SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DAVID JAMES LIVINGSTON,

Defendant and Appellant.

CAPITAL CASE

Case No. S090499

SUPREME COURT
FILED

SEP 0 8 2010

Frederick K. Ohlrich Clerk

DEPUTY

Los Angeles County Superior Court Case No. TA100812
The Honorable Jack W. Morgan, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

A 13-count amended information filed by the Los Angeles County District Attorney's Office jointly charged appellant and co-defendant Freddie Lee Sanders ("Sanders").[1] Counts 1 through 4 arose from the shooting of four security guards inside a guard shack at the Wilmington Arms apartment complex on January 3, 1999. As a result of that incident, appellant and Sanders were charged with the murder of Roderico Armando Paz ("Paz") (Pen. Code,[2] § 187, subd. (a); count 1), the murder of Remigio Perez Malinao ("Malinao") (§ 187, subd. (a); count 2), the attempted murder of Saul Conner ("Conner") (§§ 664, 187, subd. (a); count 3), and the attempted murder of Rodolfo Bombarda ("Bombarda") (§§ 664, 187, subd. (a); count 4).

Counts 5 through 7 arose from a drive-by shooting on Bullis Road in Compton on October 8, 1998. As a result of that incident, appellant was charged with the attempted murder of Emmanuel Hunter ("Hunter") (§§ 664, 187, subd. (a); count 5), the attempted murder of Damien Perry ("Perry") (§§ 664, 187, subd. (a); count 6), the attempted murder of Markuis Walker ("Walker") (§§ 664, 187, subd. (a); count 7), and possession of a firearm by a felon with three prior convictions (§ 12021, subd. (a)(1); count 13).[3]

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[1] Sanders is not a party to this appeal.

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

[3] The court subsequently granted the People's motion to dismiss counts 6 and 7 pursuant to section 1385. (3CT 775-776.) Sanders alone was charged with Counts 8 through 12, which arose from robberies that occurred inside a car dealership on May 18, 1999. (3CT 567-580.) Since Sanders is not a party to this appeal, respondent does not summarize those counts or the supporting evidence presented at trial. (3CT 567-580; see, e.g., 11RT 2096-2106, 2110-2138, 2148, 2155-2159, 2177-2199.)

The information further alleged as follows: as to counts 1 and 2, multiple-murder (§ 190.2, subd. (a)(3)) and lying-in-wait (§ 190.2, subd. (a)(15)) special circumstances; as to counts 1 through 4, firearm use by a principal (§ 12022.53, subds. (d), (e)(1); § 12022.53, subds. (c), (e)(1)), §§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (e)(1)); and as to counts 1 through 7, street gang enhancements (§ 186.22, subd. (b)(1)). It was further alleged appellant suffered two prior convictions of a serious or violent felony (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and three prior prison terms (§ 667.5, subd. (b)). (3CT 567-580.) Appellant and Sanders pleaded not guilty and denied all allegations. (2CT 533, 535-536; 3CT 581-582, 775; 1RT 3, 31.)

A jury convicted appellant of counts 1 through 5 and 12[4], and found all the special allegations to be true. The jury also convicted Sanders of second degree murder for counts 1 and 2, convicted him as charged for counts 3 and 4, and found all special allegations to be true. (24CT 6304-6325, 6329-6343.)

Following the penalty phase of appellant's trial, the jury returned a verdict of death. (16RT 3329-3330; 24CT 6397-6399.) The court denied appellant's motion for new trial and a motion to modify the death verdict. (17RT 3450, 3456; 25CT 6484-6486.) For counts 1 and 2, the court sentenced appellant to death and imposed, but stayed, additional and consecutive state prison terms for the appended firearm and gang enhancements (§§ 12022.53, subds. (a), (c), (d), 186.22, subd. (b)(1)). For count 3, the court sentenced appellant to 25 years to life, imposed an additional term of 25 years to life for the appended firearm enhancement (§ 12022.53, subd. (d)), and imposed, but stayed, additional and consecutive

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[4] Because count 12 was dismissed pursuant to section 995, counsel stipulated to refer to count 13 as count 12. (2RT 293-294.)

state prison terms for the appended firearm and gang enhancements. (§§ 12022.53, subd. (c), 12022.5, subd. (a), 186.22, subd. (b)(1).) For counts 4 and 5, the court sentenced appellant to 25 years to life, imposed an additional term of 25 years to life for the appended firearm enhancement (§ 12022.53, subd. (d)), two consecutive two-year terms for the appended gang enhancements (§ 186.22, subd. (b)(1)), and imposed, but stayed, additional terms for other appended firearm enhancements (§§ 12022.53, subd. (c), 12022.5, subd. (a)). The court imposed a term of 25 years to life by virtue of appellant's two prior felony convictions. The court ordered that the additional years of imprisonment imposed for counts 3, 4, 5, and 12, be stayed and not served because the court relied on the facts underlying those offenses and denied the motion to modify the death penalty.[5] (17RT 3462-3467; 25CT 6485-6486, 6489-6490.)

STATEMENT OF FACTS

A. Introduction

This case arises from two separate incidents. The first incident occurred on October 8, 1998 on Bullis Road in the city of Compton. On

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[5] Respondent does not summarize Sanders' sentence because he is not a party to this appeal and, in any event, his convictions were later reversed. On July 17, 2002, the California Court of Appeal reversed Sanders' convictions on the ground that Sanders was improperly joined with appellant. (25CT 6512-6530 [California Court of Appeal opinion].) The *Sanders* court stated that because the reversal was based on joinder grounds, nothing in their opinion should be construed as a finding or conclusion on Sanders' other claim that insufficient evidence supported the theory that Sanders aided and abetted appellant in the murder/attempted murder of the security guards, as charged in counts 1 through 4. (25CT 6528, fn. 9.) On January 6, 2003, Sanders pled no contest to the two counts of robbery charged in counts 8 and 9 and the firearm allegation appended to count 8. (25CT 6541-6542, 6547-6551.) Sanders was sentenced to state prison for 10 years. (25CT 6609, 6611.)

that date, appellant attempted to murder Hunter, a rival gang member, by shooting at him from the passenger side of a green-colored Cadillac. The second incident occurred a few months later on January 3, 1999. On that date, appellant and Sanders killed two security guards, and attempted to kill two other guards, inside a guard shack at the Wilmington Arms apartment complex in Compton.

B. Prosecution's Guilt Phase Evidence

1. The October 8, 1998, Drive-By Shooting on Bullis Road (Counts 5 through 7).

On October 8, 1998, Damien Perry ("Perry"), also known as "Day-Day," was driving a car on Compton Boulevard. (6RT 1181-1182, 1184-1185; 7RT 1242.) Antwone Hebrard ("Hebrard") and Markuis Walker ("Walker") were passengers inside the car. (6RT 1184; 7RT 1322.) Hebrard was known as "Twone" or "Twain," and he was a member of the Leuders Park Piru gang, a "Blood" gang. (6RT 1182-1183; 7RT 1242, 1254-1255, 1322-1323.) Walker was known as "Noon," and he was member of the Treetop Piru gang, also a Blood gang. (6RT 1184; 7RT 1322.) The Leuders Park, Treetop, and Mob are different sets of the Blood gang. (7RT 1255.)

At some point that evening, Compton police pulled over Perry's car on Compton Boulevard, between the intersections of Bullis and Brentford. (6RT 1185.) The police officer ordered Perry, Hebrard, and Walker, all of whom were wearing the color red, to exit the car.[6] (6RT 1187-1188, 1218, 1222.) As Perry spoke with the police officer, Perry noticed a light-green colored Cadillac that was "sitting there." (6RT 1187-1188, 1190.) The

[6] At trial, Perry testified that the color red represented the Blood gang. Perry also explained that Bloods did not get along with the Crip gang, and the two gangs would often fight and shoot one another. (6RT 1218.)

Cadillac was later identified as belonging to appellant. (6RT 1204-1205, 1216; 7RT 1309, 1365-1366, 1375, 1416; 8RT 1458; 9RT 1694, 1722.) The Cadillac was occupied by three people, one of whom was appellant.[7] (6RT 1190.) The police officer told Perry that he would not be allowed to drive his car home because he did not have a driver's license. (6RT 1188.) The police did not give Perry, Hebrard, or Walker a ride to their destinations, and they were told to walk. (6RT 1188-1189; 7RT 1243.)

Perry and his two companions were walking along Bullis Road, on the side adjacent to Leuders Park, when Perry saw the Cadillac again. (6RT 1191-1192, 1194; see also 7RT 1245.) The Cadillac was stopped at a red light at the intersection of Bullis Road and Rosecrans. (6RT 1191-1192.) When somebody said, "That was Goldie," the Cadillac drove through the red light. (6RT 1192.) Appellant was known as "Goldie," and he was the only White member of the Park Village Crips street gang. (7RT 1332, 1373-1374; 8RT 1458, 1550, 1590; 9RT 1653; 12RT 2347.)

Perry and his two companions crossed the street and met Hunter[8], who was sitting in a chair between two apartment buildings. (6RT 1193-1196.) Hunter was known as "Droopy," and he was a member of the Leuders Park Piru gang. (6RT 1183, 1189; Supp. 4CT[9] at 2.) The Cadillac, driven by Darrell Brown ("Brown"), made a U-turn and approached. (6RT 1196, 1200-1202; 7RT 1258, 1325-1328; see also 7RT 1375, 1398.)

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[7] At trial, Perry identified appellant in court as a person inside the Cadillac. (6RT 1190.)

[8] Emmanuel Hunter's name was actually Emmanuel *Nunley*, and he testified at trial that Hunter was actually his alias. (7RT 1280-1282, 1286.) However, since he was named in the information as Emmanuel *Hunter*, and because he is sometimes referred to as Hunter in appellant's opening brief (AOB 105), respondent will refer to him as "Hunter" to avoid confusion.

[9] Respondent refers to the 31-page clerk's transcript, certified on April 23, 2007, as "Supp. 4CT."

Brown was also known as "Squally," and he was a member of the Park Village Crips. (7RT 1376; Supp. 4CT 14.) Appellant, who was in the front passenger seat, fired approximately seven or eight shots from an assault rifle at Hunter, striking him in the leg.[10] (6RT 1191-1203, 1210, 1212, 1229, 1232; 7RT 1245, 1257-1258, 1271, 1280-1282; see also Supp. 4CT 1-16 [transcript of Walker police interview].) Perry, Hebrard, and Walker were a "quite a distance" away from Hunter at the time of the shooting. (6RT 1209-1212.)

Hunter was transported to the hospital and Compton police officers arrived at the crime scene. The officers collected two 7.62 by .39 millimeter shell casings which were capable of being fired from an AK-47, an SKS, or an AR-47 assault rifle. (6RT 1203; 7RT 1294-1299; 10RT 1898-1899; 12RT 2222.)

Later that evening, at approximately 11:30 p.m. to 12:00 p.m., appellant's Cadillac arrived at the Wilmington Arms apartment complex at 700 West Laurel Avenue in Compton. (7RT 1303, 1365, 1372-1375, 1378, 1416; 8RT 1592-1593.) Security guard Charles Chavers, who was monitoring the front gate from within the guard shack, let the Cadillac inside the complex.[11] (7RT 1377.) Chavers noticed that Brown was the driver, appellant sat in the front passenger seat, and Sanders sat in the back seat.[12] (7RT 1375-1377, 1380, 1398, 1414, 1425.) Chavers worked there forty hours a week, and he often saw appellant drive through the front gate. (7RT 1377-1378.)

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[10] When Perry was asked at trial whether he was "able to get a good look at the person who was doing the shooting," Perry replied, "Yes." (6RT 1212.)

[11] At trial, Chavers testified he knew appellant as "Goldie," and he identified appellant in court. (7RT 1373.)

[12] Chavers later identified appellant and Sanders in six-pack photographic lineups. (7RT 1390-1392, 1421.)

Approximately ten minutes later, Compton police officers arrived and asked Chavers whether a green-colored Cadillac had entered the complex. (7RT 1301-1305, 1309, 1378-1379.) After the police located the Cadillac, Captain Reggie Wright of the Compton Police Department drove three witnesses (apparently Perry, Walker and Hebrard) by the Cadillac. (7RT 1309-1311, 1364-1367; Supp 4CT 14.) All three witnesses identified the Cadillac as the same car involved in the shooting that occurred earlier that evening. (7RT 1366.) The police towed the Cadillac away and impounded it. (7RT 1381-1382.) The police did not arrest anybody at the scene. (7RT 1382.)

On October 9, 1998, appellant approached Walter Arcia ("Arcia"), a security guard who worked at the Wilmington Arms apartment complex. (7RT 1389, 1398; see also 7RT 1374, 1393, 1416-1417.) Appellant asked Arcia, "Where [is] the cripple mother fucker who got my car taken[?]" (7RT 1389, 1398; 9RT 1694-1695.) Arcia believed appellant was referring to Chavers, who walked with a limp. (7RT 1423; 9RT 1694-1695, 1708.) Appellant threatened to kill Chavers if he returned to work at the Wilmington Arms apartment complex. (7RT 1389-1390.) Arcia told Chavers about the threat and Chavers did not return to that job. (7RT 1389-1390, 1398, 1422-1423; 9RT 1693-1696.)

On January 6 and 7, 1999, the police interviewed Hebrard, Hunter, Perry, and Walker. The interviews were videotaped, and Hebrard and Walker's interviews were played at trial. (6RT 1199-1203, 1229-1232; 7RT 1245, 1251-1252, 1261-1263, 1267-1268, 1282-1286, 1300, 1323-1328; see also Supp. 4CT 1-16 [transcript of Walker police interview].)

During Perry's interview, he circled appellant's picture and wrote, "He was the shooter." (6RT 1201-1202.)[13]

2. The January 3, 1999, Guard Shack Shootings at the Wilmington Arms Apartment Complex (Counts 1 through 4).

Prior to the evening of January 2, 1999, Kimberly Grant ("Grant"), a resident of the Wilmington Arms apartment complex, overheard a conversation between appellant and Sanders. (9RT 1713-1714, 1839.) Appellant told Sanders something to the effect of: "Just don't be no punk. Just don't be no punk" (9RT 1840; see also 3CT 816, 818); "Are you down to shoot them mother fuckers?" (Death Penalty Supp. III[14] at 46-47; see also 3CT 816); "[Y]ou're supposed to be hard you little punks" (Death Penalty Supp. III at 48). Sanders did not verbally reply to appellant's comments. (Death Penalty Supp. III at 49-50.) According to Grant, appellant also told Sanders, "[fuck] them at the [front] gate." (3CT 816.) Grant believed appellant was referring to the Wilmington Arms security guards. (3CT 816-817.)

On January 2, 1999, at 8:30 p.m. or 8:40 p.m., Arcia was inside the guard shack at the Wilmington Arms apartment complex when he saw appellant's Cadillac approach the guard shack. (9RT 1696-1698.) Appellant was the driver, and a short African-American man was a

[13] Although the record is somewhat unclear, it seems apparent from Detective Richardson's testimony that Hebrard also identified appellant in a six-pack photographic lineup during his police interview. (7RT 1324-1328.) Detective Richardson also testified that Hebrard wrote, "shot at us" in the admonition to the six-pack photographic lineup. (6RT 1262, 1328; see also 7RT 1263.)

[14] In appellant's opening brief, he cites to the 225-page Clerk's Transcript, certified on January 25, 2007, as "Death Penalty Supp. III." (See, e.g., AOB 17, fn. 41.) To be consistent, Respondent will also refer to this transcript as Death Penalty Supp. III.

passenger. (9RT 1696-1698.) Behind appellant's Cadillac was a big, brown-colored car that was occupied by African-Americans. (9RT 1698.) Both cars were permitted entry into the apartment complex. (9RT 1698-1699.) Both cars had their lights turned off, and neither car had license plates. (9RT 1696-1699, 1701.) That evening, appellant's Cadillac entered and exited the apartment complex approximately six or seven times. (9RT 1702.) Arcia believed it was unusual that there was no loud music emanating from appellant's Cadillac, and that it was slowly entering and exiting the apartment complex. (9RT 1702.)

Michelle Lopez ("Michelle") and her mother, Maribel Lopez ("Maribel"), resided at the Wilmington Arms apartment complex inside a first-floor apartment across from the guard shack. (8RT 1449-1450, 1453, 1487, 1526-1527.) At approximately 11:15 p.m. on January 2, Michelle was visiting her friend's apartment (located immediately above her own) when she heard loud screaming coming from outside the apartment. (8RT 1454-1455, 1457, 1462-1463, 1488.) Michelle opened the blinds and saw appellant's Cadillac and heard an argument involving a security guard. (8RT 1457-1458, 1462; see 8RT 1529.) Michelle saw appellant sitting in the passenger seat of the Cadillac and two African-American males standing by the driver's side door. (8RT 1458-1459, 1465, 1510-1512, 1513-1514.) The two African-Americans used profanity as they argued with the security guard, and one of the two African-Americans said, "Motherfucker, I'm going to get you." (8RT 1531-1533; see also 8RT 1460-1461, 1491.) The other African-American male said, "Come on. Let's go." (8RT 1461, 1491.) One of the African-American males told somebody sitting inside the Cadillac, "We'll do it later." (8RT 1464-1465; see also 8RT 1533-1534.) After the argument with the security guard ended, appellant and the two African-American males drove away in the Cadillac. (8RT 1461-1462, 1465-1466.)

The next morning, on January 3, 1999, Grant and her boyfriend drove through the front gate of the Wilmington Arms apartment complex. (9RT 1715-1716.) Moments after Grant and her boyfriend parked their van, appellant parked his Cadillac in front of their van. (9RT 1722; see also Death Penalty Supp. III at 15-17.) Sanders and a Samoan-looking girl were also inside the Cadillac. (9RT 1826-1828, 1845; Death Penalty Supp. III at 15-17.) Grant noticed appellant's Cadillac enter and exit the apartment complex approximately two or three times. (9RT 1715-1716, 1826-1828, 1845.) At one point, it appeared to Grant that appellant's Cadillac stopped at the front gate for approximately five minutes. (Death Penalty Supp. III at 17-18, 53.)

That same morning, at approximately 5:00 a.m., four security officers – Bombarda, Paz, Conner, and Malinao – were inside the guard shack. (8RT 1594-1596, 1598, 1601.) Conner and Paz were readings newspapers and Bombarda was speaking with Malinao. (8RT 1598.) Bombarda heard somebody say, "Motherfucker." (8RT 1601; 9RT 1670.) Bombarda looked up in the direction of the voice and saw appellant standing within the guard shack's doorway and holding a semi-automatic assault rifle in his hands.[15] (8RT 1601-1602, 1604, 1614-1615; 9RT 1649-1650, 1656, 1669-1670.) Immediately thereafter, appellant fired approximately 15 rounds in rapid succession. (8RT 1604, 1628; 9RT 1650.) Bombarda sought cover by crouching behind a steel cabinet. (8RT 1616-1618.) Nevertheless, Bombarda, who was wearing a bulletproof vest,

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[15] At trial, Bombarda demonstrated in court how appellant held the gun, and he identified the photograph depicting the gun appellant used. (8RT 1603; 9RT 1654-1655.) Bombarda testified that, prior to the shooting, he had seen appellant approximately 30 times before, and he was "a hundred percent certain" appellant was the shooter. (8RT 1602; 9RT 1674.)

was shot six times: three of the bullets struck his vest, and the three other bullets struck his right hip, his right knee, and his right foot. (8RT 1604-1607.) Bombarda was able to return fire by firing one shot at appellant using his .45 caliber service handgun. (8RT 1607-1608, 1616-1618.) Malinao was struck seven times (two bullets did not penetrate his bullet-proof vest). Paz suffered a single fatal gunshot wound, and Conner suffered a single gunshot wound which entered his upper left cheek region and exited his right middle cheek region. When appellant stopped shooting, Malinao lay on the floor face down. (8RT 1608.) Conner and Paz remained seated in their chairs. (8RT 1608-1609.) Malinao and Paz died from their gunshot wounds, and Conner was blinded from the shooting.[16] (8RT 1608-1609; 10RT 1890; 11RT 2047-2069.)

Michelle and Maribel both heard the gunshots. (8RT 1471, 1534.) According to Michelle, after she heard "a lot" of loud gunshots at approximately 5:00 a.m., she looked out the window toward the guard shack and saw two African-American males running toward the park. (8RT 1471-1473, 1475-1477.) Michelle and Maribel also saw a Black woman, later identified as Grant, going toward the guard shack. (8RT 1471-1472, 1478-1480, 1546, 1578.) Later, Michelle realized that one of the murdered security guards was the same guard who had been involved in the argument the night before. (8RT 1462-1463, 1514.) According to Maribel, she also heard the shots at approximately 5:00 a.m. (8RT 1537.) After she called 9-1-1, she looked out her sliding glass door and saw two African-Americans, one of whom she identified as Sanders. (8RT 1534-1540, 1551, 1560-1561, 1563.) Sanders and the second African American stood on a patio and faced the guard shack. (8RT 1538-1539.) Maribel then saw the two of them run away. (8RT 1539.) In a subsequent police interview with

[16] Conner died of a heart attack before the start of trial. (6RT 1113.)

Detective Aguire, Maribel identified Sanders in a six-pack photographic lineup as one of the two African-Americans she saw running away. (8RT 1579-1580.)

According to Grant, she heard noises and walked towards the guard shack. (9RT 1748-1749.) It was a foggy night, but the bright lights by the guard shack allowed Grant to see. (9RT 1749; Death Penalty Supp. III at 32; 3CT 826.) She saw appellant approximately two or three feet from the guard shack door, and then she saw him run away. (9RT 1750-1751, 1762-1767, 1833, 1839.) She also saw Sanders standing outside the shack and, after the shots, she saw Sanders run away in a different direction than appellant. (9RT 1765-1767, 1794, 1797-1798, 1833, 1839.) When she arrived at the guard shack, she saw two dead security guards and heard one of the guards plead for her help. (9RT 1768-1769.)

Paramedics arrived and treated the security guards; two were already dead. (11RT 2034-2039.) The police recovered approximately 35 items from the crime scene, consisting of, among other things, expended nine-millimeter cartridge casings, expended bullet fragments, bullet fragments, and expended bullets. (10RT 1903-1908, 1981-1989.) The nine-millimeter cartridge casings recovered from the crime scene had a stamp indicating they were manufactured by Federal Cartridge. (10RT 1917.) Deputy Sheriff Jeff Wally, a firearms examiner and the People's firearm expert, opined that all but two of the nine-millimeter casings contained marks that were left behind by the same firearm.[17] (10RT 1891-1895, 1905-1906.) Deputy Wally found fluting marks on the nine-millimeter expended

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[17] The other two nine-millimeter casings had insufficient impressions for Deputy Wally to positively identify them to a particular firearm. (10RT 1906.)

cartridge casings, and opined that the most common firearms that leave fluting marks are manufactured by Heckler and Koch. (10RT 1909-1911.)

Three days after the shooting, on January 6, 1999, Compton Police searched the house of Shantae Johnson ("Shantae")[18], appellant's girlfriend.[19] (10RT 1936, 1979.) Inside the garage, the police found a firearm magazine (People's 54). (10RT 1979; see also 10RT 1960-1961.) The magazine had a capacity for 31 rounds, and contained 10 live rounds of nine-millimeter caliber ammunition manufactured by the Federal Cartridge Company. (10RT 1912-1913, 1917-1918.) Shantae did not know how the magazine came to be in her garage. (10RT 1961.) Deputy Wally opined the magazine was designed to fit various firearms manufactured by Heckler and Koch, including the semi-automatic SP-89's, MP-5's, MP-5k's, and the Model 94. (10RT 1913-1915.) The SP-89 can fire two or three rounds in one second. (10RT 1919.) Deputy Wally also opined that there are over one hundred manufacturers of nine-millimeter bullets. (10RT 1918.)

On January 8, 1999, appellant was arrested in Lancaster at the home of Rebecca Radovich, appellant's friend. (9RT 1727-1732; 10RT 1994.) At the time he was arrested, he wore a bullet-proof vest and a black-colored

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[18] The People called Shantae as a witness. (10RT 1934-1935.) Shantae testified that on the evening of January 2, 1999, she and appellant arrived at a club after 11:00 p.m. (10RT 1937-1938.) At some point between 3:00 a.m. and 4:00 a.m. the next morning, they left the club and arrived at her house. (10RT 10 RT 1938-1939.) They both went to bed and Shantae fell asleep immediately. The next thing she recalled was waking up at 8:00 a.m. Shantae did not know whether appellant remained in bed with her because she was asleep. (10RT 1938-1940.)

[19] Shantae's house, located at 709 Anzac Circle, was "around the corner" from the Wilmington Arms apartment complex. (12RT 2240.) Vera Johnson ("Vera"), Shantae's mother, also lived at the 709 Anzac Circle house. (12RT 2239-2241.) When Vera was asked whether it took 20 to 40 seconds to drive from 709 Anzac Circle to the guard shack, she replied, "Maybe. I don't know. I never timed myself." (12RT 2259.)

leather jacket. (10RT 1994-1997.) Inside the black leather jacket, the police found a fully loaded nine-millimeter Beretta semi-automatic pistol, a pair of brown-colored gloves, and a black-colored knit cap. (10RT 1994-1995, 1997.) Also inside the jacket were three ammunition clips. (10RT 1995, 1998-1999.) The Lexus that appellant used to drive to Lancaster was a stolen vehicle. (10RT 1890-1891; see also 2RT 296-297.)

On January 14, 1999, Detective Eduardo Aguirre and Detective Richardson interviewed Grant.[20] Grant told the detectives that as she approached the guard shack, she saw appellant standing near the guard shack's front door and holding what appeared to be a gun. (Death Penalty Supp. III at 27, 30; 11RT 2076-2080.) Appellant wore blue-colored pants, a light blue-colored shirt, and a long leather coat. (Death Penalty Supp. III at 40-41.) Grant said that at the time she saw appellant holding what appeared to be a gun, Sanders stood outside the guard shack, and it appeared to Grant that Sanders "was watching out or something." (Death Penalty Supp. III at 26-27, 30, 32-33.) After the shots were fired, appellant and Sanders ran away together toward the park. (Death Penalty Supp. III at 31, 33.) When Grant arrived at the guard shack, she saw the guards had been shot, and heard one of them plead for her help. (Death Penalty Supp. III at 33-35.) Grant told the detectives that she had known appellant for approximately three or four months, and had known Sanders for approximately five or six months. (Death Penalty Supp. III at 38, 40.) During the interview, Grant identified appellant and Sanders in six-pack photographic lineups. (Death Penalty Supp. III at 42-43.)

[20] At trial, the videotape of Grant's January 14 interview was played for the jury and they received a transcript of the interview. (12RT 2211-2214.)

That same day, Detective Aguirre interviewed Bombarda at the Long Beach Memorial Hospital. (11RT 2081.) Bombarda said he recognized the shooter because Bombarda had seen the shooter over 20 times in the past, and he was the same person who drove through the guard shack in October of 1998. (11RT 2082.) Bombarda described the shooter as White with a long pony tail, and Bombarda described the shooter's tattoos on his neck and arms and the birthmark on his face.[21] (11RT 2082; see also 9RT 1673.) Bombarda identified appellant as the shooter in a six-pack photographic lineup. (8RT 1610-1611; 9RT 1658-1662; 10RT 2001; 12RT 2271; see also 7RT 1325; 10RT 1990.) When Bombarda identified appellant, he told the detectives something to the effect of, "That's the guy that [*sic*] shot me." (9RT 1674.)

On March 8, 2000, Grant was interviewed again, this time by a deputy district attorney and two investigators.[22] (3CT 814.) Grant said, under oath, that as she approached the guard shack, she saw appellant, Sanders, and a third person. (3CT 814, 821-823.) Grant saw appellant carrying a gun in his hand, and saw Sanders standing near the corner of the guard shack. (3CT 822-823.) As Grant got closer to the guard shack, she heard shooting. (3CT 824.) When she heard the shots, appellant was standing by the guard shack's door and carrying a gun. (3CT 824.) After the shooting stopped, appellant ran out the gate towards the park. (3CT 824-825.) When Grant arrived at the guard shack, she saw three guards inside the shack and a lot of blood. (3CT 827-828.) During the interview,

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[21] Appellant is White. (Death Penalty Supp. III at 36.) At the time of the shooting, appellant had a long pony tail, tattoos on his arm and his neck, and a long scar on his face and arm. (Death Penalty Supp. III at 36; see also 3CT 822; see also 7RT 1352.)

[22] At trial, the tape of Grant's March 8 interview was played for the jury and they received a transcript of the interview. (12RT 2217-2218.)

Grant again identified appellant and Sanders in two six-pack photographic lineups, and also identified a picture of appellant's Cadillac. (3CT 831.)

3. Gang Evidence

The parties stipulated the Park Village Crips street gang constituted a criminal street gang within the meaning of section 186.22, subdivision (b). (11RT 2200.) Compton Police Department Detective Ray Richardson testified as the People's gang expert. (7RT 1319-1320.) At the time of the trial, Detective Richardson had worked for eight years as a gang investigator, and his responsibilities were to gather gang intelligence and to investigate gang related crimes. (7RT 1320.) During those eight years, Detective Richardson had contact with different criminal street gangs and thousands of gang members. (7RT 1321.) Detective Richardson testified that Blood and Crip gangs do not get along with each other, and neither of those gangs get along with Hispanic gangs. (7RT 1329-1330.)

Detective Richardson opined that gangs, including the Park Village Crips, terrorize the public by committing rapes, robberies, murders, drugs-related activity, and similar activities. (7RT 1321, 1331-1332.) The Park Village Crips is a criminal street gang with approximately 200 members, and consists of Samoans, Blacks, and Hispanics. (7RT 1331-1332.)

Detective Richardson testified that, to his knowledge, appellant was the only White member of the Park Village Crips. (7RT 1332.) Detective Richardson explained the meaning of various Park Village Crips-related tattoos appellant had on his the left side of his neck, his chest, and his back. (7RT 1352-1354.) Detective Richardson also explained the meaning of several photographs depicting appellant, along with others, "throwing" Park Village Crips street gang signs. (7RT 1349-1356.) Like appellant, Sanders was also a Park Village Crips gang member. (7RT 1332.)

Detective Richardson testified the area controlled by the Park Village Crips is bordered by Compton Boulevard, Wilmington, Alondra,

and Acacia. (7RT 1332.) The guard shack at the Wilmington Arms apartment complex was near Laurel and Wilmington. (7RT 1331.) The Wilmington Arms apartment complex was heavily marked by Park Village Crips street gang graffiti, and Detective Richard explained the significance of various photographs depicting this graffiti. (11RT 2163-2170.)

Detective Richardson testified that Walker was a member of the Treetop Piru gang, a Blood gang, and that his moniker was "C.K. Noon." (7RT 1322.). Hebrard was a member of the Leuder's Park/Mob Piru gang, and Hunter[23] was a member of the Leuders Park Piru gang. (7RT 1322-1323; see also 6RT 1182-1183.) The Leuders Park Piru gang is a "Blood" gang. (6RT 1182-1183; 7RT 1242, 1254-1255, 1322-1323.) The area surrounding 1200 North Bullis, where Hunter was shot, is a "Piru" area. (7RT 1345; Supp. 4CT at 2.)

Perry testified that "Treetop Piru" was a Blood gang, and he agreed the Treetop Piru gang was in the same basic neighborhood as the Leuders Park gang. (6RT 1219.) The prosecutor presented Perry with various photographs depicting gang-related graffiti, and Perry described their meaning. (6RT 1219-1220.)

C. Defense's Guilt Phase Evidence

Private investigator Daniel Mendoza took measurements at the Wilmington Arms apartment complex. Maribel and Michelle's apartment unit was approximately nine yards away from the guard shack, and Grant's unit was approximately 70 yards. (12RT 2229-2232; see also 8RT 1527, 1529; 9RT 1770.)

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[23] Detective Richardson actually testified that "Nunley" was a Lueders Park Piru gang member. (7RT 1323.) However, as indicated, *ante*, Nunely's alias was "Hunter" (7RT 1280-1282, 1286), and his gang moniker was "Droopy" (6RT 1183, 1189; Supp. 4CT at 2).

Maribel told Detective Aguirre that she was not wearing her eyeglasses when she saw Sanders run by her window, but she did not need to wear her eyeglasses to see clearly. (12RT 2274-2275, 2285-2286.) Michelle told Detective Aguirre that she heard Grant tell the "two guys that did the shooting" to run away. (12RT 2278-2279.)

Appellant's mother, Judy Gary, testified appellant was left-handed. (12RT 2237-2238.)

Vera Johnson, the mother of appellant's girlfriend (Shantae), testified that appellant and Shantae arrived at Vera's house at approximately 4:00 a.m. on January 3, 1999. At 7:00 a.m., appellant and Shantae were still at Vera's house. (12RT 2239-2248.) Vera never told the police that appellant was at her house during the early morning on January 3, 1999. (12RT 2248.)

Appellant testified on his own behalf. Appellant had two prior felony convictions for crimes of moral turpitude. (12RT 2347, 2353-2354.) Appellant admitted he was a member of the Park Village Crips street gang, which included mostly Blacks and Samoans, and owned a 1981 Cadillac which was light-green or blue. (12RT 2303-2306.) On October 8, 1998, during the evening, appellant was with one of his girlfriends, "Rachel," at her home in Signal Hill. (12RT 2307-2308, 2382-2384.) Appellant did not blame or threaten the security guards for causing his car to be towed on October 8, 1998. (RT 2307-2311.) Appellant denied he was involved in a shooting on Bullis Road. (12RT 2315-2316.)

On the evening of January 2, 1999, appellant went to Shantae's house, where he drank a beer. Appellant and Shantae arrived at a nightclub at approximately 12:00 a.m., where appellant drank several Long Island iced teas and had a "buzz." Appellant and Shantae returned to her house, where he stayed until approximately 2:00 p.m. the following day. (12RT 2320-2337; 13RT 2426.) On January 2, 1999, appellant was "in and out"

of the Wilmington Arms apartment complex "all that day." (12RT 2320.) His car was not stopped at the main gate of the apartment complex during the evening hours of January 2. (12RT 2323.) Appellant had nothing to do with the shooting of the guards at Wilmington Arms apartment complex. (12RT 2346.)

Appellant was afraid of the police; he had been shot in the back by the police in 1994. Appellant wore a bullet-proof vest because he was employed as a security guard for exotic dancers. The nine-millimeter pistol recovered from appellant's jacket had been placed there by one of his friends. (12RT 2340-2345.)

Darrell Brown, a Park Village Crips street gang member, was Livingston's friend. (12RT 2372.)

D. Prosecution's Rebuttal

Maribel, Chavers, and their respective children were relocated by the police for their safety. (13RT 2456.)

On October 21, 1998, appellant told Detective Richardson that on October 8, 1998, he had been with Shantae at her home, which was near the Wilmington Arms apartment complex in Compton. (13RT 2458-2463.)

E. Defense's Surrebuttal

On October 21, 1998, Detective Richardson did not ask appellant whether he had been in Signal Hill on the night of October 8, 1998. (13RT 2465.)

F. Penalty Phase

1. Prosecution's Penalty Phase Evidence

On January 31, 1991, San Bernardino County Sheriff's Deputy William Holland arrived at the Hilltop Mobile Home Park, in 29 Palms, after receiving a radio call about a fight. (15RT 2994-2998.) Some people at the park told Deputy Holland that there had been a fight and was

somebody was injured. (15RT 2998-2999.) Deputy Holland entered a trailer where he saw a white male, later identified as Eldon Shull, lying on the floor. (15RT 2999-3000.) Schull was approximately six feet tall, approximately 200 pounds, and Deputy Holland believed Schull was in the Marines. (15RT 3000, 3009.) Shull had a large puncture or laceration to the left side of his chest, and somebody near Schull was applying a cloth compress to Schull's injury. (15RT 3001.) Schull was having difficulty breathing, and the paramedics arrived and transported him to the hospital. (15RT 3001-3002.)

Deputy Holland advised appellant of his *Miranda*[24] rights, and appellant replied he understood those rights and wished to speak with the deputy. (15RT 3001-3002.) Appellant told Deputy Holland that he was involved in a fight at the mobile home park, and he described the other person as a large, muscular, White male. (15RT 3002.) Deputy Holland opined Schull matched that description. (15RT 3002.) Deputy Holland also recovered a black colored "K-Bar" style knife with a fixed blade, which the deputy opined was basically a bayonet knife commonly used by the Marine Corp. (15RT 3007.) As a result of this incident, appellant plead guilty to an assault with a deadly weapon. (15RT 3003-3006.)

On October 8, 1999, at approximately 6:00 a.m., Los Angeles County Sheriff's Deputy Alfredo Salazar was working inside the Men's Central Jail. (15RT 2943-2946.) As the inmates exited their cells for breakfast, an inmate, later identified as Allen Weatherspoon ("Weatherspoon"), approached Deputy Salazar and said, "Man down." (15RT 2946-2947; see also 16RT 3241.) Weatherspoon held a white cloth to the front of his neck, and Deputy Salazar noticed Weatherspoon was

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

injured. (15RT 2946-2947.) Weatherspoon suffered an injury to his neck, which began underneath his right ear and extended to the middle of his neck. (15RT 2950.) Weatherspoon also suffered a laceration to the right side of his face, and two lacerations to his right hand.[25] (15RT 2950.) All the lacerations were approximately two to three inches long. (15RT 2950.)

Deputy Salazar asked Weatherspoon what happened, and Weatherspoon replied "it was the White guy" in "Charley 11." (15RT 2948.) Deputy Salazar explained "Charley 11" referred to a cell in row C, cell number 11, and that appellant was the only White person in that cell. (15RT 2952-2953.) Weatherspoon identified his assailant as a "White guy" and a "White Crip" who cut his throat with a razor blade. (15RT 2948.) Deputy Salazar called for help and medical personnel arrived and treated Weatherspoon's injuries. (15RT 2948.) Deputy Jose Garcia searched for appellant, and found him hiding underneath a bunk inside the Charley 11 cell. (15RT 2962-2963.) When appellant was found, he had a laceration, and also had some kind of ointment or cream to cover it up. (15RT 2963-2964.)

During the penalty phase, Weatherspoon was brought into the courtroom for the jury to view his injuries. (15RT 3017.) His first scar was below his right eye and was approximately one to one and one-half inches long. (15RT 3018-3019.) His second scar was below the first scar, and was approximately two inches long. (15RT 3018-3019.) His third scar began immediately below his ear and ran to the other side of his neck to his other ear lobe. (3RT 3019-3020.)

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[25] At trial, the jury was presented with five photographs depicting Weatherspoon's injuries and photographs depicting blood on the jail floor. (15RT 2948-2952.) Deputy Salazar explained these photographs to the jury. (15RT 2951-2952.)

Otto Felske, a correctional counsel supervisor for the California Department of Corrections, testified about various incident reports included in appellant's "CDC" file, that documented appellant's involvement in prison fights.[26] (15RT 3044, 3049-3053; see also 15RT 3060, 3063.) One fight occurred on October 18, 1991, and resulted in appellant's conviction for assault and battery on another prisoner. (15RT 3053.) On November 20, 1992, in Calpatria State Prison, appellant was involved in another incident which led to his conviction. (15RT 3052-3053.) On August 5, 1996, and then again on January 31, 1997, in the state prison in Lancaster, appellant was convicted after his involvement in prison fights. The January 31 fight involved the use of a stabbing instrument. (15RT 3050-3052.) As a result of these incidents, appellant was placed in administrative segregation several times. (15RT 3054.)

During the penalty phase, family members of the slain security guards gave victim impact statements. (15RT 2966 [Judy Avalos], 2970 [Leticia Paz], 2974 [Oscar Paz], 3021 [Hermene Malinao], 3034 [Mariam Marroquin].)

2. Defense's Penalty Phase Evidence

During the defense penalty phase, appellant's family members and friends testified as to, among other things, their good relationship with appellant and his positive attributes. (15RT 3065 [Judy Gary], 3118 [Sunita Dunn], 3122 [Richard Flennaugh], 3126 [April Morris], 3131 [Mary Nordmann]; 16RT 3157 [Christina Rossi], 3162 [Donna Aitken]; 3220 [Rebecca Radovich)].)

[26] Appellant's CDC file was not admitted into evidence. (15RT 3062-3063.)

Parole Agent Santos Fuertez also testified that appellant was released on parole and tested for drugs approximately five times in 1998, and that his test results came back negative. (16RT 3147-3148, 3153.)

Doctor Jean Segall, a psychiatrist, examined appellant on June 1 and June 27, 1998. (16RT 3174-3176, 3186.) Doctor Segall tentatively diagnosed appellant with major depression with psychotic features, and treated him with Zoloft and antipsychotic medications. (16RT 3177-3178, 3179-3182.)

Appellant testified on his own behalf. (16RT 3220.) Appellant admitted he was not a "boy scout," but did not feel what was happening to him was right. (16RT 3221-3222.) He believed he could give prisoners guidance, and he sympathized with people who lost their loved ones. (16RT 3223, 3227.)

APPELLANT'S CONTENTIONS

1. The true findings on the gang enhancements appended to counts 1 through 5 are not supported by substantial evidence, requiring reversal of those true findings and of the verdicts on those counts. (AOB 40-70.)

2. The true findings on the "lying in wait" enhancements appended to counts 1 and 2 are not supported by substantial evidence, requiring reversal of those true findings. (AOB 71-80.)

3. The "lying-in-wait" circumstance, generally and as applied in this case, fails to provide a meaningful basis for distinguishing between capital and noncapital cases in violation of the Eighth Amendment. (AOB 81-97.)

4. The trial court violated appellant's federal right to confrontation by admitting testimonial statements, in the form of Walker's videotaped interview, without the opportunity for cross-examination. (AOB 98-104); the trial court erred by permitting Captain Wright to testify

that three uninjured witnesses were taken to the Wilmington Arms apartment complex and identified the car involved in the shooting (AOB 105-108).

5. The trial court denied appellant his federal due process rights by permitting Perry to testify that somebody identified the Cadillac as Goldie's. (AOB 109-118.)

6. The trial court violated appellant's various federal and state constitutional rights by instructing the jury with CALJIC Nos. 2.02 and 8.83.1. (AOB 119-128.)

7. The trial court's instructions distinguishing the treatment of direct and circumstantial evidence denied appellant his federal and state rights to due process and jury trial. (AOB 129-160.)

8. The trial court violated appellant's federal and state rights to due process and jury trial by failing, sua sponte, to instruct the jurors on how to evaluate the extrajudicial statements admitted into evidence. (AOB 161-174.)

9. The trial court violated appellant's federal and state rights to due process and jury trial by instructing the jury with CALJIC No. 2.51. (AOB 175-186.)

10. CALJIC Nos. 2.90, 2.01, 2.02, 8.83, 8.83.1, 2.21.2, 2.22, and 2.27, impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. (AOB 187-207.)

11. The unadjudicated crimes presented as aggravating factors during the penalty phase lacked sufficient evidence for any jury to find guilt beyond a reasonable doubt, and violated appellant's federal rights to due process, jury trial, and a reliable sentencing determination. (AOB 208-218.)

12. The trial court's instructions during the penalty phase denied the possibility of deadlock and violated appellant's federal rights to due process and equal protection. (AOB 219-230.)

13. The trial court violated appellant's federal and state constitutional rights by instructing the jury, during the penalty phase, not to consider the impact of appellant's sentence upon his family. (AOB 231-259.)

14. CALJIC No. 8.88 denied appellant his federal rights to due process, jury trial, and a reliable sentencing determination. (AOB 260-271.)

15. Omnibus argument. (AOB 272-317.)

16. The cumulative effect of errors undermined the fundamental fairness of appellant's trial and the reliability of the death judgment. (AOB 318-320.)

RESPONDENT'S ARGUMENT

1. Substantial evidence supports the gang enhancements.

2. Substantial evidence supports the "lying in wait" special circumstances.

3. The "lying in wait" special circumstance, generally and as applied in this case, does not violate the Eighth Amendment.

4. Appellant's *Crawford* challenges to Walker's videotaped police interview and Captain Wright's testimony fail.

5. The trial court did not err by permitting Perry to testify that someone said "That was Goldie" in reference to appellant's Cadillac.

6. Appellant has failed to show CALJIC No. 2.02 and 8.83.1 are unconstitutional.

7. Appellant fails to show that the trial court's instructions on direct evidence and circumstantial evidence were unconstitutional.

8. The trial court had no sua sponte duty to instruct the jury with CALJIC No. 2.20.

9. CALJIC No. 2.51 did not permit the jury to find guilty based on motive alone.

10. The trial court did not err in giving the standard instructions on circumstantial evidence; appellant has failed to show prosecutorial misconduct.

11. Appellant's challenge to the aggravating evidence presented during the penalty phase fails; his related claim of instructional error fails.

12. The trial court did not err by not repeating CALJIC No. 17.40 during the penalty phase; the penalty phase instructions, viewed individually or cumulative, did not amount to an impermissible *Allen* instruction.

13. The trial court did not err by instructing the jury with CALJIC No. 8.85 during the penalty phase.

14. Appellant fails to show that CALJIC No. 8.88 is unconstitutional.

15. Appellant's constitutional challenges to the death penalty are meritless.

16. The cumulative effect of any errors did not prejudice appellant.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE GANG ENHANCEMENTS

Appellant claims there was insufficient evidence to support the true findings on the gang enhancements appended to counts 1 through 4 (i.e., the guard shack shootings) and count 5 (i.e., the drive-by shooting on Bullis Road). (AOB 40.) Specifically, appellant argues, "[o]n the first prong of section 186.22, subdivision (b)(1) . . . the prosecution offered no evidence

that the crimes were committed for the benefit of, or at the direction of, a criminal street gang." (AOB 43.) Appellant also argues, "[t]he prosecution presented no evidence to support a finding on the second prong: that the underlying charges were committed with the specific intent to promote, further, or assist in criminal conduct by gang members." (AOB 44.) These claims must be rejected as meritless.

A. Applicable Law

It is axiomatic that an appellate court's role is not to reweigh evidence on appeal, but only to determine the legal sufficiency of the facts and to ensure that substantial evidence was presented at trial to justify the factfinder's conclusion. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) Accordingly, evidence in a criminal case is sufficient to support a conviction if, viewing the entire record in the light most favorable to the prosecution, and presuming in support of the judgment the existence of every fact reasonably deducible from the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) If the findings of the trier of fact are reasonably justified by the record, the opinion of the reviewing court that the evidence could be reasonably reconciled with a contrary finding does not merit reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Substantial evidence includes circumstantial evidence and reasonable inferences based on that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.) These principles apply to prosecutions under section 186.22, subdivision (b). (*In re Jose P.* (2003) 106 Cal.App.4th 458, 465-466.)

Subdivision (b) of section 186.22 constitutes a sentence enhancement. It is triggered when the defendant is "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." (§ 186.22, subd. (b).) Appellant does not seriously contest the fact that he was an active participant in a well-established, ongoing criminal street gang, as that evidence is simply overwhelming.[27] Rather, he challenges the sufficiency of the requirement that the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

This Court has repeatedly affirmed the use of expert testimony by law enforcement professionals who have experience in the area of gang culture and psychology to demonstrate a defendant's intent and the gang-related activities to support a finding under section 186.22. (See, e.g., *Gardeley, supra*, 14 Cal.4th at p. 618 [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 [reaffirming *Gardeley* and admissibility of officer's expert testimony in the area of gang culture and psychology]; see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 [affirming admission of officer's expert opinion that sole gunman who displayed no gang signs during shooting

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[27] Subdivision (f), of section 186.22 reads: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

acted to bolster gang and his own reputation in gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 ["It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.'"].

B. Substantial Evidence Supports The Gang Enhancements

1. Counts 1 through 4

Here, as to counts 1 through 4, viewing the entire record in the light most favorable to the prosecution, there was substantial evidence that the shooting of the four security guards was committed "in association with any criminal street gang." This first prong of the gang enhancement is satisfied because appellant committed the crimes with Sanders, a fellow member of the Park Village Crips. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 625 [jury could infer crimes were gang related based on fact that defendant committed crimes in association with fellow gang members]; *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [where People presented evidence defendant committed crimes "in association with Rodriguez, a fellow gang member," there was sufficient evidence defendant "committed the offenses 'in association with any criminal street gang'"]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"].)

Prior to the shootings, appellant asked Sanders, a fellow Park Village Crips street gang member (7RT 1332, 1349-1356), whether Sanders was "down" to shoot the security guards (9RT 1713-1714, 1839; Death Penalty Supp. III at 46-47; see also 3CT 816-817). Mere hours before the guard shack shootings occurred, appellant was in the company of two African-American men who had a loud, profanity-laced argument with one of the security guards who was later murdered. (8RT 1454-1459, 1462,

1465, 1510-1514; see 8RT 1529, 1531-1533.) Moments before or after the shooting, Sanders was seen near the guard shack at the same time appellant was seen holding a gun and standing near the guard shack, and Sanders appeared to be "watching out or something." (Death Penalty Supp. III at 26-27, 30, 32-33.) Both appellant and Sanders fled in the same direction after the shooting stopped (Death Penalty Supp. III at 31, 33), which suggested a coordinated effort and consciousness of guilt (*People v. Kimble* (1988) 44 Cal.3d 480, 497 [when a person suspected of and charged with a crime resorts to flight, this tends to show a consciousness of guilt].)

Bombardy's testimony also provided evidence that appellant's shooting of the security guards was committed for the benefit of, or in association with, any criminal street gang. Bombardy testified that at the time of the shooting, appellant wore a white-colored shirt, and there was no evidence that appellant's neck was covered. (9RT 1654.) Presumably, then appellant's gang tattoos on the side of his neck were visible to the security guards (see 7RT 1352-1354; 12RT 2366). (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1333 [defendant's clearly visible tattoos identified him as a gang member and supported gang enhancement].)

Furthermore, the parties stipulated the Park Village Crips were a criminal street gang within the meaning of section 186.22, subdivision (b), and Detective Richardson testified the common goal of a street gang, including the Park Village Crips, was to terrorize the public by committing crimes, including murder. (7RT 1321, 1331-1332.) The prosecutor also presented overwhelming evidence of appellant's membership in Park Village Crips, including evidence of his numerous gang tattoos and photographs of appellant throwing gang signs and associating with gang members. (7RT 1332, 1349-1356.)

There was also substantial evidence that appellant committed the murder and attempted murders of the security guards with "the specific

intent to promote, further, or assist in any criminal conduct by gang members." "[S]pecific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Committing a crime as an active gang member will not . sustain a gang enhancement. The crime itself must be "gang related." (*People v. Gardeley* (1996) 14 Cal.4th 605, 622.)

This second prong of the gang enhancement is satisfied because the "[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant[s] acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales*, *supra*, 112 Cal.App.4th at pp. 1198-1199 [intent to commit robbery in association with other gang members supported inference of intent to assist criminal conduct by fellow gang members]; *People v. Romero* (2006) 140 Cal.App.4th 15, 20 [specific intent element of gang enhancement satisfied where the defendant intended to help another gang member commit a drive-by shooting].) Here, as argued, above, there was overwhelming evidence that appellant committed the shootings of the security guards in collaboration with Sanders, a fellow members of the Park Village Crips. This evidence was alone sufficient to satisfy the specific intent element of the gang enhancement.

For good measure, however, the prosecution also presented evidence that prior to the guard shack shootings, appellant had threatened to kill security guard Chavers, whom appellant blamed for allowed the police to tow his Cadillac away from the Wilmington Arms apartment complex. (7RT 1389-1390, 1398; 9RT 1694-1695.) Furthermore, mere hours before the guard shack shootings occurred, appellant was in the company of two African-American men who had a loud, profanity-laced argument with one

of the security guards who was later murdered. (8RT 1454-1459, 1462, 1465, 1510-1514; see 8RT 1529, 1531-1533.) Appellant's threat against Chavers, the argument with the security guard, and the shootings of the security guards, occurred within territory marked by Park Village Crips street gang graffiti. (7RT 1331; 11RT 2163-2170.) Indeed, as appellant notes in his opening brief, the prosecution presented testimonial and photographic evidence that the Wilmington Arms apartment complex was within the territory "claimed" by the Park Village Crips. (AOB 51.) From this, the jury could reasonably infer that appellant believed the security guards had acted disrespectfully toward himself and the Park Village Crips, and that appellant committed the shootings with the specific intent to promote, further, or assist in any criminal conduct by gang members. (Compare *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1383 [fact that shooting was precipitated by victim's act of disrespect directed to defendant's gang supported gang enhancement].) Indeed, appellant admitted at trial that because he was the only White member of the Park Village Crips, he was required to act exceptionally tough. (12RT 2385.) Furthermore, Detective Richardson also testified that gangs, including the Park Village Crips, terrorize the public by committing murders, among other crimes. (7RT 1321, 1331-1332.)

Collectively, the witnesses' testimony and that of Detective Richardson's was sufficient for a reasonable jury to find, beyond a reasonable doubt, that appellant's shooting of the security guards was committed in association with the gang, for the benefit of the gang, and with the specific intent to assist in criminal conduct by the gang's members. Therefore, as to counts 1 through 4, substantial evidence supports the jury's findings that the alleged gang enhancements were true.

2. Count 5

As to count 5 (i.e., the drive-by shooting on Bullis Road), viewing the entire record in the light most favorable to the prosecution, there was substantial evidence showing that appellant's attempt to murder Hunter was committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Appellant, a Park Village Crip gang member, targeted Hunter in a drive-by shooting. (6RT 1183, 1189, 1191-1203, 1210, 1212, 1229, 1232; 7RT 1245, 1257-1258, 1271; 1280-1282.) Hunter was a member of the Leuders Park Piru gang (a "set" of the rival Blood gang) (6RT 1183, 1189; 7RT 1255), and the evidence presented at trial demonstrated Blood and Crip gangs did not get along, and would often fight and shoot one another. (6RT 1218; 7RT 1329-1330.) Moreover, the shooting occurred at or near 1200 North Bullis, which Detective Richardson testified was considered a "Piru area." (7RT 1345; Supp. 4CT at 2.) Detective Richardson also testified that gangs, including the Park Village Crips, terrorize the public by committing murders, among other crimes. (7RT 1321, 1331-1332.) At the time of the shooting, appellant was inside the car with Sanders and Brown (the driver), both of whom were fellow Park Village Crips gang members. (6RT 1190; 7RT 1375-1377, 1380, 1398, 1414, 1425; Supp. 4CT 14.)

In light of this evidence, the jury could reasonably conclude that appellant's act of committing a drive-by shooting of a rival gang member in the rival gang's territory was an act in association with a criminal street gang and committed with the required specific intent. (See *People v. Romero*, *supra*, 140 Cal.App.4th at pp. 19-20 [specific intent element of gang enhancement satisfied where the defendant intended to help another gang member commit a drive-by shooting and evidence showed shootings committed for gang's benefit where they took place in rival gang territory];

People v. Morales, *supra*, 112 Cal.App.4th at p. 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"]; *People v. Williams*, *supra*, 170 Cal.App.4th at p. 625 [jury could infer crimes were gang related based on fact that defendant committed crimes in association with fellow gang members]; *People v. Leon*, *supra*, 161 Cal.App.4th at p. 163 [fact that crime was committed on rival gang's turf supported gang enhancement]); see also *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 & fn. 3 [crime committed as pay back against rival gang was committed to benefit defendant's gang].)

C. Appellant's Reliance On Contrary Authority is Unavailing

Appellant, relying heavily on the Ninth Circuit Court of Appeal's decisions in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*), and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briceno*), argues that the second prong of section 186.22, subdivisions (b)(1), requires a specific intent to "promote, further, or assist" gang members in criminal activity other than the charged offense. (AOB 44-45, 49, 52, 68.)

Contrary to the Ninth Circuit's views in *Garcia* and *Briceno*, nothing in the enhancement or crime statutes indicate that for a defendant to be criminally liable under these provisions, the criminal conduct must be with the intent to promote, further, or assist *other* criminal conduct. Instead, both statutes explicitly state that it must be with the intent to promote, further, or assist *any* criminal conduct.

In *Garcia v. Carey, supra*, 395 F.3d 1099 (*Garcia*), a divided three judge panel of the Ninth Circuit read into section 186.22, subdivision (b), an additional requirement of specific intent to promote the gang's criminal activity beyond the charged crime, and found the gang expert's testimony suggesting that the crimes were gang-related was insufficient to sustain the

conviction. (*Garcia*, 395 F.3d at pp. 1102-1104.) In that case, the defendant and two companions conducted a robbery. (*Id.* at p. 1101.) At trial, a gang expert testified that the defendant was a member of a "turf oriented" gang that engaged in robbery. (*Id.* at pp. 1101-1102.) The jury convicted the defendant of robbery, and found true a gang allegation. (*Id.* at p. 1102.) After exhausting state remedies, the defendant filed a petition for writ of habeas corpus in federal court, contending, *inter alia*, that insufficient evidence supported the gang finding. (*Id.* at p. 1100.) On appeal, the majority in *Garcia* agreed with this contention, reasoning that subdivision (b)(1) of section 186.22 requires a specific intent to "further *other* criminal activity of the gang," and there was no evidence that the defendant performed the robbery with this intent. (*Id.* at pp. 1102-1104, italics added.)[28]

Implicit in the *Garcia* decision was that, at the time, there was a paucity of California case law interpreting the scope of section 186.22. (See, e.g., *Garcia, supra*, 395 F.3d at p. 1104 [Ninth Circuit forced to draw an "inference" from other state court decisions].) The Ninth Circuit, therefore, stepped in to fill the perceived void with its own interpretation of California law. But the rationale in *Garcia* rests on a misapprehension about the specific intent required under subdivision (b)(1) of section 186.22. This was evident from two subsequent California appellate

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[28] The dissenting judge in *Garcia* took issue with the majority's interpretation of section 186.22, subdivision (b), and concluded the statute did "not require proof that the crime of conviction was committed with the intent to further some other specifically identified crime or category of crimes . . . ." (*Garcia, supra*, 395 F.3d at p. 1105 (dis. opn. of Wallace, J.).) He also concluded that it was reasonable to determine that the evidence of Garcia's intimidation of others during the robbery would facilitate the gang's control of the area and make it easier to commit crimes there in the future. (*Id.* at pp. 1106-1107.)

decisions which expressly rejected the Ninth Circuit's approach. (See *Romero, supra*, 140 Cal.App.4th at p. 19; *Hill, supra*, 142 Cal.App.4th at p. 774.) As the Court of Appeal explained, "By its plain language, the statute requires a showing of specific intent to promote, further, or assist in 'any criminal conduct by gang members,' rather than other criminal conduct." (*Romero, supra*, 140 Cal.App.4th at p. 19; see also *Hill, supra*, 142 Cal.App.4th at p. 774 ["[t]here is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members relate to criminal activity apart from the offense the defendant commits"].)

Notwithstanding the California appellate courts' intervening clarification of California law, the Ninth Circuit recently reaffirmed its holding in *Garcia* in another divided three judge panel. (*Briceno v. Scribner, supra,* 555 F.3d at 1069 (*Briceno*).) In *Briceno*, the defendant committed a string of four robberies with codefendant Evaristo Landin while both were active members of the Hard Times street gang. (*Id.* at pp. 1072-1073.) Although no specific indicia of the gang (i.e. gang paraphernalia, gang turf, gang-related statements, etc.) were flaunted during the robbery, the expert's opinion was based on the facts that the robberies were committed by two gang members within a short period of time and involved the type of crimes which enhanced the status of the individual members within the gang as well as the gang itself. (*Id.* at pp. 1074-1075.) The expert testified that his opinion would not change even if the defendant harbored a dual intent to also commit the robberies for the purpose of buying Christmas gifts, because the robberies nevertheless would enhance the gang's reputation (through fear) in the community. (*Ibid.*)

Following its prior decision in *Garcia*, the *Briceno* court found there was insufficient evidence that *Briceno* had the specific intent to benefit the gang in committing the robberies. Recognizing that the state appellate

courts in *Romero* and *Hill* had held *Garcia* was wrongly decided in reading into section 186.22, subdivision (b)(1), an intent to aid other criminal gang conduct, the court nevertheless disregarded those holdings by declaring them inconsistent with this Court's holding in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), and predicting that this Court would disapprove of the lower courts' holdings if presented with an opportunity to address the issue. (*Briceno, supra*, at pp. 1080-1081.)

The *Briceno* court's reliance on *Gardeley* for its interpretation of the second element of the gang enhancement was misplaced. The court relied, in part, on footnote 10 in *Gardeley* which stated that the gang enhancement punishes "'a defendant who committed a felony to aid or abet criminal conduct *of a group* that has a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted with the specific intent to do so." (*Briceno, supra*, at p. 1080, quoting *Gardeley, supra*, 14 Cal.4th at p. 624 fn. 10, emphasis added in majority opinion). However, this language in *Gardeley* pertained to the "pattern of criminal street gang activity" required as part of the first element of the gang enhancement – not the specific intent requirement contained in the second part of the subdivision. (See *Gardeley, supra*, 14 Cal.4th at p. 624 fn. 10.)[29] "[S]pecific intent to benefit the gang is not required. As one Court of Appeal has noted, "what is required is the

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[29] Subdivision (b) of section 186.22 is triggered when the defendant is "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." As this Court explained in *Gardeley*, a criminal street gang under the first element is defined as an ongoing association of three or more persons sharing a common name, identifying sign or symbol, which has one of various specified offenses as one its primary activities and engages in a pattern of criminal gang activity consisting of certain predicate offenses. (*Gardeley, supra*, 14 Cal.4th at pp. 609-610.)

'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).) All that is required under the second element is the specific intent to assist a known gang member in committing a crime. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*).)

In interpreting the second element of the gang enhancement, the *Briceno* court also cited this Court's statement that section 186.22, subdivision (b) "'does not criminalize mere gang membership . . . .'" (*Briceno, supra*, at p. 1080, quoting *Gardeley*, 14 Cal.App.4th at p. 623.) Neither *Romero, Hill*, nor *Villalobos* suggest, however, that mere gang membership suffices to satisfy the gang enhancement. Rather, as noted above, the second element requires a specific intent to assist a known gang member with *any* criminal conduct. Indeed, it is not even necessary under California law that the defendant himself be a member of the gang to be liable for a gang enhancement. (See *Villalobos, supra*, 145 Cal.App.4th at pp. 315, 321-22 [finding sufficient evidence for gang enhancement for co-defendant Osika, who was not gang member].)[30] As the court in *Villalobos* logically explained, the "[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant[s] acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*Villalobos, supra*, 145 Cal.App.4th at p. 322.)

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[30] The gang crime has additional requirements that the gang enhancement does not contain: that the defendant "actively participates in any criminal street gang" and that the criminal conduct be with "members of that gang . . . ." (§ 186.22, subd. (a).) That difference, however, does not affect this case, as it is undisputed that there was substantial evidence that appellant and Sanders actively participated in the same gang.

As the court in *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354 explained, "numerous California Courts of Appeal have rejected the Ninth Circuit's reasoning" (*id.* at p. 353) and have found that *Briceno* misread section 186.22(b)(1) by substituting the word "any" for the word "other," as the statute refers to "the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22(b)(1)). In any event, as lower federal court decisions, these cases are not binding on this Court. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 882.)

The case of *People v. Morales* is instructive as to what evidence is sufficient to show that a crime was committed in association with a gang. In *Morales*, the defendant and two other members of a gang robbed the occupants in a house. (*Morales, supra*, 112 Cal.App.4th at pp. 1179 1183.) During the robbery, the defendant's coparticipants murdered one of the occupants. The defendant was convicted of robbery, and his sentence was enhanced under section 186.22, subdivision (b)(1). On appeal, the defendant argued that there was insufficient evidence to support the enhancement because the trial testimony showed only that he and his coparticipants in the robbery belonged to the same gang. (*Id.* at p. 1197.) The court said that such evidence might be insufficient to establish that the crime was committed for the gang's benefit, but the "crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang." (*Id.* at p. 1198.) The court went on,

> Thus the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant

committed the charged crimes in association with fellow gang members.

(*Ibid.*) Although the court in *Morales* held that the mere fact that a defendant commits a crime in association with a fellow gang member can satisfy the association element of the gang enhancement, the court nevertheless held open the possibility that the association element may be negated in a particular case by evidence that the defendant and his gang cohorts are on a "frolic and detour unrelated to the gang." (*Ibid.*)

The *Briceno* majority further cited *In re Frank S.* (2006) 141 Cal.App.4th 1192, in reasoning that California's intermediate courts are not all in agreement as to the specific intent element of section 186.22(b). (*Briceno, supra*, 555 F.3d at p. 1082.) The Ninth Circuit is also incorrect that this case creates a conflict. *In Frank S.*, the court reversed a gang enhancement because "[t]he prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1199, emphasis added.) Unlike in *Frank S.*, in *Villalobos, Romero* and *Hill*, there was substantial evidence that the defendant acted in concert with a gang member. Thus, *Frank S.* is not inconsistent with these other Court of Appeal cases.

The *Briceno* court's majority further cited the specific intent language of the gang enhancement itself as support for *Garcia's* holding. (*Id.* at p. 1083.) Yet, the second element of section 186.22, subdivision (b)(1), requires "the specific intent to promote, further or *assist in* any criminal conduct by gang members . . . ." (Emphasis added.) Contrary to the reasoning in *Garcia* and *Briceno*, the specific intent element, which is stated in the disjunctive, does not require a specific intent to promote or further the gang's criminal activity, only to assist in it, language which

further indicates that the criminal activity referred to can be *this* crime, not some other crime.

In applying section 186.22 to the facts of this case, this Court should find section 186.22 to encompass the intent to promote, further, or assist in the criminal conduct of the instant offense. The Court should therefore approve the California appellate decisions interpreting it this way and reject the Ninth Circuit's contrary construction.

Appellant's substantial reliance on *In re Frank S., supra*, 141 Cal.App.4th at p. 1192, is also misplaced. (AOB 53, 55-56.) There, a police officer stopped a minor and discovered that the minor was carrying a concealed knife, methamphetamine, and a red bandana. The minor told the officer that he had been attacked two days earlier and needed the knife for protection against "the Southerners" because they believed that he supported the northern gangs. (*Id.* at p. 1195.) The minor also stated he had friends in the northern gangs. At a contested jurisdictional hearing, a gang expert opined that the minor was a Norteno gang member and carried the knife for both defensive and offensive purposes with respect to rival gangs. When asked how the minor's possession of the knife benefited the Nortenos, the expert testified it would afford protection in the case of an assault. (*Id.* at pp. 1195-1196.) The juvenile court found a gang enhancement allegation true. (*Id.* at p. 1196.) The appellate court reversed, finding that the gang expert was improperly allowed to testify to the minor's subjective intent in possessing the knife and that insufficient evidence supported the specific intent element of the gang enhancement allegation. (*Id.* at p. 1199.)

Here, as explained, *ante*, Detective Richardson's expert gang testimony was hardly the only evidence that appellant acted "on behalf of the gang." Moreover, whereas the defendant in *Frank S.* was not apparently engaged in gang-related activity when the police officer stopped

him, appellant, who was a self-admitted gang member, shot the security guards in Park Village Crip gang territory and then shot at a rival Blood gang member when he committed the charged offenses. Accordingly, appellant's reliance upon *Frank S.* is misplaced.

D. The Reversal Of The Enhancement Does Not Require Reversal Of The Substantive Offenses

Even assuming there was insufficient evidence to support the gang enhancements, the reversal of the enhancements does not require reversal of the underlying substantive offenses. The erroneous admission of evidence is considered under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Where the admission of evidence renders a trial fundamentally unfair it violates an appellant's federal constitutional right to due process and prejudice is evaluated under a harmless beyond a reasonable doubt standard. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.)

Here, the principal issue in this case was identity. There was no dispute that someone shot at the four security guards inside the Wilmington Arms guard shack, resulting in two dead guards and two injured guards; nor was there any dispute that someone attempted to murder Hunter on Bullis Road during a drive-by shooting. Appellant, who testified on his own behalf, flatly denied he had any involvement with any of these crimes. (12RT 2306-1209, 2346.)

As to the guard shack shootings, there was *overwhelming evidence* establishing appellant's identity as the shooter. Bombarda testified that he was inside the guard shack when he heard somebody say, "Motherfucker." (8RT 1601; 9RT 1670.) Bombarda looked up in the direction of the voice and saw appellant standing directly in front of the guard shack's door and holding a semi-automatic assault rifle in his hands. (8RT 1601-1602, 1604, 1614-1615; 9RT 1649-1650, 1656, 1669-1670.) At trial, Bombarda demonstrated in court how appellant held the gun, and he identified the

photograph depicting the gun appellant used. (8RT 1603; 9RT 1654-1655.) Bombarda testified that, prior to the shooting, he had seen appellant approximately 30 times before, and he was "a hundred percent certain" appellant was the shooter. (8RT 1602; 9RT 1674.)

During Bombarda's interview with Detective Aguirre, Bombarda said he recognized the shooter because Bombarda had seen the shooter over 20 times in the past, and was the same person who drove through the guard shack in October of 1998. (11RT 2081-2082.) Bombarda described the shooter as White with a long pony tail, and Bombarda described the shooter's tattoos on his neck and arms and the birthmark on his face. (11RT 2082; see also 9RT 1673.) Appellant is White. (Death Penalty Supp. III at 36.) At the time of the shooting, appellant had a long pony tail, tattoos on his arm and his neck, and a long scar on his face and arm. (Death Penalty Supp. III at 36; see also 3CT 822; 7RT 1352.) Bombarda identified appellant as the shooter in a six-pack photographic lineup. (8RT 1610-1611; 9RT 1658-1662; 10RT 2001; see also 7RT 1325; 10RT 1990.) When Bombarda identified appellant, he told the detectives something to the effect of, "That's the guy that [*sic*] shot me." (9RT 1674.)

Bombarda's testimony, *standing alone*, was sufficient to sustain appellant's convictions for the attempted murders and murders of the security guards. (*People v. Panah* (2006) 35 Cal.4th 395, 489 ["The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable"], internal quotation marks and citation omitted; *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to sustain a criminal conviction"]; CALJIC No. 2.27 (7th ed. 2005) [Sufficiency of Testimony of One Witness]; *see also United States v.*

Arrington (4th Cir. 1983) 719 F.2d 701, 705 [the uncorroborated testimony of one witness may be sufficient to sustain a guilty verdict].)

Furthermore, Bombarda's testimony was substantially corroborated by Grant. According to Grant, prior to the shooting, she overheard a conversation between appellant and Sanders. (9RT 1713-1714, 1839.) Appellant told Sanders something to the effect of: "Are you down to shoot them mother fuckers?" (Death Penalty Supp. III at 46-47) and "[fuck] them at the [front] gate." (3CT 816.) Grant believed appellant was referring to the Wilmington Arms security guards. (3CT 816-817.) On the night of the shooting, Grant heard noises and walked towards the guard shack. (9RT 1748-1749.) It was a foggy night, but the bright lights by the guard shack allowed Grant to see. (9RT 1749; Death Penalty Supp. III at 32; 3CT 826.) She saw appellant approximately two or three feet from the guard shack door, and then she saw him run away. (9RT 1750-1751, 1762-1767, 1833, 1839.) She also saw Sanders standing outside the shack and, after the shots, she saw Sanders run away. (9RT 1765-1767, 1794, 1797-1798, 1833, 1839.) When she arrived at the guard shack, she saw two dead security guards and heard one of the guards plead for her help. (9RT 1768-1769.)

On January 14, 1999, Detective Eduardo Aguirre and Detective Richardson interviewed Grant. Grant told the detectives that as she approached the guard shack, she saw appellant standing near the guard shack's front door and holding what appeared to be a gun. (Death Penalty Supp. III at 27, 30; 11RT 2076-2080.) After the shots were fired, appellant and Sanders ran away together toward the park. (Death Penalty Supp. III at 31, 33.) During the interview, Grant identified appellant and Sanders in six-pack photographic lineups. (Death Penalty Supp. III at 42-43.)

Finally, appellant's identity as the shooter was firmly corroborated by physical evidence collected at the guard shack and from Shantae's (appellant's girlfriend) garage. The police recovered approximately 35

items from the guard shack, consisting of, among other things, expended nine-millimeter cartridge casings, expended bullet fragments, bullet fragments, and expended bullets. (10RT 1903-1908, 1981-1989.) The nine-millimeter cartridge casings recovered from the crime scene had a stamp indicating they were manufactured by Federal Cartridge. (10RT 1917.) Three days after the guard shack shooting, Compton police seized from Shantae's garage a firearm magazine. (10RT 1979; see also 10RT 1960-1961.) The magazine had a capacity for 31 rounds, and contained 10 live rounds of nine-millimeter caliber ammunition manufactured by the Federal Cartridge Company. (10RT 1912-1913, 1917-1918.) Deputy Wally opined the magazine was designed to fit in, among other guns, an SP-89, which can fire two or three rounds in one second. (10RT 1913-1915.) He also opined that there are over one hundred manufacturers of nine-millimeter bullets. (10RT 1917-1918.) The garage was "around the corner" from the Wilmington Arms apartment complex. (12RT 2240; see also 12RT 2259.) Furthermore, the number of bullets *missing* from the magazine was not inconsistent with the number of bullets *fired* during the shooting. (Compare 10RT 1912-1913, 1917-1918 with 8RT 1604, 1628; 9RT 1650.) Based on this evidence, the jury could certainly conclude that it was no mere coincidence that the expended cartridge casings and bullet fragments recovered from the guard shack substantially matched the ammunition in the magazine seized from Shantae's garage.

Similarly, overwhelming evidence supported appellant's conviction for the drive-by attempted murder of Hunter. Shortly before the shooting, Perry identified appellant as one of three occupants inside appellant's green-colored Cadillac that was parked nearby. (6RT 1187-1188, 1190.) As Perry and his two companions walked along Bullis Road, he saw the

Cadillac again. (6RT 1191-1192.) When somebody said, "That was Goldie,"[31] the Cadillac drove through the red light. (6RT 1192.) After Perry met with Hunter, the Cadillac made a U-turn and drove toward them. (6RT 1193-1196.) Appellant, who was in the front passenger seat, fired approximately seven or eight shots from an assault rifle at Hunter, striking him in the leg. (6RT 1191-1203, 1210, 1212, 1229, 1232; 7RT 1245, 1257-1258, 1271, 1280-1282; see also Supp. 4CT 1-16 [transcript of Walker police interview].) When Perry was asked at trial whether he was "able to get a good look at the person who was doing the shooting," Perry replied, "Yes." (6RT 1212.)

Later that evening, appellant's Cadillac arrived at the Wilmington Arms apartment complex. (7RT 1303, 1365, 1372-1375, 1378, 1416; 8RT 1592-1593.) Security guard Charles Chavers, who was monitoring the front gate in a guard shack, let the Cadillac inside the complex. (7RT 1377.) Chavers noticed that Brown was the driver, appellant sat in the front passenger seat, and Sanders sat in the back seat. (7RT 1375-1377, 1380, 1398, 1414, 1425.) Chavers worked there forty hours a week, and he often saw appellant drive through the front gate. (7RT 1377-1378.) Chavers later identified appellant and Sanders in six-pack photographic lineups. (7RT 1390-1392, 1421.) For these reasons, overwhelming established appellant's identity as the shooter in the guard shack shootings and the drive-by shooting on Bullis Road, and there is no possibility that admission of the gang evidence rendered appellant's trial fundamentally unfair.

Appellant was also not prejudiced by the gang evidence. This is because, even assuming the gang allegations were never alleged, the gang

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[31] Appellant was known as "Goldie," and he was the only White member of the Park Village Crips street gang. (7RT 1332, 1373-1374; 8RT 1458, 1550, 1590; 9RT 1653; 12RT 2347.)

evidence would have been relevant and admissible to explain witness fear and possible witness bias during testimony. (See *People v. Harris* (1985) 175 Cal.App.3d 944, 957.) "Regardless of [the] source [of the fear], the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances." (*People v. Olguin, supra*, at p. 1369; see *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946 [evidence of the culture of gang intimidation is admissible to explain the basis of a witness's fear, to help the jury assess the witness's credibility, and to explain why a witness might repudiate an earlier truthful statement].) Here, Grant testified that she and her family had been threatened because of her appearance in court. (9RT 1715.) She also testified that, two days after the guard shack shootings, somebody pointed a gun at her head and said she was lucky she was the "homey's mama." (9RT 1772.) Michelle and Maribel, both of whom had moved out of the Wilmington Arms complex after the guard shack shootings, expressed their reluctance to testify or speak with the police out of fear for their own and family's safety. (8RT 1453-1454, 1485-1486, 1528, 1553-1554, 1564-1566.)

Moreover, appellant was not prejudiced by the gang evidence because he volunteered, in his own defense, that he was Park Village Crip gang member, and that he had to act exceptionally tough because he was the only White member. (12RT 2357, 2385.) Finally, appellant's substantial reliance on the gang references the prosecutor made during his opening statement and closing argument are unavailing. (AOB 58-62.) The jury was instructed that "Statements made by the attorneys during the trial are not evidence." (CALJIC 1.02; 14RT 2551; 24CT 6206.) Jurors are presumed to have understood and followed the instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

For these reasons, there is no possibility that admission of the gang evidence rendered appellant's trial fundamentally unfair. In short, even

assuming appellant's gang enhancements are reversed, the reversal of those enhancements does not require the reversal of the substantive offenses.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE "LYING IN WAIT" SPECIAL CIRCUMSTANCES

Appellant claims that the true findings for the "lying in wait" special circumstances appended to counts 1 and 2 were not supported by substantial evidence and must be reversed. (AOB 71-80.) This claim is meritless and must be rejected.

A. Applicable Law

Respondent incorporates herein the law regarding the standard of review for claims challenging sufficiency of the evidence, as stated *ante*. (Arg. I.A.)

The lying-in-wait special circumstance allegation requires express malice (an intent to kill). (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 305, 309 (*Bradway*); see *People v. Robertson* (2004) 34 Cal.4th 156, 164, disapproved on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1200-1201.) The other elements required to establish the lying-in-wait special circumstance are: (1) a physical concealment or concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Stevens* (2007) 41 Cal.4th 182, 201; *People v. Gurule* (2002) 28 Cal.4th 557, 630.) The question of whether a murder was committed by lying in wait "must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales* (1989) 48 Cal.3d 527, 557-558.) Appellant does not dispute that the facts support a finding that he acted with intent to kill, thus satisfying the intent/malice element for the lying-in-wait special circumstance. Rather, appellant contends the record does not

establish the concealment, watchful waiting, and surprise elements of lying in wait. (See AOB 71-80.) Appellant's claims are meritless.

Concealment may be based on the defendant's actual physical concealment of his or her person (i.e., an ambush), or on the defendant's creation of a situation where the victim is unaware of the defendant's true purpose even though the victim sees the defendant. (*People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555; *People v. Stevens*, *supra*, 41 Cal.4th at p. 202; *People v. Hillhouse* (2002) 27 Cal.4th 469, 500.) "'The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise.'" (*People v. Morales*, *supra*, at p. 555.)

To be substantial, the period of watchful waiting does not have to continue for any particular period of time, as long as the duration is sufficient to show a design to take the victim by surprise and a state of mind equivalent to premeditation and deliberation. (*People v. Moon* (2005) 37 Cal.4th 1, 23, 24; *People v. Stevens*, *supra*, 41 Cal.4th at p. 202; *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1228-1229.) "The purpose of the watching and waiting element is to distinguish those cases in which the defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens, supra*, at p. 202.) The lying-in-wait durational period may be substantial even if it occurs over a period of only a few minutes. (*People v. Moon*, *supra*, 37 Cal.4th at p. 23.) Further, the watchful element does not require that the defendant literally have the victim in the defendant's view; rather, the element is satisfied if the defendant is "alert and vigilant in anticipation of [the victim's] arrival so that [the] defendant could take [the victim] by surprise." (*People v. Sims* (1993) 5 Cal.4th 405, 432-433.)

The requirement of a surprise attack immediately after the watchful waiting requires a temporal nexus between the killing and the watchful waiting. (*People v. Hyde* (1985) 166 Cal.App.3d 463, 476.) That is, to show that the lying in wait was the means through which the defendant accomplished the murder, the killing must "'follow on the heels of the watchful waiting.'" (*Ibid.*; see *People v. Thomas* (1953) 41 Cal.2d 470, 474, fn. 1 ["'the act causing death [must] be . . . the outgrowth of the "lying in wait'""].) However, a brief interval of time between the period of watchful waiting and the murder does not necessarily negate the temporal nexus. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 389; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1021.) If there was "no lapse in the culpable state of mind between the homicide and the period of watchful waiting," lying in wait is established. (*People v. Berberena* (1989) 209 Cal.App.3d 1099, 1107; *People v. Carpenter*, *supra*, at p. 389.)

"Lying-in-wait does not require that a defendant launch a surprise attack at the first available opportune time. [Citation omitted.] Rather the defendant 'may wait to maximize his or her position of advantage before taking the victim by surprise.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 510.) Nor does the special circumstance of require that the defendant strike his blow from the place of concealment. (*People v. Michaels* (2002) 28 Cal.4th 486, 517.)

The element of surprise may exist even if the victim has been repeatedly threatened by the defendant on previous occasions. (*People v. Arrellano* (2004) 125 Cal.App.4th 1088, 1095.) Although a victim of continuing death threats may suspect an attack sometime in the future, he or she has no way of knowing exactly when or where the attack will occur. (*Ibid.*) If the defendant takes the victim by surprise at the time of the killing, this element is established. (*Ibid.*)

B. Substantial Evidence Supports the Lying In Wait Special Circumstances Appended to Counts 1 and 2

Here the evidence presented at trial provided the jury with a legitimate basis for inferring appellant committed the guard shack shootings pursuant to a pre-planned ambush.

According to Grant, prior to the shooting, she overheard a conversation between appellant and Sanders. (9RT 1713-1714, 1839.) Appellant told Sanders something to the effect of: "Are you down to shoot them mother fuckers?" (Death Penalty Supp. III at 46-47) and "[fuck] them at the [front] gate." (3CT 816.) Grant believed appellant was referring to the Wilmington Arms security guards. (3CT 816-817.)

On January 2, 1999, at 8:30 p.m. or 8:40 p.m., Arcia was inside the guard shack at the Wilmington Arms apartment complex when he saw appellant's Cadillac approach the guard shack. (9RT 1696-1698.) Appellant was the driver, and a short African-American man was a passenger. (9RT 1696-1698.) The Cadillac had its lights turned off, and it did not have a license plate. (9RT 1696-1699, 1701.) That evening, the Cadillac entered and exited the apartment complex approximately six or seven times. (9RT 1702.) Arcia believed it was unusual that there was no loud music emanating from the Cadillac, and that it was slowly entering and exiting the apartment complex. (9RT 1702.)

Later that evening, at approximately 11:15 p.m., appellant sat in the passenger seat of his Cadillac as two African-Americans standing outside the car had a loud, profanity-laced argument with a security guard. (8RT 1454-1459, 1457, 1462-1465, 1488, 1510-1512, 1513-1514, 1531-1533.) One of the African-Americans told someone inside the Cadillac, "We'll do it later." (8RT 1464-1465; see also 8RT 1533-1534.)

The next morning (but before the guard shack shootings), on January 3, 1999, Grant noticed appellant's Cadillac enter and exit the apartment

complex approximately two or three times. (9RT 1715-1716, 1826-1828, 1845.) At one point, it appeared to Grant that appellant's Cadillac stopped at the front gate for approximately five minutes. (Death Penalty Supp. III at 17-18, 53.) At approximately 5:00 a.m., security guards Bombarda, Paz Conner, and Malinao, were inside the guard shack. (8RT 1594-1596, 1598, 1601.) Conner and Paz were readings newspapers and Bombarda was speaking with Malinao. (8RT 1598.) Bombara heard somebody say, "Motherfucker." (8RT 1601; 9RT 1670.) Bombarda looked up in the direction of the voice and saw appellant standing directly in front of the guard shack's door and holding a semi-automatic assault rifle in his hands. (8RT 1601-1602, 1604, 1614-1615; 9RT 1649-1650, 1656, 1669-1670.) Immediately thereafter, appellant fired approximately 15 rounds in rapid succession. (8RT 1604, 1628; 9RT 1650.) Bombarda sought cover by crouching behind a steel cabinet. (8RT 1616-1618.) Nevertheless, Bombarda, who was wearing a bulletproof vest, was shot six times. Bombarda was able to return fire by firing one shot at appellant using his .45 caliber service handgun. (8RT 1607-1608, 1616-1618.) When appellant stopped shooting, Malinao lay on the floor face down. (8RT 1608.) Conner and Paz remained seated in their chairs. (8RT 1608-1609.) Malinao and Paz died from their gunshot wounds, and Connor was blinded from the shooting. (8RT 1608-1609; 10RT 1890; 11RT 2047-2069.)

The fact that, approximately nine hours before the guard shack shootings, appellant's Cadillac *repeatedly* and *slowly* drove in and out of the apartment complex – with its lights off and without a license plate – supports a reasonable inference that appellant engaged in physical concealment while he studied the guards' movements and watchfully waited for the best time to ambush them. Like a shark circling its prey, appellant's tactic of repeatedly driving by the guard shack continued into the early morning hours of January 3, where at one point he stopped at the

front gate for approximately five minutes. Given the fact that the guard shack was of the type that cars drove past to enter the apartment complex, the jury could have also reasonably inferred that appellant would not risk raising suspicion by repeatedly walking by it.

There was no evidence even remotely suggesting that appellant had alerted any of the security guards that he would choose this particular time and location to engage in his attack. To the contrary, Bombarda's description of the mundane activities of the guards immediately before appellant began firing supports the inference that appellant successfully engaged in physical concealment, and that his attack caught the guards completely by surprise. The surprise nature of appellant's attack is bolstered by evidence that, of all four security guards, only Bombarda was able to return fire (and he was only able to fire one shot). Moreover, evidence that appellant fired while standing up, while at least three of the security guards were sitting down on their chairs, supports the conclusion that appellant fired on them from an advantageous position. (8RT 1602, 1608-1609, 1614-1615, 1650.) Finally, appellant stood at the doorway of the guard shack while firing, thus apparently blocking the guards' only avenue of escape. (8RT 1602, 1614-1615.)

Appellant merely urges a possible interpretation of the evidence that might be deemed inconsistent with a lying in wait murder. (AOB 74-80.) However, "the jury, which was the finder of fact, could reasonably have interpreted the evidence quite differently. Viewing the record, as [the reviewing court] must, favorably to the jury's verdict, [the reviewing court] find[s] sufficient evidence, that is, evidence which is reasonable, credible and of solid value, to support each element of lying in wait." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1142.) To the extent there was any interval of time between appellant's watchful waiting and his attempted murder and murder of the security guards, it was brief and did not negate the temporal

nexus. (See *People v. Carpenter*, *supra*, 15 Cal.4th 312, 389; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1021.) Furthermore, appellant utterly fails to point to any lapse in his culpable state of mind between the homicide and the period of watchful waiting. (*People v. Berberena*, *supra*, 209 Cal.App.3d 1099, 1107; *People v. Carpenter*, *supra*, at p. 389.)

Appellant's substantial reliance on *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, is unavailing. (AOB 74-77.) The *Domino* court, in construing the "while lying in wait" language of section 190.2, subdivision (a)(15), stated:

> the killing must take place during the period of concealment and watchful waiting *or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends*. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist.

(129 Cal.App.3d at p. 1011, italics added.) Even under *Domino*'s restrictive interpretation of the special circumstance provision (cf. *People v. Guzman* (1988) 45 Cal.3d 915, 949-952), the evidence in this case clearly supports a finding that appellant's lethal acts flowed continuously from the moment he commenced his surprise attack. Appellant, after watching the guard shack from his Cadillac, suddenly and without warning appeared in front of the shack and fired at the security guards with an assault rifle. No "cognizable interruption" occurred between the period of watchful waiting and the commencement of the murderous shooting which resulted in the immediate death of two of the guards. Accordingly, this claim fails.

III. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE, GENERALLY AND AS APPLIED IN THIS CASE, DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant claims that the lying-in-wait circumstance, generally and as applied in this case, allegedly fails to provide a meaningful basis for distinguishing between capital and noncapital cases, in violation of the Eighth Amendment of the United States Constitution. (AOB 81-97.) Specifically, appellant claims that this special circumstance "fails to adequately narrow the class of persons eligible for death penalty or to provide a meaningful basis for distinguishing between those who are subject to that penalty and those who are not." (AOB 81.) This claim is meritless.

In *People v. Carasi* (2008) 44 Cal.4th 1263, 1310, this Court considered, and rejected, a similar argument, as follows:

> On appeal, defendant claims the special circumstance applicable to his crime fails to adequately narrow the class of death-eligible murders because it applies "to virtually all homicides." He suggests the trial court erred in rejecting a similar claim he raised several times at trial (e.g., in moving for acquittal, discussing proposed instructions, and seeking a new trial). A due process violation under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution is asserted here.
>
> However, as we have explained many times before, the version of the lying-in-wait special circumstance at issue here is not unconstitutionally overbroad on the ground urged by defendant. It is limited to intentional murders that involve a concealment of purpose and a meaningful period of watching and waiting for an opportune time to attack, followed by a

> surprise lethal attack on an unsuspecting victim from a position of advantage. (*People v. Morales* (1989) 48 Cal.3d 527, 557 [257 Cal. Rptr. 64, 770 P.2d 244].) . . . . We therefore conclude no constitutional violation or other error occurred.

(*People v. Carasi*, *supra*, 44 Cal.4th at p. 1310; *People v. Lewis* (2008) 43 Cal.4th 415, 516 [the lying-in-wait special circumstance sufficiently narrows the class of murderers eligible for the death penalty, provides a principled way of distinguishing capital murders from other first degree murders, and thus comports with the Eighth Amendment]; *People v. Nakahara* (2003) 30 Cal.4th 705, 721 [same].)

Similarly, in *People v. Edelbacher*, *supra*, 47 Cal.3d at page 1023, this Court rejected the defendant's argument that the lying-in-wait special circumstance violated the Eighth Amendment proscription against cruel and unusual punishment because it allowed for the death penalty without providing "a meaningful basis for narrowing the class of murders for which death may be imposed." The *Edelbacher* court reasoned:

> The lying-in-wait special circumstance also requires that the murder be intentional, thus eliminating murders where only implied malice has been established. [Citation.] We are satisfied that the lying-in-wait special circumstance provides a 'principled way to distinguish this case' from other first degree murders and thus comports with the Eighth Amendment . . . .

(*Ibid*; see also *People v. Moon*, *supra*, 37 Cal. 4th at p. 24, fn. 1 [murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death; in contrast, the lying-in-wait special circumstance requires an intentional murder, committed under certain circumstances]; *People v. Carpenter* (1997) 15 Cal.4th 312, 388.) In

People v. Stevens, *supra*, 41 Cal.4th at page 204, the California Supreme Court again recognized the constitutionality of the lying-in-wait special circumstance, stating that a "narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not."

Prior to passage of Proposition 18 on March 8, 2000, the lying-in-wait special circumstance required that the killing be committed "while" lying in wait, whereas first degree murder by lying-in-wait required the killing be "immediately preceded" by the period of lying in wait. Proposition 18 changed the word "while" to "by means of," so that the special circumstance would conform with lying-in-wait first degree murder and essentially eliminate the immediacy requirement that case law had placed on the special circumstance. However, the special circumstance still requires a specific intent to kill, whereas first degree murder by lying-in-wait does not. Therefore, as amended, the special circumstance is not constitutionally vague. (*People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 307, 309.) Appellant's claim must therefore be rejected.

IV. APPELLANT'S *CRAWFORD* CHALLENGES TO WALKER'S VIDEOTAPED POLICE INTERVIEW AND CAPTAIN WRIGHT'S TESTIMONY FAIL

Appellant claims the court violated his federal constitutional right to confrontation and *Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) by admitting, as evidence, a videotape of Walker's recorded interview with the police. (AOB 98-105.) Appellant also argues the court allegedly erred by permitting Captain Wright to testify that three uninjured witnesses were taken to the Wilmington Arms apartment complex where they identified the car involved in the shooting. (AOB 105-108.) These claims must be rejected.

A. Relevant Facts

1. The Videotape of Walker's Police Interview

Prior to jury selection, the prosecutor told the court and defense counsel that Walker was a witness to the October 8 drive-by shooting on Bullis Road, and that Walker was subsequently murdered execution-style.[32] (1RT 157.) The prosecutor indicated Walker's January 4, 1999, interview with the police had been videotaped. (1RT 157-158; 2RT 270.) When the court asked the prosecutor whether he planned to admit the evidence through an "exception," the prosecutor replied in the affirmative. (1RT 158.) The prosecutor said there was a specific hearsay exception that applied, and he would include his argument at a later time in a trial brief. (1RT 158.)

At a later proceeding, the issue of the admissibility of Walker's videotaped interview arose again. The prosecutor clarified Walker was not under oath during the interview. (2RT 269-270.) The prosecutor also argued the evidence of Walker's videotaped interview was admissible under Evidence Code section 1370, and he would clarify his arguments in his trial brief. (2RT 270-271.) The trial court deferred ruling on this issue.

At a later proceeding, the court and counsel again discussed the issue of the admissibility of Walker's videotaped interview. The prosecutor reiterated his intent to present evidence of Walker's videotaped interview, and argued that the evidence was admissible pursuant to his arguments in the People's trial brief. (6RT 1061-1062.) The court indicated it read the People's brief, and invited argument from defense counsel. (6RT 1062.) Clive Martin ("Martin"), appellant's defense counsel, argued, among other things, that the evidence of Walker's interview denied appellant his federal

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[32] The prosecutor later clarified that Walker was a victim of a homicide on May 1, 1999. (6RT 1113.)

right to confrontation, and that Evidence Code section 1370 was unconstitutional. (6RT 1062-1063.) Martin also argued Walker's interview was not made "at or near" the time of the infliction or threat of physical injury, as required by Evidence Code section 1370. (6RT 1064.)

The trial court rejected Martin's claim that Evidence Code section 1370 was unconstitutional, and said the issue came down to whether the "at or near" time element of section 1370 was satisfied. (6RT 1068-1069.) After hearing further argument from counsel, the court ruled as follows:

> [B]ased upon everything I have heard and evaluated in my reading of the statute, that this appears to be a case or situation that falls within the spirit and letter of the Evidence Code [section] 1370, and find of the of the witness is admissible.

(6RT 1089-1090; see also 6RT 1233-1234.)

At trial, Walker's videotaped police interview was played for the jury, the jury received a redacted transcript of the interview, and the videotape was admitted into evidence. (6RT 1223-1232; 12RT 2220-2221.) According to the transcript of Walker's January 4, 1999, interview with the police, Walker was interviewed by Detectives Richardson and Aguirre. (Supp. 4CT at 2.) Walker said knew Hunter as "Droopy," and told the detectives that he knew who shot him. (Supp. 4CT at 2.) Walker told the detectives that he and his friend were driving on Compton Boulevard when the police pulled over the car and seized it because his friend was driving without a license. (Supp. 4CT 2-3.) Walker was walking on Bullis Road when he noticed a green-colored Cadillac driven by someone Walker described as a "light skinned guy." (Supp. 4CT 4-5.) The driver looked at Walker, and Walker believed the driver was "banging" on him and "mean mugging" him. (Supp. 4CT 5.) Walker threw the driver a gang sign for the Piru gang, at which point the driver drove straight on

Bullis. (Supp. 4CT 5.) Subsequently, Walker noticed a car pass him. (Supp. 4CT 7.) He looked up when he heard a gunshot and noticed the same green-colored Cadillac. (Supp. 4CT 7, 10.) Walker was not certain who the shooter was, but knew it had to be the "light-skinned [] guy" in the passenger seat who he saw earlier. (Supp. 4CT 7-8.) Walker said the shooter had a tattoo on the left side of his neck, one under his eye, and he had a long ponytail. (Supp. 4CT 11.) Walker later said the tattoo under the shooter's eye might have been a birthmark. (Supp. 4CT 12.)

Walker told the detectives that he could tell the "light-skinned [] guy" was shooting by his body movement and because the shooting came from the passenger side of the car. (Supp. 4CT 7-9.) At the time of the shooting, Walker noticed the driver was a Black male, and a third male inside the Cadillac had a "dark" complexion. (Supp. 4CT 8, 10.) Walker could not determine the caliber or size of the gun, but saw fire emanating from the gun. (Supp. 4CT 7, 9.) Walker told the detectives that more than seven shots were fired, and that Hunter was shot. (Supp. 4CT 9.)

The detectives showed Walker a photographic lineup, and Walker selected the person depicted in photo number 5 as the shooter. (Supp. 4CT 12-13.) Detective Richardson said Walker had just identified appellant, who was a Park Village Crip gang member and who was also known as Goldie. (Supp. 4CT 12, 15-16.) In another photographic lineup, Walker selected a photo depicting another person, who he believed may have been the driver. (Supp. 4CT 13-14.) Detective Richardson said Walker had just identified Brown, who was a member of the Park Village Crips. (Supp. 4CT 14.) Walker also selected a photograph of a light-green Cadillac as the car that had been involved in the shooting. (Supp. 4CT 14-15.)

Walker told the detectives that after the shooting, Captain Wright took him to view the Cadillac, where Walker identified it as the car involved in the shooting. (Supp. 4CT 14-15.)

2. Captain Wright's Testimony Regarding How Three Witnesses Identified The Vehicle Involved In The Drive-By Shooting

At trial, Captain Wright testified that on October 8, 1998, he arrived at the scene of the drive-by shooting on 1200 North Bullis, where he contacted three people who were not injured. (7RT 1364.) A fourth person, who had been injured, had already been transported away from the scene by an ambulance. (7RT 1364-1365.) Captain Wright testified he drove the three uninjured people to 700 West Laurel (i.e., the Wilmington Arms apartment complex), where he had them view a vehicle, later identified as appellant's Cadillac. (7RT 1365-1366; see also 6RT 1204.) Captain Wright testified that, to his recollection, each of the three people indicated the vehicle was the same vehicle that had been involved in the shooting earlier that evening. (7RT 1366.) Defense counsel did not object to any of these portions of Captain Wright's testimony. (7RT 1364-1366.)

B. Applicable Law

A witness's prior testimony is constitutionally admissible against a defendant in a criminal trial if the witness was subject to cross-examination by the defendant and the witness is unavailable. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59; *People v. Wilson* (2005) 36 Cal.4th 309, 340.)

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford v. Washington, supra,* 541 U.S. at p. 42.) The Confrontation Clause has traditionally barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.)

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*).) However, "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford*, *supra*, at pp. 59-60, fn. 9; see also *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.)

A new rule announced by the high court applies to all criminal cases still then pending on appeal. (*Schriro v. Summerlin* (2004) 542 U.S. 348, 351 [159 L. Ed. 2d 442, 124 S. Ct. 2519]; but cf. *Whorton v. Bockting* (2007) 549 U.S. 549 U.S. 406, 416-418 [167 L. Ed. 2d 1, 127 S.Ct. 1173, 1181–1184] [*Crawford* not "watershed" rule retroactive to cases already final on appeal].)

C. Appellant's *Crawford* Challenge To Walker's Videotaped Police Interview Must Be Rejected

Even assuming Walker's statements in the videotaped police interview amounted to testimonial hearsay in violation of *Crawford*, any error in its admission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Cage* (2007) 40 Cal.4th 965, 991-994 [finding erroneous admission of testimonial hearsay harmless beyond a reasonable doubt].) As explained below, Walker's statements were merely cumulative of other evidence properly admitted at trial.

During Walker's interview with the police, he incriminated appellant by identifying appellant as the shooter in the drive-by shooting on Bullis Road, and by identifying appellant's green-colored Cadillac as the car involved in the shooting. (Supp. 4CT 12-13, 14-16.) However, overwhelming evidence, independent of Walker's statements to the police, firmly established appellant's identity as the shooter, and the involvement of appellant's Cadillac, in the drive-by shooting.

For example, Perry testified to the following at trial: After the police stopped him and his two companions on Compton Boulevard, he saw appellant inside a green-colored Cadillac parked nearby (6RT 1187-1188, 1190), and Perry identified appellant in court as one of the Cadillac's occupants (6RT 1190). As Perry and his two companions walked along Bullis Road, Perry saw the Cadillac again, this time stopped at an intersection. (6RT 1191-1192, 1194; see also 7RT 1245.) Perry heard somebody say, "That was Goldie," at which point the Cadillac drove through the red light. (6RT 1192.) After the Cadillac make a U-turn, appellant sat in the front passenger seat. (6RT 1196.) During Perry's direct examination, the following colloquy occurred:

Q And who was doing the shooting?

A The passenger side. The passenger.

Q This guy here in court?

A Yes.

Q Any doubt about that?

A It was him.

Q And how many shots approximately were fired?

A Approximately, like seven, eight.

(6RT 1198.) Perry later clarified that he was referring to appellant as the "guy here in court." (6RT 1199.) Perry also testified he circled appellant's photograph in a six-pack photographic lineup. (6RT 1200-1201.) When

Perry was asked whether he was "able to get a good look at the person who was doing the shooting?," he replied, "Yes." (6RT 1212.) The prosecutor presented Perry with a photograph depicting a green-colored Cadillac, and Perry testified it appeared to be the same car involved in the shooting. (6RT 1204-1205.)

Perry's testimony was sufficient, by itself, to establish appellant's identity as the shooter and his Cadillac's involvement in the shooting. (See *People v. Allen, supra,* 165 Cal.App.3d at p. 623; CALJIC No. 2.27 (7th ed. 2005).) Appellant's argument to the contrary amount to nothing more than a request that this court reweigh the evidence on appeal. (AOB 104-105.) That is not the function of an appellate court. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Evidence is not deemed insufficient merely because contrary evidence was also presented. A reviewing court does not resolve evidentiary conflicts or inconsistencies. To the contrary, that function is the exclusive province of the trier of fact. (*People v. Young, supra*, at p. 1181; *People v. Maury, supra*, at p. 403.)

Moreover, reasonable inferences from other evidence presented at trial corroborated Perry's testimony and established appellant's identity as the shooter. Hebrard, who accompanied Perry on Bullis Road, testified he saw a green or mint-colored Cadillac, and provided a similar description of how the Cadillac made a U-turn and approached them. (7RT 1245, 1257-1258.) Chavers, who was on duty at the Wilmington Arms guard shack on the same evening as the drive-by shooting, testified that he saw appellant sitting in the front passenger seat of the Cadillac as it entered the apartment complex. (3RT 1375-1377, 1380, 1398, 1414, 1425; see also 7RT 1303, 1365, 1372-1375, 1378, 1416; 8RT 1592-1593.) Captain Wright testified that he drove three uninjured witnesses (apparently Perry, Walker, and Hebrard) by the Cadillac, and that all three witnesses identified it as the

same car involved in the shooting.[33] (7RT 1309-1311; 1364-1367.) Finally, although the record is somewhat unclear, it seems apparent from Detective Richardson's testimony that both Hebrard and Perry identified appellant in a six-pack photographic lineup during their police interviews. (7RT 1324-1328.) Detective Richardson also testified that Hebrard wrote, "shot at us" in the admonition to the six-pack photographic lineup. (6RT 1262, 1328.)

In sum, Walker's statements to the police were duplicative of evidence properly admitted at trial. For these reasons, any *Crawford* error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Lewis* (2008) 43 Cal.4th 415, 506-507; see *People v. Cage* (2007) 40 Cal.4th 965, 991-994 [finding erroneous admission of testimonial hearsay harmless beyond a reasonable doubt].)

D. Appellant's *Crawford* Challenge to Captain Wright's Testimony Must Be Rejected

Appellant next claims that Captain Wright's testimony – regarding three witnesses who identified the car involved in the shooting – also violated *Crawford.* (AOB 105-108.) This claim is forfeited by the lack of *any* objection in the trial court. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1027-1028 & fn. 19 [defendant's claim that the introduction of extrajudicial statements made to detectives violated the Confrontation Clause forfeited because he failed to raise it below]; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 [hearsay objection at trial did not preserve appellate argument that admission of evidence violated defendant's confrontation rights].)

When a defendant objects to evidence, he or she must state "the specific ground of the objection. . . . . The appellate court's review . . . is then limited to the stated ground." (*People v. Kennedy* (2005) 36 Cal.4th

[33] Appellant also challenges Captain Wright's testimony on *Crawford* grounds. (AOB 105-108.) As explained later, this argument is meritless.

595, 612, citation omitted.) "Specificity is required both to enable the court to make an informed ruling on the . . . objection and to enable the party proffering the evidence to cure the defect." (*People v. Boyette* (2002) 29 Cal.4th 381, 424, internal quotation marks omitted.) Here, appellant failed to object to any portion of Captain Wright's testimony that he claims amounted to *Crawford* error. Accordingly, his claim is forfeited.

In any event, appellant's claim must be rejected as meritless. To the extent Captain Wright testified that the three unidentified witnesses told him the Cadillac was the same vehicle involved in the shooting earlier that evening, those statements were not hearsay. Rather, they were admissible to show Captain Wright's state of mind, and to help explain why the police investigation centered on appellant's Cadillac, and ultimately appellant himself. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 751 [witness's out-of-court statement to police officer that defendant possessed a gun "was not admissible to prove the defendant in fact possessed a gun" but "was admissible for the nonhearsay purpose of establishing [the officer's] state of mind and the appropriateness of his ensuing conduct" to rebut a charge of excessive force]; see generally *People v. Thornton* (2007) 41 Cal.4th 391, 447 [whenever an utterance is offered to evidence """state of mind [that] ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible . . . .""" Such evidence is not hearsay."]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224 [no *Crawford* violation where statements in dispatch tape was offered to show how the police pursuit unfolded and to describe the police officers' actions].) Since the statements made to Captain Wright were not hearsay, they are not subject to the analysis in *Crawford.* The court in *Crawford* noted the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford v.*

Washington, *supra*, 541 U.S. 36, 60, footnote 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414 [85 L. Ed. 2d 425, 105 S. Ct. 2078] [the nonhearsay aspect of a confession does not raise Confrontation Clause concerns].)

Appellant's *Crawford* challenge to Captain Wright's testimony fails for an alternative, but equally valid, reason. As appellant notes, Captain Wright did not expressly identify the three uninjured people that he drove to the location of appellant's Cadillac, where it could be identified. (AOB 105-106; 7RT 1364-1365.) Nevertheless, a reasonable interpretation of the record demonstrates, and defense counsel and the jury would certainly have known, that Captain Wright was referring to Perry, Hebrard, and Walker. This is because they were the people who could have been, but were not, injured by the drive-by shooting. (See, e.g., 6RT 1193-1195, 1209-1212.) For example, Perry testified that at the time shots were fired at "Droopy," (i.e., Hunter), that Perry was with "Antoine" and "Noon" (i.e., Hebrard and Walker). (6RT 1183-1184, 1189; 7RT 1322; Supp. 4CT at 2.) Perry also testified that approximately 30 minutes to an hour after the shooting, he was taken to the Wilmington Arms apartment complex, where he "pointed" at a car. (6RT 1203-1204, 1212-1213.) Furthermore, during Walker's police interview, Walker told the detectives that after the shooting, Captain Wright took him to view the Cadillac, where Walker identified it as the car involved in the shooting. (Supp. 4CT 14-15.)

Therefore, to the extent appellant's *Crawford* challenge is premised on Perry's and Hebrard's out-of-court identifications of appellant's Cadillac, that claim fails because Perry and Hebrard testified at trial and were subject to cross-examination. (6RT 1181-1223 [Perry's testimony]; 7RT 1241-1277 [Hebrard's testimony].) As the United States Supreme Court reiterated in *Crawford v. Washington*, *supra*, 541 U.S. 36:

> when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 [26 L.Ed.2d 489, 90 S.Ct. 1930] (1970).

(*Id.* at p. 60, fn. 9.)

Even assuming, arguendo, that Captain Wright's testimony amounted to testimonial hearsay in violation of *Crawford*, any error in its admission was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *People v. Cage* (2007) 40 Cal.4th 965, 991-994 [finding erroneous admission of testimonial hearsay harmless beyond a reasonable doubt].) Captain Wright's testimony was merely cumulative of overwhelming witnesses' trial testimony – including but not limited to the testimony of Perry, Hebrard, and Chavers – establishing the involvement of appellant's Cadillac in the drive-by shooting. (See, e.g., 3RT 1375-1377, 1380, 1398, 1414, 1425; 6RT 1191-1192, 1194; 7RT 1245, 1257-1258.) Accordingly, any *Crawford* error was harmless.

V. THE TRIAL COURT DID NOT ERR BY PERMITTING PERRY TO TESTIFY THAT SOMEONE SAID "THAT WAS GOLDIE" IN REFERENCE TO APPELLANT'S CADILLAC

Appellant next claims the trial court violated his federal due process rights by permitting Perry to testify that somebody "identified" the Cadillac as belonging to Goldie. (AOB 109-118.) This claim is meritless and must be rejected.

A. Relevant Facts

Appellant's claim arises from the following exchange between the prosecutor and Perry during Perry's testimony (the challenged portion is italicized):

Q: Where was this green Cadillac when you were by the – sorry. [¶] When you were by the park on the park side, was it up Bullis [Road] on Compton Boulevard?

A: It was pulling up to the light on Rosecrans.

Q: So on Bullis [Road] pulling up to the light on Rosecrans?

A: Yes.

Q: Where were your friends?

A: Coming up to Rosecrans.

Q: Tell the jury what happened next.

A: *Somebody had said that that was Goldie* and –

Mr. Martin [appellant's defense counsel]: I object to what somebody else said.

Mr. Stirling [the prosecutor]: It's not based on the truth of the matter asserted. Explaining what happened next.

The Court: Ladies and gentlemen, this is offered to merely explain conduct. And it is not for the truth of the matter asserted. I'm referring specifically to the statement the witness just said, that someone else made reference to someone named Goldie[.]

Q: By Mr. Stirling: After someone made that reference, what did you do next?

A They ran the light. They ran the red light.

Q: When you say they, you mean?

A: The car.

Q: Okay.

A: So when they ran the red light, we ran across the red light and got across the traffic and get [*sic*] my clothes and stuff out the car [*sic*].

(6RT 1192, emphasis added.)

B. The Trial Court Did Not Abuse Its Discretion By Admitting The Challenged Portion of Perry's Testimony

Hearsay, that is, "evidence of a statement that was made other than by a witness while testifying at the hearing" and "offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)) is generally inadmissible unless it satisfies an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).) Statements that are not offered for the truth of the matter asserted are not hearsay. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.)

> "'One important category of nonhearsay evidence . . . [is] evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.' [Citation.]"

(*People v. Scalzi* (1981) 126 Cal. App. 3d 901, 907.) This Court reviews the admission of Perry's testimony for an abuse of discretion. (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Here, the challenged portion of Perry's testimony – "somebody had said that that was Goldie" – was not offered to prove the truth of the statement. Rather, as explained by the trial court, it was offered to explain Perry's conduct after somebody said "[T]hat was Goldie . . . ." Moments after hearing that statement, Perry testified the Cadillac ran through a red light, at which point Perry and Hebrard also ran across the street against a red light. (6RT 1192-1193.) Testimony introduced to establish the effect on the hearer and his subsequent conduct is not hearsay. (*People v. Scalzi*,

supra, 126 Cal. App. 3d at p. 907; see also *People v. Samuels* (2005) 36 Cal.4th 96, 122; *People v. Hines* (1997) 15 Cal.4th 997, 1047; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224.) The trial court did not abuse its discretion by admitting the challenged portion of Perry's testimony. (*People v. Cain* (1995) 10 Cal.4th 1, 33.)

Appellant all but concedes that *Crawford* does not apply because the challenged statement -- "[T]hat was Goldie . . . ." -- was not "testimonial" within the meaning of *Crawford*. (AOB 114-115.) Appellant argues, however, that "[t]he issue is whether the reliability analysis of *Ohio v. Roberts* (1980) 448 U.S. 45 [100 S.Ct. 2531, 65 L.Ed.2d 597] remains viable for nontestimonial hearsay statements." (AOB 115.) This argument is meritless.

In *Ohio v. Roberts*, *supra*, 448 U.S. at page 66 (*Roberts*), the Supreme Court held that an unavailable witness's hearsay statement could be admitted without violating the Sixth Amendment's Confrontation Clause if the statement bore "adequate 'indicia of reliability,'" such as if it fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." In *Crawford*, *supra*, 541 U.S. at page 59, the Supreme Court reconsidered its ruling in *Roberts* and held that if a hearsay statement is testimonial in nature, it is admissible only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant. The Supreme Court noted its decision implicated only testimonial hearsay and "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford*, *supra*, at p. 68.) Appellant's argument fails because the challenged portion of Perry's testimony was not hearsay and, furthermore, neither *Roberts* nor *Crawford*

contravene the well-established rule that testimony introduced to establish the effect on the hearer and his subsequent conduct is not hearsay.

In any event, any error was harmless because, in absence of the error, a more favorable outcome for appellant would not have been reasonably probable. (*See People v. Samuels* (2005) 36 Cal.4th 96, 113-114 [evidentiary errors found harmless under *Watson* standard of review].)[34] As explained above, there was overwhelming evidence, independent of Perry's challenged testimony, establishing appellant as the shooter in the drive-by shooting and connecting his Cadillac to the crime. Furthermore, the jury was expressly instructed not to consider the statement at issue for the truth of the matter stated and is presumed to have followed this instruction. (*People v. Young* (2005) 34 Cal.4th 1149, 1214; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) Accordingly, appellant's claim must be rejected.

VI. APPELLANT HAS FAILED TO SHOW CALJIC NOS. 2.02 AND 8.83.1 ARE UNCONSTITUTIONAL

Without objection, the trial court instructed the jury with the CALJIC Nos. 2.01 [sufficiency of circumstantial evidence-generally], 2.02 [sufficiency of circumstantial evidence to prove specific intent], 8.83

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[34] Appellant argues that "harmless error is measured by the *Chapman* test that reversal must follow unless it can be said that the error was harmless beyond a reasonable doubt." (AOB 117.) But *Chapman* would apply were this Court to find errors of constitutional significance, and, as argued above there are none. (Cf. *People v. Williams* (1971) 22 Cal.App.3d 34, 45-46, 57-58 [court was "not satisfied beyond a reasonable doubt that the totality of error [it had] analyzed did not contribute to the guilty verdict" when comment upon defendant's failure to testify was compounded by erroneous jury instructions and the defendant suffered "inadequa[te] legal representation in a crucial stage of the trial"]; see also *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [applying *Chapman* standard to multiple violations of defendant's federal constitutional rights].) Moreover, even under the *Chapman* standard, as argued above, any error was harmless.

[sufficiency of circumstantial evidence to prove the special circumstance], and 8.83.1 [sufficiency of circumstantial evidence to prove mental state]). (14RT 2554-2555, 2591-2593; 24CT 6211-6212, 6264-6265.) Appellant claims the court violated his rights to a jury trial and due process under the federal and state constitutions by instructing the jury with CALJIC Nos. 2.02 and 8.83.1. (AOB 119-128.) Specifically, appellant claims, "[n]othing in Nos. 2.02 and 8.83.1 requires that the facts or circumstances upon which an inference of a required specific intent or mental state rests, be found beyond a reasonable doubt." (AOB 120.) This claim fails.

A. Relevant Facts

The court instructed the jury with CALJIC No. 2.01, as follows:

> However, a finding of guilt as to any crime many not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt.

If, on the other hand, one interpretation of this evidence appears to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14RT 2554-2555.)

The court instructed the jury with CALJIC No. 2.02, as follows:

The specific intent and mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in counts I, II, III, IV, V, VIII, IX, and XII or find the allegation of gang crime under Penal Code section 186.22(b) to be true, unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent and mental state but, two, cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent and mental state permits two reasonable interpretations, one of which points to the existence of the specific intent and mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent and mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14RT 2555-2556.)

The court instructed the jury with CALJIC No. 8.83, as follows:

You are not permitted to find a special circumstance alleged in this case to be true based upon circumstantial

evidence unless the proved circumstance is not only, (1), consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14RT 2591-2592.)

The court instructed the jury with CALJIC No. 8.83.1, as follows:

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only, (1) consistent with the theory that the defendant had the required specific intent or mental state

> but, (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.
>
> If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14RT 2592-2593.)

B. Appellant's Claim Is Forfeited; In Any Event, It Must Be Rejected As Meritless

As appellant concedes, he failed to object during trial to any of the challenged jury instructions. (AOB 120.) His claims are forfeited because it was incumbent upon him to request clarifying instructions that addressed any potential misimpression the instructions taken together may have imparted to the jury. As the court in *People v. Guerra* (2006) 37 Cal.4th 1067, 1134, explained, although an appellate court may review an unobjected-to instruction that allegedly implicates a defendant's substantial rights, a claim that an instruction, correct in law, should have been modified "is not cognizable . . . because defendant was obligated to request clarification and failed to do so." If appellant believed the challenged instructions required modification, then he was obligated to object and request that the trial court change it. Because he failed to do so, his claim is forfeited.

With respect to appellant's CALJIC No. 2.02 claim in particular, appellant's claim is foreclosed by invited error. "A party is estopped from asserting error on appeal that was induced by his own conduct. He may not lead a judge into substantial error and then complain of it." (*People v. Katzman* (1968) 258 Cal.App.2d 777, 792, overruled on other grounds in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780; see also *Jackson v. Superior Court* (1937)10 Cal.2d 350, 358; *People v. Davenport* (1966) 240 Cal.App.2d 341, 346 ["the invited error doctrine prevents a party to a legal action from profiting where he causes or invites the error"]; *People v. Wright* (1962) 199 Cal.App.2d 30, 38.) Here, during the discussion of proposed jury instructions, the court stated it had tentatively approved instructing the jury with CALJIC No. 2.02, and invited counsel to make any objections. (13RT 2489.) Appellant's defense counsel replied in the negative. (13RT 2489.) Appellant cannot now complain the trial court erred by giving the jury this instruction.

Even assuming, arguendo, his claims are not forfeited, they must be rejected as meritless. "'It is well established in California that the 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. Crandell* (1988) 46 Cal.3d 833, 874, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538; see *People v. Magana* (1990) 218 Cal.App.3d 951, 956.)

In *People v. Maury* (2003) 30 Cal.4th 342, 428, this Court considered an argument similar to the one appellant raises here. This Court rejected that argument, reasoning as follows:

> Without objection, the trial court gave the standard instructions on (1) circumstantial evidence (CALJIC Nos. 2.01 [sufficiency of circumstantial evidence-generally], 2.02 [sufficiency of circumstantial evidence to prove specific

intent], 8.83 [sufficiency of circumstantial evidence to prove the special circumstance], and 8.83.1 [sufficiency of circumstantial evidence to prove mental state]); (2) the credibility and weight of the evidence (CALJIC Nos. 2.21.2 [witness willfully false] and 2.22 [weighing conflicting testimony]); and (3) the definition of reasonable doubt (CALJIC No. 2.90). Defendant claims that those instructions given, singly and collectively, impermissibly diluted the reasonable doubt standard.

Regarding the instructions on circumstantial evidence, we have repeatedly rejected defendant's argument. Those instructions, which refer to an interpretation of the evidence that "appears to you to be reasonable" and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 346-347; *People v. Osband*, *supra*, 13 Cal.4th at pp. 678-679; *People v. Ray*, *supra*, 13 Cal.4th at pp. 347-348.)

Furthermore, the decisions of this Court upholding the constitutionality of CALJIC Nos. 2.02 and 8.83.1 are legion. (See, e.g., *People v. Friend* (2009) 47 Cal. 4th 1, 53 [reaffirming constitutionality of CALJIC Nos. 2.02 and 8.83.1]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713–714; *People v. Cook* (2007) 40 Cal.4th 1334, 1361; *People v. Crittenden* (1994) 9 Cal.4th 83, 142–144 *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.) Appellant cites to no authority holding otherwise. Accordingly, his claim is meritless.

In any event, in light of the other instructions, there is no reasonable likelihood that the jury misunderstood and misapplied CALJIC Nos. 2.02 and 8.83.1 in the manner appellant suggests. (See *Estelle v. McGuire*

(1991) 502 U.S. 62, 72 & fn. 4 [112 S. Ct. 475, 482, 116 L. Ed. 2d 385]; *People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Avena* (1996) 13 Cal. 4th 394, 417.) The jury was instructed, pursuant to CALJIC No. 1.01, not to "single out any particular sentence or any individual point or instruction and ignore the others" and to "[c]onsider the instructions as a whole and each in light of all others." (14RT 2550; 24CT 6205.) The jury was instructed with CALJIC 2.90, which explained the presumption of innocence, the People's burden of proving appellant's guilt beyond reasonable doubt, and defined reasonable doubt. (14RT 2566-2567; 24CT 6232.) Finally, they were instructed as to the elements of each crime and were repeatedly instructed the People had to prove each element of every charge beyond a reasonable doubt. (14RT 2571-2612, 2817-2820; 24CT 6246-6300.) There is no reasonable likelihood that the jury would have understood CALJIC Nos. 2.02 and 8.83.1 to permit them apply a "reduced standard of proof when specific intent or mental state is provided by circumstantial evidence." (AOB 121, original emphasis and capitalization omitted.) Appellant has failed to establish the challenged instructions amounted to a structural error affecting his substantial rights. (See *People v. Flood* (1998) 18 Cal.4th 470, 499-500.) For these reasons, appellant's claim fails.

VII. APPELLANT FAILS TO SHOW THAT THE COURT'S INSTRUCTIONS ON DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE WERE UNCONSTITUTIONAL

Appellant next argues the trial court's instructions on direct and circumstantial evidence violated his right to due process and jury trial under the federal and state constitutions. (AOB 129-174.) Specifically, appellant appears to complain that the instructions on direct evidence (i.e., CALJIC No. 2.00) were deficient because they omitted certain language found in the

instructions on circumstantial evidence (i.e., CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1). Appellant argues:

> Nothing states that any of the inferences underlying the direct evidence must be proved beyond a reasonable doubt. No instruction states that if the direct evidence permits two rational conclusions or two interpretations, one of which does not lead to guilt, that must be adopted. In other words, two different standards are set forth for the treatment of direct and circumstantial evidence, despite the words of [CALJIC] No. 2.00 that neither is entitled to greater weight than the other.

(AOB 132.)

Appellant's claim is forfeited because, as he concedes, he did not object to CALJIC No. 2.00 (AOB 131), nor does it appear he requested a modification of this standard instruction. "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 this standard instruction." (*People v. Catlin* (2001) 26 Cal.4th 81, 149, internal quotation marks omitted; *People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Andrews* (1989) 49 Cal. 3d 200, 218.) While section 1259 provides, in relevant part, that an appellate court "may . . . review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby," this Court has previously held that as general rule, the trial court is not obligated to revise or improve standard instructions in the absence of a request from counsel. (*People v. Wolcott* (1983) 34 Cal.3d 92, 108-109.) Appellant has failed to establish the challenged instructions amounted to a structural error affecting his substantial rights. (See *People v. Flood, supra,* 18 Cal.4th at pp. 499-

500.) Indeed, he cannot do so because CALJIC No. 2.00 is correct in law, and therefore appellant's substantial rights are not affected.

In any event, appellant's claim must be rejected as meritless. In *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186, the California Court of Appeal considered and rejected a similar argument. There, the defendant claimed that CALCRIM No. 224[35] addressed only circumstantial evidence and criticized the "intentional omission" of direct evidence from its scope. (*People v. Ibarra*, *supra*, 156 Cal.App.4th at p. 1186.) The *Ibarra* Court observed that CALCRIM No. 224 states as follows:

> "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.
>
> Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

(*Id.* at p. 1186-1187.)

The *Ibarra* Court properly rejected the defendant's claim, reasoning:

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[35] CALCRIM No. 224 is former CALJIC No. 2.01.

> Implicit in Ibarra's argument is the assumption that circumstantial evidence and direct evidence are similarly situated, but that is not so. Circumstantial evidence involves a two-step process – first, the parties present evidence and, second, the jury decides which reasonable inference or inferences, if any, to draw from the evidence – but direct evidence stands on its own. So as to direct evidence no need ever arises to decide if an opposing inference suggests innocence. [*People v. Anderson* (2007) 152 Cal.App.4th 919, 931.]

(*Id.* at p. 1187; see also *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [explaining the difference between direct and circumstantial evidence]; *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [same].)

Similarly, in *People v. Anderson, supra*, 152 Cal.App.4th at page 931, the California Court of Appeal rejected the defendant's claim that because CALCRIM No. 224 "is limited to circumstantial evidence and sets forth basic reasonable doubt and burden of proof principles, it gives the false impression these principles apply only to circumstantial evidence, not direct evidence." In rejecting this claim, the *Anderson* Court reasoned:

> [I]n determining whether a fact necessary for conviction has been proved beyond a reasonable doubt, circumstantial evidence may be relied on only if the only reasonable inference that may be drawn from it points to the defendant's guilt. [¶] The same limitation does not apply to direct evidence. Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference. Thus,

as to direct evidence, there is no need to decide whether there is an opposing inference that suggests innocence.

(*Id.*) The *Anderson* Court also characterized the defendant's additional claim that CALCRIM No. 224 applied to both direct and circumstantial evidence as "mix[ing] apples with oranges." (*Id.*)

Similarly, in *People v. Golde* (2008) 163 Cal.App.4th 101, 118-119, the California Court of Appeal rejected the defendant's argument that CALCRIM No. 225 impermissibly set forth limitations of reasonable doubt and burden of proof principles as to circumstantial evidence only, and improperly implied such limitations do not apply to direct evidence.

Here, too, appellant's claim is premised on his assumption that circumstantial evidence and direct evidence are similarly situated, and it fails for the same reasons explained in *Ibarra, Anderson, Goldstein, Lim Foon*, and *Golde.* Appellant has not advanced any persuasive arguments requiring this Court to reject these holdings.

Even assuming, arguendo, that CALJIC No. 2.00 improperly omitted the principles found in the instructions on circumstantial evidence, there is no reasonable likelihood that the jury misunderstood and misapplied CALJIC 2.00 in the manner appellant suggests. (See *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 62, 72 & fn. 4; *People v. Smithey*, *supra*, 20 Cal.4th at p. 963; *People v. Avena*, *supra*, 13 Cal. 4th at p. 417.) As stated above, the jury was instructed, pursuant to CALJIC No. 1.01, not to "single out any particular sentence or any individual point or instruction and ignore the others" and to "[c]onsider the instructions as a whole and each in light of all others." (14RT 2550; 24CT 6205.) The jury was instructed with CALJIC 2.90, which explained the presumption of innocence, the People's burden of proving appellant's guilt beyond reasonable doubt, and defined reasonable doubt. (14RT 2566-2567; 24CT 6232.) For these reasons, appellant's claim fails.

VIII. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY WITH CALJIC NO. 2.20

Appellant argues the trial court had a sua sponte obligation to modify CALJIC No. 2.20 to make it clear that the credibility factors applying to a witness's in-court testimony also applied to his or her extrajudicial statements. (AOB 161-174.) Specifically, appellant takes issue with evidence of extrajudicial statements made by Grant, Hebrard, Perry, Detective Richardson, Bombarda, and Detective Aguirre. (AOB 162-165.) Appellant claims the trial court should have "modif[ied] CALJIC No. 2.20 to include prior statements as "testimony," or by fashioning a separate instruction to that purpose." (AOB 166-167.) Appellant further claims the court's failure to modify the instruction violated his rights to jury trial and due process under the federal and California constitutions. This claim is forfeited, and meritless in any event.

Appellant's claim is forfeited by his failure to object and request a modification of CALJIC No. 2.20, a standard instruction. A party may not complain for the first time on appeal that an instruction, which is otherwise an accurate statement of the law, required modification. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 149; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) Appellant is basically claiming that a pinpoint instruction should have been given, when none was requested. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.) Appellant does not dispute CALJIC No. 2.20 is an accurate statement of the law. If appellant believed the instruction required modification, then he was obligated to object and request that the trial court change it. Because he failed to do so, the claim is forfeited.

In any event, appellant's claim must be rejected as meritless.

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles

> of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.

(*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

The court instructed the jury with CALJIC No. 2.20, as follows:

> Every person who testified under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony; [¶] A statement previously made by the witness that is consistent or inconsistent with his or her testimony; [¶] A witness' prior conviction of a felony.

(14RT 2559-2560; 24CT 6218.)

Appellant has not cited any authorities holding that CALJIC No. 2.20 is applicable to extrajudicial statements. None of the cases cited by appellant involve CALJIC No. 2.20 or present analogous situations. (See *People v. Andrews* (1989) 49 Cal.3d 200, 215, fn. 11 [CALJIC Nos. 3.11, 3.12, 3.16]; *People v. Marquez* (1993) 16 Cal.App.4th 115, 122 [CALJIC Nos. 3.11, 3.12].) (AOB 168.) These authorities are not applicable in this context.

Notwithstanding appellant's failure to cite to supporting authority, his claim fails. CALJIC No. 2.20 is not applicable to extrajudicial statements because it refers to physical characteristics of the witness and factors which a jury cannot evaluate if the witness is not there in court. Moreover, there is no reasonable likelihood that the jury was misled into thinking that the factors pertaining to the credibility of in-court testimony did not also bear on the credibility of the initial statements that these witnesses made to police. (See *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73, fn. 4; *People v. Cain* (1995) 10 Cal.4th 1, 36, cert. den. sub nom. *Cain v. California* (1996) 516 U.S. 1077.) Finally, the extrajudicial statements appellant complains about were all made by witnesses who testified in court. (6RT 1181 [Perry's testimony]; 7RT 1241 [Hebrard's testimony], 1319 [Detective Richardson's testimony]; 8RT 1586 [Bombarda's testimony]; 9RT 1713 [Grant's testimony]; 11RT 2076 [Detective Aguirre's testimony].) Appellant had the opportunity to question these witnesses on the stand about any prior statements, and they had the chance to explain them. The jury did not need a modified version of CALJIC No. 2.20 to judge whether to believe the testimony or the prior statements.

Furthermore, appellant has not shown that he was prejudiced by the failure to modify CALJIC No. 2.20. Bombarda, Grant, Detective Richardson, and Detective Aguire, had no motive to falsely implicate

appellant. With respect to Perry's and Hebrard's testimony, they were questioned on the stand about statements they made to the police, and the jury could evaluate any inconsistent prior statements and their credibility on that basis. (See, e.g., 6RT 1199-1203, 1213; 7RT 1245-1252.) It is not reasonably possible that the jury would have found the defense more credible or returned a more favorable verdict if it had been instructed as appellant urges on appeal. Therefore, even assuming instructional defect, the resulting error was harmless.

IX. CALJIC NO. 2.51 DID NOT PERMIT THE JURY TO FIND GUILT BASED ON MOTIVE ALONE

Appellant next claims the trial court erred by instructing the jury with CALJIC No. 2.51. Specifically, appellant claims this instruction on motive permitted the jury to infer his guilty from evidence of motive alone, in violation of his rights to due process and jury trial under the United States and California constitutions. (AOB 175-186.) This claim is forfeited and meritless, and any error was harmless.

Without objection, the trial court instructed the jury on motive with CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(14RT 2562; 24CT 6224.)

Appellant's claim is forfeited because he did not object to CALJIC No. 2.51, nor does it appear he requested a modification of this standard instruction. (See *People v. Catlin*, *supra*, 26 Cal.4th atp. 149; *People v. Guiua, supra,* 18 Cal.4th 558, 570; *People v. Andrews*, supra, 49 Cal. 3d 200, 218.) Because CALJIC No. 2.51 is correct in law, appellant's

substantial rights are not affected and he has forfeited any claim that this instruction, either standing alone or in combination, was erroneous.

Even assuming this claim is not forfeited, it must be rejected because no instructional error occurred here. This Court has repeatedly addressed and rejected the argument that CALJIC No. 2.51 somehow shifts the burden of proof from the prosecution to the defense or somehow lessens the prosecution's burden of proof. (*People v. Tate* (July 8, 2010, S031641) __ Cal.4th __ [2010 Cal. LEXIS 6548]; *People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Snow* (2003) 30 Cal.4th 43.) As this Court stated in *Snow*:

> If the challenged instruction somehow suggested that motive alone was sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish all the elements of murder.

(*People v. Snow, supra*, 30 Cal.4th at pp. 97-98.)

CALJIC No. 2.51 does not instruct jurors on the standard of proof they are to apply; instead, it "merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence. . . ." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1497; see also *People v. Estep* (1996) 42 Cal.App.4th 733, 738 ["CALJIC No. 2.51 did not concern the standard of proof in this case, but merely one circumstance in the proof puzzle – motive"].)

Moreover, as discussed previously, the correctness of a jury instruction is determined from the entire charge of the court, not from the consideration of parts of an instruction or from a single instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) Here, then, the relevant

language of the motive instruction must be considered in conjunction with the "reasonable doubt" standard set forth in CALJIC No. 2.90. (14RT 2566-2567; 24CT 6232.) A "reasonable juror in the present case would understand that the language of CALJIC No. 2.51 that motive may tend to establish guilt while lack of motive may tend to establish innocence, cannot be considered a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." (*People v. Estep, supra*, 42 Cal.App.4th at p. 739.) Accordingly, CALJIC No. 2.51, as given in the present case and as repeatedly held by this Court and the Courts of Appeal, did not lighten the prosecution's burden of proof or shift the burden to appellant to prove his innocence. (*Id.* at pp. 738-739; *People v. Wade, supra*, 39 Cal.App.4th at pp. 1496-1497.) Finally, given the overwhelming evidence of appellant's guilt and the instructions above, any error was harmless, as it is not reasonably probable appellant would have obtained a more favorable outcome had the jury not been instructed with CALJIC No. 2.51. (See *People v. Breverman* (1998) 19 Cal. 4th 142, 177-178.)

X. THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE; APPELLANT HAS FAILED TO SHOW PROSECUTORIAL MISCONDUCT

Appellant next contends that several of the circumstantial evidence instructions combined to reduce the prosecution's burden of proof below that of reasonable doubt. (AOB 187-207.) As set forth in more detail below, this Court has previously rejected his several contentions; appellant presents no legitimate reason to revisit the area.

As a preliminary matter, appellant's failure to object to CALJIC Nos. 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.90, 8.83, and 8.83.1, forfeits his claim on appeal. (See *People v. Wolcott, supra,* 34 Cal.3d at pp. 108-109.) Because these instructions are correct in law, appellant's substantial rights are not

affected and he has forfeited any claim that these instructions, either standing alone or in combination, were erroneous.

A. Instructions On Circumstantial Evidence (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, 8.83.1) Did Not Lessen The Prosecution's Burden Of Proof

Even assuming appellant's claims are not forfeited, they must be rejected as meritless. Without objection, the trial court instructed the jury with CALJIC No. 2.90, as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(14RT 2566-2567; 24CT 6232.)

The United States Supreme Court has found an identical instruction – at least standing alone – constitutional. (*Victor v. Nebraska* (1994) 511 U.S. 1, 13-17 [114 S. Ct. 1239, 127 L. Ed. 2d 583].) Indeed, contentions involving CALJIC No. 2.90 have been uniformly rejected by this Court (*People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Snow* (2003) 30 Cal.4th 43, 98-99; see *People v. Freeman* (1994) 8 Cal.4th 450, 501-502), as well as in every appellate district in California. (See *People v. Hearon*

(1999) 72 Cal.App.4th 1285, 1286 [and cases cited therein].) The Ninth Circuit has similarly confirmed the constitutionality of the instruction. (*Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999-1000.) As one court has put it, the issue has been "conclusively settled adversely to defendant's position." (*People v. Hearon, supra*, 72 Cal.App.4th at p. 1287 (Scotland, P.J.) ["The time has come for appellate attorneys to take this frivolous contention off their menus."].

Notwithstanding the overwhelming amount of authority contradicting against his claim, appellant complains that use of the word "appears" in CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1, undermines the reasonable doubt standard, as it allegedly permitted the jury to find appellant guilty even if they entertained a reasonable doubt. (AOB 189-192; 24CT 6211-6212, 6265-6266.) The instructions essentially tell the jury that "if . . . one interpretation of [the] evidence *appears* to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (24CT 6211-6212, 6265-6266, emphasis added.) Respondent questions how an interpretation of evidence that is *unreasonable* could ever lead to a *reasonable* doubt, but regardless, this Court has repeatedly rejected appellant's contention. (*People v. Cleveland, supra*, 32 Cal.4th at pp. 750-751; *People v. Nakahara, supra*, 30 Cal.4th at pp. 713-714; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504; *People v. Crittenden* (1994) 9 Cal.4th 83; see also *People v. Hughes* (2002) 27 Cal.4th 287, 346-347; *People v. Osband* (1996), 13 Cal.4th 622, 678; *People v. Ray* (1996) 13 Cal.4th 313, 347-348; *People v. Jenning* (1991) 53 Cal.3d 334, 386.)

This Court has similarly rejected appellant's contention that the circumstantial evidence instructions -- by focusing on an inference that appears to be reasonable -- create a mandatory presumption of guilt (AOB 191). (*People v. Cleveland, supra*, 32 Cal.4th at p. 750-751; *People v.*

Hillhouse, *supra*, 27 Cal.4th at p. 504; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) Indeed, the instructions only apply if the jury finds a single reasonable interpretation; respondent questions how an instruction telling the jury to reject an *unreasonable* interpretation of evidence could ever legitimately inure to a defendant's detriment.

B. Other Standard CALJIC Instructions (CALJIC Nos. 2.21.2, 2.22, and 2.27) Did Not Vitiate The Reasonable Doubt Standard

Appellant next complains that numerous other standard instructions – singly and in combination – also reduced the prosecution's burden of proof. (AOB 193-207.) These claims have been consistently rejected by this Court.

This Court has repeatedly rejected appellant's claim that CALJIC No. 2.21.2 "lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a 'mere probability of truth' in their testimony." (AOB 195.) For example, in *People v. Nakahara* (2003) 30 Cal.4th 705, 714, the defendant claimed CALJIC No. 2.21.2 "impermissibly lightened" the People's proof burden by telling the jury it should distrust, and could reject, the entire testimony of a witness who has given willfully false material testimony, unless the jury believes that "the probability of truth" favors the testimony. This Court rejected that claim, reasoning as follows:

> Defendant contends this instruction "allowed the jury to assess prosecution witnesses by seeking only a probability of truth in their testimony." But as we have held, the targeted instruction says no such thing. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 493 [117 Cal. Rptr. 2d 45, 40 P.3d 754] ; *People v. Riel*, *supra*, 22 Cal.4th at p. 1200.)

(*People v. Nakahara*, *supra*, 30 Cal.4th at p. 714; see also *People v. Friend* (2009) 47 Cal.4th 1, 53 [upholding constitutionality of CALJIC No. 2.21.2]; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1138–1139.)

This Court has rejected appellant's argument that CALJIC No. 2.22 dilutes the prosecution's burden of proof by focusing on the comparative strength of evidence -- i.e., convincing force -- from each side (AOB 198-200). (*People v. Maury*, *supra*, 30 Cal.4th 342, 429; *People v. Nakahara, supra*, 30 Cal.4th at pp. 714-715.) As the Court has stated about all of the above instructions, when properly considered in conjunction with the other instructions, the jury is being instructed to weigh the evidence "only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt . . . ." (*Ibid.*, quoting *People v. Clay* (1984) 153 Cal.App.3d 433, 461-462; *People v. Salas* (1975) 51 Cal.App.3d 151, 157; see also *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714-715.)

This Court has also rejected appellant's claim that CALJIC No. 2.27 (testimony of a single witness) somehow permitted the jury to conclude that (1) he had the burden of convincing them that he was not guilty and (2) that this burden was a difficult one to meet (AOB 200-202). Although the Court acknowledged some "ambiguity" in the language of the instruction (see *People v. Turner* (1990) 50 Cal.3d 668, 697), the Court ultimately found that, in conjunction with other properly given instructions, the jury would not have been misled about the prosecution's burden of proof. (*People v. Montiel*, (1993) 5 Cal.4th 877, 928, fn. 23, 941; *People v. Turner*, *supra*, 50 Cal.3d at p. 697 ["We cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles."].) Indeed, the Court even suggested that "application of the single-witness instruction against the prosecution alone [as appellant suggests here (AOB 200)] would accord the

testimony of defense witnesses an unwarranted aura of veracity." (*People v. Montiel*, *supra*, 5 Cal. 4th at p. 941.) This Court recently upheld the constitutionality of CALJIC No. 2.27 in *People v. Friend*, *supra*, 47 Cal.4th at page 53.)

C. Appellant Has Failed To Demonstrate Any Prosecutorial Misconduct

Curiously, in a footnote, appellant also claims the prosecutor committed misconduct during a "series of questions," and the prosecutor allegedly compounded the misconduct by returning to the subject of the questions during his opening argument and closing summation. (AOB 198, fn. 91.) Although somewhat unclear, the "series of questions" to which appellant refers are questions the prosecutor asked appellant during cross-examination regarding whether other witnesses had lied. (AOB 196.) This perfunctory claim is forfeited. In any event, it is meritless and any misconduct was harmless.

Appellant's claim is forfeited because defense counsel failed to object to any of the prosecutor's questions or arguments which appellant now claims were misconduct. (12RT 2377; 13RT 2407-2408, 2424; 14RT 2679, 2680-2681.) To preserve a claim of prosecutorial misconduct, the defendant must make a timely objection at trial and request an admonition to the jury. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) A defendant is excused from the necessity of objecting and requesting an admonition if either would have been futile. (*Ibid.*; *People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, posing objections and requesting admonitions would not have been futile. Any harm could have been cured by an admonition to the jury. Defense counsel's failure to make a timely objection and request an admonishment therefore bars appellant from raising this prosecutorial misconduct claim.

In any event, the record does not support appellant's contention that the prosecutor engaged in misconduct under state law, which requires a dishonest act or an attempt to persuade the court or the jury by deceptive, reprehensible methods. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.) As our Supreme Court has held:

> The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Prosecutors are given wide latitude during argument. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Further:

> "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine. [Citations.]"

(*People v. Thomas* (1992) 2 Cal.4th 489, 526.) "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. Whether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Jablonski* (2006) 37 Cal.4th 774, 835, internal quotation marks and citations omitted.)

In assessing a claim that remarks made by the prosecutor during argument constituted misconduct, the reviewing court must determine whether there is a reasonable likelihood that the jury misconstrued or misapplied any of the remarks. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In doing so, the allegedly improper remarks must be viewed in the context of the argument as a whole. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.) Moreover, a prosecutor may make comments that would otherwise be improper if they are fairly responsive to argument of defense counsel and based on the record. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.) Also, "'[a] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

Here, the prosecutor's questions to appellant about whether other witnesses were lying were not misleading or prejudicial. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 382-383.) Appellant and the other witnesses gave dramatically different accounts about appellant's involvement in the Bullis Road drive-by shooting, and the Wilmington Apartment complex guardshack shootings. Appellant flatly denied he had any involvement with any of these crimes. (12RT 2306-1209, 2346.) The prosecution could ask appellant why his account of what transpired was

different from that of other witnesses and, in that context, whether the other witnesses were lying. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 383.)

> The prosecution's questions allowed defendant to clarify his position and to explain why . . . [the] eyewitness [] might have a reason to testify falsely. The jury properly could consider any such reason defendant provided; if defendant had no explanation, the jury could consider that fact in determining whether to credit defendant's testimony. [Citation.] Thus, the prosecution's questions in this case 'sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe.' [Citation.] There was no prosecutorial misconduct.

(*People v. Tafoya* (2007) 42 Cal.4th 147, 179.) "'Although it is misconduct for a prosecutor intentionally to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.'" (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 379–380.) Nothing in the record suggests the prosecutor sought to present evidence he knew was inadmissible. (*Id.* at p. 380.) The prosecutor questions were neither deceptive nor reprehensible, and did not constitute misconduct.

Finally, appellant summarily claims that "the prosecutor's return to this subject during opening argument on the merits and in his closing summation compounded the misconduct." (AOB 198, fn. 91.) This claim is based on the validity of his earlier argument that the prosecutor's questions to appellant during cross-examination were misconduct. As argued, above, the challenged questions were not misconduct, and accordingly his latter claim fails. In any event, the prosecutor's remarks during his opening argument and closing summation were properly based on the evidence presented at trial and was not misconduct.

Even assuming, arguendo, that the prosecutor's challenged questions or closing remarks were improper, there was no prejudice. The discrepancies between appellant's account of the events and that of the other witnesses were stark. The jury was aware of the discrepancies and were instructed: "Statements made by the attorneys during the trial are not evidence" and "[d]o not assume to be true any insinuation suggested by a question asked a witnesses. A question is not evidence and may be considered only as it helps you to understand the answer." (CALJIC 1.02; 14RT 2551; 24CT 6206.) Jurors are presumed to have understood and followed the instructions. (*People v. Gray, supra,* 37 Cal.4th at p. 217.) There is no likelihood that appellant would have achieved a better result had the challenged questions not been asked. (*People v. Riggs* (2008) 44 Cal.4th 248, 300-301.)

Furthermore, when the prosecutor's conduct is viewed in its entirety, it is clear the challenged questions or remarks were not prejudicial on the facts of this case. (See *People v. Thomas*, *supra*, 2 Cal.4th at p. 537; *People v. Sully* (1991) 53 Cal.3d 1195, 1235; *People v. Bloom* (1989) 48 Cal.3d 1194, 1213.) The established test for prejudice arising from most instances of prosecutorial misconduct is the "traditional application of this state's harmless error rule . . . ." (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Holt* (1984) 37 Cal.3d 436, 458; *People v. Galloway* (1979) 100 Cal.App.3d 551, 560, fn. 3.) Prosecutorial misconduct will lead to reversal only when it is "reasonably probable that a result more favorable to the defendant would have occurred" in the absence of the improper conduct. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Gionis* (1995) 9 Cal.4th 1196, 1220; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The strength of the evidence can eliminate any prejudice from extraneous remarks. (*People v. Hines* (1997) 15 Cal.4th 997, 1036-1038 [erroneous implication from prosecuting attorney's opening statement and

direct examination of witness was harmless given overwhelming evidence of guilt)]; *People v. Hardy* (1992) 2 Cal.4th 86, 172-173 [though prosecutor's conduct occasionally crossed the line of appropriate advocacy, none of the claims of misconduct contributed to the verdict].)

Given the overwhelming evidence supporting appellant's guilt, as argued, *ante*, it is certain that any reasonable jury would have reached the same verdicts in the absence of the allegedly improper remarks or questions. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 214; *People v. Coulter* (1989) 209 Cal.App.3d 506, 514-515 [the prosecutor's argument that defense attorney's job is to create doubt may have been misconduct but it did not warrant reversal].) Therefore, appellant could not have been prejudiced by the alleged misconduct. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 214; *People v. Fields* (1983) 35 Cal.3d 329, 363; *People v. Simington* (1993) 19 Cal.App.4th 1374, 1379; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1016-1017.)

XI. APPELLANT'S CHALLENGE TO THE AGGRAVATING EVIDENCE PRESENTED DURING THE PENALTY PHASE FAILS; HIS RELATED CLAIM OF INSTRUCTIONAL ERROR FAILS

Appellant challenges the admission, during the penalty phase, of certain aggravating evidence under section 190.3, factor (b). Specifically, the challenged evidence involves (1) evidence of appellant's involvement in four different prison fights and (2) appellant's assault on Allen Weatherspoon, a fellow inmate. Appellant claims these unadjudicated crimes were not supported by sufficient evidence and their admission denied him his federal rights to due process, the right to a jury trial, and his right to a reliable sentence. (AOB 208-218.) Appellant also appears to present a related instructional claim. (AOB 212.) Appellant's claims are forfeited, and, in any event, meritless. Furthermore, any error was harmless.

A. Relevant Facts

1. Prosecution's Penalty Phase Evidence

On January 31, 1991, San Bernardino County Sheriff's Deputy William Holland arrived at the Hilltop Mobile Home Park, in 29 Palms, after receiving a radio call about a fight. (15RT 2994-2998.) Some people at the park told Deputy Holland that there had been a fight and was somebody was injured. (15RT 2998-2999.) Deputy Holland entered a trailer where he saw a white male, later identified as Eldon Shull, lying on the floor. (15RT 2999-3000.) Schull was approximately six feet tall, approximately 200 pounds, and Deputy Holland believed Schull was in the Marines. (15RT 3000, 3009.) Shull had a large puncture or laceration to the left side of his chest, and somebody near Schull was applying a cloth compress to Schull's injury. (15RT 3001.) Schull was having difficulty breathing, and the paramedics arrived and transported him to the hospital. (15RT 3001-3002.)

Deputy Holland advised appellant of his *Miranda* rights, and appellant replied he understood those rights and wished to speak with the deputy. (15RT 3001-3002.) Appellant told Deputy Holland that he was involved in a fight at the mobile home park, and he described the other person as a large, muscular, White male. (15RT 3002.) Deputy Holland opined Schull matched that description. (15RT 3002.) Deputy Holland also recovered a black colored "K-Bar" style knife with a fixed blade, which the deputy opined was basically a bayonet knife commonly used by the Marine Corp. (15RT 3007.) As a result of this incident, appellant plead guilty to an assault with a deadly weapon. (15RT 3003-3006.)

On October 8, 1999, at approximately 6:00 a.m., Los Angeles County Sheriff's Deputy Alfredo Salazar was working inside the Men's Central Jail. (15RT 2943-2946.) As the inmates exited their cells for

breakfast, an inmate, later identified as Allen Weatherspoon ("Weatherspoon"), approached Deputy Salazar and said, "Man down." (15RT 2946-2947; see also 16RT 3241.) Weatherspoon held a white cloth to the front of his neck, and Deputy Salazar noticed Weatherspoon was injured. (15RT 2946-2947.) Weatherspoon suffered an injury to his neck, which began underneath his right ear and extended to the middle of his neck. (15RT 2950.) Weatherspoon also suffered a laceration to the right side of his face, and two lacerations to his right hand.[36] (15RT 2950.) All the lacerations were approximately two to three inches long. (15RT 2950.)

Deputy Salazar asked Weatherspoon what happened, and Weatherspoon replied "it was the White guy" in "Charley 11." (15RT 2948.) Deputy Salazar explained "Charley 11" referred to a cell in row C, cell number 11, and that appellant was the only White person in that cell. (15RT 2952-2953.) Weatherspoon identified his assailant as a "White guy" and a "White Crip" who cut his throat with a razor blade. (15RT 2948.) Deputy Salazar called for help and medical personnel arrived and treated Weatherspoon's injuries. (15RT 2948.) Deputy Jose Garcia searched for appellant, and found him hiding underneath a bunk inside the Charley 11 cell. (15RT 2962-2963.) When appellant was found, he had a laceration, and also had some kind of ointment or cream to cover it up. (15RT 2963-2964.)

During the penalty phase, Weatherspoon was brought into the courtroom for the jury to view his injuries. (15RT 3017.) His first scar was below his right eye and was approximately one to one and one-half inches long. (15RT 3018-3019.) His second scar was below the first scar, and was

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[36] At trial, the jury was presented with five photographs depicting Weatherspoon's injuries and photographs depicting blood on the jail floor. (15RT 2948-2952.) Deputy Salazar explained these photographs to the jury. (15RT 2951-2952.)

approximately two inches long. (15RT 3018-3019.) His third scar began immediately below his ear and ran to the other side of his neck to his other ear lobe. (3RT 3019-3020.)

Otto Felske, a correctional counsel supervisor for the California Department of Corrections, testified about various incident reports included in appellant's "CDC" file, that documented appellant's involvement in prison fights.[37] (15RT 3044, 3049-3053; see also 15RT 3060, 3063.) One fight occurred on October 18, 1991, and resulted in appellant's conviction for assault and battery on another prisoner. (15RT 3053.) On November 20, 1992, in Calpatria State Prison, appellant was involved in another incident which led to his conviction. (15RT 3052-3053.) On August 5, 1996, and then again on January 31, 1997, in the state prison in Lancaster, appellant was convicted after his involvement in prison fights. The January 31 fight involved the use of a stabbing instrument. (15RT 3050-3052.) As a result of these incidents, appellant was placed in administrative segregation several times. (15RT 3054.)

During the penalty phase, family members of the slain security guards gave victim impact statements. (15RT 2966 [Judy Avalos], 2970 [Leticia Paz], 2974 [Oscar Paz], 3021 [Hermene Malinao], 3034 [Mariam Marroquin].)

2. Defense's Penalty Phase Evidence

During the defense penalty phase, appellant's family members and friends testified as to, among other things, their good relationship with appellant and his positive attributes. (15RT 3065 [Judy Gary], 3118 [Sunita Dunn], 3122 [Richard Flennaugh], 3126 [April Morris], 3131 [Mary

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[37] Appellant's CDC file was not admitted into evidence. (15RT 3062-3063.)

Nordmann]; 16RT 3157 [Christina Rossi], 3162 [Donna Aitken]; 3220 [Rebecca Radovich)].)

Parole Agent Santos Fuertez also testified that appellant was released on parole and tested for drugs approximately five times in 1998, and that his test results came back negative. (16RT 3147-3148, 3153.)

Doctor Jean Segall, a psychiatrist, examined appellant on June 1 and June 27, 1998. (16RT 3174-3176, 3186.) Doctor Segall tentatively diagnosed appellant with major depression with psychotic features, and treated him with Zoloft and antipsychotic medications. (16RT 3177-3178, 3179-3182.)

Appellant testified on his own behalf. (16RT 3220.) Appellant admitted he was not a "boy scout," but did not feel what was happening to him was right. (16RT 3221-3222.) He believed he could give prisoners guidance, and he sympathized with people who lost their loved ones. (16RT 3223, 3227.)

B. Appellant's Claims Are Forfeited

Appellant's claims of insufficient evidence and instructional error are not cognizable on appeal because he failed to raise these issues at trial. As this Court stated in *People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23:

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his conviction is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may include one or more other discrete criminal incidents. (§ 190.3, factors (b), (c).) If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the

evidence, on that ground. [Citations.] And though the defendant is deemed to have objected to instructions actually given (§ 1259), generally he cannot claim that limiting instructions were wrongly omitted unless his proffer of such instructions was rejected. [Citations.]

(See, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1059-1060 [defendant's claim that "there was insufficient evidence" for the jury to find the crimes presented during the penalty phase constituted aggravating evidence was not cognizable on appeal because he failed to object or otherwise raise the issue at trial]; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 933-934 [defendant's claim challenging the sufficiency of the evidence of the crimes presented during the penalty phase because defendant did not challenge the sufficiency of the evidence at trial, and did not object to the evidence when it was introduced]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052-1054 [defendant's claim that the acts presented during the penalty phase did not satisfy the "crime" and/or "violence" requirements of section 190.3, factor (b) were forfeited under both statutory and constitutional law because he failed to object to the evidence].)

Here, at the start of the penalty phase, the court told counsel that if they had any objection to the evidence falling within section 190.3, that counsel should make an objection as soon as possible so the court could rule on it. (15RT 2896-2897.) Other than on an issue related to victim impact statements, defense counsel made no objection. (15RT 2897.) His written motion to limit penalty phase evidence was limited to his objection to the introduction of victim impact testimony concerning Conner. (24CT 6326-6327; see also 15RT 2885-2886.) To the extent defense counsel seriously challenged any of the evidence at issue here, it was limited to his argument that Weatherspoon's statement to Deputy Salazar, that identified

appellant as his attacker, was inadmissible hearsay.[38] (15RT 2905-2909.) Finally, it does not appear, nor does appellant allege, that he ever requested that the jury be instructed with the elements of assault during the penalty phase.

For these reasons, appellant's claims of insufficient evidence and instructional error during the penalty phase are forfeited and should not be considered. Appellant does not argue otherwise. (AOB 208-218.)

C. There Was Sufficient Evidence That Appellant's Assault On Weatherspoon Involved Actual, Or Threatened Use Of Violence

Even assuming appellant's claim regarding his attack on Weatherspoon is not forfeited, it must be rejected as meritless because the evidence was properly admitted under section 190.3, factor (b). Factor (b) permits the prosecutor to introduce evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) This section allows proof of violent conduct, other than the capital crime, that itself is criminal. (*People v. Anderson* (2000) 25 Cal.4th 543, 584.) Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. (*Ibid.*)

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[38] Early on at trial, appellant's defense counsel did raise an objection concerning evidence of the Weatherspoon incident as an aggravating factor. However, that objection was based on defense counsel's argument that the incident was too old. (1RT 224-225.) That objection was insufficient to preserve appellant's claim. (See *People v. Montiel*, *supra*, 5 Cal.4th at p. 928, fn. 23.) Furthermore, it does not appear defense counsel pressed for a ruling on his objection that the Weatherspoon incident was too old. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 818 ["By failing to press the court for a ruling, defendant forfeited this claim"].)

> Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. [Citation.] There is no requirement, however, that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation.

(*People v. Griffin* (2004) 33 Cal.4th 536, 585.) Testimony by an eyewitness is a competent means to prove the offense. (*People v. Coleman* (1988) 46 Cal. 3d 749, 782-783.)

"The failure to identify an actual crime does not undermine the reasonable doubt standard for considering an unadjudicated crime as an aggravating factor." (*People v. Taylor*, (2010) 48 Cal. 4th 574, 656.) "[T]hat standard is a 'foundational requirement'—which California law, not the Constitution, imposes—to ensure that 'before a sentencing juror weighs the culpable nature of such other violent criminal conduct on the issue of penalty, he or she must be highly certain that the defendant committed it.'" (*Id.*)

Here, the evidence of appellant's attack on Weatherspoon was sufficient for the jurors to find appellant committed battery, or "any willful and unlawful use of force or violence upon the person of another." (§ 242.) The evidence was also sufficient for the jurors to find appellant committed an assault, or "an unlawful attempt, coupled with a present ability, to inflict a violent injury on the person of another." (§ 240.) Deputy Salazar testified that Weatherspoon approached him and said, "Man down." (15RT 2946-2947.) Deputy Salazar noticed injuries to Weatherspoon's neck and face, and noticed Weatherspoon holding a white cloth to the front of his neck. (15RT 2946-2947, 2950.) Weatherspoon suffered an injury to his neck, which began underneath his right ear and extended to the middle of his

neck. (15RT 2950.) Weatherspoon also suffered a laceration to the right side of his face, and two lacerations to his right hand. (15RT 2950.) All the lacerations were approximately two to three inches long. (15RT 2950.) Deputy Salazar described to the jury five photographs depicting Weatherspoon's injuries and photographs depicting blood on the jail floor. (15RT 2948-2952.) Deputy Salazar testified that Weatherspoon described his attacker as the "White guy" in "Charley 11." (15RT 2948.) Deputy Salazar explained "Charley 11" referred to a cell in row C, cell number 11, and that appellant was the only White person in that cell. (15RT 2952-2953.) Weatherspoon said the "White Crip" cut his throat with a razor blade. (15RT 2948.)

Deputy Jose Garcia searched for appellant, and found him hiding underneath a bunk inside the Charley 11 cell. (15RT 2962-2963.) When appellant was found, he had a laceration, and also had some kind of ointment or cream to cover it up. (15RT 2963-2964.) During the penalty phase, Weatherspoon was brought into the courtroom for the jury to view his injuries. (15RT 3017.) His first scar was below his right eye and was approximately one to one and one-half inches long. (15RT 3018-3019.) His second scar was below the first scar, and was approximately two inches long. (15RT 3018-3019.) His third scar began immediately below his ear and ran to the other side of his neck to his other ear lobe. (3RT 3019-3020.) Accordingly, there was substantial evidence that would permit a rational jury to find beyond a reasonable doubt that appellant slashed Weatherspoon with a sharp object, and that the act was violent or forcible in nature.

D. Appellant's Claim Of Instructional Error Fails

In a related argument, appellant also appears to claim that the trial court failed to instruct, sua sponte, on the elements of assault during the penalty phase. (AOB 212-213.) However, this Court has repeatedly held that there is no duty, absent a request, to instruct on elements of crimes

proven under section 190.3, factor (b). (*People v. Taylor, supra,* 48 Cal.4th at p. 656 ["we have held that absent a request, the trial court has no duty to specify the names or elements of the unadjudicated crimes when instructing the jury on factor (b) evidence"]; *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 591-592; *People v. Hardy, supra*, 2 Cal. 4th at pp. 205-207; *People v. Davenport* (1985) 41 Cal. 3d 247, 281.) As this Court stated in *People v. Cain* (1995) 10 Cal. 4th 1, 72:

> That rule is based in part on a recognition that, as a tactical matter, the defendant "may not want the penalty phase instructions overloaded with a series of lengthy instructions on the elements of alleged other crimes because he may fear that such instructions could lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die." [Citations.] Accordingly, appellant's claim fails.

E. Any Error Was Harmless

In any event, any error in admitting the evidence of appellant's involvement in the four prison fights, or appellant's attack on Weatherspoon, was harmless. Specifically, in light of the inconclusive nature of the challenged evidence and the weight of the aggravating circumstance in this case, including the charged offenses, there is no reasonable possibility any error affected the penalty verdict. (See *People v. Martinez* (2003) 31 Cal.4th 673, 694-695; cf. *People v. Pinholster* (1992) 1 Cal.4th 865, 962 [admission of irrelevant aggravating evidence rarely reversible error]; *People v. Wright* (1990) 52 Cal.3d 367, 426–427 [same]; see also *People v. Medina* (1995) 11 Cal.4th 694, 768; *People v. Danielson* (1992) 3 Cal. 4th 691, 722; *People v. Pinholster, supra*, 1 Cal. 4th at p. 963; *People v. Gallego* (1990) 52 Cal. 3d 115, 196) The error may be harmless when the evidence is trivial in comparison with the other properly admitted

evidence in aggravation. (See *People v. Burton* (1989) 48 Cal.3d 843, 863–864.)

Here, the evidence of appellant's involvement in the four prison fights, or appellant's attack on Weatherspoon, was of minor importance compared with the properly admitted evidence in aggravation, including the facts of the charged crime. The jury that heard the penalty phase evidence was the same jury during the guilt phase that heard weeks of testimony describing appellant's ruthless ambush and shooting of four security guards and his attempted murder of a rival gang member. (See 15RT 2894-2895.) During the prosecutor's opening statement of the penalty phase, he reminded the jury of the details of the murders of the two security officers, its true finding on the lying in wait special circumstance, and the attempted murder of Hunter. (15RT 2914, 2916-2917.)

Furthermore, appellant does not challenge the evidence, admitted during the penalty phase, of appellant's attack on Schull at the Hilltop Mobile Home Park on January 31, 1991. (AOB 208-218; 15RT 2994-3006.) Deputy Holland testified that after he arrived at the mobile home park after receiving a radio call about a fight, he entered a trailer where he saw Shull lying on the floor. (15RT 2994-3000.) Shull had a large puncture or laceration to the left side of his chest, and somebody near Schull was applying a cloth compress to Schull's injury. (15RT 3001.) Schull was having difficulty breathing, and the paramedics arrived and transported him to the hospital. (15RT 3001-3002.)

Deputy Holland advised appellant of his *Miranda* rights, and appellant replied he understood those rights and wished to speak with the deputy. (15RT 3001-3002.) Appellant told Deputy Holland that he was involved in a fight at the mobile home park, and he described the other person as a large, muscular, White male. (15RT 3002.) Deputy Holland opined Schull matched that description. (15RT 3002.) Deputy Holland

also recovered a black colored "K-Bar" style knife with a fixed blade, which the deputy opined was basically a bayonet knife commonly used by the Marine Corp. (15RT 3007.) As a result of this incident, appellant plead guilty to an assault with a deadly weapon. (15RT 3003-3006.)

In light of all this evidence demonstrating that appellant was extremely violent and capable of extreme acts of cruelty and aggression, it was not reasonably possible that the jurors could have drawn any more damaging inferences from the relatively brief testimony pertaining to appellant's involvement in the four prison fights and his attack on Weatherspoon. (See *People v. Wright, supra,* 52 Cal.3d at pp. 428-429; *People v. Brown*, (1988) 46 Cal.3d 432, 449.) The evidence showing the brutality of appellant's ambush and shooting of the four security guards, two of whom were killed instantly, and his attempted murder of Hunter, so completely overshadowed the challenged evidence that the latter could not possibly have enhanced the jurors' perception of him as a violent man.

Finally, any instructional error during the penalty phase was harmless. "[T]he evidence and argument properly focused the jury's attention on the moral assessment of defendant's actions[.] . . . [T]he instructions now suggested were not essential to the jury's consideration of this issue." (*People v. Cain*, *supra*, 10 Cal.4th at p. 73.) Here, as argued above, the evidence of appellant's violence and aggression was overwhelming. Accordingly, any error in not instructing the jury on the elements of assault during the penalty phase was harmless.

XII. THE TRIAL COURT DID NOT ERR BY NOT REPEATING CALJIC NO. 17.40 DURING THE PENALTY PHASE; THE PENALTY PHASE INSTRUCTIONS, VIEWED INDIVIDUALLY OR CUMULATIVELY, DID NOT AMOUNT TO AN IMPERMISSIBLE *ALLEN* INSTRUCTION

During the guilt phase, CALJIC No. 17.40 was read to the jury as follows:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.
>
> Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(14RT 2609-2610; 24CT 6292.)

Appellant argues the trial court violated his federal rights to due process and equal protection by failing to repeat this instruction during the penalty phase, and therefore precluded the possibility of jury deadlock. (AOB 219-230.) Appellant also makes the related claim that various instructions the trial court gave during the penalty phase, viewed cumulatively, were "reminiscent" of the "*Allen* charge,"[39] which appellant argues was "banned" in California since 1977. (AOB 220-221, 222-224.) Appellant's claims are forfeited, and meritless in any event. Moreover, any error was harmless.

A. Appellant's Claims Are Forfeited

As appellant concedes, he failed to object at trial to any of the issues raised here. (AOB 221.) Appellant's claim that the trial court erred by failing to repeat CALJIC No. 17.40 during the penalty phase is forfeited

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

because he never requested that the instruction be repeated. (See *People v. Ervine* (2009) 47 Cal.4th 745, 804 [claim that the trial court failed to orally reinstruct the jury with applicable instructions during the penalty phase forfeited because he failed to request such instructions at trial; *People v. Wilson* (2008) 43 Cal.4th 1, 30 [defendant's failure to request instructions at trial forfeited his claim on appeal]; *People v. Riggs* (2008) 44 Cal.4th 248, 292 [defendant's failure to request instruction at trial forfeited his claim on appeal]; *People v. Boyer* (2006) 38 Cal.4th 412, 465.)

Moreover, in support of his claim, appellant quotes from Special Instruction E, which states, "A jury may decide, even in the absence of evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (AOB 220; 16RT 3270; 24CT 6381.)[40] Appellant argues this instruction compounded the trial court's error. (AOB 220.) However, that instruction was requested by defense counsel. (24CT 6381; see also 15RT 2887-2888; 16RT 3243.) Appellant's reliance on that instruction is therefore barred by the doctrine of invited error. "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723, quoting from *People v. Wader* (1993) 5 Cal. 4th 610, 658.)

Appellant also did not object to any of the penalty phase instructions on the basis that they amounted, either individually or cumulatively, to a prohibited "*Allen* charge." The failure to object to the trial court's instructions forfeits the claim. (See *People v. Neufer* (1994) 30 Cal.App.4th

[40] In appellant's opening brief, he incorrectly cites to "24 CT 6385." (AOB 220.) This error was not mentioned in appellant's counsel's October 21, 2009, letter. This jury instruction can actually be found on page 6,381 of the twenty-fourth volume of the clerk's transcript.

244, 254 [claim that the trial court coerced the jury's verdict by having them resume deliberations after the court learned their last 11-to-1 vote favored guilt waived because defendant failed to object to the alleged coercion].)

B. Appellant's Claims Are Meritless

Even assuming, arguendo, appellant's claim that the trial court erred by failing to repeat CALJIC No. 17.40 during the penalty phase is not forfeited, it must be rejected as meritless. In *People v. Hawthorne* (1992) 4 Cal.4th 43, 74, this Court considered, and rejected, a similar argument. In *Hawthorne*, the defendant claimed the trial court's failure to repeat CALJIC No. 17.40 during the penalty phase created an unacceptable risk the jury would improperly make its penalty determination on a "majority rule" basis. (*Id.* at p. 74.) This Court rejected that claim, reasoning as follows:

> As previously explained, we do not regard such oversight as error, particularly since other instructions informed the panel "each juror is free to assign whatever moral or sympathetic value that the juror deems appropriate to each and all of the [aggravating and mitigating] factors on which you have been instructed." (CALJIC No. 8.84.1 (4th ed. 1984).) The court also told the jury, "To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.84.2 (4th ed. 1984).
>
> In light of these specific directions, the omission of the more general one raises none of the concerns expressed in [*Mills v. Maryland* (1988) 486 U.S. 367 [100 L.Ed.2d 384, 108 S.Ct. 1860]. In that case, the United States Supreme Court concluded that a reasonable jury might interpret

portions of Maryland's capital sentencing instructions and verdict form to preclude consideration of mitigating evidence unless they unanimously agreed the defendant had met his burden of proof, thereby requiring imposition of the death penalty even though at least one juror found the aggravating circumstances less than compelling when weighed against those in mitigation. (*Id.* at pp 377-380 [100 L.Ed.2d at pp. 395-397].) Moreover, "[a] jury following the instructions set out in the verdict form could be 'precluded from considering, as a mitigating factor, [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death,' [citation], if even a single juror adhered to the view that such a factor should not be so considered." (*Id.* at p. 380 [100 L.Ed.2d at p. 397].)

We find no reasonable likelihood that the jury in defendant's case similarly misinterpreted the instructions and failed to accord him the benefit of a fully individualized evaluation of the aggravating and mitigating evidence presented.

(*People v. Hawthorne*, *supra*, 4 Cal.4th at pp. 74-75.)

Similarly, here, the jurors were instructed during the penalty phase: "*You are free to* [] *assign whatever moral or sympathetic value you deem appropriate* to each and all of the various factors you are permitted to consider." (16RT 3273, emphasis added.) The jury was also instructed, "You may consider sympathy or pity for a defendant, if you feel it is appropriate to do so, in determining to impose the penalty of life in prison without the possibility of parole," and "If any of the evidence arouses sympathy, or compassion in you to such an extent as to persuade to that

death is not the appropriate punishment, you may act in response to these feelings of sympathy and compassion and impose life in prison without the possibility of parole." (16RT 3271; 24CT 6384.) The jury was also instructed, "Each of you may consider as a mitigating factor any lingering or residual doubt that you may have as to the guilt of the defendant" (16RT 3269; 24CT 6379), that "The law of California *does not require that you ever vote to impose the penalty of death*," and that "*it is entirely up to you* to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances in this case." (16RT 3271, emphasis added; 24CT 6385.) As such, instructions informing jurors that they were not to be swayed by the majority were unnecessary. (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [trial court has no duty to provide repetitive instructions].) There is no reasonable likelihood that the jury misinterpreted the instructions and failed to accord appellant the benefit of a fully individualized evaluation of the aggravating and mitigating evidence presented. Accordingly, appellant's claim fails.

Also meritless is appellant's related claim that various instructions the trial court gave during the penalty phase, viewed cumulatively, were "reminiscent" of the "*Allen* charge," which appellant argues was "banned" in California since 1977. (AOB 220-221.) This Court has held that a trial court must refrain from delivering a supplemental instruction to a deadlocked jury which operates to displace the independent judgment of the jury "'in favor of considerations of compromise and expediency'" or "exerts 'undue pressure upon the jury to reach a verdict.'" (*People v. Gainer* (1977) 19 Cal.3d 835, 850, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) Such instructions have typically been referred to as *Allen* instructions (see *Allen v. United States (1893)* 150 U.S. 551) or "dynamite" instructions as they are thought to "blast" a verdict out of a deadlocked jury. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 844.)

In *Gainer*, this Court explained the impermissible components of an *Allen* instruction, stating:

> it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.

(*People v. Gainer*, *supra*, 19 Cal.3d at p. 852.) This Court also identified a "third common feature of *Allen*-type instructions," to which a trial court must avoid mention, as a "reference to the expense and inconvenience of a retrial." (*Id.* at p. 852, fn. 16; see also *People v. Barraza* (1979) 23 Cal.3d 675, 681-685.)

Here, the record does not demonstrate, nor does appellant contend, that the jury was ever deadlocked. Furthermore, none of the penalty phase instructions given by the trial court, viewed individually or cumulatively, bore any of the prohibited features of the *Allen* instruction in *Gainer*. (See *People v. Gainer*, *supra*, 19 Cal.3d at p. 852.) The trial court's instructions did not encourage jurors to consider numerical division or preponderance of opinion, imply that the case would have to be retried if the jury failed to reach a verdict, or make reference to the expense or inconvenience of retrial. (*Ibid.*) As the trial court's instructions did not include any of the prohibited aspects of an *Allen* instruction, appellant's claim fails. (*Ibid.*; see *Lowenfield v. Phelps* (1988) 484 U.S. 231, 234-241 [108 S.Ct. 546, 98 L.Ed.2d 568]; *People v. Keenan* (1988) 46 Cal.3d 478, 527.) The difference between the *Allen* instruction prohibited in *Gainer*, and the instructions given here "is sufficiently obvious to show the fallacy of [appellant's] reliance" upon *Gainer*. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 239; see also *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1122.) Because

the trial court's penalty phase instructions did not violate this Court's prohibitions in *Gainer*, it also did not violate appellant's federal constitutional rights. (See *Early v. Packer* (2002) 537 U.S. 3, 7 [123 S.Ct. 362, 154 L.Ed.2d 263] [California law offers greater protection to a criminal defendant under a claim of a coerced verdict stemming from an *Allen* instruction than does the United States Constitution].)

C. Any Error Was Harmless

Even assuming, arguendo, that the trial court erred by not instructing the jury with CALJIC No. 17.40 during the penalty phase, the error must be deemed harmless. Appellant fails to show the jury might have used the evidence in an improper manner and, given the overwhelming evidence against him and the jury instructions as stated, *ante*, there was no reasonable possibility the omission of CALJIC No. 17.40 affected the jury's evaluation of the evidence. (See *People v. Williams* (1997) 16 Cal.4th 153, 268 [rejecting claim that aggravating factors listed in section 190.3 were unconstitutionally vague where, inter alia, defendant cited no evidence suggesting penalty jury considered impermissible matter, and thus defendant failed to demonstrate prejudice]; *People v. Hughes, supra*, 27 Cal.4th at p. 386 [failure to provide limiting instruction in penalty phase was harmless where there was no reasonable possibility that the error affected the penalty verdict].)

Furthermore, even assuming, arguendo, the trial court's penalty phase instructions could somehow be construed as amounting to a prohibited *Allen* instruction, any error was harmless. An erroneously coercive instruction to a deadlocked jury is subject to the *Watson* standard of harmless error. (*People v. Barraza* (1979) 23 Cal.3d 675, 684; *People v. Gainer, supra*, 19 Cal.3d at p. 855; *People v. Watson, supra,* 46 Cal.2d at p. 836.) As stated, *ante*, the jury that heard the penalty phase evidence was the same jury during the guilt phase that heard weeks of testimony describing appellant's

ruthless ambush and shooting of four security guards and his attempted murder of a rival gang member. (See Arg XI.E.) Respondent has already demonstrated that the evidence against appellant was overwhelming as to each and every count alleged against him. (See Statement of Facts; Args. I.D, IV.C, XI.E.) Given the strength of the evidence, it is not reasonably probable that, but for the trial court's penalty phase instructions, he would have received a more favorable result. This claim must therefore be rejected.

XIII. THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH CALJIC NO. 8.85

In defining the aggravating and mitigating factors to be weighed by the jury in selecting the appropriate penalty, the trial court instructed the jury with CALJIC No. 8.85, which stated, in part, as follows: "Sympathy for the family of the defendant is not a matter that you may consider in mitigation." (16RT 3267; 24CT 6375.) Appellant contends this portion of CALJIC No. 8.85 violated the federal Constitution and state law because it prohibited the sentencer from considering the impact his execution would have on his family. (AOB 231-259.) This claim is forfeited, and is meritless in any event. Furthermore, any error was harmless.

As appellant concedes, he did not object to the challenged portion of CALJIC No. 8.85. (AOB 232-233.) Indeed, during the discussion of the penalty phase jury instructions, the trial court read this portion of the instruction to defense counsel, and asked him whether he had any objection. (16RT 3238.) Defense counsel replied, "No." (16RT 3238.) Appellant's claim is barred by invited error, and is, in any event, forfeited by his failure to object. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 792 ["A party is estopped from asserting error on appeal that was induced by his own conduct. He may not lead a judge into substantial error and then complain of it"], overruled on other grounds in *Rhinehart v. Municipal*

Court (1984) 35 Cal.3d 772, 780; see *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 [challenge to CALCRIM No. 600 deemed forfeited]; *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483 [failure to object or to request clarifying instructions forfeits the issue on appeal].)

Even assuming this claim is not forfeited, it must be rejected as meritless. This Court's decision in *People v. Bemore* (2000) 22 Cal.4th 809, is on point. There, the jury was instructed, "you may not consider sympathy for the defendant's family, or friends, and you may not consider sympathy for the victim or his family." (*Id.* at p. 855.) The defendant claimed this instruction violated the federal Constitution and state law because, among other things, it prohibited the sentencer from considering, as a mitigating factor, any aspect of his character or record and any of the circumstances of the offense as a basis for a sentence less than death. (*Ibid.*) The defendant also argued the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. (*Ibid.*) This Court rejected the claim, reasoning as follows:

> We have rejected similar claims before, and do so again here. (E.g., *People v. Smithey, supra*, 20 Cal. 4th 936, 999-1000 [prosecutor did not commit misconduct in urging jury to ignore sympathy for defendant's family as a mitigating factor]; *People v. Ochoa, supra*, 19 Cal. 4th 353, 454-456 [trial court did not err in refusing to instruct jury to consider sympathy for defendant's family as a mitigating factor]; *People v. Sanders* (1995) 11 Cal. 4th 475, 544-546 [46 Cal. Rptr. 2d 751, 905 P.2d 420] [trial court did not err in excluding testimony about the grief and stigma a death sentence would inflict upon defendant's family].) The foregoing cases make clear that while so-called victim impact

> considerations show the specific harm caused by the defendant and his moral culpability for purposes of determining whether he deserves to die, the impact of a death sentence on the defendant's family and friends has no similar bearing on the individualized nature of the penalty decision. Sympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused. Because the challenged instruction was consistent with the foregoing principles, the trial court did not err in giving it at defendant's trial.

(*People v. Bemore*, *supra*, 22 Cal.4th at p. 856.)

More recently, this Court reaffirmed the principle that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation. (See *People v. Alexander*, 2010 Cal. LEXIS 6754 (Cal. July 15, 2010) [citing *People v. Ochoa* with approval for the proposition that "a capital jury cannot consider sympathy for a defendant's family in mitigation"]; *People v. Bennett* (2009) 45 Cal.4th 577, 601 [same]; *People v. Romero* (2009) 44 Cal.4th 386, 425 [same]; *People v. Harris* (2005) 37 Cal.4th 310, 355 [citing *People v. Benmore* with approval for the proposition that "sympathy for defendant's loved ones and their reaction to a death verdict do not relate to either the circumstances of the capital crime or the character and background of the accused"]. Appellant has not advanced any persuasive arguments requiring this Court to reject its prior holdings, and his claim fails for this reason alone.

Appellant, however, claims that the majority decision in *Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720] (*Payne*), supports his claim. Specifically, appellant claims that *Payne* "requires an even balance between the evidence available to the defendant

and that available to the state" during the sentencing phase of a capital trial. (AOB 240.) Appellant's substantial reliance on *Payne* in unavailing.

This Court has previously rejected the claim that *Payne* allows the jury to consider sympathy for defendant's family as mitigating evidence. For example, in *People v. Smithey* (1999) 20 Cal.4th 936, the defendant, relying on *Payne*, claimed that sympathy for his family was relevant and should be considered as mitigating evidence, and therefore the prosecutor committed misconduct by essentially directing the jury to ignore the testimony of defendant's siblings regarding the difficult circumstances of their childhood. (*Id.* at p. 1000.) This Court rejected that claim, holding that the prosecutor's argument properly directed the jury not to consider sympathy for defendant's family as mitigating evidence. (*Ibid.*) In so holding, this Court, citing to *People v. Ochoa*, reiterated the reasons why sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation. (*Ibid.*) For these reasons, appellant's claim fails.

In any event, for the same reasons argued, ante, any error in giving the challenging instruction was harmless, as there is no reasonable possibility that the penalty phase jury would have rendered a different verdict in the absence of the error. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1201; Statement of Facts; Args. I.D, IV.C, XI.E) This claim must therefore be rejected.

XIV. APPELLANT FAILS TO SHOW THAT CALJIC NO. 8.88 IS UNCONSTITUTIONAL

During the penalty phase, the court instructed the jury with CALJIC No. 8.88, which stated, in part (the challenged portions are italicized), "*You are free to assign whatever moral or sympathetic value* you deem appropriate to each and all of the various factors you are permitted to consider." (16RT 3273; 24CT 6389.) Appellant claims this portion of CALJIC No. 8.88 improperly equated "moral" with aggravating factors

while limiting "sympathy" to the mitigating evidence, and therefore denied his federal rights to due process, the right to a jury trial, and a reliable sentencing determination. (AOB 260-271.) This claim is forfeited and, in any event, is meritless. Furthermore, any error was harmless.

Appellant's claim is forfeited because he did not object to CALJIC No. 8.88. At the start of the penalty phase, the trial court told counsel that the prosecutor had submitted a set of proposed jury instructions, which included CALJIC No. 8.88. (15RT 2887.) The court stated it had asked both counsel to review and consider the instructions to determine whether they had any objections. (15RT 2887.) Defense counsel did not object. (See 15RT 2887-2894.) Later during the penalty phase, the court again addressed CALJIC No. 8.88 and asked defense counsel whether he wished to "reply" to the court's modifications. (16 RT 3242.) Defense counsel said, "No." (16RT 3242.) Appellant's claim is therefore barred by invited error, and is, in any event, forfeited by his failure to object. (*People v. Katzman*, *supra*, 258 Cal.App.2d at p. 792; see *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1236; *People v. Gonzalez*, *supra*, 99 Cal.App.4th at p. 483.)

To the extent appellant claims CALJIC No. 8.88 was confusing and should have been clarified, his claim is forfeited because he did not request clarifying or amplifying language of this standard instruction. (*People v. Catlin* (2001) 26 Cal.4th 81, 149, internal quotation marks omitted; *People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Andrews* (1989) 49 Cal. 3d 200, 218.)

Even assuming this claim is not forfeited, it must be rejected as meritless. The constitutionality of CALJIC No. 8.88 – including the "moral or sympathetic value" language at issue here – has been repeatedly affirmed by this Court. (*People v. Butler* (2009) 46 Cal.4th 847, 874 ["CALJIC No. 8.88 properly advised the jury of its responsibility to make an

individualized moral assessment of the appropriate penalty"]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1316 [CALJIC No. 8.88 properly describes the weighing process as "merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances," internal quotation marks omitted]; *People v. Page* (2008) 44 Cal. 4th 1, 56 [same]; *People v. Smith* (2005) 35 Cal.4th 334, 371 [CALJIC No. 8.88 satisfied the constitutional requirement to advise the jury of its sentencing discretion].) Appellant has not advanced any persuasive arguments requiring this Court to reject its prior holdings, and his claim fails for this reason alone.[41]

The thrust of appellant's challenge to the "moral or sympathetic value" language of CALJIC No. 8.88 lies in his argument that the "disjunctive use of 'or' informed the jurors that 'moral' did not overlap with 'sympathetic,'" and that, instead, "they were different and mutually exclusive alternatives." (AOB 262.) Appellant also claims that, in part by virtue of this Court's decision in *People v. Brown* (1985) 40 Cal.3d 512, and United States Supreme Court authority, the word "moral" is not exclusively associated with aggravating evidence. (AOB 263.) This claim must be rejected. The jury was not confused by CALJIC No. 8.88. Its meaning was plain: in determining the appropriate penalty, the jury was instructed, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." As Chief Justice Rehnquist has observed:

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[41] Indeed, had the court omitted CALJIC No. 8.88's admonition that jurors were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider," then appellant may have complained this omission constituted error. (See, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1065-1066.)

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

(*Boyde v. California* (1990) 494 U.S. 370, 380-381 [108 L. Ed. 2d 316, 329, 110 S. Ct. 1190].)

In any event, for the same reasons argued, *ante*, any error in giving the challenging instruction was harmless, as there is no reasonable possibility that the penalty phase jury would have rendered a different verdict in the absence of the error. (See *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1187; Statement of Facts; Args. I.D, IV.C, XI.E) Finally, given the plain meaning of the instruction, and in light of the other instructions given during the penalty phase, there is no reasonable likelihood that the jury misunderstood and misapplied CALJIC Nos. 2.02 and 8.83.1 in the manner appellant suggests. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 & fn. 4; *People v. Smithey*, *supra*, 20 Cal.4th at p. 963; *People v. Avena*, *supra*, 13 Cal. 4th at p. 41.) This claim must therefore be rejected.

XV. APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY ARE MERITLESS

A. Section 190.2 Is Not Overly Broad

Appellant contends that section 190.2 is unconstitutionally overbroad. (AOB 277-279.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

B. Section 190.3, Subdivision (a), Does Not Violate the State and Federal Constitutions

Appellant contends that section 190.3, subdivision (a), is invalid because it allows arbitrary and capricious imposition of death. (AOB 280-282.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

C. The Fact that Penalty Need Not Be Determined Beyond a Reasonable Doubt Did Not Violate the State and Federal Constitutions

Appellant contends that the beyond a reasonable doubt standard must be used during the penalty phase. (AOB 284-298.) Except for prior unadjudicated violent crimes, this Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

D. Written Findings Were Not Required

Appellant contends that jury should have been required to base their death sentence on written findings regarding aggravating factors. (AOB 301-303.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

E. Intercase Proportionality Was Not Required

Appellant contends that the absence of intercase proportionality renders the Death Penalty unconstitutional. (AOB 304-305.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

F. Admission of Evidence of Prior Unadjudicated Criminal Activity During the Penalty Phase Did Not Violate Appellant's Constitutional Rights

Appellant contends the use of unadjudicated criminal activity by the jury during the penalty phase violated his federal constitutional rights. (AOB 306.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Hartsch* (2010) 49 Cal.4th 472, 515.)

G. No Error In Not Instructing That Some Factors Were Solely Relevant as Mitigators

Appellant contends that the jury should have been told that statutory mitigating factors were relevant solely as potential mitigators. (AOB 307-310.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Williams* (2010) 49 Cal.4th 405, 471 ["The trial court did not err in failing to specify which statutory factors could be considered solely in mitigation"]; *People v. Taylor*, *supra*, 47 Cal.4th at p. 899; *People v. Catlin* (2001) 26 Cal.4th 81, 178.)

H. No Equal Protection Violation

Appellant contends that the California's Death Penalty Scheme provides inadequate procedural protections violating the Equal Protection Clause. (AOB 311-313.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

I. International Norms Do Not Render the Death Penalty Unconstitutional

Appellant contends that California fails to comply with international norms, thus rendering the death penalty unconstitutional. (AOB 314-317.) This Court has previously held to the contrary and appellant has not

advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Taylor*, *supra*, 47 Cal.4th at p. 900.)

XVI. THE CUMULATIVE EFFECT OF ANY ERRORS DID NOT PREJUDICE APPELLANT

Appellant next claims that the cumulative effect of the errors raised in his previous arguments was prejudicial and requires a reversal of his conviction. (AOB 318-320.) Respondent submits that the cumulative effect of any errors did not prejudice appellant.

To determine whether errors are sufficiently grave to mandate reversal, it is necessary to look at the cumulative effect of the errors. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.) Reversal is appropriate only where the appellant has demonstrated that he was prejudiced by such errors. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382; *People v. Mayfield* (1997) 14 Cal.4th 668, 790.)

As set forth in the preceding arguments all of appellant's claims of error are unmeritorious and/or any error was harmless. "Zero plus zero" still equals zero. (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1358; see also *Moore v. Reynolds* (10th Cir. 1998) 153 F.3d 1086, 1113 ["Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors"]; *Mullen v. Blackburn* (5th Cir. 1987) 808 F.2d 1143, 1147 ["Twenty times zero equals zero"].) Appellant has failed to demonstrate a cumulative effect from any errors. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 1017; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 435.)

Even assuming any or all of such claims are valid, however, appellant was not prejudiced by the cumulative effect of any errors. Any such errors, even when viewed collectively, were inconsequential in light of the strong evidence of appellant's guilt as to the offenses of which he was convicted

and the weak nature of his defenses. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1382.)

A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Even assuming, arguendo, any error(s) existed, appellant has at most shown that his """trial was not perfect – few are,"' especially few of the length and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) Appellant received a fair trial. His claim fails.

CONCLUSION

Accordingly, for the foregoing reasons, respondent respectfully requests the judgment of conviction and sentence of death be affirmed.

Dated: September 7, 2010 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 35,685 words.

Dated: September 7, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. David James Livingston**
No.: **S090499**

I declare:

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

On September 7, 2010, I served the attached **RESPONDENT'S BRIEF** copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

SEE ATTACHED SERVICE LIST

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 7, 2010, at Los Angeles, California.

Sandra Fan	Sandra Fan (signed)
Declarant	Signature

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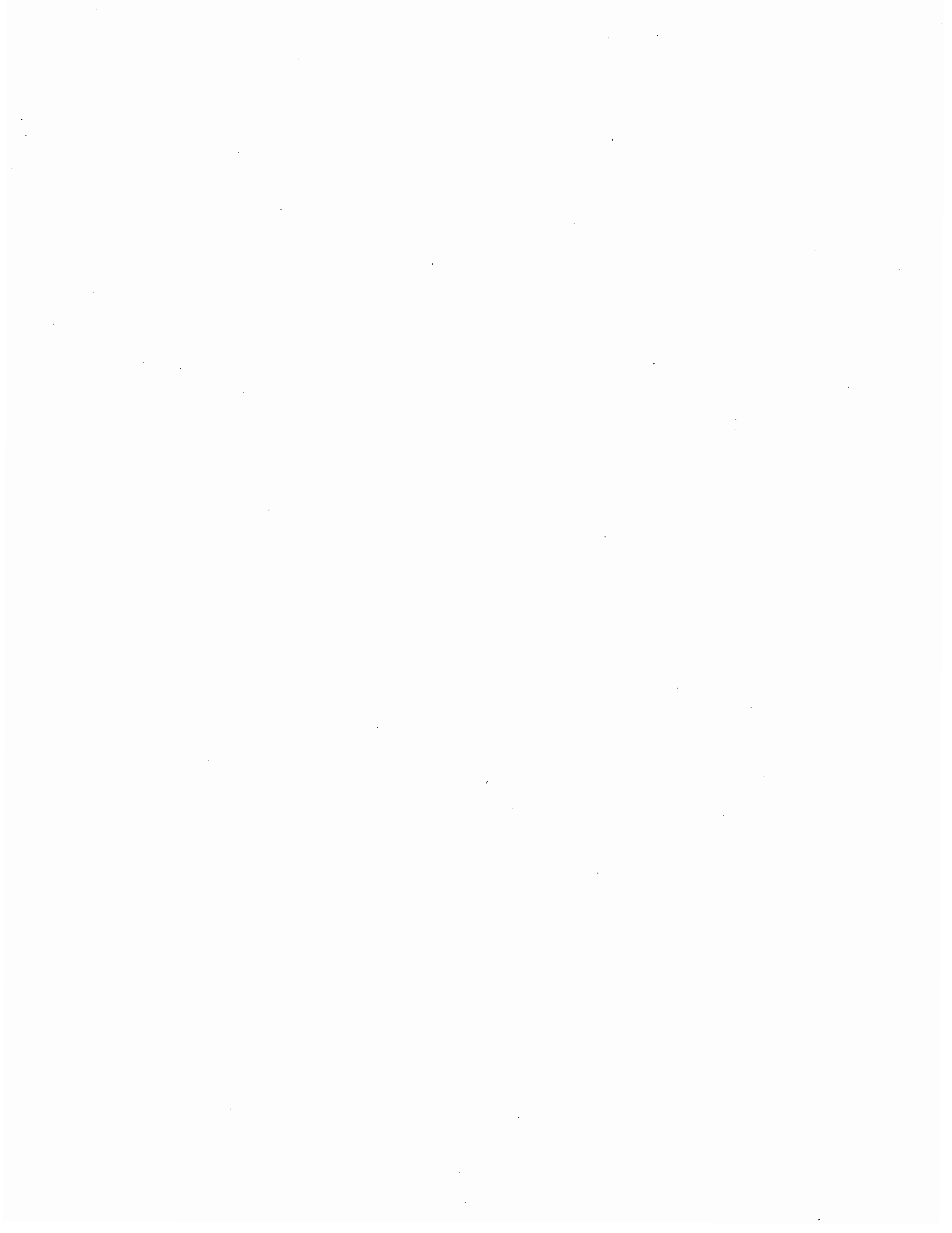

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No.: **S090499**

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