SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SONNY ENRACA,

Defendant and Appellant.

S080947

CAPITAL CASE

SUPREME COURT
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The Honorable W. Charles Morgan, Judge

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DEATH PENALTY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
Guilt Phase - Prosecution	2
Guilt Phase - Defense	15
Penalty Phase - Prosecution	19
Penalty Phase - Defense	20
ARGUMENT	23
I. THE TRIAL COURT CORRECTLY DETERMINED THAT ENRACA VOLUNTARILY AND INTELLIGENTLY WAIVED HIS *MIRANDA* RIGHTS	23
A. Trial Court Proceedings	23
B. Evidence Presented In The Trial Court	24
C. Trial Court Findings And Ruling	27
D. Legal Authority And Analysis	28
II. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCTION ON PROVOCATION/HEAT OF PASSION AS A BASIS FOR VOLUNTARY MANSLAUGHTER BECAUSE THERE WAS NOT A SUBSTANTIAL EVIDENTIARY BASIS FOR THAT THEORY	33

TABLE OF CONTENTS (continued)

Page

A. Enraca Was Not Entitled To Instruction On Heat Of Passion 34

B. Enraca Was Not Entitled To Instruction With CALJIC No. 8.73 Regarding The Effect of Heat Of Passion on Premeditation And Deliberation 38

C. Even Assuming Error, Enraca Was Not Prejudiced 39

III. ENRACA FORFEITED HIS CLAIM OF INSTRUCTIONAL ERROR AND THERE WAS NO ERROR IN INSTRUCTING ON THE EFFECT OF ENRACA'S WRONGFUL CONDUCT ON HIS SELF-DEFENSE CLAIM 40

IV. THE TRIAL COURT WAS NOT REQUIRED TO ADVISE ENRACA OF HIS RIGHT TO TESTIFY AND OBTAIN A WAIVER 43

V. THE VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS CONSIDERATION OF THAT EVIDENCE 45

VI. THE PROSECUTOR DID NOT ARGUE THAT THE SURVIVING VICTIM AND THE MURDERED VICTIMS' FAMILIES WANTED A DEATH VERDICT AND DID NOT LEAD THE JURY TO BELIEVE THE RESPONSIBILITY FOR A DEATH VERDICT RESTED WITH OTHER THAN THE JURY 48

VII. ENRACA FORFEITED HIS CLAIM OF PROSECUTORIAL MISCONDUCT AS TO ALL BUT ONE OF THE PROSECUTOR'S REFERENCES TO LACK OF REMORSE AND IN ANY EVENT, THE PROSECUTOR'S

TABLE OF CONTENTS (continued)

		Page
	ARGUMENT REGARDING ENRACA'S LACK OF REMORSE WAS PROPER	55
VIII.	LINGERING DOUBT WAS ADEQUATELY COVERED IN THE PENALTY PHASE INSTRUCTIONS AND A SEPARATE INSTRUCTION WAS NOT REQUIRED	60
IX.	THE CALIFORNIA DEATH PENALTY STATUTE IS CONSTITUTIONAL	64
X.	THERE WAS NO ERROR TO ACCUMULATE	66
CONCLUSION		67

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey
(2000) 530 U.S. 466
120 S.Ct. 2348
147 L.Ed.2d 435 64

Blakely v. Washington
(2004) 542 U.S. 296
124 S.Ct. 2531
159 L.Ed.2d 403 64

Caldwell v. Mississippi
(1985) 472 U.S. 320
105 S.Ct. 2633
86 L.Ed.2d 321 49

Cunningham v. California
(2007) 549 U.S. 270
127 S.Ct. 856
166 L.Ed.2d 856 64

In re Christian S.
(1994) 7 Cal.4th 768 42

In re Horton
(1991) 54 Cal.3d 82 44

Miranda v. Arizona
(1966) 384 U.S. 436
86 S.Ct. 1602
16 L.Ed.2d 694 24, 27, 28, 30, 31, 33

Payne v. Tennessee
(1991) 501 U.S. 808
111 S.Ct. 2597
115 L.Ed.2d 720 45, 46

TABLE OF AUTHORITIES (continued)

	Page
People v. Abilez (2007) 41 Cal.4th 472	61
People v. Alcala (1992) 4 Cal.4th 805	44
People v. Barton (1995) 12 Cal.4th 186	35
People v. Bonilla (2007) 41 Cal.4th 313	56-59, 61, 64, 65
People v. Boyette (2002) 29 Cal.4th 381	46
People v. Bradford (1997) 14 Cal.4th 1005	44
People v. Bradford (1997) 15 Cal.4th 1229	44
People v. Breverman (1998) 19 Cal.4th 142	34, 36, 39
People v. Brown (2003) 31 Cal.4th 518	47
People v. Cain (1995) 10 Cal.4th 1	56, 59, 60
People v. Catlin (2001) 26 Cal.4th 81	41
People v. Cleveland (2004) 32 Cal.4th 704	49
People v. Cole (2004) 33 Cal.4th 1158	35

	Page
People v. Crew (2003) 31 Cal.4th 822	56, 59
People v. Cruz (2008) 44 Cal.4th 636	29, 34, 64, 65, 66
People v. Cunnningham (2001) 25 Cal.4th 926	29
People v. Daniels (1991) 52 Cal.3d 815	35
People v. Edwards (1991) 54 Cal.3d 787	45, 46
People v. Fierro (1991) 1 Cal.4th 173	46
People v. Gay (2008) 42 Cal.4th 1195	60, 61
People v. Geier (2007) 41 Cal.4th 555	35
People v. Gray (2005) 37 Cal.4th 168	62
People v. Hinton (2006) 37 Cal.4th 839	49, 55
People v. Jablonski (2006) 37 Cal.4th 774	49, 55, 56
People v. Lee (1999) 20 Cal.4th 47	34, 37
People v. Marshall (1997) 15 Cal.4th 1	41

TABLE OF AUTHORITIES (continued)

	Page
People v. Moon (2005) 37 Cal.4th 1	49
People v. Mungia (2008) 44 Cal.4th 1101	64, 65
People v. Padilla (2002) 103 Cal.App.4th 675	38
People v. Romero (2008) 44 Cal.4th 386	64, 65
People v. Salcido (2008) 44 Cal.4th 93	46
People v. Sims (1993) 5 Cal.4th 405	29
People v. Smith (2003) 30 Cal.4th 581	48
People v. Steele (2002) 27 Cal.4th 1230	34, 38
People v. Valdez (2004) 32 Cal.4th 73	49
People v. Wader (1993) 5 Cal.4th 610	41
People v. Ward (2005) 36 Cal.4th 186	38, 39
People v. Wickersham (1982) 32 Cal.3d 307	35, 36
People v. Zamudio (2008) 43 Cal.4th 327	47, 61

TABLE OF AUTHORITIES (continued)

Page

Ring v. Arizona
(2002) 536 U.S. 584
122 S.Ct. 2428
153 L.Ed.2d 556 — 64

Sanchez-Llamas v. Oregon
(2006) 548 U.S. 331
126 S.Ct. 2669
165 L.Ed.2d 557 — 31

Strickland v. Washington
(1984) 466 U.S. 668
104 S.Ct. 2052
80 L.Ed.2d 674.) — 45

United States v. Booker
(2005) 543 U.S. 220
125 S.Ct. 738
160 L.Ed.2d 621 — 64

United States v. Garcia
(9th Cir. 1970) 431 F.2d 134 — 30, 31

United States v. Vasquez-Lopez
(9th Cir. 1968) 400 F.2d 593 — 30

Statutes

Penal Code
§ 186.22, subd. (b)(1) — 1
§ 187 — 1
§ 190.2, subd. (a)(3) — 1
§ 245 — 1
§ 1192.7, subd. (c)(8) — 1
§ 12022.5, subd. (a) — 1
§ 12022.7 — 1

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

CALJIC

Authority	Page
No. 2.00	40
No. 2.01	40
No. 5.55	
No. 5.17	40, 41
No. 8.20	40
No. 8.40	
No. 8.42	34
No. 8.43	34
No. 8.44	34
No. 8.50	33
No. 8.67	40
No. 8.73	34, 38, 40
No. 8.85	47, 61, 62
No. 17.51.1	62, 63

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SONNY ENRACA, Defendant and Appellant.	S080947 **CAPITAL CASE**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SONNY ENRACA,

Defendant and Appellant.

S080947

CAPITAL CASE

STATEMENT OF THE CASE

On March 13, 1998, the District Attorney of Riverside County filed an amended information charging appellant, Sonny Enraca, with the murder of Ignacio Hernandez (Pen. Code, § 187, count one), the murder of Dedrick Gobert (Pen. Code, § 187, count two), and the attempted murder of Jenny Hyon (Pen. Code, §§ 664, 187, count three). As to all three charges, it was alleged that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and that Enraca personally used a firearm (Pen. Code, § 12022.5, subd. (a), 1192.7, subd. (c)(8)). As to the attempted murder charge, it was alleged that Enraca personally inflicted great bodily injury (Pen. Code, §§ 12022.7, 1192.7, subd. (c)(8)). A multiple murder special circumstance was also alleged (Pen. Code, § 190.2, subd. (a)(3)). (4 CT 896-899.) Enraca pleaded not guilty and denied the allegations. (4 CT 900.)

Enraca's jury trial commenced March 10, 1999. (6 CT 1520.) On May 5, 1999, the jury found Enraca guilty of both murder charges, setting the degree of the murders as first, and guilty of assault with a deadly weapon (Pen. Code, § 245; "ADW"), a lesser included offense of the attempted murder charge. The jury found the firearm use and gang allegations true as to all three convictions, found the great bodily injury enhancement true as to the ADW

conviction, and found the multiple murder special circumstance true. (21 CT 5775-5786, 5956-5958.)

The penalty phase began May 12, 1999. (23 CT 5998-5999.) On May 27, 1999, the jury returned a verdict of death. (23 CT 6019, 6044.)

On July 23, 1999, the trial court heard and denied Enraca's motions for new trial and for modification of the verdict. (23 CT 6084.) The trial court sentenced Enraca to death for each of the two first degree murder convictions. It also sentenced Enraca to the middle term of three years for the ADW conviction and consecutive terms of four years for the firearm use enhancement and two years for the gang enhancement, for a total determinate term of 9 years. (23 CT 6085-6091.)[1] On July 27, 1999, the trial court imposed an additional three year consecutive term for the great bodily injury enhancement on the ADW conviction, bringing the total determinate term to 12 years. (23 CT 6107-6110.) On August 6, 1999, the trial court made an *ex parte* order, staying the determinate term pending execution of the death sentence. (23 CT 6112-6115.)

STATEMENT OF FACTS

Guilt Phase - Prosecution

In the early morning hours of November 19, 1994, a group of friends attended the illegal street races in the area of Etiwanda Avenue in Mira Loma. The group included the three victims in this case, Dedrick Gobert, Ignacio Hernandez, and Jenny Hyon, as well as Christine Maile Gilleres and Herman

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1. Determinate sentences were also imposed for the firearm use and gang enhancements as to the murder convictions and either stayed or ordered to be served concurrent to the terms on the ADW conviction.

Flores. (8 RT 1604-1605; 16 RT 2646-2647.)[2] Both Gobert and Hernandez participated in the races. (8 RT 1670-1671; 16 RT 2649.)

During a race Hernandez participated in, another vehicle pulled in front of Hernandez, which required him to brake to avoid a collision. (8 RT 1606; 16 RT 2651.) Hernandez got out of his car and began arguing with the driver of the vehicle that had cut him off. (8 RT 1606.) The two then started fighting. (8 RT 1606.) The other driver, an Asian male, ran to a group of about 10 people, also Asians, and the group surrounded Hernandez and started fighting him. (8 RT 1606-1608; 16 RT 2650.) When sirens sounded, everyone ran. (8 RT 1608.)

The people with Hernandez ran to their cars (Gobert drove a Volkswagen Rabbit and Hernandez had a Honda Del Sol), drove to Etiwanda Avenue, and parked on the street in front of a pizza parlor. (8 RT 1609-1610; 16 RT 2651.)[3] Gilleres and Flores rode with Gobert in his Volkswagen Rabbit, and Hyon rode with Hernandez in his black Honda Del Sol. (8 RT 1609-1610.) They were separated from their other friends and got out to see if they could see their friends. (8 RT 1611.) They saw the Asian group, which had been fighting with Hernandez. (8 RT 1612.) The group of Asians approached and began yelling at Hernandez. (8 RT 1613.) Hernandez and his group responded in kind. (8 RT 1614; 16 RT 2652.)

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2. Gilleres's testimony is contained in volumes 8 and 9 of the Reporter's Transcript and Hyon's testimony is in volume 16.

3. Etiwanda Avenue is a north-south boulevard, divided by a raised center median. The pizza parlor, along with a gas station and mini-market, and parking lots, is located on the east side of the avenue, north of the I-60 freeway. A fenced field is on the west side. (See Exh. 5 [aerial photograph] (7 RT 1466).)

During the argument, one member of the Asian group pulled a silver/chrome handgun and pointed it at Hyon. (8 RT 1614; 16 RT 2653.)[4] Hyon yelled at the gunman, and an older member of the group of Asians said something to the gunman, who put the gun back in his pocket. (8 RT 1615; 16 RT 2653.) The group of Asians then walked away. (8 RT 1615-1616; 16 RT 2654.)

That same night, Enraca and several members and associates of his criminal street gang, the Akrho Boyz Crazzy or ABC, including Lester Maliwat, Eric Garcia, and Roger Boring, also attended the races. (9 RT 1827, 1829, 1837; 13 RT 2306-2309; 14 RT 2442.)[5] Garden Grove Police Officer Michael Martin, a former gang officer with expertise in gangs, was familiar with the ABC gang, which originated in Orange county in 1988-1989. (11 RT 2049-2055, 2064.) The gang has a hand sign, affiliates with the Bloods, and has a turf orientation. (11 RT 2064, 2067.)

The gang members gathered at Boring's house earlier that evening and they drove in several vehicles to the races. (9 RT 1834, 1838; 13 RT 2306, 2310; 14 RT 2442.) Enraca rode with Lester Maliwat. (9 RT 1837.) Enraca carried a snub-nosed revolver. (9 RT 1828; 10 RT 1928.) The ABC gang members parked in and around the pizza parlor on Etiwanda. (9 RT 1840; 13 RT 2311.) Several of the gang members congregated in the pizza parlor parking lot and against the pizza parlor wall facing Etiwanda. (9 RT 1841; 14 RT 2443-2444.) Roger Boring noticed Dedrick Gobert and Judy Hyon walking back and forth, and talking about an earlier group. (14 RT 2445.)

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4. Gilleres testified the gun was put to Hyon's forehead. (8 RT 1614.) Hyon testified the gun was pointed at her group, generally. (16 RT 2653.)

5. Lester Maliwat's testimony is contained in volumes 9, 10 and 11 of the Reporter's Transcript, Eric Garcia's testimony is in volumes 13 and 14, and Roger Boring's testimony is in volumes 14 and 15.

Gilleres, Hyon, Gobert, Hernandez, and Flores decided that their other friends must have left, and they decided to leave also. (8 RT 1618.) Before they did, Gobert got in his Volkswagen and drove up and down Etiwanda, before pulling back in behind Hernandez's car. (8 RT 1618; 16 RT 2654-2655.) Gilleres surmised that Gobert was taking one last look for their other friends before leaving. (8 RT 1618.)

Boring also saw Gobert leave in his vehicle and return. (14 RT 2446.) He described Gobert as slamming on the brakes when he stopped in front of the ABC group. (14 RT 2446.) Maliwat saw Gobert as he circled the block in his car and testified Gobert looked at the ABC group "in a wrong way." (9 RT 1842.)

Gilleres had noticed the ABC gang members, seen that they were dressed in red, a Blood gang color, and heard some of them say, "Blood, Blood, Blood" in their conversations while looking at her group. (8 RT 1619-1620; see also 10 RT 1976 and 16 RT 2668.) She warned Gobert, but he approached the ABC gang members. (8 RT 1621.)

When he approached, Gobert said, "What's up, cuz," "Fuck Bloods," "Fuck Slobs," and claimed to be a Mafia Crip member. He also raised his arms and made a Crip gang hand sign. (9 RT 1845; 10 RT 1973; 11 RT 2031, 2041-2043; 16 RT 2655, 2669.) The things Gobert said were insults to a Blood gang like ABC,[6] and some of the gang members responded by saying, "What's up Blood," an insult to a Crip gang member. (9 RT 1844; see 11 RT 2072-2073.) The insults by Gobert required the ABC Blood gang beat him down in order to maintain respect and, in the opinion of gang expert Martin, such a beat-down

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6. Gilleres testified that Gobert grew up in Los Angeles and did not like red. She explained that he wore blue and had friends in the Crips. (8 RT 1673.)

would be for the benefit of, in association with, and at the direction of the gang. (9 RT 1846; 11 RT 2073.)

Gilleres testified the ABC gang members rushed Gobert before he lowered his hands and began beating him. (8 RT 1622-1623, 1625.) However, both Maliwat and Boring testified they and their fellow ABC gang members thought it funny that Gobert would insult a large group of Bloods and laughed at him. (10 RT 1921-1922; 14 RT 2447.) Boring said Gobert appeared intoxicated because he zig-zagged on his feet. (14 RT 2447; 15 RT 2465.)[7] Both testified that Gobert was rushed by the gang when he responded to the gang's insults by reaching under his shirt, as though he had a gun. (11 RT 2043; 14 RT 2447; 15 RT 2513-2514.)[8]

The gang members, 15 to 20 strong, hit and kicked Gobert. Gilleres, Hyon and Hernandez rushed in, shouting, "Stop it. That's enough" and tried to assist Gobert. (8 RT 1623; 14 RT 2448; 16 RT 2616-2618, 2672-2673.) As the fighting continued, the people backed across the northbound lanes, over the center median, and into the southbound lanes of Etiwanda where Gobert ended up on the ground, being hit, kicked, and stomped. (8 RT 1625-1626; 10 RT 1984; 15 RT 2468-2472; 16 RT 2673-2674.)

Hernandez, who had been trying to free Gobert by pulling people away, got on top of Gobert to protect him. (8 RT 1626; 15 RT 2474; 16 RT 2619, 2674.) Claudio, one of the ABC gang members kicked Hernandez in the head. (10 RT 1920-1921.) Gilleres had forced her way through the crowd and

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7. Gilleres and Hyon testified that Gobert had drank most of a 40-ounce bottle of malt liquor while at the races, but nothing before that. (8 RT 1646, 1652, 1657-1658; 16 RT 2663-2665.) A 40-ounce bottle of malt liquor was found near the pizza parlor by Riverside County Sheriff's Detective Eric Spidle. It contained about 2 ounces of liquid. (13 RT 2222-2224.)

8. Gilleres testified that she did not see Gobert or Hernandez with a weapon that night. (9 RT 1779.)

saw Gobert and Hernandez being hit, kicked, and stomped. (8 RT 1626-1627.) She got on top of Hernandez, trying to protect them, and she was kicked in the face. She ended up stunned and on the ground. (8 RT 1627.)

Boring thought the fight was over and began heading back to the cars. (15 RT 2481.) Maliwat, who had been knocked down by Hernandez, also thought the fight was over, when he heard someone say something about a gun and he ran. (10 RT 1981; 11 RT 2046.) As Gilleres staggered to her feet, she heard 2 to 3 gunshots and everyone began running. (8 RT 1628.) Hyon was at the outside of the circle of people when she heard the shots. (16 RT 2675.)

Boring had looked back before any shots were fired. (15 RT 2545.) He saw Enraca grab Hernandez by the head or shoulder, raise Hernandez's upper body, and shoot Hernandez. (15 RT 2541, 2543-2544.) Enraca stood over Gobert, pointed the gun, and shot Gobert. (15 RT 2482.) After Enraca shot Gobert and Hernandez, Boring saw a female approach Enraca and push or kick Enraca from behind. (15 RT 2554.) Enraca turned and fired at her. (15 RT 2554.)

Maliwat also looked back when he got to his car and saw Enraca fire at Gobert and Hernandez. (11 RT 2032-2033, 2046.) Maliwat got in his car and as he pulled out of the parking lot onto Etiwanda, Enraca got into Maliwat's car. (10 RT 1924.) Maliwat could see a girl on the ground, with her body in an awkward position and asked Enraca why he shot the girl. (10 RT 1925-1926.) Enraca replied, "Fuck them. They deserved it." (10 RT 1926; see 15 RT 2594.)

Eric Garcia, who had stayed in the car he rode in and listened to the radio, got out when he was told about the fight. (13 RT 2311.) As he walked through the parking lot toward the street, he saw the fight in which ABC gang members far outnumbered their opponents. (13 RT 2312.) Before reaching the

street he heard two to three shots and saw everyone start running. (13 RT 2311, 2315.) Garcia ran back to the car and rode away. (13 RT 2315.)

As Maliwat drove away from the area, Enraca took the expended shells from the revolver and threw them out of the car. (10 RT 2009.) Maliwat drove Enraca back to Roger Boring's house where Enraca was living at the time. (9 RT 1829; 10 RT 1943; 15 RT 2484.)

The car in which Garcia was riding stopped at a Denny's restaurant where Garcia learned from Claudio that Enraca had done the shooting. (13 RT 2315, 2317; 14 RT 2364.) After leaving the restaurant, Garcia went to Boring's house where he confronted Enraca, who at first refused to answer Garcia's knock on Enraca's bedroom door. (13 RT 2317-2319.) When Garcia asked Enraca what happened and why he shot the girl, Enraca became angry and they argued and got in a pushing match. (13 RT 2321-2322.) Finally, Enraca responded, "Maybe they deserved it." (13 RT 2323.)

Garcia asked Enraca for the gun and when Enraca refused, Garcia went outside. (13 RT 2323.) Enraca came outside and asked Garcia to take the gun, which Garcia did. (13 RT 2324-2325.) Garcia kept the gun in his closet for a few days until Enraca came, asked for it, and took it back. (13 RT 1325-1326.)

The day after the shootings, Enraca told Boring that he would turn himself in. He said he would be found sooner or later. (15 RT 2491.)

When Sheriff's deputies began arriving at the shooting scene, they found Gobert and Hernandez were dead. (7 RT 1465-1469, 1512-1513, 1519.) Hyon was alive, but was lying on the roadway and was in and out of consciousness. (7 RT 1470-1471, 1514.) Hyon had a bullet wound to the right side of her neck and was transported to the hospital. (7 RT 1519-1520; 16 RT 2644.) A bullet was removed during surgery, however, Hyon remained

paralyzed from the neck down with some movement in her left arm and only "a little bit" of movement in her right. (16 RT 2644-2645.)

In the opinion of Paul Sham, a criminalist with the California Department of Justice, the bullet, Exhibit 45, was a damaged .38 bullet. (10 RT 1877, 1880; 15 RT 2580-2593, 2585-2589; 16 RT 2625.)[9] The bullet had marks consistent with "slippage"–distortion in the rifling impressions–which indicated it could have been fired by a revolver, although it is possible to get slippage in a semiautomatic. (10 RT 1897-1899.) However, no .38 shell casings were located on Etiwanda around the deceased victims' bodies. (7 RT 1494.)

During the autopsies of Gobert and Hernandez, Dr. Darryl Garber, a forensic pathologist, observed external trauma on both victims which was consistent with having been received in a fight. (8 RT 1543, 1546-1548, 1559-1560, 1562-1564, 1583-1585.)

Hernandez suffered two gunshot wounds which caused his death. (8 RT 1549-1550.) There was a gunshot entrance wound to the left rear of his head, above and behind the left ear. (8 RT 1549, 1553.) The bullet fragmented and a portion was lodged under the skin at the entrance wound. (8 RT 1558.) The other part of the bullet traveled through Hernandez's brain, and lodged under the skin on the forehead. (8 RT 1549, 1553.) The failure of the bullet to exit through the skin and an abrasion on the skin overlaying the lodged bullet indicated that Hernandez's head was against a very hard surface, such as the ground, when the shot was fired. (8 RT 1553-1554, 1588.)

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9. Sham testified that when he identified a bullet as a .38 bullet, that was a generalized description which included .38 bullets, .357 bullets, .38 special bullets, .38 Smith & Wesson bullets, and 9mm bullets, that are all of a similar size. (10 RT 1884.)

The second gunshot entered Hernandez's left back, traveled through the lower and upper left lung, perforated the heart and right lung, then stopped in the muscles of the right front chest. (8 RT 1550, 1552, 1557.)

Gobert had a single gunshot wound on the right rear of his head, above and behind his right ear, which caused his death. (8 RT 1565-1566.) The bullet fragmented and lodged in his brain. (8 RT 1566.)

There was no stippling or tattooing around the three gunshot wounds, which, in Dr. Garber's opinion, indicated the wounds were not contact wounds and were fired from a minimum distance of one-and-a-half to two feet away. (8 RT 1580-1581, 1587.)

The bullet and bullet fragments were recovered during the autopsy and examined by DOJ criminalist Paul Sham. (8 RT 1555, 1566; 10 RT 1871, 1873-1874; 12 RT 2166-2180.) In Sham's opinion, the lead projectile removed from under the skin on Hernandez's forehead (Exh. 47B) was a damaged .38 bullet; the fragment under the Hernandez head entrance wound (Exh. 47A) was a lead fragment; the lead projectile from Hernandez's chest (Exh. 46) was a slightly damaged .38 bullet; the two fragments–one large and the other smaller–from Gobert's entrance wound (Exh. 47C), were lead fragments; and the projectile from Gobert's brain (Exh. 47D) was damaged .38 bullet, of which part was missing. (10 RT 1881-1884.) Sham also opined that the larger of the two fragments in Exhibit 47C could have come from the damaged bullet in Exhibit 47D. (10 RT 1884.) The bullet in Exhibit 47D also showed "slippage." (10 RT 1898-1899.) Sham testified that the bullets he identified as .38s were definitely not .22s. (10 RT 1886-1887.)[10]

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10. Three damaged .22 shell casings were located in the northbound lanes of Etiwanda. (7 RT 1509; 10 RT 1888, 1892.) The casings were flattened as though they had been run over. (7 RT 1490; 10 RT 1893; 12 RT 2163.) The bodies of the victims were in the southbound lanes. (7 RT 1489, 1499, 1509; 10 RT 1890; 12 RT 2163.) One .22 casing was approximately 41

On December 12, 1994, based on information received from Claudio Hortea, Enraca was arrested. (11 RT 2100-2104.) Enraca was interviewed by Riverside Sheriff's Detective John Schultz. (11 RT 2105.) The interview was tape-recorded and the recording (Exh. 53) was played for the jury. (11 RT 2106, 2108, 2111.)[11] Enraca denied any involvement in the shootings and claimed he had spend the evening watching movies with his girlfriend and did not leave the house all night. (21 CT 5603-5614.) The interview concluded when Enraca asked for a lawyer. (21 CT 5616.)

While Detective Schultz prepared paperwork, he turned Enraca over to Detective Eric Spidle for pre-booking processing. (11 RT 2111; 12 RT 2182-2183.) Detective Spidle had Enraca fingerprinted and photographed, then allowed Enraca to call his girlfriend. (12 RT 2185.) Detective Spidle began filling out the booking form. (12 RT 2192.) Enraca asked when he would get a lawyer and Spidle explained the charging and arraignment process, including appointment of counsel. (12 RT 2191-2193.) As Spidle continued filling out the form, Enraca asked whether a reward had been offered and Spidle said he was unaware of a reward but it was possible. (12 RT 2193-2194.) When Enraca said he understood there had been a reward offered and thought that was the reason someone had told on him, Spidle repeated that he was unaware of a reward, but that people will come forward with and without a reward. (12 RT 2194.) Enraca said, "It's not how it went down." (12 RT 2194.)[12]

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feet from the victims' bodies and the other two were approximately 24 to 25 feet from the victims' bodies. (9 RT 1810-1811, 1822-1823.)

11. A transcript of the tape-recording, Exhibit 53A, is contained in the Clerk's Transcript. (11 RT 2107; 21 CT 5598-5617.)

12. During the earlier interview with Detective Schultz, Enraca was told that several of his friends disputed his alibi and there were eyewitnesses who identified him as the shooter. (21 CT 5605-5616.)

Detective Spidle tried to put Enraca off, saying different people see things differently and went back to the booking form. (12 RT 2195.) When Enraca said no one has honor or respect anymore, Spidle agreed with him. (12 RT 2195-2196.) Enraca put his head down and said, "That's the way it is nowadays." (12 RT 2196.) When Spidle reminded Enraca he had asked for a lawyer, so Spidle could not ask any questions, Enraca said, "Well, what if I say what happened?" (12 RT 2196-2197.) Spidle told Enraca that he could get a tape recorder and let Enraca talk, but Spidle could not ask questions unless Enraca wanted that. (12 RT 2197.) When Spidle asked if Enraca wanted to make a statement on tape, Enraca said he did not want to implicate anyone but himself. (12 RT 2198.) When Spidle reminded Enraca that Spidle could not ask questions unless that was what Enraca wanted, Enraca said he did. (12 RT 2198.) Spidle obtained a tape recorder and recorded Enraca. (12 RT 2198.) The recording (Exh. 54) was played for the jury. (12 RT 2199, 2202, 2204-2205.)[13]

Enraca began by saying, "I did this" and he did not want to involve anyone else. (21 CT 5630, 5632.) He said he began carrying a gun after a friend was shot in a gang-related incident and he advised his friend to report the incident to the police. (21 CT 5634.)

Enraca said after the ABC gang meeting he went with his fellow gang members to the races and rode with Lester. (21 CT 5635-5637.) He brought his gun along for protection. (21 CT 5638.) Enraca said he had drank alcohol before leaving and he was "coming down" from "using speed." (21 CT 5637-5638.)

Enraca said they parked on the opposite side of the street from the gas station and he walked across the street to talk to a friend. (21 CT 5640.)

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13. A transcript of the tape recording (Exh. 54A) is contained in the Clerk's Transcript. (12 RT 2201; 21 CT 5629-5674.)

Enraca saw Gobert drive up fast, like he was angry, take something out of his car, and walk toward Roger while doing something with his belt, like he had a gun. (21 CT 5643-5644.) Gobert claimed a Crip gang, and when Enraca's group started laughing at him, Gobert began insulting them. (21 CT 5644-5645.)

Enraca said Roger responded with an insult and Enraca told Roger to "kick back." (21 CT 5645.) Enraca said he thought Gobert had mistaken them for the other Asian group. He said Hernandez, Gilleres and Hyon were by the car and Hyon said "'that's not them.'" (21 CT 5645-5646.)

Enraca said he saw Gobert reaching, then someone said "He's reaching" and one of Enraca's group punched Gobert. (21 CT 5646.) When Gobert grabbed the person who punched him, everyone in Enraca's group rushed in, as well as Hernandez, Gilleres, and Hyon. (21 CT 5647-5648.) Enraca said he tried to break up the fight as it moved across the street. (21 CT 5648-5649.)

Enraca said Gobert was knocked to the ground and Hernandez was covering him. (21 CT 5650-5651.) Enraca said he had pulled his gun to shoot in the air and get the fight to break up, but he thought he recognized Hernandez, so he grabbed Hernandez by the hair, lifted his face and asked him where he was from. (21 CT 5651-5652.)[14] Hernandez hit Enraca's hand. (21 CT 5652.)

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14. A fist-sized clump of black, kinky hair was located on the street at the shooting scene a few feet from the bodies. (7 RT 1491, 1493.) The hair was consistent with human head hair and appeared to be Negroid. (12 RT 2189; 13 RT 2301.) The clump was matted and all but four of the hairs were torn or broken and without roots. The four hairs with roots were in the growing phase and had not been shed. (13 RT 2310.) In the opinion of Marianne Stam, a criminalist with the California Department of Justice (13 RT 2297), the hairs were forcible removed and were consistent with hair samples collected during the autopsy of Gobert. (25 RT 3635, 3641.)

Enraca said he thought Hernandez was going to grab Gobert's gun, so Enraca shot Hernandez in the shoulder. (21 CT 5652.) Enraca said Hernandez leaned over and, thinking Hernandez was going to shoot him, Enraca shot Hernandez again. (21 CT 5653.) Enraca said Gobert looked at him, said "'fuck you asshole'" and began pushing Hernandez off of him. (21 CT 5653-5654.) Enraca said he thought Gobert was getting his gun, so Enraca shot him. (21 CT 5653-5655.)

Enraca said Hyon pushed him and came at him. He said he raised the gun, wanting to scare her, waved his other hand at her and backed up. (21 CT 5655-5656.) Enraca said when Hyon charged him, he pulled the trigger, thinking he was firing over her head. (21 CT 5656.)

Enraca said he fired four shots from his five-shot revolver, a snub-nosed .38 special. (21 CT 5657, 5662.) Enraca said he got in Lester's car and threw the gun out on the freeway during the ride home. (21 CT 5660.) Enraca said he had been drinking that evening, but was not drunk. (21 CT 5667.) He said he was "coming down" from speed and had consumed two lines, one at about 5:00 p.m. and the second between 8:00 and 9:00 p.m. (21 CT 5667-5668.)

After giving his statement, Enraca agreed to accompany Detective Spindle in an effort to locate the gun. (12 RT 2206.) Their conversation during that attempt was tape recorded and the recording (Exh. 55) was played for the jury. (12 RT 2206-2207, 2209.)[15] During the drive, Enraca said he had one bullet left after the shooting. (21 CT 5619.) He said he removed the expended shells and threw them out of the car while they were on the way to the freeway. (21 CT 5620-5621.) Enraca said he threw the gun out while they were on

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15. A transcript of the recording (Exh. 55A) is contained in the Clerk's Transcript. (12 RT 2208; 21 CT 5618-5628.)

the freeway. (21 CT 5620, 5622-5623.) The gun was never located. (13 RT 2285.)

The following day Enraca accompanied Detective Spidle to the scene and reenacted his version of the shootings. (12 RT 2211.) The reenactment was videotaped and the videotape (Exh. 3) was played for the jury. (13 RT 2213.)

Enraca spoke to Garcia on several occasions after his arrest. (13 RT 2328-2329.) Enraca said he had confessed. (13 RT 2329.)

Guilt Phase - Defense

Derek Toguchi testified that he was at Roger Boring's house the night of November 18, 1994, and used methamphetamine with Enraca. (17 RT 2720-2721.) He said they used it a couple of hours before everyone left for the races, but he did not remember how much methamphetamine they used. (17 RT 2721-2722.)

Dr. James Rosenberg, a forensic psychiatrist specializing in psychopharmacology, with experience in treating methamphetamine-induced disorders, described methamphetamine as a strong stimulant, with an eleven-hour half-life, that affects thinking, judgment, and impulse control. (18 RT 2867-2872.) In addition to physical symptoms, Dr. Rosenberg described mental symptoms of methamphetamine use as thinking disturbances similar to paranoid schizophrenia or the manic phase of manic-depressive illness. (18 RT 2875.) Those thinking disturbances include auditory and visual hallucinations, paranoia, racing thoughts, confusion, distraction, lack of concentration, poor impulse control and judgment, and violent outbursts. (18 RT 2875-2876.) However, he testified that whether those symptoms would occur was "a very individual thing" and is not directly related to methamphetamine blood levels. (18 RT 2876.) In response to hypothetical questions drawn largely from

Enraca's account of the shootings, Dr. Rosenberg opined that Enraca's described actions were consistent with methamphetamine intoxication. (18 RT 2885-2891.)

Blood alcohol testing of autopsy blood samples from Gobert and Hernandez revealed blood alcohol levels of 0.16 and 0.14, respectively. (17 RT 2740-2742.) It was stipulated that blood drawn from Hyon at 3:13 a.m., was tested and revealed in a blood alcohol level of 0.11. (17 RT 2745.) Toxicologist Maureen Black described expected symptoms of those blood alcohol levels including slurred speech, balance and coordination problems, mental impairment, and exaggerated emotional states. (17 RT 2746-2748.)

Several ABC gang members or associates described Gobert as appearing to be intoxicated and aggressive when he confronted the ABC gang members in front of the pizza parlor. Gobert drove recklessly before stopping in front of the ABC gang members, yelled gang insults, claimed to be a member of a Crip gang, made Crip gang hand signs, and put his hand either under his shirt or behind his back as though he had a gun. (17 RT 2814-2821, 2838-2839, 2842 [Arthur Belamide]; 18 RT 2920-2921, 2925 [Alfred Ward]; 19 RT 3052, 3054-3055 [John Frick]; 20 RT 3166, 3168-3169 [Cedrick Lopez], 3226, 3232-3235 [Daryl Arquero]. Daryl Arquero testified he saw a shiny object in Gobert's pants when Gobert lifted his shirt, and said he has a gun.[16/] (20 RT 3235-3236.)[17/]

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16. However, on cross-examination, Arquero acknowledged that when interviewed by law enforcement, he (Arquero) said nothing about seeing a shiny object and said he did not see a gun when Gobert lifted his shirt. (20 RT 3278-3279.)

17. John Frick testified Gobert simply grabbed his crotch and when he lifted his shirt, Frick could see that Gobert had no gun. (19 RT 3112-3113, 3115.)

The ABC group attacked and overwhelmed Gobert, who retreated into and across the street. (17 RT 2817, 2846; 18 RT 2926; 19 RT 3058-3060.) Arthur Belamide testified people were moving away from the area of the fight and Gobert was on the ground, badly beaten and not moving when he was shot. (17 RT 2826-2827, 2845.) Belamide said he had previously met Enraca, but did not see him in the group that rushed Gobert. (17 RT 2831, 2848.)[18] Belamide also said that although he could see the shooter, he could not see who the shooter was. (17 RT 2827-2828 ["I don't know exactly who it was, but you could see a person."].)

Alfred Ward claimed that when the group attacked Gobert, the group yelled, "this is Hyper Tech." (18 RT 2926.) He agreed that the fight had subsided once it moved across the median and the victims were "incapacitated." (18 RT 2929, 2945.) He claimed to have heard someone say, "Fuck it, John. Just shoot him." (18 RT 2931-2932.) He saw a person run across the street to a car, obtain something and run back. He then heard gunfire. (18 RT 2933-2934.) He saw the shooter standing over both victims firing at point-blank range and actually lift each victim's head before shooting them. (18 RT 2934.) He described the shooter as having a seven to eight inch, multicolored "tail" of hair at the back of his head, wearing a hooded sweatshirt, and firing a small semi-automatic handgun. (18 RT 2939-2941.)

However, Ward also testified he was not sure if the shooter was the person he had seen run to the car. (18 RT 2940.) On cross-examination, he testified he did not "actually lay [his] eyes on the exact shooter that night." (18 RT 2959.) What he saw was the person who had run to and from the car, run

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18. However, Belamide also said he knew and did not remember seeing Maliwat, Boring or Cedrick Lopez. (17 RT 2830.) He also said he did not remember seeing a second person on the ground with Gobert (17 RT 2862) and did not remember seeing any girls involved in the fight (17 RT 2826).

back to the car, wearing a white hooded sweatshirt and having a hair tail. (18 RT 2959.) He did not know if that person did the shooting. (18 RT 2972.)

In an interview with Deputy Larry DeJarnett the night of the shootings, Ward said he saw the shooter, who had a black hood covering his head. (24 RT 3537-3539.) Ward said he was sure, then said he was not sure. (24 RT 3540.) He said the shooter had a hair tail, but was not sure and had seen the shooter a month before. (24 RT 3540-3541.) He then said the hood covered the tail and the tail might have been cut off. (24 RT 3543.) He said he only got a side view of the person's face from a distance which was measured at 64 feet. (24 RT 3543.)

Ward explained his conflicting testimony and previous statements by saying he was hysterical and not lucid from seeing the shootings. (18 RT 2949, 2958.) However, Deputy DeJarnett testified that when interviewed, Ward was calm, not hysterical or excited. (24 RT 3544.)

Marcus Freeman was on his lunch break driving south on Etiwanda when he saw a quarrel on the east side of the roadway. (21 RT 3361-3362.) After purchasing food at a drive-thru, he was returning north on Etiwanda and had to stop for a fight in the street. (21 RT 3364-3365.) He testified he saw an Asian male put on a white hooded sweatshirt, then walk up to people getting off the ground and shoot them. (21 RT 3369.) Freeman described the gun as a snub-nosed revolver. (21 RT 3373.) Freeman said the shooter was over the two victims and bending down and kneeling when he shot them as they were trying to get up. (21 RT 3375, 3393.) Freeman said as he began to drive forward, a female ran toward the victims and was also shot. (21 RT 3379, 3385.) He described the victims as being on the ground for "minutes" before they were shot and said the stomping had stopped, although he also said the fight was not yet finished. (21 RT 3399-3400, 3409-3410.)

Defense Investigator Penni Stablein testified she interviewed Roger Boring three times. (23 RT 3444, 3446.) Boring told her that he did not see the shooter but had said otherwise to law enforcement because he was scared and wanted to tell them what they believed. (23 RT 3347-3349.)[19]

On August 6, 1989, Craig Netherly lived around the corner from Gobert and they had grown up in that same neighborhood. (25 RT 3615-3616.)[20] Netherly went to Gobert's house to resolve a dispute. (27 RT 3775.)[21] Gobert exited the residence with a handgun, and he and Netherly argued. (27 RT 3775.) At one point, Gobert said, "Fuck this" and fired one shot at Netherly, which missed. (27 RT 3775.)

Penalty Phase - Prosecution

Jenny Hyon testified that her spinal cord was cut by the bullet Enraca fired and she will be in a wheelchair the rest of her life. (28 RT 4130.) She has difficulty breathing and, except for the pain in one arm, which makes it hard to sleep, she cannot feel anything below her chest. (28 RT 4128-4129.) She cannot do anything for herself or for her younger sister, as she used to, and she worries how she will be cared for when her mother and sister can no longer do so. (28 RT 4128, 4131.) It hurts to see the sacrifices her mother makes in order to care for her. (28 RT 4129.)

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19. During cross-examination of Boring, he admitted making those statements to Stablein, but said he lied to her. (15 RT 2520-2521.)

20. At that time, Gobert was 17 and Netherly was 19. (27 RT 3775.)

21. Netherly claimed to recall little of the incident beyond the fact that the dispute involved an argument between Gobert and Netherly's stepdaughter. (25 RT 3616-3617.) By stipulation, Netherly's description of the incident to Los Angeles Police Officer Frank Epstein was presented to the jury. (27 RT 3775.)

Carmen Vera was Ignacio Hernandez's mother. He was born in the Dominican Republic, came to the United States in 1975, and was 19 when he was murdered. (28 RT 4133.) Hernandez played on his high school football team, was a good, loving, and respectful son, and had been accepted to the mechanical engineering program at the University of Texas. (28 RT 4133-4135.) Ms. Vera underwent three years of psychiatric care, trying to cope with his death. (28 RT 4135.) Her life and her family–Hernandez had a younger brother–changed after his death. (28 RT 4134, 4136.)

Carolyn Gobert was Dedrick Gobert's mother. (28 RT 4138.) Dedrick had acted in three movies, and had appeared in commercials and on television. (28 RT 4139-4140.) He was friendly and liked to joke with people and make them laugh. (28 RT 4140.) Ms. Gobert's life changed immeasurably after his murder. (28 RT 4142-4144.)

Penalty Phase - Defense

Enraca was born in the Philippines. As happened with his older sister, shortly after birth, Enraca's mother, Shirley Harris, left him with his extended family, who raised him from birth to the age of 8. (32 RT 4491-4494, 4521-4522, 4527-4532, 4557-4558.) Enraca's mother returned when Enraca was two to three years old. She had a younger son, Johnny, and a husband in the American Navy, Robert Harris. Shirley collected Enraca's sister and the family left for Guam, leaving Enraca behind. (32 RT 4495-4496, 4532, 4558.) Growing up in the Philippines with his extended family, Enraca had a happy childhood, was a good, loving child, and was loved and treated like a son. (32 RT 4496-4500, 4523, 4541, 4544, 4546-4547, 4551-4555, 4560.)

When Enraca was 8 years old, his mother and her family returned, collected Enraca, and the family returned to Guam, then moved to Japan, and then to the United States. Enraca did not want to leave his Philippine extended

family. (30 RT 4366-4368, 4371; 32 RT 4502, 4542.) Enraca had not known his brother and sister prior to that move. (30 RT 4366; 32 RT 4 544.) Enraca was not treated as well as his siblings by his mother and step-father. (30 RT 4370, 4376-4377, 4379; 31 RT 4407) His step-father was emotionally and physically abusive toward Enraca's mother and all the children. (30 RT 4373-4374, 4386; 31 RT 4407, 4424; 32 RT 4480.) During a visit to the Philippines, Enraca asked members of his extended family if he could stay with them. (32 RT 4504, 4543, 4563.)

Enraca's mother went to New York and left the children with her husband. (30 RT 4380-4381; 31 RT 4408-4409.) Enraca's mother returned and took Enraca's younger brother with her back to New York. (30 RT 4383.) Despite the neglect and abuse, Enraca was good, respectful, and affectionate toward members of his step-father's family. (31 RT 4406, 4410, 4412, 4420; 32 RT 4482, 4485.)

After their mother left, Enraca and his sister began staying with the families of their friends. (30 RT 4383.) Eventually, his sister moved to New York with their mother, but their mother did not want Enraca. (30 RT 4384, 4388.) Enraca wrote his Philippine family asking to move back with them, but was told it would be better for him to stay. (32 RT 4506, 4564.) Enraca continued living with families of his friends and was kind, helpful and respectful. (31 RT 4433-4435, 4441-4451; 32 RT 4458.)

Enraca did not initially join ABC gang when his friend, Rhommel Okialda, did, but he ultimately did join. (32 RT 4459-4462.) Enraca lived with the families of other gang members and worked. (32 RT 4462, 4465.) He wanted everyone to get along. (32 RT 4463.) When Okialda spoke to Enraca after the murders, Enraca was distraught. (32 RT 4464.)

Based on a review of case materials and interviews with Enraca and family members (29 RT 4200-4201), Dr. Jean Nidorf, a cultural mental health

expert (29 RT 4193-4194) opined that Enraca was nurtured when he was young, but was uprooted from that environment and felt abandoned, alone, weak and powerless. He had a need to see himself as important and considered himself a peacemaker, a moral conscience, and a leader. (29 RT 4231-4233.) In Dr. Nidorf's opinion, Enraca created a new reality to overcome his vulnerability in which the gang became like family, which, in the Filipino culture, is the source of a person's role and moral and social development. (29 RT 4234, 4240.) Dr. Nidorf opined that Enraca was capable of empathy and remorse, and described Enraca's emotional problems as including being needy for affection, fearful of rejection, irritable and guarded. (29 RT 4244, 4251.) She opined that her conclusions were consistent with a videotape of Enraca at the time of, and following his statement to Detective Spidle. (29 RT 4249-4251.) She opined that Enraca expressed remorse on the videotape. (30 RT 4338.)

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DETERMINED THAT ENRACA VOLUNTARILY AND INTELLIGENTLY WAIVED HIS *MIRANDA* RIGHTS

Enraca contends the trial court violated his constitutional privilege against self-incrimination by permitting the prosecution to present evidence of Enraca's post-invocation confessions. He asserts that although he initiated the conversation with law enforcement after having invoked his right to counsel, he did not make a knowing and intelligent waiver of his rights because he had been misinformed regarding his right to counsel and he had not been informed of his right to contact and consultation with the Philippine embassy. (AOB 58-82.) To the contrary, Enraca's waiver of his rights was voluntary and intelligent; he was properly informed of his right to counsel and the failure to advise him of his right to consult with the Philippine embassy did not affect the waiver.

A. Trial Court Proceedings

The defense filed a motion in the trial court on January 8, 1999, seeking suppression of Enraca's post-arrest statements. The defense contended that Enraca had not been advised of the right to consular notification under the Vienna Convention and because of that violation, his waiver of rights was not knowing and intelligent. (5 CT 1227-1259.) The prosecution filed its opposition. (5 CT 1279-1341.) On February 10, 1999, the trial court heard the motion and took evidence. (5 CT 1357-1358; 4 RT 688, et. seq.) The hearing concluded on February 16, 1999, when the defense also filed its response to the prosecution's opposition. (5 CT 1359, 1362-1377.) On February 23, 1999, the trial court denied the motion. (5 CT 1400; 4 RT 896-901.)

B. Evidence Presented In The Trial Court

Riverside Sheriff's Detective John Schultz, the lead investigator in the Gobert-Hernandez homicide case, testified he learned of Enraca's possible involvement in the homicides approximately three-and-a-half weeks after the shootings. (4 RT 708-710.) Enraca was arrested on December 12, 1994, by Detectives Phil Sanchez and Donna Burcham, and brought to the Sheriff's station on that date, shortly after 5:00 p.m. (4 RT 710.)

Detectives Schultz and John Horton met Enraca in an interview room at the station. Enraca was advised of his *Miranda* rights.[22] He understood his rights and waived his rights. (4 RT 712-714.)[23]

Enraca said he was born in the Philippines and had been in the United States for eight to nine years. (4 RT 727.)[24] He was not advised of his right to consular notification and the Philippine consulate was not notified of Enraca's arrest. (4 RT 727.) Enraca said he read and understood English. (4 RT 717.) During the course of the 15-to-20-minute interview, Enraca denied any involvement in the shootings. (4 RT 718-719.)

Detective Schulz and Horton challenged Enraca's claim of non-involvement. They told him there were eyewitnesses to the shootings. (4 RT 719.) Detective Horton told Enraca he needed to give some explanation in order to have a defense. (4 RT 728.) Detective Horton said the witnesses

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

23. Enraca was advised of his rights from a form which Enraca also used to record his understanding and waiver of the rights. A copy of the form was marked as Exhibit 1 and admitted into evidence at the hearing. (4 RT 845.) A copy of the form is also attached to the prosecutor's opposition to the motion. (See 5 CT 1314.)

24. Enraca's birth certificate was marked as Exhibit A and received. (4 RT 850-851.)

described cold-blooded shootings and Enraca needed to give some explanation that the detectives could convey to the district attorney. (4 RT 730.)

When the detectives told Enraca he was being dishonest, Enraca said he wanted a lawyer. (7 RT 719-721.) Detective Schultz told Enraca to stop talking and that he did not want to hear anything further from Enraca. (4 RT 721.) When Enraca asked when he would see his lawyer, Detective Schultz said he did not know, since Enraca would have to pay for his lawyer. (4 RT 721.)[25] When Enraca said he thought he would get an appointed attorney, Detective Schultz told Enraca that an attorney would be appointed in court at the arraignment and implied the arraignment would occur in 48 hours. (4 RT 722.) No further questioning occurred. (4 RT 722.)

Detective Schultz advised Detective Eric Spidle that Enraca had invoked and asked Spidle to take Enraca for picture and prints. (4 RT 723, 725, 739, 785.) After having Enraca photographed and printed, Detective Spidle began preparing the booking paperwork and let Enraca make a phone call to his girlfriend. (4 RT 743.) After the call, Enraca asked when he would get a lawyer and Detective Spidle explained the arraignment process, including appointment of counsel and told Enraca the arraignment would occur in 48 to 72 hours. (4 RT 744.)

Enraca asked Detective Spidle if a reward had been offered and Spidle responded that he was unaware of any reward in Enraca's case. (4 RT 745.) Enraca said he thought there had been a reward which was why people were telling on him and he said " 'I'm involved in this.' " (4 RT 746.) Detective Spidle tried to cut Enraca off, saying he did not know about any reward and that people were motivated by different things. (4 RT 746.) As Detective Spidle

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25. When Enraca asked about seeing "my lawyer," Detective Schultz thought Enraca was referring to already having an attorney or having one available through his family. (4 RT 733.)

continued with his paperwork, Enraca said," 'You know, it's not how it went down.' " Enraca sounded like he was pleading with Detective Spidle. (4 RT 746.) Spidle responded that several people had given information and there were always different versions when there are multiple people present. (4 RT 746-747.)

Detective Spidle returned to his paperwork and asked Enraca about one of his tattoos that Spidle could not make out. (4 RT 747.) When Enraca explained the tattoo he also commented that no one had honor or respect anymore, and Spidle agreed with him and continued with the paperwork. (4 RT 748.) Enraca put his head down and said, ' "But that's not how it went down, you know.' " (4 RT 748.) Because it appeared to Detective Spidle that Enraca wanted to talk about the shootings, Spidle said that the other detective had advised him that Enraca had asked to speak to a lawyer, so he (Spidle) was not in a position to ask any questions about the shootings. (4 RT 749.) Spidle explained to Enraca that once he asked for an attorney, the detectives were not going to question him any further. (4 RT 749.)

Enraca then asked what would happen if he said what happened and Detective Spidle told Enraca he would get a tape recorder and tape any statement Enraca wanted to make, but also reiterated that he was not allowed to question Enraca because Enraca had asked for a lawyer. (4 RT 750.) Enraca said he wanted to tell Detective Spidle, but he did not want to say anything to involve anyone else. (4 RT 750.) Detective Spidle got a tape recorder and returned to the room. (4 RT 751.)

When Detective Spidle turned the tape recorder on, he started to describe the circumstances, by asking the time and was interrupted by Enraca who said the shootings did not involve anyone else and " 'I did this.' " (4 RT 751-752.) Detective Spidle cut Enraca off, then went through the date and time, and had Enraca confirm on tape that he and Spidle met that night, that

Spidle had asked no questions about the shootings, and that Spidle agreed to tape record Enraca's statement after Enraca said he wanted to make a statement. (4 RT 752-754.) Detective Spidle also had Enraca confirm that Enraca had not been threatened or promised anything other than that the tape recording would be provided to the district attorney. (4 RT 754.)

Detective Spidle wanted to make sure that Enraca had been advised of his rights and asked Enraca if he knew his rights. Enraca said he knew his rights and did not want to have them read to him again. (4 RT 755.)

Enraca began by saying he did it and no one else was involved. He said, " 'I just got to face it. I'm caught, you know.' " (4 RT 756.) After describing his version of the shootings, Enraca reiterated that he had not been forced to talk and that Detective Spidle had not asked any questions about the shootings. (4 RT 761.) Enraca said, " 'I figure you guys already know. I might as well let you know the real story.' " (4 RT 761.) When asked why he chose to speak to Detective Spidle, Enraca said it was " '[b]ecause they're assholes,' " referring to Detectives Schultz and Horton. (4 RT 761-762.) Enraca also said that because Detective Spidle answered his question, he (Enraca) respected the detective. (4 RT 762.) Enraca said he knew his rights and explained that " 'I just know - - I just look at it as I'm caught. This happened. The consequences are there. Take them. You know?' " (4 RT 763.) Enraca said he was ashamed that he had been preaching his friends to not do the things he had done. (4 RT 764.)

C. Trial Court Findings And Ruling

The trial court found that Enraca was adequately informed and aware of his rights under *Miranda*. (4 RT 896.) The trial court found that Detective Spidle was engaged in a legitimate booking process, Enraca initiated all of the conversations with Spidle, and Spidle told Enraca that he (Spidle) could not talk to Enraca because Enraca asked for an attorney. (4 RT 896-898.) The trial

court found that Enraca knew, from what happened with Detectives Schulz and Horton, that by asking for an attorney, questioning would stop. The trial court found that Enraca wanted to talk to Detective Spidle despite his awareness of his rights. (4 RT 898.) Under the totality of the circumstances, the trial court found that Enraca freely, voluntarily, and intelligently waived his rights. (4 RT 898.)

The trial court found a violation of the Vienna Convention. (4 RT 898-899.) The court found no link between the violation and Enraca's *Miranda* waiver. (4 RT 899.)

The trial court denied Enraca's motion to suppress his statements. (4 RT 900.)

D. Legal Authority And Analysis

As this Court has explained:

> Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under "inherently coercive" circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. ([*Miranda v. Arizona, supra*], 384 U.S. at pp. 444-445, 473-474 [16 L.Ed.2d at pp. 706-707, 722-724]; *People v. Boyer* (1989) 48 Cal.3d 247, 271 [256 Cal.Rptr. 96, 768 P.2d 610].) Once having invoked these rights, the accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484- 485 [68 L.Ed.2d 378, 385-386, 101 S.Ct. 1880].) The initiation of further dialogue by the accused, however, does not in itself justify reinterrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [77 L.Ed.2d 405, 411-412, 103 S.Ct. 2830].) "[E]ven if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent

> events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." (*Ibid.*)

(*People v. Sims* (1993) 5 Cal.4th 405, 440.)

In reviewing a claim of this sort, this Court must accept the trial court's resolution of disputed facts and inferences if supported by substantial evidence and from the facts properly found by the trial court and any undisputed facts, make an independent determination whether the challenged statements were illegally obtained. (*People v. Cunnningham* (2001) 25 Cal.4th 926, 992.) In independently determining the legality of the challenged statements, federal standards are applied. (*People v. Sims, supra*, 5 Cal.4th at p. 440.)

The trial court found that Enraca initiated further conversation about the shootings with Detective Spidle and Enraca correctly concedes the record supports the finding. (AOB 65.) The trial court also concluded that Enraca made a knowing and intelligent waiver of his rights.

A valid waiver need not take any particular form, but must reflect that the suspect waived his rights knowingly and intelligently. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) A valid waiver may be express or implied. (*Ibid.*) Whether a knowing and intelligent waiver occurred is determined by the totality of the circumstances surrounding the interrogation. (*Id.* at p. 668.) Under the totality of the circumstances, the trial court correctly found that Enraca made a knowing and intelligent waiver of his right to counsel, as well as his right to silence.

Enraca was advised of his right to counsel prior to the first interview with Detectives Schultz and Horton. Not only did he state that he understood that right, he demonstrated that understanding by invoking it and, thereby, terminating the interview. When Enraca began to raise the shootings with Detective Spidle, Spidle tried to cut Enraca off and repeatedly told Enraca that because he had asked for counsel, no questioning could occur. Although

Detective Spidle had been told that Enraca invoked his right to counsel earlier, he nevertheless asked Enraca, before proceeding with the tape recorded statement if Enraca had been advised of his rights. Enraca said he had been advised and did not need to have them repeated because, "I know my rights." (4 RT 755.)

Enraca says the advice given by the detectives was conflicting and erroneous. Enraca claims that by telling him he would have an attorney appointed at his arraignment, he was effectively told that he had no right to counsel if he made a statement at that time. However, there was no conflict or error. Enraca was advised, consistent with *Miranda*, that he had a right to the presence of counsel, before and during questioning, and that one would be appointed, if he so desired, before any questioning. That advice did not set forth any timetable for counsel appointment or post-appointment questioning. It simply indicated that if appointed counsel was requested, no questioning would occur until counsel was appointed and present.

Detective Spidle's exhortations were entirely consistent. Spidle repeatedly told Enraca that since he had asked for counsel, neither Spidle nor any of the detectives could ask Enraca any questions. Enraca says the advice suggested he did not have the right to counsel if he wanted to make a statement at that time. To the contrary, the detectives made it clear to Enraca that he did have a right to counsel, but that the requested appointment would occur at the arraignment and the detectives could not question Enraca until after counsel had been provided.

Thus, Enraca's reliance on *United States v. Vasquez-Lopez* (9th Cir. 1968) 400 F.2d 593, and *United States v. Garcia* (9th Cir. 1970) 431 F.2d 134, is misplaced. In *Vasquez-Lopez,* the Spanish words used to convey the *Miranda* rights failed to convey the right to consult with an attorney before questioning. (*United States v. Vasquez-Lopez, supra,* 400 F.2d at p. 594.)

Here, the *Miranda* advice clearly set forth the right to consult with an attorney and have the attorney present during questioning. (4 RT 713.) In *Garcia*, the *Miranda* advice did not fully comply with *Miranda* and contained one statement to the effect that the right to counsel arose when answering questions and another statement to the effect that it arose when appearing in court for the first time. (*United States v. Garcia, supra,* 431 F.2d at p. 134.) Here, Enraca was clearly advised that the right to counsel arose prior to and continued during questioning, and the detectives, by word and deed, reiterated those points by ceasing interrogation when Enraca invoked and advising Enraca that no questioning could occur as a result of his invocation.

Enraca says Detective Spidle should have re-advised him of his rights and offered Enraca the opportunity to speak with an attorney "there and then," and before allowing Enraca to make his statement. (AOB 69.) However, the reason Spidle did not re-advise Enraca of his rights was because Enraca said he knew his rights and did not need to have them repeated. Moreover, nothing in *Miranda* requires law enforcement to immediately obtain counsel when a suspect asserts his or her right. What is required is to cease interrogation until counsel is provided. In fact, in *Miranda*, the Court specifically rejected the suggestion that "each police station must have a 'station house lawyer' present at all times to advise prisoners." (*Miranda v. Arizona, supra,* 384 U.S. at p. 474, 86 S.Ct. at p. 1628.) Law enforcement authorities need not provide counsel, but they must refrain from questioning the defendant. (*Ibid.*)

Enraca seeks to bolster his claim by relying on the lack of consular notification as part of the totality of circumstances surrounding the waiver. (See *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 126 S.Ct. 2669, 2682, 165 L.Ed.2d 557 ["A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police."].) However, his reliance has two faulty premises.

First, he relies on his initial assertion that he received erroneous advice from the detectives regarding his right to counsel. However, as explained above, Enraca was properly advised of his right to counsel, said he understood that right, and demonstrated his understanding of that right by invoking it. Contrary to the authorities Enraca relies on, there was no conflicting or erroneous advise given; indeed, what was implicit when Detective Schultz stopped questioning after Enraca invoked his right to counsel, was made express when Detective Spidle repeatedly told Enraca that he could not be questioned since he had invoked his right to counsel.

Second, Enraca relies on speculation and unsupported factual assertions. He says the allegedly improper advice "might have been overcome" had he been advised of his right to contact the consulate. (AOB 74.) As pointed out above, there was no improper advice and, in any case, what might have happened is not a basis for overruling the trial court's decision. Moreover, Enraca points to no provision of either treaty requiring the notification to be made prior to any post-arrest interview.

He also claims it was "undisputed" that he would not have made any statements to Schultz or Spidle had the consular notification occurred. (AOB 75.) However, that assertion is based on his declaration, which, although attached to the defense moving papers, was neither admitted nor repeated in testimony at the evidentiary hearing. (4 RT 847 [prosecution objection to declaration sustained].)[26]

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26. Enraca's reliance on his declaration is ironic in that in the declaration Enraca does not claim any misunderstanding of the *Miranda* rights. (5 CT 1258-1259.) Enraca's declaration also says he would have followed the advice of the consulate and not have spoken to Schultz and Spidle. (5 CT 1259.) However, according to the consular declaration, also attached to the defense moving papers, the consulate would have advised Enraca of his *Miranda* rights, but there is no indication the consulate would have offered any advice as to whether Enraca should or should not speak to law enforcement.

As Enraca acknowledges (AOB 74), he was 22 years old at the time of his arrest and although he was a Philippine national, he had been in the United States for 8 years. He also spoke and read English, said he understood his rights, and when the questioning became heated, he invoked his right to counsel. (4 RT 715, 717, 719-720.) While Enraca did not know when counsel would be appointed, he never expressed any confusion about his right to counsel during questioning.

Under the totality of the circumstances, the trial court correctly determined that Enraca's post-invocation waiver of his *Miranda* rights was voluntary and intelligent.

II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCTION ON PROVOCATION/HEAT OF PASSION AS A BASIS FOR VOLUNTARY MANSLAUGHTER BECAUSE THERE WAS NOT A SUBSTANTIAL EVIDENTIARY BASIS FOR THAT THEORY

Enraca contends the trial court prejudicially erred and violated his constitutional rights by refusing instructions on heat of passion as a basis for voluntary manslaughter and the effect of provocation on premeditation and deliberation. (AOB 82-100.) There was an insufficient evidentiary basis for instruction on provocation/heat of passion.

The trial court instructed the jury on voluntary manslaughter as a result of unreasonable self-defense, but refused to instruct the jury on voluntary manslaughter as a result of sudden quarrel/heat of passion. Thus, it struck the references to heat of passion in CALJIC Nos. 8.40 and 8.50 (22 CT 5327-

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(5 CT 1249.) Moreover, even if Enraca might have reached a different decision on whether to waive his rights, that does not undermine the trial court's conclusion that Enraca understood his rights when he waived them.

5328), and refused CALJIC Nos. 8.42 [Sudden Quarrel or Heat of Passion and Provocation Explained], 8.43 [Murder or Manslaughter - Cooling Period], 8.44 [No Specific Emotion Alone Constitutes Heat of Passion]. (26 RT 3721-3725.) The trial court also refused CALJIC No. 8.73, on the effect of provocation on premeditation and deliberation. (26 RT 3728.)

A. Enraca Was Not Entitled To Instruction On Heat Of Passion

A trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Cruz, supra,* 44 Cal.4th at p. 664.) The obligation extends to instructions on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present. (*Ibid.*) Thus, a trial court must instruct on provocation/heat of passion as a theory of manslaughter if supported by substantial evidence. (*Ibid.*) Substantial evidence triggering the obligation to instruct is not any evidence, but is evidence from which a jury composed of reasonable persons could conclude the lesser, but not the greater offense was committed. (*People v. Cruz, supra,* 44 Cal.4th at p. 664.)

For voluntary manslaughter due to heat of passion, both provocation and heat of passion must be proved. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The required provocation must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*Ibid.*; *People v. Lee* (1999) 20 Cal.4th 47, 59.) The heat of passion requirement has both a subjective and an objective component: the defendant must actually kill under the heat of passion and the heat of passion must be such a passion as would be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances. (*Ibid.*) While the passion aroused may be any violent, intense, high-wrought emotion (*People v. Breverman* (1998) 19 Cal.4th 142, 163), to merit voluntary manslaughter instructions, the

killing must occur suddenly as a response to the provocation and not belatedly as revenge or punishment. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

The legal adequacy of instructions is reviewed independently. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) This Court reviews the trial court's instructional ruling, not its reasoning. (*People v. Geier* (2007) 41 Cal.4th 555, 582.)

To begin, Enraca's argument provides no basis for any error impacting the Hernandez murder conviction. All of the conduct he cites as a basis for voluntary manslaughter under provocation/heat of passion is conduct by Dedrick Gobert. (AOB 82-86.) Thus, if there was any instructional obligation it was limited to the Gobert murder.

Enraca's claim to heat of passion as to the Gobert murder is flawed for several reasons. He points to evidence of Gobert's belligerent, challenging, and insulting behavior when confronting the ABC gang members, and to evidence that Gobert acted like he had a gun during that confrontation and immediately prior to the shooting. He also points to evidence that he (Enraca) was involved in the fight prior to the shooting.

However, as to the belligerent and insulting behavior, and simulating possession of a gun prior to being beaten, it is undisputed that Enraca did not shoot Gobert in response to that behavior. (*People v. Daniels, supra,* 52 Cal.3d at p. 868.) The ABC gang members rushed Gobert and beat him mercilessly, to the point that Gobert was on the ground, semi-conscious, and some of the gang members were walking away. It was not until that point that Enraca approached and shot Hernandez and Gobert.

As to Enraca's claim that immediately before he shot Gobert, Gobert cursed Enraca and made a movement that he (Enraca) interpreted as reaching for a gun (21 CT 5653), in *People v. Wickersham* (1982) 32 Cal.3d 307, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201,

this Court held that "a trial court should not instruct on heat-of-passion voluntary manslaughter where the same facts would give rise to a finding of reasonable self-defense." (*People v. Wickersham, supra,* 32 Cal.3d at pp. 327-328.) If the jury found Enraca's claimed fear reasonable, his statement supported self-defense. If the jury found his claimed fear unreasonable, but actual, his statement supported voluntary manslaughter due to unreasonable self-defense. The same facts did not support heat of passion.

Gobert's belligerent, challenging, and insulting behavior prior to being rushed does not support either prong of heat of passion. There was no evidence that Enraca was emotionally aroused by Gobert's confrontational behavior. Enraca told Detective Spidle that they laughed at Gobert until he acted like he had a gun. (21 CT 5645.) Maliwat and Boring agreed; they thought Gobert was funny and not a threat because he was alone, facing many opposing gang members and appeared intoxicated, and it was not until Gobert acted like he was reaching for a gun that the group rushed him. (10 RT 1921-1922; 14 RT 2447, 2465.)

Moreover, the belligerent and insulting behavior would not cause an objectively reasonable person to act in a violent, intense, high-wrought, emotional state. The gang expert testified that Gobert's behavior and statements were insulting to the ABC gang and would require, in gang culture, a violent response. (11 RT 2072-2073.) As a gang member, Enraca may have been especially sensitive to Gobert's insults, however, the objective standard is based on a reasonable person, not a "reasonable gang member." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1087, internal quotes omitted.)

Enraca's reliance on *People v. Breverman, supra,* 19 Cal.4th 142, is misplaced. In *Breverman*,

> there was evidence that a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by defendant and acted in a menacing manner.

(*Id.* at p. 163.)

The group's intimidating conduct included challenging the defendant to fight and using weapons to batter the defendant's car only a short distance from the front door. (*Ibid.*) The defendant and two other people in the house testified that the group's actions "caused immediate fear and panic." There was evidence that the defendant immediately responded to the group's actions, in that state of fear and panic, by shooting at the group, mortally wounding one of their number. (*Id.* at p. 151.)

Enraca was not confronted by an angry, hostile and armed group, demanding that he fight. He, like his fellow gang members, laughed at Gobert and did not take him seriously until Gobert acted like he was reaching for a gun. At that point, Enraca's group rushed, overwhelmed, and beat Gobert and Hernandez to the ground and into a state of semi-consciousness. Enraca then approached both victims and shot each in the head.

Finally, Enraca says evidence of his involvement in the fight suggested the shootings occurred as a result of a sudden quarrel. However, in order to rely on a sudden quarrel as a basis for voluntary manslaughter, the killer may not take undue advantage. (*People v. Lee, supra,* 20 Cal.4th at p. 60, fn. 6.) Gobert was overwhelmed by gang members and he and Hernandez were beaten to the ground, to the point of semi-consciousness. Enraca's "use a gun was necessarily an undue advantage." (*Ibid.*)

Because there was no substantial evidentiary support for provocation/heat of passion voluntary manslaughter, there was no error in refusing to instruct on that theory.[27]

B. Enraca Was Not Entitled To Instruction With CALJIC No. 8.73 Regarding The Effect of Heat Of Passion on Premeditation And Deliberation

No. 8.73 is a pinpoint instruction and must be given on request only when it is supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214.) The test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder is subjective. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) As this Court has stated, "The evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (*People v. Ward, supra,* 36 Cal.4th at p. 215.)

In *Ward*, the shooting occurred as a result of a confrontation between rival gang members, in which the victim and the defendant's companion exchanged challenging statements, after which, Enraca pulled a gun and fired at the victim's group. (*People v. Ward, supra,* 36 Cal.4th at pp. 195-196.) On appeal, the defendant challenged the trial court's failure to instruct the jury pursuant to CALJIC No. 8.73 based on his claim that the shootings may have been precipitated by the gang challenges. (*Id.* at p. 214.) This Court found no evidentiary support for the instruction: "However, the record contains no evidence of what, if any, response defendant had to the purported challenges . . . ." (*Id.* at p. 215.)

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27. Because Enraca references the prosecutor's request for heat of passion as a voluntary manslaughter theory (AOB 86), it warrants mentioning that a prosecutor's instructional request does not establish an evidentiary basis for the instructions. (*People v. Steele, supra,* 27 Cal.4th at p. 1251.)

In this case, the only evidence of any emotional response by Enraca to the gang challenges made by Gobert was to laugh. (21 CT 5645.) His fellow gang members also laughed at Gobert. (10 RT 1921-1922 [Maliwat]; 14 RT 2447 [Boring].) According to Enraca, when Gobert acted as though he had a gun, members of Enraca's group rushed Gobert. (21 CT 5648.) Enraca, however, simply watched and tried to breakup the beating. (21 CT 5648-5649.)

Unlike *Ward*, there is evidence of Enraca's emotional response to Gobert's actions, but it was only amusement, nothing that would support the requested instruction.

C. Even Assuming Error, Enraca Was Not Prejudiced

The trial court instructed on second degree murder and unreasonable self-defense as a basis for voluntary manslaughter. (22 CT 5817, 5820-5821, 5825-5828.) If the trial court erred in failing to instruct on provocation/heat of passion voluntary manslaughter, it was an error of state law. (*People v. Breverman, supra,* 19 Cal.4th at pp. 159-162, 165-172.) In rejecting voluntary manslaughter, and finding Enraca guilty of first degree murder, the jury necessarily concluded Enraca intended to kill and acted with express malice aforethought and not out of fear for his life. Enraca said he laughed at Gobert's belligerence and gang insults, and his fellow gang members did also. Even if the jury found Enraca killed in response to those actions, there is no reasonable probability the jury would find a gang-member's hyper-sensitivity to be objectively reasonable.

Although it did not instruct on the relationship between evidence of provocation by the victim and the mental state of premeditation and deliberation, the trial court instructed the jury on the "careful thought and weighing of considerations" required for deliberation; that the intent to kill must have been arrived at "upon pre-existing reflection" and not "under a sudden heat of passion"; and distinguished between "[a] cold, calculated judgment and

decision" and "a mere unconsidered and rash impulse." (22 CT 5818 [CALJIC No. 8.20]; see also 22 CT 5823 [CALJIC No. 8.67].) Enraca says the jury had no basis for evaluating the evidence of provocation. To the contrary, the jury was instructed on circumstantial evidence (22 CT 5798 [CALJIC No. 2.00-Direct and Circumstantial Evidence - - Inferences]) and on the sufficiency of circumstantial evidence (22 CT 5799 [CALJIC No. 2.01-Sufficiency of Circumstantial Evidence - - Generally]). Under those instructions, in order to determine Enraca's intent and the process by which it was formed, the jury had to consider all of the proved circumstances surrounding the killings, which included not only Gobert's actions, but any reaction by Enraca, as well as considering evidence of Enraca's drinking and methamphetamine usage.

Moreover, Hernandez and Gobert were laying semi-conscious on the ground, when Enraca approached, shot Hernandez in the back and in the back of the head, then shot Gobert in the back of the head. The prosecutor aptly characterized these killings as executions, not simply murders.

A more favorable result is not reasonably probable had the trial court made explicit, by instruction with CALJIC No. 8.73, what was implicit in the remaining instructions.

III.

ENRACA FORFEITED HIS CLAIM OF INSTRUCTIONAL ERROR AND THERE WAS NO ERROR IN INSTRUCTING ON THE EFFECT OF ENRACA'S WRONGFUL CONDUCT ON HIS SELF-DEFENSE CLAIM

Enraca contends the trial court prejudicially erred by instructing the jury, pursuant to CALJIC Nos. 5.55 and 5.17, on the unavailability of self-defense to one who creates the circumstances that justifies his adversary's use of force. (AOB 101-108.) Enraca's complaint may not be heard as he invited

the error. In any case, contrary to Enraca's claim, the instructions were supported by substantial evidence.

Pursuant to CALJIC No. 5.17, the trial court instructed the jury on voluntary manslaughter as a result of an actual but unreasonable belief in the necessity to defend. (28 RT 4009-4010; see 22 CT 5863.) The trial court gave the last paragraph of the CALJIC instruction as follows:

> However, this principle is not available and malice aforethought is not negated if the defendant, by his unlawful or wrongful conduct, created the circumstances which legally justified his adversary's use of force.

(28 RT 4010; 22 CT 5863.)

The trial court also instructed the jury pursuant to CALJIC No. 5.55:

> The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity in exercising self-defense.

(28 RT 4012; 22 CT 5871.)

The record reflects that the defense requested both instructions. (22 CT 5863, 5871; 28 RT 4009-4010.)[28] Defense counsel also referenced the instruction in arguing in support of self-defense that Gobert, and not Enraca, was the person who instigated the confrontation. (27 RT 3918.) Thus, the record reflects defense counsel made a conscious and deliberate tactical choice to request the instructions. Accordingly, any error was invited. (*People v. Wader* (1993) 5 Cal.4th 610, 658; see also *People v. Catlin* (2001) 26 Cal.4th 81, 150.)

Moreover, contrary to Enraca's claim, the record supports the instructions. A trial court must give a requested instruction if it is supported by substantial evidence; that is, evidence sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.)

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28. The prosecution also requested the same two instructions. (22 CT 5863, 5871.)

Together, the two instructions state the rule that self-defense and unreasonable self-defense will not protect a defendant from a murder conviction when it is the defendant's wrongful conduct that provokes the victim's actions that are the basis for the claim. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) There was substantial evidence from which the jury could find that Enraca's actions fell within the rule.

In his post-arrest statement to Detective Spidle, Enraca claimed he shot Hernandez and Gobert because of sudden movements, which he interpreted as reaching for a gun by each victim. (21 CT 5651-5654.) However, the jury could reasonably infer that any movements by the victims were provoked by Enraca.

There was evidence that both victims were on the ground, with Hernandez on top of Gobert, and both were semi-conscious from the beating they had absorbed. (8 RT 1626-1627 [Gilleres describing Hernandez on top of Gobert, protecting Gobert, while they were hit, kicked, and stomped]; 10 RT 1922 [Maliwat describing both victims on the ground as the fight was ending]; 15 RT 2482-2483 [Boring describing both victims on ground with Hernandez trying to cover Gobert at end of fight].)

Enraca said that when he approached Hernandez and Gobert, he held a gun in his right hand. (21 RT 5651-5622.) He said he grabbed Hernandez by the hair, lifted Hernandez's head to see Hernandez's face, and asked Hernandez where he was from. (21 CT 5651.) Enraca said that Hernandez responded by striking Enraca's hand and turning. (21 CT 5652.) Enraca interpreted Hernandez's movement as an attempt to grab Gobert's gun, and fired. (21 CT 5652-5653.)

After he shot Hernandez twice, Enraca said Gobert cursed at him and grabbed Hernandez. (21 CT 5653.) Enraca said he interpreted Gobert's movement as an attempt to grab the gun, and fired. (21 CT 5653.)

Under the facts, the jury could reasonably infer that it was Enraca's aggressive and wrongful conduct that produced the movements he claimed motivated his shooting both victims. Both victims had been beaten severely by members of Enraca's gang and were disabled and on the ground when Enraca approached them. Enraca approached with his gun drawn and he demanded to know where Hernandez was from–a typical gang challenge, which is often a prelude to violence. (See 12 RT 2147.) The jury could reasonably infer that any movement by Hernandez was provoked by Enraca's aggressive and threatening conduct. The jury could reach a similar inference with respect to Gobert, who not only was exposed to the same aggressive and threatening conduct that Hernandez saw, but also to Enraca shooting Hernandez twice.

Under the facts and reasonable inferences, there was a substantial evidentiary basis for instructing the jury on the effect of wrongful conduct by a defendant which precipitated the victims' acts that were claimed as a basis for self-defense.

IV.

THE TRIAL COURT WAS NOT REQUIRED TO ADVISE ENRACA OF HIS RIGHT TO TESTIFY AND OBTAIN A WAIVER

Enraca contends the trial court prejudicially erred and violated his constitutional right to testify by failing to expressly advise Enraca of the right and obtain an express waiver from Enraca. (AOB 109-117.) As Enraca acknowledges, this Court has refused to impose on the trial court a requirement to obtain an express waiver of the right to testify and Enraca offers no compelling reason for this Court to reconsider its precedent.

Although a criminal defendant has the right to testify in his or her behalf and may exercise that right even over the objection of defense counsel, there is no duty to admonish the defendant and secure an express waiver of the

right unless a conflict comes to the attention of the trial court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332; *People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053.) Trial courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict. (*In re Horton* (1991) 54 Cal.3d 82, 95.)

Enraca requests reconsideration arguing that the waiver rule is at odds with the requirement of a knowing and voluntary waiver of fundamental constitutional rights. However, this Court has recognized that the rights requiring a personal waiver are limited to the decision whether to plead guilty, to waive counsel, and to be free from self-incrimination. (*In re Horton, supra,* 54 Cal.4th at p. 95.) Other rights are controlled by counsel in the absence of an express conflict. (*Ibid.*) Moreover, by not testifying it is assumed a defendant is exercising his privilege against self-incrimination. (*People v. Alcala* (1992) 4 Cal.4th 805.)

Enraca contends that the lack of an express waiver raises the possibility of litigating a defendant's and counsel's state of mind years later in a habeas proceeding. The prospect of litigating an ineffective assistance of counsel claim based on an alleged violation of the right to testify is not a sufficient basis for expanding the requirement for express waivers. If avoidance of future habeas was all that was necessary to impose such a requirement, the list of admonishments and express waivers, and the intrusion into the attorney-client relationship would be broadly expanded well beyond the right to testify.

Enraca argues it is improper to presume a waiver from silence. However, waiver is not presumed from silence. It is presumed that defense counsel informed the defendant of his right to testify and both agreed that the defendant should exercise his privilege against self-incrimination. (*People v. Alcala, supra,* 4 Cal.4th at p. 805.) Indeed, the United States Supreme Court

has held that when addressing claims of ineffective assistance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674.)

Considered in proper context, there is no reason for this Court to impose a new obligation on trial courts.

V.

THE VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS CONSIDERATION OF THAT EVIDENCE

Enraca contends the penalty determination must be reversed because the trial court erred in admitting victim impact evidence and the jury instructions failed to properly limit and describe the jury's use of victim impact evidence. (AOB 118-138.) This Court has previously considered and rejected Enraca's claims and Enraca offers no convincing basis to revisit those decisions.

Recognizing that in *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, the United States Supreme Court ruled that the Eighth Amendment erected no *per se* barrier to evidence admitted to provide the jury with relevant information about the victim and the impact of the victim's murder (*Id.*, 501 U.S. at pp. 824-825), Enraca first questions the admissibility of victim impact evidence under California law. However, as Enraca concedes, in *People v. Edwards* (1991) 54 Cal.3d 787, this Court concluded that victim impact evidence is admissible under Penal Code section 190.3, subdivision (a), as part of the circumstances of the crime. (*Id.* at pp. 833-835.)

Enraca contends that in *Edwards*, this Court misread the statute and reached too broad a definition of circumstances of the crime, resulting in the

admission of evidence not included within the statutory aggravating factors. However, the arguments for a more limited view of the scope of factor (a)–circumstances of the crime–which would preclude victim impact evidence that was not temporally or spatially connected to the crime were presented in the dissenting opinion in *Edwards* and the subsequent dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173. (*People v. Edwards, supra,* 54 Cal.3d at pp. 851-855 (dis. opn., Mosk, J.); *People v. Fierro, supra,* 1 Cal.4th at pp. 257-264, (dis. opn., Kennard, J.).) While the majority in *Edwards* and *Fierro* did not expressly address the dissents, those views were clearly considered and rejected. Other than reiterating the views of the two dissents, which have already been considered and rejected, Enraca offers no basis for reconsidering the construction of the statute adopted in *Edwards.*[29]

Enraca also contends the trial court failed to instruct the jury on the proper use of victim impact evidence. In *Payne*, the Court held that "a state is free to determine that victim-impact evidence demonstrating specific harm caused by the defendant's crimes is relevant to a jury's assessment of a defendant's moral culpability." (*People v. Salcido* (2008) 44 Cal.4th 93, 151.) Addressing the defendant's argument in *Payne* that victim impact evidence would permit a jury to make value judgments on the relative social worth of victims' lives, the United States Supreme Court stated:

> As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind . . . . It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

(*Payne v. Tennessee, supra,* 501 U.S. at p. 823-824, italics in orig.)

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29. As there was no state law error in permitting the victim impact evidence, Enraca's claim of a federal due process violation based on denial of a state-created liberty interest, is also without merit. (*People v. Boyette* (2002) 29 Cal.4th 381, 445, fn. 12.)

Enraca attempts to convert the Court's basis for rejecting a defense argument against victim impact evidence into support for a *sua sponte* instructional obligation. He contends victim impact evidence invites comparative judgments and requires an instruction on the proper basis for considering such evidence. He proposes an instruction advising the jury that victim impact evidence was introduced for the purpose of informing the jury on the uniqueness of the victim; no human life is worth more than any other; the penalty determination must be based on the moral culpability of the defendant; and such culpability is greater for facts known by the defendant than for facts not known.

In *People v. Brown* (2003) 31 Cal.4th 518, this Court rejected a claim that the trial court erred by not instructing the jury how to consider victim impact evidence by observing that victim impact evidence is relevant to factor (a) and the trial court instructed the jury pursuant to CALJIC No. 8.85, "which tells [the jury] to 'consider, take into account and be guided by' such factors." (*Id.* at p. 573; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 369.) The trial court in this case also gave CALJIC No. 8.85. (32 RT 4648-4649; 23 CT 6028-6029.)

There is no *sua sponte* duty to instruct the jury to not engage in making a value judgment on the relative worth of a victim's life. (*People v. Zamudio, supra,* 43 Cal.4th at p. 370.) Enraca made no request for such an instruction. (32 RT 4569-4576; 23 CT 6023-6043.) Enraca points to nothing in the evidence or the argument which might have led the jury to believe the victim impact evidence in this case did anything other than present the victims as individuals. Indeed, in his opening remarks, the prosecutor told the jury that they had only seen "one side" of both victims from the guilt phase evidence. (28 RT 4124.) He specifically advised the jury that he would present evidence showing another side of Gobert, implying the same as to Hernandez. (28 RT

4125.) In his closing argument, the prosecutor told the jury that victim impact evidence looks at the blameworthiness of the defendant and the crime (32 RT 4592); that the victim impact witnesses showed something of what was special and unique about the deceased victims (32 RT 4593); and that the lives of the deceased victims "were just as valuable as any one of ours." (32 RT 4608.)

The victim impact evidence in this case was properly admitted pursuant to California law and the trial court properly instructed the jury on its consideration of that evidence.

VI.

THE PROSECUTOR DID NOT ARGUE THAT THE SURVIVING VICTIM AND THE MURDERED VICTIMS' FAMILIES WANTED A DEATH VERDICT AND DID NOT LEAD THE JURY TO BELIEVE THE RESPONSIBILITY FOR A DEATH VERDICT RESTED WITH OTHER THAN THE JURY

Enraca contends the prosecutor committed misconduct in his penalty phase argument to the jury by making several statements urging the jury to impose a death sentence based on the desires of the victims' survivors for that penalty, thereby improperly presenting the desires of the victims' survivors for the death penalty, which were not presented by any evidence, and undermining the jury's sense of responsibility for a death verdict. (AOB 138-153.). There is no reasonable likelihood the jury construed or applied the prosecutor's remarks as urging consideration of the views of the victims' survivors on the penalty or as suggesting responsibility for imposition of the death penalty rested anywhere other than with the jurors, particularly in light of the trial court's admonitions which, in any event, cured any possible prejudice.

The prosecution may not elicit the views of the victim's family as to the proper punishment. (*People v. Smith* (2003) 30 Cal.4th 581, 622.) While having great latitude to argue conclusions to be drawn from the evidence,

counsel may not assume or state facts that are not in evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 133.) It is constitutionally impermissible to lead a penalty phase jury to believe that the responsibility for determining appropriateness of a death sentence rests other than with the jury. (*People v. Hinton* (2006) 37 Cal.4th 839, 905, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 321.)

In support of a claim of prosecutorial misconduct based on remarks to the jury, the defendant must demonstrate a reasonable likelihood that the jury understood or applied the allegedly objectionable remarks in an improper or erroneous manner. (*People v. Jablonski* (2006) 37 Cal.4th 774, 835.) The prosecutor's remarks must be evaluated in context. (*People v. Hinton, supra,* 37 Cal.4th at p. 905.) In particular, determining whether *Caldwell* error occurred is based on a review of the allegedly improper remarks in light of the instructions and the arguments of both the prosecutor and defense counsel. (*Ibid.*)

In order to preserve a claim of prosecutorial misconduct in argument, other than *Caldwell* error, a defendant is required to object in the trial court to the challenged misconduct and seek a curative admonition, unless an objection would have been futile or an admonition ineffective. (*People v. Jablonski, supra,* 37 Cal.4th at p. 835; *People v. Moon* (2005) 37 Cal.4th 1, 17-18 [failure to object to *Caldwell* error in a trial predating the decision in *People v. Cleveland* (2004) 32 Cal.4th 704, does not constitute a waiver of the claim].)

Six pages into the prosecutor's argument, Enraca points to the following statement as the first instance of misconduct: "If the decision is not the appropriate one in this case, it would bring further injury to the shattered lives of the three families." (32 RT 4585.) Defense counsel did not object to this statement. (*Ibid.*) Other than the claim of *Caldwell* error, the assertion of misconduct is waived. However, none of the grounds have merit.

The statement itself makes no reference to the penalty preference of the surviving victim and the family members of the murder victims, nor does it suggest the responsibility for the decision rests other than with the jury. To be sure, it was the prosecutor's position that death was the appropriate verdict and that is exactly what he told the jury. He said that he was not going to try to push the jury into reaching a death verdict, but would discuss with the jury the reasons why death was the appropriate verdict in the case. (32 RT 4582.)

The prosecutor started his argument by reminding the jurors of their "commitment that justice be done in this case" and told the jury that it had "two options available" and "you must decide this case" based on the facts and the law. (32 RT 4580.) He also reminded the jury of a prospective juror who had been excused because the juror could not accept the responsibility of returning a death verdict and the repeated admonitions throughout the trial against forming or expressing an opinion, and he told the jurors that once the arguments and legal instructions were concluded, they would be faced with the responsibility of returning a death verdict. (32 RT 4580-4581.)

The prosecutor cautioned the jury against rationalizing to reach the lesser punishment (32 RT 4582-4584) and told the jury that rationalization should not be used to avoid "the pointed and potentially painful decision that must be made, that has to be made in this case." (32 RT 4584.)

Just before the first disputed remark, the prosecutor told the jury that each case "stands on its own" and "looks at the devastation the crime results in, the people whose lives are changed, and the defendant as a person." (32 RT 4585.) He also stressed the importance of the jury's decision and the responsibility it had for the decision and its consequences. (32 RT 4585.)

Taken in context, it is not reasonably likely that the jury understood the disputed remark as urging imposition of the death penalty because that is what the victims wanted or as suggesting responsibility for a death verdict

rested other than with the jury. Indeed, the very remark was a strong statement of responsibility the jury had for their verdict by reminding the jury that it had not only the responsibility for the decision, but also the responsibility for the consequences of that decision. As his later remarks will show, the prosecutor was relying on the victim impact evidence as a strong factor supporting a death verdict and telling the jury that a lesser sentence would adversely impact the victims by devaluing their loss.

The fact the victims would be adversely impacted as a consequence of the jury not imposing the appropriate penalty–by having their loss devalued–was not the same as urging the jury to vote for death because the family members wanted it, nor did it suggest the jury would be relieved of responsibility for its penalty verdict.

Ten pages further into the prosecutor's argument, Enraca cites to the following sentence as misconduct: "These people look to you for justice. They have waited patiently for 4 ½ years." (32 RT 4595.) The defense objected to "improper argument" and the trial court admonished the jury:

> I want to clarify something, ladies and gentlemen. Public feeling or public sentiment should not enter into your determination. It's based solely on those mitigating and aggravating factors in rendering your verdict in the penalty phase.

(32 RT 4595.)

Between the earlier disputed remark and this current disputed remark, the prosecutor told the jurors that each of them had the responsibility for evaluating the weight and balance of the relevant decision-making factors which the trial court would give in the instructions. (32 RT 4585-4586.) He told the jury that death was the appropriate verdict for Enraca's crimes and that the facts and circumstances of the crimes–factor (a)–justified and required a death verdict. (32 RT 4591-4592.) He told the jury that he was not suggesting that returning a death verdict would be "anything but painful," but "[t]hat was

the responsibility you took when you agreed to be jurors in a death penalty case." (32 RT 4591.)

The prosecutor reiterated that victim impact "looks at the devastation, the blameworthiness of that particular defendant and the blameworthiness of that particular crime"; reminds the jury that the victim is a unique individual whose death is a unique loss to society and his family; and its absence would deprive the jury of all the information necessary to reaching a proper verdict. (32 RT 4592-4593.)

In telling the jury that the victims' family had waited patiently and looked to the jury for justice, it is not reasonably likely the jury would understand the prosecutor to be arguing that the jury should return a death verdict because that was what the families wanted. The prosecutor was emphasizing the loss they experienced as an appropriate factor in assessing the punishment. The prosecutor was not suggesting to the jury that responsibility for a death verdict rested elsewhere, but was emphasizing the responsibility the jury had for returning a just verdict regardless of the difficulty that presented.

Moreover, any ambiguity was addressed by the trial court's admonition which disallowed public feeling or sentiment, and limited the jury to the mitigating and aggravating factors. (32 RT 4595.) After the admonition, the prosecutor told the jury that victim impact evidence was part of the circumstances of the crime in factor (a) and he discussed the evidence that had been presented. (32 RT 4595.) He specifically told the jury it could consider "the impact that the defendant's crime has had on the victims' families." (32 RT 4597.)

Eight pages later, the prosecutor made the next disputed remarks when he anticipated a defense argument about the power of one juror to prevent a death verdict: "Theirs, not our lives, we would be adding insult to. It's further insult that we'd be adding to theirs and their families." (32 RT 4606.) After

the trial court sustained a defense objection and admonished the jury against consideration of public feeling or sentiment, the prosecutor said he did not mean to invoke public outrage, but limited his remarks to "these facts, this defendant, and these victims." (32 RT 4607.)

In the interim, the prosecutor had continued to discuss "why death is the only appropriate verdict in this case" (32 RT 4597), addressing the evidence of Enraca's lack of remorse, and the evidence presented by the defense. (32 RT 4597-4605.)

When the prosecutor turned to the issue of a single juror's power to prevent a death verdict, he acknowledged that power, but cautioned the jury:

> Power corrupts. It has to be wielded responsibly, appropriately, and not out of some desire to wield it.

(32 RT 4606.)

It was in that context that the prosecutor made the first statement and it was that context which demonstrates that it is not reasonably likely that the jury would understand the prosecutor was urging a death verdict because the victims wanted it. The prosecutor was cautioning the jury against exercising power when inappropriate, thereby devaluing the loss suffered by the victims and their family, which, as victim impact evidence, was an appropriate consideration.

After the trial court sustained the objection and admonished the jury that public feeling and sentiment was not part of their decision (32 RT 4606-4607), the prosecutor reiterated that he was not seeking to invoke public outrage, but was addressing the victim impact evidence; i.e., cautioning the jury against devaluing the loss suffered by the victims and their families by returning an inappropriate sentence. (32 RT 4607.) The trial court recognized the distinction the prosecutor made when it responded to another defense objection by stating that victim impact is a consideration for the jury. (32 RT 4607.)

The prosecutor never stated the victims' families wanted a death verdict, the jury should consider that desire in determining penalty, or the jury would be relieved of responsibility if a death verdict was returned. Only by taking a few statements out of context has Enraca created an illusion to the contrary. In context, the prosecutor made a strong argument in favor of death as the appropriate verdict, which was the responsibility of the jury to decide, and urged the jury to consider the circumstances of the crimes, including the loss suffered by the victims' families, in making that determination.

Indeed, in concluding his argument, the prosecutor told the jurors that each juror must face the responsibility that came with being on the case. (32 RT 4608.) He asked the jury to determine "[w]hat is the appropriate punishment for this crime?" (32 RT 4608.) And, he told the jury that anything less than a death verdict would be an "injustice" in light of the evidence of the crimes and why they were committed, and the devastation they caused to the victims' families. (32 RT 4608.)

Defense counsel also addressed the jury's responsibility in returning a death sentence. She told the jury that it was their decision whether to impose death or life without parole (32 RT 4614); that their penalty decision was final (32 RT 4617); that each individual juror had to make a personal decision on penalty (32 RT 4626); and that each juror's vote counted (32 RT 4637). She also read from the instructions, telling the jury that it was their duty to determine which of the two penalties " 'shall be imposed.' " (32 RT 4623.)

The trial court instructed the jury that "under the law of this state, you must now determine which of these penalties shall be imposed" (32 RT 4646); that each juror must decide the penalty individually (32 RT 4650); and that it was the jury's duty to determine which of the two penalties "shall be imposed" (32 RT 4651).

Considered in the context of the prosecutor's entire argument, the argument of defense counsel and the trial court's instructions, the disputed statements were not misconduct.

VII.

ENRACA FORFEITED HIS CLAIM OF PROSECUTORIAL MISCONDUCT AS TO ALL BUT ONE OF THE PROSECUTOR'S REFERENCES TO LACK OF REMORSE AND IN ANY EVENT, THE PROSECUTOR'S ARGUMENT REGARDING ENRACA'S LACK OF REMORSE WAS PROPER

Enraca contends the prosecutor committed prejudicial misconduct by arguing lack of remorse as a factor in aggravation. (AOB 153-160.) Enraca objected to only one of the prosecutor's references to lack of remorse, thereby forfeiting his claim of error as to the remaining references. Moreover, the prosecutor never argued that lack of remorse was a factor in aggravation and any ambiguity was resolved by the admonition given by the trial court in response to the sole defense objection. In any case, the prosecutor's references to evidence of lack of remorse during and immediately following the crimes was a proper basis for arguing lack of remorse as a factor in aggravation and his references to lack of remorse subsequent to the crimes was a proper basis for challenging remorse as a factor in mitigation.

When a defendant challenges the propriety of statements made by a prosecutor to the jury, those statements must be judged in context to determine whether there is a reasonable likelihood that the jury understood or applied the allegedly objectionable remarks in an improper or erroneous manner. (*People v. Hinton, supra,* 37 Cal.4th at p. 905; *People v. Jablonski, supra,* 37 Cal.4th at p. 835.) In order to preserve a claim of misconduct for appellate review, the defendant must object in the trial court on the same ground and seek a curative admonition, unless an objection would have been futile or an admonition would

have been ineffective. (*People v. Bonilla* (2007) 41 Cal.4th 313, 355-356; *People v. Jablonski, supra,* 37 Cal.4th at p. 835.)

As a general rule, a prosecutor may not argue lack of remorse as a factor in aggravation. (*People v. Bonilla, supra,* 41 Cal.4th at p. 356.) However, the general rule "applies when the absence of remorse is argued other than in the context of the murder." (*People v. Crew* (2003) 31 Cal.4th 822, 857.) Evidence of a defendant's conduct or statements at the crime or when fleeing from the crime scene, and evidence of a defendant's attitude toward his crime and/or victim at the time of the crime is admissible and may be argued as aggravation, under factor (a), circumstances of the crime. (*People v. Bonilla, supra,* 41 Cal.4th at p. 356; *People v. Crew, supra,* 31 Cal.4th at p. 857; *People v. Cain* (1995) 10 Cal.4th 1, 77-78.) A prosecutor may also properly comment on lack of remorse in the context of a jury's determination whether remorse exists as mitigation. (*People v. Bonilla, supra,* 41 Cal.4th at p. 356.)

The prosecutor referenced remorse at several points in his argument to the jury. (32 RT 4597-4604.) Early in his argument, the prosecutor told the jury he would only address the jury once and would have to anticipate what the defense might argue in order to address all the potential issues. (32 RT 4581-4582.) He also told the jury that he intended to discuss the "reasons why the death penalty is the appropriate verdict, the necessary verdict in this case." (32 RT 4582.) When he addressed those reasons, he described the facts and circumstances of the crimes, "what was done and why it was done" (32 RT 4591), as the "first factor" that justified the death penalty. (32 RT 4592.) He told the jury that this came under the statutory factor (a). (32 RT 4591.) He then told the jury that "another factor" was victim impact (32 RT 4592) which also came under factor (a). (32 RT 4595.) After discussing the victim impact evidence, the prosecutor told the jury, "That's two things that, I submit, compel the more severe penalty in this case." (32 RT 4597.)

The prosecutor said there was a "third reason why death is the only appropriate verdict in this case" and told the jury that the presence or absence of remorse is a factor deemed universally relevant to the penalty determination. (32 RT 4597; see *People v. Bonilla, supra,* 41 Cal.4th at p. 356.) After discussing the meaning of remorse, he then asked the jury whether there had been any evidence of remorse, either in the witness testimony or in the videotape (Exh. 83) presented in the defense penalty phase case. (32 RT 4598.)

The prosecutor asked the jury to look at the witness Eric Garcia "on the issue of remorse" and asked the jury to "look at the night of the offense." (32 RT 4599.) He pointed to Garcia's testimony that when Garcia confronted Enraca about shooting Jenny Hyon, Enraca became angry, engaged Garcia in a shoving match, and Enraca said, " 'Maybe they deserved it.' " (32 RT 4599-4600; see 13 RT 2322-2323.)

The prosecutor reminded the jury that the defense put remorse in issue through the testimony of Dr. Nidorf. (32 RT 4600.) The prosecutor argued that what Dr. Nidorf termed remorse on the videotape (Exh. 83) was actually self-pity. (32 RT 4600.)[30]

The prosecutor pointed to Enraca's statements to Detectives Schultz and Spidle in which Enraca lied about not being at the scene and claimed self-defense, Enraca's statements to Detective Spidle in the wild-goose chase to find the gun, and Enraca's statements during the reenactment. (32 RT 4601-4602.) He argued there was no remorse and "lack of remorse is the third thing." (32 RT 4602.) Defense counsel objected at this point and although the trial court initially overruled the objection, when defense counsel argued that lack of

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30. In her closing argument, defense counsel told the jury that the absence of remorse is not an aggravating factor. (32 RT 4638.) She also said it was up to the jury to determine whether Enraca showed remorse, discussed facts for the jury to consider in making that determination, and told the jury that if it found remorse, that was a mitigating factor. (32 RT 4638-4639.)

remorse was not aggravation, the trial court agreed that "[i]t is not" and referenced the statutory factors. (32 RT 4602-4603.)

Following the admonishment, the prosecutor called the jury's attention to "the best" evidence of what Enraca's "attitude was towards the victims." (32 RT 4603.) He pointed to statements Enraca made to Lester Maliwat, as they were leaving the scene. (32 RT 4603-4604.) When Enraca got in Maliwat's car, he responded to Maliwat's questioning why Enraca shot Hyon by saying " 'They deserved it. Fuck 'em.' " (32 RT 4604; see 10 RT 1925-1926; 15 RT 2594.)

Viewed in context, the prosecutor never stated that lack of remorse was a statutory factor in aggravation. He pointed to lack of remorse as one of three "reasons," "factor[s]," and "things" that made a death verdict appropriate. While he said that the facts of the crime and the victim impact came under factor (a) (32 RT 4591, 4595), he never said lack of remorse came under that, or any, statutory factor. In response to the defense objection, the trial court told the jury that lack of remorse was not a statutory factor in aggravation. If there was any ambiguity from what Enraca calls the structure of the prosecutor's argument, it was resolved by the admonishment. In light of the argument as a whole and the admonishment, it is not reasonably likely that the jury understood the prosecutor's argument to be that lack of remorse was a statutory aggravating factor.

Moreover, the trial court was wrong in one important and relevant respect. Enraca's statement to Lester Maliwat as they were making their escape from the murder scene was evidence of lack of remorse which may properly be considered aggravating under factor (a). (*People v. Bonilla, supra,* 41 Cal.4th at p. 356 [statements or conduct at scene demonstrating lack of remorse are properly considered aggravating under factor (a)].) Additionally, although Enraca's statement to Garcia was later that night and away from the scene, it

was near the time of the crime and evidenced his attitude toward the victims at the time of the crime. That evidence was also properly considered aggravating under factor (a). (*People v. Crew, supra,* 31 Cal.4th at p. 857 [lack of remorse "near the time of the murder" is a circumstance of the murder]; *People v. Cain, supra,* 10 Cal.4th at p. 77 [" 'overt remorselessness' " showing murderer's attitude toward victims at the time of the offense is a circumstance of the crime].)

However, the entire thrust of the prosecutor's remorse argument was that the defense-initiated claim to remorse, which would only be as mitigation, was faulty as demonstrated by Enraca's acts and statements. When the prosecutor introduced the subject of remorse, he acknowledged it as a universally accepted consideration in the penalty determination. He also told the jury that the defense put remorse in issue through their expert opinion that Enraca demonstrated remorse in the videotape. Pointing to Enraca's statements to Garcia, Maliwat, and the detectives, as well as the videotape itself, the prosecutor challenged that opinion. By challenging the opinion, the prosecutor properly questioned whether remorse was present as a mitigation factor. (*People v. Bonilla, supra,* 41 Cal.4th at p. 356.) Although the prosecutor referred to lack of remorse as a "third reason" for imposing the death penalty, he did so in the context to imposing death as the "appropriate sentence." (32 RT 4597.) By undermining the defense claim to remorse, the prosecutor was providing a reason–his third reason, factor, thing–supporting his argument that death was the appropriate verdict. There is no reasonable likelihood the jury misunderstood that point.

Even if the prosecutor's statements were read as improperly using post-crime lack of remorse, the error was harmless.

> To the extent the prosecutor exceeded the proper scope of argument by characterizing defendant's post-crime attitude as aggravating, the error was harmless. "With or without argument,

> jurors can be expected to react strongly to evidence of overt callousness. [Citation.] Their response is unlikely to be influences by whether the prosecutor brands such evidence as 'aggravating' or merely 'nonmitigating.'

(*People v. Cain, supra,* 10 Cal.4th at p. 78.)

VIII.

LINGERING DOUBT WAS ADEQUATELY COVERED IN THE PENALTY PHASE INSTRUCTIONS AND A SEPARATE INSTRUCTION WAS NOT REQUIRED

Enraca claims the trial court prejudicially erred in refusing to give a defense-requested instruction on lingering doubt. He claims that this Court recognizes lingering doubt as a penalty phase defense and, as such, he is constitutionally entitled to an instruction on the defense. (AOB 160-167.) However, the trial court gave instructions which adequately informed the jury that it may consider lingering doubt.

Enraca acknowledges that this Court has previously ruled that a separate lingering doubt instruction is not required even if requested. He contends this Court should reconsider that conclusion based on the recent decision in *People v. Gay* (2008) 42 Cal.4th 1195, and the fact that an alternate juror was seated at the beginning of the penalty phase. Neither proposed reason justifies a change.

In *Gay*, a penalty phase retrial, this Court found that the trial court erred in precluding the defendant from presenting evidence of the circumstances of the crime and the error was prejudicial because not only did the trial court deprive the jury of evidence undermining the defendant's guilt, but also gave contradicting instructions on lingering doubt, telling the jury that it could consider lingering doubt, but also that the defendant's guilt had been

conclusively proved. (*People v. Gay, supra,* 42 Cal.4th at pp. 1213, 1217-1228.) None of those things occurred in this case.

Enraca says *Gay* recognized lingering doubt as a defense and he is constitutionally entitled to instructions on a defense. However, although a lingering doubt instruction was requested in this case, defense counsel did not argue lingering doubt. (32 RT 4611-4646.) Indeed, defense counsel told the jury that the defense accepted the verdict. (32 RT 4612.) In any case, in rejecting previous claims for a lingering doubt instruction, this Court held that CALJIC No. 8.85 adequately advises the jury of the role of lingering doubt in the penalty determination. (*People v. Zamudio, supra,* 43 Cal.4th at p. 370; *People v. Abilez* (2007) 41 Cal.4th 472, 531; *People v. Bonilla, supra,* 41 Cal.4th at p. 358.) The trial court in this case instructed the jury pursuant to CALJIC No. 8.85. (32 RT 4648-4649; 23 CT 6028-6029.)[31/] In light of the

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31. In its instruction pursuant to CALJIC No. 8.85, the trial court told the jury :

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case. You shall consider and take into account and be guided by the following factors, if applicable:
>
> (a). The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b). The presence or absence of any criminal activity of the defendant, other than crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c). The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d). Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

trial court's instruction pursuant to CALJIC No. 8.85, the jury was adequately instructed on lingering doubt.

Enraca also relies on the fact a juror was removed and an alternate substituted during the penalty phase (30 RT 4276-4278, 4280-4281), and the jury was instructed pursuant to CALJIC No. 17.51.1. (32 RT 4650-4651; 23 CT 6032.)[32] He recognizes that in *People v. Gray* (2005) 37 Cal.4th 168, this

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> (e). Whether or not the victim was a participant in defendants homicidal conduct or consented to the homicidal act.
>
> (f). Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g). Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h). Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impair [sic] as a result of mental disease or defect or the affects of intoxication.
>
> (i). The age of the defendant at the time of the crime.
>
> (j). Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k). Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> You must disregard any jury instruction given to you in the guilt-or-innocence phase of this trial which conflicts with this principle.

(32 RT 4648-4649.)

32. The trial court's instruction pursuant to CALJIC No. 17.51.1 stated:

> Members of the jury, a juror has been replaced by an alternate juror. The alternate juror was present during the

Court held that the substitution of alternates does not provide a basis for requiring a lingering doubt instruction (*id.* at p. 232), but says the decision in *Gray* does not indicate that the jury was instructed with CALJIC No. 17.51.1. However, the absence of any mention of CALJIC No. 17.51.1 in the *Gray* decision is not a basis for concluding the alternate juror instruction was not given.

In any case, contrary to Enraca's argument, the instruction does not tell the alternate juror that Enraca's guilt and the implied and associated findings "were to be taken as unquestionable fact." (AOB 163.) CALJIC No. 17.51.1 told the jury that the guilt phase verdict and findings were to be accepted as proven beyond a reasonable doubt. (32 RT 4650.) Moreover, although the instruction advised the jury that the verdict and findings were to be accepted as proven beyond a reasonable doubt, the jury's penalty phase deliberations were to include "any review as may be necessary of the evidence presented in the guilt phase of the trial." (32 RT 4651.) The alternate juror instruction did not foreclose consideration of lingering doubt.

> presentation of all the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in verdicts and findings returned by you to this point. For the purposes of the penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and the true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine, along with the other jurors, in light of all the -- in light of the prior verdict or verdicts and findings and the evidence and the law, what penalty should be imposed. Each of you must participate fully in deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial.

(32 RT 4650-4651.)

Since Enraca offers no persuasive reason for changing the rule regarding instruction on lingering doubt, this Court should find no error.

IX.

THE CALIFORNIA DEATH PENALTY STATUTE IS CONSTITUTIONAL

Enraca offers a number of challenges to the state capital punishment scheme. (AOB 170-200.) This Court has previously considered and rejected each challenge and Enraca offers no basis for a different result.

The California statutory scheme adequately narrows the class of murderers eligible for the death penalty and voter pamphlet arguments do not change that result. (*People v. Romero* (2008) 44 Cal.4th 386, 428; *People v. Bonilla, supra,* 41 Cal.4th at p. 358.)

Factor (a), the circumstances of the crime, does not allow imposition of the death penalty in an arbitrary and capricious manner. (*People v. Cruz, supra,* 44 Cal.4th at p. 636; *People v. Romero, supra,* 44 Cal.4th at p. 428; *People v. Bonilla, supra,* 41 Cal.4th at p. 358.)

Neither the state nor the federal constitution requires the jury find the existence of aggravating factors beyond a reasonable doubt or find that aggravating factors outweigh mitigating factors beyond a reasonable doubt, and there is no constitutional requirement for instructions requiring the jury to make those findings. The United States Supreme Court decisions in *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856; *United States v. Booker* (2005) 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, do not change that result. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1142; *People*

v. Cruz, supra, 44 Cal.4th at p. 681; *People v. Romero, supra,* 44 Cal.4th at pp. 428-429; *People v. Bonilla, supra,* 41 Cal.4th at pp. 358-359.)

The jury is not required to make written findings. (*People v. Mungia, supra,* 44 Cal.4th at p. 1142; *People v. Cruz, supra,* 44 Cal.4th at p. 681; *People v. Romero, supra,* 44 Cal.4th at pp. 428-429; *People v. Bonilla, supra,* 41 Cal.4th at pp. 358-359.)

Intercase proportionality review is not constitutionally required. (*People v. Mungia, supra,* 44 Cal.4th at p. 1142; *People v. Cruz, supra,* 44 Cal.4th at p. 681; *People v. Romero, supra,* 44 Cal.4th at p. 429; *People v. Bonilla, supra,* 41 Cal.4th at p. 359.)

The use of "extreme" and "substantial" in the statutory scheme is not an unconstitutional barrier to consideration of mitigating evidence. (*People v. Cruz, supra,* 44 Cal.4th at p. 681; *People v. Romero, supra,* 44 Cal.4th at p. 429; *People v. Bonilla, supra,* 41 Cal.4th at pp. 360.)

The trial court is not required to instruct the jury that the statutory mitigating factors could only be considered as mitigating and that the absence of evidence for a mitigating factor cannot be viewed as aggravating. (*People v. Cruz, supra,* 44 Cal.4th at p. 681; *People v. Romero, supra,* 44 Cal.4th at p. 429; *People v. Bonilla, supra,* 41 Cal.4th at pp. 360.)

The equal protection clause does not require that capital defendants be afforded the same sentence review provided under the determinate sentencing law. (*People v. Mungia, supra,* 44 Cal.4th at p. 1142; *People v. Bonilla, supra,* 41 Cal.4th at p. 360.)

California's use of capital punishment does not violate international law and is not used as a regular form of punishment. (*People v. Mungia, supra,* 44 Cal.4th at p. 1142; *People v. Cruz, supra,* 44 Cal.4th at p. 682; *People v. Romero, supra,* 44 Cal.4th at p. 429; *People v. Bonilla, supra,* 41 Cal.4th at p. 360.)

X.

THERE WAS NO ERROR TO ACCUMULATE

Enraca contends the cumulative effect of the errors he claims undermined the fairness of the guilt and penalty phases of his trial. (AOB 201.) As explained above, there was no error and, thus, no prejudice to accumulate. (*People v. Cruz, supra,* 44 Cal.4th at p. 689.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 9, 2009

Respectfully submitted,

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Attorney General of the State of California

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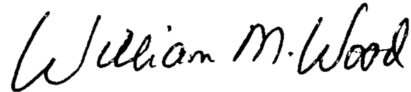
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 20300 words.

Dated: February 9, 2009

Respectfully submitted,

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



WILLIAM M. WOOD
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Sonny Enraca*
No.: S080947

I declare:

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

On February 11, 2009, I served the attached ***RESPONDENT'S BRIEF*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 11, 2009, at San Diego, California.

Terri Garza
Declarant

Signature

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