In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **KIONGOZI JONES,** **Defendant.**	**CAPITAL CASE** Case No. S075725

Los Angeles County Superior Court Case No. NA031990
The Honorable Bradford L. Andrews, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
VIET H. NGUYEN
Deputy Attorney General
State Bar No. 233925
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-0207
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged them with the murder of Mario Lopez (Pen. Code,[1] § 187, subd. (a); count 1), the murder of Jose Angel Villa (§ 187, subd. (a); count 2), the attempted murder of Nery Hernandez (§§ 664/187, subd. (a); count 3), assault with a firearm on Veronica Munguia (§ 245, subd. (A)(2); count 4), and shooting at an inhabited dwelling (§ 246; count 5). As to counts 1 and 2, a special circumstance was alleged that appellant committed multiple murders. (§ 190.2, subd. (a)(3).) As to counts 1 to 4, it was alleged that appellant personally used a handgun. (§1203.06, subd. (a)(1); § 12022.5, subd. (a).) As to counts 3 to 5, it was alleged that appellant inflicted great bodily injury upon a human being. (§12022.7, subd. (a).) As to all counts, it was alleged that appellant had served a prior prison term (§667.5, subd. (b)), had suffered a conviction for a serious felony (§667.5, subd. (a)(1)), and had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (1CT 232-236.) Appellant pleaded not guilty and denied the allegations and special circumstance. (1CT 238.)

Following a trial by jury, the jury was unable to reach a unanimous verdict. The trial court found that the jury was hopelessly deadlocked, declared a mistrial, and discharged the jury. (2CT 374.)

On retrial, the prosecution's motion to consolidate appellant's case with Melvin Sherman's case was granted. (2CT 432.) An amended information was filed. Sherman was charged with conspiracy to commit a crime. (§182, subd. (a)(1); count 1.) Appellant and Sherman were charged

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[1] All further statutory references will be to the Penal Code, unless otherwise indicated.

with the murder of Lopez (§ 187, subd. (a); count 2), the murder of Villa (§ 187, subd. (a); count 3), the attempted murder of Hernandez (§§ 664/187, subd. (a); count 4), an assault with a deadly weapon by means of force likely to produce great bodily injury on Munguia (§ 245, subd. (a)(1); count 5), and shooting at an inhabited dwelling (§ 246; count 6). As to counts 2 to 4, a special circumstance was alleged that appellant committed multiple murders. (§ 190.2, subd. (a)(3).) As to counts 2 to 4, it was alleged that a principal was armed with a handgun. (§12022, subd. (a)(1).) As to counts 4 to 5, it was alleged that appellant inflicted great bodily injury upon a human being. (§12022.7, subd. (a).) As to counts 2 to 6, it was alleged that appellant had served a prior prison term (§667.5, subd. (b)), had suffered a conviction for a serious felony (§667.5, subd. (a)(1)), and had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (2CT 434-441.)

Following a trial by jury, the jury found appellant guilty on all the charges, found true the special circumstance, and found true the allegations. (2CT 585-587; 20RT 5205-5209.) The jury found Sherman not guilty on count 1, found Sherman guilty on counts 2 to 6, found true the multiple murder special circumstance, and found true the allegations. (*Ibid.*) Following a penalty hearing, the jury returned a verdict of death. (3CT 652-653.)

STATEMENT OF FACTS

A. Prosecution Evidence

1. Background Gang Evidence

The Insane Crips Gang (hereinafter "ISC") and the Rolling 20's Crips (hereinafter "RTC") were two of the largest African-American gangs operating in Long Beach. (17RT 4371.) The Eastside Longo (hereinafter

"ESL") was the largest Hispanic gang operating in Long Beach. (17RT 4317.) These three gangs were among the most violent, hardcore gangs in Long Beach. (17RT 4402.)

In December of 1996, the RTC and ESL were engaged in "a black-brown war" in a two-block area of downtown Long Beach that included Pacific Avenue and Pine Avenue.[2] (16RT 4160, 4234.) Both the ESL and the RTC claimed this area as their turf.[3] (17RT 4372.) There were many acts of violence committed between the ESL and RTC in the area. (16RT 4163.) These acts of violence included numerous shootings. (14RT 3704.) In fact, between February to December of 1996, there had been nine homicides committed in this two-block area. (17RT 4165, 4298-4300.)

Within this two-block area, African-American gang members, including members of the ISC and the RTC, were known to hang out at the apartment complex at 1708 Pine Avenue. (15RT 4021-4022; 16RT 4164; 17RT 4298-4300.) There is an alleyway behind the apartment complex at 1700 Pacific Avenue between Pacific Avenue and Pine Avenue. (14RT 3628.) The alleyway runs parallel to Pacific Avenue, between Pacific Coast Highway and 16th Street. (14RT 3648.)

There was graffiti on a nearby wall on the rear carport area of 1700 Pacific Avenue. (16RT 4160-4163 [Peo. Ex. 1 [photographs].) The graffiti was visible from 1708 Pine Avenue. (16RT 4164-4165.) The graffiti indicated that the area was claimed by the ESL. (15RT 3764.)[4] The graffiti included the phrase "Fuck All Monkeys." This phrase would be

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[2] This was a lower-income area of Long Beach. (16RT 4163.)

[3] Turf is territory where a gang resides or hangs out. (17RT 4372.)

[4] A gang claims its territory by marking it with graffiti to communicate that the area is their turf. (17RT 4372-4373.) The presence of an African-American gang member in ESL turf is a sign of disrespect. A gang would use some type of force to get the gang member to respect their turf. (17RT 4376-4377.)

directed to the "Insane Crips, Samoans, and any other Black gang." (17RT 4373-4376; Peo. Ex. 1.) Although the RTC was not specifically mentioned, the graffiti did not indicate that the RTC were exempt from the hostility by the ESL. (17RT 4376.) The Long Beach Police Department was aware of this graffiti and suspected that there may be possible retaliation in the area because it conveyed a "pretty bold statement." (16RT 4161-4163.)

Appellant was a member of the RTC. On April 25, 1990, Long Beach Police Officer John Stople had a conversation with appellant. Appellant admitted that he was member of the RTC and that his gang moniker was "Swoop." (15RT 3934-3935.) In May of 1990, City of Long Beach Police Detective Steven Carl Lasiter had a conversation with appellant. Appellant stated that he was a member of the RTC and that his moniker was "Swoop." (15RT 3939-3940.) On May 2, 1990, appellant told Long Beach Police Officer Michael Schaich that he was a member of the RTC and that his gang moniker was "Key Loc." (17RT 4288-4291.)

Appellant had "Little 20 Swoop" tattooed on his right forearm. On the web of his left hand, the name "Kio" was spelled out. Appellant had a "2" and "0" tattooed on his left index finger. Appellant had the word "Crip" tattooed on his left wrist. Appellant had "RTC" tattooed above his elbow. Appellant had a "2" tattooed on the back of his left arm and a "0" tattooed on the back of his right arm. (17RT 4404-4407.)

Melvin Sherman was also a member of the RTC (15RT 3943, 4015-4016) and his gang moniker was "Baby Troub" (16RT 4175). Sherman had a "2" tattooed on the back of his left arm and a "0" tattooed on the back of his right arm. (18RT 4665-4666.)

Amber Gutierrez had seen appellant hanging out on Pine Avenue. On one occasion, appellant had "yell[ed] gang stuff at" Gutierrez and her friends. (14RT 3640-3641, 3678.) Veronica Munguia had seen both appellant and Sherman on Pine Avenue. (14RT 3704.) Anna Granillo

(hereinafter "Anna")[5] had seen appellant and Sherman on multiple occasions before the shootings. Whenever Anna passed by 1708 Pine Avenue, she would see Sherman. (15RT 3811-3813, 3822.)

On December 6, 1996, appellant had been angry because "he was beat down . . . by a Mexican earlier that week." (16RT 4177.) If a gang member from the RTC had been physically beaten by a Hispanic gang member, that gang member would have to retaliate. Committing a murder would be utmost form of retaliation.[6] A gang member who murdered a rival would gain an enormous amount of prestige within the gang. (17RT 4394-4396.) Moreover, actually approaching the residence of a rival gang member "would show other gang members that [the perpetrator is a hard-core gang member], that [the perpetrator] would do anything . . . ." (17RT 4396-4397.)

Mario Lopez ("Mario")[7] and his twin brother, Robert, were members of the ESL. (14RT 3693-3694, 3712, 3720.) Arthur Granillo (hereinafter "Arthur") was also a member of the ESL. (15RT 3772-3775.)

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[5] Anna Granillo and Arthur Granillo share the same last name. Thus, for purposes of clarity, counsel for respondent will refer to Anna and Arthur by their first names.

[6] The commission of an act of violence benefits a gang member by enhancing the reputation of the gang member. The more violent an act, the "more clout" the gang member earns. (17RT 4394.)

[7] Mario Lopez and Robert Lopez share the same last name. Thus, for purposes of clarity, counsel for respondent will refer to Mario and Robert by their first names.

2. The Shooting at 1700 Pacific Avenue, Apartment Number 4: the Murder of Mario Lopez (Count 2), Assault with a Deadly Weapon of Veronica Munguia (Count 5), and Shooting at an Inhabited Dwelling (Count 6)

a. Amber Gutierrez's Account of the Shooting

On December 6, 1996, at approximately 7 p.m., Gutierrez was at a party at 1700 Pacific Avenue, apartment number 4, in the City of Long Beach (hereinafter the "Pacific Avenue Apartment"). (14RT 3626-3628.) She was with a group of people that including, among others: Munguia, Anna, "Sunshine," "Casper," Tricky,[8] Arthur,[9] and Gregory Sinsun.[10] There were also three children present; Gutierrez's son,[11] Munguia's daughter, and Anna's daughter. (14RT 3628-3629.)

Gutierrez was sitting on a couch inside the Pacific Avenue Apartment, talking on the telephone. The front door was "wide open." Gutierrez had a clear view of the doorway from her vantage point. (14RT 3631-3632.) A "minute or two before the shooting," Gutierrez saw Sherman[12] walking slowly past the doorway. Sherman glanced inside the Pacific Avenue Apartment. Sherman then walked away from the back alley, towards Pacific Avenue. None of the people inside the Pacific Avenue Apartment spoke to Sherman. After Gutierrez saw Sherman walk past the doorway, she heard Sherman make a statement to someone in the direction of the back alley. (14RT 3632-3634.)

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[8] Tricky was a member of the ESL. (14RT 3710-3711.)

[9] Arthur was also known as "Joker." (14RT 3643.)

[10] Sinsun was also known as "Sleepy. (14RT 3715, 3750.)

[11] Munguia testified that Gutierrez was with her son. (14RT 3692.)

[12] Gutierrez identified Sherman at trial (14RT 3639) and from a photographic six-pack lineup (14RT 3669-3670).

Shortly thereafter, Mario and Casper went outside of the Pacific Avenue Apartment. Mario leaned up against a fence. Casper sat down in a chair outside. (14RT 3647.) At that time, Anna entered the apartment. As Anna was walking through the living room, shots were fired. (14RT 3635-3636.) Approximately eight to nine gunshots were fired from the back alley. (14RT 3651.)

The partygoers ducked for cover. (14RT 3637-3638.) Munguia was inside a bedroom. She ran out to get her daughter and was struck in the knee by gunfire. (14RT 3638-3639.) Casper ran inside the apartment. Mario also entered the apartment. He was holding the side of his body. Mario stumbled and fell on the living room floor. Mario was alive, but was bleeding. Mario stated that he wanted to go to the bathroom. Gutierrez assisted Mario to the bathroom. (14RT 3634-3637.) Gutierrez did not see appellant in the apartment complex at 1700 Pacific Avenue that night. (14RT 3661.)

b. Veronica Munguia's Account of the Shooting

Munguia had four brothers, including Mario, Robert, "Jesse," and Arthur. Mario and Robert were members of the ESL. (14RT 3693-3694, 3712, 3720.) Munguia also knew many members of the ESL. (14RT 3705.)

Mario and Arthur were at the Pacific Avenue Apartment during the party. (14RT 3710.) Everyone was drinking beer and having a good time. (14RT 3712.)

Before the shooting, Munguia was in the apartment's sole bedroom with Anna and Sinsun. (14RT 3707.) Anna had returned from the laundry room and was putting away her clothes. (14RT 3715, 3717.) Anna did not seem excited or upset. (14RT 3716-3717.) Munguia, Anna, and Sinsun had been inside the bedroom together for approximately five minutes when Munguia heard gunfire. (14RT 3716.) Anna had been walking back and

forth to the bedroom with her laundry. (14RT 3717.) When Munguia first heard gunfire, Anna had just walked into the bedroom and dropped off her laundry basket. (14RT 3718-3719, 3727, 3736.)

Munguia ran to the living room to protect her daughter. When she got to the living room, Mario pushed Munguia's daughter towards Munguia. Munguia picked up her daughter. Munguia was then struck by gunfire in the knee and ran back to the bedroom. (14RT 3698-3700.) Sinsun and Anna were inside the bedroom when Munguia returned. (14RT 3707.)

Gunshots continued to ring out. The partygoers ran into the bedroom. (14RT 3700.)[13] Mario collapsed in the hallway by the bathroom. (14RT 1700, 1703.) The partygoers tried to help Mario and debated whether to move him. The police were called and arrived approximately 15 minutes later. (14RT 3703.)

Munguia did not see the gunman. (14RT 3703, 3707-3708.) Munguia moved out of the apartment one month after the shooting. (14RT 3705.)

c. Anna Granillo's Account of the Shooting

Anna was at the party. (14RT 3739.) She had consumed a couple of beers. (14RT 3745.) That day, Anna had been doing her laundry. She had been walking back and forth between the laundry room and the bedroom, where she would put away her clothes. (14RT 3740-3741, 3745-3749.) Anna would only stay in the laundry room for short periods of time, just to load and unload her laundry. (14RT 3751-3752; 15RT 3781-3782.)

Before Anna's last trip to the laundry room, she saw Mario and Casper outside of the Pacific Avenue Apartment by the door. (14RT 3743; 15RT 3765-3766.) On her way to the laundry room, Anna saw appellant

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[13] Munguia testified that the shooting occurred between 7:00 p.m. and 8:00 p.m. (14RT 3712.)

and Sherman in the back alley, "scoping" out the apartment building. (14RT 3752-3754, 3758; 15RT 3764.) Appellant and Sherman were in the alley, approximately 38 feet away. (15RT 3816.) Although the back alley was dimly lit (15RT 3814), appellant and Sherman were both facing Anna. (15RT 3804.) Anna was certain that she saw appellant and Sherman in the back alley. (15RT 3826-3827.) Villa and another neighbor were also in the back alley. (15RT 3845.)

As Anna was leaving the laundry room, she again saw appellant and Sherman. They "came right close behind" her, and Anna saw them out of the corner of her eye. Anna warned Mario to "watch out." As she walked through the middle of the living room, Anna heard gunfire. Anna then ran into the bedroom and dropped off her laundry basket. (14RT 3754-3758; 15RT 3764-3765, 3783-3784.)

Anna heard more than seven gunshots that came from near the doorway. She then heard approximately three more gunshots that came from the back alley. (15RT 3767-3768.) Anna stayed in the bedroom until the gunfire ceased. (15RT 3766.) During that time, Anna saw Munguia run out to the living room screaming for her daughter. (15RT 3766-3767.)

Mario ran into the apartment. He stated, "God, these fucking niggers shot me." Mario then stated, "Damn, I'm hurt. I need to use the bathroom." (15RT 4768.)

The police were called. Anna felt that the police did not respond to the call in a timely fashion. The police ordered Anna to get out of the Pacific Avenue Apartment. However, she did not want to leave. She was "real upset and crying." She was angry at the police for not arriving at the house more quickly. (15RT 3769.)

The police took Anna and her mother outside of the Pacific Avenue Apartment. Mario was taken away in an ambulance. Anna was "real

upset" that the police did not allow her to go in the ambulance to the hospital with Mario. (15RT 3770.)

Anna was questioned by the police that day. She lied and told the police that she did not have any information that could help the police "because she did not want to talk to them at that time." (15RT 3770-3771.) Anna told the police that she was in the bedroom during the shooting and could not identify anyone. (15RT 3791-3792.) Although Anna did not actually see appellant shoot and kill Mario, she "knew something about it." (15RT 3772.)

Anna had a hostile relationship with the police. She believed that the police would harass her family. (15RT 3770-3771.) Whenever illegal activity would occur in the neighborhood, if someone of Hispanic decent was alleged to be involved, the police would come to her home. This upset Anna and caused her to distrust the police. (15RT 3779.) Moreover, there had been previous situations where other individuals of Hispanic decent had been shot, assaulted, or killed. Anna felt that the police did not help these victims. (15RT 3772.)

Anna did not speak with the police that day because she was upset and angry. She was hurt and did not want to talk to anybody, even her family, about what had happened. She wanted to forget about it. (15RT 3775-3776.) She did not want to testify at trial because she did not want to think about think about Mario. (15RT 3800.)

Because Anna's brothers were members of the ESL, Anna was expected to be uncooperative with the police. This was true despite the fact that her brother had been killed. If she testified against appellant, she would be considered a "snitch." She was discouraged by her own gang[14] not to cooperate with the police. She was also afraid that she would be

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[14] Anna was affiliated with the La Puente gang. (15RT 3806.)

attacked[15] if she cooperated with the police. (15RT 3772-3774.) Furthermore, Anna's brothers did not want her to cooperate with the police. (15RT 3776-3777.)

Arthur was outside when the shooting occurred. He did not speak to the police about the shooting. Some members of the ESL would consider a person a "snitch" if a person told "the police what they observed, even if the people that they are telling about are rival[] [gang members]." (15RT 3774-3775.)[16] The ESL's attitude was that they would take care of their own problems. (15RT 3776.)

3. The Murder of Jose Angel Villa on 16th Street in Front of the Back Alley (Count 3)

On December 6, 1996, shortly before 7 p.m., Maria Jaramillo was playing with her nephews in front of her home, located on 16th Street. She heard gunfire coming from the direction of Pacific Avenue. Jaramillo took her nephews inside the house. She then went back outside and saw appellant[17] walking out from the back alley.[18] Villa rode by on a bicycle from the direction of Pacific Avenue. Appellant grabbed Villa from around the neck and shot Villa on the right-side of his head, at approximately eye-level. (16RT 4087-4093.)

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[15] Being a "snitch" is looked down upon by other gang members. Snitches are not trusted by gang members. If someone is labeled a snitch, they would be assaulted or killed in prison. (17RT 4398.) Moreover, it is considered a sign of weakness to cooperate with the police. (16RT 4178.)

[16] If a member of the ESL witnessed a crime being committed by a member of the RTC, they would not talk to the authorities about the crime. (17RT 4399.)

[17] Jaramillo identified appellant at trial. (16RT 4102.) Jaramillo was confident in her identification of appellant as the shooter. (16RT 4108.)

[18] Officer Remine walked and jogged the distance from the rear of 1700 Pacific Avenue, to the alley where Villa was murdered, and back to 1708 Pine Avenue. It took approximately 45 seconds to walk that distance and 30 seconds to jog that distance. (17RT 4344.)

Jaramillo went back inside her home. She then heard additional gunfire. Jaramillo went back outside and saw that a person had been shot in a station wagon. (16RT 4093-4095.) She saw appellant walking towards Pine Avenue. (16RT 4094, 4096-4097.)

4. The Attempted Murder of Nery Hernandez (Count 4)

Hernandez was leaving his home located on Pine Avenue with his wife and two children. Hernandez backed out of his driveway and got out of his car to close the gate. (16RT 4243-4244.) Hernandez saw appellant and Villa arguing on the sidewalk by the alley. They were approximately 10 to 15 feet away. (16RT 4244-4245, 4249.) Hernandez got back inside his car. Hernandez then looked over and saw appellant pointing a gun at Villa. Hernandez tried to leave because he thought a shooting was going to occur. Hernandez heard two gunshots. Hernandez turned around to back his car out of the driveway. However, a car was passing by, and Hernandez had to wait. Hernandez turned around a second time to check if he could back up his car. When he looked up, appellant was standing in front of his car. Appellant pointed the gun at Hernandez. Appellant looked directly at Hernandez. Hernandez looked back at appellant. Appellant then shot Hernandez on the right-side of his chest. Appellant then ran towards Pine Avenue. (16RT 4245-4248, 4278.)

Hernandez's wife started screaming. His children were crying. Hernandez was able to maintain consciousness. Hernandez opened the door of his car and yelled for help. (16RT 4248-4249.)

Hernandez did not know appellant and had never had contact with appellant before the shooting. (16RT 4264.) Hernandez does not know any of appellant's other victims. (16RT 4282.)

5. Subsequent Investigations

a. Appellant and Sherman's Presence at 1708 Pine Avenue, Apartment Number 4

On December 6, 1996, before 7 p.m., Long Beach Police Officers Ernie Kohagura and Peter Anderson received a call from police dispatch about a shooting that occurred on the 1700 block of Pacific Avenue. Officer Kohagura was informed that there shots fired, "some victims down, and then possibly two male Black suspects." (17RT 4297-4298.) The suspects were last seen running eastbound through the apartment building towards Pine Avenue. (15RT 4019-4022, 4024.) The officers were not aware that anyone had been killed. (17RT 4298.)

Because of the location of the shooting, Officer Kohagura believed that the shooting may have been gang-related. (17RT 4307.) Officers Kohagura and Anderson were aware that "numerous Black Crip gangs" would hang out at the apartment complex at 1708 Pine Avenue. (17RT 4298-4300.) Because the scene had been secured by other officers, Officers Anderson and Kohargura went directly to 1708 Pine Avenue. Upon entering the apartment complex's courtyard, the officers saw appellant standing outside the front door of apartment number 4 (hereinafter the "Pine Avenue Apartment"). Appellant appeared startled. He quickly turned, ran inside the apartment, and "slammed the front door extremely hard." (15RT 4021-4024; 17RT 4300-4302.)

This raised Officer Anderson's suspicion. The officers walked over to the apartment and knocked on the front door. After approximately one to two minutes, a woman opened the door. Appellant was standing next to the woman. The officers explained that there was a shooting nearby and wanted to speak to appellant. (15RT 4024-4025; 17RT 4302-4303.)

Officer Kohagura spoke with appellant and filled out a field investigation ("FI") card with appellant's information. (17RT 4303-4305.)

Officer Anderson spoke to Sherman and filled out a FI card with Sherman's information. (15RT 4025-4026.)

Leslie Rainey was also present in the apartment. Rainey was friends with appellant and Sherman. (15RT 3960-3961.) However, the officers did not speak to Rainey because he was "somewhat older" and did not fit the description of the suspects. (15RT 4026.)

Rainey testified[19] that he was inside the Pine Avenue Apartment with appellant, Sherman, and four women. They were listening to music and watching television. Before 7 p.m., appellant walked out of the Pine Avenue Apartment and stated he would be standing outside the door. (15RT 3961-3963.) When appellant reentered the Pine Avenue Apartment, he closed the door behind him. Twenty seconds later, the police knocked on the door. Appellant answered the door and spoke with Officer Kohagura. Then, appellant closed and locked the door. (15RT 3985-3987.) The television program that they were watching was interrupted by "breaking news." Helicopters were flying above Pine Avenue, shining lights down on the area. (15RT 3987- 3988.) The apartment was not searched. (15RT 4026.) No arrests were made. (15RT 4027.)

b. Eyewitness Identifications

Long Beach Police Officer Victor Thrash created two photographic six-pack lineups containing appellant and Sherman's pictures. (16RT 4166-4167.) On December 7, 1996, Officer Thrash showed Hernandez the photographic six-packs. Hernandez identified appellant as the gunman. (16RT 4167-4169, 4251-4252, 4269.) Hernandez also identified appellant at the preliminary hearing. (16RT 4252.)

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[19] Due to their friendship, Rainey testified that he would not implicate appellant and Sherman in a murder, even if appellant and Sherman "had come back into the apartment with blood all over their shirt and a smoking gun . . . ." (15RT 3978.)

On December 9, 1996, Officer Thrash showed the photographic six-packs to Jaramillo. Jaramillo identified appellant as the gunman. (16RT 4097-4099, 4104, 4117, 4169-4172.)

On December 10, 1996, Officer Thrash showed the photographic six-packs to Gutierrez. Gutierrez was unable to identify appellant. However, two days later, Gutierrez identified Sherman as the person that she saw that night. (16RT 4172-4174; 4198.)

On December 8, 1997, Long Beach Police Officer Craig Remine showed Anna the photographic six-packs. (17RT 4341-4343.) Anna identified appellant and Sherman as "the two individuals [she] observed walking down the walkway prior to the shooting occurring." (15RT 3819-3822, 3827.)

c. Police Interviews

On December 13, 1996, Long Beach Police Detective Erik Herzog executed a search of the homes of Walleen Robinson (Sherman's grandmother) and Rosalind Gilyard (Sherman's mother). Detective Herzog was unable to locate any useful evidence. However, Detective Herzog spoke with both Robinson and Gilyard.

Robinson stated that Sherman had been in town for Thanksgiving. Sherman stayed with Robinson for two nights. Robinson did not know where else Sherman was staying. Robinson told Detective Herzog that Sherman had left town on either December 8th, 9th, or 10th. (15RT 3950-3952, 4011-4013.) After Robinson stated that she thought "something was wrong," Detective Herzog asked Robinson, "What did [Sherman] do?" Robinson stated that Sherman had come home one night and asked to be taken to the bus station. Sherman was taken to Gilyard's house. Sherman was in a hurry, and Robinson felt that was something unusual. Robinson then pointed to the calendar and stated that Sherman may have left town on December 2nd or 3rd. (15RT 3952-3954, 4013-4014.)

Detective Herzog spoke to Gilyard and asked her if she knew of Sherman's whereabouts. Gilyard stated that Sherman had been staying with Robinson. Sherman stayed over one night. Sherman then went to the bus station to go to Modesto. (15RT 4014-4015.) Gilyard told Detective Herzog that there were "a lot of Hispanic gangs in [her] neighborhood and [Sherman] [could not] come over [to her house]." Gilyard also stated that Sherman was a member of the RTC. (15RT 3943, 4015-4016.) However, Gilyard believed that Officer Herzog asked if Sherman was associated with the RTC. (15RT 3948-3949.) In addition, Gilyard has never heard of Sherman referred to as "Baby Troub." (15RT 3947.)

On December 13, 1996, Officer Thrash interviewed Rainey. (15RT 3963-3966.) Rainey stated that he was at the Pine Avenue Apartment with appellant and Sherman. He referred to appellant as "Swoop." He referred to Sherman as "Baby Troub." Rainey stated that appellant and Sherman had left the apartment together. Appellant left the door opened so he could get back inside the apartment. Appellant and Sherman were gone for approximately five minutes. They returned together with "Clarissa." Appellant stated, "Something must have happened out there because there are a lot of police." No one left the apartment after appellant and Sherman returned. Minutes after they returned, Officers Kohagura and Anderson arrived at the apartment. (16RT 4174-4177, 4204-4206.) During the course of the conversation, Rainey stated that appellant was angry because "he was beat down . . . by a Mexican earlier that week." (16RT 4177.)

Officer Thrash's report stated that Rainey stated that appellant and Sherman had left the apartment together, appellant left the door "cracked," and that both appellant and Sherman were gone for approximately five minutes. (16RT 4236-4237.)

d. The Tape Recording of a Telephone Conversation Between Appellant and His Younger Brother

On January 12, 1997, Los Angeles County Deputy Sheriff Dale Lovvik was assigned to a special crime task force. Deputy Lovvik monitored a wire tap of a telephone conversation between appellant and an unidentified woman. Appellant asked the woman to make a three-way call to appellant's younger brother, Tony Lamar Frazier. (15RT 3892-3894, 3897; Peo. Ex. 27.)

During the telephone call, appellant asked Frazier "[w]hat you guys doing?" Frazier stated, "Nothing. I talked to Troub man and I'm trying to get a hold of the dude so I can find out what happened in there." Frazier asked, "*Who* was it? Why they detain you?" Frazier stated that he did not know and asked whether Frazier was "talkin[g] my homeboy little Troub." Appellant then explained what happened at the preliminary hearing stating, "They pointed cuz[20] out and kept me man." (3CT Supp. IV 511, emphasis added.)[21]

Later, Frazier inquired into the identity of one of the witnesses at the preliminary hearing, asking appellant: "Okay now, who said something . . . Who is this person, a lady?" Appellant responded, "Two ladies and . . . [a] dude, but they ain't sayin[g] shit. They ain't sayin[g] nothing. I'm thinkin[g] they got help. The [j]udge said no doubt in his mind that he

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[20] The term "Cuz" is used by a member of the Crips to recognize another Crip gang member. Moreover, a member of the Crips will also refer to themselves in the third-person as "Cuz." (17RT 4399-4400, 4419-4420.)

[21] At the preliminary hearing, Jaramillo mistakenly identified Sherman as the shooter. She tried to correct her mistake, but was not given the opportunity. (16RT 4100-4101.)

think I'm guilty of the crimes. They pointed the homeboy out." (3CT Supp. IV 512.)

Frazier then asked, "Well who are these people? Get the transcripts." Appellant responded, "Yeah, I fixin to tell my lawyers man." Appellant then stated, "But he said he fixin to go out there and investigate. You know I ain't got, I ain't do this cuz, they ain't go." Frazier stated, "I know." Appellant then twice stated, "Don't even worry about it." Frazier stated, "Man I'm worried about it man. I know how the folks is." Frazier then stated, "I[t] ain't just." Appellant then stated "Nigger[22] need that DA hit that's who the nigger need hit."[23] Frazier states, "Yeah, but you know, you know." Appellant states, "You know that's what I'm thinking fool. He's mad because he come up with that proof on the nigger." (3CT Supp. IV 513.)[24]

Appellant and Frazier discussed Frazier's attempts to contact Troub. Frazier stated that he was "waitin[g] on Troub" and that Troub was "supposed to come by last night, but he went to Pomona . . . ." Frazier then talked about having to see a psychiatrist. Frazier stated that he found two pistols in the garage. Appellant warned Frazier "Don't be talking over the phone cuz. They've got my girl's phone tapped." Frazier then stated, "but anyway I gave them to [T]roub." (3CT Supp. IV 513-515.)

Officer Lovvik notified his supervisors about the conversation because there was a reference to the district attorney being "hit." (15RT 3897-3898.)

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[22] In gang lingo, the term "Nigga" is not a racially derogatory term. It is often used among Hispanics, Asians, African-Americans, and Samoans as a non-threatening term. (17RT 4400.)

[23] The term "hit" means to commit a murder. (17RT 4400-4401.)

[24] From the tape, it appears that appellant was using the term "Nigga" in the third person. (17RT 4401.)

e. Firearm Evidence

Long Beach Police Officer William Collette was one of the investigating officers. (17RT 4434-4436.) When Officer Collette arrived at the scene he initially went to West 16th Street, where Villa's body was lying. Villa was still straddling the bicycle. An expended .40 caliber shell casing was recovered approximately three feet away from Villa's body. Hernandez's car was in the street. There was a gunshot hole on the lower portion of the windshield. An expended .40 caliber bullet shell casing was recovered "in line with the front end" of Hernandez's car. (17RT 4436-4440; Peo. Exs. 22, 25.)

Officer Collette went to 1700 Pacific Avenue. Eight shell casings were in the area. One casing was in the area of the walkway of the Pacific Avenue Apartment. Four expended casings were found by the door of the Pacific Avenue Apartment. Three expended shell casings were in an adjoining yard. (17RT 4440-4443.)

Los Angeles County Sheriff's Department Senior Criminalist Dale Higashi examined eight .40-caliber Smith & Wesson expended cartridge cases, three intact expended bullets, and bullet fragments. (15RT 3910-3914; Peo. Ex. 15.) The bullets were fired from a semi-automatic handgun. (15RT 3917.) The impressions from the casings and the rifling characteristics of the expended bullets are indicative of a "Glock" pistol. (15RT 3918.) All eight of the expended cartridge casings were fired from the same firearm. (15RT 3912.) Although the intact bullets shared general characteristics, it could not be determined whether the expended bullets were fired from the same firearm because there was no specific firearm that could be tested. (15RT 3913-3914.) The large bullet fragments had similar characteristics to the intact expended bullets. (15RT 3914.) There was no Glock pistol found to conduct a comparative analysis of the bullets. (15RT 3919.)

f. Autopsy Evidence

On December 9, 1996, Los Angeles County Coroner's Department Forensic Pathologist Thomas H. Gill performed an autopsy on Villa. (15RT 3927.) Villa suffered a single gunshot wound, which entered his right eye. The bullet passed through Villa's eye and through his brain tissue. (15RT 3928-3930.) Dr. Gill opined that Villa's gunshot wound was inflicted from a weapon that was fired from approximately "zero to eighteen inches." (15RT 3931-3932.) A toxicology screening was conducted and showed that Villa had a .09 blood alcohol level. (15RT 3932-3933.)

On December 16, 1996, Los Angeles Corner's Department Deputy Medical Examiner Suko Jack Wang performed an autopsy on Mario. (16RT 4152.) Mario had suffered two gunshot wounds: one gunshot wound to the chest and another to the left forearm. (16RT 4152-4153; Peo. Ex. 5 [photographs].) The gunshot wound to Mario's chest was fatal. The bullet lacerated Mario's heart, where it was lodged. (16RT 4154-4155.) The gunshot wounds were not inflicted from close range. (16RT 4155-4156.) A toxicology screen was conducted. At the time of his death, Mario had a blood alcohol level of 0.17 and a methamphetamine level of 0.11 microgram per millimeter. (16RT 4156.)

B. Defense Evidence

1. Anna Granillo's Whereabouts During the Shooting

On December 6, 1996, Sinsun testified that he was inside the bedroom with Anna when the shooting occurred. Anna was in Sinsun's presence during the entire time of the shooting. (17RT 4492-4494.) Sinsun was a former member of the ESL. (17RT 4495.) Sinsun was at the Pacific Avenue apartment for approximately 45 minutes to an hour before the

shooting occurred. Anna had left the bedroom on several occasions. Sinsun was unsure whether Anna was doing her laundry. (17RT 4498-4500.) Sinsun did not remember the period of time that Anna was in the bedroom before the shooting. (17RT 4501.) Sinsun had previously testified that he did not recall whether Anna was inside the bedroom before the shooting. (17RT 4502.)

Long Beach Police Officer William Jarman took a statement from Anna. Anna stated that she was with Sinsun in the bedroom when she heard gunshots. Anna dropped to the floor and never left the bedroom. (17RT 4532-4534.) Sinsun stated that he was with Anna, heard several gunshots, dropped to the ground, and that Anna never left the bedroom. (17RT 4534.)

2. The Circumstances Surrounding Appellant's Conversation with Frazier

Frazier had a telephone conversation with appellant after the preliminary hearing. When Frazier stated, "I spoke to Troub man and I'm trying to get a hold of the dude so I can find out what happened in there," Frazier was referencing the preliminary hearing. Frazier wanted the transcripts because he wanted to know what happened at the preliminary hearing. (17RT 4541-4543.) When Frazier stated, "Well who are these people, get the transcripts," Frazier was not concerned about the identity of the witnesses, but the content of their testimony. (17RT 4553-4554.)

Frazier's next door neighbor was named "Troub." Frazier did not state "Little Troub." (17RT 4554-4555.) Frazier had stated, "Yeah, I gave him some and I had found two pistols in the garage here." He made this statement because he was having a yard sale and found two old revolvers, which he gave to a neighbor because Frazier was on parole. (17RT 4543-4545.) Frazier had never seen Sherman before the court proceedings. (17RT 4547.)

Frazier "somewhat" recalled appellant stating that, "They just need that D.A. hit, that's who the nigger need hit." Frazier believed that appellant made the statement because he was upset. Appellant was not telling Frazier to "hit a D.A." (17RT 4546-4547.) In addition, "hit" could mean "a whole lot of things." Frazier was unsure what appellant meant when he used the term "hit." (17RT 4560.)

Darlene Garrett-Frazier, Frazier's wife, testified that the two pistols found in the garage belonged to her ex-boyfriend. (18RT 4575-4578.) Garret-Frazier also stated that she did not know anyone named Troub. (18RT 4594.)

3. Sherman's Whereabouts

Debra Lincoln was Sherman's step-mother. In 1995, Sherman was living with Lincoln in Modesto. He was employed at a car wash and attended Modesto Junior College. Later, Lincoln and Sherman's father separated. (18RT 4597-4599.) Sherman had been incarcerated at the California Youth Authority because he had committed an armed robbery. On July 12, 1995, Sherman was paroled to live with Lincoln in Modesto. As a condition of Sherman's parole, he was ordered to stay in Modesto and ordered not to associate with people he knew to be gang members. (18RT 4629-4633, 4662-4664.)

Sherman was living in Modesto in November of 1996. Lincoln had seen Sherman in Modesto before Thanksgiving. (18RT 4599-4602.) Curtistine Hymes was Sherman's ex-girlfriend and Lincoln's niece. In 1996, Hymes testified that Sherman had left Modesto two days before Thanksgiving to go to Long Beach. (18RT 4680-4684.)

4. Robert Elder's Account of the Shootings

Robert Elder's testimony from the first trial was read into evidence. (18RT 4781.) Elder was a neighbor of Hernandez. Elder heard three

gunshots. He looked downstairs and saw a man with a gun in his hand. The man was "stocky," was wearing a navy pea coat, and had his hair styled in "a big afro." The man was walking eastward towards Long Beach Boulevard. The man entered a "little Nissan car and drove off." (8RT 2323-2327.)

Elder went outside. Hernandez had gotten out of his car and was walking towards his house. A man on a bicycle had been shot. He was trying to stand up and collapsed. Elder called 911, and later gave a statement to the police. (8RT 2330.) Because of the rivalry between Hispanic and Black gangs, the area was dangerous for young men. (9RT 2348.)

C. Penalty Phase Evidence

1. Aggravating Evidence

a. The Murder of Carl Milling

On August 27 1990, Long Beach Police Sergeant Keith Gregfrow was called to a homicide scene. Carl Milling was lying face down with his hands tied behind his back with a phone cord. Milling had suffered two gunshot wounds in his upper back. (20RT 5279-5280.) A neighbor reported hearing gunshots and seeing two people running from the scene of the crime. (20RT 5283.)

On August 26, 1990, Lakisha Johnson was living with Milling, who was her boyfriend. That evening they brought three friends to the house, one of whom was appellant. The three friends stayed until after midnight. Johnson subsequently fell asleep on the couch, and was awakened by Milling at approximately 2 a.m. He asked for Johnson brother's phone number and then left. When Milling returned, men wearing masks entered the house, put guns to Milling and Johnson's heads and told them to lie on the floor with their heads down. The men demanded money. One of the

men took Johnson outside to the garage. Johnson heard gunshots. Johnson recognized one of the men as appellant, because one of his eyes was "droopy." (21RT 5304 -5327.)

Long Beach Police Officer Dennis Robbins interviewed Alerey Ambrose, who told Officer Robbins that appellant stated he was a member of the RTC and that he was going to commit a robbery. Ambrose told Officer Robbins that appellant showed Ambrose a rag that he planned to use as a mask. Appellant stated that he had met at someone's house and then went over to Milling's house. (21RT 5345-5348.)

Ambrose testified that he was at Milling's house with appellant on August 26, 1990, but denied having made the statements incriminating appellant in the murder to Officer Robbins. (21RT 5330-5338.) The case was still open and no one had been charged. (21RT 5350.)

b. The Carjacking of Sarom Sao

On June 6, 1990, Sarom Sao was carjacked at gunpoint by a group of three to four black men, including appellant. During the carjacking, appellant held the gun, pulled Sarom out of his car by his collar, and told him that he would shoot him if he called the police. Sao's car was returned a week later. Although Sao picked appellant's photograph from a photographic lineup, he later told the district attorney that appellant was not the perpetrator. Sao lied to the district attorney about this because he was afraid. (21RT 5371-5377.)

Long Beach Police Officer Terry Madison saw appellant riding in the passenger seat of Sao's car three days after it was stolen. (21RT 5387-5390.)

c. The Robbery of Artis Lisby

On May 15, 1991, Artis Lisby was robbed at gunpoint. The robber was someone whom Lisby owed money for a drug transaction. During the

robbery, the man shot his gun in the air and drove off. Lisby told the police that appellant was the robber. However, afterwards, Lisby claimed that appellant did not commit the robbery. (21RT 5397-5408.)

Lisby told Officer Stolpe that he and appellant had argued over money that Lisby owed appellant. Appellant pulled out a gun, fired a shot, and then took off running. Lisby further told Officer Stolpe that appellant returned with a larger gun with a towel wrapped around it, and then took off in a black car with someone else. (21RT 5491-5496.)

d. The Murder of Ronald Broussard

On September 23, 1991, appellant was arrested for the murder or Ronald Broussard. Appellant had been identified from a photographic lineup by Armando Hernandez, an eyewitness to the murder. Appellant told Long Beach Police Officer Timothy Cable, the investigating detective, that he was asleep at his mother's house when the shooting took place and that his mother woke him up to tell him about the shooting. Appellant told Officer Cable that Broussard, whom appellant referred to as "Chubby," had been shot by a Mexican who was killed the next night. Hernandez did not identify appellant in a subsequent live lineup, and the case was dismissed. (21RT 5411-5438.)

e. The Shooting of Matthew Ferguson and Quincy Saunders

On April 25, 1990, at approximately 11:30 p.m., Matthew Ferguson had just returned home from his job as a security officer. Ferguson heard shots being fired from his backyard and from the front of his home. One of the shots hit Ferguson in the foot. Ferguson did not see the person who shot him. (21RT 5465-5467.)

The same night Quincy Saunders was shot in the hand and buttocks. (21RT 5469-5473.) Appellant was detained because he fit the description of the shooter. (21RT 5449.)

f. Possession of a Loaded .32 Revolver

On June 14, 1990, while serving a search warrant as part of a drug investigation, Long Beach Police Officer Garth Miller found a loaded .32 revolver in appellant's pants pocket. (21RT 5499-5501.)

g. The Robbery of Charles Loch

On April 16, 1992, appellant admitted to robbing Charles Loch. (21RT 5479-5480.)

h. Victim Impact Testimony

Anna Munguia was Mario's mother. Mario's murder hurt Anna Munguia. Mario was not involved in gangs and worked at an AM/PM store. (21RT 5520- 5528.)

Inez Villa Uriarte was Villa's sister. Villa was 36 years old. He was not a gang member. He was employed as a construction worker. Villa was survived by his wife and four young children. (21RT 5509-5513.)

Margarita Rodriguez is Villa's widow and the mother of his four children. Villa was a good man and was employed as a construction worker. Rodriguez is getting money from the county. Villa's children have been affected "a lot" by their father's death. (21RT 5530-5534.)

2. Mitigating Evidence

a. Valerie Williams

Valerie Williams, appellant's maternal grandmother testified that appellant was a sweet, obedient child and a good father to his children. All of appellant's brothers had spent long periods of incarceration in prison. Appellant's father had been addicted to drugs and alcohol. Appellant's mother was a devout Christian. Williams and appellant's mother had done the best they could raising appellant. (21RT 5538-5551.)

b. Robert Robinson

Robert Robinson worked for a gang prevention/intervention program. Robinson had brought appellant to talk to kids to dissuade them from joining gangs. Robinson determined that appellant was no longer an active gang member, and he was hoping to hire him to work with the program. He felt appellant was sincere about wanting to help the community and change his life. (51RT 5584-5581.)

c. Helene Cummings

Helene Cummings was a 29-year employee of the Long Beach Parks and Recreation Department. Cummings had known appellant his entire life. Appellant had been a good child. Appellant told Cummings that he was going to get his life together. Cummings was not aware that appellant was a gang member. (22RT 5590-5597.)

d. Jonathan Chaney

Jonathan Chaney was the teen director at the Boys and Girls Club of San Pedro and the junior varsity basketball coach at San Pedro High School. Appellant and Chaney played basketball together. Appellant was involved in community efforts to stop gang violence and had participated in negotiating a gang truce about 1992 or 1993. (22RT 5602-5607.)

e. Barbara McCoy

Barbara McCoy knew appellant his entire life. Appellant had been a good child and was a good athlete in school. Appellant was a good father. (22RT 5618-5632.)

f. Shawn Williams

Shawn Williams was appellant's classmate. Williams has known appellant for over 17 years. Williams described appellant as good-natured and kind-hearted. (22RT 5632-5654.)

g. Murise Stinson

Murise Stinson was a minister. Stinson had known appellant for approximately 10 years. Appellant was working with the recording artist "Snoop Dog" on a career in music. Appellant had a close relationship with his children. (22RT 5677-5685.)

h. Rickey Gipson

Rickey Gipson was employed by the Long Beach Unified School District as a gang suppression specialist. From 1983 to 1988, Gipson was aware that appellant was a good basketball player. (22RT 5698-5701.)

i. Lolitha Jones

Lolitha Jones has known appellant for over four years. Appellant had a very good relationship with his children. (22RT 5702-5713.)

j. Vanessa Gaskin

Vanessa Gaskin has known appellant for approximately 15 years. Appellant has a good relationship with his children. (22RT 5714-5721.)

k. Doris Vaughn

Doris Vaughn is appellant's mother. She testified about appellant's father's problems with drugs and alcohol. Appellant did not respect his father because of his addiction problems. Vaughn did not know about appellant's gang involvement. (21RT 5721-5736.)

l. Mellisa Bedolla

Melissa Bedolla was appellant's girlfriend and mother of his three children. She testified that appellant was a devoted father. Bedolla was half-Mexican. Appellant was close to her Mexican father. Bedolla denied knowing about appellant's gang involvement or criminal record. (21RT 5739-5749.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT RULED THAT MUNGUIA'S LAY OPINION ABOUT WHETHER THE EVIDENCE AGAINST APPELLANT WAS WEAK WAS SPECULATIVE AND THAT DETECTIVE COLLETTE'S STATE OF MIND DURING THE INVESTIGATION WAS IRRELEVANT

Appellant contends that the trial court abused its discretion when it restricted appellant from questioning Munguia, Anna, and Detective Collette about a statement made by the prosecutor regarding the strength of the evidence in the case. (AOB 39-50.) Appellant argues that a statement made by the prosecutor to Munguia that "the case against appellant was weak, and that without an eyewitness to identify [appellant], appellant would likely 'walk'" would impeach Anna by showing that Anna had a strong motive to fabricate her testimony. (AOB 39-40.) Appellant asserts that the statement was not hearsay because it was evidence of Munguia's state of mind and would impeach Anna's testimony. (AOB 44-45.) Appellant claims that the restriction deprived him of his constitutional rights to confrontation (AOB 45-47) and to present a defense (AOB 47-49).

Respondent disagrees and submits that the trial court did not restrict appellant's cross-examination of Munguia or Anna during appellant's retrial. At the *first trial*, the prosecutor objected to the admission of the prosecutor's statement to Munguia on hearsay grounds, and the trial court excluded any such testimony from Munguia and Anna concerning a statement made by the prosecutor about the strength of the case. However, during the *retrial*, there was no such objection or restriction. Appellant simply asked Munguia whether the case against appellant was weak, without reference to any statement made by the prosecutor who conducted the first trial. The prosecutor at the second trial objected on speculation grounds. The trial court sustained that objection. Appellant, as the

proponent of the testimony, failed to attempt to meet his burden of establishing the foundational requirements for Munguia's lay opinion testimony that the case against appellant was weak. Appellant did not ask Munguia about any statement made by the prosecutor about the strength of the case. Appellant also did not ask Anna about any statement by the prosecutor.

Because there was no ruling or stipulation that the objection and rulings in the first trial would be deemed to be renewed or otherwise carried over to the second trial, appellant's claim that the trial court erred when it excluded or restricted Munguia's or Anna's testimony has been forfeited. Furthermore, the trial court did not abuse its discretion when it sustained the prosecutor's objection that Munguia's testimony that the case against appellant was weak was speculation. Moreover, the trial court did not abuse its discretion when it found that Detective Collette's state of mind was irrelevant and that his testimony on about the prosecutor's statement was inadmissible because it contained multiple layers of hearsay. In any event, any alleged error was harmless.

A. Relevant Proceedings

During appellant's first trial, Anna testified that, on the night of her brother's murder, she did not want to talk to the police. She had lied when she told the police that she was in the back bedroom and did not see the shooter. She did not know that Mario's murderer was on trial until Munguia informed her. She felt guilty for not coming forward and contacting Deputy District Attorney ("DDA") Patrick Connolly.[25] (7RT 1913-1914.)

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[25] The prosecutor during appellant's first trial was DDA Patrick Connolly. (See 1RT 1.) For purposes of clarity, appellant will refer to (continued...)

On cross-examination, Anna testified that she spoke with Munguia on December 8, 1997. Appellant attempted to elicit testimony regarding what Munguia told Anna about Munguia's conversation with DDA Connolly. Specifically, appellant sought to question Munguia on what DDA Connolly's "words were" i.e., "[t]hat [DA Connolly] thought the case was weak and needed additional witnesses." (7RT 1927-1928.) DDA Connolly objected on hearsay grounds. Appellant argued that the evidence was relevant to "state of mind" and "goes to bias and motive." (7RT 1928-1929.) The trial court ruled that appellant could ask Anna about the "result of the conversation with [Munguia], did you come forward, et cetera, but not the words of [DDA Connolly] to [Munguia]." (7RT 1929.) The trial court excluded the "statement by [DDA Connolly] - - or any statement by [Munguia] about what [DDA Connolly] said about the evaluation of the case." (7RT 1930.) The trial court suggested to appellant that he ask a "closed-ended question" about whether Munguia "instruct[ed] [Anna] to testify, come forward to testify because [Munguia] told [Anna] that they had to have [Anna's] testimony or needed [Anna's] testimony or whatever it was that [Munguia] told her. I want to avoid a statement by [DDA Connolly] to [Munguia]." (7RT 1931.)[26]

Appellant then asked Anna whether "as a result of that conversation [Munguia] had with [DDA Connolly], that she informed you that they needed your testimony[?]" (7RT 1931-1932.) Anna replied that Munguia

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(...continued)
DDA Connolly by name, in order to avoid confusion with the prosecutor at the second trial, DDA Steven Schreiner.

[26] Respondent notes that if appellant wanted to make in inquiry into Munguia's state of mind or impeach Anna without reference to a statement made by DDA Connolly, appellant could have simply asked Munguia whether she feared that appellant would not be convicted if she did not find additional witnesses for the prosecution.

"didn't tell me like that." Rather, Munguia and Anna were "talking." Munguia told Anna that she needed to tell "the truth." Anna then "started telling her [the truth]." (7RT 1932.)

Later, a mistrial was declared and the case was set for retrial. (9RT 2556.) DDA Connolly was transferred to another unit (10RT 2650-2651) and the case was reassigned to DDA Schreiner (10RT 2654, 2656). There does not appear to be a ruling or stipulation that the objections and rulings in the first trial were deemed to be renewed or otherwise applied during the retrial.

During retrial, appellant cross-examined Munguia. Munguia testified that she had a conversation with DDA Connolly on December 8, 1997. As a result of that conversation, Munguia was of the state of mind that she needed to obtain additional witnesses. Munguia provided DDA Connolly with one additional witness, Anna. Anna had not come forward as a witness before that time. (14RT 3708-3709.)

Defense counsel asked Munguia, "Is it true that as a result of that conversation with [DDA] Connolly . . . that you were of the state of mind that you needed an additional witness was because the case was weak, correct?" The prosecutor objected on speculation grounds. The trial court sustained the objection. Defense counsel did not attempt to lay any foundational grounds for lay opinion testimony by Munguia that the evidence against appellant was weak. Munguia then testified that she spoke to Anna after her conversation with DDA Connolly and that Anna came forward at that time. Defense counsel did not ask Munguia whether DDA Connolly had stated to Munguia that the case against appellant was weak. (14RT 3709.)

Munguia further testified that she had felt the she needed to obtain additional witnesses for DDA Connelly. Munguia knew that Arthur and Casper were outside when the shootings occurred. They had witnessed the

shootings, but refused to come forward and cooperate. Arthur and Casper were gang members and it was "against gang credo" to testify and cooperate with authorities investigating crimes. (14RT 3721-3723.) DDA Connelly asked Munguia whether Munguia knew anything and whether Munguia would help him. Munguia knew that Anna "knew things, but she did not want to come forward and not talk to anyone." (14RT 3723.) Anna did not want to talk to anyone about the shooting, even Munguia. Munguia asked Anna to talk to DDA Connelly. Munguia did not tell Anna that she wanted Anna to say anything in particular. Munguia just asked Anna to talk to DDA Connelly, "if she knew about it." (14RT 3724.)

Munguia had not told anyone that Anna was a potential witness prior to Munguia's conversation with DDA Connelly. Munguia did not know what Anna would say to DDA Connelly because Anna and Munguia had not been in contact for approximately one year. (14RT 3725-3727.)

Anna testified that she had not spoken to Munguia for over a year. Anna had a conversation with Munguia. Munguia informed Anna that there was a trial involving Mario's murder. Munguia told Anna that she had a conversation with the district attorney.[27] As a result of the conversation, Munguia asked Anna to call DDA Connolly. Anna called DDA Connolly and gave him a statement. She had never spoken to anyone about what she witnessed that night. Appellant did not ask Anna about any statement made by DDA Connolly to Munguia about the strength of the case against appellant. (15RT 3801-3804.)

Later, appellant also asked Officer Remine about the conversation between DDA Connolly and Munguia. Officer Remine was aware that Anna had given a statement on the day of the murder that she could not

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[27] Although DDA Connolly was not referred to by name, it appears that he was the "district attorney."

identify anyone and that she did not leave the bedroom. (17RT 4349-4350.) In November of 1997, Officer Remine spoke with Munguia about additional witnesses. At that time, Munguia did not tell Officer Remine that Anna had witnessed the shooting. (17RT 4346-4347.)

Around December 8, 1997, Officer Remine was contacted by DDA Connolly informing him that he should contact Anna. DDA Connolly stated that he had a conversation with Munguia and told Officer Remine that Anna was a potential witness. (17RT 4346.) Officer Remine did not have a conversation with DDA Connolly "regarding his conversation that he may have had with Veronica Munguia." (17RT 4350.)

Defense counsel then asked Officer Remine about a conversation between DDA Connolly and Munguia. Officer Remine stated that he knew nothing about that conversation. Officer Remine and Detective Collette were not present during a conversation between DDA Connolly and Munguia that occurred on December 8, 1997. (17RT 4345-4346.)

Defense counsel then asked Officer Remine, "Okay. Now, sir, you were present when myself and . . . my investigator interviewed Veronica Munguia regarding her conversation with the district attorney, correct?" Officer Remine stated that he had no recollection of the interview. (17RT 4351.)

Afterwards, appellant asked Detective Collette whether he was present during an interview between defense counsel and Munguia, wherein Munguia had stated that she had a conversation with DDA Connolly on December 8, 1997. Detective Collette had heard Munguia state that, as a result of the conversation with DDA Connolly, Munguia spoke with Anna. Munguia stated that she felt obligated to find additional witnesses. Appellant then asked Detective Collette, "Do you recall Miss Munguia expressing to my office, to myself and my investigator, that she felt

obligated as a result of the conversation she had with [DDA Connolly] regarding the evidence in the case?" (17RT 4460.)

DDA Schreiner made a request for a sidebar, which was granted. (17RT 4461.) DDA Schreiner objected to defense counsel's line of question because it appeared that appellant was "trying to move into an area where she is going to get a characterization or opinion of [DDA Connolly] as to the relative strength of the case and suggest [it] to the jury." DDA Schreiner stated that he "understood it is certainly fair ground to suggest there is some sort of inducement to Miss Munguia that resulted in her bringing in these people," but did not want any reference of what transpired at the first trial. (17RT 4461-4462.)

Defense counsel responded that the evidence was relevant to Detective Collette's ["the lead detective"] state of mind and what Detective Collette "did with that statement." (17RT 4462.) The trial court asked defense counsel how this line of questioning to Detective Collette was relevant, stating, "Even though that's what [DDA Connolly] thought, how does that help this jury determine the facts of the case as it is presented now?" (17RT 4462.) Defense counsel replied, "It goes to the fact as to why Veronica Munguia went to her sister Anna and it brings up that whole thing. She told Anna that this is a very weak case, we need someone to come forward. Anna says, 'Okay, I saw everything.' It goes to that, Your Honor." (17RT 4463.) The trial court found that the line questioning was irrelevant and was not proper impeachment of Anna, stating "Well, the person to ask about that is Anna Granillo, not the detective, not this detective." (17RT 4463.)

The prosecutor further argued that DDA Connelly's opinion about the strength of case would be inadmissible hearsay. The prosecutor argued that, if the statement was admitted, he would have to call DDA Connelly as a witness to explain his opinion, which would result in DDA Connelly

offering his opinion of appellant's guilt or innocence. (17RT 4463.) The trial court agreed and restricted defense counsel from asking Detective Connelly any questions "concerning an opinion offered by [DDA] Connolly concerning the strengths or weaknesses of the case," but allowed appellant to question Detective Collette about his interview with Anna. (17RT 4463-4464.)

Appellant questioned Detective Collette about Anna's prior statement on the night of the shooting. Detective Collette was also asked about the circumstances prior to Anna's statement on December 9, 1997, which occurred after Anna had a conversation with Munguia. Moreover, Detective Collette testified that, after the shooting, Sinsun had stated that he was in the bedroom with Anna. (17RT 4464-4468.)

B. Appellant Has Failed to Preserve His Claim that the Trial Court Abused Its Discretion by Restricting Munguia and Anna from Testifying about a Statement Made by DDA Connelly Regarding the Strength of the Case

Appellant has failed to preserve his claim that the trial court abused its discretion when it restricted appellant from asking Munguia or Anna about a statement made by DDA Connelly to Munguia about the strength of the case against appellant.

> While it may not be necessary to renew an objection already overruled in the same trial [citation], absent a ruling or stipulation that objections and rulings will be deemed renewed and made in a later trial [citation], the failure to object bars consideration of the issue on appeal . . . . A defendant may not acquiesce in the admission of possibly excludable evidence and then claim on appeal that rulings made in a prior proceeding render objection unnecessary.

(*People v. Clark* (1990) 50 Cal.3d 583, 623–624, 268 Cal.Rptr. 399, 789 P.2d 127, fn. omitted; *People v. Richardson* (2008) 43 Cal.4th 959, 1002 [rejecting the defendant's argument that his objections to the evidence

during the first trial, which ended in a mistrial, preserved his claims on appeal because the trial court referred to its prior rulings].)

Here, on retrial, appellant did not ask Munguia or Anna about any statement made by DDA Connolly about the strength of the case. Although the trial court restricted appellant's cross-examination of Munguia and Anna on this subject on hearsay grounds during the first trial (7RT 1928-1931), it did not do so on retrial (14RT 3709; 15RT 3802). Rather, the trial court excluded Munguia from stating her lay opinion on whether the case against appellant was weak on speculation grounds. On retrial, appellant simply did not ask Munguia or Anna about a statement made by DDA Connelly about the strength of the case against appellant. (14RT 3709.) Accordingly, appellant has failed to preserve the issue for appeal. (Evid. Code, §§ 353, 354; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [a reviewing court does not have the discretion to consider the merits of a question relating to the admission or exclusion of evidence that has not been preserved for review]; cf. *People v. Partida* (2005) 37 Cal.4th 428, 431 [although a defendant may argue that a trial court's error in overruling an objection had the legal consequence of violating due process, a defendant may not argue on appeal the court should have excluded the evidence for a reason not asserted at trial]; see, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 717 [the defendant forfeited the argument that the evidence should have been excluded because it was inadmissible hearsay because he "never made any objection whatsoever on that basis"].)

C. The Trial Court Properly Found that Munguia's Lay Opinion Testimony about the Strength of the Case Was Speculative

On retrial, appellant asked Munguia whether the evidence against appellant was weak. The prosecution objected to the question on speculation grounds. The trial court sustained the prosecution's objection

as calling for speculation. Appellant did not make an offer of proof regarding the admissibility of the evidence and did not rephrase the question. (14RT 3709.)

1. The Trial Court Did Not Abuse Its Discretion When It Sustained the Prosecution's Objection to Munguia's Lay Opinion Testimony on Speculation Grounds

The trial court did not abuse its discretion when it sustained the prosecution's objection to Munguia's lay opinion testimony on speculation grounds. An "appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla, supra*, 22 Cal.4th at p. 717.)

Because Munguia was not qualified as a testifying expert, admission of her opinion testimony was governed by Evidence Code section 800, which requires that a lay witness's opinion must be rationally based on the witness's own perceptions and helpful to a clear understanding of his or her testimony. (*People v. Farnam* (2002) 28 Cal.4th 107, 153.) A nonexpert witness's testimony concerning a particular matter is inadmissible unless the witness has personal knowledge of the matter. (Evid. Code, § 702, subd. (a).) "Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (*Ibid.*) Moreover, the proponent of the evidence has the burden to establish this requisite foundation. (Evid. Code, § 403, subd. (a)(2).) The personal knowledge requirement of witnesses also applies to hearsay declarants. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104.) "In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation." (*Ibid.*) In addition, evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. (*People v. Morrison* (2004) 34 Cal.4th 698, 724.)

Where the relevancy of proffered evidence depends upon the existence of a preliminary fact, the evidence is inadmissible unless the proponent of the proffered evidence has shown the existence of the preliminary fact by a preponderance of the evidence. (Evid. Code, § 403, subd. (a)(1).) "It is the trial court's function to determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence, even if the court personally would disagree." (*People v. Marshall* (1996) 13 Cal.4th 199, 832-833, citations omitted.) "The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

It is unknown whether Munguia's belief or opinion about the strength og evidence against appellant was based on her own perception or personal knowledge,[28] absent an adequate foundation. Because appellant failed to lay this foundation, he cannot show that the trial court abused its discretion when it excluded Munguia's lay opinion testimony. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 724; *People v. Navarette* (2003) 30 Cal.4th 458, 493 [the proponent of opinion testimony must, upon objection, lay the proper foundation].)

Moreover, Munguia's lay opinion testimony about the strength of the case against appellant was not helpful to a clear understanding of Munguia's testimony because her opinion would be of no assistance to the jury.[29] (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77 [testimony

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[28] It appears that, if Munguia had an opinion regarding the strength of the case against appellant, it would have been based on DDA Connolly's supposed perception.

[29] Respondent notes that, as phrased, appellant merely asked Munguia whether she believed that the case against appellant was weak. (14RT 3709 ["Is it true that as a result of that conversation with [DDA]

(continued...)

of a lay witness that contains an opinion about the guilt or innocence of a defendant is ordinarily inadmissible because it is "'of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'"], quoting *People v. Torres* (1995) 33 Cal.App.4th 37, 47.) As a lay witness, Munguia had no greater skill than the jury to evaluate the evidence against appellant. (7 Wigmore, Evidence (Chadbourn rev.1978) § 1919, p. 32 [where the witness has "no greater skill than the jury in drawing inferences from the kind of data in question [,][s]uch a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them"].)

Furthermore, Munguia's opinion on the state of the evidence against appellant was not a proper subject for lay opinion testimony. (See *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 848-849 [a layperson may not testify on matters which are not proper subjects of lay opinion testimony]; see also *People v. Chapple* (2006) 138 Cal.App.4th 540, 547 [lay opinion testimony is admissible where no particular scientific knowledge is required or when the matters observed are too complex or subtle to enable the witness accurately to convey them to court or jury in any other manner].) Here, there was no evidence that Munguia had any legal training or had reviewed the evidence. Whether the case against appellant was weak is simply a subject matter that was too complex for Munguia to accurately convey to the jury. Moreover, the prosecutor's subjective assessment of the strengths or weaknesses of the case, as related to a witness, is irrelevant and speculative. Thus, appellant has failed to

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(...continued)
Connolly . . . that you were of the state of mind that you needed an additional witness was because the case was weak, correct?"].)

show that the trial court abused its discretion when it sustained the prosecutor's objection on speculation grounds.

2. The Exclusion of Munguia's Lay Opinion Testimony Did Not Violate Appellant's Constitutional Rights

The exclusion of Munguia's testimony at issue did not violate appellant's constitutional rights. The Constitution guarantees a criminal defendant a meaningful opportunity to present relevant evidence in his own defense at trial. (*See, e.g., Taylor v. Illinois* (1988) 484 U.S. 400, 408 [108 S.Ct. 646, 98 L.Ed.2d 798]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].) The Confrontation Clause guarantees to a defendant in a criminal prosecution the right to explore witness bias through cross-examination, but trial courts retain wide latitude to impose reasonable limits in order to prevent confusion of the issues or interrogation that is only marginally relevant. (*People v. Harris* (1989) 47 Cal.3d 1047, 1091.) States have the power to formulate and apply reasonable foundational requirements for the admission of evidence. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178 [discussing *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], *Skipper v. South Carolina* (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1], and other United States Supreme Court decisions]; see also *People v. Phillips* (2000) 22 Cal.4th 226, 238.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.)

Here, the application of ordinary rules of evidence did not violate appellant's constitutional rights to present a defense or to confrontation. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 427-428; see *People v. Wilson* (2008) 44 Cal.4th 758, 794.) As stated above, appellant did not attempt to lay a foundation for Munguia's lay opinion about the strength of

the case and such testimony would have been irrelevant. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1249-1250, 9 Cal.Rptr.2d 628, 831 P.2d 1210 [exclusion of irrelevant evidence does not violate a defendant's due process, confrontation, or 8th Amendment rights].) Therefore, the trial court's ruling sustaining the prosecutor's objection to Munguia's lay witness opinion testimony did not violate appellant's constitutional rights.

3. Any Alleged Error Was Harmless

In any event, any alleged error by the trial court when it sustained the prosecution's objection on foundation grounds was harmless under any standard. An evidentiary ruling, even if erroneous, does not warrant reversal on appeal absent a miscarriage of justice. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*").) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Moreover, assuming that an evidentiary ruling violated a defendant's federal constitutional rights, any error would be harmless if it was harmless beyond a reasonable doubt. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 152 ("*Eubanks*") ["[i]n the interest of complete review, we note that even if we were to assume evidentiary error, any error would be harmless, whether assessed under the federal constitutional" under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 ("*Chapman*").)

Here, it is not reasonably probable that appellant would have been acquitted of Mario's murder if Munguia had been allowed to opine that she thought the case against appellant was weak. Munguia's lay opinion about the strength of the evidence against appellant would not have impeached Anna's testimony placing appellant and Sherman at the scene of the first

shooting. (See AOB 49-50.) Munguia testified that she had felt the she needed to obtain additional witnesses for DDA Connelly. (14RT 3721-3723.) Therefore, the jury was already aware that Munguia was not confident in the state of the evidence on December 9, 1997.

Furthermore, Anna testified that she did not witness appellant commit the shooting. (15RT 3772.) Rather, Granillo's saw appellant and Sherman in the back alley "scoping" out the apartment building. (14RT 3752-3754, 3758; 15RT 3764.) She then saw appellant and Sherman approach the apartment building. (14RT 3754-3758; 15RT 3764-3765, 3783-3784.)

Anna's testimony was not the only evidence of appellant's identity as the shooter. Appellant had a strong motive to commit the shooting of the Pacific Avenue Apartment. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [gang evidence may be relevant in cases not involving a gang enhancement by helping to prove identity, motive, specific intent and other issues pertinent to guilt of the charged crime]; see e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193.) Appellant was a member of the RTC (15RT 3934-3935, 3939-3940; 17RT 4288-4291, 4404-4407.) Mario was a member of the ESL. (14RT 3693-3694, 3712, 3720.) The RTC and the ESL were engaged in a gang war. The Pacific Avenue Apartment was in the middle of this war. (16RT 4160, 4163, 4234; 17RT 4165, 4298-4300, 4372.) Appellant had recently been physically beaten by a Hispanic gang member (16RT 4177.) Thus, appellant had a strong motive to retaliate for the beating. (17RT 4394-4396.)

In addition, multiple eyewitnesses placed Sherman and appellant at the scene of the crime. Gutierrez testified that she saw Sherman walking slowly past the doorway and glanced in the apartment shortly before the shootings (14RT 3632-3634, 3647) and that the gunfire came from the back alley (14RT 3651). Jaramillo testified that she heard gunfire. Shortly thereafter, Jaramillo saw appellant walking out from the back alley. (16RT

4087-4093.) Hernandez testified that he saw appellant and Villa arguing on the sidewalk by the alley. (16RT 4244-4245, 4249.)

There was ample evidence that appellant and Sherman were together shortly after the shootings. When responding to a dispatch call, Officers Anderson and Kohargura saw appellant standing outside the Pine Avenue Apartment. (15RT 4021-4025; 17RT 4300-4302.) The officers spoke with both appellant and Sherman inside the Pine Avenue Apartment. (15RT 4025-4026; 17RT 4303-4305.) Later, Rainey told police that appellant and Sherman had left the apartment together. Appellant left the door opened so he could get back inside the apartment. Appellant and Sherman were gone for approximately five minutes. Appellant and Sherman then returned together. (16RT 4174-4177, 4204-4206.) Thus, there was ample evidence, aside from Anna's testimony, that placed appellant and Sherman at the scene of the shooting, i.e. the back alley.

D. Assuming that Appellant Had Attempted to Impeach Anna with a Statement Made by DDA Connolly to Munguia, Any Alleged Error Would Be Harmless

As detailed above, appellant did not ask Anna about any statement made by DDA Connolly to Munguia. Thus, the trial court could not have abused its discretion by excluding such evidence and the exclusion of the evidence could not have violated appellant's constitutional rights. In any event, even if appellant had questioned Anna about any statement made by DDA Connolly to Munguia, the error would be harmless under any standard.

As detailed above, Anna did not testify that she saw appellant commit the shootings. Rather, she saw appellant and Sherman in the back alley and that they later walked behind her. (15RT 3772.) Even if appellant had successfully impeached Anna's testimony, there was ample evidence showing that appellant committed the shooting of the Pacific Avenue

Apartment. As detailed above, appellant had a strong motive to commit the shootings at the Pacific Avenue Apartment.

Multiple eyewitnesses placed appellant Sherman at the scene. Before the shooting at the Pacific Avenue Apartment, Gutierrez saw scoping out he Pacific Avenue Apartment shortly before the shootings (14RT 3632-3634, 3647) and heard gunfire from the back alley. (14RT 3651). After the shooting at the Pacific Avenue Apartment, Jaramillo saw appellant walking out from the back alley. Appellant then murdered Villa (16RT 4087-4093), who was a witness to the Pacific Avenue Apartment shooting (15RT 3845). Hernandez saw appellant and Villa arguing on the sidewalk by the alley and saw him point a gun to Villa's head. Appellant then shot Hernandez because he witnessed Villa's murder. (16RT 4244-4245, 4249.) Moreover, Officers Anderson and Kohargura interviewed both appellant and Sherman, who were together at the Pine Avenue Apartment, shortly after the shootings. (15RT 4025-4026; 17RT 4303-4305.)

There was also ample evidence of appellant's consciousness of guilt. During his tape recorded telephone conversation with Frazier, it appears that appellant and Frazier were discussing the identity and location of witnesses to threaten them; that appellant made a threat against a deputy district attorney; and that Frazier gave Sherman two pistols to dispose. (3CT Supp. IV 511-515; see, e.g., . *People v. Williams* (1997) 16 Cal.4th 153, 201 [attempts to suppress evidence and demonstrates a consciousness of guilt];*People v. Tripp* (2007) 151 Cal.App.4th 951, 957 [attempt to dispose of or hide contraband indicated a consciousness of guilt]; *People v. Rider* (1955) 130 Cal.App.2d 353, 355 [attempt to hide murder weapon and other circumstances arising prior to arrest "all indicated a consciousness of guilt"].)

There was also evidence of Sherman's consciousness of guilt. (*People v. Turner* (1990) 50 Cal.3d 668, 694-695 [the jury could infer guilt

from the defendant act of leaving crime scene in haste to return to his home town].) Robinson told Detective Herzog that Sherman was in a hurry to leave Long Beach. (15RT 3952-3954, 4013-4014.) Gilyard told Detective Herzog that Sherman then went to the bus station to go to Modesto. (15RT 4014-4015.) Thus, there was ample evidence, aside from Anna's testimony, that placed appellant and Sherman at the scene of the shooting, i.e. the back alley.

E. The Trial Court Properly Exercised Its Discretion When It Found that Detective Collette's State of Mind During the Investigation Was Irrelevant and Not Proper Impeachment of Anna

Appellant sought to ask Detective Collette about statements he may have overheard Munguia make to defense counsel about DDA Connolly's evaluation of the evidence in the case. (17RT 4460.) The prosecutor objected to appellant's line of questioning on the ground that appellant was "trying to move into an area where she is going to get a characterization or opinion of the district attorney as to the relative strength of the case and suggest [it] to the jury." (17RT 4461-4462.) Appellant argued that the evidence was relevant to Detective Collette's state of mind and what Detective Collette "did with that statement." (17RT 4462.) The trial court asked appellant how this line of questioning to Detective Collette was relevant. (17RT 4462.) Appellant explained that it would impeach Anna's testimony. (17RT 4463.) The trial court found that the line questioning was irrelevant and was not proper impeachment of Anna. (17RT 4463.) The prosecutor further argued that DDA Connelly's opinion about the strength of case would be inadmissible hearsay. (17RT 4463.) The trial court restricted appellant from asking Detective Connelly any questions "concerning an opinion offered by [DDA] Connolly concerning the strengths or weaknesses of the case," but allowed appellant to question Detective Collette about his interview with Anna. (17RT 4463-4464.)

1. The Trial Court Did Not Abuse Its Discretion When It Found that Detective Collette's State of Mind Was Irrelevant

The trial court did not abuse its discretion when it excluded testimony from Detective Collette regarding Munguia's statements made to defense counsel concerning DDA Connelly's statements to Munguia about the strength of the evidence against appellant to show Detective Collette's state of mind because Detective Collette's state of mind was irrelevant.

Relevant evidence is defined in Evidence Code section 210 to mean, in pertinent part, ". . . evidence . . . having any tendency in reason to prove or disprove any disputed fact . . . ." "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Clark* (2011) 52 Cal.4th 856, 922.) In other words, evidence is relevant if it "'"'logically, naturally, and by reasonable inference'"' establishes material facts such as identity, intent, or motive. (*People v. Williams* (2008) 43 Cal.4th 584, 633.) Evidence is irrelevant, however, if it leads only to speculative inferences. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1035; *People v. Babbitt* (1988) 45 Cal.3d 660, 684 ["'exclusion of evidence that produces only speculative inferences is not an abuse of discretion.'"].) "'The trial court has considerable discretion in determining the relevance of evidence.'" (*People v. Williams*, *supra*, 43 Cal.4th at p. 634; *People v. Warner* (1969) 270 Cal.App.2d 900, 908.)

When asked by the trial court, appellant stated that the relevance of the challenged line of questioning of whether Detective Collette overheard Munguia's statements to defense counsel was to show Detective Collette's state of mind during the investigation. (17RT 4462.) Here, the trial court did not abuse its discretion when it found that Detective Collette's state of

mind was irrelevant. Detective Collette's state of mind had no tendency to prove or disprove any material fact. Only by speculative inferences would Detective Collette's state of mind be relevant to impeach Anna's testimony. There was no evidence, allegation, or offer or proof that Detective Collette's subjective state of mind as to the relative strength or weakness of the case was in any way relevant to any issue in the case. Thus, the trial court did not abuse its discretion when it found that appellant's line of questioning to Detective Collette was not relevant to impeach Anna.

In any event, even if the line of questioning to Detective Collette was somehow relevant to impeach Anna, the trial court's exclusion of such evidence was not an abuse of discretion. A trial court has discretion to exclude impeachment evidence if it is collateral, irrelevant, cumulative, confusing, or misleading. (*People v. Price* (1991) 1 Cal.4th 324, 412; see *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues"].) "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) However, "[a] matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue . . . ." (*Ibid.*)

Here, there was no evidence that Detective Collette conveyed any statement made by DDA Connolly to Munguia to Anna. (17RT 4463.) As the trial court stated, if appellant wanted to impeach Anna with this line of questioning, "the person to ask about that is Anna Granillo, not the detective, not this detective." (17RT 4463.) Appellant did not ask Anna whether she was made aware of a statement by the prosecutor on the strength of the case by Detective Collette or Munguia. It was mere

speculation that, because Detective Collette overheard a statement by Munguia made to defense counsel about a statement made by prosecutor concerning the strength of the case, that this would somehow impeach Anna's credibility. Without more, there was no rational inference to be made that Anna fabricated her testimony based on *Detective Collette*'s state of mind or what Detective Collette knew. Thus, the trial court did not abuse its discretion when it restricted appellant's cross-examination of Detective Collette.

2. Testimony That Detective Collette Overheard Munguia Making a Statement Regarding a Statement Made by DDA Connolly about His Evaluation of the State of the Evidence Involved Inadmissible Hearsay

Any statement by Detective Collette about a statement made by DDA Connolly to Munguia involved multiple layers of inadmissible hearsay. "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a non-hearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585, superseded by statute on other grounds as stated in *People v. Cottle* (2006) 39 Cal.4th 246, 255.) Moreover, the admission of multiple hearsay is only permissible where each level falls within a hearsay exception. (*People v. Williams* (1997) 16 Cal.4th 153, 199, fn. 3.)

Here, as stated above, the non-hearsay purpose provided by appellant for Detective Collette's testimony, i.e., Detective Collettes state of mind, was not relevant to any issue in dispute. Moreover, a statement by Munguia to defense counsel about a statement made by DDA Connelly concerning the strength of the case overheard by Detective Connelly involved multiple levels of hearsay. Arguably, a statement by DDA Connelly to Munguia could be non-hearsay, if offered to show that

Munguia acted in conformity with that belief that the case was weak. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [evidence of a declarant's statement is not hearsay if it "'is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'"].)

However, a statement by Munguia to defense counsel about the prosecutor's opinion of the strength of the case that Detective Collette overheard was hearsay and does not fall under any exception. Defense counsel originally offered the evidence to establish that Detective Collette [the hearer] acted in conformity with the information he received from Munguia. (14RT 4462.) However, Detective Collette's conduct during the investigation was not at issue in the case.

Later, appellant stated that the evidence was relevant to impeach Anna. (14RT 4463.) Thus, appellant did not offer Detective Collette's proffered testimony for the non-hearsay purpose of showing Detective Collette's state of mind and ensuing conduct. Rather, appellant sought to introduce the Munguia's statement for the truth of the matter asserted, i.e., that the prosecutor told Munguia that the case against appellant was weak. Thus, the testimony was inadmissible hearsay. (Cf. *People v. Mayfield* (1997) 14 Cal.4th 668 [a witness's statement that he told a police officer that the defendant had a gun was not admissible to prove that the defendant had a gun, but admissible for the non-hearsay purpose of establishing the officer's state of mind and the appropriateness of his ensuing conduct because one of the *issues* in the case was whether the officer had used excessive force or behaved improperly in his confrontation with defendant].)

Furthermore, appellant did not make an adequate record at trial to show that the out-of-court statement would, in fact, have any impeachment value. A statement by Munguia to defense counsel about the prosecutor's opinion on the strength of the case which was overheard by Detective Collette would impeach Anna only if: (1) Detective Collette told Anna about Munguia's statement to defense counsel; and (2) Detective Collette told Anna about the statement before she came forward to the police. The trial record does not demonstrate whether these conditions were satisfied. Thus, testimony from Detective Collette about a statement made to defense counsel about a statement made by DDA Connolly was inadmissible hearsay.

3. Appellant's Rights to Confrontation and Due Process Were Not Violated

Appellant's rights to confrontation and due process were not violated when trial court restricted appellant's line of questioning to Detective Collette. A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The Confrontation Clause simply guarantees an *opportunity* for effective cross-examination; it does not assure a chance to cross-examine in whatever way, and to whatever extent, the defense might wish. (*Delaware v. Van Arsdall, supra*, 475 U.S. at pp. 679-680.)

Here, as the trial court stated, if appellant wanted to impeach and confront Anna about whether she came forward because Munguia had told her that DDA Connolly had stated the case against appellant was weak, appellant should have simply asked Anna about it. (17RT 4463.) As the

trial court's comments indicated, there was no prohibition against this line of questioning of Anna on retrial.

Moreover, appellant's right to due process was not violated by the trial court's restriction of appellant's line of questioning to Detective Collette. As detailed above, the proffered evidence was irrelevant and inadmissible hearsay. A criminal defendant "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (*Taylor v. Illinois*, 484 U.S. at p. 410.) Indeed, "any number of familiar and unquestionably constitutional evidentiary rules authorize the exclusion of relevant evidence." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S. Ct. 2013, 135 L. Ed. 2d 361].) As detailed above, Detective Collette's state of mind was not relevant to any issue in the case. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999 ["Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right."].) Thus, the trial court's restriction of appellant's questioning of Detective Collette's did not violate appellant's right to due process. (See *Taylor v. Illinois* (1988) 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 ["The accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence"].)

4. In Any Event, Any Alleged Error Was Harmless

In any event, any alleged error in the exclusion of appellant's proposed line of question was harmless under any standard.

> It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. (Evid. Code, §§ 353, subd. (b), 354.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause,

> including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

(*People v. Richardson* (2008) 43 Cal.4th 959, 1001 [citing harmless error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836]; see *Eubanks*, *supra*, 53 Cal.4th at p. 152; *Chapman*, supra, 386 U.S. at p 24.)

Here, as detailed above, absent evidence Detective Colette knew that Munguia told Granillo that DDA Connely had told her that the case against appellant was weak or that Detective Collette told Granillo about this statemnt, the evidence was irrelevant.

As detailed above, Anna did not testify that she saw appellant commit the shootings. Rather, she saw appellant and Sherman in the back alley and that they later walked behind her. (15RT 3772.) Appellant had a strong motive to commit the shootings at the Pacific Avenue Apartment. Gutierrez saw Sherman walk slowly past the doorway and glanced in the apartment shortly before the shootings (14RT 3632-3634, 3647) and heard gunfire come from the back alley (14RT 3651). After the shooting at the Pacific Avenue Apartment, Jaramillo saw appellant walking out from the back alley and murder Villa. (16RT 4087-4093.) Hernandez saw appellant and Villa arguing on the sidewalk by the alley before appellant murdered Villa. (16RT 4244-4245, 4249.) Appellant appeared startled when he saw Officers Anderson and Kohargura at the Pine Avenue Apartment. He quickly ran inside the apartment and "slammed the front door extremely hard." (15RT 4021-4024; 17RT 4300-4302.) Officers Anderson and Kohargura interviewed both appellant and Sherman, who were together at the Pine Avenue Apartment, shortly after the shootings. (15RT 4025-4026; 17RT 4303-4305.) During his tape recorded telephone conversation with Frazier, there was ample evidence of appellant's consciousness of guilt. (3CT Supp. IV 511-515.) Sherman's hasty return to Modesto also was

evidence of Sherman's consciousness of guilt. (15RT 3952-3954, 4013-4014.) Thus, any error by the trial court of restricting appellant's cross-examination of Detective Collette was harmless.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED ROBERT ROBINSON'S TESTIMONY DURING THE GUILT PHASE

Appellant contends that the trial court abused its discretion when it excluded Robert Robinson's testimony regarding whether appellant was an active gang member. (AOB 51-73.) Appellant argues that, because the trial court found Robinson to be the functional equivalent to a gang expert, he should have been allowed to rely on hearsay and opine that appellant was no longer a gang member. (AOB 57-60.) Appellant further argues that, even if the trial court did not find that Robinson was qualified as a gang expert, he still should have been allowed to testify that appellant had a reputation of someone who gave up the gang lifestyle and opine that appellant was no longer an active gang member because the testimony would have been admissible as character evidence and/or a proper opinion of a lay witness. (AOB 60-63.) In addition, appellant asserts that the exclusion of Robinson's testimony deprived him of his constitutional right to present a defense (AOB 63-69) and to a fair trial (AOB 69-70). Respondent disagrees and submits that appellant did not seek to have Robinson qualified as an expert and, therefore his claim that Robinson was qualified to testify as a gang expert has been forfeited. Moreover, the trial court did not make a finding that Robinson was the functionally equivalent to a gang expert, but rather the trial court found that that Robinson was a lay witness who did not have the required expertise to opine that appellant was no longer a gang member based on Robinson's observations alone. Furthermore, the trial court did not abuse its discretion when it excluded Robinson's lay opinion testimony that appellant was no longer a gang

member based on his observations alone. In any event, any alleged error was harmless.

A. Relevant Proceedings

A hearing under Evidence Code section 402 was held on the admissibility of Robinson's proposed testimony. (18RT 4690.)[30] Robinson was a gang prevention outreach counselor with the Long Beach Parks, Recreation, and Marine Department. The organization's function was to prevent gang violence and find employment the community's youths. (18RT 4691-4692.)[31] Robinson was a former gang member and primarily worked with gang members or ex-gang members. (18RT 4692.) Robinson had been a member of the 21st Street Gangsters. The 21st Street Gangsters were neither a "Rolling 20's Gang" or a "Crip gang." As Robinson explained, "[W]e weren't even nothing then, back in my days. You know, I'm like forty years old, so it was something different then." (18RT 4696.)

Robinson knew appellant because appellant applied for a job through the program. After interviewing appellant, Robinson wanted to hire appellant to work for the organization. (18RT 4692-4694.)[32] Because everyone working for the organization could no longer be an active gang member, Robinson had to determine whether appellant was in a gang. (18RT 4694-4695.)

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[30] Evidence Code, section 402, subdivision (b) provides that the trial court "may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ."

[31] Although Robinson testified that the organization worked closely with the Long Beach Police Department, the only example he provided of the organization's work with the police was assisting the police identify victims of shootings. (18RT 4692.)

[32] If appellant had not been incarcerated for the current offense, Robinson would have hired appellant. (18RT 4695.)

Robinson made this determination by interviewing appellant, talking to gang members in the community, and observing appellant's demeanor. (18RT 4694- 4695, 4699.) When Robinson interviewed appellant, appellant stated that he was no longer in a gang and was trying to get his life together for the benefit of his children. (18RT 4695.) Robinson also talked to rival gangs in Long Beach including members of the RTC and the ICG about appellant's gang membership. (18RT 4694, 4697-4698.) Robinson was told that appellant was no longer a gang member. However, he could not remember who had told him that appellant was no longer a gang member, although it was more than one person. (18RT 4698-4699.) Robinson also observed appellant demeanor and opined the appellant was no longer a gang member "just by his conversation, the way he fitted [*sic*] in and was talking to the kids, letting them know there's other things out there letted [*sic*] me know that his mind was in a different place." (18RT 4699.)

Appellant offered Robinson's testimony in response to the People's evidence that appellant claimed to be a member of the RTC. Specifically, appellant offered the evidence to rebut Officer Schaich's testimony that appellant stated he "gang bang[ed]." (18RT 4700-4701.)[33] Appellant argued that Robinson's proffered testimony would show that appellant was no longer a gang member at the time of the murder. (18RT 4700-4702.)

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[33] Defense counsel had previously argued that Robison's testimony was admissible to rebut Officer Schaich's testimony that appellant stated he was a gang member. Defense counsel argued that appellant had told Officer Schaich that he no longer "gang bangs" based on an entry on "the great sheet." However, Officer Schaich testified that appellant did not make that statement to Officer Schaich. Officer Schaich did not know the source of the entry. Thus, the trial court denied appellant's motion to admit the evidence on this ground because there was no evidence that appellant had ever made the statement. (17RT 4526-4531.)

The prosecutor objected to the proffered testimony on multiple grounds. The prosecutor argued that Robinson's proposed testimony was irrelevant. The prosecutor also argued that, if appellant was offering Robinson's testimony as character evidence, the prosecution should be allowed to rebut that evidence. (18RT 4702-4703.) Moreover, the prosecutor argued that, pursuant to Evidence Code section 1220, appellant's own statement to Robinson that he was no longer a gang member was inadmissible hearsay (18RT 4703)[34] and that statements by unknown gang members would also be hearsay (18RT 4704). Furthermore, the prosecutor argued that appellant was attempting to offer lay opinion testimony from Robinson "which the court would never allow an expert of the People to do." (18RT 4704.)

The trial court asked appellant, "With respect to the hearsay objection, . . . what exception is there for the hearsay objection as to what [Robinson] would repeat about what other persons have told him and what defendant told him?" (18RT 4709.) Appellant stated that he was not offering the testimony for the truth of the matter asserted, but for Robinson's state of mind because the testimony would confirm Robinson's opinion that appellant was not a gang member. (18RT 4709-4710.)

The trial court stated that Robinson's state of mind was not an issue in the case. However, the trial court agreed with appellant that the proposed testimony would be relevant to rebut the prosecution's evidence, but, aside

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[34] Evidence Code section 1220 provides in part: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity . . . ." Thus, to be admissible under this section, the statement must be offered by a party opposing the party declarant. Because appellant's statement to Robinson was offered by appellant and appellant was the declarant, this section would be inapplicable.

from Robinson's personal observations, Robinson's testimony would be inadmissible hearsay. (18RT 4710-4711.) The trial court tentatively ruled that Robinson could testify to his opinion that appellant was no longer a gang member based on his personal observations. (18RT 4711.)

The prosecutor then argued that Robinson's observation and opinion of whether appellant was a gang member would be character evidence and that, as character evidence, the People should be allowed to rebut that evidence. The prosecution again argued that the evidence was irrelevant. Further, the prosecutor argued that Robinson should not be allowed to offer his opinion on appellant's gang membership based on demeanor and behavior because a gang expert would not be allowed to offer such an opinion. (18RT 4712-4714, 4719-4721.)

Appellant responded that the evidence was relevant to rebut the police officer's testimony that appellant admitted he was a gang member. Appellant stated that he had "a little issue, but . . . [understood]" the trial court's ruling that Robinson could not testify about appellant's statement to Robinson that he was no longer a gang member. Appellant asked the trial court to allow Robinson to testify about his observations and the screening process involved in hiring appellant in the organization. (18RT 4714-4719.)

Ultimately, the trial court precluded Robinson from opining that appellant was no longer a gang member because two of the bases for his opinion were hearsay, including appellant's statement to Robinson that he was no longer a gang member and statements by unnamed gang members in the community that appellant was no longer a gang member. Although Robinson would only be allowed to testify to his personal observations, the trial court believed that the jury would be "misled" and would not have the complete information of Robinson's opinion. (18RT 4721-4723.) The trial court further found that Robinson's opinion that appellant was no longer a

gang member based on his interactions with other people was not rationally based on his perception, stating:

> And I don't believe that there is sufficient expertise established by Mr. Robinson. He does have significant history or involvement either personally with a gang or now more recently since he is no longer an active gang member - - no longer a gang member at all, his work with gang members apparently on a daily basis gives him sufficient expertise I believe to be knowledgeable about gangs, but not sufficient based on observation alone of the defendant's interaction - - and we don't know how many occasions - - with persons on the street to form that opinion.

(18RT 4723.) Afterwards, appellant made a record "with respect to the court's ruling." Appellant stated that the prosecution was allowed to ask appellant's mother, "a lay person" whether appellant was a gang member and stated that appellant was offering "the same thing." However, appellant noted that Robinson was "someone who has more expertise" on gangs than appellant's mother. (18RT 4723-4726.)

B. Appellant Has Forfeited His Claim that the Trial Court Erred by Excluding Robinson's Testimony Because Robinson Was a Gang Expert

At trial, appellant did not seek to have Robinson qualified as a gang expert and did not argue that Robinson's proposed testimony was admissible hearsay because it qualified as expert testimony. Rather, appellant argued that Robinson was a "lay witness" just like appellant's mother, who had been allowed to testify that appellant admitted that he was a gang member. (18RT 4723-4726.)

Because appellant failed to have Robinson qualified as an expert and failed to argue that Robinson's testimony was admissible as expert testimony, the issue has not been preserved on appeal. (See Evid. Code, § 354, subd. (a) [reversal not warranted on ground that evidence was erroneously excluded unless "[t]he substance, purpose, and relevance of the

excluded evidence was made known to the court"]; see, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 462 [the defendant forfeited his claim that the evidence was admissible as a statement against penal interest because defense counsel's failure to proffer the testimony on that ground deprived the trial court the opportunity to make the determination]; *People v. Fauber* (1992) 2 Cal.4th 792, 854 [holding that defendant was precluded from asserting for first time on appeal that statements were not hearsay because his counsel did not "specifically raise th[e] ground of admissibility" urged on appeal in the trial court].)

C. The Trial Court Did Not Make a Finding That Robinson Was a Functional Equivalent to a Gang Expert

Contrary to appellant's assertion (AOB 57 ["while Robinson was not formally qualified as a gang expert, the court made a finding that was, for all intents and purposes, functionally equivalent"]), the trial court did not make a finding that Robinson was the functional equivalent of a gang expert. Rather, the trial court found that, because Robinson was a lay witness, he could not testify about hearsay statements made by appellant and unnamed gang members and did not have sufficient expertise to rationally determine whether appellant was a gang member based only his personal observations. (18RT 4723.)

Moreover, contrary to appellant's assertion, the prosecutor did not argue that Robinson could not offer the "expert" opinion that appellant was no longer active in the gang. (AOB 54.) Instead, the prosecutor argued that Robinson should not be able to offer his opinion on whether appellant was a gang member based solely on Robinson's observations of appellant's demeanor because an expert or any other witness would not be allowed to do so, stating: "I don't believe that it should be allowed that [Robinson] should come in and render an opinion based on factors that I can't imagine

would ever be allowed from another witness." (18RT 4721; see also 18RT 4713-4714 ["Apparently, it's going to be suggested by the defense that [Robinson] has some sort of expertise and ability to divine from the defendant's speech or behavior whether or not he's a gang member. And I do not think anyone has either that ability, and, certainly, no one else would be allowed to render an opinion such as that."].)

As stated above, appellant did not seek to have Robinson qualified as a gang expert and did not argue that the out-of-court statements made by appellant and unnamed gang members were admissible because Robinson was an expert witness. This Court should not assume error in the absence of a record affirmatively showing that the trial court made such a finding. (Evid. Code, § 354.) Thus, Robinson could not testify to the hearsay statements made by appellant and unnamed gang members that appellant was no longer a gang member.

In any event, Robinson clearly lacked qualification as a gang expert on appellant's gang, the RTC. Even if relevant, hearsay evidence is inadmissible "[e]xcept as provided by law . . . ." (Evid. Code, § 1200, subd. (b).) Depending upon the nature of the hearsay exception, the law interposes certain foundational requirements. In regards to expert testimony, Evidence Code section 720 requires that, against the objection of a party,[35] the proponent of the evidence must show that the proffered expert "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness's qualifications." (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.)

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[35] Because appellant never offered Robinson as an expert, the prosecution did not have the opportunity to object.

Here, appellant did not establish that Robinson had any special knowledge of appellant's gang. Robinson had been a member of the 21st Street Gangsters, which was neither a "Rolling 20's Gang" nor a "Crip gang." In fact, when Robinson was a gang member, it does not appear that appellant's gang had even existed. (18RT 4696 ["we weren't even nothing then, back in my days. You know, I'm like forty years old, so it was something different then."].) Furthermore, there was no evidence that Robinson had any formal training or education on gangs, specifically, gangs in the Long Beach area. Although Robinson was an ex-gang member and had experience with ex-gang members, this fact alone did not qualify him as an expert on appellant's gang or whether any person was an active gang member or not.

D. Appellant Has Forfeited His Claim that the Trial Court Erred by Excluding Robinson's Testimony as Character Evidence under Evidence Code Section 1102

Appellant has forfeited his claim that the trial court erred when it excluded Robinson's testimony because it was admissible as character evidence pursuant to Evidence Code section 1102. Appellant did not offer Robinson's testimony as character evidence. Rather, it appears that appellant made a strategic choice not to offer the evidence as character evidence.

In criminal cases, the prosecution is generally prohibited from introducing evidence of a defendant's bad character or reputation in order to prove he or she acted in conformity with that character in committing the charged offense. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) A defendant, on the other hand, may introduce "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation" in order to "prove his conduct in conformity with such character or trait of character." (Evid. Code, § 1102, subd. (a); Evid. Code,

§ 1324 ["[e]vidence of a person's general reputation with reference to his character or trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule"].)

However, "[a] defendant who elicits character or reputation testimony opens the door to the prosecution's introduction of hearsay evidence that undermines testimony of his good reputation or of character inconsistent with the charged offense." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357-358.) Once the door is opened, the prosecution may then pursue an inquiry "'as to the contents and extent of the hearsay upon which the opinion was based, and may disclose rumors, talk, and reports circulating in the community.'" (*Id.* at p. 358, quoting *People v. Eli* (1967) 66 Cal.2d 63, 78.) "The prosecution may explore opinion-based hearsay by asking whether the witness has heard of statements at odds with the asserted good character or reputation." (*People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 358.)

Here, appellant argued that Robinson's proffered testimony that he was told by appellant and unnamed gang members that appellant was no longer a gang was non-hearsay because it was not offered for the truth of the matter asserted, but to show Robinson's state of mind. In addition, appellant argued that appellant's statement to Robinson that he was no longer a gang member was admissible as a "party admission." However, appellant did not offer the evidence as character evidence. (18RT 4709-4712.) In fact, the prosecutor noted, "Now, if it's going to character, that's one thing. But if we're talking character, then let's call it that, and then allow me to respond." (18RT 4712.) Afterwards, appellant did not state that the evidence was admissible as character evidence, but argued that the evidence was relevant to rebut the prosecution's evidence that appellant was a gang member. (18RT 4714-4719.)

Because appellant did not offer Robinson's testimony as character evidence, the issue has not been preserved on appeal. (*People v. Marks* (2003) 31 Cal.4th 197, 228 ["A general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal"]; see, e.g., *People v. Doolin* (2009) 45 Cal.4th 390, 438 [finding that the defendant had forfeited his claim that the trial court had failed to consider the inflammatory nature of the uncorroborated testimony that he raped an ex-girlfriend and mistreated another ex-girlfriend by failing to make the arguments at trial].)

E. The Trial Court Did Not Abuse Its Discretion When It Excluded Robinson's Lay Opinion Testimony That Appellant Was No Longer a Gang Member Based on His Observations of Appellant's Interactions with People in the Community

The trial court did not abuse its discretion when excluded Robinson's lay opinion testimony that appellant was no longer a gang member based on Robinson's personal observations of appellant's interaction with the children involved in the program. (*People v. Waidla, supra*, 22 Cal.4th at p. 717 ["appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].)

Expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) As long the material is the type reasonably relied upon by experts in the field, ordinarily inadmissible evidence can form the proper basis for an expert's opinion testimony; and the expert witness, whose opinion is based on such inadmissible matters can, when testifying, describe the material that forms the basis of the opinion. (*Ibid.*)

However, Robinson was not an expert witness, but rather a lay witness. As such, Robinson could only express his opinion on whether appellant was active gang member if it was rationally based on his perception and helpful to a clear understanding of his testimony. (Evid. Code, § 800, subd. (a); *People v. Farnam*, *supra*, 28 Cal.4th at p. 153.) Accordingly, Robinson could not testify to the hearsay statements made by appellant and unnamed gang members that appellant was no longer an active member of the RTC.

Here, the trial court found that Robinson's opinion testimony that appellant was no longer a gang member was relevant. (18RT 4710-4711.) However, the trial court found that Robinson did not have "sufficient expertise" to opine that appellant was no longer a gang member "based on observation alone of the defendant's interaction[s] . . . with persons on the street to form that opinion." (18RT 4723.) Accordingly, the trial court precluded Robinson's testimony that appellant was no longer a gang member because the jury would be "misled" about that opinion because two of the bases for Robinson's opinion were inadmissible hearsay. Thus, the jury would not have the complete information on Robinson's opinion. (18RT 4721-4723.)

Pursuant to Evidence Code section 352, "a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate[s] the trial court understood and fulfilled its responsibilities . . . ." (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time . . . [and] its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious

> or patently absurd manner that resulted in a manifest miscarriage of justice."

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, citations omitted, italics in original.) A reviewing court evaluates the exclusion of evidence under this section for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130.)

Here, appellant cannot show that the trial court exclusion of Robinson's testimony was arbitrary, capricious, or patently absurd. Evidence may be excluded under Evidence Code section 352 when its admission "will create substantial danger of . . . of misleading the jury." Although the evidence was relevant to whether appellant was an active gang member at the time of the shooting, there was a danger that the testimony would mislead the jury. Robinson could not base his opinion on inadmissible hearsay because he was a lay witness. Robinson testified that his opinion that appellant was no longer an active gang member was based on three factors: (1) appellant's statement that he was no longer a gang member; (2) statements by unnamed gang members that appellant was no longer an active gang member; and (3) Robinson's personal observations of appellant's interactions with other people. Absent the first two factors, Robinson would simply be speculating as to appellant's gang status based on his extremely limited interactions with appellant when appellant applied for a job at the organization. Therefore, under the circumstances, appellant cannot show that the trial court's decision to exclude the evidence was arbitrary, capricious, or patently absurd because the jury would not have had the complete information about the foundation of Robinson's opinion. (18RT 4721-4723.)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED AN AUDIO RECORDING OF A JAILHOUSE TELEPHONE CONVERSATION BETWEEN APPELLANT AND FRAZIER

Appellant contends that the trial court erred when it admitted into evidence an audio recording of a jailhouse telephone conversation between appellant and Frazier. (AOB 74-102.) Specifically, appellant argues that the evidence was irrelevant (AOB 87-91), that the trial court abused its discretion because the recording's probative value was outweighed by its prejudicial impact (AOB 91-93), that the recording should have been excluded because it was unintelligible (AOB 93-98), and the admission of the recording violated his right to due process (AOB 98-99). Respondent disagrees.

A. Relevant Proceedings

A recording of a telephone conversation between appellant and Frazier was played for the jury. (15RT 3892-3894, 3897; Peo. Ex. 27.) During the telephone call, appellant asked Frazier "[w]hat you guys doing?" Frazier stated, "Nothing. I talked to Troub man and I'm trying to get a hold of the dude so I can find out what happened in there." Frazier asked, "*Who* was it? Why they detain you?" Frazier stated that he did not know and asked Frazier was "talkin[g] my homeboy little Troub." Appellant then explained what happened at the preliminary hearing stating, "They pointed cuz out and kept me man." (3CT Supp. IV 511, italics added.)

Later, Frazier inquired into the identity of one of the witnesses at the preliminary hearing, asking appellant: "Okay now, who said something . . . Who is this person, a lady?" Appellant responded, "Two ladies and . . . [a] dude, but they ain't sayin[g] shit. They ain't sayin[g] nothing. I thinkin[g]

they got help. The [j]udge said no doubt in his mind that he think I'm guilty of the crimes. They pointed the homeboy out." (3CT Supp. IV 512.)

Frazier then asked, "Well who are these people? Get the transcripts." Appellant responded, "Yeah, I fixin to tell my lawyers man." Appellant then stated, "But he said he fixin to go out there and investigate. You know I ain't got, I ain't do this cuz, they ain't go." Frazier stated, "I know." Appellant then twice stated, "Don't even worry about it." Frazier stated, "Man I'm worried about it man. I know how the folks is." Frazier then stated, "I ain't just." Appellant then stated "Nigger need that DA hit that's who the nigger need hit." Frazier states, "Yeah, but you know, you know." Appellant stated, "You know that's what I'm thinking fool. He's mad because he'd come up with that proof on the nigger." (3CT Supp. IV 513.)

Appellant and Frazier discussed Frazier's attempts to contact Troub. Frazier stated that he was "waitin[g] on Troub" and that Troub was "supposed to come by last night, but he went to Pomona . . ." Frazier then talks about having to see a psychiatrist. Frazier stated that he found two pistols in the garage. Appellant warned Frazier "Don't be talking over the phone cuz. They've got my girl's phone tapped." Frazier then stated, "but anyway I gave them to [T]roub." (3CT Supp. IV 513-515.)

The prosecution moved to admit into evidence this audiotaped recording of appellant's jailhouse telephone conversation between appellant and his brother, Tony Frazier. The prosecutor argued that appellant's statements on the audiotape were admissible as admissions and were relevant because there was reference to "some guns" that were found and given to "Troub" and another reference to "hitting the district attorney." (14RT 3566-3567.)

Sherman objected to the admission of the audiotape on the grounds that the audiotape was hearsay, that Sherman was denied a separate jury, that the admission of the tape would deny Sherman his right to

confrontation, there was no foundation as to the moniker "Troub," and that there was "a 352 issue" because "it is likely going to be difficult for the jury to understand what's on the tape." Sherman also argued that he could not have given the pistols to Frazier because he had been incarcerated since December 6, 1997, before the preliminary hearing, which was conducted on January 9, to January 10, 1997. (14RT 3567- 3571.)

Appellant "concurred with the statements [Sherman] has made concerning the accuracy of [the] tape. My office as well is having a difficult time in transcribing the tape." Moreover, appellant argued that appellant's statement that he needed the "district attorney hit"[36] was not relevant because "it is not a terrorist threat case." Appellant also argued that, because there was no information on the type of pistols that Frazier was referring to, it was "far-fetched, remote" that the pistols would relate to the instant murder. Appellant noted that "[i]t is talking about someone talking to [appellant] saying, 'I found two pistols.' It does not say, 'I found two pistols at the crime scene' or 'these are the two pistols you threw away and gave to me.'" Appellant also objected on hearsay grounds. (14RT 3571-3774.)

The prosecutor argued that the audiotape was admissible as a party admission and as a statement by co-conspirators. (14RT 3577.) The prosecutor responded that the evidence was relevant to show appellant's and Sherman's "consciousness of guilt." The prosecutor argued that the evidence was not "remote" and was relevant. The prosecutor explained that the murders occurred on December 6, 1996. The preliminary hearing was conducted on January 9, 1997. Sherman was not held to answer and

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[36] DDA Deborah Cole-Hall was the district attorney that conducted the preliminary hearing. (16RT 4136.) DDA Cole-Hall's testimony regarding the atmosphere at the preliminary hearing was excluded. (16RT 4148-4150.)

released afterwards.[37] The telephone conversation occurred on January 12, 1997. (14RT 3574-3575.)

Moreover, the prosecutor stated that the murders were alleged to have occurred during a conspiracy. The prosecutor explained that the statements were made by co-conspirators and that the evidence of the tape showed an ongoing conspiracy and was made to further the conspiracy. (14RT 3575-3576.) Furthermore, the prosecutor stated that any statement made by appellant would be admissible as an admission under Evidence Code 1220. (14RT 3576.)

The prosecutor stated that the transcript was not evidence, but the recording itself was the evidence. The transcript was a tool to assist the jury listening to the recording, but would be collected after the tape was played. During deliberations, the jury would only have the audiotape. The prosecutor did not object to correcting the transcript if changes needed to be made. (14RT 3577-3578.)

The audiotape was played for the trial court. (14RT 3578-3579.) Afterwards, the prosecutor argued that the conversation also involved intimidating witnesses because Frazier asked who the witnesses were and wanted to get the transcripts to locate the witnesses. (14RT 3579.) Sherman's counsel contested "who [was] being referred to as 'Troub'" because Sherman's counsel maintained that Sherman had been incarcerated on December 9, 1996. In addition, Sherman argued that the words on "page 4 between lines 22 and 26" were unclear and it was speculation as to what was said. Sherman also argued that a "conspiracy is not demonstrated in any way by [appellant] talking to somebody else." (14RT 3579-3580.)

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[37] The prosecutor did not know the exact date that Sherman was released, but knew that Sherman was not held to answer at the preliminary hearing. (14RT 3577.)

Appellant submitted on her previous arguments and concurred with Sherman's arguments. (14RT 3580-3581.)

The prosecutor then argued that the statements were highly relevant "to three areas concerning consciousness of guilt: disposing or hiding evidence, witness intimidation, murdering a district attorney as well. All those things go to consciousness of guilt, the desire of a co-conspirator not to be convicted of the charged offense." The prosecutor then stated that Frazier, whom appellant was speaking with, was also a co-conspirator. The prosecutor also stated that, although the transcript was "substantially accurate," he was amenable to altering the transcript. (14RT 3581-3582.)

The trial court ruled that the audio tape was admissible, as follows: "I am going to make a ruling on the admissibility and allow the tape to be admitted. However, to the extent there is a difference with the transcript, if you can agree as to the wording other than this wording for the transcript so that we can amend this to correct words that may be in error here. I will instruct the jury that the transcript is not necessarily the accurate interpretation of the words from the tape itself which is evidence." (14RT 3585-3585.)

The prosecutor then suggested that the trial court listen to the audiotape and note how the court interpreted the audiotape because the prosecutor thought "it is going to be extremely difficult, if not impossible, for the parties here who are advocates on either side to agree on those things . . . ." The trial court agreed and asked the prosecutor for a copy of the audiotape. (14RT 3586-3587.)

Appellant stated that the other person speaking in the audiotape was his brother, Tony Frazier. Appellant stated that he intended to call Frazier and his girlfriend Darlene Garrett to testify. (14RT 3590-9592.)

The jury was given a copy of a transcript of the tape to assist them. The trial court instructed the jury:

> I'll remind the jury at this time that the document that you're receiving is not evidence in this case. This is an interpretation of the conversation that is heard on the tape recording. The only reason it's being provided to you is to help you as you listen to the tape to understand what it is that's being played on the tape. The actual evidence in this case is the tape recording itself.
>
> Now you may have a different interpretation for words or sentences that are stated on the tape. You're to use your interpretation as the evidence, so it's your interpretation.
>
> This is only to provided to you as an aid, and when we are concluded with the playing of the tape, you'll need to turn back in the transcript that you have. They will not be offered to you as evidence in the case and they will not be available to you in the jury room as you begin your deliberation at the conclusion of all the evidence.
>
> It is simply an aid to you to help you understand what it is that you're hearing on the tape. So if you have a different - - if you hear something different than what is stated on that document, it is - - what you hear is what is evidence for you to consider.

(15RT 3895-3896.) The tape was then played for the jury. (15RT 3897.)

B. Appellant's Recorded Conversation with Frazier Was Relevant to Show Appellant's Consciousness of Guilt

Except as otherwise provided by statute, "all relevant evidence is admissible." (Evid. Code, § 351.) Evidence of witness intimidation may be relevant to prove consciousness of guilt. (*People v. Williams* (1997) 16 Cal.4th 153, 206, citing *People v. Weiss* (1958) 50 Cal.2d 535, 554, superseded by statute on another ground as stated in *People v. Griffin* (1991) 235 Cal.App.3d 1740, 1746.) Moreover, a defendant's

> "[e]fforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. [Citation.] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony,

evidence of such conduct is admissible against the defendant. [Citations.]"

(*People v. Weiss*, *supra*, 50 Cal.2d at p. 554; accord *People v. Hannon* (1977) 19 Cal.3d 588, 600 ["the admission of evidence purporting to show suppression or attempted suppression of evidence is erroneous absent the prerequisite of proof that the defendant was present at such an incident or proof of authorization of such illegal conduct"], disapproved on another ground by *People v. Martinez* (2000) 22 Cal.4th 750, 762-763.) To be admissible, there needs to be some evidence in the record which, if believed by the jury, would sufficiently support an inference that a defendant attempted to suppress evidence. (Cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246 [finding that the trial court did not err in instructing the jury on consciousness of guilt from attempted suppression of adverse evidence].)

Here, there was ample evidence from the tape, if believed by the jury, that would support an inference that appellant was attempting to suppress evidence. From the tape, it was reasonable to infer appellant and Frazier's references to "Troub," which was Sherman's gang moniker, were references to Sherman. Frazier wanted to know what happened at the preliminary hearing. Appellant asked Frazier if he had talked to "my homeboy Troub." Appellant then explained that a witness "had pointed cuz out and kept me man." (3CT Supp. IV 511.) At the preliminary hearing, Jarmarillo had mistakenly identified Sherman as the gunman, but later corrected himself. (16RT 4100-4101.) When Officer Thrash interviewed Rainey, Rainey referred to Sherman as "Baby Troub." (16RT 4174-4177, 4204-4206.) Thus, from this evidence, a juror could reasonably infer that appellant's reference to "Troub" was a reference to Sherman.

Frazier stated that he had been waiting for Troub and that he found two pistols in his garage. At that point, appellant warned Frazier, "Don't be talking over the phone cuz. They've got my girl's phone tapped." Frazier

then stated that he gave the pistols to Troub. (3CT Supp. IV 513-515.) From this evidence, a reasonable juror could infer that appellant reaction to Frazier's statement about the pistols indicated a consciousness of guilt. (See, e.g., *People v. Tripp*, *supra*, 151 Cal.App.4th at p. 957 [attempt to dispose of or hide contraband indicated a consciousness of guilt].)

Moreover, from the content of the tape, a jury could reasonably infer that appellant and Frazier were attempting to intimidate witnesses. People living in gang-claimed areas are frequently reluctant to come forward and speak to police for fear of retaliation. (16RT 4178-4180.) Gangs are very successful in intimidating witnesses from testifying in court. It is very common for a witness to a crime to not want to be involved in the investigation of the crime. (17RT 4378-4379.) The mere presence of a gang member is enough to intimidate a potential witness because the witnesses live in the gang's territory. (17RT 4379.) In fact, at the preliminary hearing, Hernandez was reluctant and afraid, and Jaramillo was crying and nervous about testifying. (17RT 4446-4447.) Frazier was unable to attend the preliminary hearing, but specifically asked appellant for the identities of the witnesses, stating "Well who are these people? Get the transcripts." (3CT Supp. IV 513.) Thus, the jury could infer that appellant and Frazier were discussing ways to intimidate the witnesses.

In addition, from appellant's statement that he wanted the DA "hit," the jury could infer that appellant wanted to kill the prosecutor to prevent her from prosecuting the case. (*People v. Wilson* (1992) 3 Cal.4th 926, 940 ["Defendant's act of soliciting the murder of a critical prosecution witness was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses"]; *People v. Pensinger*, supra, 52 Cal.3d at p. 1246 [finding the defendant's argument that this conversation with the informant about killing a witness was "mere jailhouse rhetoric is unpersuasive" and concluding "the evidence

was suggestive enough to allow the jury reasonably to conclude that it showed a consciousness of guilt"].) Therefore, the taped conversation between appellant and Frazier was relevant.

C. The Trial Court Did Not Abuse Its Discretion When It Admitted Evidence of Appellant's Conversation with Frazier into Evidence

Appellant contends, even if tape is relevant, the trial court has discretion, pursuant to Evidence Code section 352, because its probative value was outweighed by its prejudicial impact. Appellant argues that the any inference of appellant's consciousness of guilt was mere speculative and without support from the record. As an example, appellant argues that there was no evidence that appellant's references to Troub were references to Sherman. (AOB 91-93.)

Appellant is mistaken. As stated above, it was reasonable to infer that appellant and Frazier's references to "Troub" were references to Sherman, whose gang moniker was "Baby Troub." (16RT 4175.) Frazier wanted to know what happened at the preliminary hearing. Appellant asked Frazier if he had talked to "my homeboy Troub." Appellant then explained that a witness "had pointed cuz out and kept me man." (3CT Supp. IV 511.) At the preliminary hearing, Jarmarillo had mistakenly identified Sherman as the gunman, but later corrected himself. (16RT 4100-4101.) In addition, when Officer Thrash interviewed Rainey, Rainey referred to Sherman as "Baby Troub." (16RT 4174-4177, 4204-4206.) Thus, it was not speculation that Sherman was referred to as Troub in the tape, but a reasonable inference from the evidence. (*People v.. Cluff* (2001) 87 Cal.App.4th 991, 1002 ["In any given case, one 'may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A

finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'"], quoting *People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on an unrelated point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

D. The Trial Court Properly Denied Appellant's Motion to Exclude the Recording of Appellant's Telephone Conversation with Frazier on the Ground That the Recording Was Unintelligible

Appellant contends that the trial court erred when it denied his motion to exclude the recording of appellant's conversation with Frazier on the ground that the recording was unintelligible. Specifically, appellant argues that the portion of the recording where appellant and Frazier discuss the guns in the garage was not sufficiently intelligible to be probative. (AOB 93-98.)

"[A] tape recording may be admissible even if substantial portions of it are unintelligible." (*People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People v. Hall* (1980) 112 Cal.App.3d 123, 127.) The legal standard for admission of a partially unintelligible recording requires a balancing of probative value against prejudice. Recordings and written transcriptions need not be completely intelligible as long as relevant material is intelligible, and the unintelligible portions would not lead to speculation by the jury or unfairness. (See *People v. Polk* (1996) 47 Cal.App.4th 944, 952.)

Here, the trial court listened to the tape, reviewed the transcript, and made changes to the transcript for accuracy. (15RT 3850.) The trial court was aware of any inaudible, unintelligible portions of the recording, as well as those parts that were clearly intelligible and probative. The unintelligible portions of the recording were marked as "unintelligible" in the transcript. (See 3CT Supp. IV 511-519.) Although Sherman's counsel argued that it would be speculation as to what was said about the pistols in

the garage, the trial court listened to the tape and denied this argument. Thus, the trial court properly ruled that the tapes were admissible after carefully balancing whether their prejudicial impact would outweigh their probative value.

Moreover, the portion of the recording discussing the pistols was not unintelligible. The portions of the tape that refer to the pistols were not marked by the trial court as unintelligible. (3CT Supp. IV 514.) In fact, the transcript was accurate. Frazier testified that, during the conversation with appellant, Frazier had stated, "Yeah, I gave him some and I had found two pistols in the garage here." (17RT 4543-4545.) This corroborates the accuracy of the recording and transcript.

Furthermore, notwithstanding the portion of the recording that appellant claimed was unintelligible, other portions of the tape also showed appellant's consciousness of guilt. As stated above, from appellant and Frazier's discussion of the witnesses identities, appellant's stated desire that he wanted the district attorney "hit," and appellant's reaction to Frazier's mentioning of the pistols, the jury could infer that appellant exhibited a consciousness of guilt. Thus, the trial court did not abuse its discretion when it admitted the tape into evidence. (See, e.g., *People v. Siripongs, supra,* 45 Cal.3d at p. 574 ["in spite of unintelligible portions, the tape clearly demonstrated defendant's efforts to remove incriminating evidence from his home. Comprehensive transcripts of the tape manifesting his attempt to destroy relevant evidence were made by both interpreters. Under these facts, we cannot find an abuse of discretion in admitting the tape recording"]; *People v. Miley* (1984) 158 Cal.App.3d 25, 36 [tape recording and transcripts containing unintelligible parts was not unduly prejudicial as admitted; the trial court listened to the tape, compared it to the transcript, and made corrections to the transcript for accuracy].)

In addition, the trial court did not err when it allowed the jury to use the transcript as a guide when listening to the recording. (AOB 95-98.) As stated above, the trial court listened to the tape, reviewed the transcript, and made changes to the transcript for accuracy. The relevant portions of the transcripts were not marked unintelligible. Moreover, Frazier testified that he made the statement in the transcript about the pistols during his conversation with appellant. Thus, there is no indication that of the portion of the tape was "so inaudible [that it] could not be accurately transcribed." (AOB 96.) In any event, the trial court admonished the jury that the transcript was simply an aid and that it was to "use your [own] interpretation [of the words] as the evidence. (15RT 3895.)

E. Appellant's Due Process Right Was Not Denied When the Trial Court Admitted the Taped Conversation into Evidence

Appellant contends that the admission into evidence of the taped recorded conversation between appellant and his brother violated his right to due process. (AOB 98-99.) "'The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.'" (*People v. Partida* (2005) 37 Cal.4th 428, 439, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) """"Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a[n Evidence Code] section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant."""" (*People v. Scott* (2011) 52 Cal.4th 452, 490, citations omitted.) The prejudice referred to in Evidence Code section 352 is characterized as """"evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value

with regard to the issues . . . ."'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1168, citations omitted.)

Here, the admission into evidence of appellant's telephone conversation with Frazier was not so prejudicial as to render appellant's trial fundamentally unfair. As stated above, the evidence was relevant to show appellant's consciousness of guilt. The relevant portions of the recording of the conversation were intelligible. Moreover, appellant has not shown that he was prejudiced by the admission of this evidence. Rather, he has merely made conclusory allegations that the prosecutor was allowed to "bolster the testimony of witnesses whose credibility was dubious and otherwise shore up a weak case by showing that appellant had a propensity for violence." (AOB 98-99.) However, appellant fails to explain how this evidence was relevant to any of the witnesses' credibility. Moreover, appellant has not argued in this appeal and did not object to the evidence at trial on the ground that the taped conversation was improperly admitted as propensity evidence. Thus, appellant has failed to show that his due process right was violated in any way, or that admission of the taped rendered his trial fundamentally unfair.

F. Any Alleged Error Was Harmless

In any event, any alleged error in admitting the tape was harmless. (*People v. Richardson, supra*, 43 Cal.4th at p. 1001.) Aside from the taped conversation ample evidence supported the jury's verdict. Multiple eyewitnesses placed appellant and Sherman at the scene of the Pacific Avenue Apartment shooting. Anna testified that she saw appellant and Sherman in the back alley "scoping" out the apartment building. (14RT 3752-3754, 3758; 15RT 3764.) She then saw appellant and Sherman approach the apartment building shortly before the shooting. (14RT 3754-3758; 15RT 3764-3765, 3783-3784.) Gutierrez testified that she saw Sherman walk slowly past the doorway and glanced in the apartment

shortly before the shootings (14RT 3632-3634, 3647) and that the gunfire came from the back alley. (14RT 3651).

Moreover, Jaramillo testified that she heard gunfire. Shortly thereafter, Jaramillo saw appellant walking out from the back alley. Appellant then shot Villa in the head. (16RT 4087-4093.) She saw appellant was walking towards Pine Avenue. (16RT 4094, 4096-4097.)

Hernandez testified that he saw appellant and Villa arguing on the sidewalk by the alley. (16RT 4244-4245, 4249.) Later, appellant was standing in front of Hernandez's car. Appellant pointed the gun at Hernandez. Hernandez looked back at appellant. Appellant then shot Hernandez on the right-side of his chest. Appellant then ran towards Pine Avenue. (16RT 4245-4248, 4278.)

When responding to dispatch call, Officers Anderson and Kohargura saw appellant standing outside the Pine Avenue Apartment. (15RT 4021-4025; 17RT 4300-4302.) Later, the officers spoke with both appellant and Sherman inside the Pine Avenue Apartment. (15RT 4025-4026; 17RT 4303-4305.)

Appellant had a strong motive to commit the shootings. Appellant was a member of the RTC. (15RT 3934-3935, 3939-3940; 17RT 4288-4291, 4404-4407.) Mario was a member of the ESL. (14RT 3693-3694, 3712, 3720.) The RTC and the ESL were engaged in a gang war. The Pacific Avenue Apartment was in the middle of this war. (16RT 4160, 4163, 4234; 17RT 4165, 4298-4300, 4372.) Appellant had recently been physically beaten by a Hispanic gang member. (16RT 4177.) Appellant had to retaliate to the beating. (17RT 4394-4396.) Moreover, because Villa and Hernandez witnessed appellant committing crimes, appellant had a strong motive to kill them. Thus, based on this evidence, any error in admitting the tape was harmless under any standard.

IV. CALIFORNIA'S MULTIPLE-MURDER SPECIAL CIRCUMSTANCE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant contends that California's multiple-murder special circumstance violates the Eighth and Fourteenth Amendments because it "encompasses an overly-broad class of persons with vastly different levels of culpability." (AOB 103-107.) This Court has rejected argument that the multiple-murder special circumstance violates his Eighth Amendment rights because it fails to adequately narrow the class of murderers who are eligible for the death penalty. (*People v. Coddington* (2000) 23 Cal.4th 529, 656, superseded by statute as stated in *People v. Zamudio* (2008) 43 Cal.4th 327, 355-356, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn 13; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S.Ct. 546, 98 L.Ed.2d 568].) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected. (See, e.g., *People v. Vieira* (2005) 35 Cal.4th 264, 294 [declining to reconsider this Court's position that the multiple-murder special circumstance violates his Eighth Amendment rights because it fails to adequately narrow the class of murderers who are eligible for the death penalty; *People v. Sapp* (2004) 31 Cal.4th 420, 287 [finding the multiple-murder special circumstances narrows "the class of death-eligible first degree murderers to those who have killed and killed again"].)

V. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT JUROR NO. 3389'S FEELINGS ABOUT THE DEATH PENALTY WOULD SUBSTANTIALLY IMPAIR HIS PERFORMANCE AS A JUROR

Appellant contends that the trial court erred when it excused Juror No. 3389 for cause because of Juror No. 3389's feelings about the death penalty. (AOB 108-127.) Specifically, appellant argues that Juror No. 3389 made no statement that would suggest that he would be unable or unwilling to set aside his personal views. Respondent disagrees and

submits that substantial evidence supported the trial court's finding that Juror No. 3389 could not fairly consider the death penalty as sentencing option.

A. Relevant Proceedings

Juror No. 3389 completed a jury questionnaire. (16CT Supp. II 4407-4422.) He stated that he currently belonged to his church's "men's club," and he was the club's president. He was also a member of the Knights of Columbus. (16CT Supp. II 4410.)

Juror No. 3389 stated that, "The death penalty should be used rarely, only when society cannot depend upon life in prison without possibility of parole being 'absolutely' implemented." Juror No. 3389 answered that he was "moderately against" the death penalty. Juror No. 3389 stated that, if the trial reached the penalty phase, he would not automatically vote for life without parole in every case. (16CT Supp. II 4418.)

Juror No. 3389 also stated that he considered death a worse punishment than life in prison without parole, explaining "My religious beliefs include the fact that God demands justice, but God is also all forgiving to those who warrant forgiveness. Life in prison provides the opportunity to earn forgiveness. Society must be absolutely protected from a possibility of parole." (16CT Supp. II 4419, emphasis in original.) He also stated, "I am unfamiliar with what 'without possibility of parole' means legally. If it doesn't mean what it says, then death penalty is warranted." (*Ibid.*) Further, Juror No. 3389 explained that he held his opinion regarding the death penalty because he was "a Roman Catholic" and tried to "practice what the Church teaches regarding capital punishment." (*Ibid.*) Juror No. 3389 stated that "Roman Catholic teaching in high school" caused him to evaluate his opinion of the death penalty at the time. (16CT Supp. II 4420.) Juror No. 3389 stated that the view of the Roman Catholic Church concerning the death penalty was that "the death

penalty should only be imposed when life in prison . . . without possibility of parole cannot be 'absolutely' implemented to protect society." (*Ibid.*) Juror No. 3389 stated that he felt obligated to accept this view. (*Ibid.*)

Juror No. 3389 stated that he "strongly disagreed" that "[a]nyone who commits multiple murder should receive the death penalty." (16CT Supp. II 4421.) Juror No. 3389 viewed the purpose of the death penalty was to "protect society from evil persons; a poor substitute for 'life in prison without parole.'" (16CT Supp. II 4422.)

During voir dire, the prosecutor asked whether Juror No. 3389 had indicated in his questionnaire that he was opposed to the death penalty. (13RT 3220-3221.) Juror No. 3389 stated that "Basically I believe that if there were such a thing as life imprisonment that would be sustainable, then I probably would not be." The trial court then asked whether Juror No. 3389 was "not certain as to whether or not life without the possibility of parole actually means that, correct?" Juror No. 3389, responded affirmatively. The trial court then explained "that once a person is sentenced to life without possibility of parole, the jury must assume for all purposes that that person will never be released from custody and that they will live out the rest of their natural life in custody." The trial court next asked, "Given that assumption, do you foresee any circumstances where you would vote for the death penalty as opposed to life without the possibility of parole?" Juror No. 3389 responded:

> I think it's possible that certain circumstances could allow me to do that if there were - - I'll invent one. If there were individuals that were incarcerated and had ended up killing three of the guards, you know, where the system was having difficulty with that individual and where that individual's existence is hazardous to some segment of society, even though it happens to be inside[,] within the prison, then I could find - - I would find that an easy decision to say, hey, I would [be able to impose the death penalty]."

(13RT 3221-3222.) The trial court asked Juror No. 3389 whether there were "other circumstances that come readily to mind where you might vote for the death penalty as opposed to life without possibility of parole?" Juror No. 3389 replied, "I don't have any obvious. If you want to ask me about one." The trial court explained that, "There are no right or wrong answers. We are trying to explore your feelings. You know your own heart and mind. There is no way for us to know that." Juror No. 3389 then stated, "My inclination is to try to avoid the death penalty, inclination but not an absolute." (13RT 3222.)

The prosecutor questioned Juror No. 3389. The prosecutor asked whether appellant thought that "a life sentence didn't [necessarily] mean that the person was in for life . . . ?" The prosecutor then asked Juror No. 3389, "Absent something like that [a situation where a person is in prison and still poses a danger to others], your inclination is to always vote for life without the possibility of parole?" Juror No. 3389 replied, "I think that's correct." (13RT 3222-3223.)

Defense counsel asked Juror No. 3389, "If you sat in the penalty phase and you felt the facts and evidence presented warranted a death verdict, could you render such a verdict?" Juror No. 3389 replied, "In other words, if it fit *my* criteria, yes." Defense counsel then asked, "If you believed based upon the facts and the circumstances, could you come back with a death verdict?" Juror No. 3389 stated, "*I think so*, yes." (13RT 3223-3224, emphasis added.)

The prosecutor moved to have Juror No. 3389 excused for cause, arguing that Juror No. 3389 stated a "clear preference" for a sentence of life without parole. Juror No. 3389's primary concern was whether the person would actually be in prison for the rest of their life and was no longer a threat to society. The only situation where Juror No. 3389 stated that he could impose the death penalty involved a situation where the person

continued to commit murders in prison. (13RT 3244-3245.) Defense counsel opposed the motion. Defense counsel argued that Juror No. 3389 stated that he was open to a death verdict, depending on the circumstances and facts of the case, if he felt it was warranted. (13RT 3245-3246.) The trial court granted the prosecutor's motion as follows:

> I am going to grant the motion as it relates to [Juror No.] 3389. It appears from his answers that he has a definite bias in favor of [] life without parole and that the only situation in which he could foresee himself, the only one he gave as an example - - even when I asked him for additional situations where it might occur - - the only one that came to mind for him is a situation where someone was already serving a life sentence and had committed further murders while in custody serving that life sentence.
>
> I believe that based upon his expression of his strong religious beliefs that he would not fairly consider both options in this case if given the opportunity to do so.

(13RT 3246.)

B. Applicable Law

The proper standard for exclusion, for cause, of a juror based on bias with regard to the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* review standard in California].) A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider imposing the death penalty *as a reasonable possibility.* (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.)

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) To

the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

In applying this standard, "where equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*People v. Ghent*, *supra*, 43 Cal. 3d at p. 768; see also *People v. Jones* (1997) 15 Cal.4th 119, 164, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800 [same].) If there is no inconsistency, "the trial court's judgment will not be set aside if it is supported by substantial evidence." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285.)

C. Substantial Evidence Supported the Trial Court's Exclusion of Juror No. 3389

Here, substantial evidence supported the trial court's finding that Juror No. 3389 views on the death penalty would "prevent or substantially impair" his performance. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Juror No. 3389 statements were not equivocal or ambiguous. In his response to the jury questionnaire, Juror No. 3389 clearly expressed strong religious beliefs against the death penalty. Further, Juror No. 3389 explained that his opinion regarding the death penalty was guided by his faith in the Roman Catholic Church and tried to "practice what the Church teaches regarding capital punishment." (16CT Supp. II 4419.) Juror No. 3389 stated that the view of the Roman Catholic Church concerning the

death penalty was that "the death penalty should only be imposed when life in prison . . . without possibility of parole cannot be 'absolutely' implemented to protect society." (16CT Supp. II 4420.) Juror No. 3389 stated that he felt *obligated* to accept this view. (*Ibid.*) Juror No. 3389 also stated that he considered death a worse punishment than life in prison without parole, explaining "My religious beliefs include the fact that God demands justice, but God is also all forgiving to those who warrant forgiveness. Life in prison provides the opportunity to earn forgiveness. Society must be absolutely protected from a possibility of parole." (16CT Supp. II 4419, emphasis in original.)

Moreover, Juror No. 3389 clearly stated a bias in favor of imposing a sentence of life in prison without parole and could not consider imposing the death penalty as a reasonable possibility. In his responses to the jury questionnaire, Juror No. 3389 stated that he "strongly disagreed" that "[a]nyone who commits multiple murder should receive the death penalty" (16CT Supp. II 4421), which was a special circumstance alleged in this case. Juror No. 3389 viewed the purpose of the death penalty was to "protect society from evil persons; a poor substitute for 'life in prison without parole.'" (16CT Supp. II 4422.) During voir dire, Juror No. 3389 stated that, absent a situation where an incarcerated person continued to commit additional murders in prison, he was inclined to "always" impose a sentence of life without parole. (13RT 3222-3223.)

Juror No. 3389 also did not clearly state that he was willing to temporarily set aside his beliefs in deference to the rule of law. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137] ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law"].) In fact, Juror No. 3389's response in the jury

questionnaire indicated that he could not set aside his religious beliefs because he stated that he felt obligated to follow his church's views against the death penalty. (16CT Supp. II 4420.)

Furthermore, aside from the example detailed above, Juror No. 3389 was unable to provide any further examples of circumstances where he would consider imposing the death penalty instead of life in prison. (13RT 3222.) Again, Juror No. 3389 stated that he "strongly disagreed" that "[a]nyone who commits multiple murder should receive the death penalty." (16CT Supp. II 4421.) Although Juror No. 3389 stated that he could impose the death penalty "if it fit [*his*] criteria" (13RT 3224), there was no indication he could set aside his own rigid criteria and defer to the rule of law.

To the extent Juror No. 3389 gave conflicting answers when questioned by defense counsel, the trial court resolved those differences adversely to appellant by granting the challenge, and its determination as to Juror No. 3389's state of mind are binding. (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].)

The trial court was best suited to reach a conclusion on Juror No. 3389's actual state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890 [when a juror supplies conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve on a capital jury, the trial court, through its observation of the juror's demeanor as well as

through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007 ["the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views"]; *People v. Stewart* (2004) 33 Cal.4th 425, 451 ["appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record"].)

Here, the trial court noted that the only stated circumstance where Juror No. 3389 would impose the death penalty involved a situation where the defendant continued to commit murder while in prison and found could not "fairly consider both options in this case if given the opportunity to do so." (13RT 3246.) Thus, the trial court properly exercised its discretion when it granted the prosecution's motion dismissing Juror No. 3389 for cause. (*People v. Bradford*, (1997) 15 Cal.4th 1229, 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

VI. THE ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR UNADJUDICATED CRIMINAL ACTIVITY DURING THE PENALTY PHASE WAS CONSTITUTIONAL

Appellant makes several claims regarding the jury's consideration of unadjudicated criminal activity as a circumstance in aggravation. (§ 190.3, factor (b).) (AOB 128-134.) First, appellant argues that the admission of evidence under 190.3, factor (b), does not withstand constitutional scrutiny because this Court's interpretation of that provision treats "death differently by lowering rather than heightening the reliability requirements in a manner

that cannot be countenanced under the federal Constitution." (AOB 129-131.) This Court has repeatedly rejected this argument. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 651; *People v. Harris* (2008) 43 Cal.4th 1269, 1315 [nothing in the high court's decisions requires penalty phase procedures to be more rigorous than other criminal procedures].) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Next, appellant's argues that he was denied his constitutional right to an impartial fact finder and reliable penalty determination because the same jury that decided his guilt could not be expected to evaluate this evidence without bias. (AOB 131-134.) This Court has repeatedly concluded there is no constitutional infirmity in using the same jury that decided guilt to weigh evidence of unadjudicated crimes. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 651; *People v. Rogers* (2006) 39 Cal.4th 826, 894; *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208; *People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Balderas* (1985) 41 Cal.3d 144, 204–205.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Lastly, appellant contends that, because California does not allow the use of unadjudicated offenses in non-capital sentencing, the use of this evidence in a capital proceeding violates his equal protection rights. (AOB 134.) This Court has found that the use of unadjudicated offenses in capital proceedings, but not in noncapital matters, does not violate equal protection or due process principles. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 651; *People v. Watson* (2008) 43 Cal.4th 652, 701 [capital and noncapital defendants are not similarly situated and may be treated differently without offending equal protection or due process guarantees]; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

VII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant briefly presents several "laundry list" challenges to the constitutionality of California's death penalty statute to urge reconsideration of the claims and to fairly present the issues for federal review. (AOB 135-150.) First, appellant argues that permitting the jury to consider the circumstances of the crime as a factor in aggravation within the meaning of section 190.3, factor (a)) results in an arbitrary and capricious imposition of the death penalty. (AOB 135-136.) As he recognizes, this Court has repeatedly rejected this contention. (*People v. Lee* (2011) 51 Cal.4th 620, 651; *People v. Gutierrez* (2009) 45 Cal.4th 789, 831; *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Lewis* (2001) 26 Cal.4th 334, 394; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 2637, 129 L.Ed.2d 750].) It should fail here as well.

Appellant next argues contends that the trial court erred when it failed to instruct the jury that it had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors. (AOB 136-137.) As he recognizes, this Court has rejected the argument that the reasonable doubt standard applies to capital penalty phase proceedings. (*People v. Bivert* (2011) 52 Cal.4th 96, 123-124; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208 [reiterating the holding that that the jury is not required to find beyond a reasonable doubt that (1) the aggravating factors have been proved, (2) the aggravating factors outweigh the mitigating factors, or (3) death is the appropriate sentence]; *People v. Harris*, *supra*, 37 Cal.4th at p. 365; see *People v. Prieto*, *supra* 30 Cal.4th at p. 275; *People v. Hillhouse* (2002) 27 Cal.4th 469, 510–511.)

Appellant then argues that *Cunningham v. Washington* (2007) 549 U.S. 270, 293 [127 S.Ct 856, 166 L.Ed.2d 856] ("*Cunningham*"), *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403] ("*Blakely*"), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] ("*Ring*"), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435] ("*Apprendi*") require that any fact used to support an increased sentence must be submitted to the jury and proved beyond a reasonable doubt. Thus, he contends that the trial court erred when it failed to instruct the jury had to make the factual findings that the aggravating factors were present and the aggravating factors were so substantial as to make death an appropriate punishment. (AOB 137-138.) This Court has held that *Cunningham*, *Blakely*, *Ring*, and *Apprendi* have not altered the conclusion that the jury is not required to find beyond a reasonable doubt that the aggravating factors have been proved and that death is the appropriate sentence. (*People v. Bivert*, *supra*, 52 Cal.4th at p. 124; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 227; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.)

Appellant further argues that the trial court erred when it did not instruct the jury that the state had the burden of persuasion regarding the existence of any factor in aggravation pursuant to Evidence Code section, 520, the appropriateness of the death penalty, and that it was presumed that life without the possibility of parole was the appropriate sentence. (AOB 138-139.) This Court has held that the statutes do not require that the prosecution carry the burden of proof or persuasion at the penalty phase. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 208; *People v. Bivert*, *supra*, 52 Cal.4th at pp. 123-124.)

Appellant next argues that the instructions given (CALJIC Nos. 8.85 and 8.88[38]; 3CT 609-610, 624-625) failed to provide the jury with the guidance constitutionally required for administration of the death penalty because it does not instruct on the burden of persuasion or that it is presumed that life in prison without the possibility of parole is the appropriate sentence (AOB 139). As he recognizes, this Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because it is largely moral and normative. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.) Moreover, this Court has rejected any instruction that there is a presumption of life imprisonment without the possibility of parole. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1318; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Arias* (1996) 13 Cal.4th 92, 191).

Appellant contends that, assuming it was permissible not to have any burden of proof, the trial court erred when it failed to instruct the jury on the lack of burden of proof. (AOB 139.) This Court has rejected the contention that the jury be instructed on the *absence* of a burden of proof. (*People v. Cornwell* (2005) 37 Cal.4th 50, 104, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Turner* (2004) 34 Cal.4th 406, 439 ["The jury need not be instructed on the burden

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[38] Language similar to CALJIC No. 8.88 now appears in CALCRIM No. 763. (*People v. Lomax* (2010) 49 Cal.4th 530, 595.)

of proof during the penalty phase because the sentencing function is 'not susceptible to a burden-of-proof quantification' "].)

Appellant contends that the instructions violated the Sixth, Eighth and Fourteenth Amendments to the federal constitution by failing to require juror unanimity on aggravating factors. (AOB 140-141.) This Court has consistently and repeatedly held that "neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors." (*People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Combs* (2004) 34 Cal.4th 821, 868; accord *People v. Monterroso* (2004) 34 Cal.4th 743, 795; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Yeoman* (2003) 31 Cal.4th 93, 157; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury should have been instructed that prior criminality had to be found true by a unanimous jury pursuant to *Cunningham*, *Blakely*, *Apprendi*, and *Ring*. (AOB 141-42; 3CT 616.) As he recognizes, this Court has routinely rejected these claim. (*People v. Gonzales* (2011) 52 Cal.4th 254, 333; *People v. D'Arcy* (2010) 48 Cal.4th 257, 302; *People v. Burney* (2009) 47 Cal.4th 203, 259-260 ["we previously have held that nothing in the federal Constitution or in statutory law requires the penalty phase jury to agree unanimously that a particular aggravating circumstance exists"].) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the instructions violated the Sixth, Eighth and Fourteenth Amendments to the federal constitution because the question of whether to impose death hinged on the were "persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of life without parole." (3CT 625 [CALJIC No. 8.88].) He argues that the phrase "so substantial" and "warrants" are an impermissibly broad phrases that do not sufficiently limit the jury's discretion. (AOB 142-143.) As he recognizes, this Court has found that these phrases do not render the jury instructions constitutionally deficient. (*People v. Lomax* (2010) 49 Cal.4th 530, 595.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury instructions were constitutionally deficient because they failed to tell the jury that it must impose a life sentence without the possibility of parole if it finds that the circumstances in mitigation outweigh those in aggravation. (AOB 143-144.) As he recognizes, this Court has repeatedly rejected this claim. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 595; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 124.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury instructions were constitutionally deficient because they failed to tell the jury that appellant bears no burden in proving facts in mitigation. (AOB 144-145.) This Court has rejected this claim. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 595; *People v. Moon*, *supra*, 37 Cal.4th at pp. 43-44.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury instructions were constitutionally deficient because of a lack of an instruction that unanimity is not required for mitigating evidence. (AOB 145.) This Court has rejected this claim. (*People v. Holt* (1997) 15 Cal.4th 619, 685.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury instructions were constitutionally deficient for failing to instruct the jury that the law favors life and presumes life in prison without parole to be the appropriate sentence. (AOB 145-146.) As he recognizes, this Court has repeatedly denied this claim. (*People v. Moore* (2011) 51 Cal.4th 1104, 1144; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Lewis* (2009) 46 Cal.4th 1255, 1318; *People v. Arias* (1996) 13 Cal.4th 92, 191.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the California death penalty law is constitutionally flawed because it does not require the jury to make written findings during the penalty phase of trial. The lack of such a requirement, appellant argues, makes impossible the constitutionally required meaningful review of the judgment and denies him equal protection of the law. (AOB 146-147.) As he recognizes, this contention has been repeatedly denied. (*People v. Brown, supra*, 33 Cal.4th at p. 401; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Hillhouse, supra*, 27 Cal.4th at p. 510; *People v. Caitlin* (2001) 26 Cal.4th 81, 178; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the list of potential mitigating factors with such adjectives such as "extreme" and "substantial" (3CT 645 [CALJIC No. 8.85]; § 190.3, factors (d) & (g)) violated his constitutional rights. (AOB 147.) As he recognizes, this Court has repeatedly denied this argument. (*People v. Avila* (2006) 38 Cal.4th 491, 614–615; see *People v. Valencia* (2008) 43 Cal.4th 268, 310.) Because appellant provides no

persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the trial court erred when it did not omit sentencing factors set forth in CALJIC No. 8.85 that were inapplicable to his case. (AOB 147.) As he recognizes, this Court has repeatedly denied this argument. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248; *People v. Harris* (2008) 43 Cal.4th at pp. 1320-1321.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the jury instructions were constitutionally deficient because it did not inform the jury which sentencing factors in CALJIC 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating. (AOB 147-148.) As he recognizes, this Court has held that the trial court is not required to instruct that certain statutory factors can only be considered in mitigation (*People v. Brown, supra*, 33 Cal.4th at p. 402; see *Tuilaepa v. California, supra,* 512 U.S. at p. 979), there is no requirement that the court identify which factors are aggravating and which are mitigating (see, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 178), or restrict the jurors' consideration of the evidence in this regard (see *People v. Zapien* (1993) 4 Cal.4th 929, 990). Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant contends that the failure to provide intercase proportionality review violates his constitutional rights. (AOB 148.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has held that "[c]omparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th

43, 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 1, 44; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson* (2001) 25 Cal.4th 543, 602.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant argues that California's death penalty scheme violates the Equal Protection Clause of the Fourteenth Amendment because it provides person's facing death fewer procedural protections. (AOB 149.) This Court as repeatedly rejected the argument that California's death penalty law violates equal protection principles. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243 [because capital defendants are not similarly situated to noncapital defendants, the absence in California's death penalty law of certain procedural rights provided to noncapital defendants does not violate equal protection; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant argues that the use of the death penalty and, in the alternative, the regular use of the death penalty violates international law and the Eighth and Fourteenth Amendments. (AOB 149-150.) This Court has repeatedly rejected the claims that the death penalty violates international law or the Eighth and Fourteenth Amendments. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Lewis* (2008) 43 Cal.4th 415, 537-538.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

VIII. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 151-

153.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *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. Caitlin,* 26 Cal.4th at p. 180.) 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 appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

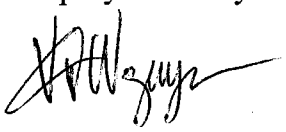
CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 18, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General



VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

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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 28,592 words.

Dated: September 18, 2012

KAMALA D. HARRIS
Attorney General of California

VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Kiongozi Jones***

No.: **S075725**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 18, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Steven P. Schreiner
Deputy District Attorney
Los Angeles County District Attorney's Office
18000 Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, CA 90012

Jessica K. McGuire
Assistant State Public Defender
State Public Defender's Office - Sacramento
770 L Street, Suite 1000
Sacramento, CA 95814

Michael J. Hersek
State Public Defender
770 L Sacramento, Suite 1000
Sacramento, CA 95814

California Court of Appeal
Second Appellate District
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
(hand delivered)

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Geraldine S. Russell
Attorney at Law
P.O. Box 2160
La Mesa, CA 91943-2160

Clerk
Los Angeles County Superior Court
Metropolitan Courthouse
1945 S. Hill St.
Los Angeles, CA 90007-1466

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

On September 18, 2012, I caused thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Fedex**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 18, 2012, at Los Angeles, California.

Marianne A. Siacunco	
Declarant	Signature

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