness No. 15 as a "down and out hype," which prompted the following rebuke from the trial court:

> Q [by defense counsel] You were a down and out hype, weren't you?
>
> A I was greedy, yes. That particular day I was. The majority of the time I'm not greedy.
>
> Just that particular day for 20 seconds I happened to be greedy.
>
> I'm sure we all get greedy in our life one time or another.
>
> The Court: Amen.
>
> Next question.
>
> Down and out hype.
>
> He is telling you that he has used heroin 27 years and has been to prison for 25. He steals to get his heroin.
>
> Now to characterize this gentleman as a down and out hype, is it necessary to do so?
>
> Again, he is a witness here and testifying for counsel to question, not to name call.
>
> Okay?
>
> Next question.

(56 RT 8794-8795.)

4. The Trial Court's Comments Regarding The Immunity Agreement Between The Prosecution And Witness No. 16

Defense counsel objected to the prosecutor's inquiry into the terms of Witness No. 16's grant of immunity (see 57 RT 8889-8890), which led to the

following discussion:

Q [by the prosecutor] What happens if you don't testify truthfully or you don't answer all the questions put to you?

Mr. Esqueda: Your Honor, I will object to the question, form of the question.

It is for the jury to decide whether he is testifying truthfully.

The Court: But there is an agreement and order by the Court.

I think he is asking about the terms of what happens if the agreement is breached.

I think it is important for the jury to know.

What happens if you lie or the judge says you lie[d] or you don't show up?

The Witness: I wouldn't be granted immunity.

The Court: And then what? You would be prosecuted for murder?

The Witness: Correct.

(57 RT 8890-8891.)

5. The Trial Court's Admonishment Of Defense Counsel For Inquiring Into Witness No. 16's Juvenile Record

The trial court admonished defense counsel during counsel's cross-examination of Witness No. 16 about a juvenile adjudication that he purportedly suffered in 1989 or 1990:

By Mr. Esqueda:

Q Were you convicted in 1989 with assault with a deadly weapon.

The Court: Well, counsel, what year are you talking about?

'89?

How old are you?

The Witness: 24.

The Court: He couldn't have been convicted of anything in '89 as a matter of law.

Mr. Esqueda: "CNV" means conviction.

The Court: Not if you are a juvenile, as you know.

By Mr. Esqueda:

Q In 1990 were you convicted --

The Court: Before you ask questions where the answer may not be what you think, confer with counsel and take a look at your Rap Sheet and make sure you are not asking questions that you should not be asking.

Juvenile adjudications are irrelevant, as you know.

So look at it over the noon hour.

You may ask something else.

Mr. Esqueda: Okay.

(57 RT 8939-8940.)

6. The Trial Court's Ruling On The Prosecution's Objection To Defense Counsel's Inquiry Into The Identity Of The Deputy District Attorney Who Took Witness No. 14's Plea In Another Matter

During defense counsel's cross-examination of Deputy District Attorney John Monaghan regarding the disposition of Witness No. 14's unrelated kidnap-robbery case, the following objection and colloquy occurred:

By Mr. Esqueda:

Q What was the name of the District Attorney that handled [Witness No. 14's kidnap/robbery case?

A I do not know. It was handled by our Pomona office.

Q You don't know the name of the D.A.?

A No, I do not.

Q You testified under direct examination that you reviewed the file.

A I reviewed the file after [Witness No. 14 was sentenced. And after he was sentenced and all proceedings were completed in that case, I went and got the file and I have the file upstairs.

You are free to take a look at it.

I kept the file so it would be part of this particular record if anybody ever needed it.

Q And --

A And it will have that name and also a disposition memo signed by the Pomona office as to why that particular disposition was offered [Witness No. 14].

I will be glad to bring it down and you can read it.

Q Having read that file, you cannot tell me who the D.A. who handled that case was?

A I could not tell you who took the plea.

I know the disposition memo --

Q Who was the D.A., Mr. Monaghan, who hand --

Mr. Manzella [the prosecutor]: I will object to this, Your Honor.

That is insulting.

The Court: I don't know about insulting. It is argumentative.

You know who it is, I assume.

If so, give him a name.

It's not a secret.

It's a public record.

By Mr. Esqueda:

Q I want to know if he knows.

The Court: He told you twice he does not.

The Witness: I don't. There are over a thousand D.A.'s in this county.

The Court: Mr. Monaghan --

The Witness: I apologize, Your Honor.

(58 RT 9082-9083.)

7. The Trial Court's Comments Regarding Defense Counsel's Inquiry Into Detective Stephen Davis's Willingness To Listen To An Interview Tape, Review His Notes, And Return To Court

While defense counsel was cross-examining Detective Stephen Davis about his prior audiotaped interview of Witness No. 14, the following exchange ensued:

Q [by defense counsel] And you have a copy of that tape available to you for your review.

Is that correct?

A Yes.

Q I assume you also took notes.

Is that correct?

A That's correct.

Q And you also have those notes to review?

A Yes.

Q If I asked you to go home and listen to the tape, or to the station, sorry, and to review your notes and come back at some later date and tell us what you heard and saw in your notes, would you be willing to do that?

Mr. Manzella: I will object on grounds that it is not relevant.

The Court: Whether he would or would not is not relevant.

If you want to make arrangements, do it.

Don't waste the jury's time.

We have access to these items, I assume, here in court?

(58 RT 9199.)

8. The Trial Court's Interruption Of Defense Counsel's Closing Argument

Finally, appellant points to the following comments by the trial court during his closing argument as further evidence of alleged judicial misconduct:

> What evidence does the prosecutor have to convict Mr. Maciel of count 6 that he had the specific intent to willfully, deliberately with premeditation and malice kill Ambrose Padilla, a 6-month old child?
>
> The Court: Counsel, I will have to interrupt you.
>
> I hate to interrupt either counsel during argument, but I will do that.
>
> That is a misstatement of the law and that is not required in this case.
>
> If you want me to explain it, I will be glad to.
>
> I don't want the jury confused as to the law that applies to those counts.
>
> That is one theory as to how the defendant may be convicted of that count of four.
>
> Mr. Esqueda: I'm sorry?
>
> The Court: That is one theory of four that may apply to that count.
>
> You certainly don't suggest that is the only one.
>
> Mr. Esqueda: With respect to count 5, I ask you the same question.
>
> With respect to count 3, I ask you the same question.
>
> With respect to count 2, I ask you the same question.
>
> As to the other theories of liability here, what evidence is there that Mr. Maciel conspired with the murderers, that he was part of this conspiracy?
>
> What evidence is there that he aided and abetted in any of these murder?

(62 RT 9714-9715.)

B. Appellant's Contention Is Forfeited

As demonstrated by the foregoing, no objections were made to the trial court's comments or questions. (See 55 RT 8522, 8593; 56 RT 8795; 57 RT 8891, 8939; 58 RT 9083, 9199; 62 RT 9714.) Appellant's contention regarding alleged judicial misconduct is therefore forfeited as a result of his failure to object. (*People v. Bell*, *supra*, 40 Cal.4th at p. 603, fn.7; *People v. Monterroso*, *supra*, 34 Cal.4th at pp. 759-760; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1108; see also *People v. Corrigan* (1957) 48 Cal.2d 551, 556 [noting that it "is well settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred"].)

Appellant maintains that no objections were necessary, purportedly because, given the trial court's "demeaning and dismissive attitude toward [defense counsel], it is unlikely that the [trial court] would have sustained counsel's assignments of misconduct, or taken any . . . remedial steps sufficient to cure the real harm caused by . . . evident pro-prosecution bias." (AOB 215.) Contrary to appellant's assertion, this is not a case where "any attempt by defense counsel to object to the trial court's [comments] 'would have been futile and counterproductive to his client.'" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237, quoting *People v. Hill*, *supra*, 17 Cal.4th at p. 821.) Indeed, the record shows that the trial court exercised admirable restraint and impartiality throughout a lengthy and difficult trial. Moreover, as set forth below, the trial court's comments and questions were appropriate.

C. Alternatively, Appellant's Contention Is Without Merit

The quoted portions of the record demonstrate that the trial court's comments and questions during defense counsel's cross-examination and closing argument were not so "discourteous and disparaging . . . as to discredit

the defense . . . ." (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233, internal quotation marks omitted.) Yet, even if any of the complained-of actions evince a certain brusqueness, "[i]n the setting of a protracted trial, . . . the court's momentary and isolated expression of irritation with defense counsel did not indicate bias or suggest to the jury that the court was 'allying itself with the prosecution.'" (*People v. Bell*, *supra*, 40 Cal.4th at p. 605, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 353.) The trial court did not "'withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.'" (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 948, quoting *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 766.)

As such, the trial court's pattern of behavior in this case was not even remotely similar to the "unique facts" which this Court found to constitute misconduct in *People v. Sturm*, *supra*, 37 Cal.4th at pages 1218, 1238, authority upon which appellant relies. (See AOB 212-213.) Instead, the trial court properly:

(1) cautioned *both* counsel against making speaking objections (55 RT 8522 ["Just make an objection, gentlemen, when you make one, if you do"]);

(2) strengthened defense counsel's argument that Sergeant Valdemar had, in fact, offered different testimony during the grand jury proceeding regarding the use of a silencer in the murders (55 RT 8592-8593 ["Did you make a different offer in front of the grand jury? [¶] The Witness: Yes"]);

(3) admonished defense counsel against denigrating a witness (56 RT 8794-8795 ["Now to characterize this gentleman as a down and out hype, is it necessary to do so?"]);

(4) overruled defense counsel's objection to the prosecutor's inquiry into the terms of a witness' immunity agreement (57 RT 8890-8891 ["I think he is

asking about the terms of what happens if the agreement is breached. [¶] I think it is important for the jury to know"]);

(5) informed defense counsel that the fact of a juvenile adjudication could not be used for impeachment purposes (57 RT 8939 ["Juvenile adjudications are irrelevant, as you know"]);

(6) sustained the prosecutor's objection to defense counsel's argumentative questioning (58 RT 9082-9083 ["He told you twice he does not [know]"]);

(7) sustained the prosecutor's objection to defense counsel's irrelevant inquiry into whether Detective Davis would listen to an interview tape, review his notes, and return to court (58 RT 9199 ["Whether he would or would not is irrelevant"]); and

(8) clarified the law and the prosecution's theories of liability during defense counsel's closing argument (62 RT 9713-9714 ["I don't want the jury confused as to the law that applies to those counts. [¶] That is one theory as to how the defendant may be convicted of that count of four"]).

Indeed, as appellant acknowledges, the trial court's examination of Sergeant Valdemar only bolstered his claim that Valdemar had "inaccurately told the grand jury that [Raymond] Shyrock ordered the deaths of the children, and wanted a silencer so he could silence the children, ie., keep them from screaming."[108] (AOB 213.) Appellant also acknowledges that the trial court's limitation on defense counsel's inquiry into a witness' juvenile adjudication was proper, as "[s]tate law prohibits using sustained juvenile court petitions for

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108. A trial court may properly "'undertake the examination of witnesses . . . when it appears that relevant and material testimony will not be elicited by counsel.'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1125, quoting *People v. Rigney* (1961) 55 Cal.2d 236, 243; see also *People v. Harris*, *supra*, 37 Cal.4th at p. 350 [same]; Evid. Code, § 775 [trial court "may call witnesses and interrogate them the same as if they had been produced by a party to the action"].)

impeachment purposes because they are not criminal 'convictions.'"[109] (AOB 214.) Nor can the trial court's innocuous comments regarding defense counsel's irrelevant and/or argumentative cross-examination,[110] or its correction of defense counsel's misstatement of the law during closing argument, be fairly characterized as overreaching or biased.[111] (See *People v. Bell*, *supra*, 40 Cal.4th at p. 605; compare *People v. Sturm*, *supra*, 37 Cal.4th at p. 1242 [trial court told jury that it "'appear[ed] that [the court] was ruling against [defense counsel] 99 times out of 100'"].) And, despite appellant's assertion that "the court's most damaging misconduct came during the testimony of [Witness No.16, through its inquiry into the terms of his immunity agreement]" (AOB 214), the jury was instructed pursuant to CALJIC No. 2.20 (3 CT 667) that they

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109. It is beyond cavil that a juvenile adjudication does not constitute a "felony conviction" for purposes of impeachment. (See, e.g., *In re Joseph B.* (1983) 34 Cal.3d 952, 955; *People v. Jackson* (1980) 28 Cal.3d 264, 311; see also *People v. Sanchez* (1985) 170 Cal.App.3d 216, 218.) Although appellant contends a "witness may be impeached with prior conduct evincing moral turpitude, even if such conduct was the subject of a juvenile adjudication" (AOB 214, italics omitted), the record shows that defense counsel was not seeking to impeach the witness with prior juvenile *conduct*, but, rather, with the *fact* of a prior juvenile *adjudication*. (See 57 RT 8939.)

110. A trial court may prohibit questions that are "designed to engage a witness in argument rather than elicit facts within the witness's knowledge." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1125, citing *People v. Mayfield*, *supra*, 14 Cal.4th at p. 755; see also *id.* at p. 1127.) Likewise, a trial court has "wide discretion in determining relevance." (*People v. Chatman* (2006) 38 Cal.4th 344, 371, citing *People v. Green* (1980) 27 Cal.3d 1, 19.)

111. A trial court "retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark." (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.) As the trial court correctly noted, and as the jury was instructed, there were "four separate theories upon which criminal liability [could] be premised[.]" (3 CT 716 [CALJIC No. 17.55, as modified].) In apparent recognition of that fact, defense counsel addressed those alternate theories of liability immediately following the trial court's remarks. (See 62 RT 9715.)

were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness." (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1126 [rejecting claim of misconduct where same instruction was given].)

In sum, the complained-of comments and questions did not have the effect of "'reprimanding defense counsel before the jury,'" (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1240, quoting *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174-1175), or of "creat[ing] the impression [that the trial court was] allying itself with the prosecution." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 353; compare *People v. Sturm*, *supra*, 37 Cal.4th at pp. 1230-1241 [documenting numerous examples of judicial bias]; *id.* at p. 1242 [trial judge "closed his admonition to the jury by questioning defense counsel's competence and knowledge of the rules of evidence"].)

D. Any Error Would Be Harmless

Appellant contends that "the cumulative effect of the trial judge's misconduct -- including misconduct during the penalty phase . . . requires reversal of both the guilt and penalty phase judgment no matter what standard of review this Court applies." (AOB 216.) Even if it were assumed that any or all of the alleged errors amounted to misconduct, no prejudice could be shown under any standard of review.

Defendant's contention rests, in effect, upon eight remarks made during the guilt phase of a month-long jury trial. (Compare *People v. Sturm*, *supra*, 37 Cal.4th at p. 1241 ["trial court sua sponte intervened more than 30 times" during the defense case in mitigation].) The record shows, however, that the complained-of remarks were not so prejudicial that they deprived appellant of "'a fair, as opposed to a perfect, trial.'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 112.) Moreover, the trial court instructed the jury pursuant to CALJIC No. 17.30 (3 CT 724) that it had "not intended by anything [it had] said or done, or by any questions that [it] may have asked, or by any ruling [it] may have made,

to intimate or suggest what [the jury] should find to be the facts, or that [it] believe[d] or disbelieve[d] any witness." (See *People v. Harris*, *supra*, 37 Cal.4th at pp. 350 [finding "no prejudice" where same instruction was given].) Finally, because of the strength of the evidence and the heinous nature of the crimes, there is no "reasonable possibility of an effect on the outcome." (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 236.) Appellant's contention should therefore be rejected.

XIV.

APPELLANT'S CONTENTION THAT THE TRIAL COURT SHOULD HAVE GIVEN "LIMITING INSTRUCTIONS" REGARDING EVIDENCE OF THREATS AND WITNESS FEARS IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

Appellant contends that he was "denied his rights to . . . due process, a fair trial, and a reliable death judgment" under the state and federal Constitutions because of the trial court's failure "to give a limiting instruction at both phases of the trial." (AOB 217, 222.) The record shows, however, that appellant did not request any limiting instruction during either phase of trial, nor did he ask the trial court to clarify or amplify the limiting instruction it provided; consequently, his contention is forfeited. Alternatively, it is without merit.

A. Proceedings Below

As set forth previously, prior to the presentation of testimony by the last defense witness, the trial court discussed proposed jury instructions with both parties. (See 61 RT 9463-9465.) The trial court informed counsel:

> [The Court:] The fact that I pass some [instructions] up in the packet do[es] not mean that they are not being given.
>
> We will have to discuss it.
>
> . . . . . .
>
> . . . Likewise, the fact that I mention an instruction now does not preclude counsel at a later point from arguing it should not be given.

(61 RT 9464.)

Defense counsel indicated his understanding of the foregoing by stating, "All right." (61 RT 9464.) The trial court then went on to list a number of instructions it intended to provide to the jury, including CALJIC No. 2.09, regarding the admission of evidence "for a limited purpose." (61 RT 9464-

9465.) Appellant did not ask the trial court to clarify or amplify CALJIC No. 2.09, nor did he ask that any other limiting instruction be given. (See RT, *passim*.)

B. Appellant's Contention Is Forfeited

As set forth previously, it is settled that when a defendant fails to request that an instruction otherwise correct in law should be clarified in a particular case, his claim of error regarding that instruction is forfeited. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1202.) A trial court is required to instruct sua sponte on the general principles of law that are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. St. Martin*, *supra*, 1 Cal.3d at p. 531; 5 Witkin & Epstein, Cal. Criminal Law, *supra*, § 609.) It need not, however, give instructions on specific points or special theories (commonly called "pinpoint" instructions), unless a defendant has requested clarifying or amplifying language. (5 Witkin & Epstein, Cal. Criminal Law, *supra*, § 610.) "'Generally, 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; *People v. Andrews*, *supra*, 49 Cal.3d at p. 218.)

Because appellant did not request clarification/amplification of the limiting instruction provided by the trial court, or request his own limiting instruction addressing matters which he now raises, his contention is forfeited. (See, e.g., *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1037 ["Oliver has forfeited his claim. Because he did not seek clarification of the instructions concerning the 'threats' and uncharged acts, he cannot complain about their lack of clarity on appeal"]; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 687 [defendant "argues that the issue has not been forfeited because any request for a limiting instruction would have been futile. We disagree"]; *People v. Boyer*,

supra, 38 Cal.4th at p. 466 ["failure to request [a limiting] instruction in the trial court forfeits a direct appellate claim that it should have been given"].) Likewise, his federal constitutional claim may not be considered. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126, fn. 30; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 991; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Davis*, *supra*, 10 Cal.4th at pp. 532, fn. 29, 533; cf. *United States v. Olano*, *supra*, 507 U.S. at p. 731 [113 S.Ct. at p. 1776]; *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590.)

C. In The Alternative, Appellant's Contention Is Without Merit

In the event this Court nevertheless believes it may address the absence of a more specific limiting instruction as affecting appellant's "substantial rights" (§ 1259; *People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 6; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 669, fn. 3; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 381), no error could be shown.

Appellant contends such a limiting instruction was required, based in part upon the following portions of the record in which "witnesses testified about their fear of testifying in anticipation of gang retaliation, or retaliation by unidentified people acting on appellant's behalf." (AOB 217.)

1. Guilt Phase Threat Or Fear Evidence

a. Sergeant Richard Valdemar

As set forth in Respondent's Statement of Facts, Sergeant Richard Valdemar of the Los Angeles County Sheriff's Department offered expert testimony regarding the violent and retaliatory practices of the Mexican Mafia. (See Statement of Facts, *ante*; see also 55 RT 8485-8563, 8568-8603.)

b. Witness No. 15

Witness No. 15 testified that he had warned his brother Anthony Moreno that "dropping out" of the Mexican Mafia carried with it a mandatory death sentence. (56 RT 8760.) Witness No. 15 elaborated on that point, which led to the following objection and ruling:

A I kept warning my brother that I was very concerned that something might happen to him or the family.

He was so involved into the drugs that all he wanted to do was inject heroin all day.

He didn't take it very serious.

I did.

I kept warning him that something was going to happen because Tito had been giving us information --

Mr. Esqueda [defense counsel]: I will object to any statements of Tito.

The Court: Yes.

That last portion --

Mr. Manzella [the prosecutor]: Let me ask another question.

The Court: The last portion of the answer having to do with what Tito said will be stricken and nonresponsive.

Next question.

(56 RT 8761.)

Witness No. 15 subsequently testified that, because he had been "debriefed," he was on the Mexican Mafia's "hit list," and was likely to be stabbed or killed. (56 RT 8799.) On recross-examination, the following colloquy occurred:

Q [by defense counsel] Has any inmate attempted to stab you while you were in custody?

A In the county jail.

Yes, there have been five different attempts.

Maciel sent people to do that.

Mr. Esqueda [defense counsel]: Your Honor, I will object to the speculation that Maciel has sent.

The Court: The last portion will be stricken without further foundation.

The portion that there have been five attempts to stab him will remain.

(56 RT 8833.)

c. Witness No. 16

Witness No. 16 testified under a grant of immunity. He identified a photograph of himself (People's Exhibit 81) with his face scratched out, and the number "187" written across his chest. (57 RT 9825.) He also testified:

Q [by the prosecutor] And the fact that in this photograph of Sangra gang members your image has been scratched out and the numbers "187" have been written across your chest, does that mean anything to you?

A Yes, it does.

Q What does that mean to you?

A It means that they want to kill me.

Q And why would they want to kill you?

A For testifying.

Q In these proceedings?

A That's correct.

Q All right.

Thank you.

(57 RT 8925.)

d. Witness No. 14

Witness No. 14 testified that Deputy District Attorney John Monaghan indicated that he would help Witness No. 14 obtain "hous[ing] in a federal institution" in return for the Witness No. 14's testimony at trial. (58 RT 9059.) Deputy District Attorney Monaghan confirmed that he had spoken "with a number of people and was able to have [Witness No. 14] housed at a specific institution within the California Department of Corrections so that he would be safe." (58 RT 9073.) Monaghan also confirmed that he had advised Witness No. 14 "that when he had completed testifying in the various cases that [Monaghan] would do what [he] could to have the federal government house him within a Federal Bureau of Prisons where he would not only be safe, but that he would be able to go to school and do what is called "program" which he cannot do . . . at the institution he is currently housed at." (58 RT 9074.)

e. Witness No. 13

Although Witness No. 13 did not testify about any threats, in her tape-recorded statement to police describing her brother's role in the murders (People's Exhibit 74; 57 RT 8960, 8963, 8965; see also 8 1SCT 1637), Witness No. 13 expressed concern that gang members might "send somebody to hurt her."

2. Penalty Phase Threat Or Fear Evidence

a. Nathaniel Lane

Nathanial Lane was brought into the courtroom during the penalty phase of trial and refused to testify. (62 RT 9837-9839.) Lane told the trial court:

I have nothing to say and I don't want to be here.

. . . . . .

. . . Bringing me here every day is not going to do any good.

(62 RT 9839.)

The following exchange ensured:

The Court: What I would do is if you refuse to testify without good reason, what I will do is have to hold you in contempt of court and I will have to order you incarcerated on my case, this case, until such time as you do testify.

Do you understand that?

The Witness: Well, you might as well have me put in jail for the rest of my life because I don't have nothing to say here now or no other time.

The Court: Well, the attorneys have not asked you any questions.

The Witness: I don't have anything to say.

The Court: You don't know what they are going to ask you.

The Witness: It doesn't matter.

I have nothing to say.

The Court: And if I hold you in contempt, your mind will not change?

The Witness: No.

The Court: Nothing I can do?

The Witness: No.

(62 RT 9840-9841.)

b. Witness No. 17

Witness No. 17 testified about the stabbing he had received by appellant on August 30, 1994, because of his suspected involvement in the shooting death of a little girl one week earlier. (63 RT 9868-9879.) Witness No. 17 indicated that he did not identify appellant as his assailant initially, because Witness No. 17 did not want "nothing against him." He changed his mind, however, when appellant began "sending messages to [his] family." (63 RT 9876.) Defense counsel objected:

Mr. Esqueda: Your Honor, I will object.

The Witness: Do you know what I mean?

Mr. Esqueda: Motion to strike.

Mr. Manzella: Let me interject.

The Court: The last portion will be stricken as nonresponsive to the question.

(63 RT 9877.)

Witness No. 17 refused to answer any further questions about the stabbing after the following exchange:

Q [by the prosecutor] After the shooting which resulted in the death of a little girl, did some El Monte Flores gang members come by your house?

A I don't want to talk about that no more, I said already.

Q Why not?

Why don't you want to talk to me?

A Because that bothers me.

I get stabbed and that thing bothers me.

You know?

(63 RT 9880; see also *id.* at pp. 9880-9883.)

As appellant acknowledges, "evidence of a witness's fear of testifying is admissible as relevant to credibility." (AOB 219.) "Generally, evidence that a witness is afraid to testify is admissible as relevant to the witness's credibility." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 301, citing Evid. Code, § 780; *People v. Warren*, *supra*, 45 Cal.3d at p. 481.) "For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1142.)

> . . . 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. . . . [¶] 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.

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

Contrary to appellant's contention that the trial court had a sua sponte duty to provide a limiting instruction due to the purported "dominant role" the witness' fear of recrimination played at trial (see AOB 220), this Court has held in a similar situation that a trial court has "no obligation" to give such an instruction "without request[.]" (*People v. Sapp*, *supra*, 31 Cal.4th at p. 301, citing *People v. Padilla* (1995) 11 Cal.4th 891, 950.) And, as stated previously, no such request was made here.

Nevertheless, in addressing a claim of instructional error, a reviewing court decides whether there is a reasonable likelihood that the jury misconstrued or misapplied the terms of the instruction. (*People v. Clair*, *supra*, 2 Cal.4th at p. 663.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248; see also *People v. Castillo*, *supra*, 16 Cal.4th at p. 1016.) "We must look to the entire charge, rather than merely one part, to

determine whether error occurred." (*People v. Chavez*, *supra*, 39 Cal.3d at p. 830; see also *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248.)

Here, the record shows that the trial court sustained defense counsel's objections to testimony regarding threats allegedly attributable to appellant, and struck the evidence. (See, e.g., 56 RT 8833; 63 RT 9877.) In addition, as appellant admits, general limiting instructions were "given in the guilt and penalty phases," as well as "instructions on the believability of witnesses." (AOB 222.) Thus, despite appellant's contention that "fear of Eme became a dominant theme in the prosecutor's case for guilt" (AOB 220),[112] there is no reasonable likelihood that the jury misconstrued or misapplied the terms of the instructions provided so as to convict appellant based merely upon unspecified threats to certain witnesses. (*People v. Clair*, *supra*, 2 Cal.4th at p. 663.)

D. Any Error Would Be Harmless

Even if it were assumed that the alleged instructional error occurred herein, "the prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable prejudicial error test embodied in article IV, section 13 [of the California Constitution]." (*People v. Flood* (1998) 18 Cal.4th 470, 490, citing *People v. Watson*, *supra*, 46 Cal.3d at pp. 836-837.) This Court has declared that a reviewing court may reverse a conviction based upon instructional error under similar circumstances "'only if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 111.) No such showing can be made here.

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112. The trial court instructed the jury immediately before closing arguments in the guilt phase to "keep in mind that the statements that you are about to hear are not evidence. You have heard the evidence." (62 RT 9648.)

Again, the evidence of appellant's guilt was strong, and the nature of the crimes heinous. Thus, under any standard of harmless-error review, "it is neither reasonably possible (*People v. Jackson* [(1996)] 13 Cal.4th [1164,] 1232) nor reasonably probable (*Strickland v. Washington* [(1984) 466 U.S. 668, 669 [164 S.Ct. 20521, 80 L.Ed.2d 674]] that the evidence or its treatment altered the [guilt or] penalty phase outcome at defendant's capital trial." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 301.)

XV.

APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPROPERLY REFUSED TO INVESTIGATE AND HOLD A HEARING ON AN ALLEGED VIOLATION OF *BRADY v. MARYLAND* IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

In his final contention regarding alleged error during the guilt phase of trial, appellant maintains that he was denied his state and federal Constitutional rights to "due process and a fair trial" by the trial court's failure to "investigate the possibility that there was an express or implied offer of assistance or lenity by law enforcement agents [with respect to Witness No. 15], as claimed in appellant's motion for new trial. (AOB 224, 226-229.) The record shows, however, that appellant did not request any investigation or pursue this matter further at the hearing on the motion for new trial; consequently, his contention is forfeited. Alternatively, it is without merit.

A. Proceedings Below

Prior to sentencing, defense counsel moved for a new trial pursuant to section 1181, based in part upon the alleged "[p]rejudicial misconduct of the prosecution[.]" (3 CT 830-834.) At the hearing on the motion, defense counsel argued as follows:

> [The Court:] Let's take the motion for new trial.
>
> The Court has read and considered the motion filed by Mr. Esqueda [defense counsel] and the People's opposition.
>
> Let's see.
>
> Moving party, Mr. Esqueda, I will hear you further on that motion.
>
> Mr. Esqueda: Your Honor, I don't have anything additional to add, and I don't want to be repetitive or redundant other than just a few things that I didn't include.

I would ask this Court to make part of the record, the largest part of the record, the records that were received from (Witness No. 15), that is, the witness and brother of the decedent, Anthony Moreno.

Because it is my understanding that this person received a credit of time served on a 25 to life sentence after he sat here and made the representation to the jury, and I believe the People represented, that there were not going to be any deals or leniency given to him in this testimony.

I know he wrote to this Court asking the Court to contact Judge Joseph De Vanon in Pasadena and to convey to the sentencing judge in Pasadena how cooperative and what a great guy he was in coming here to testify.[113/]

And I think that raises an inference that something was going on when an individual facing 25 to life is given credit for time served.

I have been around the courthouse many, many years, in excess of 27 years, and this is the first time I have known anybody facing 25 to life to walk out of court with time served.

So I would ask the Court to lodge those letters as part of the record.

The Court: They are.

That is why they were put in the court file in the first place.

Once they are put in the court file, they become part of the record in

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113. In a letter filed in this case on January 22, 1998, Witness No. 15 thanked the trial court for "show[ing him] some respect" while testifying. Witness No. 15 also asked the trial court to "call up [his] Public Defender . . . and also . . . Judge . . . De Vannon [sic] . . . the [judge] . . . handling [Witness No. 15's] case." (8 1SCT 1705.)

Previously, in a letter to the trial court dated July 19, 1997, Witness No. 15 expressed his fear of testifying in this case and indicated that appellant was "threatening . . . to do something to the rest of [Witness No. 15's] family . . . ." Witness No. 15 accordingly asked the trial court to "exclude [him] as a witness." (1 2SCT 2-5.)

the case and will be transmitted with all other transcripts and items and so forth that go along with everything.

That is why they were brought to counsel's attention.

Mr. Esqueda: I am not in any way remotely suggesting that there was any wrongdoing by this Court.

Just asking to make sure that that is part of the record.

The Court: They are, indeed.

Anything else?

Mr. Esqueda: I will submit it, Your Honor.

(66 RT 10245-10247.)

The prosecutor responded that the sentencing court in Witness No. 15's case was not petitioned by the District Attorney's Office to entertain any requests for leniency:

Mr. Manzella [the prosecutor]: With regard to (Witness No. 15), Your Honor, I should put on the record at this point that the plea or the court -- the sentencing court in (Witness No. 15)'s case was not advised by the District Attorney's office but advised by the Sheriff's -- representatives of the Sheriff's Department as to his testifying in this -- in our case, the Maciel case.

The representative of the District Attorney's Office who was handling (Witness No. 15)'s case did not consent or join with the representative of the Sheriff's Department in advising the Court of his cooperation in this case, his testimony in this case.

It is my understanding that the Deputy District Attorney handling (Witness No. 15)'s case objected to any leniency being shown to (Witness No. 15).

(66 RT 10247-10248.)

At the conclusion of argument, the trial court denied appellant's motion for new trial:

> [The Court:] The allegation and motion for new trial are three:
>
> Error in instructing the jury, prejudicial misconduct of prosecution, and juror improperly dismissed.
>
> There is, however, no enumeration in the motion as to exactly what error or errors the defense feels were made in jury instructions.
>
> There is no enumeration or explanation of the alleged misconduct of the prosecution whatsoever.
>
> There is no argument re the dismissing of the juror. No citation to authority or fact.
>
> So the motion is denied.

(66 RT 10247-10249.)

B. Appellant's Contention Is Forfeited

As the record shows (and as the trial court expressly found), appellant's contention was asserted without citation to applicable authority or evidentiary facts. Matters that "are perfunctorily asserted without argument or authorities in support" may be denied without consideration. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1214, fn. 11; see also *People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *People v. Gonzalez*, *supra*, 126 Cal.App.4th at p. 1543, fn. 3.)

Moreover, despite appellant's present claim that the trial court erroneously denied his motion for new trial because of the purported "need to investigate possible *Brady*[114] error" (AOB 228), no such contention was advanced at trial. In fact, appellant made *no* mention of alleged *Brady* error in his moving papers (see 3 CT 830-834), or at the hearing on his motion (see 66

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114. *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

RT 10245-10247). His claim of federal constitutional error is likewise forfeited. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126, fn. 30; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 991; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Davis*, *supra*, 10 Cal.4th at pp. 532, fn. 29, 533; cf. *United States v. Olano*, *supra*, 507 U.S. at p. 731 [113 S.Ct. at p. 1776]; *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590.)

C. Alternatively, Appellant's Contention Is Without Merit

Even if it were assumed that appellant's newly-asserted contention is cognizable, it would nevertheless be without merit. "When a verdict has been rendered or a finding made against the defendant, he may move for a new trial on various statutory grounds" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1159), including, as relevant here, that "the district attorney . . . has been guilty of prejudicial misconduct *during* the trial thereof before a jury" (§ 1181 (5), italics added). A new trial may be granted *only* if the defendant demonstrates reversible error. (*People v. Clair*, *supra*, 2 Cal.4th at p. 667; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1159.) "On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1159, citing *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 128.) The trial court's ruling will not be disturbed "'unless a manifest and unmistakable abuse of discretion clearly appears.'" (*People v. Davis*, *supra*, 10 Cal.4th at p. 524.)

Appellant's claim of prejudicial misconduct is premised upon an alleged violation of *Brady v. Maryland*. In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87 [83 S.Ct. at pp.

1196-1197].) The high court subsequently clarified that "the duty to disclose such evidence exists even though there has been no request by the accused, that the duty encompasses impeachment evidence as well as exculpatory evidence, and that the duty extends even to evidence known only to police investigators and not to the prosecutor." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042, citing *United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 97 L.Ed.2d 481]; *United States v. Agurs*, *supra*, 427 U.S. at p. 107 [96 S.Ct. at p. 2399]; *Kyles v. Whitley* (1995) 514 U.S. 419, 438 [115 S.Ct. 1555, 131 L.Ed.2d 490].)

So-called *Brady* evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*Kyles v. Whitley*, 514 U.S. at p. 433 [115 S.Ct. at p. 1565].) Because *Brady* applies to police investigators as well as prosecutors, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Id.* at p. 437 [115 S.Ct. at p. 1567]; see also *In re Brown* (1998) 17 Cal.4th 873, 879; accord, *People v. Salazar*, *supra*, 35 Cal.4th at p. 1042.)

"[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 [119 S.Ct. 1936, 144 L.Ed.2d 286], fn. omitted.) As this Court has observed:

> . . . Prejudice, in this context, focuses on "the materiality of the evidence to the issue of guilt or innocence." Materiality, in turn,

> requires more than a showing that the suppressed evidence would have been admissible, that the absence of the suppressed evidence made conviction "more likely," or that using the suppressed evidence to discredit a witness's testimony "might have changed the outcome of the trial." A defendant instead "must show a 'reasonable probability of a different result.'"

(*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043, citing *Banks v. Dretke* (2004) 540 U.S. 668, 699 [124 S.Ct. 1256, 157 L.Ed.2d 1166]; *Strickler v. Greene*, *supra*, 527 U.S. at p. 289 [119 S.Ct. at p. 1952]; *Wood v. Bartholomew* (1995) 516 U.S. 1, 2 [116 S.Ct. 7, 133 L.Ed.2d 1]; *United States v. Agurs*, *supra*, 427 U.S. at p. 112, fn. 20 [96 S.Ct. at pp. 2401-2402]; *United States v. Fallon* (7th Cir. 2003) 348 F.3d 248, 252.)

Petitioner's claim of *Brady* error rests entirely upon the prosecution's alleged suppression of Witness No. 15's receipt of "an extremely lenient sentence [in his Three Strikes case]." Appellant argues, "[a]ssuming the jury *was* kept ignorant of the true motives underlying [Witness No. 15's] testimony and the magnitude of the benefit received, one can hardly be confident that appellant received a fair trial." (AOB 231, italics in original.)

Yet as the record shows, Witness No. 15 was sentenced in his Three Strikes case *after* the jury returned its verdicts in the guilt phase of appellant's trial; the prosecutor represented (and appellant does not contend otherwise) that no consideration was provided by the District Attorney's Office in exchange for Witness No. 15's testimony in this case. Instead, it appears that the Los Angeles County Sheriff's Department subsequently lobbied the court on Witness No. 15's behalf, a request that was opposed by the trial prosecutor in that case. (See 66 RT 10247-10248.) There is nothing in the record to suggest that such lobbying was even contemplated at the time trial was pending in this matter.

Thus, even if the *post-trial* efforts of the Sheriff's Department on Witness No. 15's behalf arguably fall within the purview of *Brady* (compare *Strickler v. Greene*, *supra*, 527 U.S. at pp. 281-282 [119 S.Ct. at p. 1948]), there is no evidence that the District Attorney's Office had advance knowledge that the efforts would be undertaken, much less that it "suppressed" such information (*Banks v. Dretke*, *supra*, 540 U.S. at p. 691 [124 S.Ct. at p. 1272]). Nor can those efforts be considered material in the context of this case. "'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime[.]"' (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1050, quoting *United States v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1210.) "In contrast, a new trial is generally not required when the testimony of the witness is 'corroborated by other testimony[.]'" (*Ibid.*)

Here, Witness No. 15's testimony was corroborated by other evidence linking appellant to the charged crimes. The primary thrust of Witness No. 15's testimony concerned the practices of the Mexican Mafia, as well as appellant's self-proclaimed membership in that gang. (See 56 RT 8714-8722.) In contrast, appellant's role in the murders was established in detail through the videotaped meeting of Mexican Mafia members (including appellant at one point) discussing the planned "hit" on "drop out" Anthony Moreno (55 RT 8530, 8556-8559; 8 1SCT 1644-1672); the testimony of Witness No. 14, recounting his encounter with appellant on the day of the murders, and Jimmy Palma's statement to appellant shortly before the murders that he was "strapped" and "going to take care of business" (57 RT 8996); telephone and pager records establishing that appellant had received numerous calls from the homes of several codefendants before and after the murders (59 RT 9212-9220); and, finally, appellant's audiotaped police interview, in which he admitted his role as "middle man" and stated at one point, "My kids, my wife, I mean they'll all

be all fucked up, because of me." (60 RT 9309-9311, 9314; 8 1SCT 1675, 1696, 1698.)

In sum, "[i]n light of that testimony, as well as other circumstantial evidence of [appellant's] guilt, it is not reasonably probable the result would have been different had the defense sought to use [the sentence ultimately received by Witness No. 15] to impeach [his] testimony." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1052.) Appellant has therefore "failed to establish the materiality of this evidence under *Brady*." (*Ibid.*)

PART 2. PENALTY PHASE ARGUMENTS

XVI.

APPELLANT'S CONTENTIONS REGARDING ALLEGED PROSECUTORIAL AND JUDICIAL MISCONDUCT ARE FORFEITED; ALTERNATIVELY, THEY ARE WITHOUT MERIT

In his first claim of error involving proceedings during the penalty phase of trial, appellant contends that he was "deprived of his [state and federal] rights to a fair trial, confrontation, and a reliable death judgment" as a result of the prosecutor's reference during closing argument to "the privileges enjoyed by people sentenced to life imprisonment without parole," and by his appeal "to the passions of jurors by asking them to close their eyes and imagine the victims' suffering as they died." (AOB 233, 235.) Appellant also contends that the same rights were violated as a result of the trial court's purported "disparate treatment of defense counsel and the prosecutor regarding the privileges enjoyed by life prisoners," and by its interruption of "defense counsel's argument on the jury's unbridled discretion not to impose death." (AOB 239, 241.) The record shows, however, that appellant did not object to the foregoing instances of alleged misconduct or request curative instructions; consequently, his contentions are forfeited. Alternatively, they are without merit.

A. Legal Principles Of Prosecutorial Misconduct

As set forth previously, "[a] prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Harrison*, *supra*, 35 Cal.4th at p. 242, quoting *People v. Morales*, *supra*, 25 Cal.4th at p. 44; see also *People v. Stanley*, *supra*, 39 Cal.4th at pp. 950, 958; *People v. Gionis*, *supra*, 9 Cal.4th at p. 1214; accord, *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181 [106 S.Ct. at p. 2471]; *Donnelly v. DeChristoforo*,

supra, 416 U.S. at p. 643 [94 S.Ct. at p. 1871].) To violate the federal Constitution, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs*, *supra*, 427 U.S. at p. 108 [96 S.Ct. at p. 2400].) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under California law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Samoyoa*, *supra*, 15 Cal.4th at p. 841; see also *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) "A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom." (*Ibid.*) "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation] . . . ." (*People v. Williams*[, *supra*,] 16 Cal.4th [at p.] 221, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) Thus, "[a] defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.)

A claim of prosecutorial misconduct may be forfeited where "[a] timely objection and request for admonition at the first sign of any purported misconduct might have curbed the vigor of the prosecutor's argument." (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244, citing *People v. Dennis*, *supra*, 17 Cal.4th at p. 521; see also *People v. Stanley*, *supra*, 39 Cal.4th at p. 959.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct [at trial]. [Citation.]" (*People v. Samoyoa, supra*, 15 Cal.4th at p. 841; see also *People v. Box, supra*, 23 Cal.4th at p. 1215.)

"A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citation.]" (*People v. Hill, supra*, 17 Cal.4th at p. 820; see also *People v. Harrison, supra*, 35 Cal.4th at pp. 243-244.)

Respondent addresses each of appellant's claims of prosecutorial misconduct in turn.

1. The Prosecutor's References To The Privileges Afforded Prisoners Sentenced To Life Without Possibility Of Parole

Appellant contends the following portion of the prosecutor's closing argument constituted misconduct because it purportedly referred "to supposed facts that [were] not in evidence" (AOB 233, italics omitted):

> Consider this.
>
> Consider what it means to serve life in prison.
>
> The defendant would have access to every recreational facility and activity.
>
> Basketball, weights, television, movies, magazines, law library, visiting privileges.
>
> He would have access to all of those activities.

(65 RT 10133-10134.)

2. The Prosecutor's Invitation To Jurors To Imagine The Victim's Suffering

Appellant also contends the prosecutor committed misconduct during closing argument by appealing "improperly to the jury's passions and prejudices." (AOB 235-236) by way of the following comments:

> Finally, ladies and gentlemen, the law allows you to consider the travail [through] which the victims went while they were being killed.
>
> If you have not already done so, I suggest that some time you should close your eyes and based upon the evidence that you heard think about what it was like and try to picture what it was like in that room when those five people were being slaughtered.
>
> Dido was probably under the influence because of the amount of heroin you know he took that day.
>
> Tito Aguirre may have been under the influence as well, but we know that he was alert enough to run from his killers.
>
> Then there are Maria, Laura and Ambrose, the baby.
>
> Maria, it appears, tried to run. She was shot in the hip and went down and then was shot in the head at close range.
>
> You are entitled to consider in determining which penalty is appropriate what it was like for Maria to lay there knowing that she was going to die.
>
> It is appropriate for you to consider, in determining the penalty, the appropriate penalty, to consider what Maria may have felt when the bullet exploded into her brain.
>
> We can hope that Ambrose was not awake when he was shot.
>
> You recall the Coroner's testimony that the bullet passed through his eyelid, the one that entered his brain, passed through his eyelid indicating that his eyes were closed at the time that [he] was shot.

But if that were the case, if little Ambrose was asleep when he was shot, then he would have had to have been shot first because enough shots were fired in that room to have awakened him if he had been sleeping.

So it appears that Ambrose was probably awake, because it does not appear that he was shot first.

He was probably awake which means that if his eyes were closed, and they were, they were closed in terror and fear.

You are entitled to consider that.

We know that Laura Moreno was awake. We know she was awake. And we know what her last act was.

We know what her last act was as she lay dying on the floor after having been shot through the back.

We know that her last act was to reach over and to touch her mother. We know that because of People's Exhibit 41.

You can see it clearly on People's 41. You can see the handprint of a little girl on the back of her mother's slacks.

So we know that Laura Moreno's, five year old Laura Moreno's, last act was to reach out for her mother. But we also know that Laura found no comfort there because her mother lay dying as well.

(65 RT 10136-10138.)

Appellant in addition finds fault with the following passage quoted by the prosecutor from Gatlin, The Killing of Bonnie Garland (1982).[115/]

When one person kills another, there is an immediate revulsion at the nature of the crime. But in a time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an

---

115. See *People v. Clark*, *supra*, 5 Cal.4th at p. 1034, fn. 41; see also *People v. Rowland, supra*, 4 Cal.4th at pp. 277-278, fn. 17.

identifiable figure.

To those individuals in the community of goodwill and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate; and that is always the criminal.

The dead person ceases to be a part of everyday reality; ceases to exist. She is only a figure in a historic event.

And we inevitably turn away from the past towards the ongoing reality. And the ongoing reality is the criminal; trapped, anxious, now helpless, isolated, perhaps badgered, perhaps bewildered. He usurps the compassion that is justly the victim's. And he will steal his victim's moral constituency along with her life.

Don't let that happen.

He does not deserve your sympathy.

He does not deserve your good will.

He does not deserve your pity.

He does not deserve your warmth.

He does not deserve your compassion.

He does not deserve your mercy.

And he does not deserve your leniency.

(65 RT 10139-10140.)

B. Appellant's Contentions Regarding Alleged Prosecutorial Misconduct Are Forfeited

As demonstrated by the foregoing, no objection was made to the prosecutor's comments. (See 65 RT 10134, 10136, 10140.) Appellant's contentions regarding alleged prosecutorial misconduct are therefore forfeited as a result of his failure to interpose "[a] timely objection and request for admonition at the first sign of any purported misconduct . . . ." (*People v. Harrison*, *supra*, 35 Cal.4th at p. 244; see also *People v. Huggins*, *supra*, 38

Cal.4th at pp. 251-252.)

Appellant nevertheless claims that "[n]either an objection nor a request for curative admonition [was] necessary," purportedly because the prosecutor's "argument was so inflammatory as to be well beyond the curative power of the court"; he also maintains that, "[g]iven the court's discourteous and disparaging treatment of defense counsel," counsel "may well have wished to avoid [a] confrontation with the court . . . ." (AOB 244-245.)

As set forth in the following argument, however, the prosecutor's comments were well within the "wide latitude" afforded prosecutors during closing argument (see *People v. Williams*, *supra*, 16 Cal.4th at p. 221) and, in any event, were not so inflammatory that "'an admonition would not have cured the harm caused by the [alleged] misconduct.'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; see also *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 [finding alleged misconduct to have been "waived" by failure to object].) Moreover, and contrary to appellant's contention, the record shows that the trial court's interaction with defense counsel was not such that "a timely objection and/or a request for admonition . . . would [have been] futile." (*Ibid.*)

> As noted by this Court in *People v. Hillhouse* (2002) 27 Cal.4th 469:
>
> It is true that in an extreme case, when misconduct was pervasive, defense counsel had repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile, we have excused counsel from having to object continually.

(*Id.* at pp. 501-502.)

But, as the quoted portions of transcript make clear, "[t]his case was not remotely close to that extreme." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 502.) To the contrary, "[t]he trial atmosphere was not poisonous, defense counsel did not object at all, and the record fails to suggest that any objections

would have been futile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1213.) Under such circumstances, "the normal rule requiring an objection applies here, not the unusual one applied to the extreme circumstances[.]" (*Ibid.*)

Appellant's contentions should be rejected outright.

C. Alternatively, Appellant's Contentions Regarding Alleged Prosecutorial Misconduct Are Without Merit

In the alternative, appellant's contentions are without merit. The prosecutor's references to the privileges enjoyed by life prisoners preceded comments about appellant's poor record of conduct while awaiting trial:

> And consider this.
>
> Sentencing this defendant to prison is the same as handing him a credit card to commit assaults, allowing him to assault correctional officers, other inmates and prison staff.
>
> We have shown that custody does not inhibit this man.
>
> He not only committed violent assaults while in custody, but he committed them under the very eyes of his custodians, the jail deputies.
>
> No one is safe from him.
>
> The defendant was not being attacked by anyone when he shanked the two inmates.
>
> He was not defending himself when he shanked those two inmates, Wishum and Velasquez.
>
> He was not being attacked by anyone when he tried to head butt Deputy Wiggins.
>
> And the defendant did not have those shanks for protection. He had them to commit assaults, for whatever reason.

(65 RT 10134.)

The prosecutor's comments on appellant's potential to endanger others if sentenced to life imprisonment without possibility of parole were proper.

(See *People v. Huggins*, *supra*, 38 Cal.4th at p. 253 [finding similar remarks to be permissible]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1063-1064 [same].) And, this Court has characterized far more pointed statements describing the conditions of life in prison as "brief and mild," and concluded that they "could not have been prejudicial standing alone[.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 838.)

Likewise, the prosecutor's invitation to the jury "to consider the travail [through] which the victims went while they were being killed" (65 RT 10136) was entirely proper. In *People v. Wrest*, *supra*, 3 Cal.4th at page 1088, the prosecutor similarly exhorted the jury "to 'imagine' what was going through the minds of the victims and 'to consider what impact [the defendant's acts] had upon the victims in this particular case. Six separate victims that can never, never have those memories taken away.'" (*Id.* at p. 1107.) In rejecting the defendant's claim of prosecutorial misconduct, this Court held: "The argument was proper. The impact of a capital defendant's crimes upon victims can be considered by a penalty phase jury. As a part of victim impact argument, the jury can be urged to put itself in the shoes of the victim." (*Id.* at pp. 1107-1108, citing *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Edwards* (1991) 54 Cal.3d 787, 839; *People v. Douglas* (1990) 50 Cal.3d 468, 536.)

Finally, the prosecutor's resort to the previously-quoted passage from The Killing of Bonnie Garland was also appropriate. In *People v. Rowland, supra,* 4 Cal.4th at page 238, this Court rejected an identical claim of misconduct involving the same passage:

> We believe that the jury must have taken the challenged remarks at face value: in determining penalty, it was required to consider not only the criminal but also his crime. That proposition is manifestly sound. Defendant asserts that "[t]he prosecutor's remarks . . . had only one

thrust -- use of the judicial process is a further aggravation of the crime." There is simply no reasonable likelihood that the jury so understood the words.

(*Id.* at pp. 277-278; see also *People v. Cook*, *supra*, 39 Cal.4th at p. 613 ["the text read to the jury is a reminder that the victims of murder are absent from the courtroom, but the living defendant is present"]; *People v. Gurule* (2002) 28 Cal.4th 557, 658 ["we have rejected this precise claim before, involving apparently the same passage from the same book"]; *People v. Clark*, *supra*, 5 Cal.4th at pp. 1033-1034 [the import of the prosecutor's statements "were to remind the jury that, while it may be natural to sympathize with defendant, because the jury sees him every day, the victim (and her inability to attend the trial) should be remembered when the jury is making its decision"].)

In sum, no prosecutorial misconduct has been shown.

D. Legal Principles Of Judicial Misconduct

As set forth previously, "[a] trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." *(People v. Carpenter*, *supra*, 15 Cal.4th at p. 353; see also *People v. Bell*, supra, 40 Cal.4th at p. 603.) In undertaking such an evaluation, a reviewing court "must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." (*People v. Harris*, supra, 37 Cal.4th at p. 347.)

As with claims of prosecutorial misconduct, a claim of error involving judicial misconduct may be forfeited by the defendant's failure to object. (*People v. Bell*, *supra*, 40 Cal.4th at p. 603, fn.7; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 761; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1108.)

Respondent addresses each of appellant's claims of judicial misconduct in turn.

1. The Trial Court's Purported Disparate Treatment Of Defense Counsel And The Prosecutor Regarding The Privileges Enjoyed By Life Prisoners

During defense counsel's closing argument, the following colloquy occurred:

> [Defense Counsel:] Why let [appellant] breathe and watch T.V., work out, lift weighs, have visits?
>
> It would be grossly inappropriate for you to consider those factors. But that is the revenge that they are seeking.
>
> Because the truth of the matter is that as a Mexican Mafia member who receives life without the possibility of parole, you are sent to Pelican Bay and he is in his cell 23 hours a day.
>
> The Court: Let me just interrupt.
>
> Counsel, I will allow both of you latitude, but there is no evidence of that and it is not always the case.
>
> So on both counts, the Court will sustain its objection.
>
> Ladies and gentlemen, like it or not, you will have to decide this case based on the evidence we received in the trial and not statements like that.
>
> It is not correct.
>
> Go ahead.

(65 RT 10150-10151.)

2. The Trial Court's Interruption Of Defense Counsel's Argument On The Jury's Purported Unbridled Discretion Not To Impose Death

Appellant also points to the following colloquy as yet another example of judicial misconduct:

> [Defense Counsel:] And I suggest to you when the government stands here and tells you:

Kill Mr. Maciel for the killings he is responsible for, there is no distinction between that and what occurs on the streets.

It is a distinction without a difference because all killings are wrong. They're evil. And no one should die.

The law in the State of California does not require you ever to impose the death penalty.

You have heard the law. I'm not going to repeat it.

Mr. Manzella [the prosecutor] told you that there is no preference. It seems to me that if there is no preference, he certainly argued vigorously for the penalty of death.

The United States Supreme Court has held that the death penalty is not cruel and unusual punishment because the jury has unbridled discretion to select the appropriate penalty.

And as long --

The Court: I hate to interrupt, but I will, however, when counsel misstates the law.

You do not have unbridled discretion to do whatever you feel like doing on a whim.

The U.S. Supreme Court has never held so.

The reason we have a death penalty law that is constitutional is because you are guided by a list of factors that must be considered in this case, Mr. Esqueda [defense counsel].

They are the factors that were read to the jury.

Go ahead.

(65 RT 10143-10144.)

E. Appellant's Contentions Regarding Alleged Judicial Misconduct Are Forfeited

As demonstrated by the foregoing, no objection was made to the trial court's comments. (See 65 RT 10144, 10151.) Appellant's contentions regarding alleged judicial misconduct are therefore forfeited as a result of his failure to object. (*People v. Bell*, *supra*, 40 Cal.4th at p. 603, fn.7; *People v. Monterroso*, *supra*, 34 Cal.4th at pp. 759-760; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1108.) And, appellant's claim that any objection would have been futile (see AOB 245-246) should be rejected for the same reasons previously set forth with respect to his contentions regarding alleged judicial misconduct during the guilt phase of trial.

F. Alternatively, Appellant's Contentions Regarding Alleged Judicial Misconduct Are Without Merit

Appellant's contentions regarding alleged judicial misconduct are nevertheless without merit. A trial court may properly limit comment on the conditions of confinement at Pelican Bay State Prison. As this Court has held in that regard:

> The right to present closing argument at the penalty phase of a capital trial, while broad in scope, "is not unbounded . . . ; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark." (*People v. Marshall*, *supra*, 13 Cal.4th at pp. 854-855.) It is improper to state facts not in evidence, unless such facts were subject to judicial notice or are "matters of common knowledge or illustrations drawn from experience, history, or literature." (*People v. Farmer* (1989) 47 Cal.3d 888, 922 . . . , overruled on another ground in *People v. Waidla*[, *supra*,] 22 Cal.4th [at p.] 724, fn. 6 . . . .) *The security conditions at Pelican Bay State Prison*

fall into none of these categories.

(*People v. Boyette*, *supra*, 29 Cal.4th at pp. 463-464, italics added.)

The trial court also properly corrected defense counsel's misstatements of law regarding the jury's "unbridled" discretion in a death penalty case. "'[N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 301, quoting *People v. Samayoa*, *supra*, 15 Cal.4th at p. 853.) Sentencing juries "'may not act on whim or unbridled discretion.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 393, quoting *People v. Clark* (1993) 3 Cal.4th 41, 164.)

Moreover, the trial court's interruption of defense counsel's argument was not so "discourteous and disparaging . . . as to discredit the defense . . . ." (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233, internal quotation marks omitted.) As set forth previously, "[i]n the setting of a protracted trial, . . . the court's momentary and isolated expression of irritation with defense counsel did not indicate bias or suggest to the jury that the court was 'allying itself with the prosecution.'" (*People v. Bell*, *supra*, 40 Cal.4th at p. 605, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 353.)

No judicial misconduct has been shown.

G. Any Error Would Be Harmless

Appellant contends that "[t]he above errors were [of an] extremely prejudicial character because all went to the heart of the jury's death penalty determination." (AOB 246.) Even if it were assumed any or all of the alleged errors amounted to misconduct, however, no prejudice could be shown under any standard of review.

The complained-of comments by the prosecutor and trial court were innocuous, occurred over the course of a lengthy and complicated trial, and were not "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs*, *supra*, 427 U.S. at p. 108 [96 S.Ct. at p. 2400] [discussing federal harmless error standard for prosecutorial misconduct]; *People v. Bell*, *supra*, 40 Cal.4th at p. 605 [same]; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 112 [discussing judicial misconduct, and concluding reversal is required only where the judicial misconduct was so prejudicial that it deprived defendant of "'a fair, as opposed to a perfect, trial'"].) Indeed, with respect to the prosecutor's comments, the trial court instructed the jury that "[s]tatements made by the attorneys during the trial are not evidence[.]" (3 CT 767 [CALJIC No. 1.02.) Such an instruction has been held to guard against any prejudicial result in similar situations. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148.)

Nor is "it . . . reasonably probable that a result more favorable to [appellant] would have been reached without the [alleged] misconduct" under state law. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839 [discussing prosecutorial misconduct under state-law standard of error]; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 236 [discussing judicial misconduct under same standard and concluding such misconduct "is subject to the general rule for error under California law that reversal requires prejudice," i.e., "a reasonable possibility of an effect on the outcome"].) The evidence giving rise to the jury's verdicts of death was both heinous and compelling. Appellant's contentions should therefore be rejected.

XVII.

APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPROPERLY DENIED HIS REQUEST TO EXCUSE JUROR NO. 2 FOR CAUSE IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

Appellant contends the trial court improperly denied his request to excuse Juror No. 2 for cause, after that juror had informed the court that he worked with Los Angeles County Deputy Sheriffs Robert Poindexter and Thomas Looney, two penalty phase prosecution witnesses. Appellant's failure to pursue the matter following the trial court's invitation to "reopen" his request constitutes a forfeiture of the contention on appeal. In the alternative, the trial court properly denied appellant's request.

A. Proceedings Below

Upon the conclusion of the prosecutor's penalty phase opening statement, Juror No. 2 approached the bench and informed the trial court that he had "close personal knowledge of who [Deputies Poindexter and Looney] are." Juror No. 2 had been employed in "general maintenance" at the Los Angeles County Jail for "three years" and, although he did not "really know [the deputies], . . . they work[ed] the same shift as [him]." (63 RT 9828.) The trial court conducted the following examination of Juror No. 2:

The Court: Have you seen either one of the deputies outside of work?

Juror No. 2: Never.

The Court: Socialized with either one?

Juror No. 2: No.

The Court: Ever go out to grab a beer or get something to eat or go to their house or have they been at your house?

Juror No. 2: I have had lunch with them in the same cafeteria.

The Court: Have you spoken to either one of them about anything relating to this case or to the defendant, Mr. Maciel?

Juror No. 2: No.

The Court: Or anything remotely related to the matter?

Juror No. 2: No.

(63 RT 9828-9829.)

After both sides declined to inquire further, the trial court asked Juror No. 2:

[Deputies Poindexter and Looney] will be testifying as witnesses here. Therefore, their credibility like any other witness, as I instructed you, is always an issue in the case.

You have to decide what weight to give the testimony of each witness, prosecution or defense.

Do you believe that you can hold these two witnesses to the same standard and apply the same yard stick to their testimony or do you think your knowledge of them would make that difficult to do?

(63 RT 9829.)

Juror No. 2 responded that he "would weigh [their testimony] the same as [he] would weigh anybody else's testimony." (63 RT 9829.) The trial court then stated, "If you realize that it is not possible for you to follow the Court's instructions re credibility and anything else, let me know." Juror No. 2 answered, "Yes." (63 RT 9830.)

Juror No. 2 exited the courtroom, and defense counsel moved to dismiss him for cause; counsel stated, "[Juror No. 2] has indicated that he has had lunch with [the deputies] and I think there is a risk of danger or potential bias." (63 RT 9830.) After hearing argument from the prosecutor, and initially taking the matter "under submission," the trial court ruled:

The Court: . . . [¶] I will say the following:

I will let [you] do . . . research on the point *and we can hear you more later.*

The witness (sic), as far as I could tell, did not say anything that would remotely rise to the level of a challenge for cause, or the juror, not witness. He indicates that he knows these fellows through work.

I don't know of any case that says knowing a witness, even knowing a witness fairly well, for example, would lead to a challenge for cause unless the Court is convinced based on the testimony that that knowledge is likely to influence a decision in the case and based on what the witness said.

He appeared to me to be honest. That is based on his answers and demeanor.

So at this point I cannot say that there is any evidence that he has prejudged any issue or is likely to do so.

If you want to --

I will deny your request now.

If you want to reopen that request at any point, do so.

And if you have anything that you want me to read or anything, I will be glad to do that.

(63 RT 9831-9832, italics added.)

B. Appellant's Contention Is Forfeited

Preliminarily, respondent notes that appellant did not reopen his request or submit additional research, despite being invited to do so by the trial court. (See RT, *passim.*) As such, his claim of error is forfeited. (See *People v. Panah* (2005) 35 Cal.4th 395, 436 [finding defendant's claim "forfeited," where he failed to renew his request to appoint a third mental health expert after trial court denied it "without prejudice to renewal of the request"]; *People v.*

Davenport (1995) 11 Cal.4th 1171, 1195 [finding defendant "waived" his claim of error regarding underrepresentation of Hispanics in the jury pool, where he failed to pursue the matter at trial after it was denied "without prejudice"]; cf. *People v. Gurule*, *supra*, 28 Cal.4th at p. 614 [declining to resolve forfeiture issue, where defendant failed to renew his objection after trial court stated it "was taking the matter under submission"]; *People v. Catlin*, *supra*, 26 Cal.4th at p. 133 [declining to resolve forfeiture issue, where defendant failed to renew objection to expert-witness testimony after trial court overruled objection "without prejudice"]; compare *People v. Hinton*, *supra*, 37 Cal.4th at p. 860 [where grounds for excusal are discovered prior to trial, to preserve claim of error based upon denial of challenge for cause defendant must show he used a peremptory to remove the juror in question, exhausted his peremptory challenges, and objected to the jury as finally constituted].)

C. The Trial Court Properly Denied Appellant's Request

Appellant's contention is nevertheless without merit. In *People v. Ledesma*, *supra*, 39 Cal.4th at page 641, this Court addressed a similar claim of error involving a juror (Peter W.) who was employed in the main county jail, and who informed the court that he was aware the defendant was in custody and believed he "'stayed in the old building.'" (*Id.* at p. 668.) Although the parties stipulated to excuse Peter W. for cause, the trial court refused to accept the stipulation, and Peter W. eventually served on the defendant's jury. (*Ibid.*) In rejecting the defendant's contention that the trial court abused its discretion, this Court held:

> "On appeal, we will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has given conflicting or ambiguous statements." (*People v. Farnam*[, *supra*,] 28 Cal.4th [at p.] 132 . . . .) The court did

not abuse its discretion in concluding that Peter W. was qualified to serve on defendant's jury. The juror did not have actual contact with defendant through his employment at the jail and expressed no opinion suggesting he could not be fair and impartial.

Defendant contends that no deference is due the trial court's ruling, because Peter W.'s employment as a corrections officer in the county jail system where defendant was housed constituted "implied bias" -- a presumption of bias that could not be overcome by a finding that he could be fair and impartial. Under California law, a juror may be excused for "implied bias" only for one of the reasons listed in Code of Civil Procedure section 229, "and for no other." (Code Civ. Proc., § 229.) If the facts do not establish one of the grounds for implied bias listed in that statute, the juror may be excused for "[a]ctual bias" if the court finds that the juror's state of mind would prevent him or her from being impartial. (Code Civ. Proc., § 225, subd. (b)(1)(C).)

None of the statutory grounds for a finding of implied bias is present in this case, and the trial court concluded that Peter W. was not actually biased. . . . Defendant relies upon federal cases concluding that bias may be implied or presumed from the "potential for substantial emotional involvement" inherent in certain relationships. (*United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 [jurors should have been excused for cause from serving on case in which the defendant was charged with robbing a bank that employed them, even though they claim they could be impartial]; see also *Fields v. Woodford* (9th Cir. 2002) 309 F.3d 1095 [evidentiary hearing required to determine whether juror whose wife had been the victim of a crime quite similar to the ones charged was biased]; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513 [juror who had two sons who were serving long prison terms for murder and robbery

committed in an attempt to obtain heroin should have been excused from serving in case in which the defendant was charged with conspiracy to possess and distribute heroin].) Even assuming these federal decisions are otherwise persuasive, we discern on the present record no potential for the type of "emotional involvement" that these cases found to be grounds for disqualification. Peter W. did not work in the part of the jail in which defendant was housed. The circumstance that he knew defendant was incarcerated did not render him unable to be impartial. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 121 . . . ; *People v. Bradford* (1997) 15 Cal.4th 1229, 1336 . . . .)

(*Id.* at pp. 669-670, footnotes omitted.)

The same result is compelled here. As the trial court properly found, there was no basis for concluding Juror No. 2 harbored actual bias as a result of his job as a "general maintenance" worker in the same jail as Deputies Poindexter and Looney. Indeed, Juror No. 2 stated that he did not "really know [the deputies]," and did not socialize with them or talk to them about the case. (63 RT 9828-9829.) Juror No. 2 also affirmed that he "would weigh [the deputies' testimony] the same as [he] would weigh anybody else's testimony." (63 RT 9829.) As such, there is nothing on the face of the present record to suggest any type of "emotional involvement" that would require the excusal of Juror No. 2 for actual bias. (See *People v. Holt* (1997) 15 Cal.4th 619, 655 ["A juror is disqualified and thus subject to challenge for cause . . . on the basis of '[a]ctual bias -- the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party'"]; compare *United States v. Allsup*, *supra*, 566 F.2d at p. 71.)

And, Juror No. 2 did not meet any of the statutory grounds for finding implied bias under Code of Civil Procedure section 229: he was not related to

either of the deputies; was not employed or supervised by them; did not serve as a grand juror in this matter; was not interested "in the event of the action, or in the main question involved in the action"; did not form an opinion as to the merits of the case based upon knowledge of its material facts; did not evince any "enmity against, or bias towards, either party"; was not a party to the action; and did not entertain "such conscientious opinions as would preclude [him] finding [appellant] guilty[.]"[116/] The trial court's denial of appellant's request

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116. Code of Civil Procedure section 229 provides:

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city

was therefore proper. (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 670; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 675 ["In general, the qualification[s] of jurors challenged for cause are 'matters within the wide discretion of the trial court, seldom disturbed on appeal'"].)

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and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

XVIII.

THE TRIAL COURT PROPERLY REPLACED JUROR NO. 1 WITH AN ALTERNATIVE JUROR, AFTER JUROR NO. 1 INFORMED THE TRIAL COURT THAT SHE COULD NO LONGER DELIBERATE FAIRLY AND IMPARTIALLY DURING THE PENALTY PHASE OF TRIAL

Appellant contends his right to a fair penalty trial by a unanimous jury was denied by the trial court's replacement of Juror No. 1 with an alternate juror. (AOB 251.) According to appellant, in excusing Juror No. 1 based upon her stated inability to continue deliberating, the trial court "relied on irrelevant considerations," did not in fact establish that Juror No. 1 "was unable to perform the duties of a juror as a demonstrable reality," asked "leading questions" of the juror, and failed to conduct an adequate inquiry "into whether [Juror No. 1] was incapable of performing the duties of a juror." (AOB 255-256, 258-260.) Appellant maintains that the alleged errors "require reversal of the death judgment." (AOB 262.) The record shows otherwise.

A. Proceedings Below

On the second day of penalty phase deliberations (see 65 RT 10074, 10163), Juror No. 1 told the bailiff that she "wanted to address the Court." (65 RT 10164.) Juror No. 1 was brought into courtroom, where the following colloquy occurred outside the presence of the other jurors:

> The Court: . . . [¶] We have now been joined in the courtroom by Juror No. 1 who is in the jury box.
>
> How are you today?
>
> Juror No. 1: All right.
>
> The Court: Ma'am, I am told by Deputy Harvey that you want to say something.
>
> Juror No. 1: I wish to be dismissed.

The Court: Why is that?

Juror No. 1: It's just too heavy on me.

It is affecting me emotionally and mentally.

The Court: You mean what, the penalty phase deliberations?

Juror No. 1: Yes. Yes.

The Court: How is it affecting you.

When you say "mentally" and "emotionally," what do you mean?

Juror No. 1: I have just been thinking about it a lot.

I don't know if I can make, like, the right decision.

I have been having a hard t[im]e sleeping because of this.

I just really wish to get out of this now while we are still beginning the penalty than later when I know --

I tried to see if I could. I tried to see if maybe I could get over it. Maybe I could make the right decision.

But right now I really don't think I can. And I think it is better for me to get out now while everybody is not really started on it really yet.

The Court: Let's see.

When did you start feeling this way? Just today or when did you go out?

Did the jury go out yesterday?

Juror No. 1: Yesterday.

Mr. Esqueda [defense counsel]: Yesterday at noon.

The Court: When did you start feeling this way?

Juror No. 1: Yesterday when we were starting to talk about everything, like the rules.

We went over the rules again and I just -- I was just thinking about it the whole weekend.

Throughout the weekend I thought I was going to be okay, like you said to think about it. I thought maybe I could just finish it. Finish the whole trial.

The Court: Right.

Juror No. 1: I don't think I can.

The Court: I have forgotten.

Tell me again.

You are a young lady.

How old are you?

Juror No. 1: 22.

The Court: You are probably our youngest juror on the case.

Juror No. 1: Yes.

The Court: And the youngest one we have had on these.

(65 RT 10165-10167.)

The trial court inquired further into Juror No. 1's stated inability to deliberate:

The Court: Have you talked to anybody over the weekend about it?

Juror No. 1: No.

The Court: You need to approach it on your own the best you can.

Could you sleep last night?

Juror No. 1: No.

Can you tell?

The Court: No. I couldn't tell, but you said you had trouble.

Juror No. 1: I think I had two hours, three.

The Court: Two hours since when?

Juror No. 1: Since –

For the past couple of weeks.

I just have been having like an average of three to five hours sleep.

I usually sleep eight hours a night, eight to nine.

The Court: I noticed one thing yesterday, and maybe it was my imagination.

You tell me if this was right.

During the arguments of counsel, at one point a photograph was held up and it looked to me -- a photograph --

Juror No. 1: I couldn't look.

The Court: I know. I was sort of watching, not you in particular, of course, but I keep an eye on things and I note that you turned your head and would not look at it.

Juror No. 1: I couldn't look.

Even throughout the other trials, I just – the other ones we had, I couldn't look.

I have seen it, but I couldn't look at it again.

The Court: This was a picture of the child, one of the children?

Mr. Manzella [the prosecutor]: Yesterday?

Juror No. 1: The woman.

Mr. Manzella: Yesterday it was the mother.

(65 RT 10168-10169.)

At sidebar, the trial court discussed Juror No. 1's responses with counsel:

The Court: -- the other jurors -- not all jurors seemed to want to stare, but there was the one juror that did not want to look and made a noticeable motion with her head.

She is one of the closest jurors to me which is probably why I am able to say that.

Any comments?

Mr. Manzella: Well, she seems to be saying that she cannot

deliberate.

Do you want to make that clear whether she can or cannot?

If she wants to be excused --

She clearly wants to be excused.

The Court: What do you think?

Mr. Esqueda: I am troubled by it, Judge, obviously.

Somebody who sits through the entire guilt phase and has been queried about how she feels, and says:

Yeah, I can do it, I don't know. Maybe this is my defense attorney perspective, but it seems to me that she just can't say "Yes" or "No" on the penalty of death.

And I think it would be wrong to excuse her for that reason having sat through this entire trial.

It is rather apparent that she is not going to say yes to death.

It appears to me that way from my perspective.

And I am, of course, biased.

. . . . . .

The Court: People.

Mr. Manzella: Well, if she can't go forward, and she is not deliberating, then under the case law she should be excused and an alternate put in her place.

She seems to be saying that she cannot deliberate.

If that is the case, then I think she should be excused and an alternate replace her because under the case law, it seems clear, that if a juror cannot deliberate or announces that during the course of deliberations that they can no longer deliberate with the other jurors, and that the law permits, maybe even requires, that you be [re]placed with an alternate.

(65 RT 10170-10172.)

The trial court resumed its inquiry of Juror No. 1. Juror No. 1 explained further:

> Juror No. 1: [Appellant's] life is depending on me. I don't really know how to go about that.
>
> I mean if I decide to go one way and I agree with all --
>
> If the jurors and I all agree on the death penalty, it is like -- that is too heavy on me. I don't really want that on my conscience.
>
> And if I decide to give him life in prison, I don't really know if I should do that either.
>
> I really don't know what to do. I can't really think too clearly right now.
>
> . . . . . .
>
> Since I can't really think too clearly, I feel like while deliberating, hearing the other jurors' opinions, it would kind of alter my opinion to go their way, not really thinking for myself, because I really don't know how to think right now.
>
> I'm young.
>
> I don't know.

(65 RT 10173.)

After the trial court informed Juror No. 1 that "[t]here [was] no obligation back there for any juror to go the way the majority goes," Juror No. 1 replied, "That is another thing, too, I don't really know how to go about it. Just by listening to all the witnesses, it is just confusing. It is confusing me right now." (65 RT 10174.) Juror No. 1 also revealed that she had told the other jurors "how [she] felt, like that [she] just wanted to be dismissed while everything [was] still in the beginning of the deliberations instead of like waiting until later on and then . . . back out because it won't be fair to them or to Maciel for [her] to do that or to [herself]." (65 RT 10175.)

The trial court asked Juror No. 1 whether she could "decide this most difficult issue based on a weighing of aggravation and mitigation and . . . do so clear headedly." Juror No. 1 answered, "I don't think I can." (65 RT 10176.) The trial court cautioned Juror No. 1 that it did not "want to let somebody go off of a case because it is a little tough on them." (65 RT 10176-10177.) Juror No. 1 informed the court that she "[did not] think" or "believe" that she could rationally weigh the aggravating and mitigating factors. (65 RT 10177.) She also stated:

> I feel like I'm a strong person. If I believe in one thing, I will go with it even if I have to go against everybody. But the thing is I am not going to be fair to Maciel because I am just confused right now and I believe that my opinion will be swayed to go towards, you know, whoever's opinion that might strike me like maybe he seems he is right.
>
> My opinion would be to go his way because I am just confused.
>
> I can't really think right now.

(65 RT 10178.)

The trial court again discussed the matter with both parties at sidebar:

> The Court: It seems to me that there are risks to both sides leaving a juror on like this.
>
> She says, and I think you may want to consider this in assessing your position here, that she may simply go with whatever sounds good.
>
> The way she couched that was:
>
> I can't be fair to Mr. Maciel.
>
> That tells me . . . that preliminarily a number of jurors, at least, have taken a position adverse to Mr. Maciel and that she may be tempted to go along because she can't think for herself.

That gives me, obviously, some pause and perhaps should give you some pause.

Additionally, it appears to me if I am forced to rule and your position is that you want her on there, and I am forced to rule, I am prepared to do so, but it may be a good idea given that statement to stipulate her off.

If you don't want to stipulate, that is fine.

If not, I will make the call.

(65 RT 10179-10180.)

When defense counsel refused to stipulate, the trial court ordered Juror No. 1 excused:

The Court: She will be excused.

It is more than a reality that the juror is not capable of doing her duties at this phase.

She indicates that she cannot think. She can't sleep. She has become the focus of this rather than the evidence.

She cannot look at the evidence.

She is tempted to go with whatever juror's argument sounds good.

She says that she cannot give Mr. Maciel a fair trial or fair decision at this point due to her fears.

I think she is being truthful.

You may differ with me, but I don't think either counsel is prepared to say that this lady is not credible.

She is quite credible to me.

(65 RT 10181.)

Defense counsel then asked the trial court to inquire of the juror whether she had felt the same way during the guilt phase of trial. (65 RT 10181-10182.) The following discussion ensued:

The Court: Do you want to be heard?

Mr. Manzella: She was asked –

The jury was polled on each count and -- maybe they were polled on the counts collectively.

The Court: Counts collectively.

Mr. Manzella: But she was the first juror and did not hesitate to say yes, that was her verdict.

Nobody reported any problems.

The Court: Nor did she.

Mr. Manzella: Nor did she.

Nobody reported any problems during the guilt phase deliberations.

The Court: That is a fact.

It is also a fact that at the beginning of the case the Court invited any juror who had a problem to bring it to my attention and also told other jurors to bring to my attention any problems that any juror has.

I repeated that again and now she has come forward.

I don't see any need to do any inquiry of her thought processes during the guilt phase of the case.

(65 RT 10182-10183.)

Nevertheless, in response to defense counsel's request, the trial court asked Juror No. 1 when her difficulties commenced:

The Court: Did the problems that you are relating to me now primarily manifest during the penalty phase deliberations?

Is that when the problem started with you?

Juror No. 1: Yes.

(65 RT 10183.)

The trial court concluded, "It is a demonstrative [sic] reality that [Juror No. 1] is incapable of doing her duty as a juror and I don't frankly believe she could give either side a fair trial at this point of any meaningfulness due to her

. . . inability to follow the law and decide the case on aggravation and mitigation which is what it is about." (65 RT 10183-10184.) The trial court consequently excused Juror No. 1 "for legal cause[.]" (65 RT 10184.)

After an alternate juror was chosen to replace Juror No. 1, defense counsel moved to begin guilt phase deliberations anew with the seated alternate:

> [Mr. Esqueda:] . . . I am very troubled by Juror No. 1. And I truly believe if she did not have the intestinal fortitude to continue her deliberations in the penalty phase, that she may very well have just gone along for the ride in the guilt phase.
>
> . . . . . .
>
> And I am going to ask that they commence deliberations anew on the guilt phase with the new seated alternate.

(65 RT 10198.)

After hearing argument by the prosecution (see 65 RT 10198), the trial court denied defense counsel's request:

> The Court: That motion will be denied.
>
> There is nothing before the Court to suggest that the juror was unable to do her duty during the guilt phase.
>
> And the evidence is to the contrary, in fact.
>
> [Juror No. 1] appeared to be able to pay attention and so forth and did not bring to the Court's attention, nor did any other juror bring to the Court's attention, any disability of Juror No. 1 during the guilt phase.
>
> Her own responses today seem to indicate strongly to me that her problems began, in terms of their severity and so forth, at least during the penalty phase deliberations and she was weighing the fate of the defendant.
>
> It's --
>
> It sometimes happens that that is the issue.

I have yet to have a juror have a real problem with guilt phase, but oftentimes jurors during the penalty phase know what they are actually into and some people can't take part in such a -- an event.

(65 RT 10199; see also *id.* at pp. 10200-10201.)

Prior to sentencing, defense counsel moved for a new trial, based in part upon the alleged "improper[] dismiss[al]" of Juror No. 1. (3 CT 830-834.) After hearing argument on the motion (see 66 RT 10245-10248), the trial court issued the following ruling:

[The Court:] The allegation and motion for new trial are three:

Error in instructing the jury, prejudicial misconduct of prosecution, and juror improperly dismissed.

There is, however, no enumeration in the motion as to exactly what error or errors the defense feels were made in jury instructions.

There is no enumeration or explanation of the alleged misconduct of the prosecution whatsoever.

There is no argument re the dismissing of the juror. No citation to authority or fact.

So the motion is denied.

(66 RT 10248-10249.)

B. The Trial Court Properly Dismissed Juror No. 1 Based Upon Her Stated Inability To Deliberate During The Penalty Phase Of Trial

Appellant maintains that the trial court "had already decided to dismiss [Juror No. 1] based on her relatively youthful age, and her turning away from a single photograph, *before* asking any questions to determine whether she could actually continue to deliberate, and follow the court's instructions." (AOB 256, italics in original.) To the contrary, the record shows that the trial court properly considered Juror No. 1's stated inability to deliberate before discharging her for good cause.

A trial court's authority to discharge a juror is granted by section 1089, which provides in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, *or if a juror requests a discharge and good cause appears therefor*, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

(Italics added; see also Code Civ. Proc., §§ 233, 234.)

"The most common application of these statutes permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474 [citing cases]; see also *id.* at pp. 475-484.)

This Court has stated, "'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.]'" (*People v. Williams* (2001) 25 Cal.4th 441, 447; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843.) Nevertheless, a juror's inability to perform as a juror must "'"appear in the record as a demonstrable reality."'" (*People v. Marshall*, *supra*, 13 Cal.4th at p. 843; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 743; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 458.)

The record in the instant matter unequivocally demonstrates that Juror No.1 was unable to perform her duties as a juror during the penalty phase. Specifically, Juror No. 1 informed the trial court, "I am not going to be fair to Maciel because I am just confused right now and I believe that my opinion will

be swayed to go towards, you know, whoever's opinion that might strike me like maybe he seems he is right." (65 RT 10178.) She indicated that any return of a death sentence would be "too heavy on [her]," but also claimed that she could not "decide to give [appellant] life in prison[.]" Throughout the proceeding, Juror No. 1 reiterated her fear that the other jurors "would . . . alter [her] opinion to go their way, not really thinking for [herself], because [she] really [didn't] know how to think right now." (65 RT 10173.)

Moreover, the trial court's inquiry into Juror No.1 's age and reaction to a crime-scene photograph was, as appellant himself acknowledges, "superfluous" to the court's ultimate determination. (See AOB 256.) As the record shows, the inquiry occurred *prior* to Juror No. 1's discussion of her difficulties and played no part in the trial court's ultimate decision to excuse her for cause. (See 65 RT 10183-10184.) In sum, Juror No. 1's stated inability to deliberate """appear[ed] in the record as a demonstrable reality."""" (*People v. Marshall*, *supra*, 13 Cal.4th at p. 843; see also *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1098-1100 [juror properly excused where, after initially affirming she could deliberate fairly, she indicated that anxiety over her new job "may affect [her] verdict . . . and [her] deliberations"].) As such, the trial court properly excused her from further deliberations.

C. The Record Supports The Trial Court's Finding That Juror No. 1 Was Unable To Perform The Duties Of A Juror

Appellant also contends that "the record does not support a finding that [Juror No. 1] was unable to deliberate as a demonstrable reality." (AOB 256-257, italics omitted.) According to appellant, "[t]here is no evidence in the record that [Juror No. 1] was refusing to participate in deliberations." (AOB 257.)

As set forth previously, however, there is ample evidence in the record to support the trial court's determination that Juror No. 1's inability to

deliberate was a demonstrable reality. (See 65 RT 10165-10184.) And, contrary to appellant's contention, there is no requirement that a juror actually *refuse* to participate in deliberations before she may be excused for cause. (See, e.g., *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1098-1100 [juror properly excused where anxiety over new job would affect deliberations]; *People v. Johnson* (1993) 6 Cal.4th 1, 21 [juror properly excused for sleeping during trial]; see also *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 626-629 [juror properly excused due to inability to concentrate].)

No error can be shown.

D. The Trial Court Properly Questioned Juror No. 1 Prior To Excusing Her For Cause

Appellant argues in the alternative that, even if Juror No. 1 "made statements indicating an inability to decide," she did so only in response to "a long series of leading questions by the court[.]" (AOB 258.) Appellant's contention may be disposed of summarily.

Again, the record shows that the trial court properly questioned Juror No. 1 about her stated inability to deliberate. Far from playing on purported "subconscious pressures" (see AOB 258), the trial court reassured Juror No. 1 that "[t]here [was] no obligation back there for any juror to go the way the majority goes"; the court also asked whether she could "decide this most difficult issue based on a weighing of aggravation and mitigation and . . . do so clear headedly." (65 RT 10174, 10176.) Perhaps most important, the trial court cautioned Juror No. 1 that it did not "want to let somebody go off of a case because it is a little tough on them." (65 RT 10176-10177.) Thus, instead of suggesting answers in "conformity with what the [trial court] was signaling [Juror No.1] the answer should be" (AOB 259), the court took great pains to determine whether Juror No. 1's inability to deliberate was a demonstrable reality before excusing her for cause.

Nor were Juror No. 1's responses influenced or shaped by the trial court's questions. Juror No. 1 informed the court that she did not "really know how to go about [deliberating]. Just by listening to all the witnesses, it is just confusing. It is confusing me right now." (65 RT 10174.) Juror No. 1 also revealed that she had told the other jurors "how [she] felt, like that [she] just wanted to be dismissed while everything [was] still in the beginning of the deliberations instead of like waiting until later on and then . . . back out because it won't be fair to them or to Maciel for [her] to do that or to [herself]." (65 RT 10175.) Juror No. 1 even confirmed that she "[did not] think" or "believe" that she could rationally weigh the aggravating and mitigating factors, but would be "swayed to go towards, you know, whoever's opinion that might strike me like maybe he seems he is right." (65 RT 10177-10178.)

This is not a case where Juror No. 1 simply did "not deliberate well or relie[d] upon faulty logic or analysis[.]" (Compare *People v. Cleveland*, *supra*, 25 Cal.4th at p. 485 [finding such circumstances do not constitute proper grounds for discharge of a juror].) Rather, Juror No. 1 confirmed that she would be unable to deliberate *at all*, because of her emotional reaction to the evidence presented during the penalty phase, as well as her belated realization that the consequences of any verdict would be, in her words, "too heavy on [her]" (65 RT 10173). (See *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1098-1100.) Appellant's contention should therefore be rejected.

E. Appellant's Contention That The Trial Court Should Have Conducted Further Inquiry Into Juror No. 1's Stated Inability To Deliberate Is Forfeited; Alternatively, It Is Without Merit

Appellant also claims that the trial court "should . . . have made [further] inquiry regarding whether [Juror No. 1's] state of mind perhaps resulted from coercion or duress by other jurors." (AOB 260.) Appellant's contention is forfeited as a result of his failure to request such inquiry at trial. Alternatively,

further inquiry was not required under the circumstances.

As the record shows, appellant did not ask the trial court to conduct further inquiry into Juror No. 1's stated inability to deliberate prior to her discharge; nor did appellant object to the thoroughness of the trial court's inquiry. (See 65 RT 10164-10181.) For that reason alone, this Court should reject appellant's contention.[117] (See *People v. Ramirez*, *supra*, 39 Cal.4th at p. 460 [finding claim forfeited regarding trial court's failure to conduct further inquiry into jury's exposure to news coverage of fellow juror's murder]; cf. *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590; compare *People v. Fudge*, *supra*, 7 Cal.4th at p. 1100, fn. 6 [declining to address waiver argument, because there was "substantial evidence to support the trial court's decision to excuse [a juror]".)

Appellant's contention should be rejected, also, because further inquiry was not required. (See *People v. Bell*, *supra*, 40 Cal.4th at pp. 612-618.) There is *nothing* to suggest that Juror No. 1 was pressured or coerced in any way by her fellow jurors. Instead, Juror No. 1 affirmed that she was unable to deliberate due to her *own* emotional difficulties. (See 65 RT 10164-10181.) As this Court has observed, "whether . . . further inquiry was appropriate is a matter within the sound discretion of the trial court, which was in the best position to observe the jury." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 461; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1159 [the "trial court retains discretion about what procedures to employ, including conducting a hearing or detailed inquiry, when determining whether to discharge a juror"].)

And, further inquiry "with the most obvious source of additional information -- the other jurors" (AOB 260), would have been improper in view

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117. The law is unclear whether a procedural bar applies to an excusal for cause. (See *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007; compare *People v. Hill* (1992) 3 Cal.4th 959, 1005, with *People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4.)

of "the need to protect the sanctity of jury deliberations. [Citations.]" (*People v. Cleveland, supra*, 25 Cal.4th at p. 475.) "Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id.* at p. 476; see also *People v. Bell, supra*, 40 Cal.4th at p. 618 ["As to other jurors' views of whether intimidation had occurred, the trial court acted within its sound discretion in concluding that further questioning would be an unwarranted intrusion into the secrecy of jury deliberations"].) The trial court did not abuse its discretion in conducting its inquiry of Juror No. 1.

F. The Trial Court Properly Denied Appellant's Motion To Begin Guilt Phase Deliberations Anew

As set forth previously, the trial court denied appellant's motion to begin guilt phase deliberations anew:

> [The Court:] There is nothing before the Court to suggest that the juror was unable to do her duty during the guilt phase.
>
> And the evidence is to the contrary, in fact.
>
> [Juror No. 1] appeared to be able to pay attention and so forth and did not bring to the Court's attention, nor did any other juror bring to the Court's attention, any disability of Juror No. 1 during the guilt phase.
>
> Her own responses today seem to indicate strongly to me that her problems began, in terms of their severity and so forth, at least during the penalty phase deliberations and she was weighing the fate of the defendant.

(65 RT 10199.)

Appellant contends that Juror No. 1's "youth and immaturity . . . , and her unwillingness to view exhibits . . . pre-dated penalty phase deliberations." He accordingly maintains that "[defense] counsel reasonably argued that the

jury should be instructed to begin the guilt phase instructions anew." (AOB 261.)

As appellant concedes, however, this Court recognized over 20 years ago that "unforeseen circumstances may require the substitution of a juror at the penalty phase of a capital trial, even though the alternate did not take part in the guilt phase deliberations." (*People v. Fields* (1983) 35 Cal.3d 329, 351, fn. 9.) Although appellant urges this Court to overrule *People v. Green* (1971) 15 Cal.App.3d 524 -- a decision upon which *Fields* relies -- he has set forth no compelling reason to depart from such well-settled authority. (See AOB 261.)

In any event, Juror No. 1 confirmed that her stated difficulties commenced during the *penalty* phase of trial:

> The Court: Did the problems that you are relating to me now primarily manifest during the penalty phase deliberations?
>
> Is that when the problem started with you?
>
> Juror No. 1: *Yes.*

(65 RT 10183, italics added.)

No relief is warranted.

G. Any Error Would Be Harmless

Appellant argues that the foregoing alleged errors require reversal of the death judgment, purportedly because Juror No. 1 was "such an obviously death-penalty scrupled juror[.]" (AOB 262.) Even if it were assumed any or all of the alleged errors occurred, however, no prejudice could be shown.

Contrary to appellant's contention (and as set forth previously), Juror No. 1 was, by her own admission, an individual who was "swayed to go towards, you know, *whoever's* opinion that might strike me like maybe he seems he is right." (65 RT 10177-10178, italics added.) The trial court astutely observed in that regard:

The Court: It seems to me that there are risks to both sides leaving a juror on like this.

She says, and I think you [defense counsel] may want to consider this in assessing your position here, that she may simply go with whatever sounds good.

The way she couched that was:

I can't be fair to Mr. Maciel.

That tells me . . . that preliminarily a number of jurors, at least, have taken a position adverse to Mr. Maciel and that she may be tempted to go along because she can't think for herself.

That gives me, obviously, some pause and perhaps should give you some pause.

(65 RT 10179-10180.)

As such, it is just as likely that Juror No. 1 would have voted for death as for life without possibility of parole, based merely upon the views of others; therefore, her discharge could not possibly have resulted in prejudice to appellant.

Finally, although appellant frames the issue of prejudice in federal constitutional terms (see AOB 262), he did not raise such constitutional claims below. (See 65 RT 10164-10181.) Appellant's "fail[ure] to make any objection whatever based on any federal constitutional provision" precludes him from raising such newly-asserted claim of error at this advanced stage. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126, fn. 30; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 991; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Davis*, *supra*, 10 Cal.4th at pp 532, fn. 29, 533; cf. *United States v. Olano*, *supra*, 507 U.S. at p. 731 [113 S.Ct. at p. 1776]; *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590; compare *People v. Lewis and Oliver*, *supra*, 39 Cal.4th

at p. 990, fn. 5 [new constitutional arguments not forfeited on appeal where "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply"].) His federal constitutional claims are therefore forfeited.

XIX.

APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY TO NOTIFY IT OF ANY JUROR'S FAILURE TO FOLLOW INSTRUCTIONS IS FORFEITED; ALTERNATIVELY, IT IS WITHOUT MERIT

During a discussion of proposed jury instructions prior to the jury's commencement of penalty phase deliberations, the trial court announced its intention to instruct the jury

> that they must notify the Court if they are unable or unwilling to follow the instructions of the Court and, likewise, they should notify us of any jurors who are unwilling or unable to do so. [¶] My reason for giving that is based upon experiences that this Court has had and litigation such as this one. [¶] It is not uncommon during the deliberations for one or even more jurors to simply indicate that they can't follow the instructions. [¶] They have to utilize extraneous matters in arriving at this quite difficult decision and this simply urges them to let us know if that is the case.

(64 RT 10052.)

After discussing the issue, the trial court invited comments from "either side." The defense and the prosecution both stated, "No comment." (64 RT 10053.) The trial court accordingly instructed the jury as follows:

> It is the duty of each juror to notify the court promptly if you conclude that you are unwilling or unable to follow any instruction of the court. Likewise, you must notify the court if any of your fellow jurors appears to be unwilling or unable to follow any such instruction.

(3 CT 790.)

Appellant contends for the first time that the foregoing instruction, which "is for all intents and purposes the same as former CALJIC No. 17.41.1,"

prejudicially "impaired the free and private exchange of views that is essential to the right to a jury trial under both the federal and state [C]onstitutions." (AOB 263, 265.) He maintains that the alleged error "deprived the death judgment of its reliability in violation of the Eight Amendment, and article I, section 17 of the state [C]onstitution." (AOB 265.) As the record shows, however, no objection was voiced to the complained-of instruction; consequently, appellant's contention is forfeited. In any event, the contention is without merit.

A. Appellant's Contention Is Forfeited

As set forth previously, appellant did not object to the instruction, nor did he request that the instruction be modified in any manner. (see 64 RT 10052-10053.) Appellant's federal constitutional claim is therefore forfeited. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126, fn. 30; see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 991; *People v. Hinton*, *supra*, 37 Cal.4th at p. 894; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Davis*, *supra*, 10 Cal.4th at pp. 532, fn. 29, 533; cf. *United States v. Olano*, *supra*, 507 U.S. at p. 731 [113 S.Ct. at p. 1776]; *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) Appellant's state-law claims are likewise barred from consideration for the same reason. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1153, 1167; *People v. Clark*, *supra*, 5 Cal.4th at p. 1026; *People v. Gates*, *supra*, 43 Cal.3d at pp. 1182-1183; *People v. Ghent*, *supra*, 43 Cal.3d at p. 766.)

B. In The Alternative, Appellant's Contention Is Without Merit

In the event this Court nevertheless believes it may address the challenged instruction as affecting appellant's "substantial rights" (§ 1259; *People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 6; see also *People v. Ledesma*, *supra*, 39 Cal.4th at p. 669, fn. 3; *People v. Carpenter*, *supra*, 15 Cal.4th at p.

381), no error could be shown.

As appellant admits (see AOB 264), in *People v. Brown* (2004) 33 Cal.4th 382, this Court rejected a similar claim regarding the use of CALJIC No. 17.41.1 during the guilt phase of a capital trial. In *Brown*, the defendant argued -- as does appellant herein -- that CALJIC No. 17.41.1 "was erroneous because it undermined his right to a trial by jury, to due process, and to a unanimous verdict." (*Id.* at p. 393.) This Court disagreed, and held:

> In *People v. Engleman* (2002) 28 Cal.4th 436 . . . , this court addressed the propriety of giving CALJIC No. 17.41.1. We acknowledged that the instruction "creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk" (*Engleman*, at p. 449), but nevertheless found no constitutional infirmity with respect to either the right to trial by jury or to a unanimous verdict. (*Id.* at pp. 439-440.) In particular, we rejected the analogy -- also drawn by defendant here -- to the "dynamite" instruction disapproved in *People v. Gainer* [(1977)] 19 Cal.3d 835. "CALJIC No. 17.41.1 does not share the flaws we identified in *Gainer*. The instruction is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest that a doubt may be unreasonable if not shared by a majority of the jurors, nor does it direct that the jury's deliberations include such an extraneous factor. CALJIC No. 17.41.1 simply does not carry the devastating coercive charge that we concluded should make us 'uncertain of the accuracy and integrity of the jury's stated conclusion' and uncertain whether the instruction may have '"operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency."'

[Citation.]" (*Engleman*, at pp. 444-445.)

Defendant makes no argument warranting reconsideration of our conclusions. Nor does he cite anything in the record indicating the jurors in his case were improperly influenced by the instruction in their deliberations. (See *People v. Ortiz* (2003) 109 Cal.App.4th 104, 119, fn. 7 . . . .) Accordingly, we find no error.

(*Ibid.*)

Here, as in *Brown*, appellant fails to offer any persuasive reason to revisit this Court's prior holdings (especially since the instruction at issue was given during the *penalty* phase of appellant's trial, and therefore could not have affected the jury's consideration of guilt or innocence). Moreover, there is nothing in the record to suggest that the jurors in this case were improperly influenced by the complained-of instruction, notwithstanding appellant's speculation that "[t]he instruction *may* have furnished the other jurors just the ammunition they needed to pressure [J]uror [No. 1], *possibly* the sole dissenting juror, to withdraw from the case."[118] (AOB 264, italics added.) In sum, no error can be shown.

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118. The previously-quoted responses of Juror No. 1 belie appellant's characterization of her as the "sole dissenting juror." Indeed, Juror No. 1 expressed her fear to the trial court that other jurors "would . . . alter [her] opinion to go their way, not really thinking for [herself], because [she] really [didn't] know how to think right now." (65 RT 10173.) Stated somewhat differently, the record suggests that Juror No. 1 had not formed *any* opinion during the penalty phase deliberations. And, contrary to appellant's insinuation, there is nothing to indicate that Juror No. 1 was "pressured" to withdraw from the case by *anyone*.

XX.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUESTED INSTRUCTION ON IMMUNITY AND CODEFENDANT SENTENCES

Appellant faults the trial court for refusing to provide an instruction on the immunity granted by the prosecution to Witness Nos. 12 and 16 "as a mitigating circumstance," as well as an instruction "allowing the jury to consider the more lenient sentences given to codefendants as mitigating factors." (AOB 266; see also 64 RT 10042-10046; 65 RT 10075-10076.) Relying primarily upon *Parker v. Dugger* (1991) 498 U.S. 308 [111 S.Ct. 731, 112 L.Ed.2d 812], appellant claims that "a capital sentencer [should] not be precluded from considering as a mitigating factor any circumstance of the offense or offender that the defendant proffers as a basis for a sentence of less than death." (AOB 268, italics omitted.)

As appellant acknowledges (see AOB 266), in denying his request for an immunity instruction, the trial court cited *People v. Danielson* (1992) 3 Cal.4th 691, wherein this Court rejected a similar claim and held:

> . . . "The focus in a penalty phase trial of a capital case is on the character and record of the individual offender. The individually negotiated disposition of an accomplice is not constitutionally relevant to defendant's penalty determination."

(*Id.* at p. 718, quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1239; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 300 [the "sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation"].)

And, in *People v. Brown* (2003) 31 Cal.4th 518, this Court rejected any consideration of the sentences meted out to codefendants:

> "We have consistently held that evidence of an accomplice's sentence is irrelevant at the penalty phase because 'it does not shed any

light on the circumstances of the offense or the defendant's character, background, history or mental condition.'" (*People v. McDermott* (2002) 28 Cal.4th 946, 1004-1005 . . . , quoting *People v. Cain* [(1995)] 10 Cal.4th [1,] 63.) Defendant presents no persuasive reason to reconsider that conclusion. *Parker v. Dugger*, *supra*, 498 U.S. 308, on which he relies, does not direct a different result. "*Parker* did not hold evidence of an accomplice's sentence must be introduced in mitigation at the penalty phase, or that a comparison between sentences given codefendants is required. [Citation.] The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. [Citation.] *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (*Cain*, *supra*, at p. 63.) We conclude the trial court did not err in refusing to grant the request for judicial notice.

(*Id.* at pp. 562-563; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 300 [same]; *People v. Bemore* (2000) 22 Cal.4th 809, 857 [same]; *People v. Hines* (1997) 15 Cal.4th 997, 1068 [same]; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1188 [same].)

Appellant's contention should therefore be rejected.

XXI.

CALIFORNIA'S DEATH PENALTY LAW, AS INTERPRETED AND APPLIED, DOES NOT VIOLATE THE CONSTITUTION

Appellant presents a multi-pronged attack on the constitutionality of California's capital sentencing scheme as interpreted and applied, recognizing that "challenges to most of these features have been rejected by this Court." (AOB 270.) Appellant contends that California's capital sentencing scheme is impermissibly broad, allows arbitrary and capricious imposition of death, violates the Equal Protection Clause because it denies procedural safeguards to capital defendants that are afforded to non-capital defendants, and falls short of international norms of humanity and decency. (AOB 270-304.) Because appellant fails to raise anything new or significant that would cause this Court to depart from its earlier holdings, his contentions should be rejected. Moreover, it is entirely proper to reject appellant's contentions by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overbroad And Perform The Requisite Narrowing Function

Appellant contends that "California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders who might be subjected to capital punishment within the law." (AOB 271.) Specifically, appellant argues that his death sentence is invalid because section 190.2 exists "not to narrow those eligible for the death penalty but to make all murderers eligible." (AOB 272.)

The United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death

sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Huggins*, *supra*, 38 Cal.4th at p. 254; *People v. Crew*, *supra*, 31 Cal.4th at p. 860; *People v. Yeoman* (2003) 31 Cal.4th 93, 164; accord *People v. Pollack* (2004) 32 Cal.4th 1153, 1196; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Bolden* (2002) 29 Cal.4th 515, 566; see also *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."].) Appellant's claim must be rejected.

B. Section 190.3, Factor (a), Is Not Impermissibly Overbroad

Section 190.3, factor (a), allows the trier of fact, in determining penalty, to take into account:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellant contends his death penalty is invalid because section 190.3, factor (a), as applied, "allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive"; according to appellant, this permits the arbitrary and capricious imposition of death, in violation of the Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution. (AOB 276.) Appellant's contention is without merit.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], the Supreme Court stated:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976 [114 S.Ct. at p. 2637].)

This Court recently held in *People v. Guerra*, *supra*, 37 Cal.4th at page 1067, that "Section 190.3, factor (a), is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty." (*Id.* at p. 1165.) Indeed, this Court has consistently rejected this claim and followed the ruling by the United States Supreme Court. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Brown*, *supra*, 33 Cal.4th at p. 401; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1050-1053.) There is no need for this Court to reconsider the issue.

Appellant also raises numerous subclaims in support of his contention that California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, he claims: (1) "[e]xcept as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt" (AOB

277-289); (2) the jury was not instructed that it could impose a death sentence "only if [it] was persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh mitigating factors and that death is the appropriate penalty" (AOB 290-293); (3) the jury was not required to "base any death sentence on written findings regarding aggravating evidence" (AOB 293-295); (4) California's death penalty statute "forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty" (AOB 295-297); (5) "the prosecution may not rely in the penalty phase on unadjudicated criminal activity" as a factor in aggravation (AOB 297-298); (6) "[t]he use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by appellant's jury" (AOB 298); and (7) the instructions failed to inform the jury "that statutory mitigating factors were relevant solely as potential mitigators" (AOB 298-301). Respondent addresses each subclaim in turn.

1. The United States Constitution Does Not Compel The Imposition Of A Beyond-A-Reasonable-Doubt Standard Of Proof In Connection With The Penalty Phase; Nor Does It Require A Jury To Agree Unanimously As To Pay Particular Attention To An Aggravating Factor

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not factual, and thus not susceptible to *any* burden-of-proof qualification. (*People v. Burgener*, *supra*, 29 Cal.4th at pp. 884-885; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601; *People v. Welch*, *supra*, 20 Cal.4th at p. 767.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase (*People v. Sapp*, *supra*, 31 Cal.4th at pp. 316-317; see also *People v. Welch*, *supra*, at pp. 767-768; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt*, *supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]) and, because appellant

does not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; *People v. Osband* (1996) 13 Cal.4th 622, 710.)

Appellant argues, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (AOB 277-289.) This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affects California's death penalty law. (*People v. Stanley, supra*, 39 Cal.4th at p. 963; *People v. Monterroso, supra*, 34 Cal.4th at p. 796; *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox, supra,* 30 Cal.4th at pp. 971-972; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272.) The same is true as to *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. (*People v. Monterroso, supra*, 34 Cal.4th at p. 796; *People v. Morisson* (2004) 34 Cal.4th 698; compare *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] [finding fault with California's *Determinate* Sentencing Act].)

2. The Jury Was Not Constitutionally Required To Provide Written Findings On The Aggravating Factors Upon Which It Relied

This Court has held, and should continue to hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Avila, supra*, 38 Cal.4th at p. 614; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Hughes*

(2002) 27 Cal.4th 287, 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) The above-cited decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725].)

3. Intercase Proportionally Review Is Not Required By The Federal Or State Constitutions

Appellant also contends that the failure of California's death penalty statute to require intercase proportionality review violates his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 295-297.) Appellant's point is not well taken.

Intercase proportionality review is not constitutionally required in California (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-54 [104 S.Ct. at pp. 879-881]; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Avila*, *supra*, 38 Cal.4th at p. 615; *People v. Boyer*, *supra*, 38 Cal.4th at p. 484; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Lenard* (2004) 32 Cal.4th 1107, 1131).

4. Section 190.3, Factor (b), Properly Allows Consideration Of Unadjusted Violent Criminal Activity And Is Not Impermissibly Vague

With regard to unadjudicated criminal activity, section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3 CT 793 [CALJIC No. 8.85].)

Appellant's claim that consideration of unadjudicated criminal activity at the penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby rendering the death sentence unreliable (AOB 297-298), must be rejected because section 190.3, factor (b), has been held by this Court to be constitutional. It is well settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 483 ["Nor is factor (b) (defendant's other violent criminal activity) unconstitutional insofar as it permits consideration of unadjudicated crimes"]; *People v. Chatman*, *supra*, 38 Cal.4th at p. 410; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa* (1997) 15 Cal.4th 795, 863.) Factor (b) is also not impermissibly vague; both the United States Supreme Court and this Court have rejected that contention. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 976 [114 S.Ct. at p. 2637]; *People v. Lewis*, *supra*, 25 Cal.4th at p. 677.) The United States Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California*, *supra*, at p. 976 [114 S.Ct. at p. 2637].)

The United States Supreme Court concluded: "Factor (b) is not vague." (*Tuilaepa v. California*, *supra*, at p. 976 [114 S.Ct. at p. 2637]) And neither *Ring v. Arizona*, *supra*, 536 U.S. 584 [122 S.Ct. 2428], nor *Apprendi v. New Jersey*, *supra*, 530 U.S. 446 [120 S.Ct. 2348], affects those holdings because *Ring* and *Apprendi* "have no application to the penalty phase procedures of this

state." (*People v. Martinez*, *supra*, 31 Cal.4th at p. 700; *People v. Cox*, *supra*, 30 Cal.4th at pp. 971-972.)

5. Adjectives Used In Conjunction With Mitigating Factors Did Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellant contends the inclusion in potential mitigating factors of such descriptions as "substantial" in factor (g) and "extreme" in factors (d) and (g) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 298.) Not so.

This Court has previously held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Jones* (1997) 15 Cal.4th 119, 190.)

Significantly, the trial court instructed the jury pursuant to factor (k):

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers including his mental state, any evidence of mental illness or personal background as a basis for a sentence less that 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.

(3 CT 794.)

As this Court has noted:

> the catch-all language of section 190.3 factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it not "extreme." Similarly, factor (k)

allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias* (1996) 13 Cal.4th 92, 189, citations omitted.)

Thus, appellant's claim that the jury was inhibited in its consideration of mitigating factors should be rejected.

6. The Trial Court Did Not Err In Failing To Label The Aggravating And Mitigating Factors

Appellant argues that the trial court erred in failing to label the factors as aggravating and/or mitigating, thus precluding a fair, reliable, and evenhanded administration of the capital sanction. (AOB 298-301.) He is wrong.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Crew*, *supra*, 31 Cal.4th at p. 860.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams*, *supra*, 16 Cal.4th at p. 669.)

In addition, the United States Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 979 [114 S.Ct. at p. 2638].) Thus, the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not until the court or parties make an improper or contrary suggestion." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784; see also *People v. Carpenter*, *supra*, 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is

self-evident, the trial court need not identify which is which]; *People v. Samayoa, supra,* 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating"].) In light of such well-established authority, the trial court properly instructed the jury.

C. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants That Are Afforded To Non-Capital Defendants

Appellant claims that "California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes." (AOB 302.) This Court rejected a virtually identical claim in *People v. Allen, supra,* 42 Cal.3d at page 1222.

This Court has also consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the Determinate Sentencing Act. (*People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Harris, supra,* 37 Cal.4th at p. 366; *People v. Cox, supra,* 30 Cal.4th at p. 970; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) As aptly noted by this Court in *People v. Cox* (1991) 53 Cal.3d 618, 691:

> . . . [I]n *People v. Allen, supra,* 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine

if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "*[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations].*" (*People v. Williams* [(1988)] 45 Cal.3d [1268,] 1330, emphasis added.)

Thus, appellant's equal protection claim must be rejected because he is not similarly situated to defendants sentenced under the Determinate Sentencing Act.

D. International Law

Appellant asserts that California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments to the state and federal Constitutions. (AOB 304-306.) This claim was specifically rejected in both *People v. Perry* (2006) 38 Cal.4th 302, 322 (discussing the 1978 death penalty statute and observing that "when the United States ratified the [International Covenant of Civil and Political Rights], it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of capital punishment"), and *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779 (discussing the 1977 death penalty statute).

Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Perry*, *supra*, 38 Cal.4th at p. 322 [citing 138 Cong. Rec. S-4718-01, and S4783 (1992)]; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; see *People v. Avila*, *supra*, 38 Cal.4th at p. 615; *People v. Boyer, supra,* 38 Cal.4th at pp.

489-490; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1164; *People v. Bolden*, *supra*, 29 Cal.4th at p. 567.) As this Court cogently observed in *People v. Perry*, *supra*, 38 Cal.4th at page 322:

> Defendant . . . argues that the "regular" imposition of capital punishment in California violates international norms, and hence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal Constitution. This is a variation on the familiar argument that California's death penalty law does not sufficiently narrow the class of death-eligible defendants to limit that class to the most serious offenders, a contention we have rejected in numerous decisions. [Citations.]

Appellant does not provide sufficient reasoning to revisit the issue and, thus, it should be rejected.

XXII.

THE CUMULATIVE EFFECT OF ANY ERRORS DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL DURING EITHER THE GUILTY OR PENALTY PHASE

In his final contention,[119] appellant argues that the cumulative effect of alleged errors involving "an undercurrent of fear," the introduction of "completely inadmissible, highly inflammatory bad character evidence," and penalty phase instructions regarding the killing of Jimmy Palma while on death row "deprived the guilt and penalty phase judgments of any semblance of reliability." (AOB 307-309.) As respondent has demonstrated throughout this brief, however, there was no error; to the extent there was any error, appellant has failed to demonstrate prejudice.

Indeed, whether considered individually or in the aggregate, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180; see also *People v. Williams* (2006) 40 Cal.4th 287, 339; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1065-1066; *People v. Stanley*, *supra*, 39 Cal.4th at p. 966; *People v. Avila*, *supra*, 38 Cal.4th at p. 615; *People v. Boyer*, *supra*, 38 Cal.4th at p. 489.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

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119. Appellant incorrectly labels this contention as Argument "XXI." (See AOB 307.)

CONCLUSION

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

Dated: October 30, 2007

Respectfully submitted,

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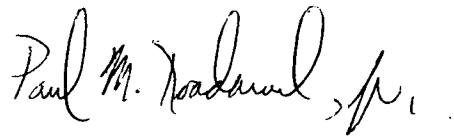
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 105173 words.

Dated: October 30, 2007

Respectfully submitted,

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



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Supervising Deputy Attorney General

Attorneys for Plaintiff and Respondent

Declaration of Service

DEATH PENALTY CASE

Case Name: ***People v. Luis Maciel*** **Case No.: S070536**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 **October 30, 2007**, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Melissa Hill
Attorney at Law
P. O. Box 2758
Corrales, NM 87048

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attention: Mel Greenlee
101 Second Street, #600
San Francisco, CA 94105

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **October 30, 2007**, at Los Angeles, California.

Erlinda O. Zulueta

Erlinda O. Zulueta
Signature

PMR:ez
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