SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. RICHARD PENUNURI, Appellant.	CAPITAL CASE Case No. S095076

SUPREME COURT
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Los Angeles County Superior Court Case No. BA189633
The Honorable Robert W. Armstrong, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged with second degree robbery of Shawn Kreisher (Pen. Code,[1] § 211; count 1), second degree robbery of Randy Cordero (§ 211; count 2), assault with a firearm of Carlos Arias (§ 245, subd. (a)(2); count 3), first degree murder of Brian Molina (§ 187, subd. (a); count 4), first degree murder of Michael Murillo (§ 187, subd. (a); count 5), conspiracy to commit murder of Jaime Castillo (§ 182, subd. (a)(1); count 6), and first degree murder of Jaime Castillo (§ 187, subd. (a); count 7).[2] (1CT 1-9.)

As to counts 4 and 5, a special circumstance was alleged that appellant committed multiple murders. (§ 190.2, subd. (a)(3).) It was also alleged, as to count 7, that appellant killed a witness for the purpose of preventing his testimony. (§ 190.2, subd. (a)(10).) As to counts 1 to 5, it was alleged that appellant personally used a handgun. (§ 12022.5, subd. (a).) (1CT 1-9.)

Appellant pleaded not guilty and denied the allegations and special circumstances. (1CT 11-12.) Following a trial by jury, the jury found

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

[2] Codefendants Joseph Castro Jr., Arthur Bermudez, and Alfredo Tapia were charged with the first degree murder of Jaime Castillo (§ 187, subd. (a); count 7) and conspiracy to commit murder of Jaime Castillo (§ 182, subd. (a)(1); count 6). It was alleged that in connection with count 7, Castro was a principal in the offense and at least one principal intentionally and personally discharged and personally used a firearm, proximately causing great bodily injury within the meaning of sections 12022.7 and 12022.53, subdivision (d). The special circumstance of a murder of a witness for the purpose of preventing his testimony (§ 190.2, subd. (a)(10); count 7) was also alleged as to each of the codefendants. Bermudez was also charged with dissuading a witness from testifying (§ 136.1, subd. (c)(1); counts 8, 9, and 10). (1CT 1-9.)

appellant guilty on all the charges, found true the special circumstance alleged, and found true the other allegations, except the firearm allegation as to count 1.[3] (12CT 3452-3466; 25RT 3823-3834.) Following the penalty phase, the jury returned a verdict of death as to appellant only. (13CT 3541-3542; 30RT 4511-4513.)

Appellant filed a motion to set aside the verdicts and for a new trial. The trial court denied the motion and sentenced appellant to death. (13CT 3558-3610; 31RT 4527-4536.)

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

STATEMENT OF FACTS

In addition to two robberies and an assault with a firearm, this case involves the murders of two young men and the subsequent conspiracy and execution of a witness in order to prevent his testimony at trial.

A. Guilt Phase Evidence

1. Prosecution Case-in-Chief

a. The Ralphs Parking Lot Incident: Robbery of Shawn Kreisher (Count 1) and Randy Cordero (Count 2)

On October 23, 1997, at approximately 9:00 p.m., Randy Cordero was driving Shawn Kreisher and David Bellman to a Ralphs grocery store in the City of Whittier. On the way to the store, while stopped at a traffic light, Cordero and the others noticed a white Cadillac with four or five

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[3] Codefendants Castro and Bermudez were convicted as charged, except Bermudez was acquitted of the charges in counts 8, 9, and 10. Codefendant Tapia was acquitted of all charges. (25RT 3823-3834; 12CT 3452-3466.) None of the codedfendants are parties to this appeal. Alejandro Delaloza was tried separately and convicted of robbery (§ 211), assault with a deadly weapon (§ 245, subd. (a)(1)), conspiracy to commit murder (§182, subd. (a)(1)), and first degree murder (§ 187, subd. (a)). (IV CT Supp. 1170-1184.)

passengers "mad dogging" them. (8RT 877-880; 9RT 955.) Kreisher, who was seated in the back seat, put on a hockey mask and stared back at them. When the light turned green, the Cadillac continued straight through the light, while Cordero turned into the Ralphs grocery store parking lot. (8RT 880-883; 9RT 960.)

After parking and getting out of the car, Cordero noticed the Cadillac had driven through the back entrance of the grocery store parking lot. As they walked towards the store, the Cadillac stopped in front of Ralphs. Appellant was the driver. (9RT 958-959.) Once the car stopped, all the men inside the Cadillac ran towards them. The men asked, "Who's Jason? Where's Jason? Where the fuck is Jason?" (8RT 883-886; 9RT 968-69.) One of the men from the Cadillac swung at Bellman and the two began fighting. (8RT 887; 9RT 970.) During the fight, one of the men from the Cadillac pulled out a knife, but dropped it on the ground. (9RT 971-974; 14RT 1758.). While they were fighting, appellant, the biggest member of the group, who wore a large jacket and baggy pants, walked over to Kreisher and demanded money. Appellant also had his hand in his pocket as if he had a weapon. Thinking he had a gun, Kreisher gave him $40 out of his wallet. (8RT 862-864, 888-890; 9RT 977-978.) Appellant then walked towards Cordero and demanded money. (8RT 890.)

As Kreisher, Cordero, and Bellman walked back to their car, someone from the Cadillac yelled, "Get his keys, get his keys." (8RT 891; 9RT 980.) Cordero immediately ran to the trunk of his car and pulled out a baseball bat. As he pulled out the bat, a black duffel bag filled with clothes dropped to the ground. In response, someone from the Cadillac yelled, "Blast 'em." (8RT 892-893; 9RT 936-937, 980-981.) Appellant pulled out a gun and cocked it as if to shoot. Cordero yelled, "He's got a gun. Let's go. Let's run." (9RT 981-983.) Kreisher, Cordero, and Bellman ran away through the parking lot to an intersection where several police officers were

gathered at a traffic accident and told the officers what had happened. (9RT 984.) While running, Kreisher looked back and saw one of the men grab the black bag. (8RT 892-893.)

Two employees at the Ralphs market observed the fight and recorded the Cadillac's license plate number, which they gave to the police. (8RT 852-868; 9RT 921-929.)

Whittier Police Officer Robert Hanson was on duty the night of the incident at the Ralphs parking lot and was assisting with a nearby traffic accident. He was given the Cadillac's license plate number and broadcast both the number and vehicle description over the police radio. (9RT 1032-1037.) Whittier Police Officer Jeff Piper heard the broadcast and saw the Cadillac travelling on Whittier Boulevard. Although he pursued the Cadillac, Officer Piper eventually lost sight of the car. (9RT 1040-1050.)

The next day, on October 24, 1997, Officer Piper served a search warrant at the address registered to the Cadillac. The car was registered to Alejandro Delaloza, who was not present during the search. (9RT 1053-1055.) During the search, a small knife, a large amount of money, and ammunition for a 9-millimeter firearm were found. (9RT 1055-1059.) Officer Piper also found a set of keys, which fit the door and ignition of the Cadillac parked in the front of the house. (9RT 1060.) A subsequent search of the residence recovered clothing and other items from a trash can outside of the residence. (9RT 1065; 14RT 1752.)

The same day, Detective Mary Hanson admonished and showed Kreisher a photographic array, and he identified appellant as the man who robbed him. (8RT 895-898.) Initially, Kreisher selected someone else, but when he was shown a second lineup he immediately said, "No. It's not the other guy. It's this guy," and pointed at appellant's photograph. (9RT 1080-1089.) Kreisher signed the identification and wrote, "This is definitely the guy with the sports jacket on." (8RT 898.)

Detective Hanson admonished Cordero and showed him a photographic array. Cordero viewed it for 10-15 seconds and selected appellant as the person with the firearm. (9RT 1088.) Cordero also identified Delaloza as "possibl[y the man] with the knife" and stated he was fairly certain of his identification. (9RT 1089-1090.) Detectives also showed Cordero a few clothing items recovered from Delaloza's residence, which he recognized as his own and coming from the duffel bag. (9RT 986-987; 12RT 1585-1587.)

b. The Hornell Street Incident: Assault with a Firearm of Carlos Arias (Count 3)

On October 24, 1997, at approximately 12:30 a.m., a few hours after the Ralphs parking lot incident, Luke Bissonnette[4] and Carlos Arias walked from a local Taco Bell and arrived back at Luke's grandfather's house on Hornell Street in Whittier. (9RT 1128-1131; 14RT 1845.) While at Taco Bell, Arias had an argument with a man, whom he later identified as appellant. (14RT 1861-1862.)[5] Both Luke and Arias got into Luke's mother's car, which was parked in the driveway of his grandfather's house, and ate their food. (9RT 1131-1133.)

After Luke finished eating, he got out of the car to smoke a cigarette, while Arias stayed inside. Once outside, Luke noticed an approaching white Cadillac, which he recognized as Delaloza's car.[6] (9RT 1133-1134.) Delaloza was driving with appellant, Jaime Castillo, and an unidentified

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[4] In order to avoid confusion with another witness with the same last name, Luke Bissonnette is referred to as "Luke".

[5] The trial court found Arias to be unavailable and his testimony from Delaloza's trial was read to the jury. (14RT 1840-1841.)

[6] Luke knew several members of the Cole Street gang, including appellant (aka "Dozer"), Delaloza (aka "Hondo") and Castro (aka "Stalker"). (9RT 1111-1112.)

female. When the Cadillac parked, appellant got out and approached Luke. (9RT 1135-1136.) Appellant "claimed" his gang and told Luke to get in the Cadillac, which made Luke feel threatened. Luke looked at Arias and ran into the backyard of his grandfather's house. (9RT 1136-1138.)

Arias also ran for safety because the man had a gun and was "taking charge against us, so we ran." (14RT 1849, 1863.) Arias ran through several backyards and hid three houses down for about 20-30 minutes in someone's backyard. (14RT 1859.)

In the back of his grandfather's house, Luke knocked on the sliding door and pleaded with his mother, Roxanne Bissonnette, to let him in. He told her that "Dozer" (appellant's moniker) was out there and he was going to kill him. (9RT 1141-1142; 11RT 1346.) His mother refused to let him in because she was concerned for the safety of those in the house, so Luke hid behind some boxes in the backyard. Luke believed he was in danger because he had stopped hanging out with the Cole Street gang. (9RT 1143; 11RT 1346-1347.) While hiding, Luke could hear his mother and appellant talking. He also saw Arias jump over the fence. (10RT 1162-1164.) Roxanne described appellant, who was wearing dark clothes, dark shorts, and a dark mid-length jacket. (11RT 1340.) She told appellant "that he better not touch Luke." Delaloza and a third man were also present. Before leaving, appellant told Roxanne to let Arias know that they were looking for him. (11RT 1343-1345.) After Luke could not hear anyone talking, he confirmed that the Cadillac was gone. (10RT 1166.) He then ran a short distance to his house on Goodhue Street which was a few minutes away. (10RT 1167.)

c. The Goodhue Street Incident: Murders of Brian Molina (Count 4) and Michael Murillo (Count 5)

Luke arrived at the Goodhue residence and saw Arias already there in the backyard talking to Luke's sister Laura. (10RT 1167.) He also noticed Brian Molina and Michael Murillo sleeping on the patio. Murillo was sleeping sitting up on a two-seater iron rocking chair, and Molina was lying down on a couch. The two men were friends who did not have a place to sleep and would frequently come over to Luke's house. (10RT 1172-1175.) Molina was wearing a black sweatshirt, which covered his face, and Murillo was wearing a white sweatshirt. (10RT 1179.) After speaking with Laura and Arias for about 20 minutes about how appellant had pulled a gun on Arias, they all went inside to get some sleep. (10RT 1180-1182.) Luke remained worried about appellant, as both appellant and Delaloza knew where Luke lived. (10RT 1183.)

After lying down for about 20 minutes, everyone in the house heard several gunshots. According to Luke, there were about 10 shots in rapid succession.[7] (10RT 1188.) Luke went to the bedroom window, which faced the front of the house, and saw a person running across the street with a jacket and body size similar to appellant. Luke blurted out, "Dozer." (10RT 1191-1195; 11RT 1401.) The hood of the jacket was down and Luke saw what appeared to be the head of appellant. (10RT 1195.) Luke's brother Shane, who was staying in the house, tried to chase after the person, but Luke stopped him. (10RT 1197-1198.) Immediately after the shots,

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[7] A neighbor heard five to six gunshots. (10RT 1310.) Another neighbor heard about seven gunshots. (12RT 1415.) Another heard at least four gunshots. (13RT 1597.) Roxanne heard about five gunshots. (11RT 1352.)

neighbors saw two young Hispanic men get into a white Cadillac and drive away. (10RT 1310-1319; 12RT 1418; 13RT 1600, 1717.)

Luke, concerned about Murillo and Molina, ran to the backyard. Shane, Laura, and Arias followed. (10RT 1198.) Murillo was still sitting up the way he had been sleeping, but there were three bullet holes in his chest area. Luke tried to wake him, but Murillo was unresponsive. Luke lifted Murillo's sweatshirt and saw blood on his chest. (10RT 1199; 11RT 1403.) Molina was no longer on the couch where he had been sleeping. Luke heard someone moaning and saw Molina nearby on the ground. (10RT 1201.) Luke approached Molina and put his hand on Molina's back and saw blood. Molina had also been shot above the eye, but managed to tell Luke, "Go get him." (10RT 1202.)

Deputy Sheriff Gilbert Martinez responded to the shooting to find a young man sitting, slouched, with a gunshot wound to the neck. He was nonresponsive and appeared unconscious. (13RT 1607-1608.) Deputy Martinez also noticed a trail of blood and saw a second victim on the ground. This young man was in distress and moaned, "Help me." (13RT 1610, 1705.) Paramedics arrived shortly thereafter, treated both victims, who were taken to the hospital. (13RT 1611-1615.) However, both Murillo and Molina died from multiple gunshot wounds. (11RT 1371-1372, 1405.)

(1) The Police Investigation

On October 24, 1997, approximately at 6:00 p.m., several police officers arrived at appellant's home with an arrest warrant. His mother, Maria Penunuri, was home and spoke with the officers. The officers asked if appellant was home and entered with guns drawn while Maria waited outside. (12RT 1470-1474.) The officers found appellant in the bathroom and escorted him outside. (12RT 1474; 14RT 1764.) Officers also

recovered a large, black, hooded jacket from appellant's bedroom. (14RT 1766.)

Maria told officers that appellant had left around 9 p.m. the night before. (12RT 1480.) She also told officers that her father, Adolpho Pozo, had a gun in a drawer, but when she led officers to the bedroom the gun was not in the drawer. Maria told the officer that the gun was similar to the officer's service pistol, a 9-millimeter handgun, but possibly was silver in color. (12RT 1484-1485; 13RT 1727-1728.)

Detective Terrance McAllister of the Whittier Police Department interviewed appellant's uncle, Ruben Pozo, who lived with appellant. Ruben told Detective McAllister that appellant got home between 7 and 7:30 a.m the day of the shootings. However, at trial, Ruben testified that appellant was in bed when Ruben got up for work at 5:30 a.m. (12RT 1446-1454; 13RT 1725.)

Appellant's grandfather, Adolpho Pozo, also lived with appellant. At the time of the interview, Adolpho stated that he had used to have a gun, which he stored in a drawer in his bedroom. At trial, however, Adolpho testified that at the time of the incident the gun was no longer in his possession and, in any event, it did not work. (12RT 1463-1465.) He also testified that the gun was a revolver, and not a 9-millimeter handgun. (12RT 1467.)

According to Richard Catalani, a Los Angeles County Sheriff's Crime Lab firearms examiner, the eleven expended casings recovered from Goodhue location were fired from the same firearm, a 9-millimeter handgun. (13RT 1674-1678.) One live round found at the Goodhue location and rounds recovered from Delaloza's residence had been cycled or "worked through" the same firearm. (13RT 1685, 1692-1695.) A 9-millimeter handgun, with has a total capacity of 11 rounds, comes in chrome silver or steel blue. (13RT 1690.)

(2) The Recorded Jail Conversations between Appellant and Maria Penunuri

Maria Penunuri visited appellant several times while he was in custody in county jail. Several conversations were recorded, and two of them were played for the jury. (12RT 1551-1553, 1560-1563.)

On July 19, 1998, Maria visited appellant at county jail and told him that she had a "note" to show him. (12RT 1563; 12CT 3243.) Appellant promised the conversation was not recorded, but Maria did not want to take a chance. (12CT 3243.) After several unintelligible exchanges, appellant told Maria, "Alright then yeah. She came to see me though. Not you cause where she going to do go [*sic*] see you at 3 in the morning." (12CT 3244.) Maria then offered to go talk to "her" first. Appellant told Maria to let him know once she talked to her so he can "investigate" her, and told Maria that "[he] was messing around with so and so but I kept it a secret because I'll she say she married to [*sic*]." (12CT 3244.) After confirming that "she" had a boyfriend, Appellant stated, "Yeah we were a secret alright, yeah, yeah I know all that" and "Alright. Hell mama. Alright." (12CT 3245.) Maria then mentioned someone named "Pauline" and how she "helped somebody like that." (12CT 3245-3246.)

On August 15, 1998, Maria again visited appellant at county jail and told appellant that Delaloza better "find a way to clean this shit up." (12CT 1559; 12RT 3274.) Appellant told Maria that "all [Delaloza] has to do is get up there and say what he has to say and it'll make it easier on him and me." (12CT 3275.) He continued, "that the most – if he goes up there and says what he has to say I could be free and he'll get 10-15 years at the most. But he don't want to do that. Alright so now we're both waiting for a ride and we both get life." (12CT 3276.) Appellant told Maria that Delaloza should say that he was with appellant at the Ralphs incident, but was dropped off afterwards. (12CT 3276.) Appellant then referred to Castillo

as the person who was later with Delaloza that night, because Castillo ended up being killed. (12CT 3276-3277; 12RT 1558.) Appellant told Maria that Delaloza dropped him off around 3 a.m. the night of the incident. (12CT 3278.)

After listening to the taped conversations at trial, Maria denied making several of the statements on the tape and denied trying to fabricate an alibi for her son. (12RT 1563-1566.)

(3) The Tape Recorded Interview of Delaloza

On October 24, 1997, shortly after his arrest, Delaloza provided a taped statement to police. At trial, Delaloza refused to testify and his statement was played for the jury. (12RT 1425-1426, 1443-1444.)

Delaloza told police that he was driving his white Cadillac the day of the incident with appellant in the car. (CT Supp. IV 112.) It was about three or four in the morning when Delaloza drove appellant to Goodhue Street in Whittier to talk to an alleged girlfriend. Delaloza stayed in the car. (CT Supp. IV 114-115.) While waiting, Delaloza heard several, maybe five, gunshots. (CT Supp. IV 118, 137.) He then saw appellant running towards the car. Once in the car, appellant said, "Let's go." (CT Supp. IV 119.) Delaloza did not see a gun when appellant left the car and did not see a gun in appellant's hand when he came back. (CT Supp. IV 120.) Appellant was wearing a large jacket with a hood. (CT Supp. IV 120-121.) Delaloza thought appellant was getting shot at because he thought he heard shots as appellant came running out. However, the shots might have stopped the moment he saw appellant running towards the car. (CT Supp.

IV 113, 136-139.) Delaloza drove appellant home afterwards.[8] (CT Supp. IV 122.)

d. The Conspiracy to Murder and the Murder of Jaime Castillo (Counts 6 & 7)

In 1997, Jesus Marin lived in Whittier with his wife, Tracie McGuirk, and their children. Marin associated with Cole Street gang members. Although he was not part of the gang, gang members would come by his apartment several times a week, because Joe Castro, a known gang member, lived in Marin's detached garage. (14RT 1955-1962; 16RT 2321-2322.) Marin knew appellant (aka Dozer), codefendants Castro (aka Stalker) and Bermudez (aka Droopy), Castillo (aka Cartoon), and Tapia (aka Freddie or Rascal) as members of the Cole Street gang. (14RT 1959-1966; 15RT 1989-1991; 16RT 2329-2330.)

In December 1997, Marin allowed Castro to move into the detached garage. Gang members would come by the garage to "party" and Marin would frequently join them. (15RT 1993-2007.) During this time, Carmen Miranda also moved into the house and Castro developed a relationship with her. (15RT 2007-2009; 16RT 2316-2319; 17RT 2452-2454.)

Sometime in early December 1997, appellant started making collect telephone calls from county jail asking for Castro. Appellant would identify himself as "Richard" or "Dozer." Marin would accept the collect call, speak with appellant for a short time, and hand over the phone to Castro. (15RT 2010-2012; 16RT 2335-2337.) During this time period, appellant would call two to four times a week from jail. (15RT 2014.) On at least two occasions, Marin handed over the phone to Castro and stayed in the room. One of these times, Marin heard the end of the conversation,

[8] Delaloza also admitted that he drove appellant to Hornell Street to talk to Luke and to Luke's mother. (CT Supp. IV 126.)

where Castro said into the receiver, "It's fucked up. I'll handle it." During this conversation, Marin also heard the name "Cartoon," which was Castillo's gang moniker. Bermudez was also in the room and took part in the telephone conversation. (15RT 2020-2023.)

After the phone call, everyone went to the garage. Both Castro and Bermudez seemed agitated. (15RT 2023-2027.) Castro and Bermudez were walking around saying, "It's all fucked up" and "Cartoon's gonna rat," and they needed to shut him up. (15RT 2030-2031.) Appellant told Castro that "Castillo was going to rat him out, that he was going to testify against him, and to tell Castillo to shut, keep his mouth shut." (15RT 2031; 16RT 2340-2344.) McGuirk, who was also close by during some of the calls, also heard Castro and Bermudez tell appellant not to worry and that they would take care of it. (16RT 2344-2345.) On another occasion, Miranda also overheard the calls from appellant. She heard Castillo's name mentioned and Castro saying, "Oh. You want us to – you want us to get rid of him. Yeah. Me and Artie [Bermudez] will get rid of 'em." (17RT 2465-2468.)

A day or two after one of the phone calls, appellant called and told Marin that his "homeboy" was going to "rat him out," that Castillo was closer friends with the other guy in the case, and he was going to testify on his behalf. Appellant told Marin to tell Castillo not to testify, and to "tell him not to say shit, that that's wrong." Appellant also mentioned that there were a lot of witnesses and it was not looking good for him. (15RT 2033-2034.)

After these phone calls, on two to four occasions, Castro and Bermudez would talk about harming Castillo in front of Marin and Tapia. They would tell Tapia that he had to "do it or else they were going to fuck him up, too, so that Freddie had to shut up Jaime." They would "blast" Castillo. (15RT 2035-2040.) Tapia did not want to do it because Castillo

was his close friend. (15RT 2041, 2053.) Marin heard them discussing a plan to pick up Castillo, on a ruse to "party," and drive him to the mountains. On several occasions, Marin saw a gun displayed. Tapia asked Marin to come along, and Marin agreed to be the driver. (15RT 2042.)

On the evening of January 14, 1997, Marin, Castro, Bermudez, and Tapia, picked up Castillo and drove him to the San Gabriel Mountains in the City of Azusa. Once in the canyon, they stopped at a couple turnouts, but continued driving as other people were around. (15RT 2057-2070; 16RT 2347-2355; 17RT 2474-2479.) Near the top of the hill, Marin pulled to the right of an embankment and pulled around so the car was pointed towards the road. Everyone got out of the car and gathered to smoke some narcotics. (15RT 2072-2076.) While Castillo was smoking, Tapia approached Marin and told him that he was not going to shoot Castillo. Marin suggested that they leave, but Tapia told him that they could not because Castro had the gun. (15RT 2078-2081.) Marin walked back to the car with Bermudez to "roll a joint." Looking in the rearview mirror, Marin could see Tapia walking back to Castillo and Castro. Bermudez told Marin, "Joe's gonna do it. Joe's gonna do 'em both. Joe's gonna shoot 'em both." Marin replied, "Fuck that," and tried to get out of the car, but Bermudez told him to stay in the car with him. (15RT 2084-2086.)

As Castillo bent down, Marin saw Castro walk behind Castillo, stretch out his arm, and pull the trigger a single time. Castillo dropped to the ground. (15RT 2086-2087.) Both Castro and Tapia ran towards the car, got in, and quickly left. While Marin drove, Castro kept repeating, "I fucking did it. I fucking did it." (15RT 2089-2090.) Once back at the garage, Castro removed a gun, a chrome semi-automatic .22 or .25 caliber handgun, from his pocket and started cleaning it. Bermudez quickly left. Castro removed the clip and casing, and wrapped it in tissue paper and placed it in a hole in the garage. The gun was placed on top of the

refrigerator inside the home. (15RT 2094-2100; 16RT 2358.) After both Tapia and Castro were gone, Marin told his wife, McGuirk, about what happened that night. (15RT 2103-2107; 16RT 2358-2360.) A few hours after returning, Castro told Miranda that he had killed Castillo. (17RT 2496.)

Approximately two weeks after the shooting, Bermudez and a couple other men came to Marin's house and confronted him. They told him he was "talking" and yelled, "You're a fucking rat." (15RT 2109-2114; 16RT 2368-2371.) The men swung at Marin and continued to call him a rat. Marin eventually took out a handgun and the men ran away. (15RT 2119-2122.) After this incident, Bermudez called Marin's home and threatened his family by saying that "they better keep their mouths shut or else he was going to fuck them up." (15RT 2125; 16RT 2376-2377.)

On March 24, 1999, Marin spoke with Detective Joe Holmes about the incident. (15RT 2108.) Marin and his family were placed in the witness protection program at the time of the trial and no longer lived in California. (15RT 2127.)

(1) The Police Investigation

On January 15, 1998, Castillo's body was discovered by CalTrans workers in Azusa Canyon. (14RT 1772-1179.) The cause of death was a gunshot wound to the back of the head. (14RT 1922-1924.) A small-caliber bullet was recovered from Castillo's body and a live .22 caliber bullet was found near the body. (14RT 1929; 18RT 2677.)

Detective Joe Holmes of the Whittier Police Department investigated the murder of Castillo. He arrived on the scene the morning the body was found and was given a pager that belonged to Castillo. (18RT 2654-2667.) After leaving the scene, Detective Holmes drove to Castillo's residence and spoke with family members. (17RT 2619-2635; 18RT 2680-2681.)

Phone records associated with the pager showed that Castro paged Castillo several times the night of the murder and multiple times after the murder. According to Detective Holmes, the subsequent pages were sent to throw off suspicion that Castro was involved in the murder. (18RT 2683-2689.) In addition, Detective Holmes spoke with Marin, McGuirk, and Miranda several times. He also reviewed appellant's phone records from county jail. These records show that appellant made eight calls to Marin's apartment between January 5, 1998 and January 15, 1998. (18RT 2711-2721.) Several more calls were made from county jail to Marin's apartment between January 15, 1998, and January 25, 1998. (18RT 2723-2727.)

(2) Gang Expert Testimony

Detective Curt Levsen of the Whittier Police Department testified that he was familiar with the East Side Whittier Cole Street gang ("Cole Street gang"). He grew up in Whittier when the gang first started and described the gang's territory. (18RT 2775-2782.) While the detective explained that the Cole Street gang showed allegiance to the Mexican Mafia, he clarified that they do not belong to the Mexican Mafia.[9] (18RT 2784.) Appellant admitted to the detective that he was a Cole Street gang member, and told the detective his moniker was "Oso." (18RT 2785.) Castro, Tapia, and Bermudez were also members of the Cole Street gang. (18RT 2788-2789.)

2. Defense Evidence

Deborah Anderson, a criminalist at the Los Angeles County Sheriff's Department, took a sample from the inside and outside surfaces of

[9] The testimony about Mexican Mafia was stricken and the court told the jury that it should not be considered. (18RT 2784; 19RT 2816-2818.)

appellant's jacket sleeves and pockets in preparation for the gunshot residue test. (20RT 2897-2898.)

Debra Kowal, a criminalist at the Los Angeles County Department of Coroner, conducted the gunshot residue test on appellant's black jacket and found no particles of gunshot residue. (19RT 2828-2833.)

According to Lawrence Baggett, a firearms expert, the firing of multiple rounds of a 9-millimeter handgun should leave residue on the shooter. He would also expect residue to be present on a jacket worn by the shooter, and in the pocket if the gun was placed there after firing. (20RT 2921-2923.)

Dr. Kathy Pezdek, an eyewitness identification expert, testified regarding eyewitness testimony in general. In essence, expectations affect perceptions. Dr. Pezdek opined that according to the hypothetical mirroring Luke's testimony of the murders, it would be unlikely that he could correctly identify the suspect. (19RT 2847-2852.)

Police Officer Jeff Piper recovered a black sweatshirt, a dark blue jacket, and a black pair of jeans from the Delaloza residence. Officer Piper also recovered a black hooded jacket from appellant's residence. (19RT 2874-2878.)

3. Rebuttal Evidence

On May 21, 1999, wiretaps were placed on the home telephones of Marin, Castro, Bermudez, and Tapia. The jail phones of appellant and Delaloza were also wiretapped. That same day, search warrants were carried out at the residences of Castro, Bermudez, and Tapia in order to stimulate conversations on the telephone. (22RT 3307-3312.)

Several calls were recorded and played for the jury. (22RT 3312-3339.) In one of the calls Bermudez stated that the police were trying to "get him" for the murder of "Jaime," and that he did not "plan" to be around for "that." (CT Supp. IV 177-180.) In another call, Bermudez

blamed "Tony" for "ratting on" him. Bermudez again mentioned "Jaime" and "Cartoon." (CT Supp. IV 182-183.) In another call, Bermudez said that "they're trying to get me for murder," and mentioned "Tony" and how "we can do Tony right away." (CT Supp. IV 185, 189.) In other calls Bermudez discussed getting a gun and mentioned sleeping with his shoes on in case the police come to get him. (CT Supp. IV 192-193, 197.)

After both Tapia and Castro were arrested, Bermudez called a friend to pick him up and help him get out of his house. (CT Supp. IV 201.) Shortly thereafter, Bermudez's mother called him to tell him that the police were looking for him. Bermudez told her he was leaving town. (CT Supp. 202-203.) Bermudez was arrested shortly after this last call. (22RT 3353.)

B. Penalty Phase Evidence

1. Prosecution Evidence

a. Prior Bad Act

On May 29, 1997, R.J. Uzel, along with two friends, Debra Recio and Michael Orozco, went to a local McDonald's in Whittier to use the payphone in the front of the restaurant. (27RT 4022-4023, 4047-4048.) Both Uzel and Orozco got out to use the phone. While Uzel was on the phone, another vehicle pulled into the parking lot and an unidentified person passed by. (27RT 4022-4031, 4049.) After finishing the call, both Uzel and Orozco got back into the car. As Recio pulled out of her parking spot, bullets came through the window, hitting Uzel in the right leg and skimming his chest. Uzel did not see where the shots came from, or the person that fired them. Recio drove Uzel to the hospital. (27RT 4031-4033, 4050.)

At the time of the incident, Uzel told officers that a male Hispanic told him to get off the payphone. That same person walked up to the car and shot at him. At trial, however, Uzel denied making these statements.

He did admit knowing appellant from high school, but did not know him as Dozer. (27RT 4038-4044.)

Recio testified that the word on the street was that Dozer had shot Uzel. However, Recio previously testified that, "all I remember him it was Dozer, and he was trying – they were trying to figure out how they could get back at Cole Street for shooting at them, vice versa." (27RT 4054.)

Abraham van Rood was in his car at an intersection at the time the shooting occurred in front of the McDonald's. He heard the shots fired and saw the muzzle flashes of the gun. He also saw a young man holding a gun and shooting at the car. The man then ran into a car and drove away. Rood followed the car and wrote down the license plate number. He then flagged a police officer down and gave him the information. (27RT 4059-4063.)

Deputy Jeffrey Reiley ran the license plate, which matched the address for Bermudez. (27RT 4070-4072.) Deputy Ramon Lascano went to the address and spoke with Diana Hara, who was registered owner. She told Deputy Lascano that someone was using the car the night the shooting occurred. (27RT 4075.)

b. Victim Impact Testimony

(1) The Family of Brian Molina

John Molina, father of Brian Molina, testified that Brian was an intelligent young man who had a lot of dreams and hopes in life. His murder affected John and his family in a very big way. There is now a void in all of their lives. (26RT 3899-3904.)

Brandon Molina, Brian's younger brother, testified that it was "heartbreaking" to see his brother dead in the hospital. They were really close growing up and like best friends. His murder brought sadness and hurt to everyone in the family. (26RT 3907-3912.)

John David Molina, Brian's older brother, testified that Brian's death changed his life forever and changed everyone in the family. (26RT 3913-3916.)

Sandy Esparza, Brian's aunt, testified she was very close to Brian before his death. Brian was a very special person, who was very talented, but those talents did not get to be developed because of his sudden death. Brian was also very close to his mother, Keryn, who told Sandy that Brian was dead. His death changed her life forever. (26RT 3917-3920.)

Yolanda Peru, Brian's godmother, testified she misses Brian and cannot believe he is gone. He was a big part of the family, whose absence left a big hole in her life. (26RT 3921-3924.)

Keryn Serna, Brian's mother, testified that Brian brought joy to the family. Brian was still a child and never had any problems or enemies. Keryn described how, while at the hospital, she could only see the left side of Brian's face because he had been shot in the right eye. She still woke up every morning at 3:30 a.m. with the realization that her son is gone. It took her two years to get back to work. Her life and the life of her family have no joy and happiness. (26RT 3926-3934.)

(2) The Family of Michael Murillo

Sarah Teutimez, grandmother of Michael Murillo, testified that Michael was a very good and sensitive person. There was a void in her heart and the heart of everyone in the family. She missed him and it tore her heart to think of the way he died. (26RT 3942-3943.)

Maria Teutimez Enriquez, Michael's aunt, testified that Michael was a person with a big heart, who cared for his family and made them laugh. None of the victims had a choice in dying, but appellant had a choice in pulling the trigger and ordering the trigger to be pulled. (26RT 3944-3947.)

Jami Murillo, Michael's sister, testified that Michael was her friend. Michael had a natural gift to make people laugh. Everyone was devastated to find out Michael was murdered. (26RT 3948-3957.)

Janice Chamberlain, Michael's aunt, testified that his death had been devastating, but it had also brought the family together. (26RT 3958-3961.)

Heather Chamberlain, Michael's cousin, read a poem that was read at his funeral. (26RT 3963-3964.)

Esther Murillo, Michael's mother, testified that Michael was a wonderful son and it was very hard to live without him. A videotape tribute to Michael's life was played for the jury. (26RT 3966-3969.)

Sylvia Fuchs, Michael's godmother, testified that his death was something she will never forget, and it was a tremendous loss. She missed him tremendously and part of her was still angry. (27RT 3977-3978.)

Mike Murillo, Michael's father, testified that his death has caused a long grieving process and has had a huge impact on all of this family members. (27RT 3979-3981.)

(3) The Family of Jaime Castillo

Javier Castillo, Jaime's father, testified that his son's death affected his whole family, especially Jaime's younger brother. (27RT 3983-3985.)

Linda Castillo, Jaime's stepmother, testified that while Jaime was hanging out with a bad crowd, he tried to distance himself from that kind of environment. He wanted to change his life and was looking forward to spending time with his newborn sister. Jaime's death affected everyone and has resulted in a lot of anger in the family. (27RT 3986-3990.)

David Castillo, Jaime's brother, was angry when he first heard of his brother's murder. He still missed him a lot. (27RT 3991-3993.)

Luci Castillo, Jaime's aunt, testified that Jaime was a happy person, who always joked around with family members. She was going to miss his

personality the most. She blamed appellant as much as Castro for pulling the trigger that killed Jaime. (27RT 3994-3996.)

Maria Novela, Jaime's aunt, helped raise Jaime and knew him to be a very nice and happy person. She missed him very much. (27RT 3997-4001.)

Juan Castillo, Jaime's cousin, saw Jaime as a brother and a role model. Jaime told him to stay out of gangs and trouble. (27RT 4001-4004.)

2. Defense Evidence

a. Testimony of Dr. Cynthia Stout and Dr. James Rosenberg

Dr. Cynthia Stout, a forensic psychologist, testified that she examined appellant by conducting a clinical interview, gathering psychological history, and conducting psychological testing. The testing included objective tests to determine personality structure and functioning, an estimate of intelligence, and a projective test for underlying issues of a personality. The tests are interpreted together in conjunction with the clinical interview. (28RT 4211-4215.)

After the clinical interview, Dr. Stout opined that appellant was a nice, social, friendly individual with normal responses and reactions. However, the testing results supported a finding of excessive use of methamphetamine. Appellant had signs of paranoia, delusions, hallucinations, and slight signs of anti-social behavior. (28RT 4216-4219.) Although appellant had used methamphetamine for about a two-year period, by the time he was examined by Dr. Stout he had been in jail for about three years. (28RT 4219-4220.) According to Dr. Stout, appellant told her that he had used about two grams of methamphetamine, drank 24 beers and smoked marijuana the night of the incident. (28RT 4227-4228.)

Dr. James Rosenberg, a physician and psychiatrist, testified regarding the effects of methamphetamine on the body. In the short term, the drug can cause immediate psychological effects, including elevated mood, feeling grandiose and euphoric. Long-term effects include severe symptoms of depression and paranoia, and physical damage to the brain and personality changes affecting judgment, impulse control and ability to control aggression. (28RT 4254-4261.)

b. Character Witnesses

George Garcia, appellant's cousin and best friend, testified that they were raised together. Garcia was also a user of methamphetamine at one time and described how it changes a person. On occasion, they would do drugs together, but appellant used methamphetamine on a daily basis. According to Garcia, appellant was a beautiful person who always tried to make other people laugh. (28RT 4188-4197.)

Matthew Penunuri, appellant's younger brother, testified that appellant helped raise him and look out for him. He saw appellant get involved in the gang life, but appellant kept him away from it. Matthew saw appellant get into drugs, but appellant always told him to stay away from them. He does not believe that appellant killed anyone. (28RT 4203-4208.)

Lupe Villalba, appellant's great aunt, had known him all of her life. She thought of him as a loving son and close to his family. He was very loving and respectful while growing up. (28RT 4303-4307.)

Rita Garcia, appellant's aunt, testified that appellant took a wrong turn in life, but he was a loving person who tried to make people laugh. He had shown hope for redemption. (29RT 4378-4391.)

Frances Martinez, appellant's great grandmother, testified that appellant was a very nice boy who was compassionate. She wanted to see her grandson live. (29RT 4395-4398.)

Josi Penunuri, appellant's grandmother, testified that appellant was a wonderful boy and she loved him very much. (29RT 4400-4401.)

Maria Penunuri, appellant's mother, testified that appellant had been like a big brother to a lot of family members. He was always protective of them and showed them a lot of love. Maria did not believe that appellant committed the crimes and believed Delaloza pointed the finger at appellant. She felt bad for the families of the victims, but she did not want to lose her son. Maria admitted she tried to manufacture an alibi for appellant. (29RT 4404-4423.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT JUROR METCALF'S FEELINGS ABOUT THE DEATH PENALTY WOULD SUBSTANTIALLY IMPAIR HIS PERFORMANCE AS A JUROR

Appellant contends that the trial court erred when it excused Juror Steve Metcalf for cause because of Metcalf's feelings about the death penalty. (AOB 65-90.) Specifically, appellant argues that Metcalf stated he could fairly and impartially decide the case and return a verdict for either life or death.[10] (AOB 71-76.) Respondent disagrees and submits that

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[10] With respect to this and nearly every claim on appeal, appellant urges that the error or misconduct he is asserting violated his federal constitutional rights. In this claim and in others, he also alleges a violation of his state constitutional rights. In most instances, to the extent that appellant raised the issue in the trial court, appellant failed to make some or all of the constitutional challenges he now advances. As this Court stated in *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, and as is true in this case:

> In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind . . . that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different

(continued...)

substantial evidence supported the trial court's finding that Metcalf could not fairly consider the death penalty as sentencing option.

A. The Relevant Proceedings

Juror Metcalf completed a jury questionnaire. (8CT 2170-2184.) According to the questionnaire, Metcalf was a middle-aged Caucasian male, married with two children, and employed as a pastor at La Verne Heights Presbyterian Church. (8CT 2170-2171.) He attended Princeton Theology Seminary and graduated with a master's degree in divinity. (8CT 2172.)

In the questionnaire, Metcalf described his views on the death penalty as "in flux – <u>away</u> from its use as presently practiced in this country." (8CT 2181, emphasis in original.) He also described his prior view on the death penalty as "too naïve and non-reflective." As to his general feeling about the death penalty, Metcalf stated that he "finds [himself] having increasing difficulty in its use today. I have read and heard of too many who having received this ultimate penalty were found not to have received all possible consideration." (8CT 2181.) Metcalf also felt that it was used too often and randomly. When asked what type of cases justify the death penalty, Metcalf responded, "I'm not sure that any do. I know how I'd <u>feel</u>

(...continued)

from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred in the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none.

about serious, brutal crimes against people (esp. those I may love!), but what I feel isn't necessarily justification for what is right." (8CT 2181, emphasis in original.) Although Metcalf noted that he did not belong to a group that advocated the abolition of the death penalty, he did feel that the death penalty was applied disproportionately to certain individuals in society. (8CT 2181.)

Metcalf also stated that he was "not sure" if his religious views would affect his ability to render a verdict of death if the facts suggested that this was the appropriate penalty. (8CT 2182.) Importantly, Metcalf added that he did not feel that California should have the death penalty. Metcalf also noted that he "did not think" he would automatically in every case vote for a verdict of life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death. (8CT 2182.)

When choosing which was worse, death or life in prison without possibility of parole, Metcalf chose death, explaining, "this is the end – not opportunity for change or for justice to make for renewal of defendant or victim's family or friends." (8CT 2182.) Metcalf also stated that, in the last ten years, he was less likely in favor of the death penalty. (8CT 2182.) He also did not believe in the adage "eye for an eye." (8CT 2183.)

During voir dire, the trial court explained that questioning would take place, but cautioned that not all prospective jurors would be questioned. (7RT 718.) Initially, the following question was asked by the trial court:

> **Trial Court:** So, preliminarily, is there any one of the group of you who at this time feel that should the case get to that place, that you could under no circumstance; no matter what the evidence was; no matter what the factors in aggravation were, ever vote for a penalty of death?
>
> **Metcalf:** I should probably include myself, Your Honor.
>
> **Trial Court:** All right.

(7RT 721-722.) After additional questioning of other prospective jurors, including those who did not complete the questionnaire, the trial court granted the prosecution's challenge for cause as to Metcalf without objection from defense counsel. (7RT 752.)

B. The Applicable Law

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

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) To the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

When the juror has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison without the possibility of parole, the court's ruling will be upheld if supported by substantial evidence. (*People v. Pearson* (2012) 53 Cal.4th

306, 327-328.) If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. "The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses." (*People v. Clark* (2011) 52 Cal.4th 856, 895; see *People v. Garcia* (2011) 52 Cal.4th 706, 743; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [167 L.Ed.2d 1014, 127 S.Ct. 2218] ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].)

C. Substantial Evidence Supported the Trial Court's Exclusion of Metcalf

Here, although defense counsel's failure to object to Metcalf's removal did not forfeit this claim on appeal based on the applicable law at the time,[11] by failing to question Metcalf, defense counsel relinquished "the opportunity to rehabilitate [Metcalf] in an effort to show [he was] not excludable" (*People v. Mills* (2010) 48 Cal.4th 158, 188), and further suggests that "counsel concurred in the assessment that the juror was excusable" (*People v. Cleveland* (2004) 32 Cal.4th 704, 735).

In any event, substantial evidence supported the trial court's finding that Metcalf's views on the death penalty would "prevent or substantially impair" his performance. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

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[11] As this Court recently explained, defense must now "make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under [*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] and *Wainwright v. Witt*, *supra*, 469 U.S. 412] in order to preserve the issue for appeal." (*People v. McKinnon* (2011) 52 Cal.4th 610, 643.)

First, in his response to the jury questionnaire, Metcalf clearly expressed strong beliefs against the death penalty. He explained that his views on the death penalty were "in flux – away from its use as presently practiced in this country." (8CT 2181, emphasis in original.) Metcalf stated that he "finds [himself] having increasing difficulty in its use today. I have read and heard of too many who having received this ultimate penalty were found not to have received all possible consideration." (8CT 2181.) Metcalf also felt that it was used too often and randomly. When asked what type of cases justify the death penalty, Metcalf responded, "I'm not sure that any do. I know how I'd feel about serious, brutal crimes against people (esp. those I may love!), but what I feel isn't necessarily justification for what is right." (8CT 218, emphasis in original.) Although Metcalf noted that he did not belong to a group that advocated the abolition of the death penalty, he did feel that the death penalty was applied disproportionately to certain individuals in society. (8CT 2181.)

Moreover, Metcalf stated a bias in favor of imposing a sentence of life in prison without parole. In his responses to the jury questionnaire, Metcalf stated that he did not feel that California should have a death penalty. (8CT 2182.) However, Metcalf noted that he "did not think" he would automatically in every case vote for a verdict of life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death. (8CT 2182.)

While the responses to the questionnaire may have reflected conflicting views concerning the death penalty, Metcalf's response during voir dire established his inability to serve. During voir dire, Metcalf stated that he should probably be included in the group that "under no circumstance, no matter what the evidence was, not matter what the factors in aggravation were, ever to vote for a penalty of death." (7RT 721-722.) Unlike *People v. Riccardi* (2012) 54 Cal.4th 758, where the trial court erred

by failing to conduct voir dire with respect to one prospective juror with conflicting views on the death penalty, Metcalf's response at voir dire resolved any ambiguity involving Metcalf's ability to impose the death penalty.

In *People v. McKinzie* (2012) 54 Cal.4th 1302, 1335, substantial evidence supported the determination the juror's views on the death penalty would have prevented or substantially impaired the duties of a juror in a capital case. In that case, the juror confirmed during voir dire that he "probably" could not impose death penalty unless it was a narrow category of cases. (*People v. Carey* (2007) 41 Cal.4th 109, 125 [removal for cause of prospective juror supported by substantial evidence where she indicated she would not impose the death penalty for a single murder]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].) The same is true here. Metcalf went even further and confirmed that he "probably" should be included in the group that "under no circumstance, no matter what the evidence was, not matter what the factors in aggravation were, ever to vote for a penalty of death." (7RT 721-722.)

Importantly, Metcalf also did not clearly state that he was willing to temporarily set aside his beliefs in deference to the rule of law. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137] ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that

they are willing to temporarily set aside their own beliefs in deference to the rule of law"].) Specifically, Metcalf's response in the jury questionnaire indicated that he was "not sure" his religious convictions would affect his ability to render a verdict of death. (8CT 2182.)

Furthermore, when choosing which was worse, death or life in prison without possibility of parole, Metcalf chose death, explaining "this is the end – no opportunity for change or for justice to make for renewal of defendant or victim's family or friends." (8CT 2182.) Metcalf also stated that, in the last ten years, he was less likely in favor of the death penalty. (8CT 2182.) He also did not believe in the adage "eye for an eye." (8CT 2183.). All these statements also suggest that Metcalf was unable to consider imposing the death penalty as a reasonable possibility.

To the extent Metcalf gave conflicting answers, the trial court resolved those differences by granting the challenge, and its determination as to Metcalf's state of mind are binding. (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].)

Clearly, the trial court was best suited to reach a conclusion on Metcalf's actual state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890 [when a juror supplies conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve on a capital jury, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach

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

Thus, the trial court properly exercised its discretion when it granted the prosecution's motion dismissing Metcalf for cause. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

II. Substantial Evidence Supports the Finding That Appellant Was a Principal in the Murders of Molina and Murillo

Appellant contends the evidence was insufficient to find he was a principal in the murders of Molina and Murillo. (AOB 91-106.) Respondent disagrees; there was substantial evidence to support the conviction.

A. The Applicable Law[12]

In reviewing a challenge of the sufficiency of the evidence, this Court:

> review[s] the whole record to determine whether any rational trier of fact could have found the essential elements of the crime

[12] In an effort to avoid needless repetition, the applicable law for a sufficiency of the evidence claim will not be repeated in subsequent arguments.

> or special circumstances beyond a reasonable doubt. The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In applying this test, [this Court] review[s] the evidence in the light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [This Court] resolve[s] neither credibility issues nor evidentiary conflicts; [this Court] look[s] for substantial evidence.

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [internal citations and quotation marks omitted]; *People v. Maury* (2003) 30 Cal.4th 342, 403.)

Reversal for lack of substantial evidence is warranted only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord *People v. Zamudio, supra*, 43 Cal.4th at p. 357.) "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Although "mere speculation cannot support a conviction" (*People v. Marshall* (1997) 15 Cal.4th 1, 34), this Court "'must accept logical inferences that the jury might have drawn from the circumstantial evidence'" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357). "'[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*Id.* at pp. 357-358.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Id.* at p. 358.) The test used to determine the sufficiency of the

evidence for a special circumstance allegation is the same as that for the substantive crime. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.)

Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

B. There Was Substantial Evidence to Find Appellant Was a Principal in the Murders of Molina and Murillo

Murder may be of the first or second degree. While both require malice aforethought, first degree murder requires willful, deliberate premeditation. (Pen. Code, §§ 187, 189.) Appellant, however, simply contends there was insufficient evidence to establish a finding that he was a principal in the murders of Molina and Murillo. (AOB 91-106.) While he does not contend that there lacked substantial evidence to find premeditation and deliberation, the discussion below establishes sufficient evidence as to both.

"In the context of first degree murder, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, citing *People v. Mayfield*, *supra*, 14 Cal.4th at p. 767.) In *People v. Anderson* (1968) 70 Cal.2d 15, the Court "identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, these factors are not exclusive, nor are they invariably determinative. *Anderson* was simply intended to guide an appellate court's

assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Lee* (2011) 51 Cal.4th 620, 636, internal quotes and citations omitted.) The evidence here supports each of the identified factors.

Viewing the record as a whole and presuming the existence of every fact the trier of fact could reasonably deduce from the evidence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence that is reasonable, credible, and of solid value supports the jury's finding that appellant shot and killed Molina and Murillo.

Appellant's first concern is that Luke was unable to clearly identify him as the person who committed the double murders and ran away from the Goodhue house. He specifically asserts that Luke was under the influence of drugs that night and could not have been able to identify him as the shooter. (AOB 98.) However, the weight to give to any particular piece of evidence and the credibility of the witnesses at trial are matters for the jury to decide. (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493-494.) Here, the jury could give credence to Luke's description of appellant as he ran away from the Goodhue house, and discount the effect of any drugs on his ability to identify the shooter. (10RT 1191-1195; 11RT 1401.) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; see also *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372 ["single witness's uncorroborated testimony, unless physically impossible or inherently improbable, is sufficient to sustain a conviction," and "[p]urported weaknesses in identification testimony of a single eyewitness are to be evaluated by the jury"].)

In addition to Luke's testimony, there was other evidence linking appellant to the shooting. First, appellant was in the neighborhood at the time of the shootings. Walking out of Delaloza's white Cadillac, appellant was first identified in the Ralphs robbery wearing similar clothing throughout the night and carrying a firearm, which he brandished. (8RT 895-898; 9RT 1088.) He was later involved in the assault on Arias, where both Luke and Arias saw appellant walk out of Delaloza's white Cadillac and threaten Arias with the firearm. (9RT 1134; 14RT 1849, 1863.) Luke's mother, Roxanne Bissonnette, also had a confrontation with appellant the night of the Goodhue murders, and described appellant and his clothing. (11RT 1340.) Finally, immediately after hearing the shots that killed Molina and Murillo, neighbors saw two young Hispanic men get into a white Cadillac and drive away. (10RT 1310-1319; 12RT 1418; 13RT 1600.) All these witnesses who saw appellant that night described his clothing in similar ways, which matched the clothing found at appellant's home. (8RT 862-864, 888-898; 9RT 977-978; 10RT 1191-1195; 11RT 1401; 14RT 1766.) None of these identifications of appellant were either physically impossible nor inherently improbable.

Although appellant concedes that Delaloza's testimony places him at the scene of the shooting, he contends that Delaloza did not specifically identify him as the shooter. (AOB 103.) However, Delaloza's testimony established that he was either running away at the time of the shooting or running right after the shots were fired. (CT Supp. IV 113, 136-139.) Arguing otherwise, appellant cites flaws and inconsistencies in the eyewitness identifications. But such matters were simply questions for the jury to decide. (See *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1305-1307 [evidence was sufficient to support identification of defendant as perpetrator even though the witnesses saw the defendant briefly and inaccurately guessed his height, and one witness was unable to identify the

defendant at trial]; *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 530-531 [testimony of eyewitness sufficient by itself even though she identified the wrong person at the preliminary hearing and initially at trial]; see also *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate"].) Coupled with the corroborating evidence, the identifications were sufficient to support the verdict.

Next, appellant contends that testimony at trial showed that the 9-millimeter bullet recovered from Delaloza's residence and the 9-millimeter shell casings found at the scene had been cycled through the same firearm. (AOB 104-106.) While ammunition for a 9-millimeter firearm was found at Delaloza's residence (9RT 1055-1059; 13RT 1685, 1692-1695), the evidence also showed that appellant had access to his grandfather's 9-millimeter handgun, which was no longer in the drawer where it had been kept. (12RT 1484-1485; 13RT 1727-1728.) Although his grandfather later claimed that the weapon was a revolver and did not even work (12RT 1463-1467), again, it was for the jury to decide the witness' credibility. Here, the jury could have reasonably concluded that Delaloza had provided the ammunition or simply held it for appellant, as fellow gang members typically do. As a whole, substantial evidence supported the jury's conclusion that appellant had used the 9-millimeter firearm in the killings of Molina and Murillo.

Appellant also contends that no gunshot residue particles were found on the jacket in his residence. (AOB 104-106.) Yet, a finding of no gunshot residue particles is an inconclusive finding, because it is possible that (1) the person did not discharge a firearm, (2) the person discharged a firearm but had no gunshot residue particles deposited on the hands, or (3) the person discharged a firearm and particles were deposited, but they were removed (by taking a shower or by other means) by the time the sample

was collected. Even if the evidence could be reconciled with a different finding, that does not justify a conclusion that the jury's verdict was not supported by the evidence, nor does it warrant a reversal.

Although appellant does not dispute the evidence supports a finding of premeditation and planning, here, there is evidence from which the jury could infer planning. Appellant carried a gun that night and from that alone, the jury could infer his intent to kill. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [jury could infer defendant carried the fatal weapon into the home and thus reasonably infer he considered the possibility of homicide at the outset].) And the manner in which Molina and Murillo was killed is indicative of premeditation and deliberation. Both were killed while they were sleeping without an indication of any struggle. This Court has held that this execution-style manner of killing supports a finding of premeditation and deliberation when, as here, there is no indication of a struggle. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 495; *People v. Caw* (1988) 46 Cal.3d 1035, 1050; *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Appellant had a confrontation with Luke and Arias moments before heading to the Goodhue residence and mistakenly shooting Molina and Murillo. He had watched Luke and Arias run away in fear and had confronted Luke's mother in an effort to get both of them back outside. (11RT 1343-1345.) He had a gun and had a motive to shoot both Luke and Arias. Therefore, both premeditation and deliberation were established. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1289 ["Evidence that Cummings was in possession of a handgun and had threatened to kill any policeman who got in his way went to his motive for shooting Officer Verna and thus to the elements of intent, premeditation and deliberation"]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 757 ["A defendant's threat against the victim . . . is relevant to prove intent in a prosecution for

murder"]; *People v. Cartier* (1960) 54 Cal.2d 300, 311 ["Evidence tending to establish prior quarrels between a defendant and decedent and the making of threats by the former is properly admitted and is competent to show the motive and state of mind of the defendant"].) That appellant mistakenly shot Molina and Murillo in the dark does not alter this analysis.

Thus, substantial evidence supported the finding that appellant murdered both Molina and Murillo.

III. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR CONSPIRACY TO MURDER CASTILLO

Appellant contends there is insufficient evidence to sustain the conviction for conspiracy to murder Castillo. (AOB 107-120.) Specifically, appellant contends that the evidence presented was not reasonable, credible, and of solid value for the jury to find appellant had the specific intent to kill Castillo. (AOB 107.) However, as explained below, there was substantial evidence to establish the conviction for conspiracy to murder Castillo.

A conspiracy requires proof that the members "had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act" by one or more of them in furtherance of the conspiracy. (*People v. Jurado* (2006) 38 Cal.4th 72, 120; *People v. Morante* (1999) 20 Cal.4th 403, 416; § 182, subd. (a)(1).) Thus, in the context of a conspiracy to commit murder, the participants must agree to commit that offense and possess the specific intent to kill. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1228.)

However, direct evidence of an agreement is not necessary to support a conviction. "Circumstantial evidence often is the only means to prove conspiracy. [Citations.] There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The

evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy. [Citation.]" (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 ["The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy"].)

Although appellant contends there was insufficient evidence he and his fellow assailants came to an understanding to murder Castillo, here, the evidence shows appellant had a strong motive to kill Castillo – in fact, he was the only person with a motive to harm Castillo. Not only was Castillo present when the Molina and Murillo murders occurred, but he was also the only one not in custody at the time. Fearing that Castillo might testify against him, appellant made his point clear. (See Arg. IV, *post* [substantial evidence for aiding and abetting the murder of Castillo].) He instructed Castro and Bermudez to kill Castillo. Multiple witnesses testified regarding the numerous telephone calls made by appellant from jail to Marin's home. In these calls, appellant repeatedly voiced his concern that "it's all fucked up," that Castillo was going to "rat him out"; appellant told Castro and Bermudez to "tell Castillo to keep his mouth shut" and that they [Castro and Bermudez] needed to shut him up. (15RT 2031; 16RT 2340-2344.) Castro and Bermudez responded each time that they would "take care of it." At one point Castro even responded, "Oh. You want us to – you want us to get rid of him. Yeah. Me and Artie [Bermudez] will get rid of 'em." (17RT 2465-2468.) Recognizing that each of these statements were made, appellant simply claims that they are insufficient to provide the necessary intent to murder Castillo. (AOB 111-112.)

However, to prove a conspiracy, it is not necessary to establish the parties met and expressly agreed to commit the target offense. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.) Rather, it will suffice if the evidence directly or circumstantially shows "the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." (*Ibid.*) Factors bearing on this issue include "the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.) In addition to the facts set forth above, other evidence established the conspiracy and relationship. For example, knowing Marin's garage was a gang hangout, appellant repeatedly called the house to speak with his fellow gang members once Castro moved in. He then specifically asked fellow gang members for help in killing Castillo. After one of these phone calls with appellant, Castro and Bermudez approached Tapia, a close friend of Castillo, and demanded that he had to "do it or else they were going to fuck him up, too, so that Freddie had to shut up Jaime." They would "blast" Castillo. (15RT 2035-2040.)

As stated previously, circumstantial evidence may be sufficient to connect the defendant to a crime and prove his guilt beyond a reasonable doubt, and here, there was sufficient circumstantial evidence showing appellant's involvement in the planning of the murder of Castillo. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) As such, any inconsistencies in the accounts of Marin, McGuirk, and Miranda affecting the witnesses' credibility were solely for the jury to resolve.

Appellant also contends that statements against him of coconspirators cannot be considered until the prosecution has proven by "independence evidence" that "the person against whom it was offered was participating in the conspiracy before or during that time . . . ." (AOB 110.) He concedes that the scope and extent of a conspiracy and its objectives is a question of fact for the jury, but insists there was no evidence to support that he agreed or conspired to kill Castillo. (AOB 110-111.) The scope of the conspiracy was for the jury to decide, and a conspirator is liable for the acts of his coconspirators until he effectively withdraws from the conspiracy. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 701.) As previously discussed, not only did appellant demand that his cohorts get rid of Castillo, there was not the slightest evidence appellant communicated any rejection or repudiation of the continuing conspiracy.

Lastly, appellant contends that "the jury's failure to return a true finding on several of the overt acts alleged in connection with the charged conspiracy to commit murder" further demonstrates the insufficiency of the evidence. (AOB 119.) While appellant concedes that the finding of only one overt act is sufficient (see e.g, *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399), he nonetheless argues that the failure to find true on the first over act ("that on and between January 1, 1998 and January 14, 1998, Richard Penunuri, Joe Castro, Arthur Bermudez, and Alfredo Tapia, discussed a plan to murder Jaime Castillo. . .") is particularly telling. However, "[d]isagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

"Once the conspiracy is established it is not necessary to prove that each conspirator personally participated in each of several overt acts since

members of a conspiracy are bound by all acts of all members committed in furtherance of the conspiracy. [Citations.] The crime of conspiracy can be committed whether the conspirators fully comprehended its scope, whether they acted together or in separate groups, or whether they used the same or different means known or unknown to them." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312.) Therefore, the inability of the jury to decide one or more of the overt acts is simply irrelevant. Here, the jury found true five of the nine over acts: (1) that on and between 1, 1998 and January 14, 1998, Joe Castro and Arthur Bermudez ordered Alfredo Tapia to shoot Jaime Castillo; (2) that on or about January 14, 1998, a page was sent from the cellular telephone of Joe Castro to Jaime Castillo's pager; (3) that on or about January 14, 1998, Jesus Marin drove Joe Castro, Arthur Bermudez and Alfredo Tapia to the home of Jaime Castillo; (4) that on or about January 14, 1998, Jesus Marin drove Joe Castro, Arthur Bermudez, Alfredo Tapia and Jaime Castillo into the San Gabriel Mountains north of the city of Azusa; and (5) that on and between January 14, 1998, and January 15, 1998, Jesus Marin stopped his vehicle occupied by Joe Castro, Arthur Bermudez, Alfredo Tapia and Jaime Castillo off Highway 39 at Mile Marker 22.27. (12CT 3458.) As such, these findings were more than sufficient. For these reasons, appellant's contentions are without merit.

Therefore, the sufficient evidence, together with the reasonable inferences that may be drawn from that evidence, support the conclusion that appellant conspired kill Castillo.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTION OF AIDING AND ABETTING THE MURDER OF CASTILLO

Appellant contends that there was insufficient evidence to support a finding that he either perpetrated the killing of Castillo, aided and abetted the killing, or entered into a conspiratorial agreement to kill Castillo. (AOB 121-129.) Appellant argues that there was no credible, reliable evidence to

support an inference that he agreed with the codefendants to kill Castillo. (AOB 126.) He is mistaken as the evidence establishes the conviction.

"Both aiders and abettors and direct perpetrators are principals in the commission of a crime. Penal Code section 31 defines 'principals' as '[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . .' (See Pen. Code, § 971 ['all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals . . . .'].)" (*People v. Calhoun* (2007) 40 Cal.4th 398, 402.)

A person aids and abets the commission of a crime when he, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Jurado* (2006) 38 Cal.4th 72, 136.) Whether the defendant aided and abetted a crime is a question of fact. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

"To be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission. The test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1255, italics, internal quotations, and citations omitted.) In short, "one can be guilty as an accomplice (if he shares the goal of the perpetrator) without having actually assisted the commission of the offense, e.g., by 'instigating,' or 'advising' the perpetrator to commit it or by having been 'present for the purpose of its commission.' [Citations.]" (*Id.* at p. 1256.)

Here, there was overwhelming evidence from which the jury could conclude beyond a reasonable doubt that appellant instigated the

commission of the crime and shared the goal of the perpetrators. To be clear, it was appellant who had the strongest and sole motive to kill Castillo.

First, the evidence showed that Castillo was with appellant at the Ralphs robbery (12CT 3276; 18RT 2644-2650), at the assault of Arias (9RT 1135-1136), and the Goodhue double murders (12RT 1558.) Thus, appellant had ample personal motive for instigating or advising the killing of Castillo to prevent him from testifying against him. Indeed, appellant repeatedly voiced his fears that Castillo would "rat him out" and testify against him. (15RT 2030-2031; 16RT 2340-2344.)

Second, appellant alone encouraged Castro and Bermudez to kill Castillo to prevent him from testifying against him at trial. Starting in December 1997, appellant palced collect calls from county jail to Marin's house to speak with Castro and Bermudez. (15RT 2020-2023, 2030-2031; 16RT 2340-2344.) During these conversations, appellant instigated and took an active role in the commission of the crime by encouraging the killing of Castillo. Appellant told Castro and Bermudez to tell Castillo to keep his mouth shut and not to testify. Castro and Bermudez promised they would "handle" it. At one point Castro was heard saying, "Oh. You want us to – you want us to get rid of him. Yeah. Me and Artie [Bermudez] will get rid of 'em." (17RT 2465-2468.) Appellant never disagreed or disputed with Castro's characterization of what Castro believed appellant wanted them to do.

Third, the killing of Castillo was the result of appellant's plan to prevent Castillo from testifying at trial. Castro and Bermudez approached Tapia in order to get him to "blast" Castillo in order to shut him up. (15RT 2035-2040.) On the evening of January 14, 1997, Marin, Castro, Bermudez and Tapia drove Castillo to the San Gabriel Mountains and killed him with a single shot to the head.

Any claims by appellant that the testimony was not credible are without merit and, in any event, are beside the point. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Moreover, circumstantial evidence may be sufficient to connect the defendant to a crime and prove his guilt beyond a reasonable doubt, and in this case, we have sufficient circumstantial evidence showing appellant's involvement in the planning if the murder of Castillo. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) The circumstantial evidence clearly showed appellant's involvement in the murder of Castillo as an aider and abettor.

The evidence, together with the reasonable inferences that may be drawn from that evidence, support the conclusion that appellant not only knew about, but also shared the intent to kill Castillo, and that, by his acts or advice, affirmatively encouraged and facilitated those murders.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE FINDING OF WITNESS KILLING; THE JURY PROPERLY DETERMINED APPELLANT'S DEATH SENTENCE WAS BASED ON EVIDENCE THAT CONSTITUTED CIRCUMSTANCES OF THE CRIME

Appellant contends that there was insufficient evidence for the jury to find the witness-killing special circumstance in connection to the murder of Castillo. Specifically, appellant contends the evidence was insufficient to sustain a finding that appellant either directly perpetrated the killing, that he

aided and abetted the killing, or that he joined in a conspiracy to kill Castillo. (AOB 130-132.) He separately claims that given an invalid witness-killing special circumstance, his death sentence should be reversed because the jury considered evidence it would not have otherwise considered. (AOB 133-136.) Respondent disagrees. Assuming at least one of the special circumstance findings as valid, the jury properly determined appellant should receive the death penalty based on the evidence underlying all of the alleged special circumstances, because the evidence constituted the circumstances of the crime.

A. There Was Substantial Evidence To Support The Special Circumstance Finding Of Witness Killing

"[T]he elements of the witness-murder special circumstance are: (1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed. The murder victim need not have been an eyewitness to the crime for the special circumstance to apply, so long as the defendant believed he was exposed to criminal prosecution and intentionally killed the victim to prevent him or her from testifying in an anticipated criminal proceeding." (*People v. Clark* (2011) 52 Cal.4th 856, 952, internal citations and quotations omitted.)

Here, appellant simply contends that since the evidence was insufficient to prove he conspired or aided and abetted the murder of Castillo, there is no substantial evidence supporting the witness-killing special circumstance. (AOB 132.) Yet, as explained in the sections above (see Arg. III & IV, *ante*), the evidence showed appellant's involvement in the murder of Castillo. The evidence showed that Castillo was a witness to the Ralphs robbery, the assault of Arias, and the Goodhue double murders perpetrated by appellant. While appellant was in jail awaiting trial, the

evidence showed that appellant made several collect calls to Marin's house in order to speak with Castro and Bermudez. These telephone calls established that (1) appellant was afraid Castillo would "rat him out" and testify against him; and (2) appellant told Castro and Bermudez to get "rid of [Castillo]." From this evidence, the jury could reasonably infer that appellant believed that Castillo would likely be a witness in a criminal proceeding and that the others intentionally killed him at appellant's behest in order to prevent him from testifying about the double murders. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 656 ["A defendant also may be motivated by multiple purposes in killing the victim; the witness-killing special circumstance applies even when only one of those motives was to prevent the witness's testimony"].) Thus, substantial evidence also supported the true finding of the witness-killing special circumstance.

B. The Jury Properly Determined Appellant Should Receive The Death Penalty Based On Evidence That Constituted Circumstances Of The Crime

Appellant claims that given an invalid witness-killing special circumstance, his death sentence should be reversed because the jury considered evidence it would not have otherwise considered. (AOB 133-136.) However, a single valid special circumstance finding is sufficient to determine that the defendant is eligible for the death penalty. (Pen. Code, § 190.2, subd. (a); *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101.) In determining which penalty to impose upon appellant, the jury may consider, among other things, the circumstances of the crime of which appellant was convicted in the present proceeding and the existence of any special circumstances found to be true. (Pen. Code, § 190.3, subd. (a).) The invalidation of one aggravating circumstance does not automatically require reversal of the death penalty where there are other valid aggravating factors.

(*Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

In *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], the Supreme Court of the United States held that an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. (*Id.* at pp. 220-221.) Under that rule, the High Court found that the jury's consideration of invalidated burglary (Pen. Code, § 190.2, subd. (a)(17)(G)) and "heinous, atrocious and cruel" (Pen. Code, § 190.2, subd. (a)(14)) special circumstances in aggravation did not produce constitutional error because: (1) the jury properly considered valid robbery (Pen. Code, § 190.2, subd. (a)(17)(A)) and witness-killing (Pen. Code, § 190.2, subd. (a)(10)) special circumstances in aggravation, and (2) all the facts and circumstances admissible to establish the "heinous, atrocious, or cruel," and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors. (*Brown v. Sanders*, 546 U.S. at pp. 223-224.)

When, on appeal, the evidence is determined to be insufficient to support a special circumstance finding, the judgment of death need not be reversed if the defendant suffered no prejudice. Prejudice results if the special circumstance was necessary to make the defendant eligible for the death penalty. But even if another special circumstance made the defendant eligible for the death penalty, the defendant may still have suffered prejudice if the jury's penalty verdict was influenced by evidence pertaining to the invalid special circumstance that was not otherwise admissible. (See *Brown v. Sanders*, 546 U.S. at p. 220; *People v.*

Castaneda (2011) 51 Cal.4th 1292, 1354.) Neither form of prejudice exists here, since, as previously argued, the witness-killing special circumstance was valid and supported by substantial evidence.

Moreover, even if the the witness-killing special circumstance is somehow invalid, one other valid special circumstances remains: multiple murder. Thus, the alleged invalid special circumstance was not essential to make appellant eligible for the death penalty. Nor did the existence of the invalid special circumstance affect the balance of aggravating and mitigating circumstances that the jury considered at the penalty phase. The evidence pertaining to the alleged invalid witness-killing special circumstance—that is, the evidence that appellant conspired to murder Castillo—was properly considered by the jury as "circumstances of the crime." (§ 190.3, factor (a).) Because the invalid witness-killing special circumstance did not prejudice appellant, there was no prejudice.

VI. Substantial Evidence Supports the Special Circumstance Finding of Multiple Murder; the Jury Properly Determined Appellant's Death Sentence Based on Evidence That Constituted Circumstances of the Crime

Appellant contends that there was insufficient evidence for the jury to find the multiple-murder special circumstance in connection with the murders of Molina and Murillo. (AOB 137-139.) He separately claims that given an invalid multiple-murder special circumstance, his death sentence should be reversed because the jury considered evidence it would not have otherwise considered. (AOB 139-141.) Respondent disagrees. Assuming at least one of special circumstance findings were valid, the jury properly determined appellant should receive the death penalty based on the evidence underlying all of the alleged special circumstances, because the evidence constituted the circumstances of the crime.

The multiple-murder special circumstance applies where, as here, a defendant is convicted of more than one offense of murder in the first degree. (§ 190.2, subd. (a)(3).) Here, there was substantial evidence to support the finding that appellant committed the murders of Molina and Murillo. (See Arg. II, *ante.*) Because the evidence showed appellant was the principal in the Goodhue murders, the jury properly found the special circumstance finding of multiple murder.

As to appellant's claim that an invalid multiple-murder special circumstance finding renders his death sentence invalid, the discussion in the previous section applies to the argument there. (See Arg. V, *ante.*) Given that the other valid special circumstance (witness killing) remains, there would be no error in the jury finding appellant eligible for the death penalty. (*Brown v.* Sanders, 546 U.S. at pp. 223-224.) Similarly, evidence pertaining to the Goodhue murders would be properly considered by the jury as "circumstances of the crime" under § 190.3, subdivision (a). Therefore, there was no error in finding appellant eligible for the death penalty under any circumstances.

VII. Substantial Evidence Supports the Conviction of Assault with a Firearm of Arias

Appellant contends that his conviction for assault with a firearm is not supported by substantial evidence because he "merely" pointed a gun he claims was unloaded without making threats to discharge it. (AOB 142-151.) However, the jury could properly find that the gun was loaded.

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) In order for a defendant to be found guilty of assault with a firearm, the prosecution must prove beyond a reasonable doubt that defendant: (1) did an act with a firearm that by its nature would directly and probably result in the application of force to a person; (2) acted willfully in committing that act;

(3) was aware that the act would directly and probably result in the application of force to another; and (4) had the present ability to apply force with a firearm to a person. (*People v. Flores* (2007) 157 Cal.App.4th 216, 219-221.)

"A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3.) The threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury. (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)

However, even a mere intent to frighten is sufficient for assault so long as the other elements are proved. As our Supreme Court explained, it has long been established that "[h]olding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*People v. Colantuono* (1994) 7 Cal.4th 206, 219.)

In *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1460, the defendant "pointed a gun at [the victim], with his arm fully extended, and said, 'Don't.' The gun was about four feet from [the victim's] face." The court held that "[a]bsent any evidence that the gun was loaded, or that [the defendant] attempted or threatened to use it as a bludgeon, there was no proof of assault with a firearm." (*Id.* at p. 1463.)

More recently, in *People v. Chance* (2008) 44 Cal.4th 1164, 1168, this Court held that the present ability element of assault is satisfied when the defendant has attained the means and location to strike immediately. Accordingly, it found the evidence in that case sufficient to support a

conviction of assault with a firearm even though the defendant did not point the gun at the victim. (*Id.* at p. 1176.) Although attempting to shoot someone with an unloaded gun does not constitute an assault because there is no present ability to inflict injury (*People v. Valdez* (1985) 175 Cal.App.3d 103, 110-111), that a gun was loaded may reasonably be inferred from evidence that a gang member logically would not carry an unloaded gun in an area where gang violence was prevalent (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 12).

Whether a gun is loaded is a question of fact for the jury, and the prosecution can establish the matter by circumstantial evidence. (*People v. Orr* (1974) 43 Cal.App.3d 666, 672.) "'The acts and language used by an accused person while carrying a gun may constitute an admission by conduct that the gun is loaded.' [Citations.]" (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 13.; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 536, 541-542 [pointing gun at a police officer's head with finger on trigger demonstrated implied assertion the pellet gun was charged]; *People v. Mearse* (1949) 93 Cal.App.2d 834, 836-838 [defendant's command to victim to "halt or I'll shoot" indicated gun was loaded]; *People v. Montgomery* (1911) 15 Cal.App. 315, 317-318 [defendant enraged, returned with gun he leveled at victim and said, "I have got you now" sufficient to support finding the gun was loaded].)

Here, there was substantial evidence from where the jury could find the gun to be loaded. The jury heard evidence that appellant had used a the same loaded gun immediately before and after the assault on Arias. First, direct evidence established the gun was loaded, given that the jury found appellant used it to shoot Molina and Murillo after the assault on Arias. Second, the jury also heard evidence that appellant had pulled out a gun at the Ralphs parking lot robbery and "cocked" it as if to shoot immediately before the assault on Arias. (9RT 981-983, 1088.) Criminals "do not

usually arm themselves with unloaded guns when they go out to commit robberies." (*People v. Hall* (1927) 87 Cal.App. 634, 635-636.) Therefore, substantial evidence established that the gun used on the assault of Arias was loaded.

In addition, circumstantial evidence also established that the gun was loaded. First, appellant "claimed" his gang when he approached Luke and told him to "get in the car." (9RT 1136-1138; 10RT 1057.) The manner in which appellant spoke and acted towards Luke made him feel threatened. Arias later told Luke that appellant had pulled out a gun and pointed it to his head. According to Luke, Arias looked "like he almost got killed." (10RT 1181-1182.) Arias ran for safety because appellant had a gun and pointed it at Arias, who described appellant as "taking charge against us, so we ran." (10RT 1181-1182; 14RT 1849, 1851, 1863.) Arias also described appellant chasing him and yelling, "Hey, come here, come here." (14RT 1855.) Therefore, through his words and actions, appellant behaved as if the gun was loaded and operable and that he intended to fire it. Based on the totality of the circumstances, the logical inference is that appellant had a loaded gun and had the present ability to commit an assault on Arias. Therefore, there was substantial evidence to find appellant committed the assault with a firearm.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A MISTRIAL BASED ON A SINGLE AND BRIEF MENTION OF THE MEXICAN MAFIA; MOREOVER, THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ASKING THE FOLLOW-UP QUESTION THAT ELICITED THE TESTIMONY

Appellant contends that the trial court erred when it denied his motion for a mistrial based on the prosecutor's reference and elicitation of Mexican Mafia testimony from Detective Levsen. (AOB 152-172.) In a related claim, appellant contends that the prosecutor committed misconduct when

he deliberately elicited the Mexican Mafia testimony from Detective Levsen. (AOB 161-163.) The prosecutor, however, did not commit misconduct by asking a follow-up question that, without fault, elicited the Mexican Mafia testimony. In any event, any alleged prejudice from the brief testimony of Detective Levsen regarding the Mexican Mafia was cured by the judge's admonition and instruction to the jury. Therefore, the trial court did not abuse its discretion in denying appellant's motion to dismiss.

A. The Relevant Proceedings

Towards the end of trial, counsel for one of the co-defendants was concerned about the prosecutor's intent to present testimony of Detective Levsen, and raised the issue with the court. According to the prosecutor, Detective Levsen would testify regarding photographs which depicted the defendants "throwing" gangs signs. The prosecutor explained that the testimony was necessary to explain why appellant chose these co-defendants to kill Castillo. The court, however, was concerned that the jury already knew that each of the defendants were members of a street gang and any additional testimony about gang signs would be "overkill." (18RT 2750-2751.)

However, after additional discussion of possible testimony regarding gang affiliation and activities, and hearing counsels' concerns, the trial court agreed that Detective Levsen could testify about membership of the East Side Cole Gang and the significance of the gang signs. (18RT 2752-2760.)

Once on the stand, Detective Levsen of the Whittier Police Department testified that he was familiar with the East Side Whittier Cole Street gang ("Cole Street gang"). He grew up in Whittier when the gang first started and described the gang's territory. (18RT 2775-2782.) After the prosecutor asked about a specific photograph, Detective Levsen

observed that the individuals in the photograph were "throwing a X III, which is for the number 13." (18RT 2783.) The prosecutor followed up with a question about the significance of "displaying the Roman numeral of 13," which the detective explained that the Cole Street gang showed allegiance to the Mexican Mafia, but clarified that the Cole Street gang did not belong to the Mexican Mafia. (18RT 2784.) After counsel objected and moved for a mistrial, the testimony about the Mexican Mafia was stricken, and the court told the jury that it should not be considered. (18RT 2784; 19RT 2816-2818.)

After the detective's testimony, counsel again renewed his motion for a mistrial, but the trial court denied it. (18RT 2792-2795.) After the hearing, counsel filed a written motion for a mistrial based on prosecutorial misconduct for introducing the Mexican Mafia testimony. (19RT 2799-3306; 12CT 3299-3206.) After hearing argument, the trial court denied the motion, but struck all references to the Mexican Mafia. (19RT 3306-3307.) The court also instructed the jury as follows: "any reference to Mexican Mafia or dues paying or anything of that nature is stricken and is not to be regarded by you in any way." (19RT 2817; 12CT 3350.)

B. The Applicable Law

The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that 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 court or the jury.'" (*People v. Hill* (1998) 17 Cal.4th 800, 819, internal citations omitted.)

Prosecutors "are held to an elevated standard of conduct." (*People v. Hill, supra,* 17 Cal.4th at p. 819). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].)

Generally, it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting "to elicit inadmissible evidence in violation of a court ruling." (*People v. Silva* (2001) 25 Cal.4th 345, 373.) However, any prosecutorial misconduct in asking questions about matters encompassed by the trial court's exclusionary order is not a basis for reversal unless defendant suffered prejudice. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 184.) A prosecutor commits misconduct by asking a witness a question that implies a fact harmful to the defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. (See *People v. Earp* (1999) 20 Cal.4th 826, 859-860.) "For a prosecutor's question implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, *but for the improper question,* the jury would not have otherwise heard." (*Id.* at p. 860; see *People v. Warren* (1988) 45 Cal.3d 471, 481 [describing the gist of the misconduct as implying in the question "facts [the prosecutor] could not prove"].)

"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) A prosecutor has wide latitude during argument so long as the argument is a

fair comment on the evidence, which includes reasonable inferences or deductions drawn therefrom. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Moreover, the prosecutor's statements must be viewed in the context of the argument as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Prosecutorial misconduct that violates the federal Constitution is reversible error unless the reviewing court finds beyond a reasonable doubt the misconduct did not affect the verdict. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) Misconduct under state law mandates reversal if there is a reasonable probability a result more favorable to the defendant would have occurred absent the error. (Id. at p. 1375). "[O]nly misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm." (*Ibid.*)

With respect to mistrial motions, "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) Since "[a] motion for mistrial is directed to the sound discretion of the trial court" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985), on appeal, "we apply the deferential abuse of discretion standard [citation]." (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1068).

C. The Trial Court Did Not Abuse Its Discretion by Denying Appellant's Motion for a Mistrial; the Prosecutor Did Not Commit Misconduct Because He Did Not Deliberately Elicit the Mexican Mafia Testimony

Appellant contends the trial court abused its discretion by denying his motion for a mistrial. He claims "this is a case where the admonition failed to cure the prejudice suffered by being associated with the Mexican Mafia

because of the nature of the charges (conspiracy to commit murder and murder and the witness-killing special circumstance) and because after the admonition the trial jurors expressed concerned for their personal safely." (AOB 157.) In conjunction with this claim, appellant complains that the prosecutor committed misconduct by deliberately eliciting inadmissible testimony about the Mexican Mafia. (AOB 161.)

First, the objectionable question, occurring "after the trial was well along, permit[ted] the judge to view the situation from retrospective advantage." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 709.) Here, except for the detective briefly mentioning the Mexican Mafia, no other mention of it had occurred during trial. Absent further evidence, it is unlikely the jurors understood the implication of that line of questioning, or more importantly, that it resulted in any prejudice.

Second, any claim that the prosecutor committed misconduct by deliberately eliciting testimony about the Mexican Mafia is without merit because the prosecutor simply asked a proper follow-up question. Prosecutorial misconduct is more than simply asking questions to which the court sustains objections. (*People v. Hinton* (2006) 37 Cal.4th 839, 864.) "[T]he critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's errors rendered the trial fundamentally unfair or constituted deceptive or reprehensible methods to attempt to persuade the jury." (*Ibid.*) The prosecutor's question about "displaying the Roman numeral of 13" was proper because it was a follow-up question to the detective's testimony. The trial court had allowed Detective Levsen to testify about appellant's gang affiliation and the nature of the gang signs shown in photographs. (18RT 2759-2760.) A prosecutor simply is not guilty of misconduct when he questions a witness in accordance with the trial court's ruling. (*People v. Rich* (1988) 45 Cal.3d 1036, 1088.) Accordingly, in this instance, the question did not put before the jury

information that fell outside the evidence and that, without which, the jury would not have otherwise heard. Thus, there was no misconduct. (See *People v. Earp*, *supra*, 20 Cal.4th at pp. 859-860.) Even assuming the worst, the question certainly did not establish a pattern of egregious, intemperate behavior constituting misconduct violative of the federal Constitution. The same applies to whether the behavior involved the use of a deceptive method to try to persuade the jury (so as to constitute prosecutorial misconduct under state law).

D. Any Misconduct Did Not Prejudice Appellant

But in any case, even assuming the prosecutor's question was improper, there is not a reasonable probability a result more favorable to the defendant would have occurred absent the error. In addition to admonishing the jury to disregard the brief reference to the Mexican Mafia, the trial court also sustained defense objections to the prosecutor's question and struck the answers to that question. (19RT 2817; 12CT 3350.) The court also gave CALJIC No. 1.02 regarding stricken evidence. (12CT 3350.) Absent a contrary showing, it is presumed the jury followed the instructions. (*People v. Holloway* (2004) 33 Cal.4th 96, 151; *People v. Osband* (1996) 13 Cal.4th 622, 714.) Furthermore, the prosecutor's single question and the single answer were brief and must be considered in the context of the examination of the gang expert. (See *People v. Cox* (1999) 20 Cal.4th 936, 961; *People v. Smithey* (1999) 20 Cal.4th 936, 961.)

Therefore, the trial court did not abuse its discretion by giving the admonition and denying the motion for mistrial. Moreover, any alleged misconduct by the prosecutor regarding the brief testimony about the Mexican Mafia could not have affected the trial's outcome and was therefore harmless.

IX. THE TRIAL COURT PROPERLY ADMITTED SEVERAL OF ARIAS' STATEMENTS; HOWEVER, ADMISSION OF ARIAS' PRIOR TESTIMONY AND TAPED STATEMENTS TO THE POLICE APPEAR TO HAVE VIOLATED THE CONFRONTATION CLAUSE; IN ANY EVENT, ANY ERROR IN ADMITTING THOSE STATEMENTS WAS HARMLESS

Appellant contends the trial court erred in admitting several of Arias statements, including (1) those statements made to Luke, (2) the testimony of Arias in the prior trial of Delaloza, and (3) Arias' taped statements to the police. He claims the trial court's error violated his rights under state evidentiary rules and his rights to confrontation under state and federal law. (AOB 173-209.) First, appellant has waived any confrontation clause claim as to taped statements to the police for failure to object on those grounds. Second, the trial court properly admitted Arias' statements made to Luke. However, while it appears that the admission of the prior testimony and taped statements did violate the confrontation clause, any error was harmless beyond a reasonable doubt.

A. The Relevant Proceedings

Unable to locate the Arias, the trial court found him to be an unavailable witness and admitted several of his statements, including those made to Luke, those made in a prior proceeding, and those made in a taped statement to the police. (12RT 1532.)

First, the trial court allowed Luke to testify about Arias' demeanor and statements made by Arias after his confrontation with appellant. (10RT 1180-1182.) Appellant's counsel objected on hearsay grounds. The trial court ruled that the statements were made under the excited or spontaneous utterance exception to hearsay. (10RT 1181.) Specifically, Luke testified that Arias was "exhausted from running" and "[r]eally tired" and "[s]till breathing heavy" when he saw Arias at the Goodhue residence just before the murders. (10RT 1180.) Luke described Arias with "eyes [] big like he

almost got killed, he said, that night." (10RT 1181.) Lastly, Arias told Luke that appellant had "pulled out a gun and put it to his head." (10RT 1182.)

Second, the prosecutor sought to introduce Arias' prior testimony from Delaloza's trial. The trial court found Arias to be unavailable, but appellant's counsel objected on the ground that appellant was not involved in the Delaloza trial and thus did not have an opportunity to cross-examine Arias. (12RT 1532-1533.) The prosecutor explained that Arias was cross-examined regarding the same events that were at issue in the current case (the assault with a firearm on Arias and the double murders of Molina and Murillo), and that he recanted most of his prior statements to police, and thus had to be impeached with the taped statements he made to detectives. (12RT 1533-1534.) The prosecutor requested to read both the prior testimony and impeaching testimony Arias made to police. The trial court ruled that the statements would be admitted, because Arias was a party to all the events and activities in this case. (12RT 1535-1537.) Arias' testimony from Delaloza's trial was read to the jury. (14RT 1840-1907.) In that prior testimony, Arias recanted much of his original taped statement to the police, including the statement about appellant pointing the gun at him (14RT 1855-1856) and the statement about appellant's jacket (14RT 1870-1875, 1879-1880).

Third, the trial court played Arias' taped statements to the police for the jury over appellant's hearsay objection. A transcript of the recording was also given to the jury. (14RT 1910-1917.) In that statement, Arias told a detective that he fell asleep inside the car at Luke's grandfather's house. (CT Supp. IV 159.) When he awoke, he saw Luke outside the car smoking a cigarette. Arias said he saw "that guy . . . Dozer or whatever" chasing Luke. (CT Supp. IV 160.) Luke ran to the back of the house while Arias got out and was also chased by appellant, who pointed a gun at Arias. (CT

Supp. IV 162-165.) Arias got away and ran back to the Goodhue residence ten minutes later. (CT Supp. IV 169.) There, he saw Molina and Murillo asleep in the back of the house. (CT Supp. IV 160, 162, 170.) Arias told the detective that everybody went to sleep and heard gunshots maybe fifteen or twenty minutes later. (CT Supp. IV 170.) Arias looked out the window after the shots stopped and saw the shooter "with a black jacket an[d] a hood . . . same thing that I saw on him at . . . the other house." (CT Supp. IV 160-161, 166-167, 172.) Arias told the detective that he believed it was appellant whom he saw running away after the gunshots. (CT Supp. IV 172.)

B. Appellant's Confrontation Claim As to the Arias' Taped Statements Is Waived

First, appellant has waived any confrontation clause claim as to Arias' taped statements to the police. While appellant's counsel objected on hearsay grounds, he failed to make any objection on confrontation clause grounds.[13] (14RT 1910-1917.) A claimed violation of one's rights under

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[13] Appellant repeatedly asks this Court to excuse the default, arguing that his counsel provided ineffective assistance by failing to object at trial. The bar for proving ineffective assistance of counsel is high, clearing it "is never an easy task," *Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473, 176 L.Ed.2d 284], and appellant fails to do so here and subsequently in the brief.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish his counsel's performance was below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would be different. (*People v. Seaton* (2001) 26 Cal.4th 598, 696, citing *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) A reasonable and informed tactical decision made by defense counsel in light of the facts apparent at the time of trial and founded upon investigation and preparation, does not constitute ineffective assistance of counsel. (*In re Hall* (1981) 30 Cal.3d 408, 426.) Because it is not normally apparent from

(continued...)

the confrontation clauses of the state and federal Constitutions is forfeited on appeal if not raised in the trial court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Seijas* (2005) 36 Cal.4th 291, 301.) Therefore, this issue is not preserve for appeal.

C. The Trial Court Properly Admitted Arias' Statements to Luke as "Spontaneous" Under Evidence Code Section 1240

Appellant also contends that Arias' statements to Luke were improperly admitted. He specifically asserts that they were not properly offered for any nonhearsay purpose, claiming they were not spontaneous. (AOB 192-196.) Evidence Code section 1240 provides an exception to the hearsay rule for the statement of a declarant which: "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." This Court reviews the admission of evidence under Evidence Code section 1240 for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

To qualify as "spontaneous" under Evidence Code section 1240, a statement must have been made "before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." (*People v. Thomas* (2011) 51 Cal.4th 449, 495, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 318.) "Neither lapse of time between the event and the

(...continued)
the record why a defense counsel has acted or failed to act the way he or she did, a claim of ineffective assistance of counsel are more appropriately litigated in a petition for writ of habeas corpus, where the reasons for defense counsel's actions or omissions can be explored. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 697; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Brown* (2003) 31 Cal.4th 518, 541, citation and internal quotation marks omitted.)

For example, in *Brown*, although the statement was made after a two-and-a-half-hour delay and in response to a question, the statement was properly admitted as spontaneous because the declarant was still "labor[ing] mightily under the emotional influence of the disturbing events he perceived, so much so that he could not stop his body from shaking nor stem the flow of tears." (*People v. Brown, supra,* 31 Cal.4th at p. 541.) The disturbing event in *Brown* was that the declarant saw, or possibly merely heard, the defendant shoot a single time someone the declarant did not know. (*Id.* at pp. 524-526, 540-542; see also *People v. Roybal* (1998) 19 Cal.4th 481, 515-516 [call to 911 made "within minutes" of finding dead wife, and statement made to police "on the heels of the 911 call" properly admitted].)

Here, Arias' statements were made minutes after the confrontation with appellant when Arias ran away to the Goodhue street residence. (10RT 1167.) Not much time could have elapsed since Luke described Arias as "exhausted from running" and "[r]eally tired" and "[s]till breathing heavy" when he saw Arias at the Goodhue residence just before the murders. (10RT 1180.) Moreover, Luke described Arias with "eyes [] big like he almost got killed, he said, that night." (10RT 1181.) Under these circumstances, the court did not abuse its discretion in finding that Arias' statements were made under the stress of excitement. (See *People v. Poggi* (1988) 45 Cal.3d 306, 318-320 [statement made 30 minutes after stabbing and in response to police questioning properly admitted]; *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234-1235 [statement made two days after

attack properly admitted].) Therefore, given their spontaneity, the trial court properly admitted Arias' statements under section 1240.

D. Admission of Arias' Prior Testimony and Taped Statements Violated the Confrontation Clause But Was Harmless Beyond a Reasonable Doubt

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that the confrontation clause of the Sixth Amendment of the federal Constitution prohibits "testimonial hearsay" from being admitted into evidence against a defendant in a criminal trial unless (1) the declarant is unavailable as a witness and the defendant has had a prior opportunity to cross-examine him or her, or (2) the declarant appears for cross-examination at trial. (*Crawford*, at pp. 53, 59 & fn. 9.) *Crawford* was retroactively applied to cases that were pending on direct appeal when it was decided, because it repudiated *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597] and announced a new rule on the effect of the confrontation clause on hearsay statements. (See, e.g., *Schriro v. Summerlin* (2004) 542 U.S. 348, 351 [124 S.Ct. 2519, 159 L.Ed.2d 442]; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649]; *People v. Cage* (2007) 40 Cal.4th 965, 970; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; cf. *Whorton v. Bockting* (2007) 549 U.S. 406, 409, 421 [127 S.Ct. 1173, 167 L.Ed.2d 1] [*Crawford* not retroactive to cases on collateral review].)

Additional elaboration on the term "testimonial" was provided in *Davis v. Washington* (2006) 547 U.S. 813, 823 [126 S.Ct. 2266, 165 L.Ed.2d 224]. The high court explained: "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." (*Id.* at p. 822.) An exception to the confrontation requirement, however, exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.)

Here, Arias' prior testimony and taped statements to the police appear to be clearly testimonial and were not subject to cross-examination by appellant. Therefore, the admission of those statements appears to be a violation of his Sixth Amendment rights. However, confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (federal constitutional error requires proof of harmlessness beyond a reasonable doubt). (See *People v. Jennings* (2010) 50 Cal.4th 616, 652 [*Crawford* error does not require reversal of a conviction if it was harmless beyond a reasonable doubt]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] [otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was harmless beyond a reasonable doubt]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 239 [same].) Thus, to avoid reversal of appellant's convictions, it is the People's burden to establish beyond a reasonable doubt that the error in admitting Delaloza's testimony and statements did not contribute to the verdicts (*People v. Mower* (2002) 28 Cal.4th 457, 484) or that a rational jury would have found appellant guilty absent the error. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.)

Whether confrontation clause error is harmless beyond reasonable doubt depends upon a number of factors, including the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted and the overall strength of the prosecution's case. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674]; see also *People v. Villatoro* (2011) 194 Cal.App.4th 241, 262 [where testimony in violation of confrontation clause was cumulative, error harmless beyond reasonable doubt].)

Here, any error was harmless beyond a reasonable doubt for the following reasons. First, as to the assault with a firearm, Arias' testimony and taped statements were cumulative because any information gleaned from them were already known from what he told Luke right after running away from appellant, which was properly admitted at trial as an excited or spontaneous statement. (See Arg. IX.C, *ante*.) Specifically, Arias told Luke that appellant had "pulled out a gun and put it to his head." (10RT 1182.) Luke described Arias with "eyes [] big like he almost got killed . . ." (10RT 1181.) Under these circumstances, any reliance on the taped statements and prior testimony was unnecessary for the jury to convict appellant.

Second, as to the murders of Molina and Murillo, Arias' account was also cumulative. Both Luke and Arias saw appellant just before the murders. Luke saw Delaloza's Cadillac approach and saw appellant exit the car. (9RT 1133-1134.) Both ran away because they were scared, and Arias actually saw appellant with a gun in his hand. (9RT 1135-1138; 14RT 1849.) However, Luke's testimony detailed all these events in the same detail that Arias' prior testimony and taped testimony had done. Next, Roxanne, Luke's mother, also remembered speaking with appellant when he was looking for Luke and Arias right before the murders. She

described the confrontation and what he had been wearing. (11RT 1343-1345.) Lastly, right after shots were fired, Luke remembered seeing what appeared to be the head of appellant in similar clothing running away from the house. (19RT 1195.) Immediately after the shots, neighbors also saw two young Hispanic men get into a white Cadillac and drive away. (10RT 1310-1319; 12RT 1418; 13RT 1600, 1717.) Any identification of appellant by Arias was not necessary to link appellant to the crimes. In sum, Arias' account to the police and prior testimony merely reaffirmed that appellant was in the neighborhood when shots were fired.

Finally, the overall strength of the prosecution's case, even apart from Arias' statements to the police, was overwhelming. (See Arg. II-VII, *ante.*) Therefore, any error was harmless beyond a reasonable doubt.

E. Any Hearsay Violation in Introducing Arias' Statements Was Also Harmless

Lastly, appellant contends that the prior testimony and taped statements were improperly offered for a nonhearsay purpose. (AOB 189-192.) It appears that appellant is correct. When a trial court erroneously relies on one hearsay exception to admit evidence that otherwise would have been admissible under a different exception, it cannot be said that the evidence was admitted in error. (*People v. Fair* (1988) 203 Cal.App.3d 1303, 1309, overruled on another ground in *People v. Brown* (1994) 8 Cal.4th 746, 759.) However, as set for below, it does not appear that Arias' prior statements would have been admissible under another exception. In any event, the admission was harmless.

Under Evidence Code section 1235, a witness's prior inconsistent statement may be admitted at trial, but only if "offered in compliance with [Evidence Code] Section 770." (Evid. Code, § 1235.) Under that provision, an inconsistent statement is not admissible unless the witness either testified and was given "an opportunity to explain or to deny the

statement" or "has not been excused from giving further testimony in the action." (Evid. Code, § 770, subds. (a) & (b).) However, Arias' statements were not admissible for their truth as prior inconsistent statements under Evidence Code sections 1235 and 770. Those sections permit admission of inconsistent statements made by a witness who actually testifies at the proceeding. (*People v. Blacksher* (2011) 52 Cal.4th 769, 806; *People v. Williams* (1976) 16 Cal.3d 663, 669.) Because Arias did not testify at trial, those sections do not apply here.

Evidence Code section 1238 similarly requires that the witness testify at trial before a statement of prior identification may be admitted. (*People v. Mayfield* (1972) 23 Cal.App.3d 236, 241.) Therefore, that section is also not relevant here.

Pursuant to Evidence Code section 1291, the prior testimony of a witness is admissible only when the witness is unavailable and the defendant had the right and opportunity to cross-examine the witness in the prior proceeding with a similar interest and motive as the defendant has in the current proceeding. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) In the instant case, section 1291 does not apply since appellant was not a party to the Delaloza trial and did not have an opportunity to cross-examine Arias.

Lastly, Evidence Code section 1294 allows the statement of a person who is unavailable as a witness to be introduced as evidence in court if the statement was previously introduced at a hearing or trial of the same criminal matter as a prior inconsistent statement of the witness. This section is designed to overcome the admissibility problems associated with out-of-court statements that are inconsistent with an unavailable witness's former testimony, but it requires that the evidence of the statements be introduced at the prior hearing when the witness actually testified. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408-409.) Section 1294 does not

apply in this case because Arias' recorded statement first had to be introduced at the preliminary hearing.

In any event, as previously set forth above, given the overwhelming evidence before the jury, the admitted statements by Arias were merely cumulative of the other evidence. Any error was therefore harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

X. ANY ERROR IN ADMITTING DELALOZA'S PRIOR STATEMENTS WERE HARMLESS BEYOND A REASONABLE DOUBT

Appellant contends the trial court erred in admitting Delaloza's statements to the police under state evidentiary rules and his rights to confrontation. (AOB 210-235.) While it appears that the admission of those statements did violate the confrontation clause, any error was harmless beyond a reasonable doubt. Moreover, the trial court did not err in admitting the same statements under state evidentiary rules.

A. The Relevant Proceedings

The prosecutor called Delaloza as a witness, but he refused to testify. As a result, the trial court found him to be an unavailable witness. (12RT 1425-1430.) While the prosecutor sought to introduce Delaloza's recorded statements to the police as a declaration against penal interests, appellant's defense counsel argued they lacked an inherent reliability. (12RT 1431-1433.) The trial court disagreed, noting that Delaloza made an admission that he was at the scene of the crimes and drove to the location. The court specifically noted that whether or not the statement was exculpatory or incriminating was a question of fact to be determined by the jury. (12RT 1436.) Defense counsel, including appellant's, also objected based on a confrontation grounds, which the court overruled. (12RT 1440.)

The audio tape from the police interview was played for the jury and copies of the transcript were also given to them. (12RT 1443.) In the audio tape, Delaloza told police that he was driving his white Cadillac the day of

the incident with appellant in the car. (CT Supp. IV 112.) It was about three or four in the morning when Delaloza drove appellant to Goodhue Street in Whittier to talk to an alleged girlfriend. Delaloza stayed in the car. (CT Supp. IV 114-115.) While waiting, Delaloza heard several, maybe five, gunshots. (CT Supp. IV 118, 137.) He then saw appellant running towards the car. Once in the car, appellant said, "Let's go." (CT Supp. IV 119.) Delaloza did not see a gun when appellant left the car and did not see a gun in appellant's hand when he came back. (CT Supp. IV 120.) Appellant was wearing a large jacket with a hood. (CT Supp. IV 120-121.) Delaloza thought appellant was getting shot at because he thought he heard shots as appellant came running out. However, the shots might have stopped the moment he saw appellant running towards the car. (CT Supp. IV 113, 136-139.) Delaloza drove appellant home afterwards.[14] (CT Supp. IV 122.)

Later in the trial, the prosecutor sought to call Detective Mary Hanson as a witness because she interviewed Delaloza about his involvement in the robbery at the Ralphs parking lot. (13RT 1742.) Defense counsel again objected on the same grounds, but he trial court allowed her to testify as Delaloza was unavailable. (13RT 1742-1744.) According to Detective Hanson, Delaloza initially denied any involvement in the robbery. (13RT 1748.) However, he eventually admitted he had been involved in a fight in the parking lot of Ralphs where three of his friends fought three other people. Delaloza said he hit someone in the face and the knife clipped to his belt fell off and skidded across the pavement. (13RT 1748-1749.) While he went to retrieve the knife, he saw one of the three others go to

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[14] Delaloza also admitted that he drove appellant to Hornell Street talk to Luke and to Luke's mother. (CT Supp. IV 126.)

their car and get a baseball bat out of the trunk. He described one of his friends as the "big guy" who chased after the others, but refused to give any names. (13RT 1749.) Delaloza also admitted that they picked up a bag containing clothes and CDs, which his friends divided. (13RT 1750-1753.)

Before the close of evidence, defense counsel made a motion for a mistrial based on the admission of Delaloza's statements as a violation of the right of confrontation, and that it was not a statement against his penal interest and did not have the inherent quality of trustworthiness. The motion was denied. (22RT 3199-3209.)

B. The Admission of Delaloza's Statement Violated Appellant's Sixth Amendment Right, However, Any Error Was Harmless beyond a Reasonable Doubt

Here, Delaloza's statements were taken during police interrogation and were not subject to cross-examination since he refused to testify, and therefore the admission of his statements was a violation of his Sixth Amendment rights. However, confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California*, *supra*, 386 U.S. at p. 24 (federal constitutional error requires proof of harmlessness beyond a reasonable doubt). (See *People v. Jennings*, *supra*, 50 Cal.4th at p. 652 [*Crawford* error does not require reversal of a conviction if it was harmless beyond a reasonable doubt].) Thus, to avoid reversal of appellant's convictions, it is the People's burden to establish beyond a reasonable doubt that the error in admitting Delaloza's testimony did not contribute to the verdicts or that a rational jury would have found appellant guilty absent the error. (See *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 663.)

Whether confrontation clause error is harmless beyond reasonable doubt depends upon a number of factors, including the importance of the witness's testimony, whether the testimony was cumulative, the presence or

absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted and the overall strength of the prosecution's case. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684; see also *People v. Villatoro*, *supra*, 194 Cal.App.4th at p. 262 [where testimony in violation of confrontation clause was cumulative, error harmless beyond reasonable doubt].)

Here, any error was harmless beyond a reasonable doubt for the following reasons. First, Delaloza's testimony was cumulative because any information gleaned from his statements to the police was already made known to the jury through other witnesses' testimony. Specifically, as to the Ralphs robbery, Delaloza merely described the altercation as a "fist fight" where they grabbed a bag and divided the contents. However, Kreisher and Cordero independently identified appellant as the one who walked over to them and demanded money. Appellant was also described as having his hand in his pocket as if he had a gun. (8RT 890.) Later, when appellant pulled out a gun and cocked it, Cordero yelled, "He's got a gun. Let's go. Let's run." (9RT 981-983.) While appellant attempts to portray Kreisher and Cordero's account as unreliable (AOB 227-228), each identified appellant in a photographic array. (8RT 898; 9RT 1088.) Thus, Delaloza's statement was not crucial in establishing appellant as the perpetrator.

As to the murders of Molina and Murillo, Delaloza's account was also cumulative. Both Luke and Arias saw appellant just before the murders. Luke saw Delaloza's Cadillac approach and saw appellant exit the car. (9Rt 1133-1134.) Both ran away because they were scared, and Arias actually saw appellant with a gun in his hand. (9RT 1135-1138; 14RT 1849.) Roxanne, Luke's mother, remembered seeing Delaloza with appellant when he was looking for Luke right before the murders. (11RT 1343-1345.) Lastly, right after shots were fired, Luke remembered seeing

what appeared to be the head of appellant running away from the house. (19RT 1195.) Immediately after the shots, neighbors saw two young Hispanic men get into a white Cadillac and drive away. (10RT 1310-1319; 12RT 1418; 13RT 1600, 1717.) Delaloza's account to the police merely reaffirmed that both appellant and Delaloza were in the neighborhood when shots were fired, and appellant was running towards the car at the time. (CT Supp. IV 118-119.) As previously stated, Delaloza's account did not verify that appellant was the shooter, but merely placed him at the scene of the shooting. The jury, together with reasonable inferences from all the other evidence, concluded that appellant had shot Molina and Murillo.

Moreover, while Delaloza's statement was important in so far as establishing his own involvement in the crimes, he was merely the driver when appellant committed the double murders of Molina and Murillo. As stated above, other than corroborating the testimony of other witnesses at the scene, Delaloza's statement was not crucial for *appellant's* convictions.

Finally, the overall strength of the prosecution's case was overwhelming. (See Arg. II-VII, *ante.*) Therefore, any error was harmless beyond a reasonable doubt.

C. The Trial Court Properly Admitted Delaloza's Statements under Evidence Code Section 1230

Although admission of Delaloza's statements violated appellant's right to confrontation (but the error was harmless), the trial court properly admitted Delaloza's statements under Evidence Code section 1230. (AOB 220-226.)

As noted earlier, the trial court originally found Delaloza's statements admissible under Evidence Code section 1230 (declarations against his penal interest) and reaffirmed such tentative ruling several more times before and during trial. This Court reviews the trial court's ruling that the foundational requirements for admissibility of evidence have been met

under an abuse of discretion standard. (*People v. Martinez* (2000) 22 Cal.4th 106, 120, 126.) This Court will "overturn the trial court's exercise of discretion only upon a clear showing of abuse." (*Id.* at p. 120, internal citations and quotes omitted.)

Generally, hearsay evidence, which "[i]s evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)), is inadmissible unless the law provides an exception for its admission. (Evid. Code, § 1200, subd. (b).) Statements which are not offered to prove the truth of the matters asserted do not constitute hearsay.

"Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest. The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. A trial court determining whether the proffered evidence is sufficiently reliable may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Lucas* (1995) 12 Cal.4th 415, 462, internal citations and quotes omitted.)

Because of concerns that declarations against penal interest may contain self-serving and unreliable information, such hearsay exception generally does not "apply to collateral assertions within declarations against penal interest." (*People v. Campa* (1984) 36 Cal.3d 870, 882.) Further, "[e]ven a hearsay statement that is facially inculpatory of the declarant may, when considered in context, also be exculpatory or have a net exculpatory effect. Ultimately, . . . whether a statement is self-inculpatory or not can only be determined by viewing it in context." (*People v. Duarte*

(2000) 24 Cal.4th 603, 612, internal quotes and citations omitted.) Thus, if the statement "is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others)[, it] does not meet the test of trustworthiness and is thus inadmissible." (*Ibid.*) Consequently, only those portions of Delaloza's statements that were "specifically disserving" (*People v. Leach* (1975) 15 Cal.3d 419, 441) to his penal interests would be admissible under Evidence Code section 1230.

D. Delaloza's Statements Were Self-Incriminatory and Thus Properly Admitted

Here, Delaloza was unavailable to testify due to the assertion of his Fifth Amendment privilege against compelled self-incrimination. His recorded statements made to police based on his first-hand knowledge of the robbery and double murder with words of self-incrimination, admitting he had been a part of a robbery and drove the white Cadillac during the murders, were clearly disserving and against his penal interest. Although Delaloza responded to questions that appellant had been running away when shots were fired, thereby implicating himself as an accomplice, Delaloza nonetheless acknowledged his own personal culpability in the robbery and in driving appellant to commit the murders. While Delaloza did attribute blame to appellant, he also accepted blame for himself as an active role in the crimes and described his involvement. Thus, Delaloza's statements specifically were disserving to his penal interest because it subjected him to the risk of criminal liability to such an extent that a reasonable person in his position would not have made the statements unless he believed them to be true. These statements were "so clearly and strictly self-incriminatory when uttered that they are almost certain to be true." (*Duarte, supra*, 24 Cal.4th at p. 618.)

As the final test to admissibility, a court must consider whether Delaloza's statement was "sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 611.) As previously set forth, in making this determination this Court must consider the words uttered, the circumstances under which the declaration was made, the declarant's possible motivation, and the declarant's relationship to the defendant.

As noted above, there was evidence from which the trial court could reasonably conclude Delaloza knew his statements were against his penal interest: he saw appellant running when shots were fired, but did not attempt to cast blame on appellant. This was thus not a case in which Delaloza admitted to some culpability in order to shift the bulk of the blame to appellant. He admitted to being the driver and driving appellant home after the shooting. Thus, the circumstances surrounding Delaloza's statement indicate it "was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) The trial court therefore did not err in ruling the evidence was admissible under Evidence Code section 1230.

In sum, the record supports the trial court's findings, and there was no abuse of discretion in the court admitting Delaloza's statements under Evidence Code section 1230 and for nonhearsay purposes.

XI. THE TRIAL COURT'S DID NOT ERR IN ITS ACCOMPLICE INSTRUCTIONS RELATING TO TESTIMONY OF DELALOZA

Appellant contends that the trial court improperly instructed the jury on the rules applying to Delaloza's testimony by omitting the relevant accomplice instructions. (AOB 236-260.) Specifically, appellant contends that the trial court failed to instruct that Delaloza was an accomplice as a matter of law (CALJIC No. 3.16), failed to instruct that Delaloza's statement must be corroborated (CALJIC No. 3.11), and failed to instruct

that Delaloza's statement must be viewed with "care and caution" (CALJIC No. 3.18). However, these claims are without merit as explained below.

A. The Relevant Proceedings

Before playing the audio tape of Delaloza's interrogation, the trial court made the following statement:

> This is what our situation is relative to the testimony of this witness, Delaloza.
>
> Mr. Delaloza was charged with the double murder that occurred in October 1997 and was tried in another department of the superior court and was found guilty and has been sentenced in that matter. That case is now up on appeal.
>
> We don't know what the jury decided in that case as to reason, whether they convicted him as a principal, as an accomplice, as an aider and abettor. But at least, for our purposes, he would be an accomplice.
>
> When an accomplice testifies, whether by live testimony or by testimony in writing, that testimony must be corroborated. It doesn't require evidence that's beyond a reasonable doubt to corroborate. The corroboration can be evidence that is only slight. But there has to be some corroboration of an accomplice. Because – on the theory that an accomplice's testimony is inherently improbable or inherently improbable from his standpoint – I shouldn't say improbable. I should say untrustworthy – because of the fact that he has his own axe to grind by testifying in the matter and, therefore, his testimony must be corroborated by other evidence.
>
> You'll be instructed fully on this matter.
>
> I anticipate there will be another witness who has been referred to in this trial who has been granted immunity in this case, and he will testify, and the same rules will apply to him. Because, obviously, it will appear from his testimony that he was an accomplice – an accomplice and an aider and abettor, or whatever. That's for the jury to decide what the position of each of these parties were.

> But at this time the court is going to allow the tape to be played. And it's up to the jury to weigh this evidence with all other evidence to give it what weight the jury feels it's entitled to.

(12RT 1442-1443.)

When instructing the jury, the trial court gave the following accomplice instructions:

> CALJIC 3.10 [accomplice defined]: An accomplice is a person who is subject to prosecution for the identical offense charged in Counts six and seven against the defendant on trial by reason of aiding and abetting or being a member of a criminal conspiracy.
>
> CALJIC 3.11 [testimony of accomplice must be corroborated]: You cannot find a defendant guilty based upon the testimony of an accomplice unless the testimony is corroborated by other evidence which tends to connect that defendant with the commission of the offense. [¶] Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice state out-of-court was true.
>
> CALJIC 3.13 [one accomplice may not corroborate another]: The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.
>
> CALJIC 3.16 [witness accomplice as a matter of law]: If the crime of conspiracy to commit murder and murder of Jaime Castillo was committed by anyone, the witness Jesus Marin was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.
>
> CALJIC 3.18 [testimony of accomplice to be viewed with care and caution]: To the extent that an accomplice gives testimony that tends to incriminate a defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it care and caution and in the light of all the evidence in this case.

(12CT 3386-3391.)

B. The Trial Court Did Not Err in Instructing the Jury With the Accomplice Instructions Relating to Delaloza's Testimony

A conviction cannot be based on the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the offense. (Pen. Code, § 1111.) An accomplice is one "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1227 [one is not an accomplice by merely giving assistance with knowledge of the perpetrator's criminal purpose].) An "accomplice" is a person who can be charged with the same crimes as the defendant. (*People v. Tobias* (2001) 25 Cal.4th 327, 331). It includes persons who aid and abet the charged crimes. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) To be liable as an aider and abettor, a person must (1) do something to aid, promote, or encourage the charged crime; (2) while knowing of the perpetrator's unlawful purpose; and (3) while intending to encourage the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Whether a witness was an accomplice is a question for the jury, unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence. (*People v. Williams* (2008) 43 Cal.4th 584.) Whenever the evidence is sufficient to warrant the jury conclusion that a witness was an accomplice, "the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice." (*People v. Zapien* (1993) 4 Cal.4th 929, 982; see also *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1458.) But, when the facts establishing the witness's status as an accomplice are clear and undisputed, the court must instruct the jury that the witness was an accomplice as a matter of law. (*People v. Williams, supra*, 43 Cal.4th at p. 636.)

Here, the trial court was not bound to conclude that Delaloza was an accomplice as a matter of law. It was not enough that Delaloza was present at the time of the murders of Molina and Murillo . (See *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530 ["[m]ere presence at the scene of a crime is not sufficient to constitute aiding and abetting"].) Nor was it enough that Delaloza assisted appellant after the shooting. (E.g., *People v. Boyer* (2006) 38 Cal.4th 412, 467, superseded on other grounds by § 29.4 [an "accessory" is not an "accomplice"].) However, the trial court told the jury that Delaloza "for our purposes, [] would be an accomplice," yet failed to give CALJIC No. 3.16 as pertaining to Delaloza. (12RT 1442-1443.) Even if the trial court erred by failing to instruct on its own motion that Delaloza was an accomplice as a matter of law, the failure was harmless since there was sufficient corroborating evidence in the record. (*People v. Williams, supra*, 43 Cal.4th at pp. 636-638; *People v. Brown, supra*, 31 Cal.4th at p. 556.) As previously explained, ample evidence connected appellant to the crimes of robbery and murder apart from the testimony of Delaloza. (See Arg. X, *ante*.)

In addition, in light of *all* the accomplice instructions given, the trial court's omission was nonprejudicial. (See *People v. Wilson* (2008) 43 Cal.4th 1, 20 ["not reasonably probable that the jury would have reached a more favorable verdict had it been instructed with CALJIC No. 2.71.7" where "the trial court thoroughly instructed the jury on judging the credibility of a witness"]; cf. *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 185 [no accomplice corroboration instructions whatsoever].)

When reviewing the prejudicial effect of an instructional error, a court evaluates whether it is reasonably probable that such error affected the verdict. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) In this case, the error was harmless for three reasons. First, the trial court's failure to instruct that Delaloza was an accomplice as a matter of law (CALJIC No.

3.16) was mitigated by its recitation of CALJIC Nos. 3.10 [accomplice defined], 3.11 [corroboration], 3.12 [sufficiency of evidence to corroborate an accomplice], 3.13 [one accomplice cannot corroborate another], 3.18 [care and caution]. While the court did not explicitly identify Delaloza in giving these instructions, they more than adequately conveyed the essence of accomplice testimony and how the jury was to handle such testimony.

Second, there was information apart from the jury instruction which cast suspicion on Delaloza's testimony. (See *People v. Williams* (2010) 49 Cal.4th 405, 456 [failure to give jury instructions on accomplice testimony was harmless because "[t]he jury would have been inclined to view [the witness's] testimony with caution even in the absence of an instruction that it do so," because the jury knew the witness was arrested in connection with the crime, had been contacted by the defendant after the crimes, and had driven him to his destination after his criminal activity].) The California Supreme Court noted that the purpose of Penal Code section 1111 is to compel the jury to treat accomplice testimony with distrust and suspicion. (See *People v. Miranda* (1987) 44 Cal.3d 57, 101, overruled on other grounds in *People v. Marshall* (1990) 50 Cal.3d. 907, 933, fn. 4.) Thus, the court held in *People v. Miranda* that any error the trial court made in failing to give the proper instruction was harmless because the "jury had before it ample information suggesting that [the witness's] testimony may not have been completely trustworthy." (*Ibid.*) Here, the court gave jury instructions on accomplice testimony, and there were circumstances surrounding Delaloza's testimony that would reasonably prompt the jury to treat it with suspicion. Delaloza's status as a former co-defendant should have raised suspicion. His inconsistent statements in his police interview and his uncooperative testimony at trial also gave the jury reason to distrust his testimony and require corroborating evidence.

Finally, Delaloza's testimony was sufficiently corroborated by independent evidence. Failure to properly instruct the jury on accomplice testimony is harmless error where there is sufficient corroborating evidence in the record. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 215.) Evidence is corroborative if it is independent of the accomplice's testimony and tends to connect the defendant to the commission of the crime. (Pen. Code, § 1111.) The evidence may be slight and entirely circumstantial. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 215.) Only a portion of the accomplice's testimony need be corroborated, and the corroborative evidence need not establish every element of the charged offense. (*People v. Sully, supra*, 53 Cal.3d at p. 1228.) The trier of fact's determination of corroboration is binding on the reviewing court unless the evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Thompson* (2010) 49 Cal.4th 79, 123-124.)

Here, the corroborating evidence reasonably supports the truthfulness of Delaloza's testimony. During his interview with the police, Delaloza initially denied being involved in the Ralphs robbery, but later admitted he was involved in the fistfight and robbery. Delaloza's description of the events were corroborated by Cordero and Kreishner, who separately identified appellant as the perpetrator of the robberies. As to the murders of Molina and Murillo, Delaloza's statements placed appellant at the scene of the shooting and corroborated the description given by Luke and Arias of a man dressed like appellant running away from the Goodhue residence. Taken together, the corroborative evidence was sufficient to render any instructional error harmless.

XII. Petitioner's Claim Regarding the Trial Court's Remarks Is Forfeited; in Any Event, the Remarks Did Not Amount to Vouching for the Prosecution and Did Not Deny Appellant a Fair Trial

Appellant contends that judicial misconduct denied him his constitutional right to due process. (AOB 261-285.) He identifies six specific instances where he contends the trial judge improperly commented on the evidence, and on the prosecutor's and defense counsel's position, resulting in the deprivation of a fair trial. While he recognizes that no single comment necessarily warrants reversal, he asserts their cumulative effect gave a reasonable inference that the court disfavored the defense and its evidence. Respondent disagrees; appellant forfeited his right to appellate review by failing to object and request an admonition and, on the merits, the court properly controlled the proceedings.

A. The Claim Is Forfeited for Failing to Object

A litigant generally forfeits a claim of judicial misconduct by failing to contemporaneously object and request an admonition unless neither could have cured the prejudice. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; see also *People v. Snow* (2003) 30 Cal.4th 43, 78 [failure to object or seek jury admonition regarding alleged judicial bias waives issue on appeal].)

Appellant attempts to avoid the waiver rule by arguing it would have been futile to object and no admonition could have cured the prejudice the alleged misconduct caused. (AOB 267-270.) The futility exception typically arises when the court has overruled the defendant's objections in a manner that suggests any further objections would be useless. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 821 [judge implied defense counsel was being an obstructionist for making objections].) Since appellant did not raise a single objection to the trial court's comments, the futility

exception does not apply. Therefore, appellant's request to excuse the waiver rule in this instance does not apply. (Cf. *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [lack of objection excused where trial judge instructed prospective jurors to lie on voir dire, thus rendering the defendant's trial fundamentally unfair].)

B. The Applicable Law

The principles of judicial conduct during trial are well established. The trial judge is required "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Pen. Code, § 1044.)

However, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. Trial judges should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other. A trial court commits misconduct if it persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge. (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1237-1238, internal quotes and citations omitted; accord, *People v. McWhorter* (2009) 47 Cal.4th 318, 373.) These principles cannot be overemphasized, as it is settled that "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Mahoney* (1927) 201 Cal. 618, 626-627.) Only one instance of judicial misconduct may constitute prejudicial error if egregious, particularly when the judge exhibits bias directly toward the defendant. (See, e.g., *People v. Byrd* (1948) 88 Cal.App.2d 188, 192; see also *People v. Perkins* (2003) 109

Cal.App.4th 1562, 1571-1573 [repeated questions of defendant by court sought to develop and amplify prosecution evidence in the manner of partisan advocacy amounting to prejudicial misconduct].) Nevertheless, a "trial court's numerous rulings against a party -- even when erroneous -- do not establish a charge of judicial" bias or misconduct. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.)

Appellate courts "determine the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs." (*People v. Cash* (2002) 28 Cal.4th 703, 730.) "The role of a reviewing court 'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. Harris* (2005) 37 Cal.4th 310, 347, quoting *People v. Snow*, *supra*, 30 Cal.4th at p. 78.)

A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) Further a trial court cannot become an advocate for either party under the guise of commenting on the evidence or examining witnesses or casting aspersions or ridicule on witnesses. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.)

C. The Trial Judge Did Not Commit Misconduct by Making Any of the Remarks Nor Did They Lead to an Inference That the Court Disfavored the Defense and Its Evidence

Cases in which judicial misconduct led to reversal on appeal invariably involve extremely egregious and demeaning attacks from the bench. (See, e.g., *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1176 [conviction reversed based on an extensive pattern of judicial hostility

toward defense counsel, which included belittling suggestions, humiliating "elementary school scolding," references to counsel's conduct as improper, unethical and taken in bad faith, and derogatory comments about counsel's ineptitude and lack of experience, that permeated the record and defied a finding of no prejudice]; *People v. Zammora* (1944) 66 Cal.App.2d 166, 205-206 [trial court systematically belittled defense counsel before the jury by accusing him of making repeated objections, suggesting he look up what a leading question was, sarcastically referring to someone using ventriloquism to make his statement and accusing him of sleeping].) Here, every incident of which appellant complains, whether considered separately or cumulatively, does not rise to the level of prejudicial judicial misconduct.

All of the appellant's alleged complaints followed the finding that Delaloza was unavailable to testify. Initially, outside the presence of the jury, the trial court found Delaloza was an unavailable witness because he refused to testify. (12RT 1429-1431.) Below, each instance of alleged misconduct is set forth and analyzed in turn, except for the three instances of the court's comments on the evidence, which are discussed together.

1. No misconduct for making an accurate comment

First, appellant contends that the judge committed misconduct by commenting to the jury that Delaloza had been brought into the courtroom outside their presence and refused to testify. Specifically, the judge stated the following:

> I'm sorry for this delay in the proceedings, but what was involved here was a witness who is in custody was to be brought into the court to testify. And that witness was unwilling to even come into the court, and, once he came into court, he refused to testify or to be sworn or to have any part in the proceedings. The name of that witness was Mr. Delaloza. He has been referred to as Hondo in these proceedings.

(12RT 1431.)

Appellant claims that this was improper because it encouraged the jury to speculate as to the reason why Delaloza refused to testify and was "perhaps" fearful for his safety. (AOB 273-274.) This claim is baseless and pure speculation. "A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and 'scrupulously fair.' Of course, the court may not express its views on the ultimate issue of guilt or innocence or otherwise usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses." (*People v. Melton*, *supra*, 44 Cal.3d at p. 735, internal citations omitted; *People v. Calderon* (1994) 9 Cal.4th 69, 75.) In his comments, the trial judge simply informed the jury that Delaloza was in custody and refused to testify. As such, the judge's factually accurate comment cannot be said to be improper.

2. No misconduct for holding a section 402 hearing in the presence of jury because the judge has discretion whether to hold it outside the presence of the jury

Second, in the presence of the jury, the judge asked defense counsel to "state his position" regarding the finding that Delaloza was unavailable. (12RT 1431.) Appellant contends that by this statement the judge was holding an "Evidence Code section 402" hearing in the presence of the jury and thus created the strong impression that he was allying himself with the prosecution when he overruled defense counsel's objection to the finding.

(AOB 274.) However, even assuming it held such a hearing, by its terms section 402, subdivision (b), requires a hearing out of the presence of the jury only when the admissibility of a defendant's confession or admission is at issue; in other circumstances, the section grants the trial court discretion in the matter. (Evid. Code, § 402, subd. (b))

Therefore, without a finding that the court abused its discretion (which appellant does not, and cannot, allege) in holding the hearing in the presence of the jury, no misconduct can be placed on the trial court for simply asking defense counsel's position on the finding that Delaloza was unavailable.

3. No misconduct for commenting on evidence because it did not distort the testimony

Third, appellant contends that the judge improperly commented on the evidence and supported the theory that Delaloza was the driver that night of the incident. (AOB 274-275.) Specifically, when discussing the admissibility of Delaloza's statements to the police, the prosecutor criticized defense counsel for forgetting to mention that the keys to the white Cadillac were found on Delaloza's property and thus he was the driver. (12RT 1433.) The judge, in response and in the presence of the jury, replied, "I think that's inherent in his statement that he made." (12RT 1433.)

Fourth, after the previous statement, the judge also made the following comment to defense counsel in the presence of the jury, "Mr. Bernstein, if this witness were called to the stand and had willingly testified, I would not stop him in his testimony if he testified exactly as he's testified in this statement. [¶] He was there. He was the driver of the car. He admits to that." (12RT 1434-1435.) Appellant contends that the judge again improperly commented on the evidence and favored the prosecution. (AOB 276-277.)

Fifth, prior the Delaloza's interview tape recording was played, the judge made the following comment:

> Based on the cursory reading of this, I disagree with Mr. Bernstein's position that this is an exculpatory statement. There are admissions in this statement that he actually drove to the location; that he drove away from the location and, therefore, was part and parcel of what was going on, it could be contended.
>
> Whether or not the statement is exculpatory or incriminating I think is a question of fact to be determined by the jury.

(12RT 1436.) Appellant again contends that the judge improperly commented on the evidence in a favorable manner to the prosecution, created an impression he was allying himself with the prosecution, and usurped the fact-finding function of the jury. (AOB 277-278.)

In commenting on the evidence a judge "may not withdraw material evidence from the jury's consideration or distort the testimony." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 822-823.) As previously stated, a court may comment on the evidence as long as the remarks are "accurate, temperate, and scrupulously fair." (*People v. Melton, supra*, 44 Cal.3d at p. 735, internal citations omitted.) Here, the three previous comments did not distort testimony not only because they were accurate and already part of the evidence, but also because the trial court's comments concerned a rational inference that could be drawn from the evidence, i.e., Delaloza admitted being the driver of the car. (See *People v. Mayfield, supra*, 14 Cal.4th at pp. 739, 755 ["it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible"].) Moreover, the judge's comments cannot be said to be improper as they were part and parcel of the court's decision-making process regarding the admissibility of the statements.

4. No misconduct for commenting on Delaloza's previous conviction because defense counsel invited the error

Lastly, appellant contends that the judge improperly told the jury that Delaloza had previously been tried and found guilty of a double murder that occurred on October of 1997. (AOB 278.) In *People v. Young* (1978) 85 Cal.App.3d 594, the court held that informing the jury of the midtrial guilty plea of the codefendant charged as the gunman in a pair of robberies was "irrelevant to the jury's determination of guilt or innocence" but harmless beyond a reasonable doubt due to other evidence implicating the codefendant's aiders and abettors. (*Id.* at pp. 598-599, 601-603.) However, *Young* is distinguishable.

Appellant fails to mention is that it was *defense counsel* who requested to tell the jury about the status of Delaloza, and thus invited any error. (12RT 1437 ["And I would like also for the jury to be aware of that, that he has been convicted in this case, so that they can properly judge his testimony"].) "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330; see also *Mt. Holyoke Homes, LP v. California Costal Com.* (2008) 167 Cal.App.4th 830, 842 [a party who induces an error is estopped under the doctrine of invited error from asserting the alleged error as grounds for reversal].) Clearly, it was a deliberate tactical choice by counsel to have the jury know of Delaloza's conviction in order for them to judge his credibility and weigh his testimony, which trial counsel argued should not be believed. As such, defense counsel invited any alleged error this instance.

D. Any Error Was Harmless

Even if the court's comments and actions were error, any error was harmless. The court's conduct in these limited circumstances made no difference to the outcome of the trial under the "harmless beyond a reasonable doubt" standard articulated in *Chapman v. California, supra,* 386 U.S. at p. 18.

First, here there was no repeated and improper disparaging of appellant or his counsel in the presence of the jury. (*People v. Sturm, supra,* 37 Cal.4th at p. 1240.) The court did not intervene and disallow questioning inappropriately. (*Id.* at p. 1230, 1241, 1243, 1245 [holding it was reversible error when the trial court made inappropriate comments during the entire trial and gave the jury the impression the court aligned with the prosecution].)

Second, the court instructed the jury multiple times that it was the trier of fact and sole judge of witnesses' credibility. It further instructed the jury not to assume anything the court said suggested anything about the facts. (CALJIC Nos. 1.00, 1.02, 2.20, 17.41; 12CT 3343-3344, 3350, 3346, 3363.) "We must assume that jurors followed their instruction not to disbelieve any witness or to decide the facts based on anything the court said or did, and to disregard any intimations or suggestions the court may have made regarding the believability of any witness." (*People v. Harris* (2005) 37 Cal.4th 310, 350, referring to CALJIC No. 17.32.)

Finally, the court's conduct would not reasonably lead a juror to believe the court was advocating on behalf of the prosecution or otherwise "abandoned its role as a neutral arbiter." (*Cook, supra,* 39 Cal.4th at p. 597.) Therefore, any error in the court's conduct was harmless beyond a reasonable doubt.

XIII. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1

Appellant contends the trial court's instructions to the guilt phase jury in the language of CALJIC No. 17.41.1[15] violated his rights to jury trial and due process under the Sixth and Fourteenth Amendments to the federal Constitution. (AOB 286-290.) Since appellant's trial, this Court has rejected similar claims that the instruction violates a defendant's federal constitutional rights. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 805-806.)

The validity of CALJIC No. 17.41.1 was definitively resolved by this Court in *People v. Engelman* (2002) 28 Cal.4th 436, which held the instruction does not infringe upon a defendant's federal or state constitutional right to trial by jury or his or her state constitutional right to a unanimous verdict. (*People v. Engelman, supra*, 28 Cal.4th at pp. 441-445.) And, as the instruction of the jury with CALJIC No. 17.41.1 did not affect appellant's substantial rights, he has therefore forfeited any claim of error by failing to object below. (*People v. Elam* (2001) 91 Cal.App.4th 298, 310 ["His failure to do so waives any claim of error on appeal unless CALJIC No. 17.41.1 affected his substantial rights. In our view, it did not."]; § 1259 ["The appellate court may . . . review any instruction given, .

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[15] The trial court instructed the jury with CALJIC No. 17.41.1 as follows:

> The integrity of a trial requires reversal that jurors at all times during deliberations conduct themselves as required by these instructions; accordingly, should it occur that a juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on penalty or punishment in this phase of the case or any other improper basis, it's the obligation of the other jurors to immediately advise the court of that situation.

(24RT 3733; 12CT 3347.)

. . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)

The arguments set forth by appellant are not new, nor are the concerns appellant raises concerning CALJIC No. 17.41.1 unique or necessarily implicated by reference to the specific facts or particular circumstances of the instant case. Appellant has offered no legal or factual basis that would dictate that the opinion in *Engelman* does not resolve this claim against him, nor has appellant set forth facts or an argument which would dictate or suggest the issue should be revisited and reconsidered. This claim is forfeited, and in any event, instruction of the jury with CALJIC No. 17.41.1 was not error. Respondent adopts herein by reference the reasoning expressed by this Court in *People v. Engelman, supra*, 28 Cal.4th at pages 441 through 445.

Accordingly, the challenge to CALJIC No. 17.41.1 must be rejected.

XIV. APPELLANT RECEIVED A FAIR TRIAL; TO THE EXTENT ANY ERROR OCCURRED, IT WAS HARMLESS

Appellant contends that the cumulative effect of the alleged errors denied him the due process right to a fundamentally fair trial. (AOB 291-295.) Respondent disagrees.

A defendant is entitled only to a fair trial, not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96].) When a defendant invokes the cumulative error doctrine, the litmus test is whether the defendant received due process and a fair trial. (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their

absence." (*Ibid.*; see *People v. Carrera* (1989) 49 Cal.3d 291, 332 [accord]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 [accord].)

For the reasons articulated in Arguments I through XIII, *ante*, respondent submits that either no errors occurred or that any alleged error either considered individually or together was harmless. (See *People v. Thomas*, *supra*, 2 Cal.4th at p. 532 [finding that prosecutor's misstatement of witness's testimony, prosecutor's ambiguous comments that might have been taken as attack on defense counsel's integrity, and remarks by victims' parents cumulatively did not warrant reversal of murder conviction]; *People v. Williams, supra*, 170 Cal.App.4th at p. 646 ["any errors which we have found, and any others we may have assumed for purposes of argument, were harmless under any standard, whether considered individually or collectively."]; *People v. Najera* (2006) 138 Cal.App.4th 212, 228-229 [rejecting cumulative error claim where prosecutor committed misconduct, but defense counsel did not object, and even assuming trial court erred in excluding defendant's statement to police and instructional error occurred].)

Appellant received a fair trial, in which the evidence of his guilt was overwhelming. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1231 [rejecting cumulative error claim where trial court failed to admonish the jury pursuant to section 1122 and to reinstruct the jury with general evidentiary principles in the course of its penalty phase charge]; *People v. Boyette* (2003) 29 Cal.4th 381, 467-468 [rejecting cumulative error claim where "trial court should have excused one prospective juror for cause, and it improperly limited the questioning of a witness" and "the prosecutor committed some instances of misconduct"].) Accordingly, his claim of cumulative error must be rejected.

XV. APPELLANT FORFEITED HIS CLAIM REGARDING HIS ABSENCE FROM THE PENALTY PHASE CLOSING ARGUMENT OF CODEFENDANT CASTRO; IN ANY EVENT, THERE WAS NO VIOLATION OF APPELLANT'S RIGHTS; TO THE EXTENT ANY ERROR OCCURRED, IT WAS HARMLESS

Appellant contends that his exclusion from the penalty phase closing arguments relating to codefendant Castro violated his constitutional and statutory rights. (AOB 296-312.) Respondent submits that counsel failed to properly object and preserve the claim. In any event, there was no constitutional nor statutory violation to appellant's rights. To the extent there was error, it was harmless.

A. The Relevant Proceedings

Appellant and codefendant Castro were found guilty, and they received a joint penalty trial. (12CT 3487-3492.) After the presentation of evidence at the guilt phase, appellant's counsel and the prosecutor made their closing arguments without the presence of Castro, as he was not available. (30RT 4429-4460.) The trial court then gave the relevant jury instructions as to appellant, and the jury began to deliberate. (30RT 4460-4469.) Shortly after deliberations had begun, the trial court stated:

> Oh, for the record, what I propose to do since Mr. Castro has now returned, or has been brought to court and is now present, and is ready to go, is to have him come in at 1:30, and then have the argument as to him, and Mr. Penunuri will not be present unless, of course, there's a question or verdict as to Mr. Penunuri.
>
> Mr. Bernstein, you are certainly welcome to stay at the counsel table as Mr. Corona was present during your argument. But I don't propose to have your client present during the Castro argument.

Appellant's counsel replied, "Thank you, Your Honor." (30RT 4470.)

B. Failure to Object at Trial Has Waived the Issue on Appeal

Appellant did not raise an objection in the trial court. Indeed, defense counsel explicitly waived appellant's the right to be present. (See 30RT 4470.) "[B]ecause he failed to raise an objection on this ground at trial," the issue is forfeited on appeal. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1237; *People v. Moon* (2005) 37 Cal.4th 1, 21; *People v. Santos* (2007) 147 Cal.App.4th 965, 972.) Counsel may waive all but a few fundamental rights for a defendant. (*In re Horton* (1991) 54 Cal.3d 82, 95 [distinguishing those fundamental rights where a defendant must be admonished and the court must secure an express waiver; and those courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict].) Appellant has no fundamental right to be present at a codefendant's closing argument during the penalty phase. Even in a capital case, defendants may generally waive their right to be present at trial when evidence is not taken. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 738; see also *People v. Frierson* (1985) 39 Cal.3d 803, 817-818 [counsel waiver reflects defendant's consent on whether to present a defense at the guilt phase of a capital trial].) Therefore, appellant waived any right to be present at Castro's penalty-phase closing argument.

C. In Any Event, No Violation of Appellant's Right to Be Present Occurred

Under the Sixth Amendment, criminal defendants have the right to be personally present during critical stages of the proceedings against them. (*People v. Santos* (2007) 147 Cal.App.4th 965, 972.) However, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination. [¶] Similarly, under the Fourteenth Amendment's due process clause, a criminal defendant does not

have a right to be present at a particular proceeding unless he finds himself at a stage . . . that is critical to [the] outcome and his presence would contribute to the fairness of the procedure." (*People v. Waidla* (2000) 22 Cal.4th 690, 741-742, internal citations and quotes omitted; *People v. Santos*, *supra*, 147 Cal.App.4th at pp. 972-973; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1356-1357.)

The state constitutional right to be present at trial is generally coextensive with the federal due process right. "Neither the state nor the federal Constitution, nor the statutory requirements of sections 977 and 1043 of the Penal Code, require the defendant's personal appearance at proceedings where his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Butler* (2009) 46 Cal.4th 847, 861, quoting *People v. Harris* (2008) 43 Cal.4th 1269, 1306.) "Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.)

Admittedly, as to the right to counsel, a closing argument is a critical stage of a criminal trial. (*Herring v. New York* (1975) 422 U.S. 853, 857 [95 S.Ct. 2550, 45 L.Ed.2d 593]; *United States v. Cronic* (1984) 466 U.S. 648, 658 [104 S.Ct. 2039, 2046, 80 L.Ed.2d 657].) However, the same cannot be said for the closing argument of a *codefendant* during the penalty phase of a trial. Appellant's presence in that case "bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Butler*, *supra*, 46 Cal.4th at p. 861.) Put simply, an attorney's argument is not evidence. (*People v. Clark* (1993) 5 Cal.4th 950, 1033, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22.) Therefore, appellant had no right to be present at the closing argument of Castro, and he has failed to demonstrate how being present at

Castro's closing argument bore any reasonably or substantial relation to his opportunity to defend the charges against him.

D. Assuming a Violation, It Was Harmless

However, assuming arguendo that the hearing was somehow a critical proceeding at which appellant had a right to be present, he has not shown that his absence was prejudicial. "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*People v. Perry* (2006) 38 Cal.4th 302, 312; see also *People v. Bradford, supra,* 15 Cal.4th at p. 1357*; People v. Santos, supra,* 147 Cal.App.4th at p. 974.)

Here, the penalty phase closing arguments relating to codefendant Castro were relevant to appellant. Appellant's presence alone could not have affected the outcome or contributed to the fairness of the hearing. Second, appellant's absence during that portion of codefendant's case was not likely to affect the outcome of the trial. No new evidence was presented that had not previously been available for cross-examination. Indeed, the argument simply summarized previously presented evidence and presented Castro's theory of the case. In any event, as to each defendant, the trial court warned the jury that they must decide *separately* the question of penalty as to each defendant. (30RT 4429-4430, 4469, 4498, 4509-4510.) Therefore, any alleged error was not prejudicial.

XVI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING APPELLANT'S RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION

Appellant contends that the penalty phase instructions denied him of an individualized sentencing determination. (AOB 313-325.) There is no merit to this claim given that the trial court, as a whole, properly instructed the jury.

A. The Relevant Proceedings

At the close of the mitigation portion of the joint penalty trial of appellant and Castro, but before any closing arguments, the trial court made the following comment to the jury:

> Again, you're reminded as you think about it at this time, and I'm urging you again not to decide the case, but you must bear in mind that in order for a decision to be reached in this case, all 12 jurors must agree. And you must also realize that there are two separate people here, and that each of them is entitled to a trial as if he were the only person. So what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate.
>
> So – but you must give each one an individual trial. But that's – I'll instruct you more fully on that. The instructions that I'll give you on Tuesday are very brief compared to the almost hundred pages that we had before. Be like six or seven pages of instructions. Because these simply deal with this one issue of what the appropriate punishment should be.

(29RT 4425-4426.)

After defense counsel and the prosecutor gave their closing arguments, the trial court told the jury the following:

> The instructions that are being given to you at this time obviously apply to defendant Penunuri only. At such time as we hear the arguments and have Mr. Castro before us, which will – I anticipate will be this afternoon, we'll after hearing those instructions there will be some additional, those arguments rather. Apply only to him. But these instructions are for the trial of Mr. Penunuri.

(30RT 4461.)

As part of those instructions to the jury, the trial court made the following comment to the jury: "In this case, you must decide separately the question of penalty as to each defendant. Of course as you retire now you're considering only the case as to Mr. Penunuri." (30RT 4469.)

While the jury was deliberating as to appellant, the trial judge interrupted those deliberations in order for Castro's attorney to give his closing argument. At the close of the proceedings, the jury was instructed, in part, as follows:

> In this case you must decide separately the question of penalty as to each of the defendants. If you cannot agree upon the penalties to be inflicted upon both defendants, but you do agree on the penalty as to one of them, you must render a verdict on the one to which you do agree.

(30RT 4509-4510.)

After deliberating, the jury returned a verdict of death for appellant and life in prison without the possibility of parole for Castro. (30RT 4511-4514.)

B. The Trial Court Properly Instructed the Jury Regarding Appellant's Right to An Individualized Sentencing Determination

Under the Eighth Amendment, a defendant has a right to an individualized determination of his sentence based on his own character and background. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944].)

To this end, a judge must appropriately instruct the jury to assess independently the appropriateness of the death penalty for the defendant. (*People v. Ervin* (2000) 22 Cal.4th 48, 95.) Here, there is nothing to indicate that the jury engaged in improper comparative evaluations of the defendants. Although, the trial court initially and briefly misspoke when it told the jury, "so what you decide against one person should not be carried over into the decision of the other person, *unless you feel it is appropriate*" (29RT 4426, emphasis added), any potential error was cured when it separately, and correctly, instructed the jury with the following: "In this

case you must decide separately the question of the penalty as to each of the defendant." (30RT 4469, 4509-4510.) Such an instruction is adequate to ensure individualized sentencing in joint penalty trials. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174.) The jury was instructed to consider the instructions as a whole and in light of each other. (13CT 3523, 3527-3528, 3539.) Moreover, it was clear that the jury carefully considered the evidence as to each defendant and determined each penalty separately, given that appellant and Castro received separate punishments – death for appellant and life without the possibility of parole for Castro. These individualized punishments were appropriate given appellant's relatively higher culpability as the mastermind behind the crimes.

Appellant also claims that the interruption of the deliberations by the trial court and argument by the prosecutor also prevented the jury from making an individualized sentencing determination. (AOB 321-324.) For example, appellant claims that the trial court implicitly encouraged the jury to compare the relative culpability of each defendant by allowing the prosecutor to argue Castro's portion of the closing arguments while the jury was deliberating as to appellant. (AOB 322-323.) Yet, there is nothing in the record indicating the jurors failed to assess independently the appropriateness of the death penalty for appellant, or engaged in improper comparative evaluations of the defendants due to any interruption. In the absence of a showing that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant, there was no error. Therefore, no gross unfairness depriving appellant of a fair trial or due process is evident. (See *People v. Box*, *supra*, 23 Cal.4th at p. 1197.)

XVII. APPELLANT FORFEITED HIS CLAIM REGARDING THE VICTIM IMPACT TESTIMONY; NONETHELESS, THE EVIDENCE PRESENTED WAS WITHIN THE SCOPE OF PERMISSIBLE TESTIMONY; TO THE EXTENT ERROR OCCURRED, THE EFFECT WAS HARMLESS

Appellant contends that it was improper for prosecutor to elicit, and for the victim's family to express, their opinion on the proper penalty for appellant during the penalty phase. (AOB 326-338.) Respondent submits that counsel failed to properly object and preserve the claim. In any event, the evidence presented was within scope of constitutionally permissible victim impact testimony. To the extent any error occurred, it was harmless beyond a reasonable doubt.

A. The Relevant Proceedings

While questioning the first witness, John Molina, the father of one of the victims, the prosecutor had the following exchange:

> **Prosecutor:** Mr. Molina, now, understanding what the potential penalties are in this case, sir, are you testifying out of revenge, looking for revenge, or looking for justice? How would you characterize it?
>
> **Molina:** I want justice.
>
> **Prosecutor:** And in your own mind, and in your heart, what do you feel is the appropriate penalty for this jury to impose upon [appellant]? Well, strike that. [Appellant].
>
> **Molina:** That's not for me to say.
>
> **Prosecutor:** Understood. Very well then. I thank you, Mr. Molina.

(26RT 3904.)

Immediately thereafter, the prosecutor concluded his examination of the witness and called for the next witness. However, defense counsel requested to approach the bench, and the following exchange took place outside the presence of the jury:

Defense counsel: I was disturbed by [the prosecutor] asking this witness, Mr. Molina, as to, you know, what he wants to have done with [appellant] as far as life or death is concerned. And I was going to object, and I didn't because that I just sensed Mr. Molina was going to do the right thing. The difficulty is that he's asking a question that asks for vengeance. When someone says, you know, I want revenge, I want vengeance, whatever, it's a question that asks for improper –

Trial Court: I hear your point. What is your reply?

Prosecutor: Well, maybe that was a poor way to ask the question, but I think it's well within my right to get an impression from these witnesses as to what they think the appropriate penalty would be, if they're willing to answer that question. Much like the defense witnesses that will be called, I anticipate that they're going to plead for, you know, to save these individual's lives as opposed to putting them to death.

Trial Court: I would expect that you would – that you would be asking witnesses such questions as why do you feel that the defendant's life should be spared.

Defense counsel: That's not a question that asks for revenge.

Trial Court: No. And he preceded it by asking him what – if he's motivated by revenge or by justice, and he answered correctly and said justice. Now the follow-up question is what do you feel would be a just resolve. You're going to be asking your witnesses the same thing. They're going to say the best resolve would be life without possibility of parole. I think he's entitled to ask the question. I understand your concern, I think you have to be careful as to how you phrase it.

Defense counsel: I think the difficulty is that the jury instructions that this jury is being asked to consider say that this is not a question of revenge. [The prosecutor] in his opening statement said that this is not a question of revenge, it's not eye for eye, yet the question asks for a revenge response. And there's no way for me to tell which of the many witnesses – there's like 60 witnesses here, you know, are going to go sideways and start talking about revenge.

> **Trial Court:** If I were to sustain your position I would have to preclude you from asking any of the defense witnesses why they feel life should be spared. So if someone says I feel appropriate penalty is death, then the follow-up question is why do you feel that way. And if he says, revenge, why then obviously that's an inappropriate answer. I think it could be held against that witness. But I think the jury would hold it against them. So, I think you have to be careful in phrasing your questions, but I do think he's entitled to ask what their opinion is, so objection overruled.

(26RT 3905-3907.)

While questioning another family member, Mike Murillo, the father of one of the victims, the following exchange took place:

> **Prosecutor:** What is it that you feel is the most important thing that this jury should know in evaluating the proper punishment for his killer?
>
> **Murillo:** I've thought about that, and I just can't comprehend how a person, [appellant] right here, could have done something like that, you know. Not only Mike but his friend, and then continue to ask his friends to kill his supposedly friend. See, that's something I just can't comprehend. I'm just hoping that justice is taken so this individual can't be out in the streets and harm somebody else out there.

(27RT 3980-3981.)

While questioning Javier Castillo, the father of one of the victims, the following exchange took place:

> **Prosecutor:** Other than what you have told us today, is there anything else that you feel that this jury should know in evaluating a penalty for the killer of your son Jaime Castillo?
>
> **Castillo:** I have no objection on the penalty that they are seeking. I don't have no objection at all. I don't believe – I believe that these individuals are – especially [appellant], he became very influential when he was in the jail house and being such influential, he gave the order to kill my son. And I don't think he should be given that same opportunity to do the same thing again. Those are my . . .

(27RT 3984.)

Lastly, while questioning Linda Castillo, the stepmother of one of the victims, the following exchange took place:

> **Prosecutor:** Is there anything else, in closing, you would like to say to this jury to help them evaluate the punishment for Jaime's killer?
>
> **L. Castillo:** I am for the death penalty. I want these people to be killed in lethal injection. But it's a shame that the penalty takes so long and the system lets these people take advantage of the time they have. So, to me, it doesn't matter. If you guys get the penalty, it's good. But it's a shame that the system takes so long to be able to kill these people. They might be in for life, anyway.

(27RT 3990.)

B. The Applicable Law

The introduction of victim impact evidence in capital cases does not violate any rights guaranteed by the United States Constitution. However, the views of a victim's family as to the appropriate punishment are beyond the scope of constitutionally permissible victim impact testimony. (*Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *Booth v. Maryland* (1987) 482 U.S. 496, 508-509 [107 S.Ct. 2529, 96 L.Ed.2d 440]; *People v. Cowan* (2010) 50 Cal.4th 401, 484; *People v. Pollock, supra*, 32 Cal.4th at p. 1180; see *People v. Smith* (2003) 30 Cal.4th 581, 622.)

C. The Claim Is Forfeited For Failing to Object; in Any Event, Any Error Was Harmless

Here, defense counsel's failure to object to the victim impact testimony forfeits the claim on appeal. (*People v. Clark* (1990) 50 Cal.3d 583, 625-626; see *People v. Mendoza* (2000) 24 Cal.4th 130, 186.) Although counsel objected to the initial line of questioning by the prosecutor (see 26RT 3905-3907), defense counsel failed to renew his

objection when the prosecutor subsequently asked three other witnesses a similar question eliciting the alleged objectionable response (see 27RT 3984, 3990). Unlike the first question regarding justice and revenge, to which defense counsel objected, the prosecutor subsequently asked what the jury should know in the *evaluating* the proper punishment or penalty for his killer. Therefore, the lack of an objection has forfeited this claim.

In the event this Court finds that it was not necessary for defense counsel to renew an objection already overruled (see, e.g., *People v. Clark, supra*, 50 Cal.3d at p. 623; *People v. Antick* (1975) 15 Cal.3d 79, 95), the question posed by the prosecutor to three family members was within the scope of constitutionally permissible victim impact testimony. While it is impermissible to elicit victim testimony regarding the appropriate punishment, here, the prosecutor merely sought any information from the witnesses that they might deem relevant for the jury to know "in *evaluating* the proper punishment" for appellant. (27RT 3980-3981, emphasis added; see also 27RT 3984; 3990.) In essence, therefore, the prosecutor asked an open-ended question seeking any information or testimony from family members which they felt might be relevant to the jury in evaluating what penalty to impose in this case, which is exactly the purpose of victim impact evidence – legitimate information for a jury to hear to determine the proper punishment. To be clear, the prosecutor did not specifically ask the views of the family regarding the actual punishment to be imposed. Therefore, the question posed by the prosecutor was permissible. Moreover, two of the three responses to the question quoted above – that one witness was hoping for "justice," and the other had "no objection on the penalty that [the jury] is seeking," were brief and innocuous. (See *People v. Benavides* (2005) 35 Cal.4th 69, 107 [statement that victim's family "wants justice to be done" was held not to be inflammatory].)

However, to the extent that one family member's testimony that she was "for the death penalty" and wanted "these people to be killed in lethal injection" was improper, any possible error was harmless beyond a reasonable doubt. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 486; *Chapman v. California*, *supra*, 386 U.S. at p. 24) As properly admitted evidence in aggravation, the jury had before it the circumstances of the instant crimes showing appellant had committed multiple murders, including masterminding and soliciting the murder of a witness. The jury also heard of other crimes committed by appellant. Moreover, the allegedly improper testimony constituted only a small portion of the victim impact testimony. Indeed, appellant only objects to the responses of three witnesses out of the twenty family members who testified.

By contrast, appellant's mitigating evidence – evidence about his supposed drug abuse and appellant's mother's testimony about fabricating an alibi for appellant – was not particularly strong. Therefore, the jury's decision was properly based on the circumstances of the crimes and aggravating evidence, not the brief testimony of certain witnesses in response to the prosecutor's question. Any error was harmless beyond a reasonable doubt.

XVIII. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT APPELLANT COMMITTED THE ASSAULT WITH A FIREARM AND THUS IT WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3

Appellant claims the admission of a single incident in the penalty phase trial pursuant to Penal Code section 190.3, subdivision (b), violated his constitutional right to due process under the Fourteenth Amendment because there was insufficient evidence to support its finding. (AOB 339-357.) Appellant is mistaken, as there was sufficient evidence to support the finding that appellant committed the assault with a firearm on R.J. Uzel.

The evidence was properly admitted under Penal Code section 190.3, factor (b), which provides that the jury may consider in making their sentencing determination, "[t]he presence or absence 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." As used in factor (b), the term "criminal activity" includes only conduct that violates a penal statute. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134.) Whether a particular instance of criminal activity involved the express or implied threat to use force or violence "can only be determined by looking at the facts of the individual incident." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) This Court reviews the record for "substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 587; see *People v. Memro* (1985) 38 Cal.3d 658, 698.)

In this case, assault with a firearm is clearly a criminal activity. Moreover, it is a criminal activity that involves "the express or implied use of force or violence or the threat of force of violence." The prosecution introduced evidence of this single incident in aggravation pursuant to section 190.3, subdivision (b). According to the evidence presented, R.J. Uzel, along with two friends, went to a local fast food restaurant and parked their car. After using the pay phone, and while they were pulling out of the parking spot, bullets came flying through the window and hit Uzel in the right leg and skimmed his chest. (27RT 4022-4033.) Although Uzel testified he did not see where the bullets had come from, he did admit knowing appellant from high school. One of his friends, Recio, had previously testified that, "all I remember him it was Dozer, and he was trying – they were trying to figure out how they could get back at Cole Street for shooting at them, vice versa." (27RT 4054.) Another witness, who heard the shots fired, followed the car in which the shooter drove away

in and wrote down the license plate number. (27RT 4059-4063.) The car belonged to codefendant Bermudez. (27RT 4070-4072.)

While Uzel and Recio gave conflicting testimony, and even recanted their testimony, it was for the jury to determine their credibility. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.) Given the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that appellant assaulted Uzel with a firearm. (See *People v. Griffin* (2004) 33 Cal.4th 536, 584-585.)

Even assuming some error in admitting the incident, there is no reasonable possibility the penalty verdict would have been different absent evidence of this incident. (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 591; *People v. Lewis* (2008) 43 Cal.4th 415, 527.) The assault on Uzel was relatively trivial in comparison to the circumstances of the crimes in which appellant was convicted – brutal multiple murders, including the murder of a witness, and second degree robbery and assault with a firearm. The jury rightly heard the circumstances of these violent crimes and was provided with ample evidence of appellant's violent criminal behavior apart from the incident about which he complains. Therefore, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIX. THE TRIAL COURT'S ERROR IN FAILING TO REDEFINE REASONABLE DOUBT WAS HARMLESS

Appellant contends the trial court erred in telling the jury that the prosecution did not have a burden of proof at the penalty phase and failed to redefine reasonable doubt at the penalty phase. (AOB 358-367.) Any

error in omitting the reasonable doubt instruction at the penalty phase was harmless.

A. The Relevant Proceedings

At the conclusion of the penalty phase evidence, but before closing arguments, the trial court made the following comment: "The People do not have a burden of proof at this stage in the proceeding." (30RT 4430.) After closing arguments, the trial court instructed the jury with the following:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must decide what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias or prejudice against the defendants, nor swayed by public opinion or public feelings. Both the People and the Defendants have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(30RT 4462; 13CT 3525.)

In addition to giving CALJIC No. 8.84 [introductory penalty phase instruction], CALJIC No. 8.85 [list of aggravating and mitigating factors for jury's consideration], CALJIC No. 8.88 [penalty phase concluding instruction], CALJIC No. 9.00 [defining assault], CALJIC No. 9.02 [defining assault with a firearm], the trial court instructed the jury with CALJIC No. 8.87:

> Evidence has been introduced for the purpose of showing that the defendant Richard Penunuri has committed the following criminal act which involved the express or implied use of force or violence or the threat of force of violence:

> Assault with a firearm upon R.J. Uzel in violation of Penal Code section 245(a)(2) on or about May 20, 1997.
>
> Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convicted beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(13CT 3531.)

Although the trial court did not instruct the jury with CALJIC No. 2.90 [defining reasonable doubt] at the penalty phase portion of the trial, it did instruct the jury with CALJIC No. 2.90 at the guilt phase. (24RT 3752-3753; 12CT 3379.)

B. Any Error in Omitting the Reasonable Doubt Instruction Was Harmless

The trial court's omission in defining reasonable doubt was error. As this Court recently explained in addressing a similar claim, "if a trial court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it later must provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase," including CALJIC No. 2.90. (*People v. Lewis, supra,* 43 Cal.4th at p. 535; *People v. Chatman* (2006) 38 Cal.4th 344, 408.) However, this error was harmless. In *People v. Cowan, supra,* 50 Cal.4th 401, the same error was harmless when the trial court failed to redefine "reasonable doubt" during the penalty phase instructions because the jurors had been given the appropriate instructions during the guilt phase. (*Id.* at p. 494.) The same is true here. While the jury was not instructed with CALJIC No. 2.90 at the penalty phase, it had

been previously been given the definition of reasonable doubt at the guilt phase. (24RT 37-52-3753; 12CT 3379.)

Appellant contends that the trial court's single comment that the "People don't have a burden of proof at this stage of the proceeding" distinguishes it from *Cowan*. (AOB 364.) However, this brief comment does not affect the harmless error analysis set forth in *Cowan*. First, this comment was true given that the prosecution does not have a burden of proof at the penalty stage, except for prior violent crimes evidence and prior felony convictions under section 190.3. Second, the comment was made before the jury was given its formal instructions, including CALJIC No. 8.87, which sets forth the "reasonable doubt" standard for prior violent crimes.

In any event, the error was harmless under either state "reasonable possibility" standard for penalty phase error (see *People v. Brown* (1988) 46 Cal.3d 432, 446-448), or the "harmless beyond a reasonable doubt" standard for federal constitutional error set forth in *Chapman v. California*, *supra*, 386 U.S. at p. 18 (*People v. Lewis*, *supra*, 43 Cal.4th at p. 535). Like in *Cowan*, the jury was instructed that before it could consider unadjudicated criminal activity as aggravating, it had to find beyond a reasonable doubt that defendant had engaged in that activity. There is no reasonable possibility the jury would have believed that the reasonable doubt standard it was required to apply at the penalty phase to the prior violent crimes evidence was any different than the standard it had just applied at the guilt phase. *People v. Cowan*, *supra*, 50 Cal.4th at p. 495.

Moreover, nothing in the record suggests the absence of an instruction defining reasonable doubt caused the jurors to apply a legally incorrect standard or inconsistent standards. Nothing in counsel's closing arguments suggested that anything other than the definition given at the guilt phase applied, and the jurors did not ask any questions or request clarification of

the reasonable doubt concept. (See *People v. Lewis, supra*, 43 Cal.4th at p. 535; *People v. Chatman* (2006) 38 Cal.4th 344, 408.) Moreover, the jury was appropriately instructed on how to weigh the aggravating and mitigating evidence. (CALJIC No. 8.88; 13CT 3539-3540.)

As previously set forth, given the strength of the evidence in aggravation and the weakness in mitigation, there is no reasonably possibility that the trial court's failure affected the penalty verdict. Therefore, the error was harmless beyond a reasonable doubt.

XX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at his trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 368 – 411.) As he himself concedes, these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective, as it fails to "genuinely narrow" the class of death eligible defendants. (AOB 370-372.) This Court has repeatedly rejected such claims, and appellant has not distinguished his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213.) Appellant's claim should likewise be rejected.

B. Penal Code Section 190.3, Subdivision (a), Does Not Allow for an Arbitrary Or Capricious Imposition of the Death Penalty

Appellant asserts that Penal Code section 190.3, subdivision (a), fails to adequately guide the jury's deliberations, thereby resulting in the "wanton and freakish" application of this factor. (AOB 373-376.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630; 129 L.Ed.2d 750].) Appellant's claim should also be rejected.

C. California's Death Penalty Statute and Instructions Set Forth the Appropriate Burden of Proof

Appellant also contends, in seven subclaims, that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. (AOB 376-404.) As explained below, each of these claims have previously been rejected by this court and are meritless.

First, appellant claims the instructions failed to require juror unanimity as to the aggravating factors and the death penalty statute and unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (AOB 377-389.) This Court has concluded that the death penalty law is not unconstitutional for failing to require that the jury be unanimous in finding the existence of an aggravating factor. (*People v. Mills, supra*, 48 Cal.4th at p. 214.) This Court has also held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez, supra*, 37 Cal.4th at p. 589; *People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not

deficient by failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi*, *Ring*, and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. The reasoning set forth above applies equally to appellant's claim that *Cunningham v. California* (2007) 549 U.S. 270, 293-295 [127 S.Ct. 856, 871; 166 L.Ed.2d 856] also requires the State to prove an aggravating factor beyond a reasonable doubt. (*People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429.)

Second, appellant claims the instructions failed to inform the jury that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty. (AOB 390-393.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Third, appellant asserts that the jury was required to base a death sentence on written findings regarding aggravating factors. (AOB 393-396.) This Court has also rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Fourth, appellant claims that the death penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of

the death penalty. (AOB 397-399.) This Court has held that "[t]he federal Constitution does not require intercase proportionality review. [Citation.] The absence of disparate sentence review does not deny a defendant the constitutional right to equal protection. [Citation.]" (*People v. Romero*, supra, 44 Cal.4th at p. 429; accord, *People v. Mills, supra*, 48 Cal.4th at p. 214.)

Fifth, appellant claims that the prosecution may not rely on unadjudicated criminal activity in the penalty phase, and even if it were constitutionally permissible to do so, such alleged criminal activity could not constitutionally serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury. (AOB 399-400.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Sixth, appellant contends the inclusion in the list of potential mitigating factors of such adjectives as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) acted as barriers to the consideration of mitigation. (AOB 400.) This Court has held that the use of the adjectives "extreme" and "substantial" do not make the sentencing statute (§ 190.3) or instructions unconstitutional. [Citation.]" (*People v. Romero, supra*, 44 Cal.4th at p. 429.)

Finally, appellant argues that the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction. (AOB 400-404.) This Court has rejected this claim. (*People v. Alexander* (2010) 49 Cal.4th 846, 938.)

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. As such, the claim and subclaims must all be rejected.

D. California's Death Penalty Law Does Not Violate the Equal Protection Clause of the Federal Constitution

Appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 404-408.) However, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Tate* (2010) 49 Cal.4th 635, 713; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467.) Thus, appellant's claim of an Equal Protection Clause violation is meritless and must be rejected.

E. California's Use of the Death Penalty Does Not Fall Short of International Norms

Finally, appellant's claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 408-411.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Tate, supra*, 49 Cal.4th at p. 713.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

XXI. There Was No Error in Either the Guilt or Penalty Phase That Requires Reversal

In his final claim, appellant states that the cumulative error doctrine requires reversal. (AOB 412-416.) He is mistaken. A defendant -- even one facing capital punishment -- is entitled to a *fair* trial, not a *perfect* trial.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; cf. *People v. Marshall, supra*, 50 Cal.3d at p. 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see also *United States v. Hasting, supra*, 461 U.S. at pp. 508-509 ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and. . .the Constitution does not guarantee such a trial"].)

Respondent has argued throughout that appellant received a fair trial. Simply stated, appellant has failed to show otherwise. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton, supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors made by the trial court or prosecution, none of which were prejudicial. Moreover, as set forth in the statement of facts and prior arguments, the evidence of appellant's guilt was simply overwhelming. A review of the record without the speculation and interpretation offered by appellant shows that appellant received a fair and untainted trial. The Constitution requires no more. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts. (See *People v. Carrera, supra*, 49 Cal.3d at p. 332 [overwhelming evidence of guilt; no error affects the believability of the defendant's evidence].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: June 20, 2013

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 35,844 words.

Dated: June 20, 2013

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *The People of the State of California v. Richard Penunuri*

Case No.: **S095076**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 20, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope 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:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 20, 2013, at Los Angeles, California.

J.R. Familo
Declarant

Signature

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