In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RUBEN P. GOMEZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S087773

Los Angeles County Superior Court Case No. BA156930
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed July 7, 1998, the Los Angeles County District Attorney's Office charged appellant with six counts of robbery (counts 1, 2[1], 4, 7, and 9; Pen. Code[2] § 211), five counts of murder (counts 3, 6, 8, 10, and 11; § 187, subd. (a)), and kidnapping (count 5; § 207, subd. (a)). (2CT 406-412.)

In count 1, the victim was Xavier Salcedo. Appellant was charged with robbing Salcedo in the second degree (§ 211) on February 25, 1997, and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 407.)

In counts 3, 4, and 5, the victim was Rajandra Patel. In count 3, appellant was charged with murdering Patel in the first degree (§ 187, subd. (a)) on May 26, 1997, and it was alleged that appellant: personally used a firearm (§ 12022.5, subd. (a)(1)); committed the murder while engaged in the commission of the crime of robbery (§ 190.2, subd. (a)(17)); and committed the murder while engaged in the crime of kidnapping (§ 190.2, sub. (a)(17)). In count 4, appellant was charged with robbing Patel in the second degree (§ 211), and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). In count 5, appellant was charged with kidnapping Patel (§ 207, subd. (a)), and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 407-409.)

In counts 6 and 7, the victim was Jesus Escareno. In count 6, appellant was charged with murdering Escareno in the first degree (§ 187, subd. (a)) on June 9, 1997, and it was alleged that he personally used a

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[1] Count 2 was withdrawn by the prosecution prior to trial. (1RT 21; 11RT 1752-1753.)

[2] All further statutory references are to the California Penal Code unless otherwise specified.

firearm (§ 12022.5, subd. (a)(1)). It was further alleged that he committed the murder with malice of forethought, and while engaged in the commission of the crime of robbery (§ 190.2, subd. (a)(17)). In count 7, appellant was charged with robbing Escareno (§ 211), and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 409.)

In counts 8 and 9, the victim was Raul Luna. In count 8, appellant was charged with murdering Luna in the first-degree (§ 187, subd. (a)) on June 10, 1997, and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)), and committed the murder while engaged in the commission of the crime of robbery (§ 190.2, subd. (a)(17)). As to count 9, appellant was charged with robbing Luna (§ 211), and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 410.)

In count 10, the victim was Robert Dunton. Appellant was charged with murdering Acosta in the first degree (§ 187, subd. (a)) on July 1, 1997, and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 410.)

In count 11, the victim was Robert Acosta. Appellant was charged with murdering Acosta in the first degree (§ 187, subd. (a)) on July 1,1997, and it was alleged that he personally used a firearm (§ 12022.5, subd. (a)(1)). (2CT 411.)

As to counts 3, 6, 8, 10, and 11, it was alleged that those multiple murders were a special circumstance within the meaning of section 190.2, subdivision (a)(3). (2CT 411.)

Appellant pled not guilty and denied the allegations. (2CT 424-425.) The guilt phase was tried before a jury. (2CT 689-692.)

In count 1, Appellant was convicted of robbing Salcedo in the second degree and the jury found that he personally used a firearm. (3CT 836; 29RT 4343-4344.) In count 3, appellant was convicted of murdering Patel in the first degree, and the jury found that appellant: personally used a

firearm, committed the murder while engaged in the commission of the crime of robbery, and committed the murder while engaged in the commission of the crime of kidnapping. In count 4, appellant was convicted of robbing Patel in the second degree, and the jury found that he personally used a firearm. In count 5, appellant was convicted of kidnapping Patel, and the jury found that he personally used a firearm. (3CT 837-840; 29RT 4344-4347.) In counts 6 and 7, the jury was unable to reach a verdict, so the court declared a mistrial for these counts, which were subsequently dismissed pursuant to section 1385. (3CT 836-844, 850-853; 13CT 3476; 29RT 4338-4440; 32RT 4661.) In count 8, appellant was convicted of murdering Luna in the first-degree, but the jury rejected the allegations that he personally used a firearm and committed the murder while engaged in the commission of the crime of robbery. As to count 9, appellant was acquitted of robbing Luna. (3CT 840-841; 29RT 4339, 4348-4349.) In count 10, appellant was convicted of murdering Dunton in the first degree, and the jury found that he personally used a firearm. (3CT 842; 29RT 4349-4351; 4SCT 737-738.) In count 11, appellant was convicted of murdering Acosta in the first degree, and the jury found that he personally used a firearm. (3CT 843; 29RT 4349-4351; 4SCT 737-738.)[3] The jury found that appellant committed multiple murders. (3CT 844.)

The penalty phase was tried before the same jury. (4CT 901.) As to counts 3 and 8, the jury fixed the penalty at death. (13CT 3449-3450.) As

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[3] Codefendant Grajeda was convicted of murdering Acosta and Dunton in the first degree. The jury found that these crimes were a special circumstance within the meaning of section 190.2, subdivision (a)(3). The jury rejected the allegation that codefendant Grajeda personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). (1CT 254, 2CT 682-684.) Codefendant Grajeda was sentenced to life in state prison without the possibility of parole for both murders. (2CT 706.)

to counts 10 and 11, the jury fixed the penalty at life without the possibility of parole. (13CT 3451-3452.) On March 31, 2000, the trial court denied probation. (13CT 3476.) For count 1, the court sentenced appellant to state prison for an aggregate term of 15 years. The court ordered this sentence to run consecutively with the indeterminate life terms due to the great violence and cruelty displayed by appellant. For count 3, the court imposed the penalty of death. For counts 4 and 5, the court sentenced appellant to state prison for aggregate terms of 5 years and 20 months, respectively, but stayed these sentences pursuant to section 654. For count 8, the court imposed the penalty of death. For counts 10 and 11, the court sentenced appellant to state prison for life without the possibility of parole. The court ordered that the sentence imposed for counts 10 and 11 be served consecutively because these crimes involved violence towards separate victims. In addition to direct victim restitution, appellant was ordered to pay a restitution fine of $10,000 (§ 1202.4, subd. (a)(3)(A)), a state penalty assessment of $10,000 (§ 1464), and a county penalty assessment of $7,000 (Gov. Code § 1464). Appellant was given credit for 1,004 days of presentence custody. (13CT 3476-3481, 3486-3488, 3494-3499, 3501-3503, 3506-3513.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

THE PROSECUTION

A. The Mexican Mafia

There were four main prison gangs divided by ethnic background. The Aryan Brotherhood had White members. The Black Guerrilla Family had African-American members. The Nuestra Familia and the Mexican Mafia had Hispanic members. The Mexican Mafia was also known as "Eme." (15RT 2341.)

The Mexican Mafia started in a Youth Authority facility in 1956, after a Hawaiian Gardens gang member named Louis Florez, also know as Huero Buff, came up with the idea of forming a prison gang that would control criminal street gangs. When Florez and others were transferred to an adult prison, they recruited new members for the prison gang. Eventually, the Mexican Mafia gained control of most jail and prison systems in California. Street gang members understood that, at some point, they would be incarcerated at a prison controlled by the Mexican Mafia, where they could be killed. (15RT 2361-2365.)

California had 33 state prisons, which were divided into four categories of controlled custody: the minimum level (level one); the medium level (level two); the high level (level three); and the most restrictive custody (level four). (20RT 2968-2970.) Several factors were considered in placing an inmate: the current offense, the length of the sentence, any prior prison record, and marital status. Inmates with continued management problems while in custody could be moved to a level three or a level four prison. (20RT 2970-2971.) The Department of Corrections could not guarantee the safety of inmates who became informants or defected from a gang, even in a lower level prison with less gang activity, because the Mexican Mafia had so much influence on inmates. (20RT 2984-2990, 2993-2994.)

With very few exceptions, the Mexican Mafia controlled the activities of Hispanic street gangs in the Southern California area. (15RT 2363.) The members of the East Side Williams gang were "Surenos" who aligned themselves with the Mexican Mafia. A "Sureno" was the term used to describe a soldier who aligned himself with gangs from the Southern California area. (15RT 2363-2364.)

The extent of the Mexican Mafia's control over local gangs was profound; it had control of the Hispanic gangs inside Southern California

during the early 1970s. (14RT 2217-2218, 2348.) By the time of trial, Los Angeles County had about 700 geographically distinct gangs with 90,000 Latino gang members, the majority of them teenagers. (12RT 2355, 2402, 2416.) One such gang in Wilmington, the East Side Wilmas, was a "Sureno" or Southern California gang aligned with the Mexican Mafia. (12RT 2363-2364, 2420.) Rancho San Pedro was another Sureno gang with Mexican Mafia loyalties. Only a few gangs successfully resisted the Mexican Mafia's influence. (12RT 2421.)

The Mexican Mafia demanded "absolute loyalty," and prohibited members from putting their religion, family, or friends before the gang. The Mexican Mafia often used someone close to a victim, including family members, to threaten or even murder the victim. (15 RT 2382-2383.) One primary rule of the Mexican Mafia was that Surenos gang members, and their associates, were prohibited from cooperating with law enforcement or the legal system in any way. The Mexican Mafia covertly acquired police reports or court transcripts, also known as "paperwork," which were used to identify people violating these rules. (15RT 2381-2382.)

People testifying against the Mexican Mafia risked death for themselves as well as their families. Wives and relatives of gang members were expected to lie in court. Loyal gang members used any means to delay, obstruct, or reverse criminal prosecutions against fellow gang members. (15RT 2384-2385.)

Los Angeles County Sherriff's Sergeant Richard Valdemar began his career at the Los Angeles County Men's Central Jail. (14RT 2213-2118, 15RT 2331-2341, 2343-2350.) Sergeant Valdemar's duties at the jail brought him into contact with incarcerated gang members, and he used these contacts as opportunities to gather intelligence regarding gangs, gang rivalries, and criminal activities. (14RT 2218-2119.) Sergeant Valdemar opined that incarcerated gang members committed crimes, including

assault, battery, extortion, robbery, rape, murder, making contraband weapons, and narcotics crimes. (14RT 2219-2220.)

Sergeant Valdemar was cross designated as an F.B.I. agent after participating in operations to bring RICO charges against prison gangs, including the Mexican Mafia. (15RT 2349-2351.) While working for a gang surveillance team from 1984 through 1991, Sergeant Valdemar observed Mexican Mafia members out in the streets. Based on this experience, Sergeant Valdemar opined that Southern California Hispanic street gangs associated and aligned themselves with the Mexican Mafia, and that Northern California gangs aligned themselves with Nuestra Familia. In other words, these criminal street gangs are primarily under the control of the prison gangs. (15RT 2341-2342, 2348.) In fact, the Mexican Mafia ordered street gangs to engage in crimes or other activity. (15RT 2348.)

Sergeant Valdemar opined that the Mexican Mafia controlled criminal street gangs because "they foster a feeling of terror among the communities in which they operate, and especially among street gang members, and their reputation for violence and murder causes gang members to comply with their wishes." (15RT 2399-2400.)

As an investigator and expert for the federal task force, Sergeant Valdemar worked on operations that secretly recorded Mexican Mafia meetings discussing criminal activity. The task force used video and audio recordings. (15RT 2351-2352.) The meetings were primarily about murders and drug dealing. The criminal street gangs aligned with the Mexican Mafia were responsible for controlling territory, making money through criminal activity, and turning over a portion of that money to the Mexican Mafia. The payments to the Mexican Mafia were known as "taxes." Some of the money was passed to incarcerated members. (15RT 2353-2355.)

In exchange for the payment of taxes, the Mexican Mafia ostensibly protected local gang members against drug-related robberies by killing the robbers. (15RT 2396-2370.) Local gang members who failed to pay taxes could be marked for death. (15RT 2365, 2669, 2403.)

The term "green light" refers to a person whom the Mexican Mafia had marked for death. Such persons were put on a "green light list." (15 RT 2371.) Getting off the list required intervention by a gang member, making a large payment to the Mexican Mafia, or committing a murder for the Mexican Mafia. However, on some occasions, these people were killed anyway. (15 RT 2380-2381.) Around 1997, law enforcement authorities intercepted several green-light lists, some recorded in voicemail, containing the names "Huero" and "Spider." (15RT 2440-2441, 2444.)

Sergeant Valdemar opined that a Hispanic criminal street gang member with tattoos indicating he was aligned with the Mexican Mafia, who robbed drug dealers in San Pedro and Wilmington and failed to pay taxes to the Mexican Mafia, would be marked by the Mexican Mafia for retribution and put on the green light list. The retribution in such a case would be murder. (15 RT 2378-2380.)

B. Appellant's Street Gang and Mexican Mafia Affiliations

On July, 2, 1997, Los Angeles Police Detective Debra Winter, and her partner, Detective Carolyn Flamenco, were assigned to investigate the Escareno homicide. They contacted appellant at Harbor Jail for the purpose of observing his tattoos. Appellant's tattoos included a rose on his left wrist and left bicep, the number 13 on the web area of his left hand, depictions of "comedy clown faces" on his right shoulder, the words "ghost town gang" on the center of his neck, the words "I'm so proud" and a rose on the right side of his neck, "3CE" on his left foot, and "SUR" and "Wilmero" on his back. (13RT 2040, 2042-2043, 2045-2046.)

According to Sergeant Valdemar, a tattoo of the letters "SUR" was the phonetic pronunciation of the Spanish word for "South," and was an acronym for "Southern Race United" or "Raza." That kind of tattoo showed a pledged of allegiance and support to the Mexican Mafia. The number and letters "3CE" stood for the number 13, which was another reference to the Mexican Mafia. These tattoos showed membership in a Sureno gang and loyalty to the Mexican Mafia. (15 RT 2366-2367.) A tattoo of the letters "ESW" showed membership in the criminal street gang known as Eastside Wilmas or Wilmington. (15 RT 2367-2368, 2429-2430.) Sergeant Valdemar opined that appellant's tattoos showed his triple membership in Surenos, the East Side Wilmas, and one of its subsets, the Ghost Town Locos. (15RT 2449-2430, 2443.)

C. Codefendant Grajeda's Street Gang and Mexican Mafia Affiliations

California Department of Corrections Special Agent Leo Duarte had worked at Soledad State Prison, where he came into contact with gang members during investigations that involved a stabbing or an assault by one inmate on another. While working at Chino State Prison from 1983 until 1996, Agent Duarte's duties also brought him into contact with gang members. (20RT 2971-2974.)

In 1997, when Agent Duarte became a special agent, his duties included investigating parolees and assisting in prison investigations. Agent Duarte was also assigned as a "gang agent," and his duties included monitoring and tracking prison gangs. (20RT 2975-2976.) Based on four months of personally observing codefendant Grajeda in prison, Agent Duarte opined that codefendant Grajeda was an associate of the Mexican Mafia. (21RT 2968-2969, 2971-2973, 2957, 2990.) Mexican Mafia associates acted as "soldiers" for members and did favors for them. (16RT 2987.)

According to Sergeant Valdemar, codefendant Grajeda's tattoo of a frog and the words "La Rana" showed he was a member of La Rana, a gang located in the general area of San Pedro and Wilmington. (15RT 2430-2431, 2435-2436.) Codefendant Grajeda's older "SUR" tattoo (15RT 2436-2437, 2446) showed that he had made a pledge of allegiance and support to the Mexican Mafia. (15RT 2366.)

D. Background Information

Robert "Huero" Dunton was a drug dealer, selling mostly rock ("crack") cocaine and crystal methamphetamine. (11RT 1822; 16RT 2525; 19RT 2927; 21RT 3078; 22RT 3221.) Robert "Spider" Acosta, a street fighter in his early thirties, was "Dunton's muscle." (23RT 3483-3484.)

Witness One[4] had known Dunton and Acosta since 1974 or 1975, when they were kids, because they hung around the same gang as Witness One's step kids. (22RT 3221, 3283.) That gang was known as Rancho San Pedro or "RSP." Witness One developed a "pretty good relationship" with Acosta. Over the years, Witness One saw Acosta and Dunton, except when Acosta was in prison. During the two years before Acosta and Dunton were killed, Witness One saw them everyday. Witness One also bought

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[4] Witness One had agreed to testify truthfully and completely regarding the homicides being prosecuted in exchange for around the clock protection, relocation after the trial, and a per diem allowance of $30. Witness One understood that his testimony would involve incriminating himself in crimes including murder, and that he had not received any promise that he would not be prosecuted for such crimes. He also acknowledged that in the late 1960s he had been convicted of auto burglary and sentenced to three years in state prison. (19RT 2910-2912; 22RT 3323-3324.) Before trial, the prosecutor asked that Witness One and three other witnesses not be named in the record. (1RT 156-158, 161, 211.) There was no objection to the use of their names in the courtroom. (1RT 157-158.) At the time of trial, Witness One believed his life was in danger. (24RT 3553-3554.)

drugs from Dunton.[5] Witness One believed that codefendant Grajeda was associated with the Mexican Mafia. (24RT 3552-3553.)

Witness Two knew codefendant Grajeda.[6] Codefendant Grajeda had been with Witness Two's niece for five years, and they had a child together. (16RT 2577-2583.) Witness Two had the tattoos, "Harbor Area" and "San Pedro." Witness Two knew Dunton because he lived in the apartment in the back of Witness Two's mother's home. Witness Two knew Acosta from living in the same neighborhood. (16 RT 2583-2586, 17RT 2664.)

E. Counts 3, 4, and 5: Appellant Kidnaps, Robs, and Murders Rajandra Patel

1. Patel's Son

Sunjal Patel ("Sunjal) testified that his father, Rajandra Patel, was 49 years old when he died. Patel had worked for 20 years at Allied Signal Automotives in La Palma. (12RT 1868-1870.) Patel lived with his wife, Sunjal, Sunjal's wife and daughter, and another son. Patel owned a white Toyota Camry with the license plate: "POOJA 96." (12RT 1871.) Sunjal

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[5] Witness One primarily used heroin, and had used heroin "on and off" for 40 years. He used $20 of heroin a day in order to prevent "getting sick." He also smoked crack cocaine daily. Sometimes he used methamphetamine. At trial, Witness One no longer considered himself a heroin addict. (22RT 3221-3226, 3283-3284; 24RT 3506-3509.) Witness One admitted he had committed robberies in the past and usually used a knife. (22RT 3319-3320.) Witness One agreed he was an accessory after the fact to the Escareno murder and might be prosecuted for that crime. (22RT 3320, 3324.) Witness One knew he could go to prison for helping Acosta to sell drugs. (22RT 3321.)

[6] Witness Two knew of a person known as Boxer, who was reputed to be "a little hard core guy" and a "gang banger." (17 RT 2646-2649.) Witness Two had never met "Boxer," although he had heard that Boxer and codefendant Grajeda collected taxes for the Mexican Mafia. (18RT 2771-2772, 2786.)

last saw his father on May 25, 1997, at about 9:00 p.m., when Patel was leaving home in his Camry. Patel was wearing a bracelet, a gold watch, and a chain. At trial, Sunjal identified his father's bracelet and watch. (12RT 1872-1873.)

2. The Police Find Patel's Body

On May 26, 1997, at around 5:00 a.m., Los Angeles Police Detective Sal La Barbera was assigned to investigate Patel's death.[7] Detective La Barbera went to the northbound Terminal Island freeway on-ramp between Anaheim and Pacific Coast Highway. (9RT 1475-1477; 12RT 1858-1859.)

Uniformed officers had contained the scene using police vehicles, crime scene banner tape, and flares. It was just turning light on a clear and dry morning. The roadway and the shoulder were dry. Patel's body was found on the shoulder area of the on-ramp. He had been shot and stabbed. Three expended .40 caliber cartridge casings were discovered: one about 90 to 100 feet from Patel's body; another a few feet away from the first casing, and the third a few feet from Patel's body. There was blood on the shoulder area which was about 75 feet from Patel's body. (9RT 1478-1486, 1494-1496, 1501-1505.)

On May 28, 1997, Los Angeles Police Officer Sheldon Nicholson was on patrol in the area covered by the Harbor Division. At about 11:15 p.m., Officer Nicholson was directed to go to the alley in the rear of 648 West 1st Street in San Pedro, where he discovered Patel's car. The car's interior was completely burnt. Patel's car was towed to the police garage in San Pedro. (12RT 1877-1880.)

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[7] Patel's identity was not immediately known because there was no identification on his body and various initial fingerprint searches came back negative. Detective La Barbera discovered Patel's identity by checking missing person reports, finding a missing person flyer in Torrance, and matching fingerprints from Patel's DMV records. (9RT 1486-1488.)

3. Medical Forensic Evidence

An autopsy established that Patel's death was caused by multiple injuries. The primary injury was a gunshot wound where the barrel of the gun was in contact with Patel's head. The bullet entered through the back middle of Patel's head, went through his brain, and exited through his right temple. Patel had been stabbed in the left side of his neck and his left chest. The stab wound to Patel's chest was a cause of death because his lung was punctured and bled into his chest cavity. (9RT 1523-1530, 1565.) Patel's chin and left cheek had been cut. (9RT 1135.)

According to the medical examiner, a person stabbed in a major vessel such as a large artery in the neck, leg, or arm, would typically die within a minute. Stab wounds to the chest or abdomen that did not hit a large artery took longer to cause death, and the victim could live for five to ten minutes depending on the circumstances. (9RT 1531-1532.)

Jon Babicka worked as a criminalist for the Los Angeles Police Department Crime Laboratory. He was assigned to the Serology Unit, which involved the study of bodily fluids such as blood, semen, and saliva. (12RT 1882-1883.) Babicka identified six photographs of Patel's vehicle. He collected potential blood evidence. Each area with potential blood evidence was collected, marked with a separate number, and photographed. The samples were collected using either a cotton swab or swatch. At his laboratory, Babicka prepared the samples for testing. Afterward, the samples were booked into evidence and stored. (12RT 1884-1889.) At trial, Babicka identified the three swatches he had collected. (12RT 1896-1902.)

William Moore worked as a criminalist for the Los Angeles Police Department's Scientific Investigations Division in the Forensic Toxicology Unit. (12RT 1889-1892.) Moore examined the three swatches collected by Babicka for the presence of human blood. All three swatches contained

human blood, but Moore was unable to determine if the blood was from Patel using enzyme typing techniques. He recommended that the blood samples be tested using DNA techniques. (12RT 1892-1894.)

Harry Klann worked as a criminalist for the Los Angeles Police Department's Scientific Investigations Division in the Serology DNA Unit. Klann compared the three swatches containing human blood collected from Patel's vehicle with a sample of Patel's blood collected during the autopsy. (12RT 1903-1907.) Using six tests, Klann determined that the blood was consistent with one out of 60,000 people in the general population and was consistent with Patel's blood. Klann explained that he conducted all the tests he could perform in 1998. (12RT 1908-1911.)

Sometime before Acosta and Dunton were killed, appellant brought Patel's jewelry to Dunton's apartment. Appellant was accompanied by another person known as "Little Diablo." Appellant was driving a black and gray "older Ford" or a black Toyota pickup. Appellant and Witness One, and perhaps "some girl" were at Dunton's apartment at that time. Appellant tried to sell the jewelry to one of Dunton's connections, but that "never materialized." Appellant left the jewelry at Dunton's apartment. (22RT 3230-3232, 3253, 3255-3258; 24RT 3529-3530.)

Days later, appellant asked Witness One to burn Patel's car, which was parked in an alley behind Dunton's apartment. Appellant told Witness One to check the trunk and make sure there was no blood inside. Witness One got the keys from a different location, and took Patel's car to a 7-11, where he purchased two bottles of rubbing alcohol. He took the car to an alley about five blocks from Dunton's apartment between First and Santa Cruz. Witness One poured most of the alcohol on the upholstery, used the remaining alcohol and a rag to make a wick, and threw the wick inside the car. After returning Dunton's apartment, Witness One told appellant what he had done. Witness One burned Patel's car because he and appellant

were "pretty tight for a while." (19RT 2931-2934, 2938-2939; 20RT 3039; 22RT 3229-3230, 3257-3260.)

About three or four days before burning Patel's car, appellant talked about the victim, stating: "I hated to kill that guy because he had balls' And he said, 'If you're going to do it, go ahead and shoot me, mother fucker.'" Witness One believed he was burning "a murder car" because he had heard appellant talking about the owner of the car, and appellant had asked him to check the trunk for blood. [8] Witness One "put that together" with the jewelry and the "brick telephone" appellant brought to Dunton's apartment. At trial, Witness One identified Patel's watch and bracelet. (19RT 2937-2940; 22RT 3252, 3255.)

4. Witness Three

Witness Three lived in Wilmington with her husband, who was "good friends" with appellant. Appellant visited her home three or four times a week to talk with her husband. Witness Three had a "hi and bye" relationship with appellant. In late May 1997, after Witness Three and her husband has returned from an overnight trip to Mexico, appellant brought Patel's bracelet and watch to their home. Appellant offered to sell them Patel's jewelry. (12RT 1912-1916.)

When appellant displayed Patel's bracelet and watch, Witness Three's husband asked if she thought the items were "real." Witness Three told her husband not to buy the items. (12RT 1917.) Witness Three's husband went to appellant and told him the items were not real. Appellant responded: "Yes, it is real. It's from this Mexican man I have in the trunk

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[8] On cross-examination, Witness One said that appellant put "a hit" on him because he did not completely burn the car. Appellant asked Dunton to kill Witness One, but Dunton refused to kill him. This occurred before Witness One and appellant went to the "junk yard." (23RT 3448-4350; 24RT 3483-3484, 3491-3492, 3511-3514, 3542-3543, 3549.)

of the car I just killed."[9] Witness Three looked out a window. She saw the white car that appellant had parked outside. She had never seen that car before that day. Witness Three's husband purchased Patel's bracelet and watch by paying appellant with narcotics. (12RT 1918-1919, 1924, 1926.)

Subsequently, on a trip to Las Vegas with her husband, Witness Three pawned Patel's bracelet and watch. She received $600 to $700 for the items. At trial, Witness Three identified a pawn shop ticket and a slip for the bracelet and watch. The slip was dated June 5, 1997. (12RT 1919-1922.) Sometime after returning from Las Vegas, Witness Three and her husband were arrested, and the police found the pawn shop slip inside Witness Three's handbag. Witness Three spoke with a police detective about the bracelet and watch, and was later released. (12RT 1228-1231.) Los Angeles Police Officer Frank Caincoy went to the pawn shop in Las Vegas where Witness Three had pawned Patel's bracelet and watch, and took possession of these items. (13 RT 1968-1972.)

5. Angel Rodriguez

On June 8, 1997, Los Angeles Police Officer Terry Shelley went to Angel Rodriguez's residence in Wilmington. Rodriguez gave Officer Shelley a Smith and Wesson .40 caliber stainless steal semi-automatic handgun and a magazine containing six bullets. (12RT 1943-1948.) Afterward, Detective La Barbera was unable to locate Rodriguez. (12RT 1859-1860.)

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[9] Witness Three did not make a police report because she thought appellant was joking when he said he had killed a man. (12RT 1927.)

6. Firearm Forensic Evidence

Anthony Paul was the firearms examiner who tested the spent cartridge casings found at the scene of Patel's death. (14RT 2130-2134.) He also examined the Smith and Wesson handgun and magazine containing six live rounds that Rodriguez gave Officer Shelley. (14RT 2135-2136.) According to Witness One, appellant brought this handgun to Dunton's apartment. (20RT 3004.) Paul determined that the spent cartridge casings had been ejected from the handgun (14RT 2137-2143) Rodriguez gave Officer Shelley (12RT 1943-1948).

F. Counts 8 and 9: Appellant Murders Raul Luna

1. Luna's Brother

On June 9, 1997, Rudy Luna ("Rudy") lived with his brother, Raul Luna, his other brother, Andy, along with Andy's wife and son. Rudy went to bed at about midnight. At about 12:10 a.m., Rudy heard a car pull up in front of his apartment. Rudy heard the car's door open and close, and then he heard the car drive off. A few minutes later, Rudy heard some rustling in the bushes in front of his bedroom window. Rudy looked outside, but did not see anything. A minute later, Rudy heard someone say: "There's somebody in there, there's somebody in there." (13RT 2057-2059.)

Rudy did not recognize the voice he heard outside his bedroom window. Rudy looked out his window a second time, but didn't see anything. A few minutes later, Rudy then heard someone say, "He's here." Rudy heard Luna say, "Oh, shit." Afterward, Rudy heard one gunshot, and then "hit the ground." A little later, after hearing a garbled cough, Rudy went outside and discovered Luna lying on his back. Luna's head was bleeding. (13RT 2060-2061.) Luna's autopsy established that the cause of his death was a shotgun wound to the head. The shotgun muzzle was 6 to

12 inches from Luna's head when it was discharged. (11RT 1801-1804, 1807-1808.)

On June 10, 1997, about 1:20 a.m., Los Angeles Police Detective Geoffrey Lancaster was assigned to investigate Raul Luna's death. At approximately 1:50 a.m., Detective Lancaster arrived at a residence located in Torrance. (11 RT 1695, 1697-1699.) Detective Lancaster observed Luna's body lying on the front yard, adjacent to a walkway running from the sidewalk to the front porch. (11 RT 1700.)

An unspent 12-gauge shotgun cartridge was found about 15 feet from Luna's body. Luna had a shotgun wound to the left rear portion of his head. (12 RT 1701-1703.) A clear plastic baggie containing methamphetamine was found near Luna's knee. (11RT 1710-1711.) An ATM card was found near Luna's body. (11RT 1714.)

During the early morning hours of June 10, 1997, Torrance Police Officer Steve Fletcher (13RT 2079-2081) found a "gray over blue" Oldsmobile parked about 150 to 200 yards from the crime scene. The car's windows were down, the key was in the ignition, the engine was warm, and the tires were wet from water in the gutter. Officer Fletcher notified his sergeant, who in turn notified the investigating officers. (13RT 2082-2085.) Detective Lancaster discovered a white plastic bag containing seven unspent 12-gauge shotgun shells on the back seat of the car. (11RT 1703-1706, 1710.)

Torrance Police Officer Brook McMillon had the car towed to the police tow yard. Afterward, she checked the car for fingerprints. (13RT 2086-2090.) Latent fingerprints were found. Out of 34 latent fingerprints, 10 matched appellant's fingerprints (11RT 1716-1717): one from the roof on the passenger side; two from the exterior surface of the passenger door; one from the rearview mirror; three from the exterior surface of the driver's

window; and three from the exterior surface of the driver's door. (13RT 2091-2094, 2099-2107.)

2. Charles Orr

On June 9, 1997, Charles Orr lived in Torrance. (13RT 2068-2070.) At around midnight, Orr was working on his computer, when he heard a noise that sounded like an explosion. Orr thought that a transformer had exploded. Ten to fifteen minutes later, Orr heard the sound of running, so he looked out of his window. Someone ran past his apartment. The runner sounded "very heavy footed" and was "[k]ind of noisy." (13RT 2071, 2074.) Orr went outside and walked to the end of the street, but did not see anyone at that time. (13RT 2072-2073.) Later that morning, Orr briefly spoke with a police officer. (13RT 2074-2075.) It was "very possible" that Orr told the police that the person who ran by his apartment was "dark-skinned" because Orr thought the person was Hispanic, or dark-skinned, but not Black. (13RT 2075-2078.)

3. William Owens

William Owens and his wife lived in a large apartment complex in Torrance. (14RT 2180-2182.) On June 10, 1997, at around 1:30 to 1:45 a.m., Owens was outside smoking a cigar near the corner of a park. Owens heard a gunshot, which was unusual for his neighborhood. About five to ten minutes later, appellant ran up to Owens and asked for a ride to his girlfriend's apartment. Owens denied having a car. Appellant replied, "Okay man," and kept running. (14RT 2183-2187.) At trial, Owens identified appellant as the man who confronted him. (14RT 2201-2204, 2249.)

4. Police Investigation

On June 10, at about 2:30 a.m., Detective Lancaster contacted Owens. (15RT 2322-2323.) Owens gave a description of the man who confronted

him: a Hispanic male, 25 to 30 years old, wearing a white and red nylon jacket, blue denim pants, and white shoes. Owens estimated the encounter lasted 20 seconds. (15RT 2326-2327.) Later the same day, Detective Lancaster contacted Owens and showed him a photographic six-pack. Owens said that appellant's photograph "somewhat resembled" the man who confronted him. (15RT 2324-2325.)

5. Evidence Related to Luna's Cellular Telephone

Luna's cellular telephone was recovered from Dunton's apartment. (11RT 1740-1742.) Raul Luna, Sr., Luna's father, identified Luna's cellular telephone. (14RT 2150-2152.) Latent prints on the cellular telephone were tested, but no identifiable prints were found for appellant. (11RT 1706-1707, 1715-1716; 14RT 2165-2167.) According to Witness One, appellant brought Luna's telephone to Dunton's house. (20RT 3005.)

Shannon Harvey, custodian of records for Airtouch Cellular, identified Luna as the customer who owned the cellular telephone. (14RT 2153-2158.) According to the records, the cellular telephone was used on June 10, 1997, at 12:14 a.m. to make a 21-second call to (310) 718-9703. At 1:12 a.m., it was used to make a 33-second call to (310) 249-3213. At 1:13 a.m., it was used to make an eight-second call to (310) 260-3402. At 1:14 a.m., it was used to make a 38-second call to (310) 793-0868. At 1:15 a.m., it was used make an eight-second call to (310) 808-2211. At 1:16 a.m., it was used to make a nine-second call and a ten second call to (310) 808-2211. At 1:30 a.m., it was used to call a one-minute and a nine-second call to (310) 513-9962. At 4:54 a.m., it was used to make a six-second call to (310) 549-3774. At 5:00 a.m., it was used to make a six-second call to (310) 548-3482. (14RT 2158-2160.)

Jerrel Uhler, a special agent with telephone company GTE, examined records held by GTE regarding telephone calls made from Luna's cellular telephone. The telephone number (310) 260-3402 was a GTE telephone

number assigned to Southwest Paging. The telephone number (310) 793-0868 was a GTE telephone number assigned to America's Best Cab. (14RT 2167-2170.)

Antoinette Carter was a trainer and a custodian of records for the Pacific Bell telephone company, and testified regarding telephone calls made to Pacific Bell customers. The telephone number (310) 249-3213 was assigned to Page Net. The telephone number (310) 808-2211 was assigned to Hideo Ohta, doing business as "Yellow Cab." The telephone number (310) 513-9962 was assigned to Holland Hotel in Wilmington. The telephone number (310) 594-3374 was assigned to Marline Andrews in Wilmington. Finally, the telephone number (310) 548-3482 was assigned to Robert Dunton in San Pedro. (14RT 2171-2173.)

G. Counts 6 and 7: The Murder and Robbery of Jesus Escareno (Hung Jury)

1. Witness One

On June 30, 1997, after Witness One burned Patel's car, he and appellant drove to Wilmington looking for someone to rob. Witness One was driving and appellant was sitting in the front passenger seat. (19RT 2940-2941; 22RT 3266.) They traveled in a gray Ford or a Toyota pickup truck. (22RT 3265.) Appellant had a shotgun that belonged to Dunton and Witness One. They called the shotgun "Shorty." (19RT 2942; 22RT 3264; 23RT 3431-3432.) It was a "break open" shotgun and not a "pump" shotgun. (19RT 2943.) Dunton acquired the gun from someone who owed him money. (23RT 3433.)[10]

As Witness One and appellant passed a bar, appellant saw Escareno driving an "older Thunderbird" and commented: "Did you see that guy, all

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[10] Witness One was shown People's Exh. 50. According to Witness One, that shotgun was not "shorty." (19RT 2943.)

them rings on his fingers." Appellant and Witness One tracked Escareno. When Escareno stopped his car, Witness One pulled directly behind him and stopped. Through the passenger window, appellant started talking to the man in Spanish. The man spoke in Spanish and was "mostly laughing." Witness One only knew a little bit of Spanish, but heard appellant say: "I got mucho[s] huevos and mucho corazon." Appellant was saying he had "a lot of balls and a lot of heart." (19RT 2944-2946; 22RT 3266-3268.)

About two minutes later, appellant fired a single shot at Escareno. Escareno "suddenly disappeared" after appellant shot him. Appellant told Witness One to take the victim's car back to Dunton's apartment where they could take Escareno's rings off of his fingers. Escareno "took such a blast" that his head was "over at the passenger door" and "his left foot was up behind the steering wheel." Witness One moved Escareno's foot and drove away. Instead of taking the car to Dunton's apartment, Witness One drove about two blocks and parked the car behind a hamburger stand. Witness One took Escareno's billfold and walked back to Dunton's apartment. On the way, Witness One purchased some heroin, which he used when he got to Dunton's apartment. (19RT 2947-2950; 22RT 3270.)

Appellant asked Witness One about the victim's rings. Witness One said he did not want to remove rings from a dead man. Appellant asked about the victim's money. Witness One gave appellant about $60. Appellant said, "Is that all." Witness One told appellant that he bought a "dime bag" on the way to Dunton's apartment. Dunton told Witness One that he "didn't follow orders." Witness One replied that he did not have to follow orders. Appellant told Witness One to drive the victim's car to Dunton's apartment. Witness One got a ride back to the victim's car, and then drove it into an alley about one-half block from Dunton's apartment. (19RT 2950-2952, 2954; 22RT 3275.)

Witness One returned to Dunton's apartment. When Witness One said the jewelry was still on the victim, appellant told Witness One: "Go ahead and get it, mother fucker." Witness One took the victim's rings and two watches, went back inside Dunton's apartment, and gave the items to appellant.[11] Appellant gave the items to Dunton, who said they were "costume jewelry" and threw them away. (19RT 2953; 20RT 3000; 22RT 3272-3273.)

Appellant told Witness One to get rid of the car and the victim's body. Witness One drove the victim's car to Park Plaza shopping center. Witness One drove to the back of the shopping center and took the body out of the car. After seeing the victim's head, Witness One decided to leave the body "where someone could find it." Afterward, Witness One drove the victim's car to an open garage and left it there. As Witness One was walking away from the car he noticed blood on his shirt, so he took it off and threw it in a trash can. (20RT 3000-3003; 22RT 3275-3276.)

Witness One did what appellant told him to do because appellant "had the guns." In addition to the shotgun called Shorty, appellant possessed a small shiny chrome-plated pistol that was "a smaller version of a .40 or a .45." Appellant usually had a firearm in his possession. (20RT 3003-3004.)

2. Additional Witnesses

Deanna Gallardo lived in the area where Escareno was killed. On June 9, at around 4:42 a.m., Gallardo woke up after hearing a gunshot. She "jumped out of bed and ran to the window." Gallardo and her husband

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[11] Witness One did not recall telling Detective Joya that appellant removed Escareno's rings. (3271-3272.)

looked out a window, but neither one saw anything. After looking out another window, they heard a car skidding away. (13RT 1997-2001.)

Pedro Herrera lived in the same area as Gallardo. He was getting a glass of water when he heard a gunshot. (13RT 2006-2009.) Deputy Winter interviewed Herrera, who said he saw a car double parked, heard a gunshot, and then saw the double parked car drive away. (13RT 2010-2013.)

3. Escareno's Body is Found

On June 9, 1997, at about 8:00 a.m., Frederick Odle discovered Escareno's body near some garbage cans at Park Plaza Retail, located at 916 North Western. Odle had checked the same area at 5:30 a.m., but Escareno's body was not there at that time. (13RT 2034-2037.)

4. Police Investigation

On June 9, 1997, at approximately 8:45 a.m., Los Angeles Police Detective Debra Winter was assigned to investigate the death of Escareno. Detective Winter and her partner, Detective Carolyn Flamenco, drove to the shopping center where Escareno's body was discovered. (9 RT 1570-1572.) Escareno's body was lying facedown in an alcove at the rear of the shopping center. The top of Escareno's head had been shot off. It appeared that rings had been removed from Escareno's fingers. (9RT 1573-1575, 1578-1579.)

Two days later, Detective Winter went to the location where Escareno vehicle was found, 449 Oliver in San Pedro. (9RT 1572-1573.) There was blood in the car, mostly on the front passenger seat and door. (9RT 1582.) Projectiles were discovered in the car and were consistent with a 12-gauge shotgun firing double-aught buckshot. (15RT 2393-2394.)

5. Escareno's Sister

Maria Rosales, Escareno's sister, lived with her brother, her husband, and her children at the time Escareno was killed. Escareno worked as a bus boy for Carrow's restaurant. On Sundays, Escareno typically worked from 2:00 p.m. until 10:30 p.m., went home to change clothes, and around 11:00 p.m. went to Los Tres Cochinitos restaurant to chat with friends. The Sunday before Escareno died, June 8, 1997, Escareno came home from work and slept for a while. After sleeping, Escareno went out dancing at Mi Casita, and afterward went to Los Tres Cochinitos. (13RT 1975-1979.) Escareno left the restaurant at about 4:10 a.m. (13RT 1982-1984.)

During the early morning hours of June 9, Rosales was at home when she woke up after hearing a gunshot outside her apartment. At around 5:00 p.m., Rosales learned that her brother had died from a police detective who came to her apartment. Rosales identified her brother's car from a photograph. (13 RT 1980.) According to Rosales, Escareno always carried his wallet. (13RT 2067.)

6. Appellant's Spontaneous Statement

Detective Winter had no intent to interrogate appellant regarding the Escareno homicide. However, after she asked appellant some standard booking questions, appellant told the officers that they must be busy because things had "gone crazy" in the harbor area. Appellant talked about a man having his head shot off on Western, a woman who had been killed and then wrapped and disposed in a dumpster, and two men who had been shot and had their brains splattered all over the place. Appellant mentioned that these victims could not be identified, and that their wallets were missing. According to Detective Winter, the police had not released any information that Escareno's wallet had been stolen. (13RT 2043-2045.)

7. Firearm Forensic Evidence

Diana Paul worked as a criminalist for the Los Angeles Police Department. The parties stipulated that Paul was qualified to testify as an expert regarding firearms examination. In the course of her duties, Paul performed a bullet path determination of a vehicle (Peo. Exh. 11) seized by the police. After examining the vehicle, Paul concluded that projectiles found in the vehicle were consistent with shotgun pellets known as "double aught buck," which was a kind of buckshot. (15 RT 2392-2394.) This type of ammunition was typically fired from a 12-gauge shotgun, which was designed for hunting medium to large game. (15 RT 2394-2395.)

The driver side window of the vehicle was open. Paul determined that the two projectiles had a trajectory of upward and left to right, which in this case was upward from the driver side door towards the passenger side. The shots were consistent with a shotgun being fired through the open driver's side window. (15RT 2396-2397.)

H. Counts 10 and 11: Appellant Murders Dunton and Acosta

1. Events Leading up to the Double Homicide

About one or two months[12] before Dunton and Acosta were killed, Witness One moved into Dunton's apartment. In exchange, Witness One gave Dunton $250 in rent and helped Dunton sell mainly "crack" and some "crystal meth." Dunton weighed about 500 pounds, and had trouble moving, so Witness One would assist by letting people inside the apartment to buy drugs. (19 RT 2923-2928: 22RT 3219-3121, 3225-3226, 3228, 3274-3275.)

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[12] On cross-examination, Witness One acknowledged that on July 24, 1997, he "might have" told Detectives Winter and Flamenco that he moved into Dunton's apartment on April 1. (22RT 3219-3220, 3285.)

About three weeks to a month before Acosta and Dunton were killed, appellant came to the apartment to buy crack. Appellant was introduced as "Diablo." Appellant and Dunton were friends, so Witness One saw appellant regularly. About two weeks before Acosta and Dunton were murdered, appellant began sleeping on the couch and showering at Dunton's apartment. (19RT 2929-2930; 20RT 3005; 22RT 3228-3229, 3273-3274.)

Appellant and Boxer were from rival gangs and did not get along.[13] (22RT 3294.) During the week before the murders, around June 27, Witness One saw Boxer at Dunton's apartment. Boxer came to Dunton and said: "You ain't paying your taxes and they're getting on me because I'm not doing my job." The next day, Boxer returned with his girlfriend and a "protégé." Boxer took out a machete and told appellant: "Mother fucker, you ain't never seen me go off, have you." Boxer took $100 and appellant's small shiny chrome gun. Appellant complained. Boxer said he would return the gun to appellant. (20RT 3006-3008; 22RT 3285-3287; 24RT 3541-3542.)

After Boxer took appellant's gun, appellant called someone and asked for a gun because it was "a matter of life and death." A man arrived at Dunton's apartment and gave appellant a shotgun. Witness One and appellant cut six inches off the barrel and cut off the stock. This shotgun was used to murder Acosta and Dunton. (20RT 3010; 22RT 3290-3291-3294.)

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[13] Witness Two knew of a person known as Boxer, who was reputed to be "a little hard core guy" and a "gang banger." (17 RT 2646-2649.) Witness Two had never met "Boxer," although he had heard that Boxer and codefendant Grajeda collected taxes for the Mexican Mafia. (18RT 2771-2772, 2786.)

The day before Acosta and Dunton were killed, in the afternoon, Witness One saw codefendant Grajeda at Dunton's apartment. Codefendant Grajeda was with someone he knew as "Bimbo."[14] After codefendant Grajeda and Bimbo left Dunton's apartment, late at night, Witness One and appellant took a stolen black Toyota pickup truck to a place in Wilmington called "the junk yard" or the "third world." In that area, there were only junkyards and shipping containers. There was a lot of drug dealing in the area. (20RT 3008-3012; 22RT 3289-3290.) Appellant had the sawed-off shotgun. (22RT 3289-3290.)

Appellant and Witness One asked a man to get them drugs. When the man returned, appellant got out of the vehicle and "drew down on him with the shotgun." (20RT 3013, 3015.) Someone appeared from behind a fence and said, "Diablo, just take it and go." Afterward, appellant and Witness One went back Dunton's apartment. Appellant parked the truck down the street. (20RT 3014-3015.)

The day before the murders, at about 4:00 p.m., Witness Two[15] saw codefendant Grajeda at 12th Street and San Pedro along with some other

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[14] Witness Two was known as Bimbo. (18RT 2771.)

[15] Witness Two believed that his life was in danger because he was testifying at appellant's and codefendant Grajeda's trial. Witness Two wanted to be placed in a "level one" penal institution because he felt that he would be safer. (18 RT 2787-2788, 2792.) Witness Two admitted that he had several prior felony convictions, some involving violent crimes. He also admitted that he had been incarcerated multiple times, and was currently incarcerated because he had violated his probation. For the probation violation, Witness Two was originally facing 12 years in prison. However, in exchange for testifying truthfully at appellant's trial, Witness Two was offered a maximum sentence of six years in prison with credit for time already served. Also, Witness Two was promised that his testimony could not be used against him unless he committed perjury. Witness Two did not want to be sent to a "level four" prison because he "wouldn't last a day" after he had "taken a chance" by testifying. (17 RT 2649-2654.)

men who were drinking at Donald Juarez's apartment. (16 RT 2588-2590.) Codefendant Grajeda talked about appellant and Acosta, whom he referred to as Diablo and Spider, and complained they both failed to pay taxes to the Mexican Mafia.[16] Codefendant Grajeda said that he wanted to go to Dunton's apartment and "take care of Diablo." (16RT 2592-2595.)

Witness Two and codefendant Grajeda left together and drove to Dunton's apartment. After they arrived, they walked up to Dunton's apartment. Appellant opened the door, and Witness Two and codefendant Grajeda went inside. At that time, Witness Two was inside the apartment with appellant, codefendant Grajeda, Dunton, and Witness One. (16RT 2595-2600.)

Witness Two heard another person inside the apartment, but did not see that person. While the others talked, appellant was "nervous, walking back and forth." Witness Two saw the back door move, so he went to the bathroom and tried to listen for noise in an adjacent room. Witness Two heard someone on the other side of the door. Witness Two left the bathroom and told codefendant Grajeda that they should leave because it did not "look right." (16RT 2606-2609; 17RT 2710.)

Witness Two and appellant got up to leave. Appellant was the first one out the door. Codefendant Grajeda and Witness Two followed. Appellant and codefendant Grajeda spoke privately for a few minutes. Acosta arrived and greeted codefendant Grajeda, Witness Two, and possibly appellant. (16 RT 2601-2604, 16 RT 2609-2610.)

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[16] Witness Two admitted that his "gang nickname" was "Bimbo." Due to his age, Witness Two was considered a "veterano." (18RT 2771-2772, 2784-2785, 2971-2792.) Witness Two was an associate of the Mexican Mafia while he was incarcerated, but this association ended when he was released from prison, so he had never collected taxes for the Mexican Mafia. (17 RT 2665-2666; 18RT 2785.)

Witness Two drove codefendant Grajeda back to San Pedro. Along the way, codefendant Grajeda asked Witness Two to pick him up at 8:00 p.m. and take him back to Dunton's apartment so he could "take care" of appellant and Dunton for failing to pay their taxes to the Mexican Mafia. Codefendant Grajeda specified that he would kill appellant and then Dunton, if he refused to pay his taxes. Witness Two dropped off codefendant Grajeda, picked up a friend, and drove to the Rose Room to have a beer. About 15 minutes later, at around 6:00 p.m., Witness Two drove to his mother's apartment where he spent the night. (16 RT 2610-2614; 17RT 2718.)

Alicia Gandara was Witness Two's wife. (19RT 2894-2895.) They stayed the night together at her in-laws' apartment in San Pedro. Witness Two told his wife that codefendant Grajeda would call at 8:00 p.m. Witness Two instructed his wife to answer the telephone to tell codefendant Grajeda that he was asleep, and that she would not wake him up. (16RT 2614-2615; 18RT 2769-2770.) Around 8:00 to 8:30 p.m., Gandara received a telephone call from codefendant Grajeda. (19RT 2898, 2906-2907.) Gandara did as her husband instructed. (19RT 2899-2902.)

Eddie Maldonado[17] considered Acosta his father. (16RT 2506-2508.) On June 30, 1997, between 11:30 p.m. and midnight, Maldonado was at home with Acosta, when Acosta received a telephone call. The call lasted a couple of minutes. After Acosta hung up the telephone, he started pacing back and forth. Afterward, Acosta went into his bedroom for a few minutes and prepared to leave. Maldonado asked Acosta what was the matter. (16RT 2509-2510.) Acosta said he had to go to a meeting. (16RT 2517.)

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[17] Maldonado was 21 years old at the time of trial. (16RT 2508.)

2. The Double Homicide

As Witness One and appellant walked toward Dunton's apartment, appellant said: "They sent somebody to fuck Huero and Spider up." Witness One and appellant went inside the apartment and joined Acosta, Dunton, and codefendant Grajeda. Witness One asked appellant for some crack. Appellant said there was no more crack. Witness One cussed and then headed for his room. As he passed behind Acosta, Acosta handed him some methamphetamine. Witness One went to his room to prepare the methamphetamine for ingestion. (20RT 3016-3020; 22RT 3297, 3299-3301, 3312-3313.) At that time, appellant had the sawed-off shotgun, and codefendant Grajeda had the shotgun they called "Shorty." (20RT 3034.)

From his room, Witness One heard what was said in the other room, and he recognized individual voices. He heard Dunton said: "[I]f I got to go, I'm going to go like a man." Codefendant Grajeda said: "You know the rules." Appellant said: "Yeah, forward and backward." Then appellant said: "Don't point that at me. I don't like people pointing things at me." Afterward, "[a]ll hell broke loose" and Witness One heard about four gunshots and then someone bumping into the washing machine as he left through the back door. (20RT 3021, 3033-3036; 22RT 3307; 24RT 3486-3488.)

Witness One left his room and saw Acosta's body lying by the front door and Dunton's body on the couch with his head to the side. (20RT 3036-3037; 22RT 3303.) Witness One left through the back door, rode his bicycle to a store, called 911, and then rode to an AM/PM gas station. (20RT 3037-3038.)

Dunton's autopsy established that the cause of death was a "single tight shotgun wound to the head that caused the destruction [to the scalp and head bone] because there was an explosive effect underneath the scalp

as the hot gases were trapped in the head and scalp, and the direction of fire was to the left downward and towards the front." Dunton also suffered non-fatal gunshot wounds to his right upper arm and the right chest area. (11RT 1823-1825.)

Acosta's autopsy revealed "a large gapping gunshot wound [to] the front right side of the throat," and the shotgun was "at the throat in some contact but not pressed tightly against throat." (11RT 1811-1812.) The parties stipulated that the bodily fluids drawn from Robert Acosta, also known as Spider, and Robert L. Dunton, also known as Huero, were analyzed by toxicologists. Acosta's blood sample was positive for the presence of methamphetamine, amphetamine, and phencyclidine. Dunton's blood sample was positive for the presence of alcohol, methamphetamine, and amphetamine. (26RT 3768-3769.)

3. The Police Investigation

Los Angeles Police Officer Rafael Mora drove to a triplex located at 2332 West O'Farrell Street in San Pedro to investigate an allegation of assault with a deadly weapon. Officer Mora and other officers were unable to get through the front door of the apartment, so they went in the back door. After determining that there was no one alive inside the apartment, and a paramedic confirmed that the victims were dead, the officers left the apartment and did not allow anyone to enter it before the detectives arrived. (15RT 2449-2453.)

At approximately 4:20 a.m., Los Angeles Police Detective Olivia Joya was assigned to investigate the deaths of Robert Dunton and Robert Acosta. Detective Joya and her partner, Detective Scott Masterson, drove to the San Pedro triplex. (11RT 1727-1729, 1734.)

According to Detective Masterson, Acosta's head was so close to the front door that the door could not be opened without disturbing Acosta's body. (21RT 3119-3121, 3126.) Dunton's body was on a living room sofa.

There were four expended Remington shotgun shells on the floor and a bag of several Remington shotgun shells on a table. There was "blood matter" on the walls and ceilings. Luna's cellular telephone was found on the sofa (Peo. Exh. 20), which was later taken into custody by Detective Masterson. (11RT 1737-1741, 1749-1751, 1754-1756, 1764-1765.) A metal tube was found underneath Dunton's body. (11RT 1742-1743.) A loaded gun was found tucked in Acosta's left arm pit. (11RT 1757-1758, 1778.) Narcotics were found in the apartment, including rock cocaine packaged for sale, as well as paraphernalia for using drugs. (11RT 1759-1761, 1784-1785.)

Witness One initially told Detectives Masterson and Joya that he found the bodies after returning from getting some food, because he was afraid of being viewed as a suspect. (20RT 3038-3039; 22RT 3320; 23RT 3376-3378; 25RT 3557-3659.)[18]

4. Appellant's Arrest

Witness Four was appellant's cousin. Witness Four lived in Long Beach. (21RT 3083-3084.) On July 2, 1997, during the late afternoon, Witness Four was home with her two-year-old daughter. Appellant knocked on her door. Appellant had a shotgun and a bag. Even though Witness Four had no contact with appellant for about eight years, appellant demanded she let him stay. Witness Four left with her daughter and went to a friend's home and called the police. When the police arrived at the

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[18] Witness One was interviewed "several times," but he did not remember everything that he said during these interviews. (23RT 3379-3386, 3423-3431, 3434-3438, 3442, 3446-3448; 24RT 3488-3490, 3495-3499, 3515-3516, 3549-3550; 25RT 3657-3660) Witness One had lied "[p]robably more than a few" times during the course of the investigation. (22RT 3301-3306; 23RT 3428, 3430, 3437-3440, 3446-3447, 3452.) He also lied to the 911 operator because he did not want to be placed in the apartment during the murders. (22RT 3327-3329; 23RT 3358-3361.)

friend's home, Witness Four told them what had happened. (21RT 3085-3087.)[19]

Appellant was arrested outside of Witness Four's home, without incident, after the police ordered him to exit the residence. The police seized a shotgun (Peo. Exh. 50), that was loaded with six live rounds. (21RT 3098-3103.)

5. Codefendant Grajeda Admits Killing Dunton and Acosta

Witness Six had known codefendant Grajeda for a couple of years, and had stayed at Dunton's apartment. After Witness Six learned that Acosta and Dunton had been murdered, she spoke with codefendant Grajeda by telephone. Codefendant Grajeda told Witness Six that the police were looking for him, and asked if she had spoken with the police. (21RT 3077-3080, 3082.)

Witness Two learned about the deaths of Acosta and Dunton about two days after they were killed, and saw codefendant Grajeda at the Rose Room before he and his wife took a vacation on July 4, 1997. (16RT 2615-2616; 18RT 2786-2787.) Witness Two asked if Dunton and Acosta had been killed. Codefendant Grajeda replied, "Yeah, I did it." (16RT 2617-2618; 17RT 2704-2706.)

6. Appellant Admits He Was the Last Person at Dunton's Apartment When Dunton and Acosta Were Murdered

Witness Five was Acosta's wife and the mother of their children. Witness Five knew appellant and codefendant Grajeda. She had known appellant for 15 years through friends and family. Witness Five was in San Diego when Acosta was killed and when she was notified of his death.

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[19] According to Detective Masterson, Witness Four told him that appellant arrived at about midnight. (21RT 3123.)

(16RT 2518-2520.) On July 7, 1997, Witness Five received a telephone call from appellant, who asked her to visit him at the county jail. During the telephone call, appellant offered his condolences and also laughed. (16 RT 2528.)

On July 21, 1997, Witness Five went to visit appellant.[20] (16RT 2523-2524, 2541.) Appellant talked about the deaths of Acosta and Dunton, but denied shooting them. Appellant said his fingerprints were all over the apartment as well as Dunton's face, and that he was last person present when Acosta and Dunton were murdered. (16 RT 2525-2526.)

7. Acosta's Note to His Wife

Witness Five and Acosta had a Bible they kept in a bedroom dresser. Five days after Acosta was killed, Witness Five discovered a hand-written note from Acosta left between the pages of the Bible. Acosta signed the note and also wrote down his full name, his address, and his nickname, "Spider." Witness Five and Acosta often left notes to each other in the pages of the Bible. (16RT 2521-2522.) Normally Acosta did not sign his notes with so much information, and the fact that he did so meant that the content of the note was "something serious." After finding the note, Witness Five turned it over to the detectives investigating Acosta's death. (16RT 2522-2523.)

[20] Witness Five told Detective Joya about the telephone call and the visit, but said she visited appellant on July 17, 1997. (16RT 2544-2547.)

8. Additional Police Investigation and Forensic Evidence

Witness One told Detective Joya that there was a shotgun stock inside Dunton's apartment. On July 7, 1997, a shotgun stock was found inside a trash can in Dunton's kitchen. (25RT 3655-3657.)

Witness Six called Detective Joya on July 26, 1997. (25RT 3655.) On July 27, 1997, Witness Six gave Detective Joya permission to take the cellular telephone found in Dunton's apartment. One or two days later, the cellular telephone was given to Detective Lancaster. (11RT 1761-1763.)

Marshall Severson worked for the Los Angeles Police Department in the Scientific Investigation Division as an expert regarding gunshot residue analysis. (22RT 3182-3187.) Severson opined that no information could be gained by performing a gun residue tests on suspects or their clothing 24 hours after the firearm was discharged. (22RT 3188-3189.)

José Vazquez and Anthony Ortiz were forensic print specialists for the Los Angeles Police Department assigned to the Scientific Investigation Division. Vazquez collected Dunton's and Acosta's latent fingerprints and several latent fingerprints from the crime scene. (16 RT 2621-2625; 17RT 2634, 2641.) Ortiz estimated that they collected 30 lifts of latent prints. (19RT 2822-2824, 2831-2832.)

Rosaly Garcia was a forensic print specialist with the Los Angeles Police Department. (19RT 2849-2852.) Garcia found four identifiable prints on the sawed-off shotgun (Peo. Exh. 50): one the right side of the barrel, one the left side of the barrel, and two on the left side of the frame next to the trigger. (19RT 2858-2863, 2865-2866.) Forensic print specialist Efren Caparas determined that three out of these four prints (Peo. Exhs. 53B, 53C, and 53D) matched appellant's prints (Peo. Exhs. 53A through 53D). (19RT 2867-2872.)

Daniel Rubin was a criminalist and firearms analyst for the Los Angeles Police Department's Scientific Investigation Division. His responsibilities included collecting, preserving, analyzing, and examining physical evidence related to all types of firearms, ammunition, and ammunition components. Using comparison microscopy, Rubin could determine whether spent cartridge casings had been shot from a particular gun. The spent cartridge casings were compared with test fired cartridges generated in the laboratory. (18 RT 2738-2741.)

Rubin tested the shotgun recovered by the police. The shotgun's magazine could hold five shotgun shells. An additional shell could be loaded into the chamber. (18RT 2741-2743.) At trial, Rubin identified the shotgun, the spent cartridge casings, and the test-fired casing. (18RT 2744-2745.)

Rubin compared the unique marks left on the head of the fired shotgun shells caused by forcing the shell against the shotgun's bolt when discharged. Rubin opined that the four shotgun shells he examined (items 1, 3, 4, 12) (Peo. Exhs. 21B, 21C, 21D, and 21F) had been fired from the shotgun recovered by the police. The shotgun that Rubin examined was a 12-gauge shotgun. The live round recovered by the police was meant for a 12-gauge shotgun. (18RT 2745-2747, 2752-2758, 2763-2764, 2766-2768.) The shotgun shells had a "loaded designation" of one ounce of No. 8 shot, which indicated the size of the pellets inside the shell. (18RT 2748.) Rubin also opined that the five-inch metal tube recovered by the police could have been part of the barrel of a shotgun. (18 RT 2749, 2761.)

After both parties had rested, they entered into the following stipulation:

> Manuel Hernandez is deemed to have been called as a witness, to have been sworn and to have testified as follows:

Manuel Hernandez is 67 years of age. He was interviewed by investigators on July 1, 1997. On July 1, 1997, he lived in the first residence to the west of the Dunton residence.

Hernandez was home during the early morning hours of July 1, 1997. At about 3:15 a.m., he heard what sounded like three gunshots. Hernandez went to the window closest to the Dunton residence and looked out. The Dunton residence was in darkness.

Hernandez saw one man come out the back door of the Dunton residence. The man had something dark pulled down over his head. The man was between five feet six inches tall and five feet eight inches tall. The man ran down the walkway toward O'Farrell Street.

Hernandez then heard a car start nearby. Afterward someone came into the room and turned on the lights in the Dunton residence. Hernandez heard someone say, "Oh, my God." Hernandez then saw the man leave the Dunton residence by the back door.

(29RT 4292-4293.)

The parties also stipulated that [appellant] was six feet two inches tall and [codefendant] Grajeda was between five feet eight inches tall and five feet and ten inches tall. (29RT 4293.)

I. Count 1: Appellant Robs Xavier Salcedo

1. Salcedo's Testimony[21]

Months before any of the murders occurred, appellant robbed Salcedo. Salcedo knew appellant from "growing up."[22] A couple of weeks prior to the robbery, appellant came by Salcedo's apartment. Appellant said he was

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[21] Salcedo died before trial, so the jury heard his preliminary hearing testimony.

[22] Salcedo explained that he did not want to testify because he had been threatened with retaliation if he did so. The threats were delivered anonymously by telephone. Salcedo was jailed for a short amount of time based on his refusal to testify. (8RT 1406-1408.)

out of jail and demanded money. Salcedo denied having any money. When Salcedo answered his door on February 25, 1997, appellant and another man entered and told Salcedo to sit down, while a third man stood in the doorway. Appellant sat Salcedo down on the couch and sat next to him. (8RT 1381-1386.)

Appellant pulled a gun from his waistband and pointed the gun at Salcedo's stomach. A second man stood in front of them about four feet away. Appellant told Salcedo to take off his jewelry. Salcedo complied, and appellant placed the jewelry on the coffee table. Appellant told Salcedo they needed to have a private conversation, so Salcedo went upstairs and closed his bedroom door. At that time, Salcedo told Silvia that he was being robbed. (8RT 1387-1390.)

Salcedo went back to the living room. Appellant told him to "sit down" and "shut up." Salcedo complied. Appellant pointed the gun at Salcedo's stomach and asked Salcedo if he had any money. Salcedo asked appellant what he wanted. Appellant replied: "Whatever you got" and then said "go get it." Salcedo went to his bedroom. Appellant followed Salcedo to the hallway outside the bedroom. Salcedo went into the bedroom, gave Silvia a gun, and told her to protect herself. Salcedo retrieved $5,000 from the bedroom, returned to the hallway, and handed appellant the money. (8RT 1391-1394.)

It appeared to Salcedo that the other two men had guns. Salcedo pleaded with appellant to give back his jewelry. Appellant handed Salcedo his gun, but Salcedo handed the gun back to appellant and said, "I don't want no problems." Appellant eventually agreed to give back Salcedo's jewelry. Afterward, all three men left. Salcedo locked the door, turned off the lights, and went to his bedroom. (8RT 1395-1400.)

Salcedo told Silvia they needed to take their children and leave immediately. Before they could leave, the men returned and demanded to

be let inside. They threatened to start shooting into the walls. Salcedo had a gun, but did not want a gun battle because his children were present. Silvia called 911 a second time from the bedroom. Salcedo looked outside his bedroom window and saw his friend, Darren Smith, walking towards his apartment. Appellant and the two other men spoke with Smith. Afterward, appellant repeated his threat to shoot into Salcedo's apartment. (8RT 1400-1404.)

2. Silvia Salcedo's Testimony

On February 25, 1997, at about 11:00 to 11:30 p.m., Silvia Salcedo ("Silvia") was at home with her boyfriend, Xavier Salcedo (a.k.a. Alfonso Elizarraz), and their three children. Someone knocked at the back door, which was unusual, but Salcedo let two men inside. Silvia could hear words being exchanged, but could not make out what was being said. Salcedo entered Silvia's bedroom, spoke to her, and then left her bedroom. Silvia saw appellant standing in the hallway.[23] She believed appellant saw her. Afterward, Silvia called 911 from her bedroom and spoke with an emergency operator. The two men were still inside at this time. Salcedo returned to Silvia's bedroom again and told her the two men had left. (8RT 1335-1340, 1345, 1348-1349, 1352, 1355, 1363.)

Subsequently, someone knocked on the front door and Silvia could hear male voices. Several times someone yelled: "Open the fucking door, let me in." Silvia called 911 the second time and spoke with an emergency operator. A recording of both 911 calls was played for the jury. (13RT 1341-1343.)

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[23] Silvia met appellant around 1989. Appellant was "a friend" of Salcedo, but not a "close friend." Silvia had seen appellant a few weeks before he robbed Salcedo. Aside from that, Silvia had seen appellant once about seven years before the robbery. (8RT 1344-1346, 1362.)

Salcedo kept a large amount of cash at home. The money came from his regular business and selling narcotics. (8RT 1343.) After the robbery, Silvia discovered that appellant took $5,000 of $10,000 Salcedo kept in a box. After the police and detectives arrived, Silvia identified appellant as one of the robbers. (8RT 1355-1356.)

J. The Police Arrive at Salcedo's Home

The police arrived, and Salcedo heard people running to the back of the apartment and a dog barking. Salcedo placed his gun on top of the television. The police entered the apartment and detained "everyone." Salcedo explained that he had been robbed. (8RT 1405-1406.)

K. Evidence Regarding Appellant's Refusal to Come to Court

Los Angeles County Sherriff's Deputy John Ganarial worked at the Central Men's Jail. Deputy Ganarial was responsible for module 3301, which housed K-10 inmates for discipline. Appellant was housed in module 3301. These modules were in single-man cells. Deputy Ganarial's duties included getting inmates ready to go to court. Normally, inmates were fed breakfast before going to court. (12RT 1841-1843.) When it was time to go to court, inmates were taken out of their cells one at a time and placed in waist chains. Afterward, they were taken to a separate module to wait for transportation. The separate module was run by other deputies. (12RT 1843-1844.)

On December 14, 1999, at about 5:50 a.m., Deputy Ganarial informed appellant that he had about 30 minutes to get ready for court. Deputy Ganarial did not hear appellant respond. Deputy Ganarial returned five to ten minutes later and found that appellant was sleeping. Deputy Ganarial tried to wake appellant up, but was unsuccessful. Deputy Ganarial proceeded to feed other inmates, and returned to appellant's cell about 10 to 15 minutes later. (12RT 1844-1847.)

Deputy Ganarial woke appellant up by yelling into his cell that he needed to be ready for court. Appellant responded by saying: "Fuck court." Deputy Ganarial reminded appellant that he needed to be ready at 6:30 a.m. on the days he was scheduled to go to court. Deputy Ganarial returned to appellant's cell a few minutes later, appellant again said "fuck court." (12RT 1847-1848.) At around 8:30 a.m., appellant refused to leave his cell to go court. Appellant refused to leave his cell until about 10:00 a.m. Deputy Ganarial received information that an extraction order had been issued regarding appellant's failure to go to court. Deputy Ganarial informed appellant of the extraction order. About 15 to 20 minutes later, appellant informed Deputy Ganarial that he was going to go to court. (12RT 1848-1850.) The parties stipulated that on December 14, 1999, the parties were instructed trial would begin at 10:30 a.m. (12RT 1850-1851.)

THE DEFENSE

Appellant recalled Detective Joya. (22RT 3238.) There was a "murder book" containing all the information obtained during the investigation of Acosta's and Dunton's deaths. Detectives Joya and Masterson prepared the murder book. The murder book contained a "chronological log," which was a running log of any significant information. The entries included dates and times. Detectives Joya wrote his last name or initialed his entries where he personally received information. (22RT 3239-3240.)

On July 23, 1997, Detectives Joya and Masterson interviewed Witness Six at her residence. About three days later, Witness Six contacted Detective Joya by telephone. Witness Six said that she had talked with codefendant Grajeda, who told her: "I was supposed to go over there that night for a meeting." Codefendant Grajeda was referring to Dunton's apartment. (24RT 3596-3597; 25RT 3655.)

Detective Joya interviewed Witness One on July 2, July 15, and August 20, 1997. Witness One was also interviewed on July 24, 1997, but Detective Joya was not present during that interview. (24RT 3597.)

On July 2, Witness One denied being present when Acosta and Dunton were killed. Witness One further claimed that he walked through the front door, even though Acosta's body was blocking the door. (25RT 3657-3658.) Witness One said that the day before the murders, a man named Boxer came to Dunton's apartment and took some money. At that time, Acosta was "trying to sneak out." After Boxer left Dunton's apartment, appellant called a friend to get a gun. (24RT 3605-3606.) Witness One claimed that he and appellant sawed off the barrel and wooden stock of a shotgun in Dunton's apartment.[24] (24RT 3619; 25RT 3655.) That day, Witness One stated: "But I've been awake so long and started hallucinating and hearing things." (25RT 3689-3691.)

On July 15, 1997, Witness One again claimed he was not present during the shootings.[25] He also claimed he entered through his bedroom window, even though the window was blocked by a dresser, a television, and other items stacked inside the window. (25RT 3659-3660.) Witness One told Detective Joya that he went to the junk yard with appellant, and returned to Dunton's apartment at about 9:30 p.m.[26] (24RT 3607-3608, 3619-3621.) At that time, Witness One, appellant, Acosta and Dunton were present. Dunton was on the couch facing the door and Acosta was on the

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[24] The barrel was found on July 1, and the wood stock was found in a kitchen trash can on July 7, 1997. (25RT 3655-3656.)

[25] Witness One said that "appellant got mad real easy and he was very upset over the theft of his money and pistol by Boxer" and "when [appellant] smokes he gets paranoid and scary." Witness One claimed that he was "real scared" of appellant. (24RT 3610-3612.)

[26] Witness One also said he "wasn't too good" at estimating times. (24RT 3608.)

large sofa. (24RT 3608-3609.) Appellant told Dunton to give Witness One some money to buy food. Witness One used the money to buy rock cocaine, and then returned to Dunton's apartment about 45 minutes later. Witness One claimed that he tried to enter the apartment by crawling through a window in the front bedroom. (24RT 3609-3610.)

On August 20, 1997, Witness One was interviewed again because the two prior versions of what happened were "impossible." (25RT 3660-3661.) For the first time, Witness One talked about the white car and a dark car. He also said that codefendant Grajeda was present when Acosta and Dunton were killed. (25RT 3661-3662.) Witness One further claimed that, after retuning from the junk yard, appellant said that somebody was coming over to "fuck with" Acosta and Dunton. (25RT 3664-3665, 3674.) Witness One believed that appellant's comment pertained to the Mexican Mafia. (25RT 3696-3698.) Afterward, Witness One and appellant entered Dunton's apartment, where they joined Dunton, Acosta, and codefendant Grajeda. Acosta gave Witness One some drugs. Codefendant Grajeda had the shotgun known as Shorty, and appellant had a pump-action shotgun. (25RT 3668-3669.) Witness One heard appellant say "don't point that at me." Witness One speculated that appellant was speaking to Acosta. Dunton said, "I'll go out like a man." (24RT 3600-3602; 25RT 3670.) After hearing these statements, Witness One heard gunshots, and someone bumping into a washing machine as he ran out the back door. (25RT 3670-3671.)

On August 21, 1997, at 10:20 a.m., Caparas informed Detective Joya that four latent prints had been lifted from the shotgun seized after appellant's arrest. Detective Joya made a notation, "negative on comparison with [appellant], which meant that the prints had not been compared with any suspects." (22RT 3241-3244, 32247.) Latent print expert Wendy Cleveland requested another palm print from appellant.

(22RT 3249.) On August 27, 1997, Caparas called Detective Joya and informed him that the prints lifted from the shotgun had been compared with appellant's prints. On September 3, 1997, Cleveland told Detective Joya that appellant's prints were on the shotgun. Detective Joya also received reports from Cleveland and Caparas. (22RT 3244-3248.)

Appellant recalled forensic print specialist Vazquez. (23RT 3345.) Vazquez and Ortiz each lifted latent prints from Dunton's apartment. Vazquez lifted a fingerprint from outside the kitchen front door about 48 inches from the bottom of the door. Another print was lifted from the doorjamb about 59 inches from the ground. (23RT 3345-3348.) A print was lifted from a decorative wood on the bathroom wall about 60 inches from the ground, and inside the bathroom door about 56 inches from the floor. (23RT 3349.) A print was lifted from a hallway door about 50 inches from the floor. A print was lifted from a door next to the bathroom about 50 inches from the floor, and the side of a kitchen doorjamb leaving the living room. (23RT 3350.) Two prints were lifted from inside the kitchen door leading outside. A print was lifted from the back of a metal chair. (23RT 3351-3352.) A print was lifted from the toilet lid which was smeared. A print was lifted from an open can of Pepsi. (23RT 3353-3355.)

Imelda Solorzano, Melanie Gandara's friend, knew codefendant Grajeda. Codefendant Grajeda and Gandara had custody of two children, Arthur and Andrew. (24RT 3569-3570, 3572-3573, 3584-3585, 3592-3595.) On June 30, 1997, Solorzano helped codefendant Grajeda and Gandara prepare for an annual multi-day picnic until about 3:30 a.m., on July 1, 1997. (24RT 3571-3576.) Solorzano did not see codefendant Grajeda leave the apartment. (24RT 3577, 3590.)

Appellant recalled Detective La Barbera. (25RT 3698.) According to Detective La Barbera, the approximate time of Patel's death was from 9:00 p.m. on May 25 to about 4:00 a.m. on May 26, 1997. Detective La Barbera

believed the time of death was probably between 1:00 and 2:00 a.m. on May 26, 1997. (25RT 3699.) Detective La Barbera interviewed Witness Three several times. She told him that appellant brought Patel's jewelry to her home on May 26, 1997. (25RT 3701.) There were variations in the information Witness Three provided during these interviews. Witness Three initially said that appellant passed Patel's jewelry through a bedroom window. Detective La Barbera did not believe that a person could see the driveway or front of the apartment from the bedroom window. Witness Three's first interview occurred on July 2, 1997, after she was detained for a narcotics violation. At that time, her husband was arrested and charged with possession of cocaine for sale. (25RT 3702-3705.)

In a subsequent interview, Witness Three said that appellant came into the apartment with the jewelry. She also said that appellant came to their bedroom window, or to the front door, depending on the time of day. (25RT 3706.) During the first interview, Witness Three said that appellant came to her home "a lot." (25RT 3708.)

Detective Winter was recalled by the defense. (25RT 3710.) Detective Winter interviewed Witness One on July 24, 1997. Witness One mentioned the name Boxer, probably concerning the Acosta and Dunton murders, although Detective Winter was trying to focus on the Escareno homicide. Witness One said that Boxer had a 12-gauge shotgun. (25RT 3710-3713.) Witness One said that Dunton gave Escareno's costume jewelry to women who came to his apartment. (25RT 3713-3715, 3719.) According to Witness One, appellant had two shotguns, a 12-gauge and a pump action, as well as the ".25 auto" that Boxer took from appellant. (25RT 3717-3720.) In another interview on August 20, Witness One revealed that he was with appellant when he killed Escareno, but did not participate in the killing. (25RT 3716-3717.)

PROSECUTION'S REBUTTAL

According to Detective Flamenco, on July 24, 1997, Witness One said that Boxer took appellant's .25 caliber handgun. (26RT 3755-3756, 3763.) Detective Flamenco was aware that Witness One had told Detective Winter that Boxer took appellant's 12-gauge shotgun. (26RT 3758, 3763.) There was information in Detective Flamenco's notes that was not included on Detective Winter's report, and vice versa. (26RT 3762.)

Detective Flamenco was aware that two newspaper articles were published after Escareno was killed. The articles were published on June 10, and June 18, 1997. On July 2, 1997, appellant was arrested and interviewed. (26RT 3766-3767.)

Detective Masterson interviewed Witness Two. Witness Two stated that he took codefendant Grajeda to Dunton's apartment, where codefendant Grajeda went inside to speak to some people. Witness Two stayed outside until codefendant Grajeda returned. They drove away together. (26RT 3772.) Witness Two also stated that he saw codefendant Grajeda at the Rose Room the Friday following the double homicide. Codefendant Grajeda told Witness Two: "I killed him." (26RT 3770-3772.)

Detective Masterson interviewed Witness One three times, and these formal interviews were recorded and transcribed. He also had about 24 contacts with Witness One on the street. Sometimes they happened to see each other, and other times Detective Masterson went looking for him. These encounters were not recorded or memorialized because they were informal, but each encounter was entered into the chronological record. (26RT 3773-3775, 3777-3782.) During one encounter, Witness One said he had been threatened, so they discussed relocating him for his safety. (26RT 3783-3784, 3787.)

Detective Masterson opined that in a case involving the Mexican Mafia, a prosecution witness was in the greatest danger just before the trial started. Prior to trial, since December 3, 1999, Witness One was protected by a platoon of Metro Division police officers, who had extensive training. Detective Masterson believed these extra measures were needed to protect Witness One. (26RT 3789-3792.)

The parties stipulated that opening argument began on December 13, 1999. (26RT 3794.)

THE PENALTY PHASE

A. The Prosecution

On April 4, 1991, Jorge Lucho was working at a gas station in Carson. Shortly after midnight, Lucho was walking home on Pacific Coast Highway. Appellant blocked Lucho from walking, threatened him with a pointed screwdriver, and demanded his wallet. Appellant pressed the screwdriver against Lucho's stomach and neck. Lucho gave appellant his wallet, which contained Lucho's personal papers and one dollar. Appellant threatened to kill Lucho if he did not have more money. Lucho escaped by running away. Police officers arrived at Lucho's home, and Lucho told them what happened. Later the same morning, Lucho was taken to a location in a patrol car, where he identified appellant as his robber. (30RT 4399-4403.)

Officer Celia Komathy interviewed Lucho about the robbery. (30RT 4405-4406.) Officer Komathy asked for a K-9 unit, an airship, and extra patrol officers to set up a perimeter. Appellant was apprehended 10 to 20 minutes later. Officer Komathy saw appellant behind a car. Another officer ordered appellant to stop, but appellant ran away and jumped over a fence. Appellant was found hiding in a shed underneath a mattress. A sharp metal weapon was found next to appellant. (30RT 4407-4409.)

Forensic print specialist Peter Valverde verified that appellant's fingerprints were the same as those on an eight-page document from the California Department of Corrections bearing the number E99658. (30RT 4412-4414.) When Detective Winter interviewed appellant in the instant case, he said that he was born on March 6, 1970. (30RT 4415-4416.)

Nathan Reynolds was the custodian of records for the California Department of Corrections. Reynolds identified a "969(b)" packet showing appellant had been convicted of second degree robbery, possession of cocaine, possession of a deadly weapon by a prisoner, and assault with a deadly weapon with great bodily injury. Appellant committed robbery and cocaine possession, in two separate cases, before being sent to prison. Appellant was first sentenced on May 24, 1991. On June 12, 1991, appellant was received by the California Department of Corrections at Chino State Prison. On February 5, 1992, appellant was received at Pelican Bay State Prison. On February 2, 1996, he was received at Centinela State Prison. On November 27, 1996, appellant was received at Calipatria State Prison. Appellant was paroled to Los Angeles County on January 10, 1997. (30RT 4423-4428.)

In June 1998, Los Angeles County Sheriff's Deputy Chad Millan worked in the Men's Central Jail on his days off from his regular duties. Deputy Millan was a "prowler," meaning that he handled inmates on the floor. On June 1, 1998, Deputy Millan and other officers searched appellant's cell. (30RT 4435-4436, 4438.) At least two jail-made weapons were found in his cell. According to Deputy Millan, inmates commonly secreted contraband in their rectums, and appellant was suspected of doing so. Appellant was escorted to the hall, where he was ordered to strip down to his underwear, squat down, and cough. (30RT 4438-4440.)

Appellant pulled his underwear to his knees, but otherwise refused to comply. Appellant started looking around. The officers told appellant to

take out whatever was in his buttocks and drop it on the floor. Appellant continued to look around. Eventually, appellant took a long object from his buttocks and brought it around to his front waist area. Appellant began peeling away a layer of white paper. Appellant repeatedly refused to drop the object, so Deputy Millan sprayed him with "pepper spray." It had no apparent effect on appellant. Appellant turned away, but another officer sprayed appellant. (30RT 4440-4442.)

Appellant ran down the hallway, grabbed an inmate worker, and started stabbing him in the chest. Deputy Millan caught up to appellant and kicked him in the head. The inmate worker ran away. Appellant turned around and faced Deputy Millan. Appellant said, "Fuck you, punk," charged at Deputy Millan, and then cut or stabbed him three times with the blade. Appellant stabbed him in the left rib area twice and the knee once. Deputy Millan received five stitches to his rib area and four to his knee. He was off duty for a "couple of days." (30RT 4442-4444.) Deputy Millan identified the shank appellant used: a sharpened fork and a half inch piece of metal wrapped in toilet paper with a string on one end. The toilet paper and string acted as the handle of the shank. Appellant also had the finger of a latex glove, which was contraband because it was used to hide weapons or drugs in the rectum. (30RT 4444-4448.) Deputy Millan was Mexican-American. (30RT 4449.)

Los Angeles County Sheriff's Deputy Timothy Vanderleek worked at the Men's Central Jail. On November 20, 1999, he responded to a disturbance in one of the six-man modules. Deputy Vanderleek entered the module through a large sliding door. Inmates yelled derogatory comments. The module was very loud. Both televisions were on. Deputy Vanderleek unplugged one television and then the other. As Deputy Vanderleek was

leaving the module, appellant threw urine on his chest, neck, and face.[27] Deputy Vanderleek explained this was a common attack in some areas of the jail, and was known as "gassing." (30RT 4454-44456.)

Los Angeles County Sheriff's Deputy Frank Montoya worked in the Men's Central Jail as a module officer in the high power discipline module. On December 14, 1999, appellant was housed in that module. After returning from court, appellant walked by Deputy Montoya's office. Deputy Montoya noticed appellant was carrying a large bag of candy and other store items, which were not allowed in the high power discipline module. Deputy Montoya confronted appellant and advised him that he could not have store items because he was being disciplined. Deputy Montoya offered to store the items until after appellant was through being disciplined. (30RT 4459-4462.)

Appellant became very angry and shouted profanities at Deputy Montoya. Appellant said he would not give up his items and walked away. Deputy Montoya grabbed the bag of items, but appellant did not let go. Appellant turned around and tried to head butt Deputy Montoya, but his head landed on Deputy Montoya's shoulder. Deputy Montoya wrestled appellant to the ground. Appellant said: "You fucked up, Montoya. You fucked up. I'm going to kill you. I'm going to kill you and I'm going to kill every deputy here." (30RT 4462-4463.)

On December 15, 1999, Deputy Montoya locked appellant in the shower area. When appellant was done showering, Deputy Montoya approached appellant very carefully. Appellant's hands were out of view, so Deputy Montoya told appellant to turn around and put his hands behind his back so he could be handcuffed. Deputy Montoya was concerned about

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[27] At trial, appellant said: "You're a fucking liar, punk. Stop lying, man." (30RT 4456.)

appellant's threats and believed appellant might have a weapon. (30RT 4463-4465.)

Appellant tried to strike Deputy Montoya through the bars. Deputy Montoya moved his head and stepped back. Appellant had a plastic comb with the teeth removed and a razor blade fixed to it "like a slashing instrument." The razor came from a plastic disposable razor inmates were given before showering. Appellant would have slashed Deputy Montoya in the face or neck if the deputy had not moved his head and backed away. Afterward, appellant broke the weapon and threw it down the shower drain. Appellant said "fuck you, puto," and threatened to kill Deputy Montoya. Appellant threatened he would get Deputy Montoya later, or attack a slower deputy. (30RT 4465-4466.) Deputy Montoya was Mexican-American. "Puto" was a Spanish derogatory term. (30RT 4467.)

Los Angeles County Sheriff's Deputy Keith Holly worked as a prowler at the Men's Central Jail. On December 20, 1999, Deputy Holly was assisting with a discipline hearing for appellant. Deputy Holly and Sergeant Spiel went to appellant's cell. After giving appellant a chance to respond to the charges against him, appellant was found guilty, and told he was sentenced to a 30-day loss of privileges. (30RT 4472-4475.) Appellant said: "Fuck this discipline time. I should have fucking slashed Montoya's throat when I had a chance." Appellant also said: "Just wait until those fucking deputies take me to court and I'll slash one of those fuckers." (30RT 4476.) Deputy Holly knew that appellant had attacked Deputy Montoya and took appellant's threats seriously. (30RT 4476-4477.)

B. The Defense

Michael Picket worked for the California Department of Corrections as a regional administrator who supervised the wardens of 12 prisons in Northern California, including Pelican Bay. Picket had worked for the

California Department of Corrections for 31 years. His jobs included correctional officer, correctional sergeant, parole field agent, parole field agent supervisor, criminal investigator, associate warden, chief deputy warden, and the warden of several prisons. His duties as regional administrator included security conditions for inmates, guards, and other prison employees. (31RT 4500-4505.)

Picket explained that each California prison was classified by a number indicating the level of security: level one for minimum security; level two for minimum security with "a bit higher" security; level three for medium security; and level four for maximum security. The State of California had 33 prisons. Of these, 10 were classified level four, including prisons at Pelican Bay, Susanville, Salinas Valley, Corcoran, Calipatria, and Tehachapi. Prisoners were classified with a number system based on the inmate's background, type of offense, length of sentence, in-custody behavior in California Department of Corrections institutions and other institutions. The classifications were one through four. (31RT 4506-4507.)

There were two different types of level four prisons. The lower level four prison, for "close" inmates, was a single building which contained 100 cells and had a large open day room. These inmates took meals in a large dining room with several hundred inmates. They could work, attend school, or attend vocational training. They could recreate in the yard and have face-to-face visitor contact. A higher level four prison, for maximum security, had smaller sections: two contained 20 cells, and a third section contained 24 cells. These sections were smaller and walled off from each other. Inmates in the smaller sections took meals in a small dining room adjacent to their sections. Their movement was restricted, they had fewer program privileges, and remained in their cell 23 hours a day, and had one hour to recreate with other maximum security inmates. (31RT 4507-4513.)

Level three and level four prisons had armed posts inside the prison's perimeter. (31RT 4515.)

Three level four prisons had security housing units within the prison, which were used to segregate inmates for violent crimes, possession of illegal weapons, or dealing narcotics. Depending on the conduct, inmates were placed in administrative segregation for various periods of time. (31RT 4513-4514.) Gang members could be placed in administrative segregation for an indeterminate term. (31RT 4514-4515.) Inmates were allowed family visits, but they were separated by a Plexiglas partition. (31RT 4527, 4533.)

Control booth officers guarding the security housing units were "armed with lethal weapons." Inmates in the security housing units had daily contact with the staff who gave inmates meals, and medical staff for medical assessments regarding minor health problems. These inmates would be escorted to any other part of the prison. Inmates were chained or shackled while being escorted by guards without firearms. (31RT 4515-4516, 4524-4526, 4532, 4534, 4540.) Meals were placed into the inmate's cell through a small opening, so the main door did not have to be opened. Assaults still occurred under these conditions. (31RT 4517, 4525.) A substantial portion of violent crimes were committed in the security housing units. (31RT 4530.)

There where approximately 160,000 inmates in California's 33 prisons. The statistics for 1989 indicated there were over 10,000 incidents of assaults on staff, assaults on inmates, homicides, suicides, and narcotic seizures. The majority of incidents were assaults against staff or inmates. A disproportionally higher amount of incidents occurred in level four close conditions. There were five homicides in 1989, and Picket guessed most of these homicides occurred at a level four prison. (31RT 4521-4523, 4529-4530.)

According to Picket, appellant would be placed in a level four prison, probably in the maximum security section. (31RT 4517-4518.) Picket opined that an inmate sentenced to life without the possibility of parole who attacked a sheriff's deputy sheriff multiple times while in jail would likely be put into a secure housing unit. (31RT 4519-4520, 4537-4538.) Based on his review of appellant's convictions and his behavior in county jail, Picked opined that appellant would be sent to a secured housing unit at Corcoran or Pelican Bay. (31RT 4523-4524.)

Picket opined that Mexican Mafia inmates housed in a secured housing unit at Pelican Bay still used a communication system to control the behavior of inmates under the Mexican Mafia's control. Prison staff routinely intercepted communications, but communications still got through to inmates in the general population. Murders and violent assaults had been ordered by Mexican Mafia members from the secured housing units. (31RT 4530-4532.)

On a daily basis, staff members would be within an arm's length of inmates housed in the secured housing units. Assaults occurred when shackled inmates were escorted to another part of the prison. Inmates made weapons used for slashing or stabbing. (13RT 4532-4533.) Staff members had been assaulted with prison-made weapons while serving meals to inmates in the secured housing units. Attacks on staff were fairly common. (31RT 4534.)

In 1999, there were 200 incidents of inmates assaulting staff at the medical facility at Vacaville, 195 at Pelican Bay, 168 at Corcoran, and 144 at California State Prison at Sacramento. There were 776 assaults on staff and inmates at Pelican Bay, 698 at Corcoran, 584 at the California State Prison at Sacramento, 552 at Salinas Valley State Prison, 476 at Tehachapi, and 474 at the medical facility at Vacaville, which housed inmates with severe psychiatric problems. (31RT 4535.)

Appellant and his sister, Mercedes Sanabria, had seven other siblings. Appellant had three children: Ruben, who was 11 years old; Richard, who was 10 years old; and Coreena, who was nine years old. Appellant's children were sitting in the courtroom. Sanabria and the children had visited appellant during the three years he had been in jail. According to Sanabria, appellant's children loved him "very much." (31RT 4542-4544.) Appellant's family loved him very much. Sanabria told the jury "[t]hat despite what [her] brother has done, we are real sorry, but we all love him, and we just don't want to see him to be executed." (31RT 4545.)

ARGUMENT

I. APPELLANT'S CONVICTION FOR THE FIRST DEGREE MURDER OF RAUL LUNA IS SUPPORTED BY SUBSTANTIAL DIRECT, CIRCUMSTANTIAL, AND FORENSIC EVIDENCE

Appellant's first claim on appeal is that the evidence was insufficient to support his conviction for murdering Raul Luna in the first degree. (AOB 42-73.) Appellant's first claim should be denied. Appellant's conviction for first degree murder was supported by substantial evidence that appellant was a principal to Luna's murder. The jury's "not true" finding that appellant personally used a firearm to kill Luna makes no difference because the jury could convict appellant, either as the shooter or the aider and abettor, and the jurors did not have to be unanimous as to any specific fact supporting his conviction. For the same reasons, it was proper for the trial court to deny dismissal of count 8, for the jury to sentence appellant to death for Luna's murder, and for the jury to consider Luna's murder in sentencing appellant to death for murdering Patel.

A. Standard of Review

> "To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value,

> from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."

(*People v. Jurado* (2006) 38 Cal.4th 72, 118, quoting *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

In doing so,

> [a] reviewing court may not substitute its judgment for that of the jury. It must view the record favorably to the judgment below to determine whether there is evidence to support the [verdict], not scour the record in search of evidence suggesting a contrary view.

(*People v. Ceja* (1993) 4 Cal.4th 1134, 1143, citing *People v. Perez* (1992) 2 Cal.4th 1117, 1126; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) As this Court has observed, an appellate court may not "reweigh evidence or reevaluate a witness's credibility." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Even

> "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."

(*People v. Guerra*, *supra*, 37 Cal.4th at p. 1141, quoting *People v. Maury* (2003) 30 Cal.4th 342, 403.)

If a reviewing court determines

> that a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15 of the California Constitution [citation].

(*People v. Memro* (1995) 11 Cal.4th 786, 861.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) This Court has defined "deliberate" as "'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Memro, supra*, 11 Cal.4th at pp. 862-863.)

B. Substantial Evidence Established That Appellant Was Guilty of Murdering Luna in the First Degree

Appellant's conviction for the premeditated murder of Luna is supported by ample direct, circumstantial, and forensic evidence, and when the entire record is reviewed in the light most favorable to the prosecution, this evidence leads ineluctably to the conclusion that appellant's first claim on appeal should be denied.

Rudy, Luna's brother, provided direct evidence highly relevant to the circumstances of his brother's murder, and established important facts supporting appellant's conviction. Shortly before Luna was murdered, someone pulled a car in front of Luna's home and stopped, a car door was opened and closed, and then the car was driven away. (13RT 2057-2059.) Minutes after the car was driven away, the killers returned to Luna's home on foot. (13RT 2057-2059.) One killer told the other: "There's somebody in there[.]" Afterward, the killers found Luna, one exclaiming: "He's here." Immediately Luna exclaimed, "Oh, shit," and then Luna was killed by a single shotgun blast to the head, (13RT 2060-2061) while the muzzle was 6 to 12 inches from his head (11RT 1801-1804, 1807-1808). An unspent shotgun cartridge was lying about 15 feet from Luna's body. (12 RT 1701-1703.) From these facts showing planning and a preconceived manner of killing, a reasonable fact-finder could conclude

that the killers used a car to hunt down Luna with the premeditated and deliberate intent to kill him with a shotgun.

Under these circumstances, the question remains whether appellant was one of the principals to Luna's murder. The answer is yes. The prosecution presented direct, circumstantial, and forensic evidence that overwhelmingly established appellant and a coperpetrator murdered Luna in the first degree.

The jurors could easily infer that the killers used the abandoned Oldsmobile when they tracked and murdered Luna. The Oldsmobile had been abandoned around the time Luna was killed: the engine was warm and the tires wet. The car was left in a highly unusual state: late at night with the windows down and the key in the ignition. (13RT 2082-2085.) Perhaps most importantly, a bag of unspent 12-gauge shotgun shells was found in plain sight inside the Oldsmobile. (11RT 1703-1706, 1710.) These factors, taken together, show that this particular Oldsmobile was used by Luna's killers.

The jury could also easily infer that appellant was one of the killers who arrived in the Oldsmobile. Appellant's fingerprints were on the roof, the exterior the front doors, the exterior of the driver's window, and the rear view mirror of the Oldsmobile, which was left within walking distance, 150 to 200 yards, from Luna's house. (11RT 1700-1703; 13RT 2091-2094, 2009-2107, 2099-2107.) The location of appellant's fingerprints showed that appellant was the driver (driver's side prints, rear view mirror print, and roof print) or perhaps the passenger (passenger side print and roof print). In the face of this evidence, this Court "must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise[.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419, internal quotations and citations omitted.)

As mentioned above, an unspent 12-gauge shotgun cartridge was found about 15 feet from Luna's body. (11RT 1701-1703.) This spent cartridge was fired from the same shotgun used to kill Acosta, Dunton, and Escareno. (18RT 2745-2749.) Witness One saw this shotgun being delivered to appellant. Moreover, Witness One helped appellant saw off the barrel, and Rubin, the firearms expert, opined that the five-inch metal tube recovered from Dunton's home could have been part of a shotgun barrel. (18RT 2749, 2761.) Accordingly, a reasonable fact-finder could conclude that appellant had the murder weapon at the time of the killing and that appellant, or his coperpetrator, killed Luna with that shotgun.

Additional evidence supports the jury's verdict. Appellant was identified fleeing from the area where Luna was killed. Owens heard a gunshot. Within five to ten minutes of the gunshot, appellant ran up to Owens, who was a complete stranger, and asked him for a ride out of the area. When Owens denied owning a car, appellant continued running away. (14RT 2180-2184.) Owens identification was based on observing appellant for about 20 seconds (14RT 2185-2187; 15RT 2327), so Owens' identification was reliable. Orr provided additional evidence that someone was running through the area where Luna was killed. (13RT 2068-2071, 2074-2075-2078.)

The evidence proving appellant murdered Luna continued to accumulate even after he was seen fleeing. After Luna was killed, Luna's telephone was used to call Dunton's apartment, where appellant had been staying for about a month. Before that, between the hours of 12:14 and 1:30 a.m., Luna's telephone was used to make five telephone calls. (14RT 2158-2160.) The first two calls were to paging numbers, the third and fourth were to cab companies, and the fifth call was to the Holland Hotel. (14RT 2167-2170.) All of these telephone calls have a common theme: the caller wanted to get away from the area where Luna was murdered, either

by taxi or a ride, and the caller wanted to find a place to stay for that night. When these desperate attempts failed, the caller attempted to reach somebody at Dunton's home at 5:00 a.m. (14RT 2171-2173.) This call to Dunton's residence is additional circumstantial evidence that appellant acquired, used, and kept Luna's telephone after killing him. (11RT 1740; 14RT 2150-2152.)

Appellant points to potential reasons the jury would have discredited Witness One[28] (AOB 56 fn. 14), as well as Owens' identification (AOB 53-55), but this Court cannot "substitute its judgment for that of the jury" as to the credibility or reliability of Witness One, Owens, or any other witness at appellant's trial (*People v. Ceja*, *supra*, 4 Cal.4th at 1143), even where a witness's testimony "'is subject to justifiable suspicion do not justify the reversal of a judgment[.]'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1141, quoting *People v. Maury*, *supra*, 30 Cal.4th at p. 403.)

Appellant also complains that appellant's possession of Luna's telephone, when considered alone, is insufficient to show he took Luna's telephone when he was murdered. (AOB 55-58, 62.) However, "'[c]orroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.'" (*People v. Williams* (2008) 43 Cal.4th 584, 636, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1271; see also *People v. Garrison* (1989) 47 Cal.3d 746, 773 [evidence the defendant was in possession of property stolen from the victim, less than 24 hours after the murders, corroborated the accomplice's testimony].) Here, appellant's possession of Luna's telephone further proves that appellant murdered Luna, and when viewed in

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[28] Witness One was not an accomplice to this crime, as he was in the Escareno murder, so his testimony did not need corroboration, even though there was overwhelming evidence of appellant's guilt based on all of the reasons discussed above.

light of other highly incriminating evidence such as his fingerprints, his possession of the murder weapon, and the identification testimony. Certainly, the jury had more than appellant's possession of the stolen telephone to connect him to the murder. (See *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1304.)

Appellant claims there was insufficient evidence that he acted as an aider and abettor in Luna's murder. Appellant is wrong. It is well settled that "an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

> It matters not that jurors may disagree over the theory of the crime, for example, whether the situation involves felony murder or premeditated murder. Nor does it matter that they disagree on the theory of participation, for example, whether there was direct participation or aiding and abetting or coconspiracy.

(*People v. Vargas* (2001) 91 Cal.App.4th 506, 558.)

Here, appellant and a coperpetrator drove the Oldsmobile to Luna's home, stopped for a while, and drove away. They returned on foot, searched for Luna, found him, and killed him. The perpetrator had appellant's shotgun, and there were shotgun shells displayed openly in the abandoned Oldsmobile. This is substantial evidence that appellant and a coperpetrator acted in concert with the intent to murder Luna. (See *People v. Loza* (2012) 207 Cal.App.4th 332, 361 ["Although the evidence against Jeanne was circumstantial, it is sufficient to support a finding that Jeanne aided and abetted John in committing a premeditated murder."].)

Appellant points to other unlikely, but conceivable, reasons he might not have shared the shooter's intent, assuming he was not the shooter. (AOB 63-68.) Appellant's points are irrelevant because the test for substantial evidence on appeal is whether a reasonable fact-finder could conclude beyond a reasonable doubt that a defendant aided and abetted murder, not whether there were other facts supporting the opposite conclusion. (*People v. Gonzales* (2011) 51 Cal.4th 894, 941 [a reviewing court presumes every fact supporting the judgment which a fact-finder could reasonably deduced from the evidence]; *People v. Johnson* (1980) 26 Cal.3d 557, 578 ["We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable factfinder could find the defendant to be guilty on the theory presented."].)

Appellant relies, in part, on the jury's not true finding to the allegation that appellant personally used his shotgun to murder Luna. (AOB 60-62.) However, the jury's finding makes no difference in this case. While an aider and abettor "shares the guilt of the actual perpetrator," the mental state necessary for conviction is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) "More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918-919.) Thus, whether appellant was the shooter, or aided and abetted the shooter, he was a principal to Luna's murder and "it does not matter if the jurors disagree[d] about any facts proving the defendant's guilt, even if based on differing theories." (*People v. Briscoe* (2001) Cal.App.4th 568, 591, italics added, citing *People v. Davis* (1992) 8 Cal.App.4th 28, 40-41; see also *People v. Edwards* (1991)

54 Cal.3d 787, 824 [a jury need not agree on which acts constituted lying in wait charged as a special circumstance].)

The material facts in *People v. Garrison*, *supra*, 47 Cal.3d 746 are almost identical to the facts in the instant case. In *Garrison*, the jury found the defendant guilty of murder, but failed to reach a verdict as to personal use allegations. This Court sustained the murder conviction because there was evidence that the defendant was the shooter, and evidence he was not, which evidenced "that the jury determined that both [coperpetrator] and defendant were jointly involved in the criminal activity but could not decide beyond a reasonable doubt which one had pulled the trigger." (*Id.* at p. 782.)

> Five years later, this Court sustained a murder conviction where the jury . . . may not have been able to decide beyond a reasonable doubt whether defendant or [the coperpetrator] actually wielded the knife, but was convinced beyond a reasonable doubt that, either way, defendant was guilty of . . . murder.

(*People v. Santamaria*, *supra*, 8 Cal.4th at pp. 919-920.) This Court cited with approval a Court of Appeal case using the example of two robbers in masks. One acts as a lookout while the other uses a gun to rob the store clerk. Some evidence shows that either defendant could be the shooter. As the defendant was guilty of robbery under either theory, it would be "absurd" to make all 12 jurors agree on the defendant's role. (*Id.* at p. 920.) "Equally absurd would be to let the defendant go free because each individual juror had a reasonable doubt as to his exact role." (*Id.* at p. 920 fn. 8.)

Likewise, in the instant case, the jury quite rationally found appellant was guilty of first degree murder, but rejected the personal use allegation because they could not determine beyond a reasonable doubt that he fired the shotgun. Accordingly, it would be absurd to overturn appellant's

murder conviction based on the jury's not true finding that appellant personally used a firearm.

For the reasons discussed above, appellant's conviction for murdering Luna in the first degree is supported by substantial evidence that therefore did not contravene state law, the state constitution, or the federal Constitution. For the same reasons, the trial court properly denied appellant's motion to dismiss the charges involving Luna.

Finally, the jury properly sentenced appellant to death for Luna's murder (count 8), and properly considered Luna's murder when it sentenced appellant to death for Patel's murder (count 3). A determination of an invalid conviction or special circumstance is not prejudicial per se, but subject to harmless error analysis. (*People v. Sanders* (1990) 51 Cal.3d 471, 521.) "The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors . . . and this [C]ourt is in accord. (*Id.*, citing *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235] and *People v. Silva* (1988) 45 Cal.3d 604, 632-636.) As discussed below, appellant has failed to establish any prejudicial error, so his sentences should be affirmed.

However, assuming some prejudicial error, appellant must show that there was no basis to impose the death penalty to obtain a new penalty phase. Each of appellant's murders were so brutal and senseless there is no reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole for the Luna and Patel murders. (*People v. Roberts* (1992) 2 Cal.4th 271, 327; see *People v. Hillhouse* (2002) 27 Cal.4th 469, 512 [reversal of the penalty not required where jury considered invalid conviction for kidnapping for robbery, felony-murder theory, and felony-murder special circumstance]; *People v. Silva*, *supra*, 45 Cal.3d at p. 632 [death penalty upheld where this Court found three of four special circumstances were invalid].)

Thus, even assuming the jury should not have considered Luna's murder, appellant has failed to show a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole. The jury selected the death penalty for the Patel homicide based on the felony-murder rule as well as premeditation. Thus, even if Luna's murder was not considered by the jury, appellant would have still been eligible for the death penalty based on murder convictions as to Patel, Acosta, and Dunton. Accordingly, appellant is not entitled to a new penalty trial. (See *Brown v. Sanders* (2006) 546 U.S. 212, 224-225 [126 S.Ct. 884, 163 L.Ed.2d 723] [where there are one or valid special circumstances, which render a defendant "eligible for the death penalty," the consideration of an invalid circumstance is "no constitutional violation."].)

II. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS FOR KIDNAPPING, ROBBING, AND MURDERING PATEL

Appellant also claims that the evidence was insufficient to affirm his convictions for kidnapping, robbing, and murdering Patel in the first degree (counts 3-5). (AOB 74-95.) This claim should be denied because the prosecution presented substantial evidence, which amounted to overwhelming evidence, that appellant committed these crimes.

During closing argument, the prosecutor discussed the evidence showing that Patel had been kidnapped and stated: "I invite the defense to concede that Patel was kidnapped so that you don't have to spend any appreciable time on that issue. That would leave only the issue of who was the kidnapper for you to decide." (26RT 3810.) Appellant accepted this invitation, when defense counsel told the jury, "I will concede there was a robbery, I will concede it was a murder, and I will concede it was a kidnapping." Also, the defense essentially reiterated the prosecution's position stating: "The issue, as I believe Mr. Manzella concedes himself, is

whether or not [appellant] is the person that committed the [alleged crimes]." (27RT 3903.) Thus, the only disputed issue was identity. As discussed below, the prosecution presented substantial evidence from which a rational fact-finder could conclude beyond a reasonable doubt that appellant was the person who kidnapped, robbed, and murdered Patel.

The only reasonable interpretation of the evidence is that appellant kidnapped, robbed, and murdered Patel. Patel was murdered sometime after 9:00 p.m. on May 26, 2007, and sometime before 5:00 a.m. on May 27, 1997. When Patel's body was discovered, his watch, bracelet, and white Toyota Camry were gone. Witness Three and her husband returned from a vacation in Mexico around May 20, 1997. After Patel's murder, appellant sold Patel's jewelry to Witness Three and her husband.[29] The sale occurred "about a week" after Witness Three and her husband returned from a trip to Mexico. (12RT 1912-1916, 1940.)

This evidence is sufficient, by itself, to affirm appellant's convictions for kidnapping, robbing, and murdering Patel. Appellant's possession of Patel's jewelry was corroborated by the evidence described above. On appellate review the "'[c]orroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.'" (*People v. Williams*, *supra*, 43 Cal.4th at p. 636, quoting *People v. Hayes*, *supra*, 21 Cal.4th at 1271; see also *People v. Garrison*, *supra*, 47 Cal.3d at p. 773 [evidence the defendant was in possession of property stolen from the victim, less than 24 hours after the murders, corroborated the accomplice's testimony].)

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[29] On June 5, 1997, Witness Three's testimony was corroborated by her possession of the pawn slip for Patel's watch and bracelet. (12RT 1919-1922, 13RT 1968-1972.)

Additional evidence supports affirming appellant's convictions. Appellant told Witness Three, and her husband, that he had murdered the victim wearing Patel's jewelry. Appellant also admitted that he had arrived in the victim's car, and claimed that the victim's body was in the trunk.[30] These admissions provided strong evidence that appellant murdered Patel. Also, the car appellant was driving looked like Patel's Camry, and Witness Three had never seen appellant driving this car, even though he had visited her home frequently. (12RT 1917-1919, 1924, 1926.) This evidence was compelling and a rational jury could conclude beyond a reasonable doubt that appellant murdered Patel. In fact, there is no other reasonable explanation.

Appellant argues that Witness Three's identification was not corroborated and therefore is insufficient to prove appellant sold Patel's jewelry to Witness Three and her husband. (AOB 89-90.) Even assuming Witness Three's testimony was not corroborated, even though it was, this is a distinction without a difference. Witness Three was not appellant's accomplice, so her testimony did not require corroboration, and was in fact sufficient, by itself, to establish appellant sold the jewelry after killing Patel. "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury*, *supra*, 30 Cal.4th. at p. 403.) Moreover, even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

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[30] Klann determined that 1 out of 60,000 people in the general population have blood consistent with Patel's blood. (12RT 1908-1911.) This ratio proves beyond a reasonable doubt that is was Patel's blood that was spilled in the trunk of Patel's car.

Of course, the prosecution presented additional forensic, eyewitness, and circumstantial evidence. The bullet that killed Patel was fired from a .40 caliber semiautomatic pistol, and appellant was seen with this type of gun before Patel was murdered. Rodriguez gave this gun, which was found in appellant's neighborhood, to Officer Shelley, who was investigating Patel's murder. (14RT 2130-2134, 2137-2143.)

Witness One's testimony also established that appellant possessed Patel's car after he was murdered. Appellant asked Witness One to burn Patel's car and specifically told him to remove any blood still inside the trunk. However, Witness One failed to completely remove Patel's blood. On May 28, 1997, Patel's car, which was completely burned out, was discovered in San Pedro, about five blocks from Dunton's apartment. (12RT 1877-1880; 19RT 2931-2934, 2938-2939; 20RT 3039; 22RT 3229-3230, 3257-3260.) This reliable eyewitness, forensic, and circumstantial evidence also shows that appellant's convictions should be affirmed.

Witness One also established that appellant had Patel's jewelry. Appellant brought Patel's jewelry to Dunton's apartment, where he tried to sell the jewelry to one of Dunton's connections. When this "never materialized," appellant left the jewelry at Dunton's apartment.[31] (22RT 3230-3232, 3253, 3255-3258; 24RT 3529-3530.)

Witness One believed that he had burned "a murder car." Witness One's belief was well-founded. Appellant talked about killing the owner, and asked him to check for blood in the trunk of the car.[32] Witness One

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[31] Witness One could not remember how many days it was after Patel's death that appellant brought the jewelry to Dunton's house, or whether it was day time or night time. (22RT 2940)

[32] On cross-examination, Witness One said that appellant put "a hit" on him because he did not completely burn the car. Appellant asked

(continued...)

"put that together" with the fact that appellant brought Patel's jewelry and cellular telephone to Dunton's apartment. (19RT 2937-2940; 22RT 3252, 3255; 24RT 3549.)

Appellant asserts that Witness Three's testimony, if true, establishes that appellant only had Patel's jewelry "at most, from after 9:00 p.m. on May 25, to sometime before 5:00 a.m. the following day." (AOB 89-90.) This assertion is not supported by the record. It is important to understand that appellant's statement to Witness Three, that Patel was still in the trunk, does not make his statement true. Appellant could have kidnapped and later killed Patel on the freeway, and still claimed that Patel was in the trunk, even though he was not, in order to persuade Witness Three that the jewelry was real, to add bravado to his claim, or for some other reason. Thus, appellant cannot show that the sale took place within eight hours after Patel was killed.

Appellant argues that Witness Three and Witness One gave inconsistent accounts regarding the date Patel's jewelry was sold, and therefore their testimony is physically impossible or inherently unreliable. (AOB 89-90.) Even assuming that appellant is correct, which he is not, appellant could have kidnapped appellant, sold the jewelry the same night, and then dumped Patel's body on the freeway. Thus, contrary to appellant's assertion, appellant could have sold Patel's jewelry the night Patel was killed.

Even assuming Witness One recollection was inconsistent with Witness Three's recollection, the jury could rely on either witness to support the conclusion that appellant murdered Patel. Conflicting

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(...continued)
Dunton to kill Witness One, but Dunton refused to kill him. (23RT 3448-4350; 24RT 3483-3484, 3491-3492, 3511-3514, 3542-3543, 3549.)

testimony does not render either witness's testimony physically impossible or inherently unreliable. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1052; *People v. Maury*, *supra*, 30 Cal.4th. at p. 403.)

Under these circumstances, there was overwhelming evidence, and therefore there was necessarily substantial evidence, supporting the jury's conclusion that appellant was guilty of kidnapping, robbing, and murdering Patel. Accordingly, appellant's second claim on appeal should be denied.

III. THE PROSECUTION PRESENTED SUBSTANTIAL EVIDENCE THAT APPELLANT MURDERED ACOSTA AND DUNTON IN THE FIRST DEGREE BASED ON PREMEDITATION AND DELIBERATION

Appellant further claims that the evidence was insufficient to support his convictions for the first degree murders of Acosta and Dunton. (AOB 96-106.) This claim should be denied. There was substantial evidence supporting appellant's convictions for first degree murder based on premeditation and deliberation.

A. Applicable Law

Murder is "premeditated" when it is "'considered beforehand.'" (*People v. Perez*, *supra*, 2 Cal.4th at p. 1123.) Premeditation and deliberation can occur in a brief interval, and "[t]he test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.) Thus, premeditation and deliberation can occur in "a very short period of time" (*People v. Bloyd*, *supra*, 43 Cal.3d at p. 348) and may be shown by circumstantial evidence (*People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. Anderson* (1968) 70 Cal.2d 15, 25).

Three types of evidence are significant, but not exclusive, to the issue of premeditation and deliberation: planning, motive, and the manner of killing. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) However, as this Court has stated:

> Evidence of all three elements is not essential . . . to sustain a conviction. A reviewing court will sustain a conviction where there exists evidence of all three elements, where there is "extremely strong" evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill.

(*People v. Edwards*, *supra*, 54 Cal.3d at pp. 813-814, citing *People v. Hovey* (1988) 44 Cal.3d 543, 556.) Exceptions to the general rule are considered because "[t]hese three categories are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive." (*People v. Booker* (2001) 51 Cal.4th 141, 173, citing *People v. Brady* (2010) 50 Cal.4th 547, 562.)

Motive can be inferred based on "the defendant's prior relationship and/or conduct with the victim[.]" (*People v. Nazeri* (2010) 187 Cal.App.4th 1104, 1111-1112, quoting *People v. Thomas*, *supra*, 25 Cal.2d at pp. 898, 900-901.)

B. The Finding That Appellant Acted with Premeditation and Deliberation was Supported by Ample Evidence of Motive, Planning, and the Manner of Killing

Sergeant Valdemar opined that appellant had several tattoos (13RT 2040, 2042-2043, 2045-2046) which showed membership in a "Sureno" street gang and loyalty to the Mexican Mafia (15RT 2366-2368, 2429-2430, 2443). Agent Duarte opined that appellant's codefendant was an associate of the Mexican Mafia. (20RT 2971-2974.)

According to Sergeant Valdemar, the Mexican Mafia demanded absolute loyalty above anyone or anything, including law enforcement, and severely punished those who disobeyed this rule. (15RT 2381-2383.) In fact, prosecution witnesses risked death by testifying, and this risk was heightened because the gang could identify these witnesses by acquiring court documents. (15RT 2384-2385.)

Secretly recorded Mexican Mafia meetings were mainly about murder, drug dealing, and collecting "taxes." (15RT 2351-2355.) A gang member would be marked for death for robbing local drug dealers and/or failing to pay taxes. (15 RT 2378-2380.) Those marked for death were put on a "green light" list. (15 RT 2371.) Only intervention by a Mexican Mafia member, or making a large payment, *might* get a marked person off the green light list. (15RT 2380-2381.)

The record herein shows that appellant's motive for killing Dunton and Acosta was based on the Mexican Mafia's rules. Appellant, codefendant Grajeda, and the victims used hard drugs, sold hard drugs, or both, and all were bound by the rules of the Mexican Mafia. The seized "green light" lists showed the Mexican Mafia had marked Dunton and Acosta for death, evidencing an obvious motive by some under the Mexican Marfia rules to kill Acosta and Dunton, due to their failure to pay taxes or otherwise follow the rules. (See 15RT 2440-2441, 2444.) A day or so before the murders, a Mexican Mafia enforcer, Boxer, warned Dunton's of his obligation to pay taxes and became angry when Dunton refused to pay. (27RT 3847-3848.)

Moreover, appellant committed these murders with codefendant Grajeda, who was an active member of the Mexican Mafia (20RT 3021, 3033-3036; 22RT 3307; 24RT 3486-3488), which further evidenced that appellant's motive arose from the inner workings of the gang. In fact, around 1997, law enforcement authorities intercepted several green-light

lists, some recorded in voicemail, containing the names "Huero" and "Spider." (15RT 2440-2441, 2444.) Moreover, appellant committed both shootings, while codefendant Grajeda watched, showing his actions were motivated the Mexican Mafia's green light list, which involved by murdering Dunton and Acosta for their failure to pay taxes. Indeed, before Dunton and Acosta were killed, codefendant Grajeda told Dunton: "You know the rules." Appellant added: "Yeah, forward and backward." (20RT 3035.) Recognizing he had violated the rules, Dunton's last words were: "[I]f I got to go, I'm going to go like a man." (20RT 3035.)

There was also evidence Acosta submitted to the Mexican Mafia rules requiring his execution. (11RT 1742-1743.) Before killing Acosta and Dunton, appellant said, probably to Acosta: "Don't point that at me. I don't like people pointing things at me." (20RT 3035.) Yet, even though Acosta was armed, he did not fire even one shot before appellant discharged his shotgun four times. Thus, even though motive is not required to show premeditation and deliberation, the record herein provided compelling evidence of motive. (See *People v. Orozco* (1993) 20 Cal.App.4th 1554, 1567, citing *People v. Thomas*, *supra*, 2 Cal.4th at p. 519; see also *People v. Gonzales* (2011) 52 Cal.4th 254, 295 [motive shown when a gang member kills a rival in retaliation for a prior killing]; *People v. Martinez* (2003) 113 Cal.App.4th 400, 412-413 [premeditation and deliberation found where motive was gang related].)

There was also compelling evidence that appellant formed a preconceived plan to execute Acosta and Dunton. Planning is typically the most important of the *Anderson* factors. (*People v. Alcala* (1984) 36 Cal.3d 604, 627.) Planning activity involves the "facts about how and what a defendant did prior to the actual killing" and can "show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing[.]" (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-

27.) Here, planning was demonstrated when appellant and codefendant Grajeda committed the crimes together, and when both armed themselves before murdering Acosta and Dunton. (*People v. Romero* (2008) 44 Cal.4th 386, 401 [defendant's bringing of weapon to crime location demonstrates planning activity]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["That defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter."]; see *People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing a loaded gun indicated defendant had "considered the possibility of a violent encounter"].)

Finally, the manner of killing shows that appellant killed Dunton and Acosta with premeditation and deliberation. Appellant shot Acosta and Dunton from close range in the head or neck. There was no indication of a struggle. As this Court has held, an "execution-style manner of killing supports a finding of premeditation and deliberation[.]" (*People v. Romero*, *supra*, 44 Cal.4th at p. 401; *People v. Caro* (1988) 46 Cal.3d 1035, 1050, 251; *People v. Bloyd*, *supra*, 43 Cal.3d at p. 348.)

Even assuming Acosta and Dunton were not executed, premeditation and deliberation can still be partly premised on the manner of killing. Here, the shotgun blasts were at an extremely close range to the head or neck, showing appellant was focused, ruthless, and exacting when he killed the victims. (*People v. Halverson*, *supra*, 42 Cal.4th at p. 422 [victims shot in the head or neck from within a few feet]; *People v. Marks* (2003) 31 Cal.4th 197, 232, [noting the calm, cool, and focused manner of the subject shootings]; *People v. Thomas*, *supra*, 2 Cal.4th at p. 518 [the manner of the killings strongly suggested a preconceived plan where the victims were killed with close range shotgun blasts to the head]; *People v. Cruz* (1980) 26 Cal.3d 233, 245 [a shotgun blast to the face was substantial evidence of "a preconceived design and for a reason"].) Additionally, appellant rapidly shot the victims four times. (*People v. Poindexter* (2006) 144 Cal.App.4th

572, 588 [manner of killing demonstrated by three quick shots at relatively close range]; see *People v. Bolin* (1998) 18 Cal.4th 297, 332 [premeditation and deliberation does not require any extended period of time, rather, it is the extent of the reflection].)

Under these circumstances, the prosecution presented compelling evidence of motive, planning, and the manner of killing, which collectively amounted to overwhelming evidence that appellant acted with premeditation and deliberation when he murdered Acosta and Dunton. Accordingly, appellant's third claim on appeal should be denied.

IV. APPELLANT'S CLAIM WAS FORFEITED; AND IN ANY CASE, THE TRIAL COURT NEVER DENIED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION

Appellant's fourth claim on appeal is that the trial court unconstitutionally foreclosed the possibility of self-representation by telling appellant that his decision to proceed with counsel was final. (AOB 107-116.) This claim should be denied because it was forfeited and lacks merit. Appellant forfeited his claim because neither appellant nor his counsel objected to the court's comments that appellant challenges for the first time on appeal. Appellant's claim lacks merit because the trial court scrupulously, carefully, and properly followed the law by allowing appellant to exercise both of the mutually exclusive rights to counsel and self-representation prior to the beginning of trial. At no time was appellant denied a request for self-representation, and appellant never sought to represent himself after deciding to exercise his right to counsel.

A. Relevant Proceedings

On October 1, 1997, appellant was represented by Deputy Public Defender Nancy Gast, who asked for a two-week continuance of the arraignment and plea, so the Public Defender's Office could assign an attorney to handle the case. Appellant waived his right to be arraigned and

enter a plea. (1CT 41-42.) On October 6, 1997, Gast appeared again, but appellant was a "miss out." Gast informed the court that that her office had a conflict. The court ordered appellant to appear for the appointment of counsel. (1CT 44.) On October 7, 1997, appellant appeared with Deputy Alternate Public Defender Lee Rosen. Appellant waived his right to be arraigned and enter a plea. (1CT 46-47.)

On October 14, 1997, appellant appeared with Deputy Alternate Public Defender Joy L. Wilensky. Appellant pled not guilty and requested to have the preliminary hearing on November 7, 1997. (1CT 48-50.) On November 7, 1997, appellant was a miss-out. Wilensky explained that appellant was in the hospital. The court ordered appellant to appear on November 10, 1997. (1CT 52-54.) On November 10, 1997, appellant appeared with Wilensky. Appellant waived time for the preliminary hearing. (1CT 55-58.) On November 20, 1997, the case was continued. (1CT 59-62.) On January 8, 1998, the case was continued. (1CT 63-67.)

On February 26, 1998, Deputy Alternate Public Defender Patrick Thomas appeared for Wilensky and explained Wilensky was in trial. Thomas requested a continuance until March 25, 1998. (1CT 68-71.) On March 25, and April 22, 1998, appellant appeared with Wilensky and refused to waive time, but the court continued the case based on good cause. (1CT 72-77, 82-87.) On June 22, 1998, the preliminary hearing was conducted, and appellant was held to answer. (1CT 168, 171-301; 2CT 300-314.) During the middle of the preliminary hearing, appellant made a *Marsden*[33] motion to relieve Wilensky, which was denied. (1CT 266.)

On August 7, 1998, appellant appeared with Wilensky. (2CT 428.) On August 20, 1998, Wilensky filed a motion to dismiss under section 995.

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[33] *People v. Marsden* (1970) 2 Cal.3d 118.

(2CT 429-430.) On August 25, 1998, appellant appeared with Wilensky. The prosecution announced it would seek death. (2CT 432-433; 1RT 7.) On October 8, 1998, appellant moved for a continuance. (2CT 455-466.) On November 3, 1998, appellant moved to dismiss the case pursuant to section 995. (2CT 480-506.) On November 9, 1998, the prosecution filed an opposition. (2CT 508-512.) On November 11, 1998, the court denied the 995 motion. (2CT 522.)

On November 23, 1998, appellant filed a motion for separate trials. (2CT 540-560.) The prosecution filed an opposition. (2CT 561-570.) On December 4, 1998, the motion to sever was denied. (2CT 580.)

On February 18, 1999, appellant sought pro per status, and the court set a hearing date for February 23, 1999. The court asked appellant to fill out the pro per form. (2CT 585.) On February 23, 1999, the court granted appellant's motion for self-representation, relieved Wilensky as counsel, ordered standby counsel to appear at the next hearing, and ordered discovery be turned over to appellant. Appellant requested advisory counsel, and the court responded that this request would be granted, after appellant filled out a form and made a knowing and intelligent waiver of his right to counsel. (2CT 592-593; 1RT 100-107.)

The trial court told appellant:

> We do have a trial date set for April [1999], but obviously you'll need some time to prepare [for] the case, yet you should be advised that you can't go back and forth on this. If you want to represent yourself, that's fine. That's going to cause a delay in the proceedings, and you can't keep switching back and fourth being represented by counsel and representing yourself.

(1RT 101.) The court asked appellant, "Do you understand that?" Appellant replied, "I understand that." The court gave appellant the pro per form to fill out. Wilensky indicated that her office could not serve as advisory counsel. (1RT 101-102.) Appellant completed the paperwork

and acknowledged that he signed the form. Appellant indicated that he had no questions regarding the information in the form. (1RT 103.)

The court advised appellant that he would be facing a trial where the prosecutor was educated in the law, and that appellant would have to abide by the rules of trial and would not get any special allowances, either in the presentation of evidence or making objections to the prosecution's case. Appellant stated that he understood. (1RT 104.) The court warned appellant that he could not appeal based on his own representation, but could appeal if he was represented by counsel and counsel made a "big mistake" causing prejudice. Appellant stated he understood twice. The court warned appellant he would only get two hours a day in the law library subject to restrictions at the prison. Appellant stated he understood. Appellant indicated that he understood the consequences of a conviction. The court found that appellant made a knowing and voluntary waiver of his right to an attorney and advised appellant that he would have advisory counsel for consultation. Appellant stated he understood. Wilensky was relieved as counsel. (1RT 105-107.)

On February 26, 1999, Wilensky came to court with bar panel attorney Daniel Nardoni, who indicated he had yet to determine if he could take the case. Wilensky provided a confidential discovery list to Nardoni and appellant, as well as a sealed copy for the court. Wilensky indicated that the only missing discovery was the murder book, which Wilensky believed would be turned over the following week. (2CT 594-597; 1RT 113-114.)

The court addressed appellant about his pro per status, stating: "I do know you've run into some difficulties, Mr. Gomez, about maintaining pro per status. I don't know what's going to happen out at the jail, but I did get a report of an attempted murder of one of the deputies at the jail, so they may not give you pro per status out there." (1RT 115.)

On March 10, 1999, appellant relinquished his pro per status and Nardoni was appointed as appellant's counsel. (2CT 598.) The court told appellant, "I told you before you can't switch back and fourth." Appellant replied, "I know that." The court stated, "I'm going to hold you to this kind of change." (1RT 188.) The court also told appellant: "All I'm saying is I'm not going to let you bounce back and forth. You have a right to represent your self, I recognize that and gave that to you, and as this moment you do represent yourself." (1RT 119.) The court asked appellant, "So at this point you understand that if I'm going back, this is the final change." Appellant replied, "I understand that, yeah." Afterward, the court appointed Nardoni as appellant's counsel. Neither appellant nor Nardoni objected to the court's ruling or comments. (1RT 119.)

B. Appellant's Claim Was Forfeited Because Neither Appellant Nor Nardoni Objected or Raised Any Concern About the Trial Court's Comments

In *People v. Lancaster* (2007) 41 Cal.4th 50, Lancaster claimed his rights to "due process and self-representation under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution were violated when the trial court 'compelled' him to relinquish his in propria persona status[.]" (*Id.* at p. 67.) This Court stated: "[b]ecause [Lancaster] never made this claim below, it is questionable whether he may properly raise it now." (*Id.* citing *People v. Jenkins* (2000) 22 Cal.4th 900, 999-1000; see *People v. Stanley* (2006) 39 Cal.4th 91, 929 [the defendant "must be found to have ultimately waived or abandoned his asserted right of self-representation" because he did not renew his request after the court denied his first motion for self-representation], citing *People v. Dunkle* (2005) 36 Cal.4th 861,. 909.)

In *Jenkins*, Jenkins made several constitutional claims, including the claim that he was denied effective assistance of counsel under the Sixth and

Fourteenth Amendments and article I, section 15, of the California Constitution. Jenkins's claims were predicated on several alleged errors by the trial court:

> (1) permitting the jail authorities to confiscate his legal materials; (2) permitting the prosecutor and defense counsel to withhold discovery; (3) improperly overruling objections and restricting defendant's questioning at the preliminary hearing; (4) denying him access to the law library, telephone, witnesses, and special jail housing; (5) denying him the effective assistance of advisory counsel; and (6) disparaging his decision to represent himself.

(*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 999-1000.)

This Court "question[ed] whether this issue [was] properly before [the Court] on direct appeal." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 999.) This assessment was made even though Jenkins "repeatedly complained to the trial court regarding the conditions of his confinement" and at times represented that due to these conditions "he was – or soon would be – unable to assist in his defense." Despite Jenkins's complaints and representations, this Court focused on Jenkins's failure to make "a motion for a mistrial or other motion in which he asked the trial court to consider and rule on the contention that he asks this [C]ourt to consider[.]" *(Ibid.)*

In the instant case, appellant failed to object or file a motion of any kind, and unlike Jenkins, appellant never personally complained about the trial court's comments regarding self-representation and the right to counsel. Appellant's final trial attorney, Nardoni, appointed *immediately after* appellant relinquished self-representation, did not make an objection, file a motion, or even mention the trial court's comments. (1RT 115-119.) Of course, appellant never challenged the court's comments by requesting self-representation. As a result, appellant offers mere speculation that the court's comments stopped him from exercising his Sixth Amendments

rights. Thus, it is unquestionable that appellant's constitutional claims were forfeited as he has failed to

> "offer any reason [for this Court] to deviate from the general rule that '[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings [in connection with relief sought or defenses asserted], where an objection could have been, but was not presented to the lower court by some appropriate method.'"

(*People v. Jenkins*, *supra*, 22 Cal. 4th at p. 1000, quoting *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444; see *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-631 [defendant who failed to object to the court's revocation of his self-represented status for failing to be ready for trial on an agreed date could not complain on appeal].) Accordingly, appellant's fourth claim should be denied because it was forfeited.

C. The Trial Court Preserved Appellant's Sixth Amendment Rights

Under the Sixth Amendment, a defendant possesses two mutually exclusive constitutional rights: the right to be represented by counsel at all critical stages of a criminal prosecution, and the right to self-representation. (*People v. Marshall* (1997) 15 Cal.4th 1, 20; *Faretta v. California* (1975) 422 U.S. 806, 807-834 [95 S.Ct. 2525, 45 L.Ed.2d 562].) As in other criminal cases, the right to self-representation applies in capital cases. (*People v. Clark* (1990) 50 Cal.3d 583, 617.) "Erroneous denial of a *Faretta* motion is reversible per se." (*People v. Dent* (2003) 30 Cal.4th 213, 217, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [104 S.Ct. 944, 79 L.Ed.2d 122]; *People v. Joseph* (1983) 34 Cal.3d 936, 948 [an error in denying a timely *Faretta* motion is reversible per se.].)

In the instant case, there was no Sixth Amendment error. Appellant was initially assigned counsel to represent him at all critical stages of trial.

This satisfied his Sixth Amendment right to counsel. When appellant asked to represent himself, the trial court granted appellant's request after being satisfied that appellant was knowingly and voluntarily relinquishing his right to counsel. This satisfied the Sixth Amendment's right to self-representation. Later on, the court granted appellant's request to relinquish self-representation and re-invoke his right to counsel, again preserving appellant's Sixth Amendment rights. After exercising both of his mutually exclusive Sixth Amendment rights, appellant chose representation by counsel rather than self-representation, and made no further request for self-representation. Accordingly, appellant's fourth claim should be denied because no Sixth Amendment violation occurred or could have occurred, as the trial court granted all of appellant's Sixth Amendment requests.

Appellant's Sixth Amendment claim is necessarily based on speculation. As discussed above, the trial court granted all of appellant's requests, and appellant never questioned or challenged the subject comments by the trial court about not going back and forth; so there is no basis for establishing error. Even if appellant had requested self-representation a second time, this Court should not speculate about the circumstances or propriety of such a request. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 171 [128 S.Ct. 2379, 171 L.Ed.2d 345] ["*Faretta* itself and later cases have made clear that the right of self-representation is not absolute."].)

Appellant relies on *People v. Dent*, *supra*, 30 Cal.4th 213. (AOB 109-111.) Appellant's reliance is misplaced. In *Dent*, a capital case, two lawyers (Miller and Maple) were appointed counsel for Dent in August 1988. Trial began in March 1991. However, the court found that, at that time, neither Miller nor Maple was prepared to try the case. (*Id.* at p. 215.) The court noted that counsel had requested many continuances and failed to appear on the record. The court expressed great concern about Dent having

a fair trial and proper representation. The court decided to release the jury, continue the case, and relieve Miller and Maple as counsel of record. The court stated:

> You must be represented by attorneys that are senior trial attorneys. And you have got to have people here to represent you. *You cannot represent yourself in this matter.* So that's what I want to do and those are the reasons that I am doing it. And these attorneys are hereby relieved as of this time.

(*Id.* at p. 216, italics added.) Dent asked to address the court. The court responded: "Mr. Dent, because of the gravity of this case, let me get some attorneys in here to talk to you and I will have the attorneys talk to you because I don't want you to say anything to me that will incriminate you in any way." Later that morning, Maple appeared and, after conferring with Dent, Maple represented that he was ready for trial, although it was unclear when Miller would be ready. The court declined to reappoint Maple or Miller. Maple relayed Dent's concern regarding the delay inherent in having two new lawyers. Maple reiterated that he was ready and that Dent wanted to proceed. Maple told the court that Dent would consent to a replacement for Miller while retaining Maple. Dent indicated this was acceptable. Finally, Maple told the court that alternatively, Dent wanted to proceed in pro per. When Maple tried to explain Dent's reasoning, the court interrupted Maple stating, "I am not going to let him proceed pro per." When Maple tried to address the court, the court stated that appellant would be prohibited from representing himself in "'a death penalty murder trial.'" Dent acknowledged that he had not previously expressed a desire to represent himself. However, Dent explained, "But if I receive two new [attorneys], I would like to go pro per." The trial judge did not speak with Dent before relieving Maple and ordering the files be turned over to the court. That afternoon, the court appointed new counsel, and Dent did not ask for self-representation again. (*Id.* at pp. 216-217.)

The facts of *Dent* support respondent's argument rather than appellant's. Unlike the trial court in *Dent*, the court below carefully explained appellant's right to self-representation and the right to counsel, allowed appellant self-representation after he had invoked this right, and ultimately permitted appellant to choose between these mutually exclusive constitutional rights when appellant chose to relinquish his pro per status. This fact alone distinguishes these cases because Dent requested but was categorically denied self-representation for improper reasons, i.e. Dent was facing the death penalty and therefore had to be represented by "senior attorneys." It is well-established that a defendant cannot be denied self-representation because he faces the death penalty, or because he will undoubtedly do a poor job defending, as the foundation of the right to self-representation is rooted in individual liberty rather than foreseeable results. Indeed, the United States Supreme Court explained that the right to self-representation "exists to affirm the accused's individual dignity and autonomy." (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 17.)

Another distinction between *Dent* and the instant case is that Dent was not responsible for any potential delay in his trial because the court dismissed his appointed attorneys. In the instant case, the trial court noted and accepted that appellant's decision to represent himself would necessarily cause some delay to transfer discovery and appoint qualified standby counsel. Also, appellant was allowed to relinquish self-representation, even after he had been warned the court would not permit him to switch "back and fourth." The court allowed appellant to switch back despite any delay that could result from appointing Nardoni as counsel. (2CT 594-597; 1RT 105-107, 113-114.)

There are other material distinctions which show the court below committed no error under the Sixth Amendment. Dent was not allowed to speak to the court, but here the court spoke directly with appellant. Dent

was not advised of his rights, but appellant was carefully advised of his Sixth Amendment right to counsel, his right to self-representation, and the consequences of self-representation. Dent was not asked if he understood his Sixth Amendment rights, but appellant expressly told the court that he understood those rights. Dent was never asked to weigh the respective consequences of electing counsel or self-representation, but appellant was expressly asked to weigh such considerations before making his final decision. Based on these reasons, *Dent* does not support appellant's claim, but rather illustrates that the court below carefully preserved both of appellant's mutually exclusive Sixth Amendment rights.

Appellant also relies on *People v. Lancaster*, *supra*, 41 Cal.4th 50. (AOB 112-114.) Appellant's reliance is misplaced.[34] This Court found the trial court comments were not a "'preemptive denial'" of his *Faretta* right" and distinguished Lancaster's case from *People v. Dent*, *supra*, 30 Cal.4th 213 and *Bribiesca v. Galaza* (9th Cir. 2000) 215 F.3d 1015, 1019), finding there was no fundamental error because there was neither an "outright denial of the right [to self representation]" nor any "improper restriction on Lancaster's ability to present his own defense[.]" (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 69-70.)

While this Court commented that the trial court should not have warned Lancaster that he needed to make "a permanent decision" at that point, this Court expressly found that the impropriety was slight and caused neither fundamental nor prejudicial error. Here, as in *Lancaster*, appellant "suffered neither" fundamental nor prejudicial error. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 70.) Indeed, appellant had been granted both the

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[34] In *Lancaster*, this Court noted that Lancaster's "claims require a discussion of the underlying circumstances at some length." Respondent relies on this Court's discussion of the relevant facts. (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 69-70.)

right to counsel and the right to self-representation. Moreover, appellant never challenged the court's comments, or thereafter requested self-representation, so the trial court never made a "final" ruling. Accordingly, the trial court's comments about appellant's *Faretta* rights did not foreclose the possibility of another change, because the court did not indicate another request for self-representation would have been summarily rejected without any consideration.

For the reasons stated above, appellant's fourth claim was forfeited and lacks merit under state law, the state Constitution, and the federal Constitution. It is also manifest that there was no prejudice to appellant. Accordingly, appellant's fourth claim on appeal should be denied.

V. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SEVER THE CHARGES, AND APPELLANT HAS FAILED TO ESTABLISH A REASONABLE LIKELIHOOD THAT HE WAS PREJUDICED BY JOINDER OF THE CHARGES

Appellant's fifth claim on appeal is that the trial court erred when it refused to order four separate trials for the Salcedo robbery, the Patel homicide, the Luna homicide, and the Dunton/Acosta homicides. Appellant sought a joint trial for the Acosta/Dunton homicides and Escareno homicide. (AOB 117-176.) This claim should be denied because appellant failed to establish below that there was a substantial danger of prejudice requiring that the charges be tried separately. In any case, there is no reasonable likelihood that appellant was prejudiced by the joinder of charges.

A. Relevant Proceedings[35]

Appellant and codefendant Grajeda were jointly accused of murdering Acosta and Dunton (counts 10 and 11), while appellant alone was charged crimes with pertaining to Luna, Patel, Escareno, and Salcedo. (2CT 414-419.)

On September 25, 1998, codefendant Grajeda sought a separate trial. (2CT 437-445.) The prosecution opposed separate trials. (2CT 446-449.)

On November 3, 1998, appellant filed a motion for severance of counts. (2CT 469-479.) Appellant sought a joint trial for the Dunton/Acosta homicide and the Escareno homicide, and separate trials for the Salcedo robbery, the Patel homicide, and the Luna homicide. (2CT 469-479.) The prosecution opposed severance of any count. (2CT 561-596.) On November 23, 1998, appellant filed his own motion for separate trials. (2CT 531-551.) The prosecution opposed the motion. (2CT 552-560.)

Subsequently, the court held a hearing addressing both motions. The court found that Luna's murder (count 8) was linked to the Dunton homicide (count 10) because appellant brought Luna's stolen cell phone to Dunton's apartment. (1RT 69-70.) Appellant conceded that the Acosta/Dunton homicides were linked to the Escareno homicide because Witness One was a "crucial witness" in both cases. (1RT 70.) Appellant's counsel addressed the motion for severance of counts, but stopped and asked the court to address the motion for separate trials. (1RT 71-73.)

The court first focused on whether to sever the counts charged against appellant. When the court found all the charges were violent crimes in the

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[35] The trial court addressed appellant's motion to sever counts (Arg. V) and appellant's motion for a separate trial (Arg. VI) during the same hearing. Some of the facts considered are applicable to both motions. Accordingly, respondent has set forth the relevant proceedings for both issues.

same class, appellant counsel stated: "Yes, I have no problem with that." The court framed the issue as whether appellant would be prejudiced by joined counts. The court found appellant would suffer no prejudice by joinder of the Salcedo robbery, and framed the issue as to whether the homicide charges should be joined. Before adjourning for the day, the court stated that both motions were "very viable," and would be further considered by the court. (1RT 75.)

At the second hearing, the court stated it had read and considered the both motions and the prosecutor's response. (1RT 76-77.) The court reiterated that counts 8 and 10 were properly joined. (1RT 78-80.) The court raised codefendant Grajeda's concern that he would "sink with the ship" if he were tried jointly with appellant. (1RT 83-84.) The prosecution pointed out that appellant and codefendant Grajeda both accused the other as the source of prejudice: Appellant complained that codefendant Grajeda was a member of the Mexican Mafia, and codefendant Grajeda complained that appellant committed numerous crimes unrelated to the Acosta/Dunton homicides. The prosecutor asserted that a jury would find them both "morally bankrupt and that neither was much worse or much better that the other[.]" (1RT 84.)

Appellant's counsel raised her concern that the prosecution intended to introduce codefendant Grajeda's extrajudicial statements[36] that

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[36] Codefendant Grajeda's statement form was attached to appellant's motion. In his first statement, codefendant Grajeda denied attending the meeting at Dunton's apartment. He denied that he was in the Mexican Mafia, even though his incarcerated uncles were members, and the name "Grajeda" is "synonymous with the Mexican Mafia." Codefendant Grajeda knew appellant, but disliked him, because he was friends with codefendant Grajeda's wife. He denied attending the meeting where Dunton and Acosta were murdered, despite the fact that he knew them both, and Acosta had repeatedly invited him to attend the meeting. (2CT 549-550.)

(continued...)

inculpated appellant Grajeda. However, the prosecutor stated Grajeda's statement would not be introduced at trial. The court held that there was "no problem" unless the prosecution tried to introduce the statement during trial. (1RT 87-90.)

The court found that appellant and codefendant Grajeda should be tried together for the Acosta/Dunton homicides. (1RT 90.) The court addressed whether any counts should be severed. The court found: none of the homicide charges was significantly stronger that the others; a strong case was not being used to support a weak case; and the homicides should be tried together because they were "close together in time and circumstance." (1RT 80-82, 90-91.) In addition, the crimes were tied "in large part" due to "the manner in which the execution took place." Further, the court found that: shotguns were used, except in the Patel homicide; Witness One would testify in the Escareno case as well the Acosta/Dunton cases; the items stolen during the robberies were similar; and cars facilitated the homicides in the Luna, Patel, and Escareno homicides. The court denied the severance motion, stating: "So I'm left with the only

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(...continued)

In codefendant Grajeda's second version, he and an unnamed uncle went to Dunton's apartment where he saw appellant, Acosta, and Dunton. Appellant and Dunton were arguing about Boxer stealing appellant's money and gun. Dunton told codefendant Grajeda about the incident. Appellant told codefendant Grajeda that he had heard that "the Grajedas" put him "on the list," and asked codefendant Grajeda if he intended to kill him. Codefendant Grajeda denied having knowledge of the list, and denied he was going to kill appellant. Acosta repeatedly asked codefendant Grajeda to attend a meeting at Dunton's apartment to discuss appellant's claim that he collected taxes for the Mexican Mafia. Acosta did not indicate whether the meeting had been called by an "M" member. According to codefendant Grajeda, he would not attend a meeting called by an "M" member. (2CT 542-543, 544-547.)

concern I really have, which is the numbers, and they are so well tied together that I think they should be tried together." (1RT 91-92.)

B. Relevant Law

The consolidation or joinder of charged offenses is the course of action preferred by the law because it ordinarily promotes efficiency. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Smith* (2007) 40 Cal.4th 483, 510.) Consistent with this mandate, section 954 allows the charging of different offenses connected together in their commission or of different offenses of the same class of crimes. (*People v. Walker* (1988) 47 Cal.3d 605, 622.) Joinder obviates the need to select an additional jury, avoids the waste of public funds, conserves judicial resources, and benefits the public due to the reduced delay in the disposition of criminal charges. (*People v. Mason*, *supra*, 52 Cal.3d at p. 935; *People v. Bean* (1988) 46 Cal.3d 919, 935-936, 939-940.)

In the instant case, it is undisputable the section 954 statutory requirements for joinder were met, because appellant was charged with murdering Luna, Patel, Escareno, Acosta, and Dunton, in the first degree with special circumstances. The only non-homicide crime was the Salcedo robbery, but that crime involved: multiple assailants; forced entry into a home; the use of a firearm; the use of assaultive or forceful behavior; stealing money from a drug dealer; an attempted forceful reentry: and threats to shoot into the house while Salcedo's wife and children were inside. This charge was properly joined because Section 954 permits joinder of all assaultive crimes against the person because they are all considered "of the same class of crimes or offenses." (See *People v. Walker*, *supra*, 47 Cal.3d at p. 622.)

Since the joinder of the counts herein was statutorily authorized, the trial court's ruling against severance in favor of consolidating the counts

must be affirmed unless appellant clearly established below that there was a "substantial danger of prejudice requiring that the charges be separately tried." (*People v. Soper*, *supra*, 45 Cal.4th at pp. 773-774; *People v. Smith*, *supra*, 40 Cal.4th at p. 510; *People v. Marshall*, *supra*, 15 Cal.4th at p. 27.) Pertinent factors on the issue of prejudice include whether: (1) evidence on the crimes jointly tried would not have been cross-admissible in separate trials; (2) certain of the charges were unusually likely to inflame the jury against the defendant; (3) a "weak" case was joined with a "strong" case, so that the "spillover" effect of aggregate evidence on several charges might well have altered the outcome of some or all; and (4) one of the charges is a capital offense, or joinder of them turns the matter into a capital case. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775; *People v. Smith*, *supra*, 40 Cal.4th at pp. 510-511; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28.) The trial court's ruling is reviewed for abuse of discretion "'in light of the showings then made and the facts then known.'" (*People v. Marshall*, *supra*, at p. 27, quoting *People v. Balderas* (1985) 41 Cal.3d 144, 171; see also *Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.) This Court has clarified that, in the context of properly joined offenses, the defendant "must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*People v. Soper*, *supra*, 45 Cal.4th at p. 774, internal quotation marks omitted.)

C. The Trial Court Acted within Its Discretion

Trial court properly denied appellant's severance motion. There was cross-admissible evidence and, in any event, none of the other factors supported the requisite showing of substantial prejudice. All four murders were equally brutal and based on reprehensible motives, so no particular murder charge was unusually likely to inflame the jury against appellant. The charges did not combine a "weak" case with a "strong" case or another weak case, and there was no danger of any "spillover" effect because the

evidence was strong in each case. Finally, the joinder of charges did not turn the matter into a capital case because each murder was already charged as a capital offense.

1. Cross-Admissibility

When the evidence underlying the charges would be cross-admissible in hypothetical separate trials of other charges, the trial court is usually justified in refusing to sever the charges as any potential prejudice is dispelled. (*People v. Lynch* (2010) 50 Cal.4th 693, 736; *People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775.) The cross-admissibility need not be complete or "two-way," as it is sufficient the evidence as to count "A" would be admissible in the trial of count "B" but not vice versa. (*People v. Alcala*, *supra*, 43 Cal.4th at p. 1221.)

There was cross-admissible evidence for all the homicide cases. Appellant made a spontaneous statement in which he mentioned about a man who had his head shot off, and two other men who were shot in the head and had their brains splattered all over the place. (13RT 2043-2045.) This statement was admissible as to all the homicides because it describes the Acosta/Dunton homicides as well as the Patel, Luna, or Escareno homicides. Witness One's testimony was relevant to all the homicide cases. He was a direct witness to the Acosta/Dunton and Escareno homicides. He saw appellant arrive at Dunton's apartment with Patel's jewelry, and appellant asked him to burn Patel's car. He also saw appellant arrive at Dunton's with Luna's cell phone. He testified that appellant brought a handgun to Dunton's apartment, which could have been used to kill Patel. (14RT 2130-2136; 20RT 3004.)

There was cross-admissible evidence between certain counts. Witness Three saw appellant arrive in Patel's car, and appellant told her that he had the victim in the truck of the car. Appellant brought Patel's jewelry to Dunton's house, connecting the Dunton/Acosta homicides with Patel

homicide. The evidence regarding the shotguns, the spent shells, and the unspent shells, linked some of the homicides together. In the Escareno homicide, shotgun pellets in the car showed shots were fired from a 12-gauge shotgun using double aught buck. (15RT 2392-2395.) Witness One testified about the shotgun called "shorty" and the sawed-off shotgun. When appellant was arrested, he had a shotgun and shotgun shells. (21RT 3098-3103.) The ballistics evidence showed that the same gun was used to kill Acosta and Dunton, and used a shotgun in every murder except Patel's murder. He also shot all of the victims in the head at very close range. These facts strongly indicating that the same person committed each crime. (*People v. Cunningham* (2001) 25 Cal.4th 926, 985 ["Because complete cross-admissibility is not necessary to justify the joinder of counts [citation], in the present case the cross-admissible evidence concerning the gun would justify such joinder."].)

In any event, cross-admissibility "is not the sine qua non of joint trials." (*People v. Geier* (2007) 41 Cal.4th 555, 575; *People v. Sandoval* (1992) 4 Cal.4th 155, 173; see also § 954.1.) The absence of cross-admissibility, by itself, does not suffice to demonstrate prejudice, since certain additional factors favor joinder and the trial court's discretion under section 954 to join the counts and deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 772-774, 779-780; *People v. Alcala*, *supra*, 43 Cal.4th at p. 1221; *People v. Geier*, *supra*, 41 Cal.4th at p, 575.) Similarly, severance is not required "merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*People v. Soper*, *supra*, 45 Cal.4th at p. 781.)

2. The Charges Were Not Unusually Likely to Inflame the Jury Against Appellant.

All the murders were equally egregious, so appellant cannot establish that any of the five murders was "significantly more egregious" than any of the others. Accordingly, no particular murder was "unusually likely to inflame the jury" against appellant. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574, internal quotations omitted.) Thus, even if this Court determines the evidence was not sufficiently cross-admissible, joinder was appropriate based on the remaining factors. (See *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 423-425 [court did not address cross-admissibility because court did not find that either charge was unusually likely to inflame the jury or that the evidence of either charge was weak].)

Appellant asserts that the Dunton, Acosta, and Escareno charges were particularly inflammatory. As to Dunton and Acosta, appellant asserts that the evidence regarding the Mexican Mafia made those murders "particularly inflammatory[.]" Appellant also claims that the Escareno murder was particularly inflammatory because of the manner his body was treated after his murder. (AOB 135-138.)

These claims lack merit. None of the murders were "significantly more inflammatory" than the others. Patel was robbed and kidnapped before he was murdered. The circumstances of his murder were horrifying. Patel was cut with a knife, put in the trunk of his own car, and brought to the freeway onramp where he was murdered. After appellant released Patel from the trunk, appellant stabbed him in the chest. Patel tried to run, even though the stab would was fatal, so he was unable to get away. Appellant executed Patel by shooting him in the head at point bank range, and then left his body to rot. Appellant's motive would send chills down the spine of any law-abiding person: appellant murdered a random stranger for jewelry of minimal value in order to buy narcotics. As this Court has

found, "'It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.'" (*People v. Holt* (1984) 37 Cal.3d 436, 450, quoting *People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Thus, the Mexican Mafia killing of two drug dealers (Acosta and Dunton) was no more inflammatory than the random killing of someone totally innocent like Patel for drug money.

The circumstances of Luna's murder were no less inflammatory than any of the other murders. Luna's murder also involved the "seriousness of the narcotics problem." Luna was a drug dealer. Appellant stalked Luna at his residence, where he lived with two brothers, and one brother's wife and son. After stopping near Luna's residence, appellant and his coperpetrator drove away, parked the car about 200 yards away, and then returned to the area outside the residence. (13RT 2057-2059.) Appellant and his coperpetrator found Luna, and appellant or his coperpetrator shot Luna's head with a shotgun while the muzzle was 6 to 12 inches from Luna's head. (11RT 1801-1804, 1807-1808.) Thus, appellant and his coperpetrator hunted down Luna, killed him in grotesque manner, and left his body outside his residence where his relatives discovered the body. Like the circumstances of the Patel murder, the circumstances of Luna's murder were not significantly more inflammatory than the others.

Escareno's murder was no more inflammatory than Patel's murder or Luna's murder. In fact, the jury could not reach a verdict for Escareno's murder, showing that the jury was unaffected by the circumstances of Escareno's murder. This result necessarily shows that Escareno's murder did not influence the jury when the jury considered the other charges.

Nor *should* a jury have been so influenced. The circumstances of the Escareno murder are very similar to those underlying Patel's murder. Appellant and Witness One decided the look for someone to rob. (19RT

2940-2941; 22RT 3265-3266.) Appellant had a shotgun. (19RT 2942; 22RT 3264; 23RT 3431-3432.) When the perpetrator saw Escareno, he mentioned "all them rings on [Escareno's] fingers." (19RT 2943.) The perpetrator followed Escareno until he parked near an apartment complex. The perpetrator and his partner parked directly behind Escareno's car. The perpetrator taunted Escareno. (19RT 2944-2946; 22RT 3266-3268.) Afterward, the perpetrator shot Escareno in the head, causing his head to come apart and leave remnants inside the car. (19RT 2949.)

This shotgun injury was no more egregious than those in the other cases. In fact, perhaps less so, because the other victims where shot in the head or neck at *point blank* or *contact* range. Unlike Patel, Escareno was not cut with a knife, kidnapped, placed in the trunk of his car, and stabbed in the chest, *before* he was shot in the head at point blank range. Both murders were motivated by the desire to buy narcotics. Moreover, as in Patel's case, the money and items taken had little value, but were nonetheless used to buy narcotics. (19RT 2951.) Patel was murdered for jewelry sold to a pawn shop for about $700. (12RT 1919-1922.) Escareno was murdered for less than $100 and "costume jewelry," which was thrown away. (19RT 2953; 20RT 3000; 22RT 3272-3273.)

Finally, Escareno's body was left more or less in the same condition as the other victims. Patel's body was left on the edge of a freeway on-ramp. Luna's was left bleeding to death in front of his home where he lived with other relatives. Dunton's and Acosta's bodies were left sprawled out in their home. Escareno's body was left in a public place where Witness One believed the body would be found. Thus, there is no appreciable difference in the manner of the killings or treatment of the bodies. Accordingly, contrary to appellant's assertion, the circumstances of the Escareno murder were not more inflammatory that any of the other murders.

3. Joinder of the Charges Did Not Combine a "Weak" Case with a "Strong" Case as the Evidence Supporting All the Offenses Was Strong or Overwhelming

The evidence supporting all the offenses was strong or overwhelming, and thus, this was not "a situation where a weak case was joined with a strong one in order to produce a spillover effect that unfairly strengthened or bootstrapped the weak case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1121.) As set forth in greater detail in the Statement of Facts, as well as Arguments I, II, and III, all of the charges were strong; none of the charges were weak.

Appellant's conviction for the premeditated murder of Luna was supported by ample direct, circumstantial, and forensic evidence. Rudy heard a car stop at Luna's residence and then drive away. Minutes later, he also heard the perpetrators return to the house on foot. (13RT 2057-2059.) Luna was killed by a single shotgun blast to the head at close range. (11RT 1801-1804, 1807-1808; 13RT 2060-2061). Appellant's fingerprints were found on several areas of a car, abandoned about 200 yards from Luna's house, with a warm engine, wet tires, the windows down, and the keys left in the ignition. (13RT 2082-2085.)

Moreover, Luna was killed with a shotgun, an unspent shotgun cartridge was found near Luna's body (11 RT 1701-1703), and a bag of unspent 12-gauge shotgun shells were left in the abandoned car (11RT 1703-1706, 1710). The unspent shell was a type of ammunition used for the 12-gauge shotgun used to kill Acosta, Dunton, and Escareno. (18RT 2745-2749.) This shotgun had been delivered to appellant. (18 RT 2749, 2761.)

Appellant was seen fleeing from the area where Luna was murdered. (14RT 2185-2187; 15RT 2327.) Luna's telephone was used to call Dunton's apartment, as well as other calls indicative of person fleeing and

seeking a place to hide. The call to Dunton's residence shows that appellant acquired, used, and kept Luna's telephone after killing him. (11RT 1740; 14RT 2105-2152, 2158-2160, 2167-2173.) Appellant's possession of Luna's telephone was additional strong evidence that appellant murdered Luna.

As to the kidnapping, robbery, and murder of Patel, the only issue was identity because appellant's counsel conceded that these crimes had occurred. (26RT 3810; 27RT 3903.) Witness One saw appellant with Patel's jewelry at Dunton's apartment. (22RT 3230-3232, 3253, 3255-3258; 24RT 3529-3530.) Moreover, appellant sold Patel's jewelry to Witness Three and her husband. (12RT 1912-1916, 1940.) Appellant told Witness Three and her husband that he had murdered the victim wearing Patel's jewelry. Appellant arrived in the victim's car and claimed the victim's body was in the trunk. (12RT 1917-1919, 1924, 1926.)

The bullet that killed Patel was fired from a .40 caliber semiautomatic pistol, and appellant had that type of gun. Appellant had possession of Patel's car, and told Witness One to burn it and remove the blood (which was Patel's). Patel's burned out car was found about five blocks from Dunton's apartment. (12RT 1877-1880; 19RT 2931-2934, 2938-2939; 20RT 3039; 22RT 3229-3230, 3257-3260.) Appellant talked about killing the owner of that car, and in addition to Patel's jewelry, appellant brought Patel's cellular telephone to Dunton's apartment. (19RT 2937-2940; 22RT 3252, 3255; 24RT 3549.) Under these circumstances, there was overwhelming evidence supporting the jury's conclusion that appellant was guilty of kidnapping, robbing, and murdering Patel.

As to Escareno, Witness One described the circumstances of his murder, and identified appellant as the shooter. And there was strong evidence corroborating Witness One's testimony. Witness One took the victim's rings, and when Escareno's body was found, it appeared that rings

had been removed from his hand. (19RT 2953, 1573-1575; 20RT 3000; 22RT 3272-3273.) Escareno's body was found in the shopping center, where Witness One said he left the body. (20RT 3000-3003; 22RT 3275-3276.) Multiple witnesses heard gunshots around the time Escareno was murdered. (13RT 1980, 1997-2001, 2006-2013.) When Escareno's car was found, there was blood in the interior, consistent with Witness One's description of the shooting. (9RT 1572-1573, 1582.) There was also firearm evidence linking appellant to the shooting. (15RT 2393-2397.) Finally, appellant spontaneously told Detective Winter things had "gone crazy" in the harbor area because three men had been shot in the head. (13RT 2043-2045.) Thus, the evidence that appellant murdered Escareno was strong.

Finally, there was very strong evidence that appellant murdered Acosta and Dunton. In Argument III, *ante*, appellant merely argued that there was insufficient evidence to show he killed Acosta and Dunton *with premeditation and deliberation.* There was evidence that appellant was in trouble with the Mexican Mafia. (20RT 3006-3008; 22RT 3285-3287; 24RT 3541-3542.) After Boxer took appellant's gun, appellant acquired a shotgun because it was "a matter of life and death." This shotgun was used to murder Acosta and Dunton. (20RT 3010; 22RT 3290-3291-3294.) Codefendant Grajeda complained that appellant and Acosta were not paying taxes. (16RT 2592-2595, 16 RT 2610-2614; 17RT 2718.) Appellant was "nervous" about the situation, and spoke directly with codefendant Grajeda before Acosta and Dunton were murdered. (16 RT 2601-2604, 16 RT 2609-2610.) Witness Two, and his wife, corroborated that codefendant Grajeda was going to deal with the failure to pay taxes. (16RT 2614-2615; 18RT 2769-2770; 19RT 2899-2902, 2906-2907.) Acosta's son observed that he was pacing back and forth before leaving for a meeting. (16RT 2509-2510, 2517.)

Witness One observed that appellant had the sawed-off shotgun, and codefendant Grajeda had the shotgun they called "Shorty." (20RT 3034.) Appellant and Grajeda told Acosta and Dunton that they had violated the rules, and then appellant shot Acosta in the neck and Dunton in the head, chest, and arm. (20RT 3021, 3033-3036; 22RT 3307; 24RT 3486-3488.)

The police seized the shotgun when appellant was arrested (Peo. Exh. 50), which was loaded with six live rounds. (21RT 3098-3103.) Appellant admitted he was the last person to see Acosta and Dunton before they were killed. (16 RT 2525-2526.) Appellant called Acosta's wife, while appellant was in jail, and during the conversation he offered his condolences and also laughed. (16 RT 2528.) Acosta left his wife a note that he was concerned about attending the meeting at Dunton's apartment. (16RT 2521-2523.) Appellant's fingerprints matched those on the shotgun used to kill Acosta and Dunton. (19RT 2858-2863, 2865-2872.) Additional forensic evidence tied appellant to the murders. (18RT 2745-2749, 2752-2758, 2761-2764, 2766-2768.) Finally, after this double murder appellant tried to hide with a relative he had not had contact with for almost a decade. (21RT 3083-3084.) On July 2, 1997, appellant knocked on her door, while holding a shotgun and a bag of shotgun shells. (21RT 3085-3087.) Where the joined crimes are relatively similar, they do not carry an inflammatory effect when joined. (See *People v. Marquez* (1992) 1 Cal.4th 553, 573.) Accordingly, the prosecutor's evidence was strong for all the offenses, and the trial court acted well within its discretion in denying the severance motion.

4. All the Murder Charges Were Capital Offenses, So Joinder of the Charges Did Not Turn the Matter into a Capital case.

In the instant case, the capital charges did not result from the joinder of the separate incidents. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th

130, 162.) Each murder charge carried a special circumstance allegation. The Patel and Luna murders, as well as the alleged Escareno murder, were based on the felony-murder rule under section 190.2, subdivision (a) (17). These murders were also charged as a special circumstance based on multiple murders, within the meaning of section 190.2, subdivision (a)(3). The Acosta and Dunton murders were also multiple murders within the meaning of section 190.2, subdivision (a)(3), regardless of the other charged murders. Since the double homicide made appellant eligible for the death penalty based on multiple murders, joinder of these charges with the others did not turn the matter into a capital case. (2CT 407-410.)

Appellant points out that the Luna homicide was not initially charged as a murder with special circumstance, and the severance motion was made before the special allegations were added. (AOB 146-147.) However, the order of these events does not support appellant's case. At the time of the motion, the court understood that the Luna case was not charged as a capital case. Had the court known that the prosecution would add a special circumstance allegation, the court would have one additional reason to deny the severance motion. Moreover, there was no requirement that the Luna case be tried before any of the other case, so a conviction in any other murder case would have made appellant eligible for the death penalty for murdering Luna, pursuant to section 190.2, subdivision (a)(2). And contrary to appellant's assertion, joinder of the charges did not create a capital case as to Luna, because there was already a basis for charging a capital case, i.e., the felony-murder rule.

D. Appellant Has Failed to Show the Joinder Actually Resulted in Gross Unfairness Amounting to a Denial of Due Process

Under federal constitutional law, appellant is not entitled to reversal unless he shows the joinder "actually resulted in 'gross unfairness'

amounting to a denial of due process" or rendered the trial fundamentally unfair. (*People v. Soper*, *supra*, 45 Cal.4th at p. 783; *People v. Rogers* (2006) 39 Cal.4th 826, 851-853; accord, *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814]; *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 638.) He cannot meet this high burden. As already explained above, there was no prejudicial error in denying appellant's severance motion and trying the counts together, as the evidence was cross-admissible, the crimes were equally egregious, strong evidence supported all counts, and joinder of the charges did not have much, if any, effect on seeking the death penalty. (See, e.g., *United States v. Lane*, *supra*, 474 at p. 450; *People v. Soper*, *supra*, 45 Cal.4th at p. 784; *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 772-773.) The fact that the jury deadlocked as to the Escareno charges tends to show that jury was able to differentiate among the charges and evaluate each one separately. The same applies to jury's penalty phase verdicts. Thus, ultimately, appellant has not met his burden of showing that it is reasonably probable the joinder affected the jury's verdicts or that the joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

Finally, there is no dispute the conservation of judicial resources and public funds was significant as to both the trial and the instant appeal. The trial herein required a single courtroom, judge, and jury panel. There was no need for separate discovery, pretrial motions, and hearings. Similarly, the consolidation of charges eliminated the need for multiple appellate records, as well as separate appellate and habeas proceedings. (See, e.g., *People v, Soper*, *supra*, 45 Cal.4th at p. 782; *People v. Mason*, *supra*, 52 Cal.3d at p. 935.) And the public was further served by the reduced delay on disposition of criminal charges both at trial and through the appellate process. (See, e.g., *People v. Soper*, *supra*, 45 Cal.4th at p. 782; *People v.*

Burnell (2005) 132 Cal.App.4th 938, 947.) Accordingly, appellant fifth claim should be denied.

VI. THE DECISION TO DENY SEPARATE TRIAL WAS WELL WITHIN THE TRIAL COURT'S DISCRETION AND APPELLANT SUFFERED NO PREJUDICE FROM A JOINT TRIAL

Appellant's sixth claim on appeal is that the trial court's refusal to sever his trial from that of codefendant Grajeda requires reversal. (AOB 177-184.) This claim lacks merit because the trial court properly exercised its discretion to proceed with a joint trial. In doing so, the trial court also preserved appellant's federal constitutional rights. Even assuming error, appellant has failed to show a reasonable probability he would obtain a more favorable result at a separate trial.[37]

A. Appellant Has Failed to Establish Error or Prejudice

The California Constitution will not be construed to prohibit criminal joinder as prescribed by the Legislature. (Art. I, § 30, subd. (a); *People v. Homick* (2012) 55 Cal.4th 816, 848; *People v. Sully* (1991) 53 Cal.3d 1195, 1221-1222.) Whether to grant a separate trial is within the trial court's discretion, and the court's ruling is reviewed for abuse of that discretion. (*People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Ervin* (2000) 22 Cal.4th 48, 69.) Appellate courts almost never interfere with the trial court's exercise of discretion denying severance. (*People v. Boyde* (1988) 46 Cal.3d 212, 232, overruled on another point sub nom. *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316].) However, "[s]everance motions in capital cases generally receive heightened scrutiny for potential prejudice." (*People v. Homick, supra*, 55 Cal.4th at p. 848, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 43-44.) Abuse of discretion in denying the severance depends upon the

[37] The relevant proceedings were set forth above, in Argument V.

facts as they appeared at the time of the hearing on the motion. (*People v. Burney* (2009) 47 Cal.4th 203, 237; *People v. Mason* (1991) 52 Cal.3d 909, 934.) However, "[i]f [this Court] conclude[s] the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial." (*People v. Burney, supra*, 47 Cal.4th at p. 237.)

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1286, this Court observed that separate trials may be warranted in cases where: (1) there is an incriminating confession by one defendant; (2) the defendant will be prejudiced by an association with codefendants; (3) the jury could be confused by multiple conflicting defenses; (4) and codefendant would exonerate the defendant at a separate trial. (citing *People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, *People v. Massie* (1967) 66 Cal.2d 899, 917, 59, and *Zafiro v. United States* (1993) 506 U.S. 534, [113 S.Ct. 933, 122 L.Ed.2d 317].) Here, none of these factors were present in the trial below. The prosecution did not present an incriminating confession by codefendant Grajeda. Both defenses were based on, identification, the most easily understood defense; so there was no confusion based on "multiple conflicting defenses." There was no evidence that codefendant Grajeda would exonerate appellant at a separate trial. Appellant was not prejudiced by association at a joint trial with codefendant Grajeda because both of them were equally reprehensible defendants. In fact, appellant was the more reprehensible defendant in light of the numerous violent charges against him.

"Additionally, severance may be called for when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*People v. Burney, supra*, 47 Cal.4th at p. 237, internal

quotations omitted.) In the instant case, appellant and codefendant Grajeda "were charged with having committed common crimes involving common events and victims, presenting a classic case for a joint trial." (*People v. Homick*, *supra*, 55 Cal.4th at p. 848, quoting *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 40, internal quotations omitted.) However, appellant nonetheless claims he was prejudiced by a joint trial, because codefendant Grajeda presented an antagonistic defense that "improperly suggested [appellant]'s guilt on a propensity theory." (AOB 178-179.) This claim is meritless. Appellant and codefendant both relied on an identity defense, and neither blamed the other, so there was nothing antagonistic between their defenses and no prejudice. Thus, the trial court acted within its discretion.

Appellant suggests that codefendant Grajeda's counsel "sought to shift the blame" to appellant for the double homicide. (AOB 179.) To support his argument, appellant cherry picks tiny bits from a lengthy trial. Appellant complains that codefendant Grajeda's counsel argued that the Mexican Mafia had nothing to do with the Acosta/Dunton homicides, so the jury should not convict him solely on his relationship with that prison gang. Counsel also argued that Acosta and Dunton were murdered by somebody who was violent, paranoid and drug crazy. (28RT 3988.) Second, counsel asked Witness One if he knew, before the Escareno homicide, that the person he was with "had murdered before." Witness One answered that he "knew before that he had murdered someone for some jewelry." (22RT 3318.) Appellant uses a "see also" signal to point to Reporter's Transcript, Volume 18, pages 2407-2418, but makes no argument based on this reference. (AOB 179.)

From these two bits of minutia, appellant argues that codefendant Grajeda's defense was antagonistic to his defense, while at the same time conceding that "mutually antagonistic defense are not prejudicial per se."

(*Zafiro v. United States*, *supra,* 506 U.S. at p. 538.) Appellant also recognizes that this remains true "even if defendants are hostile to or seek to blame one another." (*People v. Tafoya* (2007) 42 Cal.4th 147, 162; see also *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1071-1072.) Therefore, even assuming conflicting defenses, there was no error because if "conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case." (*People v. Souza* (2012) 54 Cal.4th 90, 110, internal citation omitted.)

Nonetheless, to support his argument, appellant again points to tiny bits of the record to suggest that codefendant Grajeda might benefit from a joint trial, and that this necessarily meant appellant would somehow be disadvantaged. (AOB 180-181.) This argument makes no sense. The jury was not privy to any of the discussions by the parties or the court had, and therefore these instructions had by appellant nothing to do with determining whether appellant was prejudiced by a joint trial. Thus, even assuming error, appellant has failed to establish a reasonable probability that the he would have obtained a more favorable result at a separate trial. (*People v. Burney*, *supra*, 47 Cal.4th at p. 237.)

Appellant has also failed to establish that he was prejudiced at the penalty phase. (AOB 181-184.) Appellant argues that he was prejudiced because the jury knew that the prosecution sought the death penalty for appellant and not codefendant Grajeda. Appellant recognizes that this claim has been rejected by this Court in *People v. Tafoya*, *supra*, 42 Cal.4th at pages 163-164. (AOB 182, fn. 58.) Appellant presents no reason for this Court to reconsider its prior holdings. Accordingly, appellant has failed to establish either error or prejudice under state law or the California Constitution.

The federal test is similar: reversal is not warranted unless a joint trial "was so manifestly prejudicial as to require the judge to exercise his discretion in but one way, by ordering a separate trial." (*United States v. Nelson* (9th Cir. 1998) 137 F.3d 1094, 1108; *United States v. Decoud* (9th Cir. 2006) 456 F.3d 996, 1008 [same]; *United States v. Johnson* (9th Cir. 2002) 297 F.3d 845, 855 [same]; see *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1321 ["The prejudice must have been of such magnitude that the defendant's right to a fair trial was abridged."].) For the reasons discussed above, appellant has failed to show any violation of the federal Constitution. Accordingly, appellant's sixth claim should be denied.

VII. APPELLANT'S WILLFUL REFUSAL TO ATTEND HIS TRIAL WAS RELEVANT TO SHOW HIS CONSCIOUSNESS OF GUILT; THE JURY WAS PROPERLY INSTRUCTED HOW TO CONSIDER SUCH EVIDENCE; THE TRIAL COURT DID NOT COMMIT MISCONDUCT BY INTRODUCING SUCH EVIDENCE *SUA SPONTE*; AND, ANY ALLEGED ERROR WAS HARMLESS

Appellant's seventh claim on appeal is that the trial court erroneously required the presentation of evidence of his refusal to come to court one morning, erroneously instructed the jurors that they could consider the refusal as evidence of a consciousness of guilt, and failed to perform the role of a neutral arbiter. Appellant asserts that these errors violated his rights under California law, the California Constitution, and the federal Constitution. (AOB 185-225.) Appellant's claims should be rejected.

A. Relevant Proceedings

On December 14, 1999, during the morning session, the court was informed that appellant refused to leave his cell and come to count, so the court issued an extraction order to remove appellant from his cell, with or without his consent. (3CT 701-702.) Later that morning, the court was informed that appellant had decided to come to court, but only after he was told of the extraction order. (9RT 1473.)

The court noted that one juror's co-worker had covered a business meeting, so that juror could arrive on time. The court observed that the jurors seemed irritated by the delay because they had "buzzed" the court twice. About 40 minutes after trial was scheduled to resume, appellant appeared with counsel. (9RT 1473-1474; 3CT 703-705.) After the jury came into the courtroom, the court stated:

> We do have all the jurors present, and I do thank you for being on time. I know at least one of you had to work hard to get here on time, even though we were starting at 10:30 [a.m.]
>
> The reason for the delay may well be presented to you later during the trial. If you're frustrated by it, you're no less frustrated than I was. We'll do our best to be on time, and I appreciate the fact that you were here on time.

(9RT 1475.)

Later that day, the appellant moved for a mistrial because: (1) there was no evidence showing whether his refusal to attend trial was based on "illness or what ever may be"; (2) the court's comments to the jury created the inference that the delay was caused by appellant; and (3) evidence of appellant's refusal was irrelevant to the guilt phase unless he testified. (9RT 1507.) The court found that appellant's refusal was relevant to show a consciousness of guilt. Appellant's counsel replied that such evidence was "totally impermissible" during the guilt phase. (9RT 1508.)

The court disagreed with counsel, stating that the need for an extraction order showed "pretty well it [was] a refusal." The court found that appellant's refusal showed a consciousness of guilt, and the court could call its own witnesses, so the jury would hear evidence addressing this subject.[38] The court made it clear that "the jury would get . . . evidence on

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[38] The court stated that it "intend[ed] to do even more than that if this happens again." (9RT 1508.)

the subject, not my statement about what I've been informed about." The court denied appellant's motion for a mistrial. (9RT 1508-1509.)

Later that day, the court heard testimony regarding appellant's refusal to come to court. Subsequently, appellant argued that his refusal to come to court did not support consciousness of guilt instructions and was inadmissible under Evidence Code section 352. (10RT 1664.) The court noted that the facts were not in dispute. The court found that the undisputed facts showed "a situation in which four times he had the opportunity to come to court and refused, and capsulized that saying that he would go to when he is ready." This was, in the court's view, "inconsistent with innocence and shows a consciousness of guilt." (10RT 1664.)

Appellant's counsel addressed the court's intent to introduce the evidence at trial. Counsel conceded that the court could call witnesses under Evidence Code 775, but expressed concern that the court was introducing evidence of appellant's consciousness of guilt. The prosecutor offered to present the evidence, and the court agreed that this was the proper course. (10RT 1666-1667.) The court told the parties: "It's not my intension to interfere with either side, simply to expose the jury something that is uniquely appropriate to the court's control." (10RT 1667.) The court found appellant's actions were like a defendant who repeatedly refuses to stand up in court to display his height. (10RT 1667-1668.)

The jury heard the evidence regarding appellant's refusal, as set forth in the Statement of Facts. Before beginning deliberations, the jury was instructed:

> If you find that [appellant] voluntarily absented himself from this trial by refusing to come to court, you may consider that as a circumstance tending to prove a consciousness of guilt. That conduct, however, is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(3CT 876.)

B. Appellant's Claim Was Forfeited Because He Failed to Make a Specific and Timely Objection

Reviewing courts will not consider a challenge to the admissibility of evidence absent a specific and timely objection in the trial court on the ground sought to be urged on appeal. (*People v. Champion* (1995) 9 Cal.4th 879, 918-919; Evid. Code, § 353.) Here, appellant forfeited most of his current challenges to the admission of his willful refusal to come to court. Appellant merely argued that the evidence was inadmissible under Evidence Code section 352. (10RT 1663.) Accordingly, appellant has forfeited his argument that evidence of willful refusal to come to court should have been excluded under Evidence Code section 1101. (*People v. Carter* (2005) 36 Cal.4th 1215, 1256.)

Furthermore, the section 352 objection did not preserve any federal constitutional claims. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 3 ["We reiterate that a defendant may not argue that the court committed error for a reason not included in the trial objection"].) For the first time on appeal, appellant claims that the trial court "diminished the proof beyond a reasonable doubt standard, violating [appellant]'s rights to a fair trial, to the presumption of innocence, to properly instruct the jury, to counsel, to due process of law, to a reliable determination of his guilt and sentence, and to be free from cruel and unusual punishment." (AOB 208-215.) These claims were forfeited. (*People v. Riggs* (2008) 44 Cal.4th 248, 292 ["To the extent defendant on appeal raises a federal constitutional claim distinct from his claim that the trial court abused its discretion under Evidence Code section 352, he forfeited this claim by failing to identify that ground in his objections to the trial court."]; *People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12 [failure to raise federal constitutional objection in trial court forfeits appellate claim]; *People v. Brown* (2003) 31 Cal.4th 518, 546 ["We reject the constitutional claims at the threshold, for we find defendant

failed to preserve these issues for appeal by failing to object on the state and federal constitutional grounds now asserted."].) Accordingly, appellant has forfeited all federal constitutional claims by failing to raise these concerns in the trial court. (*United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508] [constitutional rights may be forfeited in criminal trial by failure to make timely assertion of right].)

C. Applicable Law Regarding Relevance and Admissibility Pursuant to Evidence Code Section 352

"Only relevant evidence is admissible [citations] and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Shied* (1997) 16 Cal.4th 1, 13, citing Evid. Code, §§ 350, 351; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Evidence Code section 210 provides:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Shied, supra*, 16 Cal.4th at p. 14.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*Id.* at pp. 13-14, citing *People v. Garceau, supra*, 6 Cal.4th at p. 177.) Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035, citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.)

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time

or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed unless it constitutes a manifest abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371; *People v. Mickey* (1991) 54 Cal.3d 612, 655; *People v. Karis* (1988) 46 Cal.3d 612, 637.) Appellate courts rarely find an abuse of discretion under Evidence Code section 352. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) The "'prejudice'" referred to in Evidence Code section 352 is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau, supra*, 6 Cal.4th at p. 178; see also *People v. Smithey* (1999) 20 Cal.4th 936, 973; *People v. Shied, supra*, 16 Cal.4th at p. 19.)

D. The Challenged Evidence Was Properly Admitted to Show Appellant Had a Consciousness of Guilt

This Court has found several different types of evidence support an inference that a defendant has a consciousness of guilt. The fabrication of evidence, the suppression of evidence, and willful falsehoods each support such an inference. (*People v. Watkins* (2012) 55 Cal.4th 999, 1028, citing *People v. Geier* (2007) 41 Cal.4th 555, 589; see also *United States v. Jackson* (7th Cir. 1989) 866 F.2d, 838, 845, [defendant's refusal to furnish writing exemplars, like evidence of flight and concealment, is probative of consciousness of guilt].)

This Court has also held that certain behaviors while in custody support an inference a defendant has a consciousness of guilt. For example, in *People v. Ochoa* (2001) 26 Cal.4th 398, 438-439, the defendant, who was facing murder charges, tattooed the numbers "1-8-7" onto his forehead.

This Court held that "[t]he trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. The [trial] court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder." Likewise, in *People v. Hartsch* (2010) 49 Cal.4th 472, 505, the defendant, also facing murder charges, displayed the number "187," by shaving the hair on his head. As in *Ochoa*, this Court rejected the defendant's claims that such evidence "was irrelevant, speculative, and highly prejudicial" because "as the trial court noted, the evidence was relevant and not particularly prejudicial." (*People v. Hartsch, supra*, 49 Cal.4th at p. 505, citing *People v. Ochoa, supra*, 26 Cal.4th at pp. 438-439.)

Willfully violating certain *court orders* can support an inference of a consciousness of guilt. For example, "[a] defendant's refusal to participate in a lineup is admissible evidence supporting an inference of consciousness of guilt." (*People v. Watkins, supra*, 55 Cal.4th at p. 1027 citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1235.) Refusing to follow a court order for a hair or blood sample permits such an inference. (*People v. Farnam* (2002) 28 Cal.4th 107, 164.) This applies to voice samples too (*People v. Ellis* (1966) 65 Cal.2d 529, 536-539), as does "defendant's refusal to remove his sunglasses so that the witness could better identify him" after being ordered to do so in open court. (*People v. Ramirez* (2006) 39 Cal.4th 398, 456). Notably, under state law and the federal Constitution, it makes no difference whether a defendant believes that he had the right to refuse a court order where the "defendant fails to establish that his refusal was protected by law[.]" (*People v. Farnam, supra*, 28 Cal.4th at p. 165, citing *People v. Roberts, supra*, 2 Cal.4th at p. 311.)

The instant matter is a capital case; so, as the trial court observed, appellant had "no right to absent himself" because "[h]e must be present."

(10RT 1661.) The record shows appellant refused to be ready for court by 6:30 a.m., even though Deputy Ganarial specifically and repeatedly told appellant to get ready. Appellant continued to willfully violate his obligation to leave his cell for over three hours. When appellant was advised that the court had issued an extraction order, he still refused to follow that order for about twenty minutes. (12RT 1848-1850.) Appellant's actions showed his intention to stay inside his cell, necessarily delaying his trial, despite his obligation to be present in court, until he was faced with a forcible extraction. Even then, appellant waited until execution of the order was imminent. Thus, accordingly, appellant's unprivileged and willful refusal to follow court orders caused a delay of about three hours and thirty minutes.

Like the defendants in *Ochoa* and *Hartch*, it was "highly unlikely that an innocent person would" willfully act in this fashion. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 437.) Appellant denied that he committed any of the crimes charged by the prosecution, yet he made the decision to rudely and willfully disobey the court's orders to come to court. An innocent person would have no interest in acting this way. Appellant's counsel conceded that appellant's comment, "fuck court," was not something an innocent man would do. (10RT 1658.) Furthermore, forcing jurors to wait for trial to resume, after the jurors were on time, is not in an innocent person's interest. Nor is delaying the trial where a defendant seeks exoneration. And in a capital case, like appellant's, a defendant faces the penalties of death or life without parole, the harshest punishments under law, making it imperative that the defendant obey court orders and attend court.

Appellant's actions are indistinguishable from out-of-custody defendants who refuse to come to court. When a defendant fails to appear for trial, without excuse for the absence, it is "reasonable to infer that defendant's absence was voluntary and it was a fact relevant to the

determination as to his guilt or innocence." (*People v. Snyder* (1976) 56 Cal.App.3d 195, 199.) Appellant's willful refusal is also similar to a defendant's decision to attempt escape from incarceration, because each case involves the *intent* to avoid prosecution and punishment. (See *People v. Carrera* (1989) 49 Cal.3d 291, 314 [escape from jail after being arrested and charged with crimes admissible to show a consciousness of guilt]; see also *People v. Schafter* (1911) 161 Cal. 573, 579 [evidence of a plan to escape shows a consciousness of guilt even if the plan was never actually attempted].)

In *People v. Sherren* (1979) 89 Cal.App.3d 752, 762-764, an out-of-custody defendant twice failed to appear for a pretrial hearing. "There was no evidence as to why [the defendant] failed to appear." (*Id.* at p. 763.) The court took judicial notice of these absences, and the prosecution argued that jury could infer that these absences evidenced the defendant "knew he was guilty and wanted to evade trial." (*Ibid.*) The court instructed the jury "with CALJIC No. 2.52 on flight as showing consciousness of guilt." (*Ibid.* footnote omitted.) The appellate court rejected challenges based on relevance and Evidence Code section 352. (*Ibid.*) Likewise, appellant's claim should be denied.

Appellant attempts to distinguish *Sherren*, noting : "An out-of-custody defendant's failure to appear may well reveal [the] intent to avoid prosecution or punishment." (AOB 197, fn. 63.) However, it is immaterial whether a defendant is in custody or out of custody: the underlying motive, to avoid prosecution or punishment, is fundamentally the same. Logically, appellant's refusal to come to court was relevant because any *deliberate* failure to come to court supports the inference that appellant expected to be found guilty of one, more, or all of the charges against him because he was actually guilty. Moreover, in *Sherren* there was no evidence as to why the defendant missed court, but in the instant case the evidence unquestionably

established that appellant willfully refused to come to court without any privilege to do so. This difference dispels any concern that appellant's conduct was not relevant, because the reason for the absence was known to be unprivileged. Thus, as in *Sherren*, appellant's willful refusal to come to court, absent the imminent execution of an extraction order, was relevant and probative to his consciousness of guilt.

Appellant cites to this Court's cases upholding the admission of consciousness of guilt evidence and the giving of related instructions in cases of flight, resisting a court order to give hair and blood samples, failure to remove sunglasses for in-court identification, and escape. (AOB 196.) Based on these cases, appellant asserts that consciousness of guilt evidence must involve "a purpose to avoid being observed or arrested, to prevent the production or presentation of evidence, or to avoid punishment." (AOB 197.) However, this Court's cases, cited above, show that consciousness of guilt evidence is not limited as appellant suggests. Even so, appellant's actions met appellant's test because he *willfully* refused to come to court, and in doing so prevented the presentation of *any* evidence during his absence. Appellant also cites to cases where the defendant was permitted to be absent by the court. (AOB 199.) However, these cases do not support appellant's argument because they do not involve the defiance of a court order or the disruption and delay caused by a deliberate refusal to come to court.

The trial court also acted within its discretion under Evidence Code section 352. First, the probative value of the evidence was not substantially outweighed by the probability it would necessitate undue consumption of time because Deputy Ganarial's testimony constituted only 11 pages in a trial with thousands of pages of Reporter's Transcript. Second, the evidence did not create substantial danger of undue prejudice because the failure to come to court is not the type of evidence that "uniquely tend[s] to

evoke an emotional bias against" appellant. (*People v. Garceau, supra*, 6 Cal.4th at p. 178.) This was especially true in this case. Appellant was on trial for five murders, so there was nothing overly prejudicial about his refusal to come to court. Appellant did not hurt anyone, or even touch anyone, and the extraction order did not need to be executed. There was no evidence that appellant would be punished in any way for refusing to come to court. Under these circumstances, the jury merely heard evidence that appellant willfully refused to come to court until after the court issued an extraction order. Third, there was not a substantial danger that this evidence caused the jury to confuse the issues or be mislead. There was no basis for confusion because the issues were easily differentiated. The overriding issue was whether appellant committed the charged crimes, and the evidence of appellant's refusal to come to court was merely one piece of evidence that appellant was guilty. Finally, there was nothing misleading about the evidence because it was true and accurate. Therefore, "[b]ecause the testimony was neither inflammatory nor misleading, its admission was proper under Evidence Code section 352." (*People v. Farnam, supra*, 28 Cal.4th at p. 154.) Also, appellant has failed to show any federal constitutional error because the evidence was relevant and not unduly prejudicial. (*Jammal v. Van de Kamp* (9th Cir. 1995) 926 F.2d 918, 920.)

E. Consciousness of Guilt Instruction

> The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues. [Citation.] It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.

(*People v. Alexander* (2010) 49 Cal.4th 846, 922, internal quotations and additional internal citations omitted.) "When testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony." (*People v. Edwards*, *supra*, 8 Cal.App.4th at p. 1104.) The record need only have "'some evidence'" to support the suggested inference. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 922, quoting *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 1020.) In the instant case, as argued above, the evidence of appellant's willful refusal to come to court was relevant to his consciousness of guilt, and therefore the trial court properly instructed the jury on this evidence and the suggested inference.

F. Appellant Has Failed to Show Judicial Misconduct or Prejudice

Appellant claims the trial court improperly became an advocate for the prosecution by using its powers to call a single witness and instruct the jury regarding appellant's willful refusal to come to court in order to punish appellant for his disrespect to the court, to deter similar conduct, and to punish appellant and counsel for counsel's mistrial motion. Appellant asserts this violated his rights to due process and the right to counsel. (AOB 215-221.) These claims should be rejected because they were forfeited by appellant's failure to raise these concerns in the trial court. (*People v. Harris* (2005) 37 Cal.4th 310, 350 ["Defendant argues the court overstepped its bounds with respect to the tone, form, and number of questions posed. However, he did not object to the trial court's questioning, thus making the claim not cognizable on appeal."], citing *People v. Corrigan* (1957) 48 Cal.2d 551, 556.)

Assuming this Court reaches the merits of appellant's claim, it should be rejected. Under state law and the federal Constitution, a defendant has a

due process right to an impartial trial judge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Brown* (1993) 6 Cal.4th 322, 332.) In *People v. Harris*, this Court stated:

> Evidence Code section 775 confers upon the trial judge the power, discretion and affirmative duty ... [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause. [Citations.] [¶] The constraints on the trial judge's questioning of witnesses in the presence of a jury are akin to the limitations on the court's role as commentator. The trial judge's interrogation must be ... temperate, nonargumentative, and scrupulously fair. The trial court may not ... withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.' [Citations.]

(*People v. Harris*, *supra*, 37 Cal.4th 3 at p. 350, all internal quotations and citations omitted.)

In the instant case, appellant has failed to show any judicial misconduct or prejudice. There was nothing in the record which demonstrates the loss of impartiality. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1050.) Similarly, there is nothing in the record showing the trial court engaged in bias against the defense. (*Ibid.*) Appellant speculates that the trial court intended to punish appellant for his disrespect to the court. (AOB 218-219.) There was no evidence that the court intended to "punish" him. There was no evidence contradicting that appellant willfully refused to come to trial. And the court's comments that appellant, and codefendant Grajeda, were not going to control the trial were whole appropriate because it is simply irrational to allow defendants to choose if, and when, he or she wishes to attend his trial. This was a capital case involving five murders, and the trial could not resume without him, so the court obviously needed

Appellant willfully refused to come to court, and the court believed this was relevant to his consciousness of guilt; so, the court had the prosecution present this evidence during the guilt phase. The court did not "punish" appellant; the court took proper action in response reacted to appellant's decision to disobey court orders.

Appellant also argues that the court intended to deter similar conduct. (AOB 212-213.) Such intent is not misconduct. Section 1044 provides that a trial court has the duty to control the trial proceedings. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 397.) Appellant was willfully violating court orders, and disrupting his trial, and codefendant Grajeda's so deterring further incidents is exactly what the court should try to achieve. Finally, appellant asserts that the trial court's intent was to punish the defense for the mistrial motion. (AOB 219.) But appellant has failed to show, in any way, that the trial court intended to punish the defense. Rather, the court wanted the evidence admitted because it was relevant. There is nothing atypical about a court and a party to have a serious exchange regarding any important aspect of the trial. For these reasons, appellant has failed to show judicial misconduct under state law or the federal constitution.

Any state-law error was clearly harmless under the "reasonable probability" test of *Watson*, and any federal constitutional error was harmless under the "beyond a reasonable doubt" test of *Chapman*. As in *Ochoa*, the evidence of the "1-8-7" shaved in the defendant's hair must be viewed in light of the overwhelming evidence that appellant was guilty of the charged crimes. Here, appellant's failure to come to court, if considered at all by the jury, would not have much effect on the nature of the evidence. This evidence was not inflammatory or a significant part of the prosecution's strong case against appellant. (See Statement of Facts, *ante*.) Thus, the error, if any, does not require reversal because it is not reasonably

probable appellant would have received a more favorable outcome if the evidence had not been admitted. Moreover, considering the strength of the prosecution's case, any error was harmless beyond a reasonable doubt. Accordingly, appellant's seventh claim on appeal should be denied.

VIII. APPELLANT'S HAS FORFEITED MOST OF HIS CHALLENGES TO THE EXPERT TESTIMONY ABOUT THE MEXICAN MAFIA; THE TRIAL COURT ACTED WITHIN ITS DISCRETION TO ADMIT RELEVANT EVIDENCE; AND, IN ANY CASE, APPELLANT HAS FAILED TO ESTABLISH PREJUDICE.

Appellant's eighth claim on appeal is that the trial court's erroneous admission of highly inflammatory expert testimony about the Mexican Mafia rendered jurors fearful for their own safety, and deprived appellant of his rights to due process and fair trial. (AOB 226-249.) Appellant's claim should be denied. The claim is almost entirely forfeited because appellant either failed to object or failed to object on the grounds he now asserts for the first time on appeal. In any event, the trial court properly admitted the gang evidence because it was highly relevant to the Acosta/Dunton double homicide, and, in the context of the whole case, it was not prejudicial to the defense.

A. Relevant Proceedings

Prior to opening statements, the prosecutor addressed the evidence regarding the Mexican Mafia, and argued it was admissible to show motive in the Acosta/Dunton homicides. The court asked: "That this was a contract killing carried out on behest of the Eme by the defendants?" The prosecutor assented. Appellant's counsel objected that "[t]here is no evidence . . . that [appellant] . . . is a member of the Mexican Mafia[,]" so "[b]y utilizing that statement that this is a contract killing carried out by Eme, . . . implies that [appellant] is a member of Eme." (8RT 1282-1283.) The prosecutor told the court that he had "no evidence that [appellant] is associated with the Mexican Mafia[,]" but the evidence established a

motive to kill Acosta and Dunton for their failure to pay taxes to the Mexican Mafia. (8RT 1284-1285.) Codefendant Grajeda's counsel objected that there was no foundational evidence that the "Mexican Mafia" was anything more than "talk, gossip and newspaper publicity." The court rejected this argument. (8RT 1286-1287.) Neither appellant nor codefendant Grajeda raised any other objections prior to (8RT 1287-1309), or during (8RT 1309-1326), the prosecutor's opening statement.

Later on, the parties and the court addressed Sergeant Valdemar's proposed testimony. The prosecutor represented that Sergeant Valdemar would testify that the type of tattoos appellant had announced membership in a Hispanic street gang and allegiance to the Mexican Mafia. (14RT 2115-2116.) Appellant's counsel objected that appellant's membership in a street gang, if any, was irrelevant to the crimes other than the Acosta/Dunton homicides. Counsel also stated: "And to a degree it's a form of character evidence" appellant had not "placed in issue." (14RT 2117.) The prosecutor clarified that the Mexican Mafia used street gang members to commit homicides and appellant was found with the shotgun used to kill the victims. Further, appellant committed the murder with codefendant Grajeda, a Mexican Mafia member, showing appellant was a "loyal soldier of Eme" when he killed Acosta and Dunton. (14RT 2117-2118.) The prosecutor concluded this evidence pertained to the Acosta/Dunton homicides (counts 10 and 11). Appellant's counsel objected that the prosecution's theory was "speculation" (14RT 2118), and relied on the conclusion of Witness One (14RT 2121-2122).

The court found that the proposed Mexican Mafia evidence was relevant to the motive for killing Acosta and Dunton and gave context to the terminology used by some of the witnesses. The court addressed whether the evidence should be excluded under Evidence Code section 352. The court acknowledged that evidence related to gangs could be "highly

prejudicial information," but that did not "overcome[] the probative value of proving the motive and therefore" the "why" and "how" these killings "took place." (14RT 2122.) The court noted that it appeared Acosta and Dunton had been executed. (14RT 2112-2113.) Appellant's counsel argued that motive was not relevant because it was unnecessary to establish premeditation and deliberation for the Acosta/Dunton homicides. (14RT 2123-2124.) The court found that the evidence was highly relevant to appellant's motive for killing Acosta and Dunton, and was not inadmissible under Evidence Code section 352. (14RT 2124-2129.)

Sergeant Valdemar testified that while in jail, gang members committed assaults, battery, murder, making contraband weapons, robbery, rape, extortion, and drug crimes. Appellant's counsel asked for a side bar, where he argued that appellant would be prejudiced if Sergeant Valdemar established his expertise by telling the jury about such crimes because the jury "was obviously aware" that appellant was in jail, and "to a degree" it was "an improper form of character type evidence." (14RT 2220-2221.) The court asked the prosecutor how Sergeant Valdemar's experience with gangs in custody was relevant. The prosecutor stated Sergeant Valdemar's in-custody experience with gang members was no different than similar out-of-custody experience, and that there was no longer a need to ask questions about that subject. (14RT 2223.) The prosecutor recited all the opinions he expected Sergeant Valdemar to offer (14RT 2223-2225), and explained that he called Sergeant Valdemar early during the trial to give context to the other witnesses testifying about the Acosta/Dunton homicides (14RT 2232-2233.) Afterward, the court addressed the original objection, finding that there was no objection before Sergeant Valdemar's answer, but the court would sustain a further objection to evidence about in-custody gang activities, unless it related directly to the expert's opinion in this case. (14RT 2236.)

Later on, when Sergeant Valdemar was recalled to the stand, he explained that he had been involved in a program designed to prevent gang activity "within the custody environment." Appellant counsel objected on relevance grounds, but the court overruled the objection. Sergeant Valdemar explained that hard core gang members committed the majority of assaults, so they were placed in special units to segregate them from the general population. (14RT 2346-2347.)

Sergeant Valdemar addressed his experience recording Mexican Mafia meetings. (15RT 2352-2353.) The court sustained appellant's objection to testimony *generally* addressing the content of these meetings, finding the question was "too broad." The prosecutor narrowed his question to Sergeant Valdemar's personal observations. Without objection, Sergeant Valdemar told the jury that the majority of meetings he overheard involved murder or drug dealing within Mexican Mafia territory. (15RT 2354-2355.)

The prosecution asked Sergeant Valdemar if he had any conclusions about the Mexican Mafia, such as where, when, and by whom it was started. Codefendant Grajeda's counsel objected on relevance grounds. The court sustained the objection, subject to an offer by the prosecution. (15RT 2356.) The prosecutor explained that background information, regarding the extent of the Mexican Mafia's history of control over street gangs, drug dealers, and inmates, was necessary to understand why appellant killed two people who appeared to be his friends. (15RT 2356-2359.) Codefendant Grajeda's counsel stated: "We have not objected to previous questions that the street gangs are in fact controlled by Eme[, so] that[] come[s] in." However, counsel complained that additional inquiry was "just repetitive." (15RT 2358-2359.) The court overruled codefendant Grajeda's objection. Appellant's counsel reiterated there was no proof appellant was a Mexican Mafia member. The court rejected this reasoning

because such evidence was to be established later during trial. Appellant raised no further objection. (15RT 2359-2360.)

Without objection, Sergeant Valdemar testified that the Mexican Mafia had strict rules which prohibited cooperation with the legal system in any way, and had the means to acquire court documents confirming a violation of this rule. He also opined that the Mexican Mafia demanded absolute loyalty, above all else, from Hispanic street gang members, and often the Mexican Mafia "used someone close to the victim to either approach them or actually carry out the murder." (15RT 2381-2383.) The next question was: "Has Eme ever used a family member to carry out a retaliatory murder on Eme's behalf?" Codefendant Grajeda objected on relevance grounds, which was immediately overruled by the court. Sergeant Valdemar answered: "Yes, sir, they have." (15RT 2328.)

Without objection, Sergeant Valdemar opined that the Mexican Mafia had a "reputation for seeking out witnesses and killing them[,]" so prosecution witnesses assumed that risk by testifying. He also opined that wives and relatives of a Mexican Mafia associate would lie for them. When the prosecutor inquired if there were other "types of relationships" where a witness would lie for a Mexican Mafia member or associate, appellant objected on relevance grounds, but the court overruled the objection. Sergeant Valdemar referred to a case where a father and son gave contrary testimony about a Mexican Mafia suspect. When the prosecutor asked for Sergeant Valdemar's opinion whether the Mexican Mafia expected such perjury to be committed, appellant offered the "same" relevance objection. The objection was overruled and Sergeant Valdemar opined that the Mexican Mafia's expectation applied to its "soldiers." (15RT 2385.)

B. Appellant's Claims Were Almost Entirely Forfeited

In a capital case, as in any other case, a judgment may not be reversed based on the admission of evidence absent a timely and specific objection in the trial court. (See Evid. Code, § 353; *People v. Cain* (1995) 10 Cal.4th 1, 28; *People v. Champion, supra*, 9 Cal.4th at p. 918; *People v. Clark* (1992) 3 Cal.4th 41, 127-128; *People v. Green* (1980) 27 Cal.3d 1, 22, fn. 8.)

Appellant did not preserve his claim that Sergeant Valdemar's testimony addressing the extensive crimes committed in jail was inadmissible. Rather, counsel objected afterward, asked for a sidebar, but never asked the court to strike this testimony. Therefore, appellant's has forfeited this part of his claim. Appellant tries to "bundle" this testimony with subsequent testimony where counsel objected. (AOB 227-228, first indented paragraph.) However, appellant's objection did not apply retrospectively to the subject evidence, and thus was not pertinent to the initial testimony.

Appellant did not object to Sergeant Valdemar's testimony that he personally overheard Mexican Mafia meetings, recorded on audio and video, where murder and drug dealing was discussed. Appellant only objected to the prior question asking, without regard to personal observation, what crimes were discussed during Mexican Mafia meetings. The court sustained this initial objection on the ground it was too broad and thus not relevant. If appellant's counsel believed that expert testimony about personal knowledge of Mexican Mafia meetings was objectionable, he had a duty to raise this ground in the trial court, but failed to make any objection whatsoever. Since the trial court sustained the first objection, appellant cannot show that another objection would have been futile. Accordingly, appellant has forfeited any claim pertaining to this part of Sergeant Valdemar's testimony.

Codefendant Grajeda's objection to opinion testimony about the history of the Mexican Mafia did not preserve appellant's claim on appeal. Appellant asserts that his counsel "implicitly seconded" the objection, but fails to explain how this was done. (AOB 288, fn. 72.) Anyway, "'[g]enerally, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 793, quoting *People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8.) However, "[a] litigant need not object, however, if doing so would be futile." (*People v. Wilson, supra*, 44 Cal.4th at p. 793) Here, appellant did not join in codefendant Grajeda's objection, even though the court held a side-bar hearing, so he cannot complain that his objection would have "futile" because "trial court overruled the objection before [appellant] had a chance to join[.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 373.) Moreover, during that sidebar, codefendant Grajeda's counsel admitted that there were no previous objections to "previous questions that the street gangs are in fact controlled by Eme[.]" (15RT 2358-2358.) Appellant's counsel implicitly accepted this assessment because he did nothing to dispute it while at side-bar. (15RT 2359-2360.) For these reasons, this part of appellant's claim was forfeited.

Appellant failed to object to the question: "Has Eme ever used a family member to carry out a retaliatory murder on Eme's behalf?" However, codefendant Grajeda's objection on relevance grounds was immediately overruled, so appellant's failure to object might have been futile. (15RT 2328.) Nonetheless, codefendant Grajeda only objected on relevance grounds, so all other state or federal constitutional claims were forfeited, even assuming that appellant's relevance claim was preserved for review. Moreover, appellant's objection to evidence of "other types" of relationships involving perjury was also based on relevance, so any additional state or federal constitutional grounds were forfeited. Even if

appellant's counsel had suggested any other ground besides relevance, he failed to ask the court to make any rulings. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 680 [failure to pursue ruling has same effect as failure to make objection].)

Moreover, counsel made no federal constitutional objection at all to the gang expert's testimony in the trial court, so his federal claims of error were entirely forfeited. (See *People v. Riley* (1992) 2 Cal.4th 870, 891 [objection under Evidence Code section 352 does not preserve due process or confrontation issues]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-629 [collecting this Court's cases holding that "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal"].)[39]

C. The Trial Court Acted within Its Broad Discretion

Because gang evidence can be highly inflammatory, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Champion*, *supra*, 9 Cal.4th at 922.) But where the evidence is relevant to explain the circumstances and motivation for a crime, it is admissible. (*Id.* at pp. 922-923; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 175

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[39] In *People v. Partida* (2005) 37 Cal.4th 433-438, this Court redefined the forfeiture doctrine. Consistent with prior decisions, this Court held that an objection to evidence under Evidence Code 352 does not preserve a due process claim that the evidence for reasons other than those articulated in his section 352 argument. This Court added, however, the defendant may make a "very narrow due process argument on appeal, i.e., the asserted error in admitting the evidence over his section 352 objection had the "additional legal consequences of violating due process," *Partida* does not allow appellant to raise new constitutional claims based on the alleged violation of other constitutional rights. (See, e.g, *People v. Huggins* (2006) 38 Cal.4th 175, 240-241 & fn. 18 [objection to evidence on grounds of Sixth, Eighth and Fourteenth Amendments did not preserve objection under Fifth Amendment, citing *Partida*].)

[gang evidence properly admitted because shooting was committed as part of gang "turf battle"]; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 ["evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation-including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like-can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."].)

Appellant has failed to show that the challenged evidence was irrelevant or inadmissible under Evidence Code section 352. Under that section, a trial court enjoys broad discretion in making its determination, and its ruling will not be disturbed on appeal absent an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Here, the entire context and motivation of the double homicides were gang-related. The Mexican Mafia put Acosta and Dunton on the "green light" list for the failure to pay taxes, and appellant, who was reputedly a tax collector, killed them for the Mexican Mafia. Thus, such evidence was highly relevant to motive, and crucial to understanding the context of the double homicide, where otherwise it appeared that appellant inexplicably executed two friends over a dispute about "taxes" or "rules." In addition, appellant performed the executions in front of codefendant Grajeda, a Mexican Mafia member, even though they were not friends; so the jury needed to understand the complex rules of the Mexican Mafia by all those involved in the double homicide which were being followed. The expert testimony as to violent activities of the Mexican Mafia, and its history, helped explain why appellant would comply with Mexican Mafia orders. The history shows that the Mexican Mafia was a criminal enterprise run by a relatively small group of powerful inmates. The in-custody crime by Mexican Mafia

inmates shows that this powerful prison gang was capable of murdering people inside and outside of prison.

The challenged testimony was not unduly prejudicial, in the sense that it was not inflammatory in the context of the case.[40] (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1121 [for purposes of Evidence Code section 352, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that "uniquely tends to evoke an emotional bias against defendant" without regard to its relevance on material issues].) Given the very violent nature of appellant's crimes, it was not uniquely bias-inducing for the jury to hear about the history, activities, relationships, and methods of the Mexican Mafia. (See *People v. Champion*, *supra*, 9 Cal.4th at p. 921 [gang evidence probative as to identity properly admitted over Evidence Code section 352 objection].)

Appellant has failed to show any constitutional violation. Non-arbitrary application of the rules of evidence does not ordinarily infringe on a defendant's federal constitutional rights. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 56 [107 S.Ct. 2704, 97 L.Ed.2d 37]; *Chambers v. Mississippi*

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[40] Appellant references communications between the court and the jury, where jurors expressed concern for their safety. (AOB 229-230, 242.) The jury's concern was valid, and in no way supports appellant's claim. (See *People v. Valdez* (2012) 55 Cal.4th 82, 106 [witness identification properly withheld from defense in a case based largely on evidence that the Mexican Mafia had ordered the homicide, posed an extreme danger to government witnesses, had an excellent intelligence network and, before approving a contract to kill a witness, demanded documentation identifying an individual as a government witness].) In any event, the court told the jury not to be concerned and took measures to ease the jury about its safety. (15RT 2386-2387, 2391; 29RT 4332, 4335.) Also, the court instructed the jury not to be biased or prejudiced against appellant. (3CT 871.) There is no showing the juror's safety concerns affected their verdicts, especially where the jury did not convict appellant on all counts, and found not true the personal use of a firearm allegation for Luna's murder.

(1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 237].) In particular, an Evidence Code section 352 determination is a judgment call that is "unquestionably constitutional." (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013, 135 L.Ed.2d 361].) The admission of evidence may violate due process only if it is so prejudicial as to render the entire trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-72 [112 S.Ct. 475, 116 L.Ed.2d 385].) For the reasons explained above, appellant's constitutional claims also fail.

D. Any Alleged Error Was Harmless

To the extent the court erred in allowing the challenged testimony, the error was harmless under either the state or federal standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24 [reversal based on federal constitutional error not warranted if error is harmless beyond a reasonable doubt]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [reversal based on state law error warranted only when it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of the error].) The portions of Valdemar's testimony challenged by appellant could not have been prejudicial because, as previously discussed above in Argument III, there was overwhelming evidence that appellant was guilty of murdering Acosta and Dunton. All of appellant's crimes were violent and despicable, so hearing about the Mexican Mafia when compared to appellant's own violent conduct. As also explained above in Arguments I, II, and III, appellant's convictions were supported by strong evidence. Accordingly, appellant eighth claim on appeal should be rejected.

IX. APPELLANT'S *CRAWFORD* CLAIM WAS FORFEITED BECAUSE HE FAILED TO OBJECT BASED ON THE SIXTH AMENDMENT; ACOSTA'S NOTE WAS NOT TESTIMONIAL AND THEREFORE WAS ADMISSIBLE UNDER *CRAWFORD*; AND IN ANY CASE, THE ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant's ninth claim on appeal is that the trial court's admission of a note left by Acosta to his wife in the pages of a family Bible violated *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. (AOB 250-259.) This claim was forfeited, lacks merit, and any alleged error was harmless.

A. Relevant Proceeding

Acosta's wife, Witness Five, had a Bible which she kept in her bedroom dresser. Acosta and his wife left notes for each other inside this Bible. Five days after Acosta was killed, Witness Five discovered a handwritten note from Acosta left between the pages of their Bible. Acosta signed the note and also wrote down his full name, his address, and his nickname, "Spider." (16 RT 2521-2522.)

According to Acosta's wife, Acosta did not normally sign his notes with so much information, and the fact that he did so meant that the content of the note was "something serious" and "meant a lot." After finding the note, Witness Five turned it over to the detectives investigating Acosta's death. (16 RT 2522-2523.) The handwritten note was dated "6-30-99," and stated:

> Tuesday morning
> Monday nite [*sic*] 1.20
> Went to meet Shady La Rana
> don't like the meeting at Big Hueros.
> Robert Acosta
> Spider

(3CT 659, 672.)

Codefendant Grajeda sought to exclude the note on the grounds that: (1) it was hearsay and there was no applicable exception to the hearsay rule; (2) it should be excluded under section 352; and (3) it should be excluded under the Truth-in-Evidence provision of California Constitution article I, section 28. (3CT 653-658.) The prosecution filed a memo of law regarding the admissibility of Acosta's note. (3CT 663-672.) At a hearing on the motion, the trial court stated it had read and considered codefendant Grajeda's motion and the prosecution's response. The court reiterated that codefendant Grajeda sought exclusion because the note was hearsay, inadmissible under Evidence Code section 1250, and prejudicial under Evidence Code section 352. (8RT 1257-1258.) At the court's invitation for additional argument, codefendant Grajeda expressed his concern that the note was forged and could not be authenticated. (8RT 1258-1261.)

Appellant objected for the first time, and stated that "in addition to what [co-defendant Grajeda] has cited in his moving papers," appellant's "biggest concern and biggest problem" was authenticating the note. Appellant expressed his belief that the note was "very very suspicious." (8RT 1261.) Appellant ultimately argued that the note was either forged or fabricated, and should be excluded under Evidence Code section 352. (8RT 1262.)

The prosecution argued that Acosta's note would be authenticated by Acosta's wife. (8RT 1263.) Appellant argued that the prosecution should have to establish the foundation for admissibility before the note was admitted at trial. (8RT 1264.) The court found that: (1) the note was authenticated by Acosta's wife, and further authenticated by its discovery at Acosta's home; (2) the note was admissible hearsay under Evidence Code section 1250; and (3) admission of the note was not prohibited by Evidence Code section 352. (8RT 1265-1269.)

B. Appellant's Claim Was Forfeited Because He Failed to Object to the Admission of Acosta's Note to His Wife Based on His Sixth Amendment Right to Confrontation

Appellant admits that he did not object based on the confrontation clause of the Sixth Amendment. (AOB 251-252.) Indeed, appellant's failure to object on Sixth Amendment grounds forfeits appellate review of his claim. Last year, this Court reiterated that a defendant's Sixth Amendment claim is forfeited where his objections are based on the state law grounds. (*People v. Riccardi* (2012) 54 Cal.4th 758, 827, fn. 33.) This Court held:

> Defendant voiced no objection based upon the confrontation clause or due process, and expressed his objections purely on state law grounds, specifically arguing that the evidence was not relevant and was prejudicial under the Evidence Code. These objections "presented legal issues different from those underlying an objection that the admission of testimony would violate the confrontation clause" and, therefore, did not preserve his Sixth Amendment claim.

(*Ibid*, quoting *People v. Redd* (2010) 48 Cal.4th 691, 732, fn. 19; see *People v. D'Arcy* (2010) 48 Cal.4th 257, 289-290 [defendant's failure to object that statement was admitted in violation to the Sixth Amendment forfeits the claim].) Here, appellant objected on the state law grounds of authentication, Evidence Code section 1250, and Evidence Code section 352. Like the defendant in *Riccardi*, appellant presented legal issues which did not pertain to his Sixth Amendment rights, and therefore his claim was forfeited.

Appellant argues that his trial was decided before *Crawford* and *Giles v. California* (2008) 554 U.S. 353 [128 S.Ct. 2678, 171 L.Ed.2d 488], and therefore an objection based on the Sixth Amendment would have been "futile." (AOB 252.) This Court has already rejected this reasoning. In *Riccardi*, the defendant committed murder and other crimes in 1983,

absconded for eight years, and was eventually arrested and tried in 1991, almost a decade before appellant's trial. Like appellant herein, the defendant only objected on state law grounds, and never raised a Sixth Amendment concern. Under these indistinguishable circumstances, this Court found the defendant's *Crawford* claim was forfeited. This Court should likewise find appellant's forfeited his *Crawford* claim. (*People v. Riccardi, supra*, 54 Cal.4th at 872, fn. 33; see *People v. Tafoya* (2007) 42 Cal.4th 147, 166 [failure to raise confrontation clause claim at trial forfeits issue on appeal]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028 [same].)

C. Acosta's Note Was Not Testimonial under the Sixth Amendment as Interpreted in *Crawford* and Its Progeny

In *Crawford*, the high court held than "testimonial out-of-court statements are inadmissible at trial unless the declarant is unavailable and the defendant had the opportunity to cross-examine the declarant. (*Crawford v. Washington, supra*, 541 U.S. at pp. 52-54, 68-69.) In *People v. Lopez* (2012) 55 Cal.4th 569, 577, this Court analyzed the "quartet of cases"[41] from the Supreme Court addressing the test for determining whether a statement is "testimonial." From an analysis of these cases, this Court identified a two-part inquiry to determine whether or not a statement is testimonial – first, the out of court statement must have been made with some degree of formality or solemnity. (*Id.* at p. 581.) Second, an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution. (*Id.* at p. 582.) "It is now settled in

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[41] The quartet consisted of *Crawford, Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705 [180 L.Ed.2d 610], and *Williams v. Illinois* (2012) 132 S.Ct. 2221, [183 L.Ed.2d 89].)

California that a statement is not testimonial unless both criteria are met." (*People v. Holmes* (2012) 212 Cal.App.4th 431, 438, quoting *People v. Dungo* (2012) 55 Cal.4th 608, 619, and *People v. Lopez*, *supra*, 55 Cal.4th at p. 582.)

Here, appellant has failed to establish that Acosta's note to his wife meets the two requirements under *Lopez*. First, the subject out-of-court statement was not made with a sufficient degree of formality or solemnity. Acosta was not "'[a]n accuser who [made] a formal statement to government officers bear[ing] testimony[.]'" (*People v. Lopez*, *supra*, 55 Cal.4th at p. 581, quoting *Crawford*, *supra*, 541 U.S. at p. 51.) Rather, Acosta wrote the note to his wife, and not to a law enforcement agent in a formalized manner; so, the note was not testimonial. (*United States v. Manfre* (8th Cir. 2004) 368 F.3d 832, 838, fn. 1 [a declarant's statement to family members is not testimonial].) Moreover, this Court has held that a three-year-old's statement to his aunt was not testimonial (*People v. Gutierrez* (2009) 45 Cal.4th 789, 812), a statement to a friend was not testimonial (*People v. Loy* (2011) 52 Cal.4th 46, 55), and a statement to a brother-in-law was not testimonial (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1270-1271). Moreover, neither Acosta nor his wife was acting as a police agent. (*People v. Letner* (2010) 50 Cal.4th 99, 199-120 ["Therefore, the statements in the letters did not constitute 'testimonial' evidence as that term has been defined after the United States Supreme Court's decision in *Crawford*"]; *People v. Geier*, *supra*, 41 Cal.4th at p. 605.) Here, there is no evidence, or reason to believe, that Acosta or his wife were acting as police agents.

Second, as discussed above, an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution. (See *United States v. Solorio* (9th Cir. 2012) 669 F.3d 943, 952 ["statements made out-of-court with a primary purpose other than

possible prosecutorial use are nontestimonial"].) Acosta wrote his note before he went to the meeting, and before any charged crime was committed. (16RT 2509-2510, 2517). In his note, Acosta did not claim that appellant, or anyone else, had committed or would commit, any crime against Acosta or anyone else. Thus, Acosta's note was not testimonial because it was not an "out-of-court analog[], in purpose and form, of the testimony given by a witness at trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.)

Moreover, Acosta's note was not "taken primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*People v. Cage*, *supra*, 40 Cal.4th at p. 984.) Acosta's primary purpose was to tell his wife that he went to a meeting met with codefendant Grajeda that he "didn't like." (See *People v. Blacksher* (2011) 52 Cal.4th 769, 818 ["statements of a distraught mother and grandmother to those offering solace completely lacked the 'formality and solemnity characteristic of testimony'" of speaking with the police], quoting *People v. Cage*, *supra*, 40 Cal.4th at pp. 965, 984.)[42] Thus, while Acosta used his full name and moniker, he still wrote the note to his wife; so, its primary purpose was providing her with his feelings about the upcoming meeting, and not describe past facts for use in a criminal trial. Furthermore, Acosta's life was riddled with drug use and sales, so he had every reason to stay away from law enforcement agents. (*People v. Cage*, *supra*, 40 Cal.4th at p. 984.) Thus, there was no *Crawford* violation.

Appellant asserts that statements by the prosecutor during argument support his claim that Acosta's note was testimonial. (AOB 254-255.)

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[42] The note was admitted under Evidence Code section 1250 to prove Acosta's state of mind about the meeting. Appellant does not dispute that the note was admissible under state law.

This assertion is meritless because the prosecutor's beliefs are not determinative of whether the statement is testimonial under *Crawford.* Certainly, the prosecution was nor conceding that the note was testimonial under *Crawford*, which was decided years after the instant trial. The prosecutor described the note as "*almost* - - the testimony of Robert Acosta from his grave." (27RT 3851, italics added.) The prosecutor asserted that the note was "very formal" and was "not the kind of note a husband would leave for his wife." (27RT 3851.) Rather, the prosecutor believed that such a note would have been left "with a minister" or with "a confidante." In any case, regardless of the prosecutor's views on the formality of the note, leaving a note meant for one's wife, a religious figure, or a confidante, still does not have the requisite primary purpose of describing a past criminal act for projection. Finally, the prosecutor argued that Acosta wanted to let *any* reader know that he had authored the note, but did not argue that Acosta wrote the note for the police. Accordingly, appellant's argument should be rejected.

D. The Alleged Error Was Harmless Beyond a Reasonable Doubt

Even assuming a confrontation clause error occurred, it was harmless beyond a reasonable doubt because the jury would have convicted appellant even if Acosta's note had been excluded. (*People v. Geier*, *supra*, 41 Cal.4th at p. 608; see *People v. Ledesma* (2006) 39 Cal.4th 641, 709; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) As the United States Supreme Court has previously held, violations of an accused's right to confront witnesses as guaranteed by the Sixth Amendment are subject to harmless-error analysis under the standard of *Chapman*, i.e., whether the error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-684 [106 S.Ct.

1431, 89 L.Ed.2d 674].) Here, Acosta's note did not even mention appellant, and set forth Acosta's state of mind about meeting codefendant Grajeda. Moreover, the note played only a minor role in proving appellant murdered Acosta and Dunton, and the prosecution presented overwhelming evidence with, or without, Acosta's note. (See Statement of Facts and Arg. III, *ante*.) Accordingly, appellant ninth claim on appeal should be denied.

X. APPELLANT'S CLAIMS ARE FORFEITED BECAUSE HE FAILED TO REQUEST CLARIFYING INSTRUCTIONS; APPELLANT HAS FAILED TO ESTABLISH A REASONABLE PROBABILITY THAT THE JURORS MISCONSTRUED THE COURT'S INSTRUCTIONS REGARDING NOTE TAKING AND READBACK OF TESTIMONY AS APPELLANT SUGGESTS; AND, IN ANY CASE, APPELLANT HAS FAILED TO ESTABLISH ANY PREJUDICE.

Appellant's tenth claim on appeal is that the trial court's improper and unconstitutional instructions effectively required jurors to take notes, sternly discouraged readback of testimony, and prohibited readback of testimony for the first two days of deliberations. (AOB 260-289.) Based on these alleged errors, appellant asserts the court "interfered with the jury's unique and exclusive responsibility and power to evaluate the credibility of witnesses . . . ." (AOB 261.) Appellant's claims should be denied because each was forfeited, lacks merit, and caused no prejudice. Appellant's claims were forfeited because he failed to request clarifying instructions addressing the concerns he raises for the first time on appeal. Appellant's claims lack merit because there is no reasonable likelihood that the jury misunderstood or misconstrued the court's instructions as appellant suggests. In any case, the alleged errors caused no prejudice.

A. Relevant Proceedings

On December 13, 1999, prior to opening argument, the court instructed the jury on taking notes during the trial:

> Let me talk about that first. It's very very important that you take notes during this trial. Those are for your own personal

use, not to prove to somebody else that what you wrote down was accurate but to refresh your own recollections of what goes on during the trial.

You can take notes of any aspect of the case. If you take notes during the opening statement or the final arguments, understand that that is not evidence in the case. The evidence comes from the sworn testimony of witnesses and from physical evidence that's offered and received during the trial.

But if you do not take notes, you will not remember what went on during the trial, and the thing that infuriates me the most about jurors is when they first go into deliberations and the first hour or two I get a note sent out saying we want a reread of the testimony of, and then I get a list of witnesses, which indicates to me the jurors didn't do their job in recording the information that you need to remember at the end of this trial.

As I've indicated, it will be some weeks before the case is given to you in the guilt phase. You've got to be able to remember the testimony, and that means you should write down names of witnesses, dates, times, places, things that are said and done.

The offenses in this case are alleged to have occurred on four different dates or five different dates, February 25th, May 26th, June 9th, June 10 and July 1, 1997. You've got to try to keep all of this organized in your minds.

And I've given this speech many many times to jurors, and I sit back and watch 90 percent of them not taking enough notes thinking, oh, well, somebody else will remind me or I will remember everything because this is so unusual, I'm going to remember everything that happens. I know the judge is wrong.

I've been here 15 years. I know I'm right. You will not remember if you don't take notes.

One caution about that is not to take so many notes that you're not watching and listening as the evidence has been presented. A witness that looks uncomfortable to you may be uncomfortable because that witness isn't telling the truth. So you should watch the witness while they're testifying as well.

Don't have your head buried in your notes all the time taking notes, but take a lot of notes to remind yourselves of what happened during the trial. If you don't, you'll have to rely on other people to refresh your memory, and you shouldn't do that. It should be your own memory that you can recall the things that are important to you.

. . .

The main thing is I'm going to be very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses, and I realize it's all going by and it won't be recorded in your memories because you aren't trying to take those notes.

You've got to try to remember the evidence that's been presented. I'll tell you honestly at the end of this trial, you will not have been given the information that you need to know what will be the key to you to make decisions in this case.

We cannot predict to you the things that are going to make a difference to you in advance. The attorneys will try to do that. It may seem very obvious, but at the end of the trial so often what happens is the key to the answer that you are asked to give will be something that occurred earlier and nobody flagged it, nobody put up a red flag saying, listen, people, this is very important. That's for you to do.

You've got to pay attention to everything, understanding it may be something minor at the end of the trial that's really important to you and you didn't record it, so you're going to be asking what happened.

So take notes. Understand they're for your own personal use. You'll leave them on the seat or under the cushion when you vacate the jury box. The bailiff is in charge of the jury box. No one will have access to that information but you. It's not something that somebody is going to spy on, but we'll make sure nobody gets into the jury box to look at your notes. But keep them for your own personal use.

I'm only saying this because I am so exhausted with saying this so many times to jurors and they don't take notes. So many of them don't take any notes at all, and that's a big mistake.

(8RT 1297-1301.)

During the guilt phase, the jury was instructed that:

> During deliberations, any question or request the jury may have should be addressed to the court on a form that will be provided. Please understand that counsel must first be contacted before a response can be formulated. If a readback of testimony is requested, the reporter will delete objections, rulings, and sidebar conferences so that you will hear only the evidence that was actually presented. This may take hours.
>
> During the course of this trial, you have been attentive and many of you have taken notes. Your general discussion of the testimony should refresh your recollection of the evidence. If there is still a disagreement among the jurors as to the state of the evidence, we will have the necessary testimony read back to you as soon as possible.
>
> Please understand that it will take time to provide a response to your request. Continue deliberating until you are called back into the courtroom.

(3CT 890-891.)

The trial court also instructed the jury that:

> The final comment is on read back of testimony. You may find that that's necessary, but I would not want to hear from you today or tomorrow that you think you've discussed everything and there's a dispute about what the witness actually said. [¶] . . . If after a day or two you still have a disagreement as to what the witness actually said, then put that on the . . . question format and tell us what you need to have.
>
> If you want the entire testimony of the witness read, we'll do that. If you want it selected on a specific topic, we'll do that. We'll give you the direct or cross-examination on that particular topic for that particular witness. But be specific as to what you'd like to have read back to you if that happens, and then any readback will start then on Monday. You've got some time to look at the exhibits and discuss the evidence.

(29RT 4176-4177.) The court instructed the prosecutor and defense counsel to maintain the ability to be in court within an hour of being called. (29RT 4182-4183.)

B. Appellant's Claims of Instructional Error Were Forfeited Because He Failed to Request a Clarifying Instruction

In *People v. Dennis*, this Court held that Dennis had waived his claim that the trial court failed to fully instruct the jurors about taking notes during the trial. This Court stated:

> The court permitted the jurors to take notes during the guilt and penalty phases of the trial. The trial court twice gave the jurors essentially the same cautionary instruction regarding the use of notes. At the conclusion of trial, the court instructed the jurors that their notes "are your own personal notes and not for the use of any other juror," and that if a juror's notes and memory differ, "the reporter's notes must prevail."
>
> [Dennis] claims the instruction was insufficient. He asserts the court also should have instructed the jurors not to permit their notetaking to distract them from the trial proceedings, advised them to use their notes only as an aid to their memories, and admonished them not to be influenced by other jurors' notetaking. [Citations].
>
> [Dennis] failed to request a more complete instruction and therefore waived the point for appeal. The trial court has no sua sponte duty to give an instruction regarding use of jurors' notes. [Citation.]

(*People v. Dennis* (1998) 17 Cal.4th 468, 537-538.) Likewise, in the instant case, appellant failed to ask the court for any instruction to clarify the concerns he raises for the first time on appeal. For the same reasons, appellant forfeited his challenge to any instructions regarding the readback of testimony. Accordingly, appellant's claims were forfeited.

C. Appellant Has Failed to Show Instructional Error

A reviewing court must determine whether there is a reasonable likelihood that the jury misconstrued or misapplied the terms of the challenged instruction. (*People v. Thorton* (2007) 41 Cal.4th 391, 436, citing *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Huggins* (2006) 38 Cal.4th 175, 217, citing *Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701].) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248, quoting *People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Whisen* (2008) 44 Cal.4th 174, 220 ["we consider the entire charge to the jury, and not simply the asserted deficiencies in the challenged instruction"].)

In *People v. Mayfield*, this Court stated:

> [Mayfield] contends the court erred in failing to caution the jury to pay attention to the trial and not become overly absorbed in note- taking. [Citation.] We note that although the trial court invited the jurors to take notes, it reminded them simultaneously that they should "keep in mind what you hear during the presentation of the evidence." Even if this brief comment did not suffice to warn the jurors that they should not let their note-taking distract them from the task of judging defendant, we have explained since [*People v. Whitt* (1984) 36 Cal.3d 724] the trial court is not required to give such an instruction. [Citation.]

(*People v. Mayfield* (1993) 5 Cal.4th 142, 180; *People v. Avena* (1996) 13 Cal.4th 394, 423 [trial court is not required to give cautionary instructions regarding note taking].)

Here, although the court had no sua sponte duty to caution the jurors about taking notes during trial, the court's instructions were proper, and in no way interfered with the jury's responsibilities. Rather, the court encouraged the jurors to take notes, based on years of experience

overseeing trials, but never told or implied that each juror was *required* to take notes. Instead, jurors were told: "You can take notes of any aspect of the case." The court did not say "must," "mandatory," "required," or any other language which would cause a juror to believe there was no other choice. The court never implied a juror would face any repercussions for rejecting the court's advice to take notes. In fact, the court recognized that the jurors could choose to "not take notes" and observed that "90 percent" of jurors chose not to take notes even though the court had "given this speech many many times to jurors[.]" In fact, the court candidly told these jurors that "[s]o many" other jurors "don't take notes at all[.]" The fact that the court would be "very discouraged" if jurors chose not to take notes only further illustrates that the court never instructed the jurors, expressly or impliedly, that they were required to take notes.

To be sure, the court addressed the most obvious reason for taking notes: without taking notes there was little likelihood that a juror would remember the trial or be able to refresh his or her memory of the trial. This common-sense observation was particularly applicable to the instant case, involving five homicides at four different locations, a robbery at a fifth location, ten special allegations, and multiple special circumstance allegations. Based on 15 years of experience overseeing trials, the court properly emphasized that taking notes could assist a juror's recollection of the trial, and that the decision not to take notes often affected the number and timing of requests for readback of testimony. Additionally, the court advised taking notes because it was difficult to predict which parts of the trial will be important during deliberations.

In sum, the court gave proper cautionary instructions about note taking, even though there is no sua sponte duty to do so. First, the instructions clarified notes were for personal use to assist recollection of what happened at trial. Second, the court cautioned taking notes should not

prevent the jurors from "watching and listening as the evidence has been presented" because each juror should use his or her memory to "recall the things that are important to you." Third, the court assured that the jury notes would not be accessible to anyone else. Fourth, the court pointed out that jurors could take notes of any aspect of the case, and reminded the jury that "opening statement and the final arguments" were "not evidence in the case." Finally, the court cautioned that jurors should balance note taking with "watching and listening as the evidence has been presented." (8RT 1297-1301.) Therefore, contrary to appellant's novel assertion, the court's instructions did not "interfere[] with the jury's unique and exclusive responsibility and power to evaluate the credibility of witnesses" (AOB 261), send the message that "observation of the witnesses was not as important as notetaking" (AOB 273), imply that jurors who did not take notes would have to rely on other jurors' notes[43] (AOB 277), or violate appellant's constitutional rights (AOB 275). Under the court's instructions regarding note taking and the numerous instructions on witness credibility, the jurors clearly understood it was their duty to determine the witnesses' credibility, and the court did not interfere with the jury's credibility determination.

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[43] The trial court told the jurors that without taking notes "you'll have to rely on other people to refresh your memory, and you shouldn't do that. It should be your own memory that you can recall the things that are important to you." (*People v. Solomon, supra*, 49 Cal.4th at p. 823.)

D. Appellant Has Failed to Show the Trial Court's Instruction Regarding the Readback of Testimony Was Erroneous

Section 1138[44] gives jurors, during deliberation, the right to rehear testimony and instructions on request. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 824, citing *People v. Frye* (1998) 18 Cal.4th 894, 1007.) "It also implicates a defendant's fair trial rights." (*People v. Solomon*, *supra*, 49 Cal.4th at p. 1007.) Here, the trial court never prohibited the jury from hearing readback of testimony. In fact, the trial court told jurors that they could request any part, or all of, any witness's testimony. The court asked the jurors to be specific and readback would begin on Monday. The court merely suggested jurors to discuss the evidence and examine the exhibits before requesting a readback. (29RT 4176-4177.) The jury was obviously not discouraged to request assistance. After two days of deliberation the jury sent the court a note requested assistance defining first degree murder. (3CT 814.) The following morning, the jury sent a note requesting readback. Within an hour the court provided the jury with the readback it had requested. (3CT 817.) The next day of deliberations, the court answered another question from the jury. (3CT 819.) Accordingly, appellant has failed to show any error.

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[44] Section 1138 states: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

E. Any Alleged Error Was Harmless Beyond a Reasonable Doubt

A violation of section 1138 is not a basis for reversing a conviction unless prejudice is shown. (*People v. Robinson* (2006) 37 Cal.4th 592, 634; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1027.) As to any error based on state law, appellant has failed to show a reasonable probability he would have obtained a better result absent the error. (People v. Robinson, supra, 37 Cal.4th at pp. 635-636.) "[I]ndeed, any alleged federal constitutional error [is evaluated by the *Chapman*] "'beyond a reasonable doubt'" test[.]" (*Id.* at p. 636.)

There is no indication in the record that the court's instructions or comments on note taking or readback had any affect on the jury's deliberations. As discussed above, the jury requested readback, as well as clarifications regarding the jury instructions; so the jury was obviously not discouraged to seek the court's guidance or the readback of testimony. Appellant merely speculates that the jury would have asked for more readback. (AOB 280-281.) In addition, as noted above, the jury was given numerous instructions on witness credibility (3CT 874-876), and nothing in the challenged instructions superseded the credibility instructions, or undermined the jury's credibility determination. Also, the convictions were supported by overwhelming evidence. (See Arguments I, II, and III, *ante*.) Accordingly, appellant has failed to show a reasonable probability he would have obtained a better verdict, and in this case, any federal constitution error was harmless beyond a reasonable doubt. (*People v. Robinson*, *supra*, 37 Cal.4th at pp. 635-636, fn. 21 [rejected claim that error was structural].)

XI. APPELLANT'S CLAIMS OF JUDICIAL ERROR WERE FORFEITED; THE TRIAL COURT'S COMMENTS DURING VOIR DIRE WERE NOT ERRONEOUS UNDER STATE LAW OR THE FEDERAL CONSTITUTION; AND, APPELLANT HAS FAILED TO SHOW HE WAS PREJUDICED BY THE ALLEGED ERRORS

Appellant's eleventh claim on appeal is that the trial court erroneously and unconstitutionally instructed jurors during voir dire regarding the exchange of testimony for leniency, effectively telling jurors that the prosecution's witnesses were lesser participants in the charged crimes and that appellant and codefendant Grajeda were the "greater culprits." (AOB 290-308.) This claim should be rejected. Appellant's state and federal claims were forfeited by his failure to object to the court's comments during voir dire. Appellant's state and federal constitutional claims lack merit because the trial court's comments were not jury instructions, and those comments were well-within the court's broad discretion to conduct voir dire. Finally, appellant has failed to establish he was prejudiced at either the guilt or penalty phases.

A. Relevant Proceedings

The court asked Prospective Juror 11 about the concept of granting partial immunity, total immunity, or a lesser sentence for a witness, in order to secure that witness's testimony "against someone else." (6RT 951.) Prospective Juror 11 told the court that he understood the concept "much better" after the court used the hypothetical situation of two men who rob a bank: one goes in and kills someone, while the other stands outside as a lookout, so the prosecution grants immunity to the lookout in order to convict the shooter. Prospective Juror 11 agreed with the court that: "It would be bad the other way around . . . to grant immunity to the killer to get [the lookout]." (6RT 951.)

Later on, the court asked Prospective Alternate Juror 2 whether he understood the concept of granting immunity or giving a lesser sentence to

a witness in order to secure his or her testimony. The court reiterated the hypothetical of two bank robbers, where the prosecution lacks enough evidence to bring the shooter to trial, but has such evidence regarding the lookout, so the prosecution gives the lookout immunity in order to prosecute the shooter. (7RT 1096-1097.) Prospective Alternate Juror 2 stated that this was not "fair," but he did not have "a problem." The court used the example of two bank robbers, but added that the lookout told the shooter not to bring a loaded gun, but the shooter did so anyway. Prospective Alternate Juror 2 had no problem "[i]n that case." (7RT 1097-1098.) The court reiterated the concept of securing the lookout's testimony in order to prosecute the shooter, where there was not enough evidence to bring the shooter to trial without the lookout's testimony. Prospective Alternate Juror 2 agreed that this "sounded right' and not "wrong." (7RT 1098.)

B. Appellant's Claims Were Forfeited

"The controlling principle is that a defendant may not challenge on appeal alleged shortcomings in the trial court's voir dire of the prospective jurors when the defendant, having had the opportunity to alert the trial court to the supposed problem, failed to do so." (*People v. Fuiava* (2012) 53 Cal.4th 622, 653; *People v. Pearson* (2013) 56 Cal.4th 393 ["Preliminarily, defendant's failure to make a timely and specific objection on the ground he now raises forfeits the claim on appeal]; *People v. Foster* (2010) 50 Cal.4th 1301, 1324 [claim that the trial court erroneously defined "aggravating circumstances" forfeited by failure to object during voir dire].) This applies to "comments implying it believed defendant was guilty of murder[.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 635; see *People v. Mills* (2010) 48 Cal.4th 158, 189.) Here, appellant did not challenge the subject comments during voir dire; so any claims premised on state law were forfeited. (*People v. Sanchez* (1995) 12 Cal.4th 1, 61-62

[failure to object to court's questioning of prospective juror during voir dire forfeits claim].)

Nonetheless, appellant now asserts, for the first time, that the trial court undermined the presumption of innocence, aligned itself with the prosecution, vouched for witnesses, usurped the jury's power to determine witness credibility, and reduced the prosecution's burden beyond a reasonable doubt. He also asserts that these alleged errors violated his rights to a fair trial, an impartial jury, due process of law, and to a reliable determination of guilt at the penalty. (AOB 300-301.) These federal constitutional claims were also forfeited. (*People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Howard* (2010) 51 Cal.4th 15, 26; *People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12 [appellant's claim of violation of constitutional rights raised for first time on appeal not preserved for review].)

Appellant admits that trial counsel failed to object to the challenged comments. (AOB 301, fn. 94.) However, he asserts that no objection was necessary because these comments were, in fact, jury instructions that affected his substantial rights under section 1259. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 431.) This characterization is patently erroneous because the court was not instructing the jury on how to decide the case, it was conducting voir dire of prospective jurors, so the exception to the general forfeiture rule does not apply to appellant's claim.

Appellant cites to *People v. Dunkle* , *supra*, 36 Cal.4th at p. 928, for the proposition that pre-instruction during voir dire is subject to appellate review under section 1259. While this is true as to jury instructions, the subject comments in this case were not jury instructions. *Dunkle* involved a *printed pre-instruction* regarding the penalty phase distributed to

prospective jurors.[45] (*People v. Dunkle*, *supra*, 36 Cal.4th at pp. 928-929.) Thus, *Dunkle* is inapposite and distinguishable.

Moreover, in *People v. Romero*, *supra*, 44 Cal.4th at pages 422-424, a case appellant relegates to a footnote (AOB 301, fn. 94), this Court addressed a similar situation. In *Romero*, during voir dire, the court made "brief" comments about the nature of aggravating and mitigating circumstances.[46] This Court rejected the defendant's claim that these comments were jury instructions, stating:

> Defendant argues that the trial court's comments, *which he mischaracterizes as jury instructions*, were biased and misled the jury because they did not include a statement that mitigation includes any other circumstance that extenuates the gravity of the crime. (§ 190.3, factor (k).) The trial court, however, was

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[45] The preprinted instruction stated:

> "In the penalty phase of the trial both counsel are permitted to introduce mitigating and aggravating evidence about the defendant. Aggravating circumstances may involve other bad acts, different from the offense(s) charged. Mitigating circumstances could be psychiatric testimony or other sympathetic factors in a defendant's life. If you[ ] are selected as a juror in this case you must, by law, consider these mitigating and aggravating factors along with the facts of the case in making a decision about the penalty to be imposed."

(*People v. Dunkle*, *supra*, 36 Cal.4th at p. 928.)

[46] This Court observed:

> In its comments to the second panel, the court stated, "And the court will give you a rather exhaustive list, if we ever get to that point." In addition, during the voir dire of a prospective juror on the second panel, the trial court commented: "You have to weigh the bad things, serious things about the case, versus the mitigating factors, the things that make the crime perhaps less blameworthy or good things about the defendant's background."

(*People v. Romero*, *supra*, 44 Cal.4th at p. 423.)

> not instructing the jury at the time it made the comments in question. Indeed it was conducting voir dire of prospective jurors. Its comments were not intended to be, and were not, a substitute for full instructions at the end of trial. [Citation.] The purpose of these comments was to give prospective jurors, most of whom had little or no familiarity with courts in general and penalty phase death penalty trials in particular, a general idea of the nature of the proceeding. [Citation.].

(*Id.* at p. 423, internal quotations omitted, italics added.) Likewise, in the instant case, the trial court comments were neither jury instructions nor intended to be jury instructions. Therefore, every aspect of appellant's claim was forfeited by his failure to object.

C. Applicable Law

Recently, this Court stated:

> Trial courts possess broad discretion over both [d]ecisions concerning the qualifications of prospective jurors to serve and the manner of conducting voir dire. Indeed, decisions of the United States Supreme Court in this area have made clear that the conduct of voir dire is an art, not a science, so [t]here is no single way to voir dire a juror. The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.

(*People v. Whalen* (2013) 56 Cal.4th 1, 29-30, all internal citations and quotations omitted.) While a trial court "'must [obviously] control voir dire examination[,]'" the court "'must remain neutral'" and "'must not proselytize [or] indicate its views of the "right" or "wrong" answers to voir dire questioning.'" (*Id.* at 30, quoting *State v. Papasavvas* (2000) 163 N.J. 565, 585.)

"[T]he adequacy of voir dire is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." (*People v. Whalen*, *supra*, 56 Cal.4th at p. 30,

internal quotations omitted, quoting *People v. Holt* (1997) 15 Cal.4th 619, 661, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424 [111 S.Ct. 1899, 114 L.Ed.2d 493].) "[T]he exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in voir dire is entitled to considerable deference by appellate courts." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313; see *People v. Cleveland* (2004) 32 Cal.4th 704, 737 [courts have broad discretion in deciding what questions to ask on voir dire]; cf. *People v. Carasi* (2008) 44 Cal.4th 1263, 1325 [trial court's discretion is "not limitless"].) "For these reasons, the court's manner of conducting voir dire will not be disturbed on appeal unless it renders the trial fundamentally unfair." (*People v. Whalen*, *supra*, 56 Cal.4th at p. 31, citing *People v. Carter*, *supra*, 36 Cal.4th at p. 1250, and *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 425-426.)

D. Appellant's Claim Lacks Merit

The trial court acted well-within its discretion during voir dire. There was no error, as the court was trying to explain a pertinent issue using a hypothetical situation and did not tell jurors how to decide this issue or any other issue. The court's explanation about leniency was not unreasonable, erroneous, or controversial, as it is almost a matter of common knowledge that prosecutors obtain assistance of witnesses by offering leniency or immunity if the witness was somewhat involved in the case. It would also be clear to any juror that a prosecutor's choice of who deserves leniency is a judgment call of the prosecutor. As applied to the facts of this case, the jury would certainly know, regardless of the court's remarks, that the prosecutor's theory was that appellant was the killer and that Witness One

was a lesser player in the Escareno homicide.[47] Witness One did not believe[48] he would be prosecuted for the Escareno homicide, and received the promise of police protection during trial, relocation after trial, and a $30 daily per diem. (19RT 2910-2912; 22RT 3323-3324.)

In addition, the brief exchanges upon which appellant relies were a miniscule part of the voir dire, which involved hundreds of prospective jurors. (3CT 679, 683-689.) Voir dire for alternate jurors continued. (3CT 690.) On December 10, 1999, four alternate jurors were selected. (3CT 691-692.) The object exchanges were not jury instructions, let alone instructions that all the jurors were required by law to assume that prosecution witnesses were "lesser participants" in the charged crimes and that appellant and codefendant Grajeda were the "greater culprits." (AOB 294-301.) Instead, as noted above, the challenged comments involved hypotheticals to explain a pertinent issue and to obtain the general views of prospective jurors on the issue.

Furthermore, the jury received several instructions which made clear that the trial court was merely using a hypothetical during voir dire and was not instructing the jury at that time. The guilt phase instructions included CALJIC Nos. 2.20 (believability of witness), 2.21.1 (discrepancies in testimony), 2.21.2 (witness willfully false), 2.22 (weighing conflicting testimony), 2.24A (witness in fear), 2.23 (believability of witness—

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[47] Appellant also claims the court's comments encompassed situations where the prosecution witness was not a participant to the charged crimes. (AOB 304-305.) This claim makes little sense. If a witness is not an accomplice, he cannot be the "greater" or "lesser" culprit for the charged crime.

[48] Witness One was not granted full immunity, partial immunity, or a lesser sentence for the Escareno murder, and testified with the knowledge that he would incriminate himself in Escareno's murder.

conviction of a felony[49]), and (3.10, 3.11, 3.12, 3.14, 3.16, and 3.18 (instructions addressing accomplice testimony). (3RT 874-877.) These instructions told the jury to evaluate and determine witness credibility and were not superseded or modified by the court's comments during voir dire.

Here, as explained above, nothing in the voir dire told the jury how to decide the case. Thus, appellant has failed to that he did not have an impartial jury, at either the guilt or penalty phase of the trial. The fact that the jury failed to convict appellant as to the Escareno crimes, despite the testimony of his accomplice, unquestionably shows that challenged comments did not direct, interfere, or otherwise effect the jury's determination as to the credibility as to the credibility of accomplices to appellant's crimes.

Under these circumstances, "[appellant] has not established that the trial court's comments or the prospective jurors' responses to the trial court's questions negatively affected any prospective juror." (*People v. Pearson*, *supra*, 56 Cal.4th at p. 420.) Thus, "[v]iewing the voir dire record as a whole, [it] cannot be sa[id] that the voir dire was inadequate and that the resulting trial was fundamentally unfair." (*People v. Robinson* (2006) 37 Cal.4th 592, 613.) Appellant's claims of constitutional error, although forfeited, should be denied as well. "The right to voir dire, like the right to peremptorily challenge [citation], is not a constitutional right but a means to achieve the end of an impartial jury. [Citation.]" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 654, internal quotations omitted, quoting *People v. Carter*, *supra*, 36 Cal.4th at pp. 1250-1251.)

Thus, appellant has failed to show that he did not have an impartial jury, at either the guilt or penalty phase of his trial. Accordingly,

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[49] Witness One admitted he was convicted of bank robbery about thee decades before appellant's trial.

appellant's eleventh claim on appeal should be denied because appellant's claims were forfeited, lack merit, and caused no prejudice.

XII. APPELLANT HAS FAILED TO ESTABLISH THAT THE TRIAL COURT ERRED BY GIVING CALJIC NO. 8.71, AND BY FAILING TO GIVE CALJIC NO. 17.11; AND, IN ANY CASE, THE ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant's twelfth claim on appeal is that the CALJIC instructions defining the process by which jurors reach a verdict on the lesser offense of second degree murder and the court's failure to instruct the jury with CALJIC No. 17.11 unconstitutionally skewed the jurors' deliberations towards first degree murder. (AOB 309-320.) This claim should be rejected. There was no reasonable likelihood that the jury misconstrued the court's instructions as appellant suggests, and the alleged error was harmless beyond a reasonable doubt.

A. Relevant Proceedings

The jury was instructed with CALJIC No. 8.70, which stated: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree." (3CT 884-885.) The jury was then instructed with the 1996 version of CALJIC No. 8.71[50], which provided:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, *but you unanimously agree that you have a*

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[50] This instruction, prior to the 1996 revision, stated: "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, *but you have a reasonable doubt* whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (Italics added.)

reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree.

(29RT 4151-4152; 3CT 885, italics added.)

The jury received other relevant instructions. These instructions included CALJIC No. 8.74, which provided:

> Before *you may return a verdict* in this case, you must agree unanimously not only as to whether a defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of Murder in the First Degree or Murder in the Second Degree.

(29RT 4152; 3CT 885, italics added.) The relevant parts of CALJIC No. 17.40 stated: "The People and the defendant are entitled to the individual opinion of each juror. [¶] . . . Each of you must decide the case for yourself" and should not "decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (3CT 891; 27RT 4152.)

As to the special circumstance allegation, the jury was instructed:

> If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances: is true or not true: Multiple Murder as to both defendants and Murder during the perpetration of Robbery or Kidnapping as to [appellant].
>
> *The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.*
>
> If you are satisfied *beyond a reasonable doubt* that a defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> . . .

> You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to both defendants, but can agree as to one of them, you make your finding as to the one upon which you do agree.
>
> You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to both defendants, you must make your finding as to the one or more of them upon which you do agree.
>
> *In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.*

(3CT 887, italics added; 27RT 4159.)

Finally, the jury was instructed that: "To find the special circumstance, referred to in these instructions as Multiple Murder convictions, is true, it must be proved: A defendant has in this case been convicted of at least one crime of Murder of the First Degree and one or more crimes of Murder of the First or Second degree." (3RT 887-888; 27RT 4160.)

B. Appellant Has Failed to Establish Instructional Error

In *People v. Pescador* (2004) 119 Cal.App.4th 252, the defendant argued that the 1996 version of CALJIC No. 8.71 – the instruction given in this case – "force[d] individual jurors who had a reasonable doubt as to the degree of murder" to conclude that they could not individually give the defendant the benefit of that doubt, unless "the jury collectively and unanimously agree[d] upon the existence of reasonable doubt." (*Id.* at p. 256.) The court of appeal rejected that assertion. In so holding, the court first observed that, when assessing the correctness of jury instructions, the court reviews all of the instructions given, rather than considering only "parts of an instruction or . . . a particular instruction." (*Id.* at p. 257.)

The court then noted that the defendant's proposed interpretation of the challenged instructions flew "in the face of CALJIC Nos. 17.11 and 17.40." (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257.) CALJIC No. 17.11 specifically informed the jurors that if they had "a reasonable doubt" regarding the degree of murder, the jurors must give the defendant the benefit of that doubt and "find him guilty of that crime in the second degree." (*Ibid.*) CALJIC No. 17.40 further instructed the jurors that the prosecution and defense were "entitled to the individual opinion of each juror," that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." *(Ibid.)* Finally, the jurors were directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" *(Ibid.)*

The *Pescador* court concluded that, in "light of the instructions as a whole," it was not reasonably likely that the jury interpreted CALJIC No. 8.71 "as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257.) For the same reasons, *Pescador* also found that

> "CALJIC No. 8.72, when considered in context with CALJIC Nos. 8.50 [explaining difference between murder and manslaughter], 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt."

(*Ibid.*)

Following *Pescador*, the validity of CALJIC No. 8.71 was again considered in *People v. Gunder* (2007) 151 Cal.App.4th 412. There, as in *Pescador*, the defendant argued that the instruction violated his due process rights because it purportedly "condition[ed] any juror's decision in favor of

second degree murder on the unanimous agreement of the jurors that a doubt exists as to degree." (*Id.* at pp. 424-425.) The *Gunder* defendant also asserted that *Pescador* was inapposite, because the *Pescador* jury, unlike his jury, was given CALJIC No. 17.11, the instruction stating that if there was a reasonable doubt as to the degree of murder, the defendant was to be given the benefit of that doubt. (*Id.* at p. 425.) The *Gunder* court concluded that the foregoing distinction was immaterial, stating:

> We disagree that this is a crucial distinction. If indeed it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree, the parallel pattern instruction [CALJIC No. 17.11] does not refute this any more directly than the instruction on the duty to deliberate individually. It is mere icing on the cake. What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder.

(*Id.* at pp. 827-828.)

Here, as in *Pescador* and *Gunder*, the totality of the instructions clearly informed the jurors not to forsake their individual opinions when considering appellant's guilt or innocence. Like the juries in *Pescador*, the jury in this case was instructed that both the People and the defendant were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself or herself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (3CT 891.) Likewise, the jurors were further

directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (3CT 871.)

Appellant nevertheless seeks to distinguish *Pescador*, claiming that, unlike the circumstances in *Pescador*, his jury was not given CALJIC No. 17.11, the instruction directing the jury to give the defendant the benefit of the doubt and find him guilty of second degree murder if it could not decide the degree of the murder. (AOB 311-315.) Here, even though the jurors were not instructed with CALJIC No. 17.11, *Gunder* aptly notes that CALJIC No. 17.11 "is mere icing on the cake," and that the "crucial" instruction is CALJIC No. 17.40 which expressly reminds jurors that they are "not bound to follow the remainder [of other jurors] in decision making." (*People v. Gunder*, *supra*, 151 Cal.App.4th at pp. 827-828.)

In *People v. Moore*, the defendant's jury was instructed with CALJIC Nos. 8.71 and 8.72, as well as CALJIC 17.40. After discussing *Pescador* and *Gunder*, this Court concluded that "the better practice is not to use the 1996 revised version[] of CALJIC No[]. 8.71[], as the instruction[] carr[ies] at least some potential for confusing jurors about the role of their independent judgment in deciding between first and second degree murder[.]" (*People v. Moore* (2011) 51 Cal.4th 386, 411.) This instruction was "unnecessary" because the jury was instructed with CALJIC No. 8.75. *(Ibid.)* In the instant case, this Court should rely on *Gunder* and find no instructional error occurred below because the jury was instructed with CALJIC Nos. 8.74 and 17.40, which cured any ambiguity in CALJIC No. 8.71.

Should this Court decline to address the merits of the claim in this case, as it did in *Moore*, then as in *Moore*, the alleged error should be found harmless beyond a reasonable doubt. In *Moore*, this Court found that the alleged error was harmless beyond a reasonable doubt because the jury found felony-murder circumstances true for both alleged murders, and

therefore second degree murder was a "not legally available verdict[.]" (*People v. Moore*, *supra*, 51 Cal.4th at p. 412.)

Here, the jury found that appellant had committed the Patel murder during a robbery and kidnapping. (3CT 837-839.) The jury found Luna's murder was in the first degree, but rejected the robbery charge; thus, the jury convicted him of first degree murder based on premeditation. The Acosta and Dunton murders were also found to be in the first degree based on premeditation. The jury also found appellant committed multiple murders. (3CT 844.) As in *Moore*, the jury's verdict as to Patel was necessarily first degree murder based on the felony murder allegation so "the challenged instructions, therefore, could not have affected the jury's verdict[]" as to Patel's murder. (*People v. Moore*, *supra*, 51 Cal.4th at p. 412.) Moreover, there is no doubt that the Acosta and Dunton homicides were committed in the first degree, as discussed above in Argument IV. The Luna homicide was also supported by overwhelming evidence that the murder was committed in the first degree, as discussed above in Argument I. Also, aside from speculation, there was no showing that, despite the overwhelming evidence of premeditation, any juror had a doubt as to the degree of the Luna, Acosta, and Dunton murders.

Furthermore, even though the jury did not find the Luna, Acosta, or Dunton murders were based on the felony-murder, this is immaterial based on the other verdicts. The jury found that Luna, Acosta, and Dunton had been murdered. And the jury was instructed that multiple murder convictions are present when: "A defendant has in this case been convicted of at least one crime of Murder of the First degree and one or more crimes of Murder of the First degree or *Second degree*." (3CT 888, italics added.) Thus, even assuming that some jurors had doubt as to whether the Luna, Acosta and Dunton murders were in the first degree, the multiple murder special circumstance would not be affected by this doubt or the alleged

error. Therefore, any instruction error could not affect either of these special circumstance findings by the jury. For these reasons, and error was harmless beyond a reasonable doubt. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 412.)

Finally, appellant also claims that the purported instructional deficiency constituted a structural error requiring reversal of his conviction. (AOB 317-318.) Appellant is incorrect because this Court has already rejected this claim. In *People v. Moore,* this Court applied the *Chapman* standard when adjudicating the same issue. Also, instructional errors are usually evaluated under *Chapman* if there is a constitutional violation. (*Neder v. United States* (1999) 527 U.S. 1, 15-20 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Wilkins* (2013) 56 Cal.4th 333, 348-349; *People v. Flood* (1988) 18 Cal.4th 470, 487-490.) Needless to say, *Sullivan v. Louisiana*[51], cited by appellant (AOB 317-318), is easily distinguishable as it involved the wrong reasonable doubt standard. Moreover, as discussed in Arguments I, II, and III, each conviction was supported by strong evidence and, therefore, any instructional error was harmless beyond a reasonable doubt.

XIII. APPELLANT FORFEITED HIS CONSTITUTIONAL CHALLENGES TO CALJIC NO. 17.41.1, AND, IN ANY CASE, THIS COURT HAS DETERMINED THAT GIVING THIS JURY INSTRUCTION DOES NOT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHTS

Appellant's thirteenth claim on appeal is that instructing the jury with CALJIC No. 17.41.1 violated appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 321-343.) This claim should be rejected. Appellant's claim was forfeited by his failure to object or ask for a modification to this instruction. In any case, appellant's claim lacks merit

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[51] *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

because this Court has already held that CALJIC No. 17.41.1 does not violate a defendant's constitutional rights under the Sixth and Fourteenth Amendments, and there is no reason to grant relief under the Eighth Amendment.

There is no indication in the record that appellant objected to CALJIC No. 17.41.1, or asked for a modification. Appellant does not claim he objected or asked for a modification at trial. Therefore, appellant's federal constitutional claims were forfeited. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30.) Appellant's state-law claims are likewise barred from consideration for the same reason. (See *Id.* at pp. 1153, 1167.)

In the event, this Court decide to address the challenged instruction as affecting appellant's "substantial rights" (§ 1259), appellant has failed to establish any error. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.) In fact, appellant recognizes that his claim has already been rejected by this Court. Any state law error in this regard would have been harmless under the "reasonable probability" test of *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243 and, indeed, any alleged federal constitutional error also was harmless under the "beyond a reasonable doubt" test of *Chapman, supra*, 386 U.S. at pp. 23-24 [guilt phase instructions], *People v. Engelman* (2002) 28 Cal.4th 436, 442-443; *People v. Brown* (2004) 33 Cal.4th 382, 393 [penalty phase instruction].) (See AOB 321-322, fns. 100, 101.)

Moreover, in 2012, this Court affirmed its prior holdings, stating:

> Defendant contends his rights under the Sixth and Fourteenth Amendment to the federal Constitution were violated by instruction pursuant to CALJIC No. 17.41.1. The instruction, as it was read to the jury, provided: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the

> obligation of the other jurors to immediately advise the court of the situation."
>
> Although defendant correctly observes that we held in People v. Engelman . . . that CALJIC No. 17.41.1 should not be given in criminal trials in California because it has the potential to intrude unnecessarily on the deliberative process and affect it adversely, defendant points to nothing in his trial that would provide a compelling reason for us to reconsider our further conclusion that giving the instruction, although ill-advised, does not violate a defendant's constitutional rights. (*Engelman*, *supra*, at p. 454, 121 Cal.Rptr.2d 862, 49 P.3d 209.)

(*People v. Souza* (2012) 54 Cal.4th 90, 121.)

Here, at the guilt phase, the jury was instructed with the same instructions discussed in Souza. (See 3CT 891; 29RT 4168-4169.) At the penalty phase, the words "based on penalty or punishment or any other improper basis," where redacted to "based on any improper basis." (13CT 3447; 31RT 4613.) Appellant has not offered any persuasive reason for this Court to reconsider the holding in *Souza*, *Engelman*, *Brown*, or *Brady*. Appellant also fails to point to anything in the record to show the subject instruction had any affect whatsoever in the jury's guilt or penalty deliberations. Certainly, appellant's rank speculation about the risk that CALJIC No. 17.41.1 could distort deliberations is insufficient to show error or prejudice. (*People v. Engelman*, *supra*, 28 Cal.4th at. pp. 448-449.)

XIV. THIS COURT HAS PREVIOUSLY REJECTED APPELLANT'S CLAIMS OF INSTRUCTIONAL ERROR AT THE GUILT PHASE

Appellant's fourteenth claim on appeal is that a series of guilt phase instructions impermissibly and unconstitutionally undermined and diluted the requirement of proof beyond a reasonable doubt. (AOB 344-361.) This claim should be rejected because it lacks merit, and has previously been rejected by this Court.

Appellant concedes that this Court has repeatedly denied many of his claims of instructional error. (AOB 356.) Indeed, this Court has rejected all, rather than many, of his claims of instructional error. In *People v. Whalen*, this Court held:

> Defendant contends that 10 standard jury instructions given in his case—CALJIC Nos. 1.00, 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 2.90, 8.83 and 8.83.1—individually and collectively allowed the jury to convict him based upon proof insufficient to satisfy the constitutionally required "beyond a reasonable doubt" standard. (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368.) He argues that the error violated his right to due process of law under the federal Constitution and requires reversal without an inquiry into prejudice. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182.) As defendant concedes, we have rejected this precise argument on occasions too numerous to recite. (E.g., *People v. Tate* (2010) 49 Cal.4th 635, 697–698, 112 Cal.Rptr.3d 156, 234 P.3d 428; *People v. Kelly* (2007) 42 Cal.4th 763, 792, 68 Cal.Rptr.3d 531, 171 P.3d 548.) As we have explained, each of these instructions "is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof." (*People v. Nakahara* (2003) 30 Cal.4th 705, 715, 134 Cal.Rptr.2d 223, 68 P.3d 1190.) Defendant invites us to revisit the issue, but provides no persuasive reason to do so.

(*People v. Whalen* (2013) (2013) 56 Cal.4th 1, 70; *People v. Friend* (2009) 47 Cal.4th 1, 48-53 [the jury was properly instructed with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, 8.20, and 8.83]; *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1027 [holding no error occurred where the jury instructions included CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, 2.90, 8.20, 8.21, 8.83, and 8.83.1].) This Court has "repeatedly rejected the same challenges to all of these instructions." (*People v. Streeter* (2012) 54 Cal.4th 205, 253, citing *People v. Parson* (2008) 44 Cal.4th 332, 358; *People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 220–221; *People v. Howard*, *supra*, 42 Cal.4th at pp. 1025-1026 & fn. 14; *People v. Kelly* (2007) 42

Cal.4th 763, 792.) Just as the appellant in *Whalen*, appellant provides no persuasive reason to reconsider or revisit this Court's prior holdings. Accordingly, appellant's fourteenth claim should be denied.

XV. THERE WAS OVERWHELMING EVIDENCE THAT PATEL WAS KIDNAPPED, AS CONCEDED BY DEFENSE COUNSEL, SO THE USE OF THE 1990 REVISION OF CALJIC NO. 9.50, WHILE IN ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant's fifteenth claim on appeal is that the trial courted erred by instructing the jury with the 1999 revision of CALJIC No. 9.50[52], rather

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[52] The trial court instructed the jury with the 1999 revision of CALJIC No. 9.50 as follows:

> Defendant Gomez is accused in Count 5 of having committed the crime of kidnapping, a violation of section 207, subdivision (a) of the Penal Code. [¶] Every person who unlawfully and with physical force, or by any other means of instilling fear, steals, or takes or holds, detains or arrests another person and carries that person without her consent or compels any person without her consent and because of a reasonable apprehension of harm to move for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a). [¶] A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit the additional crimes. If an associate crime is involved, the movement also must be more than that which is incidental to the commission of the other crime. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was moved by the use of physical force or by any other means of instilling fear; [¶] 2. The movement of the other person was without her consent; and [¶]
>
> (continued...)

than the 1996 revision.[53] Specifically, appellant claims that the jury was unconstitutionally told to consider the "totality of the circumstances" (1999 revision), rather than whether the victim was moved "for a distance that [was] substantial in character" (1996 revision), to determine whether the asportation element of kidnapping was satisfied. (AOB 362-368.) This claim should be denied. While it was error to use the 1996 revision of CALJIC No. 9.50, the error was harmless beyond a reasonable doubt.

In 2011, in *People v. Castaneda*, this Court discussed the 1996 and 1999 revisions of CALJIC No. 9.50, as well its prior opinion in *People v. Martinez* (1999) 20 Cal.4th 225, stating:

(...continued)

3. The movement of the other person in distance was substantial in character. (3CT 886-887.)

[53] CALJIC No. 9.50 (6th ed. 1996) provided:

[Defendant is accused [in Count[s] _____] of having committed the crime of kidnapping, a violation of section 207, subdivision (a) of the Penal Code.] [¶] Every person who unlawfully [and with physical force [or] [by any [other] means of instilling fear], steals or takes, or holds, detains, or arrests another person and carries that person without [his] [her] consent and because of a reasonable apprehension of harm, to move] for a substantial distance, that is, a distance more than slight or trivial, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).

In order to prove this crime, each of the following elements must be proved: [¶] [1. a person was [unlawfully] moved by the use of physical force [, or by any other means of instilling fear];] [¶] [1. A person was [unlawfully] compelled by another person to move because of a reasonable apprehension of harm;] [¶] 2. The movement of the other person was without [his][her] consent; and [¶] 3. The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial.

> Defendant contends the trial court provided an erroneous instruction concerning the element of asportation for the offense of kidnapping, and thereby violated his rights to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 17 of the California Constitution.

The trial court instructed the jury, pursuant to CALJIC No. 9.50, concerning the crime of kidnapping. (§ 207, subd. (a).) The instruction observed that kidnapping requires movement of the victim "for a distance that is substantial in character." It further explained, in language taken from our opinion in *People v. Martinez* . . . that, "[i]n determining whether a distance . . . is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit the additional crimes." (Italics added.)

The events at issue here occurred before *Martinez* . . . was decided, when "the asportation standard [was] exclusively dependent on the distance involved." [Citations.] In *Martinez*, this Court held that the jury should consider instead "'the totality of the circumstances'" in deciding whether the distance a victim was moved was "'substantial in character.'" [Citation.] We further concluded that the new standard could not be applied retroactively, because it effected an unforeseeable enlargement of the factual basis for determining what constitutes a "substantial distance" under the kidnapping statute, and the defendant did not have fair warning of the enlargement. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) Thus, this Court's prior holdings in *Martinez* and *Castaneda* make it clear that the jury should have been instructed with the 1996 revision of CALJIC

No. 9.50, rather than 1999 revision, because appellant's crimes occurred in 1997, and the 1999 revision does apply retroactively. However, as discussed below, the error was harmless beyond a reasonable doubt.

The asportation element for the crime of kidnapping, as defined by the 1996 revision of CALJIC No. 9.50, is satisfied where: "The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial." In *Martinez*, this Court discussed its prior holding in *People v. Caudillo* (1978) 21 Cal.3d 652. In *Caudillo*, this Court focused on the number of feet the victim was moved, and compared that estimate to the movement found in other kidnapping cases. In the cases finding insufficient evidence of asportation, the victims were moved about 75 feet (*People v. Brown* (1974) 11 Cal.3d 784), confined in a single room (*People v. Thorton* (1974) 11 Cal.3d 738), or moved from various rooms in a house plus an additional 15 feet outside of the house (*Cotton v. Superior Court* (1961) 56 Cal.2d 459). In the cases finding substantial evidence of asportation, the victim was moved for a quarter of a mile (*People v. Stanworth* (1974) 11 Cal.3d 588) or 200 feet (*People v. Stender* (1975) 47 Cal.App.3d 413). (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234.)

In *Castaneda*, this Court found that the instructional error was prejudicial under Watson. That finding was based on particular factors and arguments not present in the instant case. Castaneda gained access to a medical clinic where he was a former patient. At that time, one female employee was inside the clinic. While inside, Castaneda forced the victim to go 40 or 50 feet, from her office to a procedure room, where he then sexually assaulted and murdered her. The prosecutor argued that the asportation element was met based on factors consistent with the 1999 revision of CALJIC No. 9.50, such as: facilitating additional crimes, preventing detection of the crimes, and preventing the victim from escaping. In fact, the prosecutor admitted that the movement was "[n]ot a

great distance in terms of actual feet" before urging the jury to focus on factors unrelated to the distance the victim was actually moved. (*People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1003-1004.) As discussed below, the salient facts of the instant case were quite distinct from those in Castaneda.

In the instant case, there was no doubt that Patel had been moved a distance "substantial in character" as defined by prior case law. At trial, the prosecution and the defense disputed who kidnapped Patel, but neither party disputed that Patel had been kidnapped. During the People's opening argument, after discussing the evidence showing Patel had been kidnapped, the prosecutor stated: "I invite the defense to concede that Patel was kidnapped so that you don't have to spend any appreciable time on that issue. That would leave only the issue of who was the kidnapper for you to decide." (26RT 3810.) Defense counsel accepted this invitation, telling the jury: "Mr. [Prosecutor], I will concede there was a robbery, I will concede it was a murder, and I will concede it was a kidnapping." Counsel also told the jury: "The issue, as I believe [the prosecutor] concedes himself, is whether or not [appellant] is the person that committed the murder, committed a robbery and committed the kidnapping of Mr. Patel." (27RT 3903.) This agreement between the parties showed there was no actual dispute that Patel had been kidnapped.

The parties' agreement was well-founded because the trial evidence allowed no *reasonable* dispute that Patel had been kidnapped. The prosecution presented evidence showing that Patel had been forced into the trunk of his car and, while alive, moved to a freeway on-ramp in an industrial area, where he was killed. For example, Patel was placed in the truck of his car after he suffered non-fatal stab wounds, which left blood in the trunk. Afterward, he was killed on a freeway on-ramp that was not easily accessible on foot. It was clear that Patel was released from the trunk, while alive, and then appellant fatally stabbed and shot him in the

head. (9RT 1475-1477; 12RT 1858-1859.) Thus, contrary to appellant's assertions (AOB 367), there was no basis to conclude that Patel was only moved on the freeway on-ramp, or moved in his car when he was already dead. The jury could reasonably infer that Patel was moved a distance substantial in nature because freeway on-ramps are normally accessed by automobiles rather than pedestrians, and Patel was killed on the freeway on-ramp after he was stabbed in the lung and shot in the head at close range. (9RT 1523-1530, 1565.)

Thus, there was only one reasonable conclusion; the killer drove Patel to the freeway on-ramp after forcing Patel into the trunk of his car from a location away from that freeway. Such movement clearly satisfied the asportation element of kidnapping, as defined by the 1996 revision of CALJIC No. 9.50, because it was patent that Patel was moved more than a slight or trivial distance. Therefore, the instructional error was harmless, under either the Watson or Chapman standard for reviewing prejudice, because there was overwhelming evidence establishing the asportation element of kidnapping. Accordingly, appellant's fifteenth claim should be denied.

XVI. THE INSTRUCTIONS DEFINING SIMPLE KIDNAPPING WERE NOT UNCONSTITUTIONALLY VAGUE

Appellant's sixteenth claim on appeal is that the section 207, subdivision (a), definition of simple kidnapping, in effect at the time of the kidnapping in this case, was unconstitutionally vague, affecting both the guilt and penalty phases. Specifically, appellant contends that the term "substantial distance" is so vague that its use violates due process, and the prohibition against cruel or unusual punishment, under both the state and federal Constitutions. (AOB 369-384.) This claim should be rejected because it lacks merit. As appellant concedes, this Court has already

rejected his claim in *People v. Morgan* (2007) 42 Cal.4th 593. Nevertheless, appellant asks this Court to revisit the issue. (AOB 370.)

A. The Jury Instruction Below

The trial court instructed the jury that:

> Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes or holds, or arrests another person, and carries that person without his consent for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).
>
> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes. If an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was unlawfully moved by the use of physical force, or by any other means of instilling fear;
>
> 2. The movement of the other person was without his her consent; and
>
> 3. The movement of the other person in distance was substantial in character.

(3CT 886-887.)

B. This Court Has Already Rejected the Claim That Section 207 and the Related Jury Instruction Are Impermissibly Vague under Both the California and Federal Constitutions

In *People v. Morgan*, *supra*, 42 Cal.4th 593, this Court addressed the same issue presented in the instant case. In that opinion, this Court stated:

> Defendant contends the asportation element of simple kidnapping under section 207, requiring movement of a "substantial distance," was "impermissibly vague under the [statutory] construction that existed at the time of his 1994 offense and 1996 trial," in violation of our state and federal Constitutions. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7 & 15.) We disagree.
>
> "Section 207, originally enacted in 1872, delineated what is today called simple kidnapping and merely restated the common law, which required that the victim be moved across county or state lines. [Citations.]" [Citation.] Section 207, subdivision (a), now provides, and at the time of defendant's crimes provided, that "[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." "The language 'into another part of the same county' was added in 1905 in response to *Ex parte Keil* (1890) 85 Cal. 309[], in which this court held that the forcible removal of a person 20 miles from San Pedro to Santa Catalina Island, both in Los Angeles County, was not kidnapping within the meaning of the statute as it existed at that time. [Citations.]" [Citation.].

(*Id.* at p. 604.)

This Court also found that the relevant case law "provided adequate guidance as to what distances would be considered 'substantial' under the simple kidnapping statute." (*People v. Morgan*, *supra*, 42 Cal.4th at p. 607, citing *People v. Caudillo* (1978) 21 Cal.3d 562, 573-574.) And that the term "substantial distance," in the context of defining the asportation element for simple kidnapping, was not unconstitutionally vague, and

therefore did not "violate due process or constitute cruel or unusual punishment." (*Id.* at pp. 604-607, citing U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7 & 15.)

Moreover, as in *Morgan*, appellant "must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly *vague in all of its applications.*' [Citation.]" (*People v. Morgan, supra,* 42 Cal.4th at p. 606, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201.) In other words, "some marginal or hypothetical act" covered by the language of the statute is insufficient, because of the strong presumption that a statute will be upheld unless its "unconstitutionality clearly, positively, and unmistakably appears." (*Id.* at pp. 605-606, internal quotations and citation omitted.) In appellant's case, Patel was clearly moved far enough to constitute the asportation element of simple kidnapping (see Statement of Facts and Argument XV, *ante*), so appellant cannot show anything other than a "marginal or hypothetical" situation, which are insufficient to show a statute is unconstitutionally vague.

As discussed above, appellant expressly recognizes his claims were rejected by this Court in *Morgan*, and appellant does not offer any valid reasons for this Court to revisit this issue, for either the guilt or penalty phase. Accordingly, appellant's sixteenth claim on appeal should be denied.

XVII. APPELLANT'S CLAIM OF *GRIFFIN* ERROR WAS FORFEITED; THE PROSECUTOR MERELY COMMENTED ON THE STATE OF THE EVIDENCE; AND, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant's seventeenth claim on appeal is that the prosecutor violated *Griffin v. California*[54] when, in an effort to fill a crucial evidentiary gap in his case for the Escareno homicide, he argued that there was no evidence that appellant read certain newspaper articles. (AOB 385-397.) This claim should be rejected because it was forfeited, lacks merit, and resulted in no prejudice to the defense at either phase of the trial.

A. Relevant Proceedings

During closing argument at the guilt phase, the prosecutor argued there was "ample" evidence corroborating Witness One's testimony. (27RT 3835-3836.) The prosecutor argued that appellant's statement to Detective Winter included information not released to the press by law enforcement, namely, that the victims' wallets had been stolen. The prosecutor stated that the defense had presented only two newspaper articles, and invited the jurors to read these articles to determine whether appellant did not have "enough information to have told this to Detective Winter." Afterward, the prosecutor told the jury that there was "absolutely" no evidence that appellant had seen or read the articles, and no evidence that appellant read any newspapers at all, especially because his life was about drugs and drug dealers. Appellant raised no objection during this portion of the prosecutor's apartment. (27RT 3836-3838.)

After the prosecutor finished his argument, appellant's counsel moved for a mistrial based on the prosecutor's "inadvertent" comments which "in effect and implied" that appellant "did not take the stand to testify that he

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[54] *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].)

read these articles." (27RT 3860.) Counsel asserted that "in all likelihood" appellant was the only person who could establish whether he read the articles about Escareno and Patel. (27RT 3861.) The court disagreed because after "listening carefully" it was clear the prosecutor did not say that appellant did not testify. Counsel asserted it was "borderline." The court found "it was a direct statement that there was no evidence that he read the article." The court also found that appellant was not the only person who could confirm whether he did, or did not, read the articles. The court noted appellant could have presented evidence that he had a subscription to San Pedro Pilot, or testimony from someone who knew appellant read the paper, and heard him comment on the articles. The court denied the motion for mistrial.

At the guilt phase, the court instructed the jury with CALJIC Nos. 2.60 and 2.61, which state:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.
>
> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for failure of proof by the People so as to support a finding against him on any such essential element."

(3CT 877.)

B. Appellant's Claim Was Forfeited Because He Did Not Make a Contemporaneous Objection to the Subject Comments

Appellant's *Griffin* claim was forfeited because he did not raise an appropriate objection at trial. (*People v. Memro, supra*, 11 Cal.4th 786,

873-874; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1050-1051.) Although appellant moved for a mistrial after the prosecutor completed his argument, this did not preserve appellant's claim because he failed to make a contemporaneous objection and request an admonishment. By seeking a mistrial, appellant sought a new trial, rather than to continue the trial with an admonishment to the jury. Accordingly, appellant's claim was forfeited. (*People v. Coffman, supra*, 34 Cal.4th at p. 74; *People v. Hughes* (2002) Cal.4th 287, 372.)

Nonetheless, appellant claims that the mistrial motion rendered any further request for a remedy futile. (AOB 388, fn. 121.) This argument makes little sense because at the time of the mistrial motion, appellant had *already* forfeited his current claim by failing to make a contemporaneous objection and request an admonishment during the prosecutor's argument.

C. Reversal Is Not Warranted Even if Trial Court Had Preserved the *Griffin*-Error Claim for Appeal

Addressing the standard for reviewing a claim of *Griffin* error, this Court has stated:

> "[T]he Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." [Citation.] The prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide. [Citation.] The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation].

(*People v. Brady* (2010) 50 Cal.4th 547, 565-566.)

There was no *Griffin* error because the prosecutor did not refer in any way to appellant's decision not to testify. (*People v. Keenan* (1988) 46 Cal.3d 478, 509 [no *Griffin* error where the prosecutor did not refer to defendant's failure to testify].) As a "general principle," a prosecutor may "allude to the defense's failure to present exculpatory evidence" (*People v.*

Lewis (2004) 117 Cal.App.4th 246, 257, quoting *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1289.) Here, the prosecutor commented on "'state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses'" which does not fall within the rule in *Griffin*. (*People v. Turner* (2004) 34 Cal.4th 406, 419, quoting *People v. Medina* (1995) 11 Cal.4th 694, 755.) Here, the prosecutor merely commented that there was no evidence that appellant had read newspapers about the crime. (See *United States v. Robinson* (1988) 485 U.S. 25, 32 [108 S.Ct. 864, 99 L.Ed.2d 23] ["*Griffin* . . . protection of the right to remain silent is a "shield," not a "sword" that can be used to "cut off the prosecution's 'fair response' to the evidence or argument of the defendant."].) As noted by the trial court, the missing evidence could have been elicited, if it existed at all, from sources other than appellant. Certainly, the prosecution did not tell the jury that appellant was the only source of this evidence, that he should have testified, or that the jury could infer guilt from appellant's failure to testify.

There was no prejudice. Of course, appellant was not convicted of murdering Escareno. As to any error or prejudice at the penalty phase, the prosecutor's comments were "'[i]ndirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn there from, are uniformly held to constitute harmless error.'" (*People v. Monterroso* (2004) 34 Cal.4th 743, 770, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 455.) There was no "direct" comment on appellant's failure to testify and no invitation to the jury to decide guilt or punishment based on appellant's failure to testify. Regardless of the Escareno crimes, the jury had overwhelming evidence of appellant's violent conduct and convictions under the death penalty verdicts. Moreover, the jury was instructed that appellant had the "constitutional right . . . to elect to testify in the guilt phase only" and that the jury was

"instructed not to consider or discuss the fact that the defendant elected not to testify in the penalty phase. That is a matter that must not in any way affect your verdict as to the penalty." (3CT 876.) Thus, any error that may have occurred, assuming the claim was preserved for appellate review, was cured by the instructions which were presumably followed by the jury and was harmless.

XVIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE CHARGES PERTAINING TO ESCARENO; AND, ACCORDINGLY, THE JURY WAS PROPERLY INSTRUCTED HOW TO CONSIDER THESE ALLEGED CRIMES DURING THE PENALTY PHASE

Appellant's eighteenth claim on appeal is that there was insufficient evidence that he murdered Escareno, so the trial court erred and violated his constitutional rights by denying his section 1118.1 motion, allowing the jury to consider this murder at the penalty phase, and instructing the jurors that those who believed appellant guilty of murdering Escareno could consider that murder at the penalty phase. (AOB 398-424.) This claim should be denied because there was substantial evidence that appellant murdered Escareno by shooting him in the head with a shotgun. Witness One's testimony was corroborated by additional evidence tying appellant to Escareno's murder. So, the court properly denied appellant's motion to dismiss counts 6 and 7 pursuant to section 1118.1. For these reasons, the trial court properly instructed the jury how to consider the evidence of Escareno's murder during the penalty phase.

A. Substantial Evidence Supported the Escareno Charges

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is,

> 'whether from the evidence, including all reasonable inferences to be drawn there from, there is any substantial evidence of the existence of each element of the offense charged.'

(*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.)

Section 1111 provides that a defendant shall not be convicted on the testimony of an accomplice unless that testimony is corroborated by other evidence. (*People v. Williams* (2008) 43 Cal.4th 585, 635-636.) An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) Whether a person is an accomplice under section 1111 is a question of fact for the jury to decide, "[u]nless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence[.]" (*People .v Williams*, *supra*, 43 Cal.4th at p. 636, citing *People v. Avila* (2006) 38 Cal.4th 491, 565; see *People v. Hoover* (1974) 12 Cal.3d 875, 880 [the trial court, rather than the jury, determines whether a witness is an accomplice where the evidence is "clear and not disputed"].)

The evidence necessary to corroborate accomplice testimony need only be slight, such that it would be entitled to little consideration standing alone. (*People v. Sanders* (1995) 11 Cal.4th 475, 534-535.) Corroborative evidence may be entirely circumstantial. (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1271.) "The [corroborating] evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 370, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 834.) However, the evidence need not establish the accomplice has actually told the truth. (*People v. Hoyt* (1942) 20 Cal.2d 306, 312.) Moreover, corroborating evidence need not "establish every element of the offense

charged[.]" Rather, it "must relate to some act or fact which is an element of the crime." (*People v. Zapien* (1993) 4 Cal.4th 929, 982, internal quotations omitted.) Recently, this Court explained that this standard "means no more than that the evidence must 'tend[] to connect [the] defendant with the commission of the offense,' as stated in CALJIC No. 3.11." (*People v. Williams* (2013) 56 Cal.4th 630 [156 Cal.Rptr.3d 214, 256-257], quoting CALJIC No. 3.11.)

In the instant case, Witness One was an accomplice to Escareno's murder; his testimony identifying appellant as Escareno's killer needed sufficient corroborating evidence tending to show a connection between appellant and the commission of the Escareno murder. There were multiple sources of corroboration which individually, and collectively, tended to show appellant was connected to Escareno's murder.

Appellant's statement to Detective Winter, and the particular circumstances under which it was made, corroborated Witness One's testimony that appellant killed Escareno. On July 2, 1997, appellant was arrested after he attempted to hide from the police by forcing his way into a relative's apartment. He possessed a shotgun and ammunition at that time. This attempt to hide occurred shortly after Acosta and Dunton were murdered, and less than a month after Escareno was murdered. Appellant was transported to the Harbor Jail. The same day, Detective Winter and her partner identified themselves as officers from "South Bureau homicide" before asking appellant standard booking questions. (13RT 2043-2044.) Appellant told the officers that they must be busy because things had "gone crazy" in the harbor area, and that a man having his head shot off on Western, a woman who had been killed and then wrapped and disposed in a dumpster, and two men who had been shot and had their brains splattered all over the place. Appellant mentioned that these victims could not be identified, and that their wallets were missing. According to Detective

Winter, the police had not released any information that Escareno's wallet had been stolen. (13RT 2043-2045.)

The surrounding circumstances provided the crucial context for evaluating appellant's spontaneous statement to Detective Winter. Appellant's actions were entirely inconsistent with a person who was innocent, and/or inconsistent with a person concerned about facing serious criminal charges. Rather, appellant's actions clearly raised the inference that he was connected to recent murders in the area. For example, appellant deliberately displayed bravado and taunted the police about unsolved murders in the area. This naturally raised the inference that appellant could have murdered Escareno. Why else would appellant choose to tell Officer Winter, a homicide detective, that things had "gone crazy" because, among other murders, there was a man who had his head shot off on Western. (13RT 2043-2045.) There was no rational innocent reason for engaging and taunting Detective Winter about unsolved murders in the area, the state of the victims' bodies, and the effect this had on the homicide detectives.

Even if there was a different possible reason for appellant's inculpatory and provocative statement, this goes to the weight of the evidence before the jury, but does not negate the inference that appellant was involved in Escareno's murder. (See *People v. Perry* (1972) 7 Cal.3d 756, 772 ["This court has considered and rejected similar contentions on the theory that it is the jury's function to determine which of several possible reasons actually explains why a defendant fled."].) Thus, appellant's focus on whether he may have learned of the murders by reading a newspaper or speaking with Witness One (AOB 403-412) is irrelevant to whether the jury could draw the inference that appellant's statements tended to connect him to Escareno's murder because he was aware the victims' wallets had been stolen, but this information had not been released to the press. Accordingly, appellant's claim should be

rejected because appellant's statement to Detective Winter sufficiently corroborated Witness One's testimony.

Second, as discussed above in Argument VII, appellant's decision to willfully and rudely refuse to come to court, despite his obligation to do so, and despite the court's extraction order, raised the inference that he had a consciousness of guilt. The jury was also instructed on consciousness of guilt based on flight. (3CT 876.) This evidence tends to corroborate Witness One's testimony. This Court has found that the evidence of flight, which is an implied admission, "may properly be considered as corroborative of the accomplice testimony." (*People v. Williams*, *supra*, 56 Cal.4th at p. 257.) This Court has also found that "attempts of an accused to conceal his identity [citation] *or his whereabouts* [citation], may warrant an inference of consciousness of guilt and may corroborate an accomplice's testimony." (*People v. Perry*, *supra*, 7 Cal.3d at pp. 771-772, italics added.) Here, not only did appellant display a consciousness of guilt by willfully refusing to come to court, he also displayed a consciousness of guilt by trying to conceal his whereabouts. This double display of a consciousness of guilt was sufficient to corroborate Witness One's testimony, either by itself, or in combination with appellant's statement to Detective Winter.

Finally, as the prosecutor argued:

> There are two other items of corroboration that tend to connect [appellant] with the Escareno killing. [¶] One is that the killing was committed with a 12-gauge shotgun, and the other is that Escareno was shot in the head, and each of the killings took place within 37 days in the Harbor/Torrance area, in each of these killings a 12-gauge shotgun was used, except for the Patel killing, and . . . except for Acosta, each of the victims was shot in the head.

(25RT 3648.) In other words, appellant's involvement in the other charged murders tends to show he also committed the Escareno murder and

corroborates Witness One's testimony. For these reasons, there was sufficient corroboration of Witness One's testimony, and therefore the court correctly denied appellant's motion pursuant to 1118.1, and denied appellant motion to dismiss the Escareno charges.

B. The Trial Court Properly Instructed the Jurors at the Penalty Phase

For the reasons stated above, the trial court properly allowed the jury to consider Escareno's murder during the penalty phase, as long as a juror found appellant guilty of Escareno's murder beyond a reasonable doubt. (See *People v. Manson* (1977) 71 Cal.App.3d 1, 36 ["Just as an artist creates a mosaic a piece at a time, so a prosecutor creates a picture of guilt by consideration of individual bits of evidence, otherwise insignificant, which in totality convince the seeker of truth."].) Accordingly, appellant's eighteenth claim should be denied.

XIX. APPELLANT'S HAS FAILED TO SHOW THAT THE TRIAL COURT COMMITTED INSTRUCTIONAL ERROR AT THE PENALTY PHASE, AND ANY ERROR WAS HARMLESS UNDER ANY STANDARD

Appellant's nineteenth claim on appeal is that the trial court failed to instruct the penalty phase jurors that they could not consider the murder of Jesus Escareno as a factor in aggravation unless they found that Witness One's testimony was corroborated by independent evidence linking appellant to the crimes, while instructing jurors to disregard guilt phase instructions that were not repeated at the penalty phase. (AOB 425-433.) This claim is plainly meritless.

A. Relevant Proceedings

During the guilt phase, the jury was given the standard instructions regarding accomplice testimony. (3CT 880-881.) The jury hung on the charges involving Escareno. (3CT 836-844, 850-853; 29RT 4338-4440;

32RT 4661.) During the penalty phase, before argument, the trial court specifically addressed the allegation that appellant murdered Escareno. The court told the jury that this allegation was "no longer one of the circumstances of the crime." (31RT 4562.) The court explained that "[t]hose jurors who concluded beyond a reasonable doubt that [appellant] was guilty of the murder of Mr. Escareno are permitted to consider that as an aggravation factor under factor (b), prior acts of violence." And "[t]he other jurors that did not find that to be true beyond a reasonable doubt cannot consider that as an aggravating factor." (31RT 4562-4562.) The court further instructed the jury that: "you cannot require or insist or suggest that jurors that did not reach that conclusion beyond a reasonable doubt can consider that as an aggravating factor." The court reiterated and emphasized that: "those of you who did find beyond a reasonable doubt that [appellant] murdered . . . Escareno can consider it, those of you who did not find beyond a reasonable doubt cannot consider it as an aggravating factor." (31RT 4563.)

During argument, the prosecutor told the jury:

> And therefore as the Court already pointed out, for those of you who do not, did not believe that we proved Escareno's murder beyond a reasonable doubt, then you may not consider that he killed five people in 37 days, you are limited to considering that he killed four people in 37 days. Those of you who believe that we did prove appellant murdered Jesus Escareno beyond a reasonable doubt, you may consider as an aggravating circumstance that he killed five people in 37 days.

(31RT 4567.) Defense counsel did not address the evidence of Escareno's murder, or the crimes of which appellant was convicted. Rather, counsel told the jury that life without parole was punishment enough, and appellant, like any other human being, deserved mercy. (31RT 4579-4593.)

B. Appellant's Claim is Meritless

Section 1111, which governs the treatment of accomplice testimony, states:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

This Court has held "the general rules requiring accomplice instructions apply at the penalty phase as well as the guilt phase of a capital trial" for "the defendant's unadjudicated prior criminal conduct." (*People v. Williams* (1997) 16 Cal.4th 153, 275.)

In the instant case, appellant has misconstrued or mischaracterized the trial court's instructions to the jury. Appellant erroneously asserts that the court *merely* told the jurors "that those who believed [appellant] guilty beyond a reasonable doubt of the Escareno murder could consider it in aggravation." (AOB 426, citing 29RT 4329-4330, 4338-4340, 4362.) Based on this unsupportable supposition, appellant erroneously argues that the trial court never instructed the jurors how to consider Escareno's murder, causing jurors to *reconsider* the evidence without considering corroboration. (AOB 426-427.)

This is plainly incorrect. The court's specific instructions were by far more preferable that the standard instructions regarding accomplice testimony. The court's instructions cut to the quick and eliminated *any doubt* about which jurors could, and which jurors could not, consider Escareno's murder as an aggravating factor. The court's instructions or admonitions clearly told the jury only those jurors who already found appellant guilty of the Escareno murder at the guilt phase, necessarily based on the proper accomplice instructions given at the guilt phase, could consider these crimes as aggravating evidence. The court did not give the

jury the option to reconsider the truth of the Escareno crimes at the penalty phase deliberations. Moreover, the prosecutor's statement to the jury complemented, and specifically referred to, the court's prior instruction. Thus, there was no error. If somehow there was error, which there was most certainly not, it was harmless under either the *Watson* or *Chapman* standard. The Escareno crimes were just one set of many violent crimes committed by appellant. It is very doubtful that jurors who did not find appellant guilty of the Escareno crimes at the guilt phase somehow based their penalty phase verdicts on the Escareno crimes, despite the court's admonition to the contrary and despite their prior rejected of the charges at the guilt phase. Accordingly, appellant's claims based on state law and/or the federal Constitution must be rejected.

XX. APPELLANT FORFEITED HIS CONSTITUTIONAL CLAIMS; THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTION TO INTRODUCE EVIDENCE OF THE RACE OR ETHNICITY OF THE DEPUTIES ASSAULTED BY APPELLANT TO ARGUE THAT APPELLANT'S FUTURE DANGEROUSNESS APPLIED TO ANYONE AT THE PRISON WITHOUT REGARD TO RACE OR ETHNICITY; AND ANY ALLEGED ERROR WAS HARMLESS

Appellant's twentieth claim on appeal is that "the prosecutor's elicitation, and the trial court's admission, over objection, of evidence regarding the ethnic background of two jail officers appellant attacked, evidence which the prosecutor then employed arguing for death, requires reversal." (AOB 434-442.) Appellant's claim should be rejected because he has failed to establish error or prejudice.

A. Relevant Proceedings

During the penalty phase, as fully described the Statement of Facts, the prosecution presented evidence that appellant used a "shank" to stab Deputy Millan, along with an inmate worker, while in custody at the jail. At the end of his direct examination, the prosecutor asked Deputy Millan,

"What is your ancestry?" Deputy Millan said he was Mexican-American. After Deputy Millan's response, appellant objected that the evidence was irrelevant. The court overruled the objection. (30RT 4449.) According to Deputy Vanderleek, appellant threw urine on him at the jail. (30RT 4454-4457.) According to Deputy Montoya, appellant attacked him, and when appellant was subdued, he threatened to kill Deputy Montoya and "every deputy here." The next day, appellant tried to slash Deputy Montoya's throat with an improvised weapon. (30RT 4460-4466.) The prosecutor, without objection, asked Deputy Montoya for his ancestry, and he responded, "Mexican American." (30RT 4467.)

During argument at the penalty phase, the prosecutor stated, without objection:

> Ask yourself which sentence balances the scales of the lives taken by this man. Ask yourselves this: is not passed violence the best predictor of future violence?
>
> We've shown this man's history of past violence, and we've shown that this man's conduct while in custody is not the result of a racial or ethnic conduct, because his conduct, his violent behavior was not directed just at Vanderleek but also against Montoya and Millan, so that has nothing to do with it.

(31RT 4571.)

The prosecutor also argued:

> I respectfully submit to you that sentencing this man to life without parole instead of death is like handing your credit card which allows him to assault other inmates, correctional officers and prison staff.
>
> I believe that with some murders, with some killers you can say that custody will tame them. Custody will make society safe from them. I don't believe you can say that in this case. We have shown this man's conduct in custody since 1991. We've shown that custody does not inhibit him, custody does not tame him.

(31RT 4573-4574.)

B. Appellant Forfeited His Federal Constitutional Claims

Appellant objected exclusively on the ground the admission of the deputies' ancestry was irrelevant at the penalty phase. However, this objection did not preserve any federal constitutional claims. (*People v. Partida*, *supra*, 37 Cal.4th at p. 438, fn. 3; *People v. Heard*, *supra*, 31 Cal.4th at p. 972, fn. 12 [federal constitutional claims forfeited]; *People v. Riggs*, *supra*, 44 Cal.4th at p. 292 [same].) Accordingly, appellant has forfeited all federal constitutional claims by failing to raise these concerns in the trial court. (*United States v. Olano*, *supra*, 507 U.S. at p. 731.)

C. Appellant Has Failed to Establish Error or Prejudice

The legal principles regarding the introduction of relevant evidence are set forth in Argument VII, part C. Here, the deputies' ancestry was relevant to whether appellant was a potential danger to *all* jail staff or inmates. This Court has stated:

> The section 190.3 factors of our death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." [Citation.] The "'facts and circumstances of the defendant, his background, and his crime'" are most relevant to the sentencing decision in a death penalty case. [Citations.]

(*People v. Bacigalupo* (1993) 6 Cal.4th 457, 476.) However, "these factors must meet the dual standards of 'specificity' and of 'relevance.' They must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination." (*Id.* at p. 477.)

This Court explained:

> To meet these dual criteria, sentencing factors should not inject into the individualized sentencing determination the possibility of "randomness" or "bias in favor of the death penalty." (*Stringer v. Black*, *supra*, 503 U.S. 222, at p. ——, 112 S.Ct.

> 1130 at p. 1139.) Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either "seriously and prejudicially misleading," or that invited "the jury to be influenced by a speculative or improper consideration[ ]," such as the race or political beliefs of the defendant that are without any bearing on moral culpability. (*People v. Ramos* (1984) 37 Cal.3d 136, 153, 207 []; *Dawson v. Delaware* (1992) 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309.)

(*People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 477.)

In the instant case, the prosecution properly elicited, and the court properly admitted, the deputies' ancestry during the penalty phase because it was relevant to appellant's future dangerousness. The prosecutor addressed appellant's *future dangerousness* by telling the jury: "Ask yourselves this: is not past violence the best predictor of future violence?" (30RT 4571.) In this context, the prosecutor argued that appellant's violence while in custody was "not the result of a racial or ethnic conduct" and that race "had nothing to do with" appellant's attacks against the three deputies. This argument was not "seriously and prejudicially misleading" and did not direct the jury to consider matters that were "speculative or improper consideration." The prosecution in no way asked the jury to consider *appellant's* race to determine the penalty. The prosecutor did not assert that appellant acted with racial animus during any of the murders, or during the attacks on the three deputies. The prosecution did not ask the jury to consider the victims' race, or the deputies' race or ethnicity, as a reason in and of itself to impose the death penalty.

Rather, the prosecutor merely argued that appellant was dangerous and would attack jail staff and inmates without regard to their race nor ethnicity. As the prosecutor argued, sentencing appellant to life without parole was like giving him a "credit card . . . to assault other inmates, correctional officers and prison staff." To buttress this notion of future

dangerousness, the prosecutor asserted: "We have shown this man's conduct in custody since 1991. We've shown that custody does not inhibit him, custody does not tame him." (30RT 4572.) It was in the context of in-custody violence that the testimony regarding the deputies' ancestry was admitted; therefore, appellant has failed to show the evidence was irrelevant, or inadmissible for any other reason.

Assuming the evidence should not have been admitted, the error was completely benign, because the prosecutor merely argued that appellant's violent actions were *not* based on racial animus and therefore showed appellant was a danger to anyone in the prison. But this point was not a significant aspect of the prosecutor's aggravation case. Instead, the prosecutor argued that appellant deserved the death penalty based on every factor of section 190.3, and appellant merely argued that life without parole would protect society and appellant, like every human being, deserved mercy. Under these circumstances, appellant has failed to establish reasonable likelihood that he would have been sentenced to life without parole absent the alleged error.

XXI. APPELLANT'S CHALLENGE TO THE TRIAL COURT'S INSTRUCTION REGARDING "BIBLICAL REFERENCES" WAS FORFEITED; THERE WAS NO ERROR BECAUSE THE CHALLENGED INSTRUCTION WAS UNAMBIGUOUS AND CORRECTLY STATED THE LAW; AND THERE WAS NOTHING IN THE RECORD THAT SHOWED APPELLANT WAS PREJUDICED

Appellant's twenty-first claim on appeal is that the trial court erroneously and unconstitutionally told the jurors that they were forbidden to "refer to biblical references." (AOB 443-452.) More specifically, appellant argues that the trial court's instruction "erroneously impl[ied] that jurors who, in deliberations, engaged in moral reasoning illustrated by or rooted in biblical passages would be committing misconduct." (AOB 446.)

This claim should be rejected. By failing to challenge the trial court's instructions during trial, appellant forfeited any claim that the object instruction should have been clarified or modified sua sponte. This claim lacks merit because the challenged instruction plainly, and unambiguously, stated the correct law, and there was no reasonable likelihood that the jurors misconstrued or misapplied the court's instructions as appellant suggests. Finally, the alleged error was harmless because nothing in the record supported even an inference that the jury would have returned a more favorable verdict.

A. The Challenged Jury Instruction

During the penalty phase, the trial court reiterated the substance of a guilt phase instruction, stating:

> I do want to emphasize again as I've done before that you're not to bring anything to the deliberation process. Jurors are sometimes tempted in this phase of the case to refer to biblical references. Don't bring the Bible and, don't refer to those. You'll be guided by your own conscience and the law.

(31RT 4593.)

B. Appellant Has Forfeited any Claim That the Trial Court Should Have Clarified the Now Challenged Instruction

Appellant has limited the issue presented on appeal, stating that "the trial court may well have been correct insofar as it instructed jurors that they could not bring the Bible into their deliberation room." Nonetheless, appellant claims that the trial court "went too far" by telling the jurors not to refer to "biblical references." (AOB 444.)

Appellant forfeited his right to challenge the court's instruction for the first time on appeal. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or

amplifying language.'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218; see *People v. Whalen* (2013) 56 Cal.4th 1, 71 ["Because defendant did not request clarification at trial, his subclaim is forfeited."]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1175 ["During discussion of the proposed jury instructions, defense counsel did not request additional instruction and thus has forfeited his claim on appeal."]; *People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) "But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson, supra*, 38 Cal.4th at p. 1012, citing *People v. Smithey* (1999) 20 Cal.4th 936, 967, fn. 7.) Here, appellant's failure to raise this claim in the trial court is not disputed, and, as will be shown below, the challenged instruction plainly, unambiguously, and correctly stated the law. Accordingly, appellant's claim of instructional error was forfeited.[55]

C. The Challenged Instruction Was a Correct Statement of Law

The pertinent inquiry is whether there was a reasonable likelihood that the jury misunderstood the applicable law based on the language of the instruction given at trial. (*People v. Thorton* (2007) 41 Cal.4th 391, 436.) This Court must "review the [challenged] instruction in combination with the other instructions and/or the argument of counsel in determining if the instructions challenged on appeal confused the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 699: *People v. Jasper* (2002) 98 Cal.App.4th 99,

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[55] The terms "waiver" and "forfeiture" are occasionally used "interchangeably." The correct term in this case is forfeiture because appellant failed to "object" to the instruction as given, and failed to "invoke [his] right" to a clarification instruction. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

111.) The Court must also assume the jurors were intelligent persons and capable of understanding and correlating all jury instructions that were given. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.) This Court must further presume that a "commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting" during deliberations. (*Boyde v. California* (1990) 494 U.S. 370, 381 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Here, the subject instruction did not preclude consideration of moral values based on religion, just use of religious texts during deliberations. When read as a whole, the challenged instruction was a plain, unambiguous, and correct statement of law, consistent with this Court's prior holdings. Jurors were forbidden "to bring anything to the deliberation process." This was a correct statement of law because "'[i]t is, of course, misconduct for a juror to introduce any extrinsic material into the jury room.'" (*People v. Davis* (2009) 46 Cal.4th 539, 624, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 483 and citing § 1137; see *People v. Karis* (1988) 46 Cal.3d 612, 642 [jury's use of a dictionary to define legal terms is misconduct].) Jurors also commit misconduct by "reading aloud from the Bible or circulating biblical passages during deliberations" (*People v. Williams* (2006) 40 Cal.4th 287, 333), so the trial court properly told the jury not to refer to biblical references. The court did address an individual's "moral reasoning," and using common sense in other instructions, and jurors would have understood they could use their moral reasoning during deliberations, but had to leave extrinsic evidence outside the deliberation room door.

Additionally, the general prohibition of extrinsic material provided the proper context for the remaining parts of the instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539 ["a reviewing court does not

focus exclusively on only "parts of an instruction"], disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753-754; see, e.g., *People v. Anderson* (2007) 152 Cal.App.4th 919, 928-929 ["This argument depends upon a strained interpretation of a single sentence read out of context."].) Here, the trial court's admonition not to refer to biblical references was, within the context of the general prohibition, merely a common example of improper extrinsic material, and therefore a correct statement of law. In fact, reliance on religious authority "supporting or opposing the death penalty" is objectionable because "[t]h penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority." (*People v. Sandoval* (1992) 4 Cal.4th 155, 194.)

Appellant complains that the trial court's penalty phase instruction improperly singled out moral reasoning based on the Bible or biblical references. The record shows otherwise. A previous guilt phase instruction made it clear that jurors were prohibited from using a "religious text of some kind," including "a Bible or something like that." The jury was unambiguously told not to "refer to those" religious texts because all such texts were "outside information." (29RT 4174-4175.) During the penalty phase, the court specifically referred to its guilt phase instruction, stating "I do want to emphasize again as I've done before[.]"[56] (31RT 4593.) This specific reference linked the guilt phase and penalty phase instructions to each other, and therefore the penalty phase instruction should be read in light of the prior jury instruction.[57] Viewed in this light, these two

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[56] The court also explained that the jurors "could not look for outside sources of information." This included a dictionary, a magnifying glass, and cellular telephones. (29RT 4174.)

[57] During the penalty phase, the jury was instructed to: "Disregard all other instructions given to you in other phases of the trial." (13CT 3440.)

(continued...)

instructions, combined, plainly and unambiguously barred the use of religious texts during deliberations. But the instruction did not bar individual jurors from considering their own moral values, religious or otherwise.

Moreover, the subject instruction must be considered in light of all the other jury instructions. Here, the jury was told how to interpret the penalty phase instructions: "Do not single out any particular sentence or any individual point or instruction and ignore the other. Consider the instructions as a whole and in the light of all the others." (13CT 3440.) It is presumed the jury understood and followed this instruction. (*People v. Danielson* (1992) 3 Cal.4th 691, 722.) It is also assumed that the jurors were intelligent and capable of understanding and correlating all of the court's instructions, and the "[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112, internal quotations and citations omitted.)

Here, the court's instructions, taken as a whole, simultaneously required the jury to rely on the facts and the law, and allowed jurors to be guided by their own conscience *and* the law.[58] For example, the jury was told not to investigate the law by "consult[ing] reference works or persons

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(...continued)
However, the trial court's express reference to the guilt phase instruction about religious texts, and the court's desire to "emphasize [that instruction] again," manifested the court's intention to have this instruction read in conjunction with its penalty phase counterpart.

[58] The prosecution's argument was consistent with the relevant jury instructions. The prosecutor told the jury "as [the] court pointed out and I want to make clear, each of you makes your own decision as to which aggravating circumstances or mitigating circumstances are true. Each of you makes your own decision." (31RT 4567.)

for additional information." (13CT 3441.) This admonishment, on its face, applies to any written or verbal source of information regarding the law. Employing commonsense, the jurors understood that the court was speaking about *any* outside written reference works, religious in nature, or otherwise. In other words, the totality of the instructions did not single out biblical passages or religious texts.

The jury was also expressly instructed to consider: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (13CT 3445.) The instructions regarding mitigating circumstances included "any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." Each juror was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (13CT 3447-3448.)

Thus, the instructions as a whole, in no uncertain terms, properly authorized each juror to consider his or her belief system, religious or otherwise, in determining the proper punishment. (See generally, *People v. Danks* (2004) 32 Cal.4th 269, 311 [jurors may properly consider their "personal religious, philosophical, or secular normative values during penalty deliberations"].) Under these circumstances, there was no reasonable likelihood that the jury believed, based on the instructions as a whole, that moral reasoning rooted in the Bible was fundamentally different from other sources of moral reasoning and could not be considered as to the penalty decision. (See *People v. Brown* (1988) 46 Cal.3d 432, 460, citing *California v. Brown* (1987) 479 U.S. 538, 546 [107 S.Ct. 837, 93 L.Ed.2d

934] ["we conclude the jury was otherwise properly informed of its obligation to consider all of defendant's mitigating evidence"].) For the reasons stated above, appellant's state law claim of instructional error should be denied. For the same reasons, appellant's federal constitutional claims should also be denied.

Appellant erroneously insists that the jury must have singled out particular sentences of the instructions, even though the jurors were instructed not to "single out any particular sentence or any individual point or instruction and ignore the others." (31RT 4596.) For example, appellant asserts that the challenged instruction "erroneously impl[ied] that jurors who, in deliberations, engaged in moral reasoning illustrated by or rooted in Biblical passages would be committing misconduct." (AOB 446.) He also asserts that the challenged instruction deprived him of a "judgment of a jury reflective of the conscience of the community, as brought to bear by the jurors' 'personal religious, philosophical, or secular normative values.'" (AOB 446, quoting *People v. Danks*, *supra*, 32 Cal.4th at p. 311.) As explained above, the challenged instruction limited the use of religious texts, as they were extraneous or extrajudicial information. But jurors were ultimately permitted to consider their own moral values, whatever their source, in deciding the punishment.

Appellant erroneously implies that the order of the jury instructions is relevant to determining instructional error. (AOB 443, 451.) Appellant asserts: "Yet *immediately* after defense counsel concluded his summation, the court gave an instruction depriving jurors of one common and potentially crucial source of moral reasoning." (AOB 443, italics added.) Later on appellant asserts: "Moreover, the court's instruction, delivered *immediately* after defense counsel's summation, suggested to the jury that counsel had made improper arguments for a life without parole sentence." (AOB 451, italics added.)

This assertion is meritless for at least three reasons. First, the jury was instructed that "[t]he order in which the instructions are given has no significance as to their relative importance." (13CT 3440.) Second, appellant's counsel did not exhort jurors to use the Bible inclosing argument, so the instruction was not directed at appellant's counsel. (31RT 4579-4593.) Instead, near the beginning of his argument, appellant's counsel merely told the jury that "perhaps" a priest, rabbi, minister, or philosopher could *argue* or *express* issues involving life or death better than the attorneys. (31RT 4580.) Near the end of argument, appellant's counsel's referenced Terrence, an "ancient Roman playwright," for the proposition that capital punishment was a great injustice to society. (31RT 4592.) But counsel did not ask the jury to disregard the court's instructions or use religious texts to determine the sentence. Third, counsel's primary argument was based on practical matters. Defense counsel argued why a sentence of life without parole was an adequate punishment because: (1) appellant would die in prison (31RT 4580); (2) society would be protected (31RT 4581, 4584-4587); (3) and the punishment was severe (31RT 4582, 4587-4588). Acknowledging that there were aggravating circumstances, and no substantial mitigating factors, counsel nonetheless maintained that the jury should be merciful because appellant was a human being with "innate metaphysical goodness" that was "incorruptible." (31RT 4590-4592.) So, defense counsel did not exhort jurors to rely on Biblical passages or religious views to decide punishment.

Appellant also erroneously asserts that his claim of instruction error was "exacerbated" because the jury was instructed with CALJIC No. 17.41.1. (AOB 452.) This assertion should be rejected because there was no error to "exacerbate." As argued above, the court properly instructed the jury that it was prohibited from bringing outside materials to jury deliberations or referring to outside materials to determine the law.

Furthermore, the jury deliberated for about two days before rendering a verdict and, during that time, the jury did not raise any concern regarding misconduct or religious views. (13CT 3424-3428.)

Accordingly, for all the reasons discussed above, appellant's claim should be denied because it lacks merit.

D. The Alleged Error Was Harmless

In any case, even assuming the jury misconstrued the court's instructions, there is no affirmative showing of prejudice, and there is no reasonable probability that the jury would have returned a more favorable verdict, but for the alleged error. (See *People v. Rogers* (2006) 39 Cal.4th 826, 904 [applying *Watson* standard of harmless error where the court erroneously omitted CALJIC No. 2.20 during the penalty phase].) As appellant conceded at trial, there were several aggravating circumstances and no mitigating circumstances. Additionally, the verdicts of death for Luna and Patel, and life without parole for Acosta and Dunton, patently illustrated that the jurors carefully considered the court's instructions.

Appellant erroneously asserts that the prosecutor's closing argument supports his claim. (AOB 450.)[59] Appellant's assertion is wrong. The

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[59] Here, the prosecutor concluded in his argument by telling the jury:

> When one person kills another, there is an immediate revulsion at the nature of the crime, but in a time so short as to seem indecent to the members of the victim's family, the dead person ceases to exist as an identifiable figure.
>
> To those individuals in the community of goodwill and empathy, warmth and compassion, only one of the key factors in the drama remains with whom to commiserate, and that is always the criminal. The dead person ceases to be part of everyday reality, ceases to exist. It is only a figure in an historic event.
>
> And we inevitably turn away from the past towards the ongoing reality. And the ongoing reality is the criminal trapped,

(continued...)

prosecutor's quotation[60] had no substantive connection whatsoever to the challenged instruction, the jury was expressly instructed that "[s]tatements made by the attorney's during the trial are not evidence" (13CT 3440), and the prosecutor never suggested to the jurors that they should disregard the jury instructions. Certainly, there was no suggestion by the prosecutor or the court that the jurors should consider exclusively secular, rather than other sources of moral reasoning. (31RT 4577.) For these reason, even assuming error, appellant is not entitled to any relief under state law or the federal Constitution.

XXII. THIS COURT HAS ALREADY DENIED APPELLANT'S CLAIM THAT CAPITAL PUNISHMENT SHOULD NOT BE PERMITTED ABSENT A FINDING THAT A DEFENDANT IS GUILTY BEYOND ALL POSSIBLE DOUBT

Appellant's twenty-second claim on appeal is that a death sentence should not be permitted absence a jury finding that the defendant is guilty beyond all possible doubt. Appellant asks this Court to vacate his death sentences for victims Luna and Patel and remand the case for a new penalty phase. (AOB 453-462.) This claim should be denied.

(...continued)

> anxious, now helpless, isolated, perhaps badgered, perhaps bewildered. He usurps the compassion that is justly the victim's. And he will steal his victim's moral constituency along with his life.

(31RT 4577-4578.)

[60] Here, the prosecutor did not rely on religion to persuade the jury to impose death. Rather, the prosecutor focused on the callousness with which appellant executed his victims, out of greed or cowardice, by shooting them in the head or neck at contact range. (31RT 4577-4578.) The prosecutor ended by arguing appellant did not deserve the jury's sympathy, goodwill, warmth, compassion, mercy, or leniency. (31RT 4578.)

Appellant concedes that this Court has previously rejected the claim that the evidence of guilt must be stronger in a capital case than a noncapital case. (AOB 455 citing *People v. Lewis* (2009) 46 Cal.4th 1255, 1290, fn. 23.) This Court has already rejected this claim in *Lewis* and appellant has not provided new and valid reasons to reconsider the issue. Therefore, appellant's twenty-second claim on appeal should be denied.

XXIII. THIS COURT HAS ALREADY DENIED APPELLANT'S CLAIM THAT THE DEATH PENALTY IS UNCONSTITUTIONAL IN CASES PERMITTING THE JURY TO IMPOSE DEATH FOR ACCIDENTAL OR UNFORESEEABLE KILLINGS

Appellant's twenty-third claim on appeal is that because the robbery and kidnapping special circumstances in this case permitted the jury to impose a death sentence for an accidental or unforeseeable killing, the death penalty is unconstitutional. (AOB 463-474.) This claim lacks merit because, as appellant concedes, "this Court has rejected this claim." (AOB 464, citing *People v. Taylor* (2010) 48 Cal.4th 574, 661, and *People v. Young* (2005) 34 Cal.4th 1149, 1204.)

In 2010, this Court reiterated the state of the law:

> As defendant acknowledges, however, since 1987 we have repeatedly rejected the claim that an intent to kill or any other similar mental state is required under the Eighth Amendment in order to establish death eligibility for the actual killer in a felony murder, and we have also rejected the related claim that the imposition of the death penalty under these circumstances fails to adequately narrow the class of death-eligible offenders. [Citations.]

(*People v. Martinez* (2010) 47 Cal.4th 911, 966-967.) Here, appellant has not provided any new and valid reason for this Court to reconsider his claim and, therefore, his twenty-third claim on appeal should be denied.[61]

XXIV. APPELLANT'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE HAVE BEEN REPEATEDLY DENIED BY THIS COURT

Appellant's twenty-fourth claim on appeal is that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 475-497.) Each claim should be rejected.

Appellant concedes that this Court has consistently rejected all of his "routine" claims that California's capital sentencing law violates the United States Constitution. (AOB 475, citing *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.) Accordingly, appellant "briefly presents the following to urge their reconsideration and to preserve this claim for federal review." (AOB 475.) Appellant also asks this Court to grant him the right to present supplemental briefing if this Court decides to reconsider the issues presented in Ground XXIV. Because appellant fails to raise anything new or significant that would cause this Court to depart from its earlier holdings, his contentions should be rejected. (See, e.g, *People v. McKinnon* (2011) 52 Cal.4th 610, 697-698 [rejecting, without reconsideration, all of the routine challenges to California's death penalty law].) Moreover, it is entirely proper to reject appellant's contentions by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

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[61] Needless to say, there is no showing that any of the charged murders was "accidental" or "foreseeable." Instead, each and every one of the murders victims was executed with a clear intent to kill by the killer.

XXV. THE CUMULATIVE EFFECT OF ANY ERRORS DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL DURING EITHER THE GUILTY OR PENALTY PHASE

In his final contention, appellant argues that the cumulative effect of the alleged errors involving voir dire, self-representation, substantial evidence, the joinder of counts and defendants, the jury instructions, prosecutorial misconduct, and the admission of evidence. (AOB 498-505.) As respondent has demonstrated throughout this brief, however, there was no error; to the extent there was any error, appellant has failed to demonstrate prejudice.

Indeed, whether considered individually or in the aggregate, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

CONCLUSION

Based on the foregoing, respondent respectfully asks this Court to affirm the convictions and sentence of death.

Dated: June 10, 2013

Respectfully submitted,

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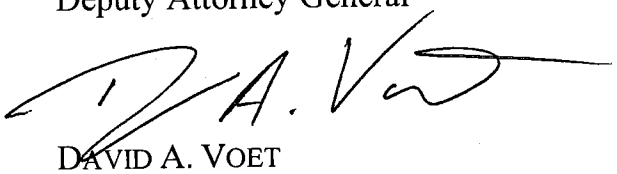

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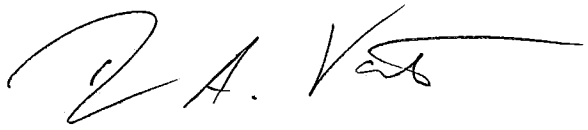
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 59,518 words.

Dated: June 10, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. Gomez***

No.: **S087773**

I declare:

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

On June 11, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On June 11, 2013, I caused thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA94102-4979** by **OnTrac**.

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 June 11, 2013, at Los Angeles, California.

Lily Hood	Lily Hood
Declarant	Signature

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