In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANH THE DUONG,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S114228

Los Angeles County Superior Court
Case No. BA240170
The Honorable Robert M. Martinez, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

A Los Angeles County grand jury indicted appellant on four counts of murder. (Pen. Code, § 187, subd. (a)[1].) As to all four counts, it was alleged that appellant personally used and intentionally discharged a handgun, which caused great bodily injury and death to the victims, Minh Dieu Tram, The Hao Tang, Robert A. Norman, and Lin Thi Dang, within the meaning of sections 12022.53, subdivisions (b)-(d), and 12022.5, subdivision (a)(1). It was further alleged that the murders constituted a special circumstance of multiple murder within the meaning of section 190.2, subdivision (a)(3). (1CT 117-120.)

Appellant pleaded not guilty and denied the special allegations. (1CT 124-125.) Trial was by jury. (4CT 951-952, 956.) As to counts 1, 2, and 3, the jury found appellant guilty of first degree murder and found true the handgun allegations. As to count 4 (Lin Thi Dang), the jury found appellant not guilty of first degree murder, but found him guilty of second degree murder and found true the handgun allegations. The jury also found true the multiple murder special circumstance allegation. (4CT 1048-1066, 1069-1074.)

The jury returned a verdict of death, and the court denied appellant's automatic motion to modify his sentence and his motion for a new trial. (5CT 1211-1215, 1286-1289.) For the three counts of first degree murder and one count of second degree murder, the court imposed a sentence of death pursuant to section 1227.5. As to the section 12022.53, subdivision (d) handgun allegations, the court imposed and stayed (due to the death sentence) a sentence of 25 years to life for each count, with an order that the stay become permanent upon the execution of the death sentence. The

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[1] All statutory references are to the Penal Code unless otherwise noted.

court ordered further that in the event the death sentence is reversed, modified, or reduced to life in prison without parole ("LWOP"), the stay should be lifted, and appellant should serve the 25 years to life as to each count before serving any modified or reduced sentence on any other counts. As to the section 12022.5, subdivision (a)(1) handgun allegation, the court imposed the high term of 10 years, and stayed that sentence pursuant to section 654, with that stay to become permanent upon the section of the death sentence or the service of the 25 years to life sentences pursuant to section 12022.53, subdivision (d). As to the section 12022.53, subdivisions (c) and (b) handgun allegations, the court imposed terms of 20 years and 10 years, respectively. The court stayed those sentences pursuant to section 654, with the stays to become permanent upon execution of the death sentence or the service of the 25 years to life sentences pursuant to section 12022.53, subdivision (d). (5RT 1256-1260, 1284-1285, 1296-1302.) The court awarded appellant presentence custody credit of 600 days, including 600 days of actual custody and zero days of conduct credit. (9CT 2548A-2548B.)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution Evidence

a. International Club Shooting

In the early morning hours of May 6, 1999, Thi Van Le was at the International Club in El Monte for a birthday party for Khiet Diep, a member of the Wah Ching street gang.[2] (6RT 897-899.) When Le arrived at midnight, he went with a Pomona Boys gang member to an area of the

[2] At the time, Le was working in an undercover capacity for the Garden Grove Police Department. (6RT 898.)

club near the restroom where there were several tables. Le recognized several members of Wah Ching sitting at those tables as well as several Pomona Boys members nearby. (6RT 898-900.)

At or near the tables, Le saw appellant, whom he knew as "John." (6RT 900-901.) Le had been introduced to appellant twice before by Duc Dien Tran Nguyen ("Duc"); once at a coffee shop owned at the time by Le, and once at Duc's house.[3] (6RT 901, 905.) Appellant was with Duc and Anthony Tran, otherwise known as "Y." (6RT 906-907.) Duc never told Le that he was a member of the Lao Family gang, but Y admitted to Le that he was a member. (6RT 907.) Also at the tables was Joey Hoa Minh Truong, otherwise known as "Hoa." Le had never met Hoa before that night, and he was introduced by Duc and Y.[4] (6RT 908.)

Le was in the restroom when he heard Y arguing for five to ten minutes with several Asian men. (6RT 908-909; 7RT 989.) Le did not see

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[3] Le met Duc some two years before the shooting. Around 1997 or 1998, Le went through a divorce and lost two coffee shops that he owned. After the divorce, Le got involved with Duc in "[s]elling drugs." (6RT 903.) Le transported the drugs from Santa Ana to Seattle, Washington. Le made five to seven trips to Seattle transporting between two and four grams of cocaine, and he was paid between $3,000 and $5,000 for this work. On one of these trips, Le was arrested. He pleaded guilty to transporting cocaine and served four and a half months in prison. At some point after his release from prison, he agreed to become an informant for the Garden Grove Police Department. (6RT 904-905.)

[4] Y admitted that he was at the International Club during the shooting, and that he was there with his girlfriend to celebrated Diep's birthday. (8RT 1198-1199, 1202-1204.) He admitted that he and Hoa were Lao Family associates, and that he had known appellant for five or six years. (8RT 1201, 1209-1211.) He acknowledged that appellant was at the club that night, but he claimed not to recall who appellant was with, how appellant got there, or whether he talked with appellant after the shooting. (8RT 1204-1205.) Y denied arriving with or leaving with appellant that night, and he denied knowing where appellant got the gun that he used that night. (8RT 1212.)

any of these men touch or hit Y, and he never saw any kind of weapon. (6RT 909; 7RT 989-990.) John Bui, co-owner of the International Club, also witnessed this argument, which was between two groups, including six to seven people in total. Minh Dieu Tram was one of the argument participants, and appellant was a part of the group arguing with Tram's group. (7RT 1052-1054, 1107.) Bui did not see anybody push, shove, or punch anybody, nor did he see anyone with a weapon. (7RT 1053.) Pedro Murillo, a Pine Street gang member also at the club, witnessed approximately 15 men "fighting" and "shoving each other" by the bar. (9RT 1385-1387.) Some of the men involved in the argument were Murillo's friends from Pine Street and others were members of Wah Ching. (9RT 1387-1388.) Bui broke up the argument and asked several of its participants to leave. (6RT 911; 7RT 1053-1054; 9RT 1406.)

After the argument participants dispersed, Le saw appellant sitting by himself at one of the tables near the restroom. (6RT 912; 7RT 1107.) Diep went over to appellant and the two men spoke in Cantonese. (6RT 912.) Appellant said, "What do you want?" (6RT 915.) Diep responded, "We'll see." (6RT 916.) Diep then left the table. (6RT 917.) Le never got the impression from this interaction that appellant or anybody else was in danger. (7RT 993-994.) Likewise, Bui never saw anyone threaten appellant, hit him, or point a gun at him or anyone in his group. (7RT 1062-1063.) Further, Y testified that nobody threatened him that night at the club, and he denied seeing anyone with a gun. (8RT 1199-1200.) He denied that appellant would have needed to defend him that night, and he claimed not to know whether appellant would have needed to defend Hoa, Duc, or anyone else at the club. (8RT 1212-1213.)

Murillo had a drink with Tram. (9RT 1419.) Tram did not appear to be mad or upset; he was acting "normally." (9RT 1421.) At no point that night did Murillo see Tram act aggressively toward anybody or display a

weapon. (9RT 1421.) Murillo then went back to the pool tables to shoot pool. (9RT 1396, 1420.)

Bui sat next to Tram in a booth by the cash register. Bui was sitting on the outside of the booth. Next to him was Tram, and also in the booth were The Hao Tang, a friend of Tram's, Lin Thi Dang, a former waitress at the club, Robert Norman, a young man who was trying to get work as a DJ, and Loan Dang, Lin Thi Dang's sister. (7RT 1054-1058.)

Le saw appellant walk toward the bar. (6RT 917-918.) Le began to look around the club for a suspect as part of his undercover with for the Garden Grove police. (4RT 918.) Two minutes later, he heard a gunshot.[5] (6RT 917.) When he heard the gunshot he turned and saw that appellant was shooting the people in the booth. (6RT 918-919, 926; 7RT 991.) After the first gunshot, Le heard between 10 and 14 additional gunshots fired by appellant. (6RT 919.) Le never saw anybody shooting at appellant.[6] (6RT 919.)

Bui heard a "loud noise," stood up and turned around, and saw appellant with a gun behind the booth. (7RT 1059, 1062, 1093.) Bui approached appellant with arms outstretched, grabbed him, and said, "No, no, no." (7RT 1059-1061, 1093.) Le saw Bui grab appellant in a "semi bear hug" and yell, "Stop shooting." (6RT 919, 952.) "[N]o more than two seconds" later, appellant performed a "judo" move and "flipped" Bui to the

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[5] According to Le, the shooting occurred 10 to 15 minutes after the fight in the restroom. (6RT 911.)

[6] Le described one of the victims as acting like a "big shot" or a "big boss" that night at the club and he had reason to believe he was carrying a gun. (6RT 961; 7RT 989-990, 992.) Later in the trial, it became clear that Le was referring to Tram. (See 10RT 1597.) However, Le never saw Tram take out a gun and show it to people, he never saw Tram go up to appellant or to the table where appellant was seated, and he never saw Tram make a gesture to appellant. (7RT 992-993.)

ground. (6RT 920, 954-955; 7RT 1061.) Appellant then turned back around and "kept shooting into the booth." (6RT 920.) After the third or fourth gunshot, Le saw one of the people from the booth try to run away. (6RT 920-921.) This person jumped over the counter, and ran toward the front door of the club. (6RT 921.) As the person ran away, appellant turned and fired at the fleeing victim three or four times, but the fleeing victim was not hit by these bullets and was able to escape out the front door. (6RT 921, 928.) From the time the first shot was fired until the time the last shot was fired, approximately ten to fifteen second elapsed. (6RT 956.) At trial, Le clearly identified appellant as "the person who shot the gun." (7RT 987.)

After he was knocked to the ground, Bui saw appellant fire "many" more gunshots, and he never saw anyone shooting other than appellant. (7RT 1070-1071.) Once appellant stopped shooting, people in the club were "running" "all over the place" so Bui did not see what happened to appellant. (7RT 1072.) There were several tables in the front of the booth that Bui believed would make it difficult for people in the booth to leave. (7RT 1075.) Bui identified appellant as the shooter. (7RT 1062.) He testified that even though several years had passed since the shooting, appellant's face "will never fade away from [his] memory." (7RT 1062.) He confirmed that he was "positive" that appellant was the shooter. (7RT 1062.)

Murillo heard the gunshots while he was shooting pool, and he got under the pool table. (9RT 1396-1397.) While he was under the table, "all this chaos [was] going on" in the bar. (9RT 1397.) Two Asian men, including appellant, approached and looked under the pool table. (9RT 1398, 1410.) Murillo made eye contact with appellant, and he believed that appellant was looking for somebody. (9RT 1399.) When appellant and the other man turned to walk away, Murillo saw that appellant had a gun in his

waistband. (9RT 1399-1400.) Based on seeing appellant with the gun, Murillo identified appellant as the shooter. (9RT 1380.)

b. Crime Scene

Shortly after the shooting, at 1:47 a.m., El Monte Police Department Officer Gary Martin Gall responded to the International Club with his partner, Officer Bill Hale. (6RT 879-880.) As he entered the club, Officer Gall encountered the four victims in the bar area. (6RT 882-885.) The female victim had been moved to the floor of the club, where she was being treated by a paramedic. Another of the victims was being treated as well.[7] (6RT 885-886.) Officer Gall discovered several expended shell casings at the scene. He did not see a handgun on Tram's person, and never heard any of the paramedics announce that any victim had a gun. He was not aware that a handgun was discovered in Tram's waistband. (6RT 887-889.)

Deputy Sheriff Patricia Fant responded to the crime scene as a firearms examiner. (7RT 1114.) She collected ten expended .45 caliber shell casings; no shell casings other than .45 caliber casings were recovered. (7RT 1116, 1118.) She also recovered several expended bullets. (7RT 1118-1119.) Later, she determined that all ten casings had been fired from a single .45 caliber semi-automatic or fully-automatic

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[7] The parties stipulated that at 1:49 a.m., Los Angeles County Fire Department personnel were dispatched to the International Club, and they arrived at 1:54 a.m. Once there, fire department personnel began to treat the three male victims, Tram, Tang, Norman, and the female victim, Dang. The parties further stipulated that shortly after the arrival of the fire department personnel, Dang was transported to El Monte Community Hospital and was treated in the emergency room. She was pronounced dead at 2:46 a.m. Her body remained at the hospital until it was transported to the coroner's office for an autopsy. Further, the parties stipulated that fire department personnel determined at 2:00 a.m. that the three male victims were dead. The bodies of the male victims remained at the scene during the crime scene investigation, at which point they were transported to the coroner's office. (6RT 890-891.)

handgun, consistent with a Colt Springfield Arms Model 1911. (7RT 1119-1120.) Deputy Fant later recovered three bullets from the autopsies on The Hao Tang and Lin Thi Dang. She compared these bullets to the six expended bullets found at the crime scene and she determined that all nine bullets were fired from the same gun. She concluded that one firearm was used for all four murders, since there was no evidence that a second firearm had been fired. (7RT 1122-1123.) Later, Deputy Fant became aware that a coroner's investigator found a .40 caliber handgun on one of the victims. (7RT 1127-1128.) Deputy Fant test-fired this handgun, but she did not find any .40 caliber ballistics evidence at the crime scene, meaning no .40 caliber bullets or expended .40 caliber casings. Deputy Fant conducted a trajectory examination at the crime scene. (7RT 1128-1129.) The results of this examination were consistent with the shooter standing in front of the booth and firing down into it, aiming for the victims' upper chest or head areas as they sat in the booth. (7RT 1132-1134.)

Los Angeles County Sheriff's Department criminalist Michael Oto assisted with evidence collection at the crime scene. Before the bodies of the victims were removed, Oto observed victim Tram. (8RT 1187.) At the time, he did not see a firearm on Tram, though he later learned that one was found in his waistband. (8RT 1188-1189.) Oto determined that this weapon was a .40 caliber Smith and Wesson. (8RT 1191.) He saw that there was a magazine loaded in the handgun and that there were ten live rounds of .40 caliber Smith and Wesson ammunition, but there was no round in the barrel. (8RT 1192.) Even though the safety was not on, Oto believed that if Tram had taken this gun from his waistband and pointed it at somebody, it could not have gone off because there was no round in the chamber. (8RT 1192-1193.)

Deputy Sheriff Richard Tomlin oversaw the crime scene and under his direction, Deputy Fant and Criminalist Mike Otto collected firearm

evidence. A crime scene diagram was prepared and a video taken of the interior of the club.[8] (8RT 1157-1158.) An expended casing was later found behind the bar in an area where some pool cues were located. (8RT 1182.) However, Deputy Tomlin did not look for any expended bullets in the pool table area of the club because at that time, he had no information that the shooter also shot at somebody running from the booth toward the pool table area. (8RT 1163.) At some point in the investigation, Deputy Tomlin learned that a witness reported that the shooter had been at a table by the restroom. Based on that information, he had a fingerprint expert lift fingerprints from those tables, as well as from ashtrays and beer bottles near the restroom. (8RT 1183.)

c. Aftermath

Cindy Hoang ("Cindy") was appellant's girlfriend at the time of the shooting.[9] (7RT 1032.) She knew several of appellant's friends, including Y. She did not know whether Y was a member of Lao Family, though she knew "that they were friends." (7RT 1035.) Cindy knew appellant to be a member of Lao Family. He had a tattoo of "LF" on his arm that Hoang said indicated Lao Family. He got this tattoo at some point during their relationship and he had it at the time of the shooting. (7RT 1035-1037.) Appellant had a black belt in Tae Kwon Do and he knew how to defend himself. He worked at a gun range and because he often fired many different kinds of guns, he was familiar with them. (7RT 1038-1039.) At the gun range, appellant taught Cindy how to fire semi-automatic handguns. Cindy knew that appellant sometimes went by the name "Calvin Thomas

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[8] The video was played for the jury. (8RT 1159.)

[9] Cindy stopped dating appellant in 1999, but she started visiting him again after his arrest in 2001. She estimated that she visited him between 50 and 60 times between July 2001 and the time of trial, and that she spoke with him on the phone. (7RT 1047-1048.)

Lee," and that he sometimes used her brother Long Hoang's name, birthdate, and address.[10] Cindy sometimes allowed appellant to use her cell phone. (7RT 1041-1043.)

On the night of the shooting, Cindy was at home. At 1:47 a.m., a call was placed from her cell phone number to check voice mail messages, but she could not recall if she made this call. (7RT 1043-1044.) At 1:49 a.m., a second call was placed to check voice mail messages, but she likewise could not recall making this call. At 1:49 a.m., a call was placed from her phone to Y's cell phone, and while Cindy could not recall making this call, she "[didn't] think" she did. (7RT 1044.) She admitted that appellant "could have possibly" made those calls, and that if he had her phone, "he maybe let someone use it . . . ." Phone records also showed several incoming calls from Y at 1:52 and 1:57 a.m. (7RT 1045.) Cindy did not recall receiving these calls. Records showed that two more calls were placed to Y's phone at 2:16 a.m., but Cindy did not know who could have made these calls. (7RT 1046.) Records showed that a call was placed from Cindy's home phone number to Y's cell phone at 3:31 a.m., but she did not recall making this call and could think of no reason why she would have called Y at that hour. She believed that appellant "could" have made this call. (7RT 1047.)

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[10] At some point, Long Hoang became aware that appellant was using his name, though he never discussed this with appellant. A California Department of Justice record indicated that on February 19, 1996, a man using Long's name purchased a Springfield Model 1911 semi-automatic .45 caliber handgun. The birthdate and address listed on the record matched Long's, but he did not purchase the gun. (7RT 1023-1025.) A driver's license with appellant's picture and the name Calvin Thomas Lee on it listed Long's address. A California Identification Card with appellant's picture on it also listed Long's name, birthdate, and address. Two other California driver's licenses had appellant's picture, but Long's personal information. (7RT 1027-1030.)

Y denied calling Diep or Le after the shooting. (8RT 1205.) He could not recall whether he called Cindy, though he denied ever having a reason to call her. (8RT 1207.) The prosecutor showed Y the cell phone records that listed a call from his cell phone to Cindy's number at 1:52 a.m. on May 6, but Y claimed not to recall making this call. (8RT 1207.) Despite seeing the phone records demonstrating that he called Duc at 1:59 a.m. and that he called Diep several times after the shooting, Y either claimed not to recall or denied making these calls. (8RT 1208-1209.)

Ana Truong, Hoa's sister, had a cell phone under her own name and address. (8RT 1233-1235.) She sometimes let Hoa use her phone, and she admitted that she did not make calls that were made to and from her cell phone number in the early morning hours after the shooting. She denied having any reason to call Y or appellant. (8RT 1235-1236.) She admitted that these calls could "[p]ossibly" have been made by Hoa, and she could not think of anyone else who would have made them. (8RT 1236.) Y could not recall calling Hoa that night or receiving calls from him, despite the phone records indicating that several calls were indeed made. (8RT 1211-1212.)

Le testified that Y and Duc both called him around noon on May 6.[11] Y told Le to go to Duc's house in Garden Grove. (7RT 998-1000.) When Le arrived, "[m]any people" were there, including Duc. (7RT 1000.) Le testified that he did not see Y or appellant there, though he admitted that in a previous statement, he acknowledged that appellant was there. Diep was also at the house, and he had Le drive him to Los Angeles to a residence belonging to someone named Khuong, who had also previously been

[11] Y denied calling Le at 11:07 a.m., despite phone records demonstrating that a call was indeed made from Y's phone to Le's phone. (8RT 1209.)

introduced to Le by Duc.[12] (7RT 1001-1002.) Diep went into Khuong's house, and when he returned "[o]ne minute" later, he had a videotape under his left armpit. Le then drove Diep back to Duc's house. (7RT 1003-1004.) When the two discovered that nobody was there, Le drove back to his house, where he let Diep use his phone to find somebody to pick him up. (7RT 1005.) While Diep was at Le's house, he put the tape in Le's VCR to "have a look" at its contents. The tape was "difficult to see" but Diep told Le that it was from earlier that morning at the International Club. Diep then burned the videotape. (7RT 1006.)

d. Victim Autopsies

Dr. Lisa Scheinin, a deputy medical examiner with the Los Angeles County Coroner's Office, testified as an expert regarding the autopsies conducted on the four victims by members of her office on May 9, 1999. (9RT 1267-1270.)

Minh Tram suffered five gunshot wounds, and Dr. Scheinin believed that four of them would have been fatal. (9RT 1271.) The first bullet, which was considered fatal, entered Tram's head "towards the top of the head" and "perforated the brain." (9RT 1272.) This bullet traveled in a downward trajectory consistent with the shooter "standing slightly behind the victim, shooting him in the head and the victim perhaps looking down at the time he was shot." (9RT 1277.) Tram was thus either sitting, lying down, or "slumped over," when he was shot by a standing shooter. (9RT 1278.) The second bullet, also considered fatal, entered Tram's chest, causing "multiple internal injuries." (9RT 1272.) The third bullet, also considered fatal, also entered Tram's chest, where it caused injuries to

[12] Khuong had been at the International Club the night before, where he had been sitting with members of Wah Ching, Lao Family, and Pomona Boys. (7RT 1003.)

"multiple internal organs including the left lung, the heart, and the right lung." (9RT 1272-1273.) The fourth bullet, also considered fatal, went across Tram's abdomen, going through "multiple internal organs including the spleen, pancreas[,] and liver." (9RT 1273.) The trajectory of the second, third, and fourth bullets were consistent with the victim already having received the head wound, and then falling to his right and laying down, where he was then shot three times in the side by the standing shooter. (9RT 1280-1284.) The fifth bullet went through Tram's right forearm, and it was not considered fatal. (9RT 1273.) Dr. Scheinin believed that the fifth wound was a "re-entry wound, a continuation of wound no. 4," and that that bullet exited the abdomen and reentered the forearm. (9RT 1282-1283.)

The Hao Tang suffered four gunshot wounds, one of which was a "reentrance of another wound," meaning three shots were fired at him. (9RT 1286.) The first bullet, considered fatal, entered through Tang's left temple, and it did not exit. (9RT 1286-1287.) The trajectory of this bullet demonstrated that Tang was either sitting or crouching when he was shot by a standing shooter. The next two wounds were determined to be the result of one bullet. The bullet went through Tang's left arm, leaving a wound there. It fractured the humerus and then exited in the bicep area. (9RT 1288-1289.) The next wound, considered a reentry of the bicep wound, was a "rather large irregular wound" on the chin, which would be "consistent with him having thrown his arm across the face so that the bicep area was against the chin." (9RT 1288, 1290.) Once the bullet entered Tang's brain on reentry through his chin, it became fatal. The final gunshot wound was in Tang's left hand. (9RT 1291-1292.) Dr. Scheinin believed that Tang's wounds were consistent with Tang being shot in the left arm and face, falling to his right, and then being shot again as the shooter stood over him. (9RT 1294-1295.)

Robert Norman suffered a gunshot wound in his back. The bullet entered his back and exited through the "lip area on the left side." (9RT 1295-1296.) This wound was consistent with Norman having been on the ground in a crawling position and the shooter standing behind Norman and shooting him. (9RT 1297.) It was further consistent with Norman having been in the booth, coming out of the booth in an effort to escape, crawling on the ground to stay low, and then being shot in the back. (9RT 1299.)

Lin Thi Dang suffered a gunshot wound on the outside of her left arm. The bullet exited through the inside of the left arm and reentered in the chest area, near the armpit. (9RT 1300-1301.) It caused three major injuries in the left lung, the heart, and the liver, all of which made it fatal. (9RT 1303.)

Dr. Scheinin saw no evidence that any bullet entered one victim, then exited and entered another victim. (9RT 1347.)

e. Investigation, Identification, and Arrest

On June 3, 1999, Fremont Police Detective Frank Noey served a search warrant on Cindy Hoang's house in Garden Grove as part of an unrelated investigation.[13] (7RT 1032; 9RT 1261-1262.) Appellant was not there at the time, but Detective Noey recovered a loaded Springfield Model 1911 semi-automatic .45 caliber handgun in a black satchel underneath a wicker laundry basket in Cindy's closet.[14] (7RT 1033; 9RT 1261-1262.) Cindy had never seen the gun before and she claimed not to know how it got there. (7RT 1033-1034, 1048.) She later told detectives that she "wasn't sure" if anybody else other than appellant could have put the gun in the closet, and that she thought it "might be [appellant]." (7RT 1035.) It

[13] At the time of the search, Detective Noey had no knowledge of the International Club shooting. (9RT 1264.)

[14] The parties stipulated that this gun was test-fired and that it was not the gun used in the International Club shooting. (9RT 1374.)

was only in the few months before the trial that she realized appellant had been using her brother's name to purchase a .45 mm semi-automatic handgun. (7RT 1049.) She admitted at trial that she lied to Detective Noey at the time of the search when she told him she did not know where appellant was; in fact, she knew he was in Texas. (7RT 1037.)

On December 9, 1999, Bui participated in a photographic lineup.[15] He told detectives he was "positive" that appellant was the shooter. However, Bui refused to sign the admonition form. He told a detective that he did not want to sign the form because he did not want his name on any documents that would allow someone to know that he identified appellant as the shooter. (7RT 1079-1081.) He told the detective, "Please keep my name out the way. Don't let somebody know my name. Okay. I have to do this. . . . You know, they are going to shoot me." (7RT 1081.) He told the detective that he would help the investigation but that he did not want to testify in court because he was afraid for his safety and for the safety of his family.[16] (7RT 1082.)

The same day, Murillo also participated in a photographic lineup. He identified appellant as the shooter, writing next to appellant's photograph that he "had the gun and shot the victim." (9RT 1392-1393.)

On July 16, 2001, Costa Mesa Police Department Officer Robert Sharpnack was part of a team of officers surveilling appellant. At around

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[15] On the day of the shooting, Bui spoke with police about the shooting, but he admitted that he "did not give all the details." (7RT 1111.) He did not tell police at the time that the shooter was named "John" or that the shooter was from Lao Family. (7RT 1112.)

[16] Sometime before the trial, a judge held Bui in custody until he agreed to testify, and he promised that when he came to court he would testify honestly. Further, he had to give the prosecutor his passport and he had to wear a monitoring device. He testified at the grand jury, where he identified appellant as the shooter. (7RT 1082-1083.)

4:00 p.m., appellant was seen playing basketball at a gym in Costa Mesa. Once officers identified him, they entered the gym and Officer Sharpnack arrested appellant on the basketball court. After the arrest, Officer Sharpnack went to a residence that appellant shared with a woman named Christine Chen to secure the residence for a search warrant for the San Jose Police Department. (8RT 1215-1216.)

Shortly after appellant was arrested, Newport Beach Police Department Officer Randall Lawton searched the basketball court for appellant's property. (9RT 1361-1362.) He recovered a cell phone, a pair of glasses, a key ring with keys on it, and a plastic container with a gym membership card in the name of Long Hoang. He gave these items to Costa Mesa Police Department Detective Edwin Everett.[17] (9RT 1362-1363; 8RT 1224-1225.) Detective Everett also recovered a parking ticket, time-stamped July 16, 2001 at 4:23 p.m. He gave the car keys to his supervisor and he explained that he believed a vehicle in the gym parking lot was associated with appellant. (8RT 1227.)

After the arrest, Costa Mesa Police Department Officer Brian Harris was handed a set of Ford keys. (8RT 1218.) Officer Harris went to the parking lot and found that the keys matched a Ford Expedition. (8RT 1219, 1228.) He then arranged for this vehicle to be towed to the Costa Mesa Police Department, where Detective Everett later took custody of it. (8RT 1219-1220.) At the station, Detective Everett discovered that the Ford was not registered under appellant's name. He then searched the vehicle and

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[17] At the time of appellant's arrest, Detective Everett was an officer. (See 1RT 157.) He surveilled appellant for a period of months. During this time, he saw appellant on various occasions. He observed appellant at an apartment where he was living, though the apartment was not in appellant's name. He likewise saw appellant in various vehicles, none of which were registered to him. He saw appellant with Chen on various occasions. (8RT 1221-1222.)

found in the center console a loaded Colt Model 1911 .45 caliber handgun with a bullet in the chamber.[18] Also in the vehicle he found a wallet with a picture identification card with appellant's picture and the name Long Hoang. He also found three credit cards in the wallet, all with names other than appellant's. (8RT 1228-1230.)

On August 7, 2001, after appellant's arrest, Le spoke with the prosecutor and several investigators from the Los Angeles County Sheriff's Department Homicide Division in a tape-recorded interview. (6RT 930.) Le also participated in a photographic line-up, in which he identified appellant as the shooter. (6RT 931-933.)

2. Defense Evidence

Khiet Diep[19], Bui's brother-in-law, worked as a manager at the International Club from 1996 to 1999. (9RT 1429-1430.) He was present at the club on the night in question for his birthday party, and the club was "very crowded," with more than 100 people present. (9RT 1430-1431.)

Los Angeles County Sheriff's Department Detective Christine Carns spoke with Diep on several different occasions. Diep told her that he went into the restroom area and that as he was washing his hands, he overheard an argument in Vietnamese between appellant and Tram, an argument appellant said was "over a girl."[20] (10RT 1599-1601.) Diep explained that

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[18] The parties stipulated that this gun was test-fired and that it was not the firearm used in the International Club shooting. (9RT 1374-1375.)

[19] When asked by the clerk to spell his name, Diep spelled it "K-E-I-T-H," which appears to be an Anglicization of his name. (9RT 1428.)

[20] Diep testified that he did not know Tram or any of the other shooting victims and he denied there were any fights or arguments prior to the shooting. He also denied telling police there was an argument in the restroom area and that as he was washing his hands, he heard two individuals talking in Vietnamese. (9RT 1432-1433.) On cross-examination, Diep denied telling detectives that appellant and Tram argued over a girl. (10RT 1564.) Further, while he claimed he "heard" Tram had a

(continued...)

after the argument, Tram returned to his table and appellant returned to his. Sometime later, Diep saw appellant's "backside" and a shooting taking place, and Diep ducked to avoid being injured. (10RT 1600-1601.) Diep heard two or three gunshots, at which point he ran out the back door of the club with someone named Tom. (10RT 1599.) Diep told Detective Carns that the shooter was from Lao Family.[21] (10RT 1615.)

Diep testified that he told the police the truth about what happened, but he denied that what was in the police report was fully accurate. He said that he told police that he "saw the shooting and . . . ran to the back door" of the club, before clarifying that he only "heard the shooting." (9RT 1434-1435.) He denied seeing anyone with a gun that night, and he denied telling defense investigator Daniel Mendoza that he heard an argument when he was in the restroom area, that he heard two individuals talking in Vietnamese, or that after the argument he went to a sofa near the restroom. (9RT 1435-1436.)

Diep testified that he was standing at the bar when he heard two to three gunshots, prompting him to run out the back door of the club. (9RT 1437, 1440.) He claimed that after he left, he went to a friend's house and spent the night there, and that when he woke up the next day he went home. (9RT 1437-1438.) He denied retrieving a videotape from the International Club the next day, he denied bringing that tape to a house, and he denied giving that tape to anybody else. (9RT 1438, 1441.) He admitted knowing appellant, saying that he "met him a few time[s]." He acknowledged that

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(...continued)
gun, he admitted he never saw it. He denied seeing a physical fight break out prior to the shooting. (10RT 1561-1562.)

[21] On cross-examination, Diep denied telling detectives that appellant was a member of Lao Family. (10RT 1546.)

appellant was at the club that night and that he was drinking there, but he denied seeing appellant fighting with anyone. (9RT 1439.)

On cross-examination, Diep admitted knowing Y from their work together at a casino, though he denied that Y paged him several times after the shooting. (9RT 1442-1443.) However, when the prosecutor showed Diep phone records indicating that he received pages from Y's phone number at 1:52, 1:53, 2:23, 2:36, 2:50, and 3:31 a.m., Diep testified that he did not know why Y was paging him and he claimed not to remember his pager number at the time. (9RT 1443-1444; 10RT 1535.) He also denied calling Y back after any of the pages. (9RT 1445.) Further, he denied that Y was paging him because he wanted to make sure the surveillance videotape had been taken from the club, and he claimed not to know that the videotape later recovered by police was blank. (9RT 1444.)

Diep claimed not to know why a call was placed from his mother's house to Thi Van Le at 1:37 p.m. on the day after the shooting, and he claimed not to know why Le called a phone number belonging to Diep's brother at 1:28 p.m. on May 6. (10RT 1536-1538, 1540-1541.) He likewise denied knowing why a phone number belonging to Bich Ngo called his brother's phone at 1:11 p.m. on May 6. (10RT 1543.) He could not explain why a call was made from his mother's house to Y's cell phone at 9:32 p.m. on May 5. (10RT 1545.) He denied telling Y that Tram would be at the International Club that night. (10RT 1547.) He denied being told by a detective that the detective believed he destroyed the videotape and that he was under investigation for doing so.[22] (9RT 1445-1446.)

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[22] At that point, Diep informed the court that he could not continue his testimony without a Vietnamese interpreter. (9RT 1446-1447.) The prosecutor's cross-examination continued the following day with an interpreter. (10RT 1529.)

Diep acknowledged that he did not stay at the club to speak with police and that he never went to the police to tell them what he heard. (10RT 1529-1530.) He claimed to have left the club with somebody named "Jim," but he could not provide any additional identifying information. (10RT 1530-1531.) He said that after he left the club he and Jim went to a friend's house in Alhambra, but he could not recall the friend's name or how he got to this house.[23] Between 6:00 and 8:00 a.m., Diep returned to his mother' house in Rosemead, and he claimed he remained there all day. (10RT 1532-1534.)

At the close of cross-examination, the prosecutor asked Diep if appellant was the shooter. Diep replied, in English, "Yeah. I see by the face." The prosecutor asked Diep to answer if appellant was the shooter, "yes" or "no." Diep replied, "Yes." (10RT 1549)

Hoa, an admitted Lao Family gang member, testified that he attended the International Club on the night in question because appellant, whom he had known for ten years, called and told him there would be a birthday party and asked him if he wanted to shoot pool. (9RT 1449, 1460.) He arrived by himself between 8:00 and 10:00 p.m., said "hi" to appellant, and then went to shoot pool. (9RT 1450.) Though the club was crowded, Hoa saw a man wearing a trench coat that "was not normal at that particular time . . . of night." He saw this man "kind of going in and out, maybe twice, maybe three times, . . . walking pretty fast and looking around." (9RT 1451.) He believed the man was "maybe waiting for a friend or someone, maybe . . . meeting somebody." He then saw the man walk out again "looking around like something was going down." (9RT 1452.)

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[23] During the lunchtime recess at trial, Diep drove with a detective to try to find this house, but Diep claimed he could not remember where it was. (10RT 1565.)

When Hoa was playing pool, somebody came up and indicated to him that the man in the trench coat had a gun. (9RT 1454; 10RT 1526-1527.) Hoa then "prepared [himself] to get ready to go," in case anything "comes down," though he claimed he was "not going to stick around" and he was "not going to intervene." (9RT 1455.) He was about to leave when he heard gunshots from the bar area. He looked over and saw two people struggling over a gun. (9RT 1455-1458.) At that point, he ran out of the club, got in his car, and drove home. He claimed not to not know Tram. (9RT 1459.)

When investigator Mendoza interviewed Hoa on October 22, 2002, Hoa told him largely the same story.[24] (10RT 1571, 1576.) Hoa told Mendoza that he saw appellant at the club talking with several people, and that there was a man in a trench coat there walking in and out of the club. Hoa said that when the shots were fired, he looked in the direction of the shots and saw two men struggling over a gun. During this struggle, gunshots continued to be fired from the gun. (10RT 1573-1574.) On cross-examination, Mendoza testified that Hoa told him that he and appellant were good friends and that appellant was a member of Lao Family. Hoa did not explain how he got to the club that night, with whom he arrived, or how he knew to go to the club. Hoa told Mendoza that somebody warned him of the shooting just before it happened, but he did not tell Mendoza who this person was. (10RT 1580-1581.) He said he saw two men struggling over a gun, prompting him to run out of the club. As he was running, he thought he saw appellant running ahead of him as shots were

[24] Mendoza wanted to tape-record the interview but Hoa refused. (10RT 1571.) Mendoza believed that Hoa was under the influence during the interview. (10RT 1577-1578.)

still being fired, meaning he could not have been the shooter.[25] (9RT 1466-1467; 10RT 1581.) Hoa gave Mendoza the impression that the shooter could have been someone other than appellant.[26] (10RT 1582.)

On cross-examination, Hoa testified that he told Mendoza "the truth, nothing but the truth" about what happened on the night in question.[27] (9RT 1453.) He claimed that when he arrived at the club, he saw appellant speaking to other individuals. (10RT 1479.) He admitted seeing Y at the club, and he admitted knowing Duc as an acquaintance of appellant. (10RT 1479-1481.) He claimed the man in the trench coat concerned him, but that he did not want to confront the man. (10RT 1482-1483.) He testified he heard two or three shots, then a short pause, and three or four more. (10RT 1485-1487.) After the shots were fired, he looked in the direction of the shots and saw two men, one of whom was appellant, leading him to believe that appellant "could be" the shooter.[28] (10RT 1476.) He admitted that he did not stay at the club to wait for the police and that he never called the police at any point subsequent to tell them what he had seen. (10RT 1475.) He testified that he probably had his sister's cell phone with him that night, though he could have had his own instead. (9RT 1461.)

The day after the shooting, Hoa flew with appellant to Texas on appellant's request, and they stayed at what Hoa believed to be appellant's apartment. (10RT 1505-1509.) Appellant "seemed happy" on the trip.

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[25] In the hallway outside of court, Hoa told Mendoza that appellant was perhaps walking out of the club, rather than running. (10RT 1584.)

[26] On December 7, 2002, Mendoza interviewed Y over the phone. Y admitted he was at the International Club for Diep's birthday party, but he denied seeing appellant there. (10RT 1585-1586.)

[27] He admitted after he spoke with Mendoza, but before he testified at trial, appellant wrote him a letter from jail. However, he claimed not to know where that letter was anymore. (9RT 1464-1466.)

[28] At another point in his testimony, however, he claimed not to recall seeing appellant after the shooting. (9RT 1460.)

(10RT 1514.) At some point, Hoa left Texas but appellant remained. (10RT 1517.)

Detective Carns and her partner interviewed Bui at the El Monte police station at 5:00 a.m. on the morning after the shooting. (10RT 1591-1592.) Bui told her that he was sitting in a booth near the bar when the shooting occurred. The shooter approached from the rear, and when the shooting began, Bui attempted to grab his gun. The shooter elbowed Bui and he fell backwards as the shooter continued shooting. Bui told Detective Carns that prior to the shooting, he saw Tram having a "heated discussion" with someone outside the restroom. (10RT 1592-1594.) On cross-examination, Detective Carns explained that Bui told her that Tram and his girlfriend had been shot and that Tram had been beaten up at another nightclub. (10RT 1612.)

Detective Carns was also present during a taped interview between the prosecutor, officers, and Thi Van Le. (10RT 1594-1595.) Le told Detective Carns that Tram was "walking around 'cuz he packing" a gun, and that at some point Y and a member of Wah Ching were asked to leave the club. (10RT 1597, 1602.) He saw Diep go to appellant's table at some point before the shooting and that the two men had a conversation in Chinese. (10RT 1619-1620.) Appellant asked Diep, "Do you want me to do him now?" (10RT 1621.) Le said the shooter, whom he described as a "sharp shooter," aimed directly at the back of Tram's head, and that he shot other people at the table. (10RT 1633.) He admitted that Diep removed a surveillance video from the club and burned it. Le said that one person got away during the shooting and that he grabbed the shooter in an attempt to wrestle the gun away. (10RT 1603-1605.)

3. Rebuttal Evidence

Los Angeles County Sheriff's Department homicide investigator Stephen Davis was assigned to assist with the investigation of the

International Club shooting. (11RT 1771.) He testified that at 12:08 p.m. on May 6, a call from Le's cell phone was made to Diep's brother's cell phone. No other call was placed from Le's phone to that phone between April 21, 1999, and May 20, 1999. At 1:11 p.m., a call from a cell phone belonging to Bich Ngo was also made to Diep's brother's cell phone. No other call was placed from Ngo's phone to that phone between April 27, 1999, and May 26, 1999. At 1:37 p.m. on May 6, a call from a phone number belonging to Diep's mother was made to Le's cell phone. No other call was placed from Diep's mother's phone to that phone in May 1999. (11RT 1772-1773.)

Los Angeles Sheriff's Department criminalist Manuel Munoz testified as a firearms expert. (11RT 1776.) He reviewed the findings of Deputy Fant that the murder weapon was a Springfield Model 1911 .45 caliber semi-automatic pistol. Several gun manufacturers make that particular model handgun, but none of them make it fully-automatic. (11RT 1778.) The gun has several external safety mechanisms, all of which prevent it from firing inadvertently when armed. (11RT 1781-1782.) In order to fire this weapon, the shooter would have to load it, put a bullet in the chamber, turn off the manual safety, grip the gun properly, cock the hammer, and pull the trigger. In order to fire the gun a second time, the shooter would have to release the trigger and allow the gun to reset, before pulling the trigger again. (11RT 1782-1784.) Munoz believed that if, after a shot was fired, somebody grabbed the shooter's hand, thereby depressing the trigger, or gave the shooter a bear hug, the gun would not keep firing unless the shooter pulled the trigger again. (11RT 1785-1786.) The standard magazine of that particular gun holds eight rounds of ammunition, plus one additional round in the chamber. Springfield sells an after-market magazine which holds 11 bullets. With the bullet in the chamber, a gun with this magazine can fire 12 bullets altogether. (11RT 1786-1787.)

B. Penalty Phase Evidence

In the penalty phase, considerable testimony was presented linking appellant to four crimes: (1) a murder committed during a robbery at Thien Thanh Supermarket in San Jose in May 1997; (2) a murder committed during an attempted robbery at Wintec Industries in Fremont in August 1998; (3) an attempted murder committed during an attempted robbery at Traditional Jewelers in Newport Beach in January 2001; and (4) a murder committed during a robbery at Jade Galore jewelry store in Cupertino in March 2001.

1. Appellant's Relationship With Christine Chen

Christine Chen, appellant's girlfriend starting in the year 2000, testified about the latter two incidents, both of which occurred while she was dating appellant, as well as about appellant's various admissions to her regarding his involvement in the former two incidents. In exchange for her testimony at the federal grand jury held on August 28, 2001, Chen was granted immunity from prosecution by the Assistant United States Attorney handling that case. The prosecutor in the instant trial honored that agreement, assuring her that her testimony could not be used against her. (15RT 2608-2609.)

Chen met appellant in 2000 at a restaurant where she worked in San Jose, and he introduced himself to her as "Tommy." (15RT 2609-2611.) She also knew him as "Johnny," and he told her his last name was "Chen." At one point, she heard one of appellant's friends call him "Anh The Duong," and when she asked appellant if this was his name, he denied it. (15RT 2620.)

The two began a relationship, despite appellant telling Chen that before he met her, he killed, robbed, and shot people. (15RT 2610.) A month after their first meeting, appellant told Chen that he was coming up

to San Jose and that he wanted to go out with her. Chen agreed. (15RT 2612.) Appellant, Chen, and several of appellant's friends traveled to San Francisco for several days, and at the end of the trip, appellant told Chen that he was returning to Orange County and that he wanted her to go with him. She agreed to join him. (15RT 2613-2614.)

Chen lived with appellant until he was arrested in July 2001. The couple originally shared a studio apartment in Costa Mesa, before moving to a "big, nice" apartment, also in Costa Mesa. The rent cost between $2,000 and $2,500, and it was split between appellant and Ed Mukasa ("Ed"). (15RT 2614-2615.) Appellant did not have a job in Orange County. He told Chen that he supported himself by gambling and by committing armed robberies. (15RT 2614.) The couple saw the movie "Heat," about a gang committing armed robberies, and appellant explained to Chen that he was in the same line of work, and that he supported himself financially through the robberies he committed. (15RT 2615-2616.) Chen went with appellant to "casino clubs" where he gambled, and she also went with him to Las Vegas so he could gamble. On one particular weekend in Las Vegas, Chen saw appellant gamble away $70,000. (15RT 2616-2617.) When Chen first met appellant, he drove a black BMW. (15RT 2617.)

Appellant told Chen that he was wanted by the police, and while she lived with him he told her that she was not allowed to receive any mail "[s]o that nobody would find him there." (15RT 2620-2621.) Appellant received his mail at Soewin Chan's house in Santa Ana as well as at other places.[29] (15RT 2621.)

Appellant supplied the guns used in his armed robberies. (15RT 2626-2627.) In a duffle bag in the closet in the apartment he shared with

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[29] Appellant kept a motorcycle at Chan's house, though it was not registered in his name. (15RT 2622-2623.)

Chen, appellant kept several guns, including a "handgun," an "M-16," and an "AK." He told Chen his favorite was the "AK." (15RT 2627.) He also told Chen he wore dark clothing during the robberies, as well as ski masks, beanies, and gloves, and that because he and the others wore masks, he was not worried about security cameras. (15RT 2628.)

When they lived together, appellant did not have his own bank account; he deposited his money to Chen's account. However, he never wanted to give Chen more than $10,000 so that the IRS would not audit where the money was coming from. Chen had a safety deposit box that only she, and later Timmy Mukasa ("Timmy"), could access. Appellant had Chen put cash, jewelry, and watches into the safety deposit box. Chen estimated that she put between $50,000 and $60,000 in cash in the safety deposit box. (15RT 2649-2651.)

Appellant once told Chen that when he was robbing a store, he could only stay there for 15 to 20 seconds. Any longer than that and he would "get caught." (15RT 2651.) He also told her that he would use a scanner to detect if the police were approaching, and that if he ever discovered that the police were following him after a robbery he would "kill himself" because the other alternative was spending the rest of his life in prison. (15RT 2651-2652.)

At some point before appellant was arrested, he and Chen were in the car together when appellant told her he thought they were being followed and Chen "freaked out." Appellant made "a series of . . . turns" to see if they were really being followed, and it turned out that "they were." Appellant parked the car and the car following them "took off." (15RT 2652-2653.) Around that same time, appellant began to move the guns out of Chen's apartment. When appellant was arrested and their apartment was searched, the guns were no longer there. (15RT 2654.) Chen never saw appellant dispose of these guns, and he "always kept his guns even if they

were used in a crime." (15RT 2655.) By the time appellant was arrested, Chen's safety deposit box had been emptied out. (15RT 2655.)

2. May 3, 1997: Thien Thanh Supermarket Incident

Thien Tang and his family owned the Thien Thanh supermarket in San Jose. At around 9:20 a.m. on May 3, 1997, Tang left the market to pick up $300,000 in cash from Cathay Bank so that he could have cash on-hand for his customers. (14RT 2245-2246, 2250-2251.) When he arrived, he learned from bank employee Billy Chi Beau Wong that the money was not yet there because the armored truck carrying the money had not yet arrived. Tang asked that he be called when the money arrived. (14RT 2246, 2252.) Between 10:00 and 11:00 a.m., Wong called Tang and informed him that the money had arrived, and Tang returned to the bank. (14RT 2246, 2252.) Tang placed the money in a paper bag, placed that bag into two plastic bags, and then left. He returned directly to the market, and he did not see anyone following him. (14RT 2252-2253.)

When Tang arrived, he parked his car in a parking lot on the side of the market. As he opened his car door, two Asian men with guns "lunged over to [his] car." (14RT 2254-2255.) One of these men carried a handgun, and the other had a "long[er]" gun, possibly a shotgun. Both men pointed their guns at Tang and the man with the handgun said, "Give me the fucking money." (14RT 2255-2257.) Tang was forced back into his car, and he sat back down in the driver's seat. (14RT 2257.) The man with the handgun shot Tang in the leg and Tang fell to the ground. The shooter then reached into the car and grabbed the bag of money from the floor of the driver's seat.[30] (14RT 2258.)

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[30] The market was only insured up to $10,000, so the loss of the $300,000 came from Tang's family's money. (14RT 2259.)

Rudy Castaneda, the owner of a hair salon across the street from the market, heard a "pop" that he initially thought was a car backfiring. (14RT 2234.) He looked out the window and saw Chau Quach, an older Asian man who worked at the market, chasing two Asian men and yelling at them to stop.[31] (14RT 2234-2236.) Once the two men reached the hair salon parking lot, Castaneda saw one of the two men turn around and fire two shots from a handgun at Quach, hitting him and causing him to fall to the ground. The two men then got into a "Honda type" car. Castaneda saw a third man sitting in the backseat of the car. The car "sputtered a little bit and then took off."[32] (14RT 2236-2237.)

Kyle Quach, Tang's brother-in-law and Chau Quach's son, was working at the market when he heard gunshots. He had his nephew call 911, and he went out to the parking lot, where he discovered that his father had been shot and was on the ground across the street from the market, near the hair salon. He did not see any suspects. (14RT 2266-2267.)

Shortly after the shooting, San Jose Police Department Officer Tom Schnutenhaus responded to the crime scene. (14RT 2214-2215.) There, he recovered a .9 mm casing near Tang's car, and he found a hole that he believed to be a bullet hole in the plastic molding strip on the car door. (14RT 2216-2217, 2219, 2221-2222.) One of Chau Quach's relatives gave Officer Schnutenhaus a spent .9 mm bullet found at the scene. (14RT 2220.) He recovered another spent bullet embedded in a building near Tang's car. (14RT 2222.) Across the street, near the hair salon, Officer

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[31] Chau Quach was Tang's 71-year-old father-in-law. (14RT 2259.)

[32] Castaneda had seen the car earlier in the day, and when the three men first got out they were "kind of loitering back and forth." The car initially caught his attention because it was backed into a parking spot, which Castaneda found unusual. He believed it was parked this way so that it "could just take right off." (14RT 2237-2238.)

Schnutenhaus found several expended casings, and he believed that a semi-automatic handgun was used in the shooting. (14RT 2226-2227.) In total, he found three expended casings at the scene, but the gun used in the shooting was never recovered. Based on the evidence found at the crime scene, Officer Schnutenhaus believed that one shot was fired in the vicinity of the market, and that two other shots were fired from the parking lot across the street. (14RT 2227-2228.) Officer Schnutenhaus brought Contra Costa County Sheriff's Department criminalist Chris Coleman the expended .9 mm casings found at the scene. Coleman determined that these casings had been fired from a Glock semi-automatic pistol. (15RT 2550-2551.)

On May 4, 1997, Dr. Massoud Vameghi, a deputy medical examiner for Santa Clara County, conducted an autopsy on Chau Quach. The cause of death was determined to be a gunshot to the abdomen, and the gunshot was fatal because it almost severed the abdomen aorta. (14RT 2277-2278.) During the autopsy, Dr. Vameghi recovered a fragment of a metal object in Quach's left thigh and turned over this fragment to Officer Schnutenhaus. (14RT 2230, 2278.)

On March 23, 2001, San Jose Police Department Sergeant Victor Vizzusi conducted two photographic lineups with Tang. Tang did not identify anyone in the first lineup. (14RT 2269-2270.) In the second lineup, Tang identified appellant as the man who shot him. (14RT 2261-2262, 2271.) Based on Tang's identification, a judge signed a complaint for appellant's arrest. (14RT 2275.)

At some point during their relationship, appellant told Chen about the Thien Thanh incident and he admitted that he took $300,000 or $350,000 from the store. He told her that he was tipped off about the potential score from an employee at Cathay Bank, and that he committed the robbery outside the market because he did not want the bank employee to get in

trouble. He admitted to Chen that he shot the man from whom he took the money and that he killed another man during the robbery. (15RT 2647-2649.)

3. August 28, 1998: Wintec Industries Incident

Bakhtawar Singh Litt worked as a security guard at Wintec Industries in Fremont ("Wintec"). One of his duties was to follow company president William Jeng home every night.[33] (14RT 2294.) On the evening of August 28, 1998, Litt went to his car to get his car to get ready to follow William and Michael Jeng ("Michael"), William's brother and the sales director at Wintec. (14RT 2295, 2307.) As Litt sat in his car waiting for William and Michael Jeng to leave the building, three masked men walked up to his car carrying handguns. (14RT 2295-2296.) They told Litt to get out of his car and lie down on the ground. Litt got out of his car and yelled, "Robbers here, run away," prompting the three gunmen to point their guns at him. (14RT 2296-2297.)

At that point, Michael exited the building with Hsu Pin Tsai ("Pin"), a fellow Wintec employee. (14RT 2307.) Michael was talking with Pin by Pin's car when he heard Litt shouting from outside the building gate. (14RT 2307-2308.) Two of the three gunmen left Litt and moved toward the gate. (14RT 2297.) Michael then saw a Wintec security guard named Ted Garcia fall to the ground[34], and he saw a masked man trying to get inside the gate. (14RT 2308-2309.) Once inside the gate, the masked man began to chase after Michael. Pin got into his car and started to drive away. (14RT 2310.) Michael got in his own car, and as he drove toward the gate, the masked man tried to stop the car by hitting it with his hand. (14RT

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[33] William Jeng died at some point after 1998, but this death had nothing to do with the incident in question. (14RT 2306.)

[34] Litt was 67 years old at the time of the incident, and he estimated that Garcia was older than he was. (14RT 2301.)

2310, 2312.) When Michael drove through the gate, he encountered a second masked man who pointed a handgun at him. (14RT 2311-2312.)

While Litt could not see what happened once the gunmen got inside the gate, he heard several gunshots, followed by more gunshots coming from a second location. (14RT 2297-2298.) He then saw a van driving quickly from across the street, go through the gate, and go into the parking lot. (14RT 2298, 2302.) At some point, the van left the gated area, the man who had been guarding Litt entered it, and the van drove away. (14RT 2300-2301.)

As Michael drove away from Wintec, he also saw the van drive away from the property. (14RT 2315.) When Michael could not find a payphone, he drove home, called 911, and told the operator what he had seen.[35] (14RT 2313-2314.)

At 8:40 p.m., Fremont Police Department Officer Robert Sanders arrived at Wintec after responding to an alarm call. When he arrived, he saw Litt waving his arms and trying to flag him down. (14RT 2323-2324.) Litt was "very excited and agitated," and he explained to Officer Sanders what happened and gave a description of the van. (14RT 2301-2302, 2325.) Officer Sanders also encountered Garcia on the ground bleeding from his head, and he called paramedics to treat him.[36] (14RT 2299, 2325.) Another officer told Officer Sanders that there might be somebody near the back of the property, and Officer Sanders proceeded there. Once there, he encountered a car with its lights on and its engine running, and it appeared

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[35] Later, officers inspected Michael's car and found two bullet holes, one in the driver's door and one in the hood. (14RT 2314, 2392-2393.)

[36] Later, Fremont Police Department Detective Kenneth Heininge went to the hospital to meet with Garcia. (14RT 2356.) He observed that Garcia had a "raised swollen area" of "about three or four inches in diameter at the crown of his head." (14RT 2356.) The injury appeared consistent with a strike to the head. (14RT 2357.)

the car had gone over some ivy and a curb. (14RT 2326-2327.) Pin was sitting in the driver's seat, slumped over into the passenger seat. Officer Sanders attempted to speak with him, but Pin was only moaning and was not talking. Paramedics removed Pin from the car to treat him. (14RT 2327.)

When Fremont Police Department Officer Scott Alameda learned of the alarm call at Wintec, he drove to the south end of Fremont in the "general vicinity of Wintec" so that he could look for the suspects' van. (14RT 2333.) Shortly after 9:00 p.m., Officer Alameda observed a white van that matched the description. The driver of the van made eye contact with Officer Alameda and then "immediately looked away." (14RT 2334.) Officer Alameda saw the driver look at the front seat passenger, who then "immediately" looked at Officer Alameda before looking away. Officer Alameda identified the driver and front seat passenger as Asian men. He also noticed that the second and third seats in the van were missing. (14RT 2335-2336.)

To avoid alarming the suspects, Officer Alameda waited until the van turned, and he followed behind them. He ran the van's license plate, and it came back to a rental agency in San Leandro. As he followed the van, he noticed the front seat passenger again look back at him before "immediately" turning away. (14RT 2335-2336.) The van turned into a strip mall parking lot, and as Officer Alameda made a U-turn to pull into the parking lot, the van already exited the parking lot and was driving away. (14RT 2336-2337.) Officer Alameda ultimately stopped the van, and as he approached he saw two people lying behind the front seats. (14RT 2337-2338.) He also saw a roll of duct tape on the floor between the two seats. At this point, he called for back-up. (14RT 2338.)

Four Asian men were removed from the van: Johnny Tangha, Cuong Chi Vuong, Eugene Lee, and Ted Nguyen.[37] (14RT 2339.) In the van, Officer Alameda discovered a manila folder between the car seats, and in the folder were rough diagrams of the Wintec facility. He then requested that somebody from Wintec be brought to the scene of the traffic stop so that he or she could identify the diagrams as being representative of that business. (14RT 2340.) Officers also recovered a live .9 mm round of ammunition, two rolls and a piece of duct tape, and a frequency guide for police scanners. (14RT 2342-2344, 2352-2353.) No gun was found. Officer Alameda checked with officers at Wintec to see if there were any .9 mm casings at the scene. (14RT 2343.)

At Wintec, Fremont Police Department Officer Jim Koepf found expended casings from two different caliber firearms: a .9 mm and a 7.62 mm. The 7.62 mm casings were from a bullet fired from a high-powered rifle. (14RT 2387-2388.) A total of seven casings were found: four 7.62 mm casings and three .9 mm casings.[38] (14RT 2390.)

At 9:00 p.m., Mike Lacasse, a facility manger at Wintec, received a call at home to return to Wintec, where he learned there had been an attempted robbery. When Officer Sanders became aware that the suspects' van had been stopped, he escorted Lacasse and Litt to that location, seven to ten miles away from Wintec. (14RT 2285-2286, 2328-2329.) Officer Alameda showed Lacasse the diagrams. (14RT 2329, 2341.) Lacasse recognized the five-page packet as rough drawings of the Wintec facility. The first page had several notations, including the words "memory" and

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[37] They were later arrested and tried in Alameda County. (14RT 2339-2340.)

[38] Several days later, on August 31, Fremont Police Department Officer Robert Willett recovered a spent 7.62 mm rifle caliber shell casing in a planter area adjacent to the rear parking lot. (14RT 2394-2395.)

"Mac," which Lacasse recognized since Wintec designed and manufactured memory for computers. (14RT 2287-2288.) The same page also had five notations indicating the location of security cameras in the facility. The second page also had notations of "memory," as well as "400CP [U or X]" and "Entry Intel," which represented computers manufactured at the time by Wintec. (14RT 2288-2289.) That page also had a notation of "10,000," which suggested to Lacasse the volume at which these computers were sold by Wintec. (14RT 2289-2290.) Lacasse believed that if these men had been successful in perpetrating the robbery, the value of the items that they aimed to steal would have been "over a million dollars, easily." (14RT 2290.) Lacasse believed that four or five individuals would have been able to lift, carry, and put into a van the items noted on the pages. The third page had notations of "front door," "lunchroom," "gate," and "shipping," referring to Wintec's shipping area. (14RT 2290-2292.)

Later that night, Detective Kenneth Heininge was asked to assist with the surveillance of a house on Rustica Terrace in Fremont.[39] (14RT 2357-2358.) At 2:20 a.m., he and another detective observed a red Lexus pull into the driveway. (14RT 2358-2359.) An Asian man and woman got out of the car and entered the house. When they exited between seven and ten

[39] In 1997, Maxon Huang moved into the house on Rustica, which was owned by Michael Liu. Huang lived there for approximately eight months. (15RT 2580.) While Huang lived in the house, Liu and a man named "Eddie" [likely Ed Mukasa] introduced him to appellant. Appellant introduced himself as "John." A year before trial, an investigator from the San Jose District Attorney's Office showed Huang several pictures, and Huang identified Eddie. (15RT 2581-2582.) On several occasions, Huang saw appellant and Eddie at Liu's house, and he got the impression that appellant, Eddie, and Liu were friends. Eddie also introduced Huang to Eugene Lee, and he believed that Lee was also friendly with appellant, Eddie, and Liu. On two occasions, Huang went out to nightclubs with appellant, Liu, Eddie, and Lee. (15RT 2582-2584.)

minutes later, both were wearing gloves, which Detective Heininge thought was unusual. The man placed something that he was carrying into the trunk of the Lexus. The garage door went up, revealing a white van inside. (14RT 2359-2360.) The woman entered the van, the man entered the Lexus, and both vehicles left the house. (14RT 2360-2361.) The two detectives debated staying at the house or following one of the vehicles, and by the time they decided to follow the red Lexus, both vehicles were out of sight. Detective Heininge was, however, able to write down the license plate number of the van. He radioed for assistance in locating the vehicle. (14RT 2361-2362.)

Based on Detective Heininge's radio call, Fremont Police Department Sergeant Francis Dorsey located the red Lexus. (14RT 2376-2377.) Two people were in the vehicle: Michael Liu, an Asian man, and Iris Wu, an Asian woman. (14RT 2377.) Sergeant Dorsey searched Liu and recovered a cell phone and a pager. (14RT 2377.)

Detective Heininge arrived at the location where the Lexus was stopped, roughly 200 yards from the Rustica house. (14RT 2362, 2377.) He searched the vehicle, and he found clothing and personal items in the trunk, including three jackets and several sweaters. All the clothing was "for keeping warm," and at least one of the jackets did not have any tags on it. (14RT 2364, 2367.) In the trunk, Detective Heininge recovered a license plate matching the plate found on the white van earlier stopped by Officer Alameda. (14RT 2364-2365.) Detective Heininge searched Wu's purse and found what he described as "like a gardener's gloves." (14RT 2366.) In one of the jackets Detective Heininge found a blue plastic bag containing a roll of duct tape, and from the driver's door pocket he discovered a piece of paper with phone numbers on it. (14RT 2367.) Detective Heininge also recovered a set of rental car keys with a license plate number on them. The license plate number on the keys matched the

license plate of the white van Detective Heininge had earlier seen leaving the house on Rustica. (14RT 2368-2369.)

At 3:06 a.m., within a half-mile of the house on Rustica, Fremont Police Department Sergeant Mark Riggs found the white Pontiac Detective Heininge had earlier seen at the house. The van was empty, though the hood was warm to the touch. (14RT 2384-2386.)

At 5:40 a.m., detectives executed a search warrant of the house on Rustica. In one room, Detective Heininge discovered a tool chest, and in that tool chest was a DMV identification card or driver's license for Cuong Chi Vuong. (14RT 2369.) Firearms were also recovered from the house, including an assault rifle and a .357 revolver. Detective Heininge also found two empty gun cases. Further, he recovered a cell phone and a manual for a "high quality" Heckler Koch model pistol. (14RT 2370-2371.) He also found a card for an indoor shooting range and under a bed he found a piece of soft luggage containing a box of latex gloves. He recovered a scanner as well as a backpack. In the backpack he found a wallet containing a driver's license in the name of Ted Nguyen. In the wallet, he also found an address book with a notation for "John An" next to three phone numbers. He also found a driver's license for John Ro, though it was later determined that this person's true name was Eugene Lee. (14RT 2371-2373.) In the backyard, Detective Heininge discovered two van bench seats. (14RT 2375.) During the search of the house, Officer Koepf discovered in a garbage can a paper bag with eye cutouts in it. (14RT 2390.)

On August 29, 1998, Dr. Sharon Van Meter conducted Pin's autopsy, and she formed the expert opinion that Pin died from a bullet wound to the back. During the autopsy she recovered bullet fragments in Pin's internal organs and she found no exit wound. The bullet passed from the back along Pin's spine, causing fractures of numerous ribs and the vertebral

tissue. It lacerated the left kidney, the spleen, the left lung, and the aorta, and it went through multiple loops of bowel. (15RT 2575-2577.)

On September 10, 1998, Officer Koepf traveled to Yorba Linda to execute a search warrant at the residence of Ted Nguyen. (14RT 2390-2391.) There, he found a total of six .45 caliber magazines, some loaded and some empty, a bucket containing expended .45 caliber casings as well as live .9 mm and 7.62 mm ammunition, an empty gun case, and a manual for a Springfield .45 caliber semi-automatic pistol. He also discovered two rolls of undeveloped film, which he had developed. Some of the pictures were of a Springfield Model 1911 semi-automatic caliber pistol. (14RT 2391-2392.)

Kourosh Nikoui, chief forensic specialist with the Fremont Police Department, testified as a fingerprint expert. (14RT 2399-2400.) Nikoui was able to raise latent fingerprints from the rough diagram of Wintec discovered by Officer Alameda in the white van. He lifted the prints of Michael Liu, Cuong Chi Vuong, and appellant.[40] (14RT 2402.) It was Nikoui's expert opinion that appellant's fingerprints were found on two of the five stapled pages. (14RT 2403, 2405.) On one page appellant's fingerprints were found once, and on the other page his fingerprints were found three times. (14RT 2403.) Nikoui matched the prints of Ted Nguyen and Eugene Lee to prints found in the Pontiac van, and Johnny Tangha left prints on the license plate matching the van stopped by Officer Alameda. (14RT 2404.)

Fremont Police Department Detective Frank Tarango obtained search warrants for the records of various cell phones, including the phone

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[40] At the time, Nikoui compared appellant's fingerprints to the prints found on the diagram. The parties stipulated that Nikoui also took appellant's fingerprints just before he testified at the penalty trial. (14RT 2403.)

belonging to Ted Nguyen. (14RT 2417.) The records indicated that on the night of August 28, this phone received calls at 8:06, 8:11, 8:13, 8:21, 8:22, 8:25, 8:42, 8:43, 8:49, and 8:57 p.m. Nguyen made five outgoing calls to a phone number belonging to Lan Bang in Garden Grove at 8:02, 8:04, 8:23, 8:36, and 8:45 p.m. (14RT 2418.)

Lan Bang, appellant's mother, had a cell phone account in her name, and she gave the cell phone to appellant to use and he paid the phone bill. Between August 28 and August 31, 1998, appellant told his mother that the cell phone was missing and he asked her to cancel the account, which she did. Bang testified that she did not know Ted Nguyen. (14RT 2512-2514.)

On February 4, 1999, Detective Tarango obtained a search warrant for Bang's phone records.[41] (14RT 2419; 15RT 2516-2517.) The warrant ordered Pacific Bell, Bang's cell phone provider, to provide cellular site information relating to calls made to and received by Bang's phone on August 28. (15RT 2517.) Bang's records indicated that 37 calls were made to and received by that phone on the day in question. At 1:36 a.m. on August 28, an incoming call came to Bang's cell phone from Ted Nguyen's phone. (15RT 2520-2521.) The site address for Bang's phone at the time it received this call, as well as for the next three calls placed to and by that phone, was the Daly City BART station. (15RT 2521-2522.)

For calls 5 to 33, Bang's phone's site address was Fremont. (15RT 2523.) On the night in question, Bang's phone received calls at 8:02, 8:04, 8:23, 8:36, 8:45, 8:57, 9:07, 9:44, 9:48, 10:07, 10:43, 10:47, 11:45, and 11:47 p.m., as well as at 12:03 and 1:57 a.m. (14RT 2420.) Calls 8 through 19 were either incoming or outgoing calls to or from Ted Nguyen's phone number. (15RT 2523.) This included calls made to Nguyen at 6:49,

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[41] Philip Venable, an employee with Pacific Bell asset protection, responded to Detective Tarango's search warrant. (15RT 2516.)

7:08, 8:06, 8:11, 8:13, 8:21, 8:22, 8:25, 8:42, 8:43, 8:49, and 8:57 p.m. (14RT 2420.) Call 20 was made to Liu's phone at 8:36 p.m. (14RT 2420; 15RT 2524.) Indeed, Detective Tarango learned that the calls made while Bang's phone was in Fremont all occurred while the phone was within close proximity to both Wintec and the house on Rustica. (14RT 2424-2425.) Call 34 was an outgoing call made while Bang's phone was in Milpitas. The last three calls, made around 11:30 p.m., were all made while Bang's phone was in San Jose. (15RT 2525.)

At some point in their relationship, appellant admitted to Chen that he had been involved in an incident in Fremont at a computer chip company where a man was killed. (15RT 2649.)

4. January 16, 2001: Traditional Jewelers Incident

At some point, Chen became aware that something was going to happen at Traditional Jewelers at the Fashion Island mall in Newport Beach. As part of an effort to case the store, appellant took Chen to the mall, walked her by the store, and asked her what she thought of the place as the target of a robbery. Later, appellant discussed with Philip Garza, Chan, and Timmy how they planned to rob the store, "take down the security guard," rob the store of high-end watches, and then leave. (15RT 2624-2625.) Appellant told Chen that his job at the robberies was "always" to take down the security guard. (15RT 2626.)

On January 16, 2001, the day of the robbery, appellant, Timmy, Chan, and Garza met at appellant's apartment to prepare. (15RT 2628-2629.) The men loaded their guns; appellant carried an "AK." Each was dressed in dark clothing. Appellant put tape on a license plate that he planned to put over his BMW's real license plate so that nobody could identify it, and they drove in the BMW to the mall. (15RT 2629-2631.)

Later that night, Wallen Wong was with his wife in the parking lot near Traditional Jewelers at the Fashion Island mall in Newport Beach.

(14RT 2472.) As they were walking in the parking lot, a "small," dark-colored BMW crossed in front of them without slowing down, and stopped in front of the mall entrance. (14RT 2472-2474.) Wong thought it was "rude" for the car to drive right in front of them without slowing down, and he thought it was "odd" that there was a passenger in the back behind the driver. The driver appeared to be a man, and Wong did not see anybody in the front passenger seat. (14RT 2476-2477.)

Christian Anderson, 11 years old at the time of trial, was with two babysitters and his sister in front of Traditional Jewelers on the night in question. While he was in front of the jeweler, he saw a black BMW or Porsche that attracted his attention. He saw two men wearing ski masks get out of the car and start running toward Traditional Jewelers. He saw a third man in a ski mask who was carrying a rifle-like gun emerge from an elevator in front of the jewelry store. (14RT 2453-2455.)

Rafael Gomez was working as security guard for Traditional Jewelers, and he was carrying a .45 mm semi-automatic handgun. At 7:40 p.m., shortly before closing, Gomez locked the front doors so that people from the outside could no longer get in. (14RT 2481-2481.) As Gomez stood in front of the store, he saw two masked men running toward him and a third behind some nearby planters. (14RT 2482-2483.) All three men were wearing ski masks, army jackets, boots, and were carrying weapons. (14RT 2483-2484.) The man behind the planters was carrying a short rifle. (14RT 2488-2489.) The men began to fire at Gomez, and he fired five to seven rounds back at them. (14RT 2484.) Brent Seyler, a manager at Traditional Jewelers, was at the front of the store when he heard gunfire coming from the front entrance. He turned and saw Gomez pulling out his gun to return fire, and Seyler "scrambled for cover." (15RT 2593.)

During the gunfight, Gomez was struck by a bullet fragment in his right chest area, and he was shot in his right arm. Several fragments also

lodged in Gomez's left eye. The assailants' bullets struck the glass walls of the store, and a piece of glass fell on Gomez's head, injuring his neck and shoulder.[42] (14RT 2484-2485.)

As the man with the rifle fired several rounds at the store, bystanders began to scream, and Anderson ran to a nearby store.[43] (14RT 2459-2460.) David Hooker was standing near Traditional Jewelers when he heard what sounded like a string of firecrackers going off. When he turned to see what made that noise, he saw the door to Traditional Jewelers shattering and he saw an automatic weapon firing. The automatic weapon had a "banana clip." (14RT 2495-2496.) Hooker saw at least two, perhaps three people in "long dark parkas" with hoods on, and while he could only recall one person with an automatic weapon, he recalled more than one armed assailant. (14RT 2497-2498.) The person with the automatic weapon fired approximately 30 rounds into the store, and Hooker noted that this person seemed very comfortable with an automatic weapon, since he was "spraying" it into the store from 10 to 15 feet away. (14RT 2500-2502.) After the shooting, the person with the automatic weapon began to back away, and then approached the store again and fired more rounds into it. The three men then exited toward the parking lot. (14RT 2502-2503.) Hooker then entered Traditional Jewelers to see if anybody needed help, and he helped Gomez before the paramedics and police arrived. (14RT 2503-2504.)

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[42] Gomez had four operations following the incident. He sustained recurring health problems and he was unable to return to work as a security guard. (14RT 2486.)

[43] Somebody in the store pulled Anderson into a hall in the back of the store and locked the door. He remained there until a police officer came to get him. (14RT 2460-2461.)

From outside in the parking lot, Wallen Wong saw three men, one of whom was carrying a rifle, running to the BMW that nearly ran into him earlier. The man with the rifle got into the passenger side, and Wong saw that another person was behind the wheel. The car drove away "[v]ery quickly." (14RT 2474-2476.)

Nothing was taken from the store during the attempted robbery. At the time, the store carried approximately 1,200 "very high end" watches in display cases, worth roughly five to six million dollars. (15RT 2593-2594.)

At 7:25 p.m., Newport Beach Police Department Officer Kent Eischen received a radio call of possible shots being fired at the Fashion Island mall. People were calling 911 from different locations in the mall because "shots were echoing within the mall." (14RT 2442-2443.) Officer Eischen responded to Traditional Jewelers because he knew that store had been robbed in the past. By the time he arrived the individuals involved in the shooting had already left, but he discovered that Traditional Jewelers had suffered damage, and he saw a great deal of shattered glass. (14RT 2443-2445.) He also discovered expended firearm casings in the area. He observed Gomez lying in the back of the store in a pool of blood. (14RT 2445-2446.)

When Newport Beach Police Department Officer Edward Walsh arrived, he encountered the wounded Gomez. While Gomez was being treated by paramedics, Officer Walsh observed that he had multiple lacerations to the face, four "really deep" puncture wounds on his arm which were attributed to fragments, and a puncture wound which was attributed to an entry wound just below Gomez's right nipple in the upper chest cavity. Officer Walsh went with Gomez when he was transported via helicopter to the hospital. (14RT 2450-2451.)

Corinna McElroy, a crime scene investigator with the city of Newport Beach, responded to Traditional Jewelers, where she collected evidence and

took photographs. When she encountered a great deal of shattered glass and blood, and saw that some of the display cases had been shattered, it became clear to her that a number of rounds had been fired into the store. (14RT 2463-2465.) She recovered 27 expended 7.62 x 39 mm casings and two expended .9 mm casings. (14RT 2465-2466.) She learned that Gomez had a .45 mm pistol, and she discovered six expended .45 mm casings. Further, she recovered several expended casings near a booth outside of the store, and she spoke with a man there who had been hit either with a bullet or a bullet fragment. (14RT 2467-2470.)

Appellant and the others returned to his apartment some time after the attempted robbery, and appellant explained to Chen that they stopped at McDonalds on the way home. Appellant admitted to Chen that he "shot up" Traditional Jewelers because he was "pissed that he couldn't get anything" from the store. (15RT 2631.)

5. March 13, 2001: Jade Galore Incident

On January 31, 2001, appellant gave cash to Timmy to buy a white Honda Civic for him.[44] (15RT 2617-2618; see also 16RT 2757.)

Around that time, Chen came up with the idea to rob the Jade Galore jewelry store in the Cupertino Village shopping mall in Cupertino. She and appellant were out of money so she suggested it as a target; she had been to the store before and she knew that high-end watches were sold there.[45] (15RT 2633-2634.) Two weeks before the robbery, appellant, Chen, Timmy, and others traveled to the Bay Area so that they could case the

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[44] The parties stipulated that Timmy purchased the Civic on that date. (16RT 2723.)

[45] Appellant told Chen that he wanted to get a job to earn money but that he could not because he was wanted by the police for murders and robberies. (15RT 2634.)

store.[46] After casing the store, appellant agreed it would be a good place to rob, and plans were made to execute the robbery. (15RT 2634-2636.)

Before they left for the Bay Area to execute the robbery, several of the men purchased rifle straps so that they would not have to hold their guns while they took jewelry from the display cases.[47] (15RT 2637.) The day before the robbery, appellant, Chen, Chan, Garza, and Timmy drove to the Bay Area in Chen's parents' Volkswagen Jetta and in appellant's recently-purchased white Honda Civic.[48] (15RT 2636.) Early in the morning on the day of the robbery, the group drove to Cupertino to observe the store. The plan was for Chen to wait in the car to see if the security guard went inside the store. (15RT 2638-2639.) Appellant explained to her that the robbery would be easier if the guard was not standing in front of the store where he could see the robbers approaching. However, appellant and Chen noticed that the security guard was always outside the store. Chen was told to call appellant when she saw the security go into the store, giving them the signal that it was clear to enter. (15RT 2639.) Appellant and one of the other men had AK's with them. (15RT 2643.)

Around 3:00 p.m. on March 13, 2001, as appellant and the others waited outside the mall, Chen saw the security guard enter the store. She

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[46] The parties stipulated that Chan paid for a room at the Howard Johnson Express Inn in Santa Clara from March 5 to March 6, 2001. (16RT 2724.)

[47] Santa Clara District Attorney's Office investigator David Rimer contacted Kurt Winkler at Turner Outdoorsman in Fountain Valley. Rimer showed Winkler receipts from March 12, 2001, showing that he sold two rifle slings, known as "super slings," that are used to carry rifles. (16RT 2753.) Rimer then showed Winkler five photographs, and Winkler identified photographs of appellant and Chan. (16RT 2746, 2754-2755, 2762-2763.)

[48] The parties stipulated that Chan paid for a room at the Super 8 Hotel in San Francisco from March 12 to March 14, 2001. (16RT 2724.)

called appellant and said, "Go. Go now." Pursuant to appellant's directions, after she made the call she drove to a designated apartment complex to wait for the men to return. She was instructed that if they did not return by a certain time, she was to gather the group's things and drive back to Orange County. (15RT 2640-2641.)

Michael Porras was parked in a parking lot near Jade Galore when he observed a "small sedan, white four-door" that attracted his attention because it was parked at an angle with all its doors open. (16RT 2732-2733, 2735.) He noticed people running from that location, and then he saw a person dressed in dark clothing and a hooded sweatshirt come around to the passenger side of the car, reach into the car, grab a "red object" made of cloth off the floor, and then leave. (16RT 2733-2734.)

Ming Chu Lee was working at Jade Galore when she saw Joseph Cambosa, the store security guard, enter the store. Within a minute, she heard gunfire. She looked up and saw three armed masked men wearing all black. (15RT 2602-2604.) Allen Wong, the owner of Jade Galore, was in his office when he heard gunfire and saw Cambosa enter the store, followed by several people saying "robbery." (15RT 2597-2599.) Wong noticed that the two men were wearing masks. Wong closed his office door and called 911. The gunman pointed a gun at an employee and asked her to give him the keys to the display case. (15RT 2598, 2603.) The employee opened the display case, but at some point, one of the gunmen jumped over the display case. (15RT 2603-2604.) The gunmen took Rolex watches and placed them in a "nylon bag," and then left quickly. (15RT 2605.) After the men left, Wong learned that Cambosa had been shot and that 53 Rolex watches with a total retail value of $53,000 were taken. (15RT 2600.)

Yuchi An was having lunch next door to Jade Galore, and as she left the restaurant, she noticed that there was no security guard in front of the store, which she thought was unusual because he was "usually" there. She

then saw three men running out of the store. (15RT 2586-2587, 2591.) One of these men was wearing all black, gloves, and a mask. He looked her right in the eye and she could tell that he was Asian. He was carrying a gun, "one of those big long rifle assault type of gun with a banana clip." (15RT 2587-2588.) The two other men followed behind the first man, and they were dressed the same way. The second man was carrying a bag and the third man was carrying a gun similar to the first man's gun. (15RT 2589.)

Porras, still out in the parking lot, saw three men dressed in dark clothing and hooded sweatshirts return to the car. The person who got into the rear passenger door was carrying what looked to Porras to be a rifle with a "bullet chamber" at the end of the barrel. (16RT 2734.) All three men got into the car and the car drove away. When Porras saw sheriff's deputies arrive, he told them what he had seen.[49] (16RT 2735.)

At 3:18 p.m., Santa Clara County Sheriff's Department Deputy Sheriff Robert Gallardo and Sergeant Robert Linderman responded to the robbery call at Jade Galore. (15RT 2530-2531, 2535.) Deputy Gallardo and Sergeant Linderman entered the jewelry store and discovered Cambosa "[f]lat on his back." (15RT 2532, 2536.) Cambosa's handgun was still in its holster, and the holster was snapped, giving no indication that he returned fire. (15RT 2533.) Sergeant Linderman noticed that Cambosa was foaming at the mouth and that his eyes were "facing toward the ceiling." He detected a weak pulse and he noted that Cambosa's eyes were

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[49] Investigator Rimer located the Honda Civic that Timmy purchased in January 2001 and traded in in April 2001. Once he found and photographed the car, Rimer showed those photographs to Porras for identification. (16RT 2757-2758.) Porras told Rimer that the pictures matched the car he had seen outside of Jade Galore, though he noted when he saw the car outside of Jade Galore, it did not have a license plate. (16RT 2736-2737.)

starting to become fixed and dilated. He asked Deputy Gallardo to call the paramedics and to begin CPR. (15RT 2533-2534, 2536.) Sergeant Linderman noticed blood coming out from a bullet hole at the middle of Cambosa's chest. (15RT 2536-2537.) While the paramedics worked on Cambosa, they informed Sergeant Linderman that he had an exit wound on his back.[50] (15RT 2542.)

Sergeant Linderman observed an expended rifle casing near a counter in the store. Deputy Gallardo discovered a live round of .9 mm ammunition within the store. (15RT 2540.) Lieutenant Hilario Lopez recovered an expended rifle casing and a live .9 mm round of ammunition. He also recovered a canister of chap stick, a nail clipper, and some loose change from the floor of the store near the live round of ammunition. The items were found just beside a glass display case from which items were taken during the robbery. (15RT 2544-2548.)

Criminalist Chris Coleman examined the rifle casing recovered from Jade Galore and he determined that this casing was 7.62 x 39 mm, the same caliber as the casings found at Traditional Jewelers. He determined that the rifle casing from Jade Galore and the rifle casings from Traditional Jewelers were all fired from the same automatic rifle. (15RT 2552-2553.) Coleman also compared two expended .9 mm casings from Traditional Jewelers with the live .9 mm round from Jade Galore, and he determined that they were all chambered through the same gun.[51] (15RT 2553-2555.)

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[50] The parties stipulated that an autopsy on Cambosa revealed that the cause of death was "penetrating high-velocity rifle wound to the chest and abdomen. The bullet entered the center lower chest and partially exited the back." (16RT 2725.)

[51] However, Coleman determined that the .9 mm semi-automatic pistol used in the Thien Thanh robbery-murder was not the same firearm used in the Traditional Jewelers or Jade Galore incidents. (15RT 2555.)

After the robbery, appellant and the others returned with the stolen jewelry to the apartment complex. Appellant told Chen to switch cars with him because she had a "clean record," and that if she were to get pulled over in the Civic, "something would less likely happen" to her, since several men perpetrated the robbery, rather than a single woman. (15RT 2641-2642.) Chen switched cars with appellant and drove in the Civic back to their hotel in San Francisco. When everyone arrived at the hotel, the men opened two or three bags and dumped "a lot" of stolen watches on the bed. (15RT 2642-2643.)

The men were "unhappy" with the results of the robbery because "something went wrong" with the security guard and the ladies who worked at the store were too "scared" to open the display cases promptly, slowing down the robbery and causing the men to take in a lesser haul than they wanted. Appellant told Chen that he fired at a security guard because the guard was either reaching for a gun or for a phone to call 911. (15RT 2644-2645.)

After the watches were dumped on the bed, everyone "took a watch of their choice" as a "souvenir." (15RT 2645.) Despite being disappointed with the take from the robbery, everyone was "okay," and the group went to Union Square in San Francisco to go shopping, before driving back to Orange County.[52] (15RT 2646.)

Chen later sold the Rolex watch she took for $10,000 and gave the money to appellant. (15RT 2647.) Appellant sold the watches he stole and used the money to gamble and buy motorcycles and car parts for his drag racing car. (15RT 2651.) On March 26, 2001, a few weeks after the Jade

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[52] Investigator Rimer learned that on the evening of March 13, 2001, Chan made a purchase at an "upscale" clothing store in San Francisco. (16RT 2763-2764.)

Galore incident, Chen went with appellant, Chan, and Philip Garza to purchase motorcycles at Champion Motorcycles in Orange County.[53] (15RT 2623.)

On April 21, 2001, shortly after the Jade Galore incident, appellant had Timmy trade in the Civic for a white Ford Expedition, which appellant drove at the time of his arrest at the gym.[54] (15RT 2618-2619; see also 16RT 2757.) Chen testified that appellant kept a .45 mm semi-automatic pistol in the Expedition.[55] (15RT 2619.)

Santa Clara County Sheriff's Office Sergeant David Langley received from Allen Wong a list of the stolen Rolex watches as well as the warranty slip for each stolen watch. (16RT 2726-2727.) On August 9, 2001, Sergeant Langley took part in a search of Chan's Santa Ana residence. (16RT 2727.) In a desk drawer, he recovered a "red emblem" tag associated with a Rolex watch, but no watch. (16RT 2727-2728.) He

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[53] Investigator Rimer contacted Steve Berkeley, the manager at Champion Motorcycles in Orange County, and Dinesh Ratnayakage, the salesman who sold two motorcycles on March 26, 2001 to a group of four people, three Asian men and one Asian woman. (16RT 2739-2740, 2745, 2758-2759.) Ratnayakage noted that the woman, whom he later identified as Chen, appeared to be "with" a man who was "handing out cash from "[r]ight out of his pocket," later identified as appellant. (16RT 2743, 2745-2748, 2759.) He later identified the other two men as Garza and Chan. (16RT 2748.) The store's records indicated that Ratnayakage sold a motorcycle to Garza for $13,685, and to Chan for $9,243.71. Both men paid in cash given to them by appellant. (16RT 2742-2744.) The men also used cash to purchase several expensive helmets costing approximately $695, and one of the men purchased an extended warranty costing approximately $599. (16RT 2744-2745.) The incident stood out to Ratnayakage because he thought there was "something weird" about the amount of cash used to purchase the motorcycles. (16RT 2748-2749.)

[54] The parties stipulated that Timmy traded in the Civic for the Expedition on April 21, 2001. (16RT 2723-2724.)

[55] A .45 mm pistol was found in the Expedition when appellant was arrested. (See 8RT 1228.)

compared the tag with the inventory list of stolen watches and he learned that the price of the watch was $3,000. (16RT 2730.)

6. Mitigating Evidence

Chen presented mitigating evidence on appellant's behalf.[56] She testified that she loved appellant, that she was still "with him" even while he was on trial, and that she had wanted to marry him. (15RT 2664, 2675.) She testified that appellant was "good with kids" and that when one of her friends brought her four year old to visit, appellant "[took] the time to play with him, watch cartoons, take him out to eat." (15RT 2673-2674.) She believed that kids "[d]idn't have a problem with him at all." (15RT 2674.)

She did not like appellant's friends because they were "always borrowing money from him and asking him to do this and that," and she "just wanted [appellant] to get away from his friends" and go somewhere where "he can just lead his own life." (15RT 2675.)

When Chen had elective surgery, appellant "took care" of her during that time. (15RT 2677, 2706.) He supported her financially while they were together and he "paid for everything," but Chen testified that regardless of the money, she "cared for him . . . for who he was." She felt sorry for appellant because he was "always on the run." (15RT 2677-2678.) Appellant was born in Vietnam, and he told Chen once that his family had to flee that country when he was very young. (15RT 2696.) According to Chen, appellant "didn't grow up like in a really wealthy, wealthy family," his parents got divorced, he "didn't live in the greatest area in Orange County," and he "[hung] out with the wrong people." (15RT 2679.) However, she believed he had a "nice family." (15RT

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[56] Appellant made clear on many occasions during the penalty phase that he did not want counsel to present the testimony of any witnesses on his behalf, with the lone exception of Chen. (See, e.g., 14RT 2192-2200; 15RT 2558-2562, 2660-2661; 16RT 2785-2798.)

2676.) She believed that because appellant had a tough upbringing and he did not have "an older person for [him] to look up to and tell you what's right and what's wrong," he kept "messing up" and not learning from his mistakes. (15RT 2679-2680.) She believed he was not born "crazy," but "different things contributed to his environment, that made this person." (15RT 2680.)

After appellant learned that the security guard at Jade Galore died, he was "devastated" and "really quiet," because "he doesn't intend to hurt people." (15RT 2681.) Appellant "wanted to change [Chen's] life around." He wanted to "share his life experiences" with her as a cautionary tale, and he did not want her to "waste [her] life." While it was "too late" for him, he did not believe it was too late for her. She believed she was his "little project he was working on to make into a better person." She claimed that she did become a "better person" and that she was "grateful." Even in jail, appellant wrote Chen letters telling her to "do whatever it takes to get through this," to "[k]eep going to school, don't smoke, don't do drugs, and stop hanging around with bad people." (15RT 2683.)

She believed that appellant had a gambling problem and that when he lost large sums of money gambling, he kept "chas[ing]" his losses, causing him to lose even more. He took the drug ecstasy in her presence, though he "stopped" after the two began dating. (15RT 2694-2695.)

During examination by the prosecutor, Chen admitted that while appellant's mother, Lan Bang, supported her family financially, appellant gave her proceeds from his robberies, including money and stolen Rolex watches. (15RT 2698-2699.) Chen acknowledged that appellant was pretty lucky to have the opportunity to move to this country and to get an education and go to college. Though appellant told Chen that he wanted her to have a better life, he never told her that it was in her best interests to get away from him and his criminal lifestyle. He never said that he wanted

to turn himself in for the crimes he committed. (15RT 2699-2701.) She acknowledged that while appellant paid for her elective surgery, he did so out of the proceeds from his crimes. (15RT 2707.)

7. Victim Impact Testimony

Jane Norman, Robert Norman's mother, testified that Robert's murder was "very emotionally [and physically] disabling" to members of her family and that it was something "you are going to live with for the rest of your life." (16RT 2772-2773.) She, her husband, and her daughter all underwent counseling. Her other son, David, was particularly affected because Robert was murdered the same month as David's birthday. At the time of his death, Robert was living with his parents and he was attending community college. He was also trying to get work as a deejay, which he enjoyed doing. He was a second-year business major in college and he planned to go into the construction business with his father. (16RT 2773-2775.) She testified: "[N]ot a day goes by that you are not thinking about your loved one and wishing you could have them back. And the holidays are extremely difficult. And of course his birthday when it rolls around every year, you realize the loss even more." She testified further that these feelings would stay with her forever. (16RT 2775.)

Mach Dang, victim Lin Thi Dang's father, testified that he and his wife were "suffering," that Lin's death was a "big loss" to her family, and that he was "not able to forget her at all." (16RT 2776.) He suffered chest pain, his wife had been "sick" since the murder, and neither was able to sleep. Lin lived with her parents when she was murdered, and she was going to school and working part-time. She wanted to become a teacher when she graduated from school. (16RT 2777.)

Loan Dang, Lin's sister, was present in the International Club when Lin was murdered. She and her sister went to the International Club on the night of the murder because Lin wanted to visit the chef who worked there.

Neither sister was a member of a gang. (16RT 2781.) After her sister's murder, Loan stopped attending school for two years and she "wasn't able to sleep." (16RT 2778-2779.) She suffered through "a lot of panic attacks" and she "kept on having . . . memories of [Lin] going into shock." Lin was her "best friend" and she went places with her "[a]ll the time." (16RT 2779.) Because Loan was present when her sister was killed, she "would always think that something bad is going to happen to [her] or always negative things going through [her] head all the time." For a while after the murder, she did not want to be left alone. (16RT 2780.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CHANGE OF VENUE; NO CONSTITUTIONAL VIOLATION RESULTED

Appellant contends the trial court's denial of his motion for change of venue "violated his rights to due process, equal protection, a fair trial and impartial jury, and a reliable penalty determination." (AOB 22-34.) This claim is without merit.

A. Relevant Trial Court Proceedings

On September 25, 2002, defense counsel filed with the trial court a motion for change of venue on the ground that "there is a reasonable likelihood that a fair and impartial trial of this matter cannot be held in this county." (1CT 269.) The trial court informed defense counsel that he had "not attached the nature of the publicity that has surrounded this case in terms of its nature, its frequency, and [its] subject matter." (1RT 130.) Defense counsel explained that an episode of the television program "America's Most Wanted" which aired in 2000 featured a "wanted poster" with appellant's name and picture, giving this case "significant publicity." He noted that a "number of publications," including the Los Angeles Times, the San Gabriel Valley Tribune, as well as internet sources,

referenced the shooting, and he argued that because of the nature of the shooting and because the shooter evaded capture for several years, "that was an area that the press followed." (1RT 131.)

The court asked whether anyone had a copy of the 2000 "America's Most Wanted" broadcast, and appellant volunteered that he "should have . . . a lot of copies" of that broadcast. Defense counsel did not believe that the episode had been rebroadcast more than once. (1RT 131.) Defense counsel then informed the court that the San Gabriel Valley Tribune ran a story on the case the day before, featuring a picture of appellant.[57] (1RT 132.)

The court found "[i]t would seem that the number of viewers of ["America's Most Wanted"] would not be disproportionately higher in L.A. County than any other county in the state. Would it not? Or do you have information that somehow there are more individuals who viewed that program in L.A. County in proportion to any other county?" Defense counsel replied that he did not know. The court then found that "it seems the dissemination of that information probably went nationwide, would it not?" Defense counsel replied that he believed "America's Most Wanted" was a "national publication." (1RT 132.)

The court then compared the instant case to another case that the San Gabriel Valley Tribune covered "extensively." There, even though the court had 27,000 subscribers, not one of the 70 prospective jurors subscribed to that newspaper and only four read it even "periodically." The court noted that the Eastern District alone had a population of one million, and that the court's jury pool on occasion pulled from "beyond the borders" of that district. (1RT 132-133.) When defense counsel noted several other

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[57] Defense counsel then made an oral motion that the court exclude cameras and electronic recording devices from the courtroom during trial, to protect appellant's "right to a fair and impartial trial." (1RT 132.)

local newspapers that might cover the case, the court noted the same was true in the other case referenced by the court. The court asked defense counsel to supplement his motion with more precise information about the "America's Most Wanted" broadcast, as well as about any possible articles about the case in the Los Angeles Times and in the San Gabriel Valley Tribune. The court then informed counsel that it would question the prospective jurors about whether any of them subscribed to the newspapers in question. (1RT 133.) The court requested that counsel explore the issue of "pretrial publicity" more fully, noting that "if the numbers are significant, it may be a justification for the request," and that "if they are insignificant it may be a basis for a denial." (1RT 133-134.)

On the next court date, October 2, 2002, defense counsel provided the court with copies of eight articles written about the case.[58] Defense counsel explained that appellant was featured in a May 2000 episode of "America's Most Wanted", a "national publication," and that this episode aired only once. (1RT 182; see 2CT 316-325.) The court explained that it would review the articles before making a ruling. (1RT 182.)

The following day, the court explained that the juror questionnaire addressed "the issue of pretrial publicity," and that the court would address the issue "if it really manifests itself in terms of the [jury] pool." (2RT 192-193.)

During jury selection, the court asked defense counsel if he wished to be heard on his venue change motion. Defense counsel incorporated all his

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[58] Defense counsel submitted the following articles: (1) May 8, 1999 – Los Angeles Times; (2) December 11, 1999 – Los Angeles Times; (3) September 19, 2001 – Los Angeles Times; (4) July 18, 2001 – Los Angeles Times; (5) September 25, 2002 – San Gabriel Valley Tribune; (6) September 24, 2002 – Inland Valley Daily Bulletin; (7) July 18, 2001 – Associated Press State and Local Wire; (8) July 18, 2001 – San Francisco Chronicle. (2CT 316-325.)

previous statements on the issue, and then noted that "there were a few [prospective jurors] that indicated they knew something about the case, some that had recently read about the article" in the San Gabriel Valley Tribune. (5RT 722.) The court asked defense counsel if he knew the "approximate number of jurors" who gave positive responses to Question no. 81, which addressed, in part, whether the prospective jurors had read anything about the case in any publications.[59] Defense counsel estimated that "[f]our or five" prospective jurors responded that "they remember something about the case or they read something about it recently." (5RT 722-723.) Accordingly, the court denied the motion to change venue, and informed defense counsel that if he discovered upon review that the numbers were "substantially different" than he reported, the court would "revisit" the ruling. "Otherwise," the court found," that is the ruling of the court." (5RT 723.)

The following day, during the selection of alternate jurors, the court indicated that it wished to speak with three prospective alternate jurors who had given "positive responses" to the pretrial publicity question (Question no. 81) on the juror questionnaire. (5RT 815.) The first prospective alternate (Juror No. 6274) explained that she read a headline in the San Gabriel Valley Tribune about how jury selection was set to begin in this case, which "caught her eye" because she was set to serve on jury duty. Though she admitted reading the entire article, she could not recall reading anything specifically about the allegations. (5RT 817.) The second prospective alternate (Juror No. 1291) recalled hearing "something" about this case a few years prior on the evening news, though he could not recall

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[59] Question no. 81 read: "Do you know anything, or have you read or heard anything, about this case? If yes, please explain." (See, e.g., 2CT 339.)

the details. (5RT 818-819.) The third prospective alternate (Juror No. 5230) recalled reading something about the shooting right after they occurred and that she noted the article because it mentioned El Monte, where she worked. (5RT 819-820.) When she read the article, she recognized the location of the shooting, but she stopped reading when she did not recognize any of the names of the victims. She recalled only that "some people were killed" and that the victims' names were "Asian of some kind," and she did not recall reading anything about the perpetrator. (5RT 820-821.) The court excused the first prospective alternate on the ground that she recently read an "entire article" about the case. (5RT 821.)

B. Applicable Law

"'A trial court should grant a change of venue when the defendant demonstrates a reasonable likelihood that in the absence of such relief, he or she cannot obtain a fair trial'" in that county. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 44; quoting *People v. Weaver* (2001) 26 Cal.4th 876, 905; § 1033, subd. (a).) In this context, "reasonable likelihood" means "'something less than "more probable than not,"' and 'something more than merely "possible."'" (*People v. Proctor* (1992) 4 Cal.4th 499, 523, quoting *People v. Bonin* (1988) 46 Cal.3d 659, 673.) "On appeal from the denial of a change of venue," this Court must "accept the trial court's factual findings where supported by substantial evidence, but . . . review independently the court's ultimate determination whether it was reasonably likely the defendant could receive a fair trial in the county." (*People v. Rountree* (2013) 56 Cal.4th 823, 837.) The defendant's challenge on appeal to the trial court's denial of a motion to change venue "must show both error and prejudice, that is, that it was not reasonably likely the defendant could receive a fair trial at the time of the motion, and that it is reasonably likely he did not in fact receive a fair trial." (*Ibid.*; see also *People v. Suff* (2014) 58 Cal.4th 1013, 1044-1045.)

"Both the trial court's initial venue determination and [this Court's] independent evaluation are based on a consideration of five factors: '(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1237.)

C. The Trial Court Properly Denied Appellant's Change of Venue Motion

When all relevant factors are considered, it becomes abundantly clear that the trial court properly denied appellant's change of venue motion.

1. The Nature and Gravity of the Offense

The crimes committed in this case were undoubtedly serious; four people were murdered in a crowded nightclub, prompting the People to seek the death penalty. However, even in a capital case, the nature and gravity of the offense "standing alone does not compel change of venue." (*People v. Harris* (2013) 57 Cal.4th 804, 825.) Indeed, "'the sensationalism inherent in all capital murder cases will not in and of itself necessitate a change of venue.'" (*Ibid.*, quoting *People v. Adcox* (1988) 47 Cal.3d 207, 231.) Further, this Court has "on numerous occasions . . . upheld the denial of change of venue motions in cases involving multiple murders." (*People v. Farley* (2009) 46 Cal.4th 1053, 1083, citing *People v. Leonard, supra*, 40 Cal.4th at pp. 1395, 1397 [six counts of murder], *People v. Ramirez* (2006) 39 Cal.4th 398, 407, 434-435 [13 counts of murder]; *People v. Welch* (1999) 20 Cal.4th 701, 721, 744-745 [six counts of murder]; see also *People v. Suff, supra*, 58 Cal.4th at p. 1045.) Thus, while appellant contends that "the sensational, grave facts of this case require[ ] a change of venue" (AOB 25), it is clear from this Court's established precedent that this factor alone is not dispositive.

2. The Nature and Extent of the Media Coverage

Appellant contends that the pretrial media coverage of this case included "inflammatory information, disputed facts, inaccuracies, and items that were inadmissible or were sure to be excluded" at trial, and that this coverage "prejudiced" him in "a number of ways." (AOB 25-30.) However, after considering the extent of the pretrial media coverage, both in print and on television, the trial court overruled appellant's motion to change venue. (5RT 723.) "Posttrial review of the denial of a motion for change of venue is retrospective, taking into account prospective jurors' exposure to pretrial publicity as revealed in voir dire." (*People v. Fauber* (1992) 2 Cal.4th 792, 819.) Further, "'[w]hen pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base [the] evaluation on [the judge's] "own perception of the depth and extent of news stories that might influence a juror."'" (*People v. Famalaro* (2011) 52 Cal.4th 1, 24, quoting *Skilling v. United States* (2010) 561 U.S. 358, 362 [130 S.Ct. 2896, 177 L.Ed.2d 619].)

Even in cases with considerable pretrial media coverage, "[h]eavy media coverage may weigh in favor of a change of venue, but does not necessarily compel it." (*People v. Harris*, *supra*, 57 Cal.4th at p. 825.) Here, however, the simple fact is that this was not a highly publicized case. According to defense counsel's own review of the jury questionnaires, only "[f]our or five" prospective jurors in the entire jury pool responded that they had even *heard* of this case, let alone seen or read any media coverage of it. (5RT 722-723.) In fact, this Court has upheld a trial court's denial of a motion to change venue even where a *considerable* number of prospective jurors had familiarity with the case and believed the defendant to be definitely or probably guilty, a far cry from the miniscule number of

prospective jurors even passingly familiar with the instant case. (*People v. Harris*, *supra*, 57 Cal.4th at pp. 825-826, citing *People v. Famalaro*, *supra*, 52 Cal.4th at p. 19 [83 percent recognition, 70 percent believed defendant guilty]; *People v. Rountree*, *supra*, 56 Cal.4th at p. 836 [81 percent recognition, 46 percent believed defendant guilty]; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1396 [85 percent recognition, 58 percent believed defendant guilty]; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 433 [94 percent recognition, 52 percent believed defendant guilty]; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 45 [71 percent recognition, 80 percent believed defendants guilty].) Accordingly, appellant cannot demonstrate that he suffered any prejudicial effect from the pretrial media coverage. (See *People v. Fauber*, *supra*, 2 Cal.4th at p. 819 [finding that because "[f]ew of the 186 prospective jurors had any recollection of the media coverage" and those that did recalled reading only a headline or part of an article, "the jurors' exposure to pretrial publicity . . . was considerably less than that found in other cases in which [this Court] held venue change to be unnecessary"].)

Indeed, even after the court gave defense counsel the opportunity to search for media articles about the shooting, the search for the suspect, and the lead-up to trial, counsel presented only eight articles published over a three-year period. (1RT 182; 2CT 316-325.) Further, though the television show "America's Most Wanted" did a segment on appellant in May 2000, so far as defense counsel could tell this episode aired only once. (1RT 182.) Even so, as the court noted and defense counsel conceded, this show aired nationwide (1RT 132), mitigating any beneficial effect appellant might have expected from a change in venue. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1127, overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421 [finding that because an "America's

Most Wanted" segment on the defendant was "seen nationally, . . . a change of venue could not be expected to dilute its prejudicial effect"].)

Despite the paucity of evidence presented of pretrial media coverage, appellant contends that the content of the coverage "prejudiced" him in "a number of ways." (AOB 25-30.) However, even to the extent the pretrial media coverage detailed facts of the shooting and the surrounding and ensuing circumstances, including appellant's flight from police capture, his gang affiliation, his involvement in other cases, eyewitness accounts of the shooting, the grief suffered by the victims' friends and family members, appellant's suicide attempt, and appellant's motion to represent himself at trial, this coverage was not "biased or inflammatory" simply because it recounted the "inherently disturbing circumstances of the case." (*People v. Harris*, *supra*, 57 Cal.4th at p. 826.) Indeed, as in *Suff*, the reporting here was "largely factual," and "something more than sensational facts" must be presented to justify a change of venue. (*People v. Suff*, *supra*, 58 Cal.4th at p. 1048.)

Further, as noted, the segment on appellant that aired on "America's Most Wanted" aired in May 2000, some two-and-a-half years prior to jury selection. Six of the eight articles presented by defense counsel were published at least a year prior to jury selection, and in some cases more than three years prior. (1RT 182; see 2CT 316-325.) Thus, to the extent there was ever intense media coverage of the shooting, "[t]he passage of time from the early intense media coverage diminished the potential for prejudice." (*People v. Suff*, *supra*, 58 Cal.4th at p. 1048; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 434 ["the passage of more than a year from the time of the extensive media coverage served to attenuate any possible prejudice and supports the trial court's denial of the motion for change of venue"]; *People v. Lewis* (2008) 43 Cal.4th 415, 449 ["[m]ost of the coverage – and nearly all of the potentially inflammatory coverage –

occurred . . . nearly a year before jury selection occurred"].) Indeed, of the three prospective alternate jurors who indicated some familiarity with the case from pretrial media coverage, two of them indicated only a distant recall of the shooting that was hazy at best, and neither recalled any pertinent details, if ever they knew them. (5RT 818-821.) While one of the prospective alternate jurors had read a *recent* article on the instant case, the court promptly excused her. (5RT 817, 821.) Indeed, none of the jurors selected for this case demonstrated any real and recent familiarity with the facts of the case.

Further, even if most of the jurors had some prior knowledge of the facts of the case, "the circumstance that most of the actual jurors have prior knowledge of a case does not necessarily require a change of venue." (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31.) Indeed, "[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Young* (1984) 467 U.S. 1025, 1035 [104 S.Ct. 2885, 81 L.Ed.2d 847]; *People v. Fauber*, *supra*, 2 Cal.4th at p. 819 ["It is not necessary that jurors be totally ignorant of the facts and issues involved in the case; it is sufficient that they can lay aside their impressions and opinions and render a verdict based on the evidence presented in court"].) Here, however, there was no suggestion that even if the jurors knew the facts of the case, they harbored "fixed opinions" of the case such that they could not fairly judge appellant.

Accordingly, because appellant cannot demonstrate that he was prejudiced by pretrial media coverage of his case, this factor does not weigh in favor of a change of venue.[60]

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[60] To the extent appellant alleges that media coverage during trial prejudiced him (AOB 30-31), this claim has been forfeited because defense (continued...)

3. Size of the Community

Appellant does not discuss the third factor in this Court's venue change analysis: the size of the community. However, it should be noted that this factor also weighs in favor of upholding the trial court's decision to deny appellant's change of venue motion. Indeed, the trial was to be held in Los Angeles County, "the largest and most populous in California," making this a factor "weighing heavily against a change of venue." (*People v. Williams* (1997) 16 Cal.4th 635, 655.) Further, the trial court noted that the East District of Los Angeles County alone had a population of one million people, and that the court's jury pool on occasion pulled from "beyond the borders" of that district. (1RT 132-133.) Thus, it is abundantly clear that "because of the number of prospective jurors that could be assembled in Los Angeles County, it was likely that an impartial jury could be chosen." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 434; see also *People v. Panah* (2005) 35 Cal.4th 395, 449; *People v. Famalaro*, *supra*, 52 Cal.4th at p. 23.) Thus, this factor weighs strongly against a change of venue.

4. Appellant's Status in the Community

Appellant contends that because he did not live in Los Angeles County and he was a "reputed gang member" who was captured after a "national manhunt," he was "friendless in the community," thus favoring a change of venue. (AOB 31-32.) However, even though appellant was a gang member, he was by no means "well known" or a "prominent member[

(...continued)
counsel never raised any such issue during trial. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097-1098.) Even so, this claim is meritless because the trial court repeatedly admonished the jurors to stay away from media coverage of the case during trial. (See, e.g., 4RT 458, 484-485, 510-511, 539-540; 5RT 641, 721, 816; 6RT 893-894.)

] of the community." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 45-46; *People v. Farley*, *supra*, 46 Cal.4th at p. 1084.) In fact, the evidence demonstrated that appellant wished to live as anonymously as possible, using Long Hoang's name, birthdate, and address on identification cards so that nobody could trace his whereabouts. (See 7RT 1023-1030, 1042.) In any event, as discussed above, any notoriety he attained by appearing on "America's Most Wanted" would have followed him to any venue, given that it was a national television program. (See 1RT 132.) Further, far from being a "friendless" outsider, appellant lived in neighboring Orange County since he moved with his family from Vietnam when was a very young child. (15RT 2696; see *People v. Edelbacher* (1989) 47 Cal.3d 983, 1002.) Thus, this factor did not weigh in favor of a change of venue.

5. Prominence of the Victims

Appellant concedes that the four victims were not public figures when they were alive, though he contends that the media descriptions of their deaths, "amplified" by appellant's status as a "dangerous Asian gang member," thrust them into "positions of public prominence." (AOB 32.) As appellant concedes, the four victims were not public figures prior to their deaths and no evidence was presented that they were prominent in the community. Indeed, there was "no evidence that the potential jury pool [in Los Angeles County] was comprised of persons who personally knew [the victims]." (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 24.) As in Famalaro, the victims here "came to the public's attention first through the publicity" surrounding their violent deaths, circumstances that "would have followed the case to any county to which venue was changed." (*Ibid.*) While appellant attempts to portray the victims as "posthumous celebrit[ies]" due to the circumstances of their deaths (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 942), this is not a case where any evidence

was presented that the victims had "long and extensive ties to the community." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 46; see also *People v. Williams* (1989) 48 Cal.3d 1112, 1129.) Indeed, the exceedingly small number of prospective jurors who had read or seen anything in the media about this case demonstrates that these victims were not well-known. (See 5RT 722-723.) Thus, this factor likewise does not weigh in favor of a change of venue.

Accordingly, based on a weighing of the five factors, only one of which (the nature and gravity of the offense) weighs in favor of granting the motion, it is clear that the trial court properly denied appellant's motion for change of venue.[61]

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[61] As to this and his many other claims, appellant contends the asserted error violated various state and federal constitutional rights. When addressing these constitutional claims, this Court should apply the same reasoning it recently applied in *People v. Chism* (2014) 58 Cal.4th 1266, and other cases. "'In most instances, insofar as [appellant] raised the issue at all in the trial court, he failed explicitly to make some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting [appellant's] substantial rights) that required no trial court action by [appellant] to preserve it, or (2) the new arguments do not invoke facts or legal standards different 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, [appellant's] new constitutional arguments are not forfeited on appeal. [Citation.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on 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.'" (*Id.* at p. 1290, fn. 9, quoting *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; see also *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1182, fn. 10; *People v. Contreras* (2013) 58 Cal.4th 123, 139, fn. 17; *People v. Harris*, *supra*, 57 Cal.4th at p. 821, fn. 4.)

D. Even if the Trial Court Erred, Any Error Was Harmless

Assuming the trial court erred in refusing to change venue, any error would have been harmless because appellant cannot demonstrate that "it was not reasonably likely [he] could receive a fair trial at the time of the motion, and that it is reasonably likely he did not in fact receive a fair trial." (*People v. Rountree*, *supra*, 56 Cal.4th at p. 837.) As discussed above, only "[f]our or five" prospective jurors responded on their questionnaires that "they remember something about the case or they read something about it recently." (5RT 722-723.) Further, when the court questioned three prospective alternate jurors about their prior knowledge of the case, two of these prospective jurors had only vague recollections of the case from media coverage, and when one of them said she read a recent article about the case, the court promptly excused her. (5RT 815-821.)

Even if the jurors had some prior knowledge of the case, this still does not constitute a violation of due process, since "there is 'no presumption of a deprivation of due process of law aris[ing] from juror exposure to publicity concerning the case.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 945, quoting *People v. Proctor*, *supra*, 4 Cal.4th at p. 527.) As this Court noted in *Suff*, the "extraordinary cases in which prejudice has been presumed involve circumstances in which 'the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings.'" (*People v. Suff*, *supra*, 58 Cal.4th at pp. 1049-1050, quoting *Murphy v. Florida* (1975) 421 U.S. 794, 799 [95 S.Ct. 2031, 44 L.Ed.2d 589].) As this Court noted, *Murphy* was a case in which "the news media was allowed to overrun the courtroom and create a circus atmosphere," depriving the defendant of the "'solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.'" (*Ibid.*) While appellant contends that

the presence of members of the media in the courtroom during trial "amplified" the prejudice he faced from the court's failure to grant his motion for change of venue (see AOB 32-34), he cannot demonstrate that the presence of the media in this case even approached the "circus atmosphere" that this Court noted was so prejudicial in *Murphy*.

Accordingly, appellant cannot demonstrate that even if the trial court erred, it was not reasonably likely that he could receive a fair trial at the time of the motion, or that it was reasonably likely that he did not in fact receive a fair trial. (See *People v. Rountree*, *supra*, 56 Cal.4th at p. 837.) Thus, even if an error occurred, that error would have been harmless. This claim fails.

II. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS EVIDENCE SEIZED DURING AN INVENTORY SEARCH OF APPELLANT'S FORD EXPEDITION

Appellant contends the trial court erred by failing to suppress evidence seized during an inventory search of appellant's Ford Expedition after his arrest. (AOB 34-46.) This claim is without merit.

A. Relevant Trial Court Proceedings

On September 25, 2002, defense counsel filed with the court a motion to suppress evidence pursuant to section 1538.5. In this motion, counsel challenged the seizure of evidence recovered from appellant's Expedition after his arrest, as well as from a house in Santa Ana.[62] (See 2CT 290-305.)

On October 2, 2002, the trial court held a section 1538.5 suppression hearing regarding the evidence seized from appellant's Expedition. Prior to the start of the hearing, the parties stipulated that the Expedition was not seized pursuant to a search warrant. (1RT 145-146.)

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[62] Defense counsel later withdrew his challenge to the evidence seized from the house in Santa Ana. (1RT 180.)

The trial court heard the following testimony: On July 16, 2001, a team of six officers arrested appellant pursuant to arrest warrants issued in Los Angeles County and other counties charging appellant with murder. Appellant was arrested on a basketball court at a gym in Costa Mesa. (1RT 146-148.) Shortly after appellant's arrest, Costa Mesa Police Department Detective Edwin Everett was in the gym parking lot when an officer from the Newport Beach Police Department handed him several items, including a parking ticket from that parking lot, dated that day at 4:23 p.m. Detective Everett was also handed a set of car keys to a Ford vehicle, a gym membership card in the name of Long Hoang, a cell phone, and a pair of sunglasses. Based on the parking ticket with the recent time-stamp, Detective Everett gave the keys to his sergeant, who in turn gave them to Costa Mesa Police Department Officer Brian Harris.[63] (1RT 157-159.) On cross-examination, Officer Harris testified that he received the keys at approximately 11:00 p.m. (1RT 171.) When Officer Harris was handed the set of keys, he was asked to find a Ford in the gym parking lot that matched the Ford key on the key ring. He tried the key in every Ford in the parking lot until he located a Ford Expedition. (1RT 169.) Detective Everett had the Expedition impounded, and it was towed to the Costa Mesa Police Department, where he took custody of it. Later, because the Expedition was tied to appellant at the time of his arrest, Detective Everett conducted an inventory search in the police station parking lot. (1RT 159, 163, 169-170.) He estimated that the search was conducted between an hour-and-a-half to two hours after appellant's arrest. (1RT 165.) Inside the vehicle, Detective Everett recovered a Colt .45 mm handgun in a black bag

[63] On cross-examination, pursuant to his police report, Officer Harris testified that he received the key at approximately 11:00 p.m. (1RT 171.) On redirect, however, he testified that he did not have an "exact recollection" of when he was handed the keys. (1RT 173.)

in the center console. (1RT 160.) He also found a credit card in the name of Soewin Chan, a check and a Visa card in the name of Christine Chen, a credit card in the name of Long Hoang, and a California identification card in Long Hoang's name but with appellant's picture. (1RT 160, 162, 166.)

The prosecutor argued that because appellant was arrested at the gym, officers had a right to impound the Expedition parked in the gym parking lot. They key ring linking appellant to the Expedition was found on the basketball court where he was arrested, and was found along with a parking ticket for the gym parking lot time-stamped close to the time of appellant's arrest. Detective Everett searched the vehicle within several hours of appellant's arrest. (1RT 174-175.)

After the trial court questioned the prosecutor about appellant's standing to challenge the search, the prosecutor noted that the vehicle was registered to Timmy Mukasa, but that the vehicle was in appellant's custody and control at the time of his arrest. Defense counsel agreed that because a key was found near where appellant was arrested, that was sufficient to show that he had possession of the Expedition at that time, therefore giving appellant standing to challenge the search. (1RT 176-177.)

However, defense counsel argued that the search was not conducted in a "timely fashion," noting Officer Harris's lack of independent recollection about when the search was actually conducted. He argued that because Officer Harris initially testified that the search was conducted at 11:00 p.m., enough time had passed since appellant's arrest to require officers to obtain a search warrant. (1RT 177.)

The prosecutor argued that a reasonable interpretation of the evidence was that Officer Harris was simply mistaken when he listed on the police report that the search was conducted at 11:00 p.m., since appellant was arrested in the afternoon and Detective Everett, who conducted the search, testified that he likely conducted the search within two hours of appellant's

arrest. Further, he argued that even if the search occurred closer to 11:00 p.m., defense counsel failed to provide any case law to demonstrate that this was too long a delay to justify a warrantless inventory search. (1RT 178.) He argued that the search was "certainly appropriate" as an inventory search conducted on a vehicle tied to appellant at the time of his arrest. (1RT 179.) The court continued the hearing to allow counsel time to file further briefing on the issue. (1RT 179-182.)

On October 4, 2002, defense counsel filed with the court a supplemental motion to suppress, arguing that the search of the Expedition was unlawful pursuant to Vehicle Code section 22651, subdivision (h) because appellant was not ". . . driving or in control of a vehicle for an alleged offense." Further, counsel argued that should the court find that appellant was subject to that section of the Vehicle Code, the prosecutor still needed to demonstrate that the Costa Mesa Police Department followed its own policy in deciding to impound the vehicle. (3CT 866-868.) The prosecutor later filed with the court a supplemental response to the motion to suppress, attaching a copy of the Costa Mesa Police Department manual section dealing with inventory searches. (4CT 904-907.) On December 9, 2002, the suppression hearing continued and the court allowed the prosecutor to present further testimony from Detective Everett and Newport Beach Police Department Officer Randall Lawton. (3RT 356.)

The court heard the following testimony: after appellant was arrested, Detective Everett directed Officer Lawton to search the basketball court area for any items belonging to appellant. He located a black Motorola cell phone, a pair of sunglasses, a key ring with several keys on it, including a Ford key, and a plastic container containing a gym membership card in the name of Long Hoang and a parking ticket for the gym parking lot time-stamped at 4:23 p.m. that afternoon. Officer Lawton asked the other basketball players on the court if the items belonged to them, and when

nobody claimed the items, Officer Lawton gave them to Detective Everett. (3RT 367-368, 371-373.) Detective Everett gave the key ring to his sergeant, who then gave it to Officer Harris to locate a matching vehicle. (3RT 368-369.) The Expedition was impounded pursuant to a Vehicle Code section allowing officers to impound a vehicle if it is driven or under the control of a person who has been arrested. Through the recovery of the parking ticket along with appellant's gym membership card, Detective Everett was able to determine that the Expedition was under appellant's control at the time of his arrest. (3RT 363-364.) Appellant was arrested between 4:45 and 5:00 p.m. and the inventory search of the Expedition was conducted at approximately 11:00 p.m.[64] (3RT 358-359.) Between 5:00 and 11:00 p.m., appellant was arrested and transported to the police station, Costa Mesa Police Department officers contacted officers in other jurisdictions regarding appellant's crimes and outstanding warrants in those jurisdictions, officers searched appellant's home and they waited for his roommates, Ed Mukasa and Christine Chen, to return, and officers searched their vehicles and arrested them when they returned. (3RT 359-360.) From the time of appellant's arrest to the time of the inventory search, Detective Everett worked "continually" on the case, along with a total of approximately 30 officers from three different agencies.[65] (3RT 360-361.) Section 6555 of the Costa Mesa Police Department policy manual requires all vehicles that are stored or impounded to be inventoried. Pursuant to that

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[64] During the time the Expedition was impounded and towed from the gym to the police station, it remained in the custody of somebody from the Costa Mesa Police Department. (3RT 359.)

[65] The three agencies were the Costa Mesa Police Department, the Newport Beach Police Department, and the Fountain Valley Police Department. (3RT 361.)

written policy, Detective Everett conducted the inventory search of the Expedition and itemized the items found therein. (3RT 362, 364.)

The prosecutor argued that Vehicle Code section 22651, subdivision (h)(1) allows the police to impound a vehicle that is under the control of somebody who has been arrested, and that the evidence showed that the Expedition was under appellant's control at the time of his arrest. Further, pursuant to Costa Mesa Police Department policy, once a car is impounded it must be inventoried. As to the timeliness issue, the prosecutor argued that while the inventory of the Expedition did not occur until 11:00 p.m., some six hours after appellant was arrested, 30 officers from three agencies worked "continually" on this case during that time. (3RT 374-375.) Because of the multiple warrants for appellant's arrest issued in multiple jurisdictions, this was not a "situation where [appellant] was in any put upon by any delay in an impound search of his vehicle because he wasn't going anywhere anyway." (3RT 375-376.)

Defense counsel countered that this was an "unusual" situation in which an officer "essentially conducts a search of what could have been every single vehicle in that entire parking lot," and that when Officer Harris put the Ford key in every Ford vehicle in that lot and turned the key to see if it opened, "a search of sorts has occurred." (3RT 376-377.) He argued that the Costa Mesa Police Department had no policy for this sort of procedure. He conceded there was "no problem" with the decision to impound the Expedition, but the question remained, "how do they make that determination to impound[?]" (3RT 377.) He argued that without a policy dictating officer conduct in situations like this, the items found in the Expedition should be suppressed. (3RT 377-378.)

The trial court denied the motion to suppress, finding as follows:

> I think the purpose of impounding a vehicle is to not only facilitate inspection assuming probable cause, but also the

> removal of unattended vehicles from private property or public streets. And, finally, for the benefit of the owner or user of the vehicle. The insertion of a key to the lock of the vehicle in the Court's view is not a search. The question is whether there is a genuine expectation of privacy that a key would not be inserted into a vehicle's door. [¶] Once a vehicle is located [and] impounded, [it] appears that the investigating agency followed its own impound and inventory search procedure. [¶] In any event the motion is denied.

(3RT 378.)

B. Applicable Law

"In ruling on a motion to suppress the fruits of an allegedly unlawful search, the trial court 'sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences.'" (*People v. Carrington* (2009) 47 Cal.4th 145, 166, quoting *People v. Laiwa* (1983) 34 Cal.3d 711, 718.) This Court reviews the trial court's resolution of the factual inquiry under the "'deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.'" (*People v. Brendlin* (2009) 45 Cal.4th 262, 268, quoting *People v. Ramos* (2004) 34 Cal.4th 494, 505.) In evaluating whether the fruits of the search should be suppressed, this Court should "consider only the Fourth Amendment's prohibition on unreasonable searches and seizures." (*Ibid.*; see *People v. Carter* (2005) 36 Cal.4th 1114, 1141.)

"The touchstone of the Fourth Amendment is reasonableness . . . ." (*United States v. Knights* (2001) 534 U.S. 112, 118-119 [112 S.Ct. 587, 151 L.Ed.2d 497].) It is true that "[a] warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search." (*People v. Redd* (2010) 48 Cal.4th 691, 719.) However, "[w]hen faced with . . . diminished expectations of privacy, minimal intrusions, or the like, the [United States Supreme] Court has

found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (*Illinois v. McArthur* (2001) 531 U.S. 326, 330 [121 S.Ct. 946, 148 L.Ed.2d 838]; *People v. Schmitz* (2012) 55 Cal.4th 909, 921.)

To determine the reasonableness of a search within the meaning of the Fourth Amendment, courts must evaluate the "totality of the circumstances." (*Samson v. California* (2006) 547 U.S. 843, 848 [126 S.Ct. 2193, 165 L.Ed.2d 250], internal quotation marks omitted.) "This test includes an assessment of the degree to which a search promotes legitimate governmental interests, balanced against the degree to which it intrudes upon an individual's privacy." (*People v. Schmitz*, *supra*, 55 Cal.4th at p. 921.)

Under Vehicle Code section 22651, subdivision (h)(1), a police officer may impound a vehicle when that officer conducts a valid arrest of a person "driving or in control of" that vehicle. (Veh. Code, § 22651, subd. (h)(1); *People v. Redd*, *supra*, 48 Cal.4th at p. 721.) Further, the United States Supreme Court has observed that automobiles are "frequently" impounded and taken into police custody "[i]n the interests of public safety" as part of police "community caretaking functions." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 368 [96 S.Ct. 3092, 49 L.Ed.2d 1000], internal quotation marks omitted.) Whether the impound of a vehicle under this doctrine is reasonable "depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a *target for vandalism or theft.*" (*Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864, emphasis added; see also *People v. Williams* (2006) 145 Cal.App.4th 756, 761.)

Once the vehicle has been impounded, officers can conduct an inventory search of the vehicle's contents "aimed at securing or protecting the car and its contents." (*South Dakota v. Opperman*, *supra*, 428 U.S. at p.

373; *People v. Redd, supra*, 48 Cal.4th at p. 721.) The United States Supreme Court noted that "the state courts have overwhelmingly concluded that, even if an inventory is characterized as a 'search,' the intrusion is constitutionally permissible." (*South Dakota v. Opperman, supra*, 428 U.S. at pp. 370-371.) Accordingly, the Court found that inventory searches are "reasonable" under the Fourth Amendment when conducted "pursuant to standard police procedures." (*Id.* at p. 372.) The requirement that the police follow standard procedures when conducting an inventory search "'is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." (*Florida v. Wells* (1990) 495 U.S. 1, 4 [110 S.Ct. 1632, 109 L.Ed.2d 1]; *Colorado v. Bertine* (1987) 479 U.S. 367, 374, fn. 6 [107 S.Ct. 738, 93 L.Ed.2d 739] (The Supreme Court's decisions "have always adhered to the requirement that inventories be conducted according to standardized criteria"); *People v. Redd, supra*, 48 Cal.4th at p. 722.) Indeed, "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (*Colorado v. Bertine, supra*, 479 U.S. at p. 375, quoting *Illinois v. Lafayette* (1983) 462 U.S. 640, 648 [103 S.Ct. 2605, 77 L.Ed.2d 65].)

C. The Trial Court Properly Found That the Ford Expedition Was Lawfully Impounded and Reasonably Searched as Part of a Valid Inventory Search

Appellant contends first that the Expedition was not properly impounded pursuant to Vehicle Code section 22651, subdivision (h)(1), because the vehicle was not in appellant's control at the time of his arrest, and thus the search was not conducted incident to his arrest. (AOB 40-42.) Specifically, he contends that he was "too far removed spatially and

temporally from the Expedition" since he was "not in or near the Expedition when he was arrested and was even farther from it when it was impounded and searched." (AOB 41.) To the contrary, appellant's Expedition was lawfully impounded for purposes of conducting an inventory search because appellant was "in control of" the vehicle at the time of his arrest at the gym, and officers were authorized to impound the vehicle under the "community caretaking" doctrine. (Veh. Code, § 22651, subd. (h)(1); *South Dakota v. Opperman*, *supra*, 428 U.S. at p. 368.)

Appellant mistakenly conflates the inventory search conducted of his vehicle with a "search [of an automobile] incident to arrest" as defined by the United States Supreme Court in *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485]. In *Gant*, the Court found that officers "may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Id.* at p. 351.) Using the Court's reasoning in *Gant*, appellant contends that the search conducted here was unreasonable because it was "'remote in time or place from the arrest,'" and was thus "'not incident to the arrest.'" (AOB 40-41, quoting *Preston v. United States* (1964) 376 U.S. 364, 367 [84 S.Ct. 881, 11 L.Ed.2d 777].) However, while appellant's vehicle was impounded at the time of his arrest, the warrantless search of that vehicle later conducted at the Costa Mesa Police Department was justified not as a "search incident to arrest" under *Gant*, but rather as a valid inventory search, a separate and distinct exception to the Fourth Amendment's warrant requirement. (See *South Dakota v. Opperman*, *supra*, 428 U.S. at p. 372.)

As Detective Everett testified, once officers recovered appellant's car keys, his gym membership card, and a parking ticket for the gym's private parking lot from the basketball court on which appellant was arrested, it

became clear that the Expedition was under appellant's control at the time of his arrest. (3RT 363-364; see Veh. Code, § 22651, subd. (h)(1).) Further, as the trial court properly found, appellant's vehicle was then lawfully impounded under the "community caretaking" doctrine, since the purpose of impounding an "unattended" vehicle is to remove it from "private property or public streets." (3RT 378; see *South Dakota v. Opperman*, *supra*, 428 U.S. at p. 368.) Appellant's vehicle was impounded from the gym's private parking lot, where police reasonably could have believed it was subject to the danger of vandalism or theft. (See *Hallstrom v. Garden City* (9th Cir. 1992) 991 F.2d 1473, 1478, fn. 4 [finding officers exercised community caretaking functions by impounding a vehicle from a private parking lot "to protect the car from vandalism or theft by having it towed"]; *Halajian v. D & B Towing* (2012) 209 Cal.App.4th 1, 15 [finding warranted police impound of defendant's truck from a private parking lot to protect it from vandalism or theft, and noting by contrast that in *Miranda v. City of Cornelius*, *supra*, 429 F.3d at p. 864, the Ninth Circuit found that "no public safety concern was implicated" because defendant's vehicle was parked in the owner's *own driveway*].)

As the trial court properly found (see 3RT 378), once the Expedition was impounded, the police conducted a valid inventory search pursuant to Costa Mesa Police Department standard procedures, as outlined in section 6555 of the police department manual. (See 3RT 362, 364; 4CT 906; *South Dakota v. Opperman*, *supra*, 428 U.S. at p. 372.) Section 6555 sets forth three prerequisites for a valid inventory search:

1. The vehicle shall be in lawful police custody;

2. The search must be for non-investigative purposes; and

3. The search must be in accordance with standard police procedures.

(4RT 906.)

Section 6555 mandates that an inventory search be conducted either "in the field," "at the impound lot," or "at the police facility," and it further mandates that if not done in the field, the search "must be completed in a timely manner." (4RT 906.)

Appellant's Expedition was in police custody from the time of his arrest until the time of the inventory search, and as the trial court correctly noted, Detective Everett testified that he conducted the inventory search consistent with the police department's written policy. (3RT 359, 362, 364, 378.) Appellant contends that the search was not timely conducted, supposedly demonstrating that officers did not conduct a valid inventory search. (AOB 42.) However, while the search occurred several hours after appellant's arrest, Detective Everett testified that between 5:00 and 11:00 p.m., he and approximately 30 officers from three agencies were working "continually" on appellant's case, including arresting appellant and transporting him to the police station, contacting officers in other jurisdictions regarding appellant's crimes and outstanding warrants there, searching appellant's home, and searching and arresting his roommates. (3RT 359-361.) Accordingly, it is clear that while the inventory search was not conducted immediately after appellant's arrest, it was conducted in a timely manner and in accordance with department policy. For this reason, the search was reasonable under the Fourth Amendment.[66] (*South Dakota v. Opperman, supra*, 428 U.S. at p. 372.)

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[66] Appellant contends that officers were not permitted to impound the Expedition pursuant to Vehicle Code section 22653 because the vehicle was not reported stolen, it was not involved in a traffic accident, and appellant did not request that it be impounded. (AOB 42-43.) However, as discussed above, officers were authorized to impound the vehicle pursuant to Vehicle Code section 22651 since appellant was arrested while in control

(continued...)

D. Even if the Inventory Search Was Unreasonable, and the Trial Court Erroneously Admitted Evidence Seized from Appellant's Vehicle, Any Error Was Harmless Beyond a Reasonable Doubt

Assuming that the trial court erroneously denied appellant's suppression motion, any error in denying the suppression motion would have been "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1129.)

Appellant contends the admission of the handgun during the guilt phase of his trial prejudiced him because it "fueled the prosecutor's improper argument that [appellant] was a bad, dangerous person whose weapon of choice was a Colt .45 Springfield model 1911 semiautomatic handgun." (AOB 43-44.) However, while the handgun found in the Expedition was relevant to show that appellant preferred the particular type of semiautomatic handgun used in the International Club shooting (see 7RT 1119-1120), it was far from integral to the prosecution's case. Indeed, the parties stipulated that the gun found in appellant's vehicle was not the actual .45 mm semi-automatic handgun used in the shooting. (9RT 1374-1375.)

Even without the handgun seized from appellant's vehicle, there was ample evidence presented to convict appellant of the International Club shooting. As appellant concedes, "[t]he identity of the shooter at [the] International Club was not in dispute." (AOB 43.) Both Le and Bui clearly and unequivocally identified appellant as the shooter, as did defense witness Diep. (7RT 987, 1062; 10RT 1549.) After the verbal argument

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(...continued)
of it, and because the vehicle was parked in a private parking lot. For this reason, appellant's contention is without merit.

near the restroom, Le saw appellant get up from his table and walk toward the bar area. Le then heard gunshots, at which point he turned and saw appellant firing between 10 and 14 shots into the booth where the victims were sitting. When Bui attempted to stop appellant, appellant threw him to the ground and continued firing into the booth. (6RT 912-920; 7RT 1059, 1070-1071.) None of the witnesses saw anyone firing a weapon other than appellant. Further, Le never got the impression that appellant or anyone else in his group was in danger, and Bui never saw anyone threaten, hit, or point a gun at appellant or anyone in his group. (6RT 919; 7RT 993-994, 1062-1063.) Deputy Fant compared the ten expended .45 caliber shell casings found at the crime scene and determined that they were all fired from a single .45 caliber semi-automatic or fully-automatic handgun, consistent with a Colt Springfield Arms Model 1911. She later removed three bullets from the autopsies on Tang and Dang and determined that all nine bullets were fired from the same gun. She found no evidence of a second firearm having been fired at the International Club. (7RT 1116-1123.) Thus, even without the Colt model .45 mm handgun found in appellant's Expedition several years after the shooting, there was ample evidence to prove to the jury that appellant was the shooter and that he used a .45 mm semi-automatic handgun.

Further, there was ample evidence that appellant acted with premeditation and deliberation. In *People v. Anderson* (1968) 70 Cal.2d 15, this Court first set forth a tripartite test for analyzing the type of evidence sufficient to sustain a finding of premeditation and deliberation. There, this Court said that such evidence falls into three basic categories: (1) defendant's planning activity prior to the homicide; (2) his motive to kill; and (3) the manner of killing, from which it may be inferred that the defendant had a preconceived design to kill. (*Id.* at pp. 26-27.) Here, under

the *Anderson* factors, substantial evidence was presented for a reasonable jury to find appellant guilty of three counts of first degree murder.

Based on the eyewitness testimony of Le and Bui, it was more than reasonable for the jury to conclude that appellant acted with express malice when he shot the victims. Indeed, the mere fact that appellant fired a lethal weapon at the victims at relatively close range gives rise to the clear inference that he acted with express malice. (See *People v. Smith* (2005) 37 Cal.4th 733, 741-742.) Further, the evidence also demonstrates that appellant acted with deliberation and premeditation. First, bringing a loaded gun to the scene of the crime is circumstantial evidence of planning activity. (*People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing a loaded gun indicated defendant "had considered the possibility of a violent encounter"].) Second, appellant's motive to kill Tram was permissibly inferred from the circumstances. Diep told Detective Carns that the argument involving appellant and Tram near the restroom was "over a girl." (10RT 1599-1601.) Bui likewise told Detective Carns that Tram said his girlfriend had been shot and that he had been beaten up in a separate incident. (10RT 1612.) The argument near the restroom was "heated," and after the argument dispersed, appellant asked Diep, "Do you want me to do him now?" shortly before he shot the victims. (10RT 1594, 1621.) Third, the manner of the shooting also supports a reasonable jury's finding of premeditation and deliberation. As noted, appellant shot Tram in the back of the head and then fired between 10 and 14 shots into the booth where the victims were sitting, and even after Bui intervened and was thrown to the ground, appellant continued firing into the booth. (6RT 912-920; 7RT 1059, 1070-1071; 10RT 1633.) This evidence amply demonstrates that appellant acted in a cold, calculated manner. Indeed, multiple gunshots at close range without evidence of provocation or a struggle "supports an inference of premeditation and deliberation." (*People v. Gonzales and*

Soliz (2011) 52 Cal.4th 254, 295, citing *People v. Marks* (2003) 31 Cal.4th 197, 230.)

Further, to the extent the prosecution aimed to demonstrate that a .45 mm semi-automatic handgun was appellant's "weapon of choice," it presented other evidence to prove that point, even without the handgun found in the Expedition. The prosecution introduced the loaded Springfield Model 1911 semi-automatic .45 mm handgun found shortly after the shooting in a satchel underneath a wicker laundry basket in appellant's girlfriend Cindy Hoang's closet. (7RT 1033; 9RT 1261-1262.) Cindy testified that she had never seen that gun before, that she "wasn't sure" if anybody else other than appellant could have put it there, and that she believed the gun "might" belong to appellant. (7RT 1033-1035, 1048.) She also testified that she at some point became aware that appellant had used her brother's name to purchase a .45 mm semi-automatic handgun. (7RT 1049.) As with the handgun seized from the Expedition, the parties stipulated that the handgun found in Cindy's apartment was not the handgun used in the shooting. (9RT 1374.) Thus, to the extent the prosecutor aimed to prove that the .45 mm semi-automatic handgun was appellant's "weapon of choice," ample evidence was presented to demonstrate this, even without the handgun seized from the Expedition.

Accordingly, it is clear that even without the introduction of the handgun found in appellant's vehicle two years after the shooting, there was nevertheless ample evidence to prove beyond a reasonable doubt that he was guilty of four counts of murder.

Appellant contends further that the admission of the handgun found in the Expedition prejudiced him during the penalty phase of his trial because the evidence that appellant had a handgun in his vehicle at the time of his arrest "bolstered" Christine Chen's testimony that appellant kept a .45 mm semi-automatic handgun in the Expedition (see 15RT 2619), and that he

participated in the four crimes highlighted during the penalty phase. To that end, appellant contends that without the "evidence of the Expedition and its contents, Chen's testimony would have been the only evidence connecting [appellant] to either the Expedition or the Colt .45 retrieved from it." Appellant contends that the "unconstitutionally seized evidence corroborated [Chen's] testimony connecting [appellant] to the Expedition and its contents, and it gave her entire testimony an aura of credibility." (AOB 45.)

However, even had the Expedition and the handgun found therein not been seized by police, ample evidence was nevertheless presented linking appellant to that vehicle and to crimes highlighted during the penalty phase. Indeed, the parties stipulated that Timmy Mukasa purchased a white Honda Civic on January 31, 2001, shortly after the Traditional Jewelers incident, and that he traded this vehicle in for a white Ford Expedition on April 21, 2001, shortly after the Jade Galore incident and prior to his arrest. (16RT 2723-2724.) Chen testified that appellant gave Timmy the money to purchase the Civic, and that appellant had Timmy trade in the Civic for the Expedition. (15RT 2617-2619.)

Further, even without the handgun seized from the Expedition, considerable evidence, including Chen's testimony, linked appellant to the four crimes highlighted during the penalty phase. The victim in the 1997 Thien Thanh incident identified appellant as the shooter in a photographic lineup (14RT 2261-2262, 2271), and appellant later admitted to Chen that he shot the man from whom he took the money and that he killed another man during the robbery (15RT 2647-2649). Appellant's fingerprints were found on the rough diagram of Wintec found in the white van in 1998 (14RT 2402-2405), numerous calls were placed to and by appellant's mother's cell phone, which appellant used, while the phone was in the area of Wintec (14RT 2417-2420; 15RT 2512-2513, 2520-2525), and appellant

admitted to Chen that he was involved in the incident (15RT 2649). Chen was present when appellant and the others planned the Traditional Jewelers robbery and saw them head for the mall in appellant's BMW (15RT 2624-2631), several people at the scene identified appellant's BMW as the one used by the robbers (14RT 2454, 2472-2476), and appellant admitted to Chen after the robbery that he "shot up" the store because he was "pissed that he couldn't get anything" (15RT 2631). Chen helped plan the Jade Galore robbery and helped them case the store (15RT 2633-2643), Chan and Garza purchased rifle straps for the robbery just before they left for the Bay Area (15RT 2637), a witness saw the robbers pull up to the mall in a white sedan matching the Honda Civic appellant had recently purchased (16RT 2732-2735), and appellant later admitted he shot at the security guard who later died from his injuries (15RT 2644-2645). Further, Chen was with appellant and the others when they divvied up the watches stolen in the robbery, she was with appellant when he purchased several motorcycles with the proceeds from the sale of those watches, and the tag for one of the watches was later found in Chan's apartment (15RT 2623, 2643-2647, 2651; 16RT 2727-2728). A criminalist matched the rifle and .9 mm casings found at Traditional Jewelers to those found at Jade Galore, concluding that the same guns were used in both robberies. (15RT 2552-2555.)

Thus, even without the evidence seized from the Expedition, there was ample evidence presented to link appellant to the four other crimes. Appellant, however, suggests that the credibility of Chen's testimony linking appellant to the four crimes highlighted during the penalty phase was in question because she was granted immunity for her testimony. (AOB 45.) It is true, as appellant notes (see AOB 45), that the prosecutor mentioned Chen's immunity in his closing argument, and acknowledged that much of the evidence connecting appellant to several of his past crimes

would not have come out without Chen's cooperation. (See 17RT 2911-2913.) However, the jurors were also admonished under CALJIC No. 2.20 that, as the "sole judges of the believability of a witness and the weight to be given the testimony of each witness," they could consider "anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness," including, but not limited to, "[w]hether the witness is testifying under a grant of immunity." (17RT 2851-2851; 4CT 1151.) It can thus be presumed that the jurors considered the issue of Chen's immunity when evaluating the credibility of her testimony. (See *Weeks v. Angelone* (2000) 528 U.S. 225, 234 [120 S.Ct. 727, 145 L.Ed.2d. 727] ["A jury is presumed to follow its instructions"].) Yet, though the jury was fully aware of Chen's immunity, it nevertheless found her testimony credible when voting to recommend the death penalty for appellant. As discussed above, Chen's testimony was far from the only evidence linking appellant to the four other crimes, but even to the extent appellant contends that Chen's testimony, standing alone, was insufficiently credible to link appellant to the four other crimes, it is clear that the jury determined otherwise.

Accordingly, appellant cannot demonstrate that he was prejudiced at the penalty phase due to the trial court's decision to allow in the evidence found in appellant's Expedition. This claim fails.

III. APPELLANT'S WAIVER OF HIS RIGHT TO TESTIFY WAS VALID AND DOES NOT REQUIRE REVERSAL

Appellant contends his waiver of his right to testify "after the trial court erroneously suggested he could challenge the trial court's ruling to permit the prosecutor to cross-examine him with unadjudicated offenses on appeal if he did not testify" was not "knowing, intelligent, and voluntary." (AOB 46-54.) Appellant's contention is without merit.

A. Relevant Trial Court Proceedings

During the People's case, the prosecutor raised before the trial court the issue of whether, if appellant decided to testify, the prosecutor would be able to cross-examine appellant regarding "other people he has shot," given that it would be "critical as to intent on the issue of self-defense." (8RT 1240.) The prosecutor noted he would not introduce any evidence other than that which he planned to introduce at the penalty phase, but he expressed to the court his desire to "know exactly what the parameters are going to be," and "exactly what is going to be admissible on cross-examination." (8RT 1240-1241.) Defense counsel asked that the trial court defer its ruling until the conclusion of the People's case, so that appellant could get the benefit of hearing the evidence against him before making a decision on whether or not to testify. (8RT 1245-1247.)

The trial court agreed with defense counsel that the ultimate decision whether or not to testify "is directed to a client once all the evidence is in . . . ." The court made clear that it would not "compel [appellant] to indicate whether or not he intends to testify," given the court's belief that "I don't think it's the law nor do I think it's appropriate to address issues of the scope of direct or the scope of examination in advance of his taking the stand." Accordingly, the court found that "[w]hat will become relevant on cross-examination is going to be dictated by what he says in direct." (8RT 1252.) Further, the court noted that if appellant testified that "he was not there, whether or not he's been involved in other crimes is just completely immaterial," and that, on the other hand, if he testified that he shot the victims, that he "would never harm anybody," or if he claimed the killings were inadvertent, that would "open the door to other acts of violence or murder." (8RT 1252-1253.) Ultimately, the court ruled that it would "be in a better position" to rule on the scope of cross-examination once the direct examination was complete. (8RT 1253.)

During the defense case, defense counsel asked the court to consider the scope of cross-examination if appellant decided to testify, given that it was "possible" appellant would take the stand later that day. (10RT 1552.) The court responded that it could not reach a ruling until after appellant testified on direct, "because it's really going to depend on what he says." (10RT 1552.)

Later that day, at the close of testimony, defense counsel informed the court that he would "spend the time until they take [appellant] on the bus this afternoon" to discuss whether appellant would testify. (10RT 1634-1635.) The prosecutor reiterated his position that he would introduce appellant's history of violent behavior if appellant testified that he acted in self-defense. (10RT 1635-1637.) The court explained that it did not want to make a ruling on the cross-examination issue for two reasons: "One, I'm doing it in a vacuum; two, my ruling could possibly have a chilling effect on the decision of [appellant] of whether or not to testify." (10RT 1637.) The court went on, "And if I make an erroneous ruling on the admissibility of this, I may create an issue on appeal that [appellant] didn't exercise his right to testify because of the erroneous ruling." (10RT 1637-1638.) The prosecutor noted that for an appellate challenge to the admission of other crimes evidence "to be preserved," appellant "would have had to actually testify." (10RT 1638.) The court made clear that "the defense is going to have to make a decision. [Appellant] is going to have to make a decision with the consultation of his counsel. [¶] If he elects to testify, once the direct examination is completed then I will address myself to the issue of the scope of the cross-examination." (10RT 1638.) The court again stated that it would not make a ruling prior to appellant taking the stand, noting that appellant was "going to have to make a decision recognizing that there's a body of law that says under certain circumstances evidence of uncharged crimes may be relevant to the issue of intent to kill,

premeditation, and deliberation, and understand that there are pending charges dealing with those types of offenses, some of which preceded and some of which followed, according to [the prosecutor], and that may be relevant, again, depending on the scope. (10RT 1638.)

The following day, defense counsel asked the court for the opportunity to make an offer of proof as to what appellant's testimony would be, so that the court could make a ruling as to which other crimes the prosecutor would be able to use to cross-examine him. (11RT 1640-1641.) Defense counsel explained that if appellant were to testify, he would testify that shooting Tram was based on his belief of "self-defense of another party," someone named "Chestnut." He would testify further that when Bui intervened in the shooting of Tram, he inadvertently shot the other victims, and that he had "no intent" to discharge his weapon at the other victims. (11RT 1641-1642.) The prosecutor countered that if appellant were to so testify, he hoped to cross-examine appellant about (1) the 1997 Thien Thanh incident, (2) the 1998 Wintec Industries incident, (3) the 2001 Traditional Jewelers incident, and (4) the 2001 Jade Galore incident, and present Chen's testimony linking appellant to each of these incidents. He argued appellant's conduct during those crimes was sufficiently similar to his conduct at the International Club, since in each case appellant "went to locations with a gun that was loaded and in those other situations pointed the gun at individuals and pulled the trigger, sometimes killing them, sometimes wounding them, sometimes shooting them in the same parts of the body that these victims were shot in." (11RT 1642-1643, 1650-1658.) Defense counsel countered that the other incidents all involved robberies, making them "completely, absolutely different" from the International Club shooting, and thus, prejudicial against appellant. (11RT 1658-1662.)

The court ruled that if appellant were to testify, the prosecutor would be able to cross-examine him regarding the Thien Thanh incident and the

Jade Galore incident, but not the Wintec incident or Traditional Jewelers incident. (11RT 1662-1665.)

Later, the following colloquy occurred:

> [Defense Counsel]: Again, just to reiterate briefly, it's the defense position as stated previously that it's in violation of [appellant's] 4th, 5th, 6th and 14th Amendment rights of the federal constitution and state constitution to testify in this matter, and he understands that. However, based on the Court's ruling of the two uncharged homicides which are still pending in other jurisdictions, he believes it is in his best interest not to testify. [¶] [Appellant], you understand that my advice in this case at this time is for you not to testify based on the status of the case at this time?
>
> [Appellant]: Yes, now I will not testify.
>
> [Defense Counsel]: And you understand that you have a right to testify no matter what I say, whether I think it's good or not good for you to testify, you could still testify. [¶] Do you understand that?
>
> [Appellant]: Yes.
>
> [Defense Counsel]: And having that knowledge, what is your position?
>
> [Appellant]: Now I will not testify.
>
> [Defense Counsel]: Thank you.

(11RT 1685-1686.)

B. Applicable Law

Under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, "'[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.'" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1198, quoting *Harris v. New York* (1971) 401 U.S. 222, 225 [91 S.Ct. 643, 28 L.Ed.2d 1]; see also *Rock v. Arkansas* (1987) 483 U.S. 44, 52-53 [107 S.Ct. 2704, 97 L.Ed.2d 37]; *People v. Gutierrez* (2009) 45

Cal.4th 789, 821-822.) However, "[i]t is settled . . . that defendants accused on capital crimes may waive important rights [such as the rights to testify or not to testify] conferred to them by constitutional and statutory law." (*People v. Farnam* (2002) 28 Cal.4th 107, 146.) While "tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel." (*People v. Carter, supra*, 36 Cal.4th at p. 1198.) Unlike other rights, such as the right to a jury trial, which can only be waived with the consent of both parties in open court (see Cal. Const., art. I, § 16), "[n]o such personal waiver is expressly required for a defendant to waive his right to testify." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1053.)

Further, a defendant "may be allowed to exercise, or not to exercise, the right to testify, without advisement by the trial court . . . ." (*People v. Barnum* (2003) 29 Cal.4th 1210, 1223.) Indeed, "[a] trial court has no duty to [advise the defendant of his right to testify] or seek an explicit waiver, unless a conflict with counsel comes to its attention." (*People v. Enraca* (2012) 53 Cal.4th 735, 762; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1332-1333; *People v. Alcala* (1992) 4 Cal.4th 742, 805-806.) "'Like the right to produce evidence and to confront and cross-examine adverse witnesses, [a defendant's right to testify] must be exercised with caution and good judgment, and with the advice and under the direction of competent trial counsel.'" (*People v. Bradford, supra*, 14 Cal.4th at p. 1053, quoting *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545.)

"When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.'" (*People v. Alcala, supra*, 4 Cal.4th at pp. 805-806, quoting *People v. Hayes* (1991) 229 Cal.App.3d

1226, 1231-1232.) "'It necessarily follows that a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy . . . .'" (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1053, quoting *People v. Mosqueda*, *supra*, 5 Cal.App.3d at p. 545.) Otherwise, "'the judge would have to conduct a law seminar prior to every criminal trial.'" (*People v. Cox* (1991) 53 Cal.3d 618, 671, disapproved on another ground by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22, quoting *People v. Mosqueda*, *supra*, 5 Cal.App.3d at p. 545.)

C. Appellant's Waiver of His Right to Testify Was Valid

As appellant notes (AOB 49), the United States Supreme Court ruled in *Luce v. United States* (1984) 469 U.S. 38 [105 S.Ct. 460, 83 L.Ed.2d 443] that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." (*Id.* at p. 43.) This Court adopted the "*Luce* rule" in *People v. Collins* (1986) 42 Cal.3d 378, where it found that "if a defendant wishes to preserve for appeal an objection to a trial court's *in limine* ruling permitting impeachment by a prior conviction, he or she must take the witness stand and actually suffer such impeachment." (*People v. Sims* (1993) 5 Cal.4th 405, 454, citing *People v. Collins*, *supra*, 42 Cal.3d at pp. 383-388.) In *People v. Sims*, *supra*, 5 Cal.4th 405, this Court, extending the "*Luce* rule" as adopted in *Collins*, found that a claim challenging a trial court's ruling permitting impeachment with evidence of unadjudicated crimes is likewise not preserved for review unless the defendant actually takes the witness stand. (*Id.* at pp. 454-456.)

Based on this line of cases, appellant contends that his waiver of his right to testify was "not knowing, intelligent, and voluntary" because the

trial court "never informed [him] that he would not be able to challenge the admission of [his other crimes] on appeal." (AOB 49-50.)

Though appellant expressly waived his right to testify in open court, this Court has made clear that no such waiver is actually required. (See *People v. Bradford, supra*, 14 Cal.4th at p. 1053 ["No . . . personal waiver is expressly required for a defendant to waive his right to testify"]; *People v. Bradford, supra*, 15 Cal.4th at p. 1332.) Given that appellant failed to express any conflict with defense counsel about his decision not to testify, the court was under "no duty" to "seek an explicit waiver" at all. (*People v. Enraca, supra*, 53 Cal.4th at p. 762.)

It follows, then, that because appellant was not required to expressly waive his right to testify, there could certainly be no requirement, as appellant contends (see AOB 49), that such a waiver be "knowing, intelligent, and voluntary." Indeed, appellant cites no authority in support of his contention that a waiver of a right to testify must satisfy these criteria.[67] In an analogous case cited by appellant (see AOB 49), *People v. Nakahara* (2003) 30 Cal.4th 705, 717, this Court noted that while the trial court in *People v. Guzman* (1988) 45 Cal.3d 915, 941-942, "explained to the defendant that he had a constitutional right not to testify and that no

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[67] None of the other cases cited by appellant in support of his argument that waivers must be knowingly, intelligently, and voluntarily made involve a waiver of the right to testify. (AOB 48-49; see *Iowa v. Tovar* (2004) 541 U.S. 77, 81 [124 S.Ct. 1379, 158 L.Ed.2d 209] [waiver of the right to counsel]; *Colorado v. Spring* (1987) 479 U.S. 564 [107 S.Ct. 851, 93 L.Ed.2d 954] [waiver of the right to remain silent during a custodial interrogation]; *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378] [waiver of the right to counsel]; *Brady v. United States* (1970) 397 U.S. 742, 748 [90 S.Ct. 1463, 25 L.Ed.2d 747] [waiver of various rights as part of guilty plea]; *People v. Farnam, supra*, 28 Cal.4th at pp. 147-148 [waiver of the right to have a separate proceeding on defendant's priors]; *People v. Collins* (2001) 26 Cal.4th 297, 305 [waiver of the right to a jury trial].)

adverse inferences could be drawn from his silence," this Court did not "suggest that such an *array of admonishments* was a necessary or constitutional prerequisite to receiving a defendant's testimony against advice of counsel." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 717, emphasis added.) Similarly here, nothing in this Court's established precedent suggests that a similar "array of admonishments" would be required when a defendant elects not to testify. Indeed, had appellant simply not testified without making an express waiver in open court, the trial court would have "safely assume[d]" that appellant, who was "ably represented," was "merely exercising his Fifth Amendment privilege against self-incrimination" and "abiding by his counsel's trial strategy . . . ." (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1053, internal citations omitted.)

That said, appellant *did* waive his right to testify in open court, and he offered no reason for the trial court to suspect that he was doing anything but "exercising his Fifth Amendment privilege against self-incrimination" and "abiding by his counsel's trial strategy . . . ." (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1053, internal citations omitted.) Appellant suggests that he did not understand that by electing not to testify, he would forgo under *Luce*, *Collins*, and *Sims* the opportunity to challenge on appeal the trial court's ruling permitting the prosecutor to cross-examine him with evidence of other crimes. (AOB 49-50.) However, despite appellant's claims to the contrary, "[n]othing in the record raises any doubts about [appellant's] knowledge or understanding of these matters." (*People v. Farnam*, *supra*, 28 Cal.4th at p. 148.) At the close of the defense case, defense counsel informed the court that he would "spend . . . time" with appellant that afternoon to discuss whether it was in his best interests to testify. (10RT 1634-1635.) Shortly thereafter, the prosecutor noted that in order for appellant to "preserve[ ]" an appellate challenge to the admission

of other crimes evidence in this case, he would have to "actually testify." (10RT 1638.) The following day, defense counsel explained his position that while he did not believe it was in appellant's best interests to testify, appellant nevertheless had a right to do so, and that appellant "understands that." He then advised appellant in open court not to testify, and reminded him that he could nevertheless testify even if counsel did not think it was wise to do so. Appellant indicated that he understood, and that he still elected not to testify. (11RT 1685-1686.)

Appellant expressed no confusion or reluctance about his decision not to testify and he demonstrated no conflict with counsel about this decision. (See *People v. Enraca*, *supra*, 53 Cal.4th at p. 762.) Indeed, appellant and defense counsel were both aware of the consequences of not testifying, and defense counsel informed the court that he had discussed with appellant the ramifications of his decision not to testify. Even after defense counsel informed appellant that he had the right to testify despite counsel's objections, appellant nevertheless replied, "Now I will not testify." (10RT 1638, 1685-1686.) Thus, there was simply no reason for the court not to "safely assume" that appellant was aware of the consequences of not testifying, and that he was following defense counsel's competent advice to exercise his Fifth Amendment right against self-incrimination. (See *People v. Bradford*, *supra*, 14 Cal.4th at p. 1053.) In any event, as this Court noted in *Bradford*, "[i]f that assumption is incorrect, [appellant's] remedy is not a personal waiver in open court," which, again, appellant made, but rather a "claim of ineffective assistance of counsel." (*Ibid.*) However, as in that case, appellant "does not assert, nor would the record support" a claim of

ineffective assistance of counsel.[68] (*Ibid.*) Accordingly, appellant's contention is entirely without merit.

D. Even if Appellant's Waiver of His Right to Testify Was Invalid, Any Error Was Harmless Beyond a Reasonable Doubt

"The United States Supreme Court 'has recognized that most constitutional errors can be harmless.'" (*People v. Allen* (2008) 44 Cal.4th 843, 870, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 306 [111 S.Ct. 1246, 113 L.Ed.2d 302].) In *Allen*, this Court found that the denial of the defendant's right to testify "did not affect any aspect of his trial other than his ability to present personal testimony," and that for this reason the error was "trial error" rather than "structural error," and was thus subject to harmless error analysis under *Chapman*. (*People v. Allen*, *supra*, 44 Cal.4th at p. 871, citing, e.g., *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 307-308; *People v. Johnson* (1988) 62 Cal.App.4th 608, 634-636 [in which "the court rejected the argument that improper denial of a defendant's right to testify is structural error, and applied the *Chapman* standard"]; *People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1234, fn. 11 [in which "the court stated in dicta that any error in excluding the defendant from the courtroom and thereby preventing him from testifying was subject to harmless error analysis under *Chapman*"].) Here, appellant contends that he was effectively denied the right to testify. (AOB 51-54.) However, even if appellant's waiver of his right to testify was somehow invalid, any error

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[68] Even if appellant did raise such a claim, that claim would be better suited for habeas corpus proceedings, since in cases "where the appellate record does not reveal whether counsel had a legitimate reason for a litigation choice, [courts] generally reserve consideration of any ineffective assistance of counsel claim for possible proceedings on petition for writ of habeas corpus," rather than on direct appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 95, 111; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

was harmless beyond a reasonable doubt. (*People v. Allen*, *supra*, 44 Cal.4th at pp. 871-872.)

"[I]f the facts to which a defendant offered to testify would not have affected the verdict, the exclusion of his or her testimony was harmless." (*People v. Allen*, *supra*, 44 Cal.4th at p. 872.) Accordingly, to determine whether an error of this sort was harmless, this Court must "consider the facts [appellant] sought to establish." (*Ibid.*) When asked to make an offer of proof as to appellant's proposed testimony, defense counsel explained that appellant would testify that shooting Tram was based on his belief of "self-defense of another party," someone named Chestnut. He would testify further that when Bui intervened in the shooting of Tram, he inadvertently shot the other victims, and that he had "no intent" to discharge his weapon at the other victims. (11RT 1641-1642.) However, this proposed testimony would have been not only incredible, but clearly belied by the record.

While appellant would have testified that he killed Tram in defense of Chestnut, presumably as a result of the argument that took place near the restroom, the evidence offered at trial ran directly counter to a theory of defense of another. To successfully make that defense, a defendant must show that "the circumstances were sufficient to excite the fears of a *reasonable person*, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." (*People v. Randle* (2005) 35 Cal.4th 987, 998-999, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201, internal quotation marks omitted.)

The weight of the evidence demonstrates that the argument near the restroom was only a verbal altercation. Neither Le nor Bui saw anybody in either group threaten, push, shove, or punch anyone in the other group, and neither man saw any of the argument participants carrying a gun or pointing one at appellant or members of his group. (6RT 909; 7RT 989-990, 1053,

1062-1063.) Y testified that nobody threatened him that night and he denied seeing anyone with a gun. (8RT 1199-1200.) He denied that appellant would have needed to defend him that night, and he claimed not to know whether appellant would have needed to defend Hoa, Duc, or anyone else at the club. (8RT 1212-1213.)

However, even if threats were made near the restroom, this would not have been sufficient to justify the shooting as an action by appellant in defense of another. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1068 ["Third party threats, or even threats from the victim, however, do not *alone* establish self-defense"].) Indeed, "[t]he victim's behavior is also highly relevant. There must be evidence the defendant feared imminent, not just future, harm." (*Ibid.*) After the argument broke up, the participants retreated to separate areas in the bar. Le saw Diep and appellant converse in Cantonese, but he never got the impression that appellant or anybody else was in any danger. (6RT 912-917, 993-994.) Meanwhile, Tram retreated to a booth to have a drink, and Murillo noted that he was acting "normally" and that he did not appear to be mad or upset. At no point that night did Murillo see Tram act aggressively toward anybody or display a weapon. (9RT 1421.) Further, appellant waited some 10 to 15 minutes after the verbal altercation before shooting Tram and the others multiple times, casting serious doubt upon the proposed claim that he believed he needed to act because someone's life was in immediate danger. (6RT 911, 917-918; see *People v. Minifie*, *supra*, 13 Cal.4th at p. 1069 ["Evidence of antecedent threats is admissible when the threats are followed by some 'overt act' that has placed the defendant in immediate danger"].)

Additionally, when Tram was shot by appellant, he was sitting on the inside of a booth, behind several tables and surrounded by Bui and others. (7RT 1054-1058, 1075.) Tram was essentially trapped in the booth, and from this vulnerable position, no reasonable person would have believed at

that time that he posed a real threat to others in the club. Though it later turned out that Tram had a gun on his person at the time, it was found tucked into his waistband and there was no round in the chamber. (8RT 1188-1189, 1192.) Thus, there was simply no evidence to suggest that the circumstances would have excited a reasonable person to kill in defense of another or that appellant actually killed under the influence of fear, rather than out of a clear desire for revenge. (*People v. Randle, supra*, 35 Cal.4th at pp. 998-999.)

Further, while appellant would have testified that he lacked the intent to kill the other three victims, and that he only shot them when Bui intervened, this, too, is belied by the record. Even before Bui intervened, Le saw appellant firing between 10 and 14 gunshots at the victims while they remained trapped in the booth. (6RT 918-919, 926; 7RT 991.) After Bui grabbed appellant, appellant flipped him to the ground "no more than two seconds" later, and once free of Bui's embrace, appellant continued shooting at the victims. (6RT 920, 954-955; 7RT 1061, 1070-1071.) Further, the autopsies of the victims demonstrated that appellant intentionally killed them. For example, Dr. Scheinin believed that Tang's wounds were consistent with him being shot in the left arm and face, falling to his right, and then being shot again as the shooter stood over him. (9RT 1294-1295.) Dr. Scheinin believed further that Norman's wounds were consistent with him trying to escape from the booth by crawling away, and then being shot in the back while he was on the ground in a crawling position and the shooter was standing behind him. (9RT 1297, 1299.) Accordingly, nothing in the record would have supported appellant's proposed testimony that the murders of the three victims other than Tram were somehow unintentional and the result of Bui's interference. Further, even if appellant only intended to kill Tram, and the other victims were killed accidentally, he still would have been guilty of murder under the

doctrine of transferred intent. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 653; *People v. Bland* (2002) 28 Cal.4th 313, 320-321.)

Accordingly, even if the trial court erred by effectively denying appellant the right to testify on his own behalf, any error would have been harmless beyond a reasonable doubt. (See *People v. Allen*, *supra*, 44 Cal.4th at pp. 871-872.) This claim fails.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S RIGHT TO PRESENT A DEFENSE BY EXCLUDING THE TESTIMONY OF DR. DAVID POSEY

Appellant contends that when the trial court excluded the testimony of Dr. David Posey, it excluded "relevant, admissible evidence" and "eviscerated" appellant's defense. (AOB 54-79.) Appellant's contention is without merit.

A. Relevant Trial Court Proceedings

On January 17, 2003, during the People's case, the prosecutor expressed concern regarding the proposed defense testimony of a medical doctor named Dr. David Posey. The prosecutor explained that Dr. Posey had "formed a beyond a reasonable doubt opinion" that the three victims other than Tram were "accidentally shot." The prosecutor argued that Dr. Posey could testify as to his opinion, but that he could not use words such as "beyond a reasonable doubt." (8RT 1243, 1247-1248.) Defense counsel noted that Dr. Posey had reviewed the autopsy reports, autopsy photos, and photos from the International Club. However, the prosecutor expressed concern that Dr. Posey had been given only some of the police reports, not all, and that he had not reviewed any of the witness testimony from trial. The prosecutor noted that in Dr. Posey's report, he indicated that the shooter "shot Tram Minh with a volley of several shots and then while an individual was attempting to disarm the perpetrator, a second volley of shots accidentally and unintentionally injured and killed three other

victims." However, the prosecutor argued that he knew of "no witness testimony that in any way establishes what is said in that paragraph." Accordingly, the prosecutor requested an Evidence Code section 402 hearing. (8RT 1249.)

The court agreed with the need for a 402 hearing, noting that "where medicine has evolved to a scientific and medical certainty of whether a person's discharge of the firearm was accidental or intentional, I'm really curious to find the scientific or medical data that provides the basis of that type of conclusion." Further, the court wondered whether Dr. Posey "understands the definition of reasonable doubt," and noted that while Dr. Posey would be able to "express an opinion" about the circumstances of the shooting, "it's the jury that attaches a standard to the strength of the evidence." (8RT 1249-1250.)

On January 21, 2003, the prosecutor again requested a 402 hearing regarding Dr. Posey. The prosecutor noted, however, that even if Dr. Posey were to testify that several of the victims were shot accidentally, "the intent would transfer to all the other victims" under *People v. Bland, supra*, 28 Cal.4th 313. (9RT 1259.)

On January 24, 2003, near the close of the defense case, the prosecutor again requested a 402 hearing regarding Dr. Posey, arguing that he did not know "of any way that a medical doctor could testify that the shooting of individuals was unintentional, accidental and random, [and] additionally testify to that beyond a reasonable doubt." He reiterated that "that's [not] a proper subject matter for an expert to testify to in any form" and "that's up for the jury to decide." (11RT 1721.) The prosecutor again reiterated that Dr. Posey came up with an "incident scenario" that was not "supported by the evidence" or by the police reports he reviewed. In sum, the prosecutor argued that Dr. Posey did not have the "expertise to come in and testify as to whether somebody was randomly shot or intentionally

shot." (11RT 1722.) Defense counsel replied that he spoke with Dr. Posey, and that Dr. Posey would not make any reference to "beyond a reasonable doubt and those legal terms." (11RT 1723.) Defense counsel further argued that Dr. Posey should be able to testify as to his opinion. Accordingly, defense counsel opposed the 402 hearing. (11RT 1724.)

The court asked defense counsel how Dr. Posey could form an opinion as to whether the firearm was fired intentionally or accidentally given that he had not examined the weapon. Defense counsel countered that Dr. Posey should be able to render an opinion based on whether the trajectories of the bullets and the wounds were "consistent with somebody that would be unobstructed in the shooting versus somebody that would be obstructed." (11RT 1724-1725.)

1. Dr. Posey's Testimony

The prosecutor questioned Dr. Posey about how he developed his incident scenario. Dr. Posey testified that he relied upon the autopsy reports, the crime scene photographs, the autopsy photographs, and a video of the crime scene when developing his incident scenario, though he acknowledged that none of these sources indicated how the shooting took place. He also reviewed the felony complaint for an arrest warrant that only listed appellant's charged offenses, and did not include an affidavit laying out the facts of the crimes. (11RT 1727-1729.) The prosecutor questioned Dr. Posey regarding the many pages of discovery he relied upon when creating his incident scenario, though Dr. Posey acknowledged he did not consider all of them.[69] (11RT 1729-1734.)

The court asked Dr. Posey whether he was in court to "render an opinion as to the scenario of what took place." Dr. Posey replied to the

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[69] Dr. Posey testified that he reviewed pages 1-64, 76-191, and 192-207. (11RT 1729.)

contrary that he believed he was there to provide an "injury pattern analysis," meaning that he would render an opinion "based on the wound patterns" as to whether he believed the "wounds were intentionally placed or unintentionally placed." He explained that this analysis was based "mostly" on medical science. (11RT 1734.) When asked whether a gunshot wound could tell him whether the shot was fired intentionally, Dr. Posey replied: "If I base it on the one individual, according to the record that was intentional. The others just by the angle of entry appeared to be, again based on what I understand happened at the scene, I would say be unintentional. If I took the autopsies by themselves and the [crime scene] photos by themselves, I have no clue. I couldn't tell you." (11RT 1735.)

The court asked Dr. Posey what "training or experience" qualified him to "take the step beyond medical science and recreate what happened." Dr. Posey replied that as a forensic pathologist, he does not simply rely on what he sees on the autopsy table, but that he uses "factual information" obtained by visiting the crime scene, by reading investigative reports, or by reading interviews with witnesses, to "try and synthesize the entire medical-legal situation or scenario." (11RT 1735.) He explained that forensic pathologists "really verge on . . . thinking like attorneys and like lawyers and judges." (11RT 1735-1736.) He further explained that he was trained in "injury pattern analysis" at the Armed Forces Institute of Pathology where he was involved in aircraft accident investigation for four years. He said that in a shooting incident, as in an aircraft accident, "[y]ou take the pattern of injuries or pattern of gunshot wounds and you work backwards through the scenario given the information" provided. (11RT 1736.)

The court asked Dr. Posey what area of medical science he relied upon when formulating an opinion on the intentionality of the gunshots fired. Dr. Posey conceded that he was "not at the scene" and "was never in

the mind of the perpetrator," and that the gunshots wounds "individually or in concert" could not lead him to the conclusion that the shots were fired either intentionally or not. (11RT 1736-1737.) However, he explained that once he compared the wounds of the four victims, he was able to reach a conclusion. He believed that Tram's wounds were "very accurately" and "purposefully placed," that they were "placed to kill." On the other hand, he believed that Dang's wounds were not the result of a "purposeful shot," a shot that was "meant to kill her," based on what he learned from "diagrams" of the crime scene, along with the "videos and everything like that." (11RT 1737.) He likewise believed that Norman's wounds were "not as if they were purposeful," but that "if you just raise the angle of the weapon one or two degrees you would have put the bullet right in the head, [and] there would be no question whether he was going to kill or not." (11RT 1737-1738.) The court asked Dr. Posey how he used "bodily science" to permit him to make these "inferences and conclusions." Dr. Posey explained it was an "aggregation of studying gunshot wounds, having done multiple gunshot wound cases and having worked in this area for almost 25 years," along with "injury pattern analysis" of the four victims. (11RT 1738.)

The court again asked him what he meant by "purposefulness." (11RT 1738.) The following colloquy occurred:

> [Dr. Posey]: My understanding from the – again from what I have read in the discovery documents is that [Tram] was purposefully shot. He was the target of –
>
> The Court: I know that's your opinion, but what do you mean by purposefulness?
>
> [Dr. Posey]: Well, he meant to kill him. Maybe I don't understand your question, sir.

The Court: Are you saying that the shooting of the three other persons that you have described as unpurposeful was that the person didn't intend to pull the trigger?

[Dr. Posey]: I don't think he intended to kill them, no.

The Court: I didn't ask you that.

[Dr. Posey]: I don't know. I wasn't in his mind. I wasn't in his mind at the time.

The Court: Well, obviously if the shooter intended to pull the trigger, your conclusion would be what?

[Dr. Posey]: If I had evidence in front of me that said he intended to kill these people –

The Court: I didn't say that. [¶] Pull the trigger.

[Dr. Posey]: That doesn't mean anything to me because anybody can pull a trigger. If it's you intend to –

The Court: When you have a gun and pull the trigger, what's the purposefulness?

[Dr. Posey]: The purposefulness is to discharge the weapon. [¶] Let me insert you have to aim the weapon at a target if you intend to hit it. I mean, for example, you can take a weapon and just (indicating) aim it, pull the trigger and shoot, what I am doing I am just shooting a gun.

The Court: You can't tell us whether the person intended to pull the trigger?

[Dr. Posey]: I have no idea whether he intended to pull the trigger or not. Only based on the scenario of what I got from this information and from [defense counsel] that there was a scuffle after the first shot.

(11RT 1738-1739.)

The court noted that the jurors had heard several witnesses testify about how the shooting occurred, and that they would be asked to determine "what actually happened." The court asked Dr. Posey how his

background and education put him in a "better position to interpret what happened." (11RT 1742-1743.) Dr. Posey replied first that his expertise came from his "medical opinion." The court asked him to clarify his answer, given that "the medical opinion really deals with the examination of the body and the determination." (11RT 1743.) Dr. Posey then explained that his was a "forensic opinion" or a "medical forensic opinion." He went on to explain that the "essence of a lot of the training of forensic medicine," which, he conceded, was "maybe not used in our courts today," was "reconstruction of injury patterns to try to put together in the mind's eye of the beholder, whoever that is, . . . what exactly happened. (11RT 1743.)

The court asked if Dr. Posey could determine, if the court shot the court reporter in the shoulder, whether that shooting was intentional. Dr. Posey replied that he could do so based on a "pattern," but that he could not do so in an isolated case. The court asked whether Dr. Posey could make such a determination if the court shot the reporter in the forehead and there was gunshot residue. Dr. Posey replied that the gunshot would be fatal and thus, in his opinion, a "homicide." The court asked again whether Dr. Posey would believe the shooting was intentional, and Dr. Posey replied that he would based on the information given, including the gunshot residue and the "location of the bullet." (11RT 1744.)

The court asked if Dr. Posey could determine, in a case where somebody is playing Russian roulette and the gun discharges at close range even though the victim thought the gun was empty, whether that shooting was intentional. Dr. Posey acknowledged the court's "parallel," but he reiterated that he was "not just using gunshot wounds" but also the "history as well as the medical information." (11RT 1744-1745.) He explained that the gun is "minimally important" in his analysis since a "small caliber weapon" "will kill you just as easily . . . versus a large caliber weapon." He

also explained that the pounds required to pull the trigger on a particular firearm "isn't relevant" to a determination of whether the shots were fired intentionally. He reiterated that "if someone wrestled with [the shooter] at that point in time my opinion would have a firm foundation and basis. If it's not true, then I have no opinion." (11RT 1746.) Dr. Posey admitted that he had never tried to verify his opinions through experimental research. The court asked Dr. Posey if there existed a "body of science out there that has conducted research that tries to determine whether a shooting is intentional or accidental." Dr. Posey responded that ballistics experts were the "closest" as far as constituting a "body of science" on the intentionality of gunshots, though he conceded that he did not know of any other pathologists working on the topic. (11RT 1747.)

The court asked Dr. Posey how he tried to confirm his conclusions to see whether his "process" or "evaluation" was correct. (11RT 1747-1748.) Dr. Posey replied that he takes "multiple pieces," including the medical information and the crime scene photographs to see if they fit the investigative information. He explained that when he first learned about this case, he did not think it was "totally possible" that the four victims were not killed intentionally. (11RT 1748.) However, he began to reconsider after seeing Dang's wounds, which he compared to the "well-placed shots" that killed Tram. He noted that "[a]nybody handling a firearm will know if you put a shot in the back of the head, the lights are out. If you put them in the chest, the chances are the guy isn't going to survive." (11RT 1748-1749.) The court questioned Dr. Posey if he was "suggesting anybody who shoots somebody in the chest didn't do so intentionally." (11RT 1749.) Dr. Posey responded:

> I would think that one case by itself, if they shoot them in the chest, I would think they were thinking about ending the individual's life or at least stopping them from going forward. But when you relate this to the other three and you look at the

> wound pattern, that's what gave me the opinion, based on the other information I had from the investigative reports, that, yes, that could be a possibility that the . . . three victims weren't the intention of that crime that night, that this actually became more of a secondary accidental thing than it did as I did not, he did not, whoever the perpetrator, did start out to shoot these three people. That's how I came to my opinion, Your Honor.

(11RT 1749.)

2. Trial Court's Ruling

The prosecutor argued that under the doctrine of transferred intent, if Dr. Posey were to testify that Tram's shooting was intentional, "it simply doesn't matter about the other three victims." (11RT 1749-1750.) The prosecutor argued further that he did not see how Dr. Posey could testify as to whether or not the shooter "intended or didn't intend to pull a trigger." He noted that Dr. Posey had conducted "no studies" or experiments, did not know of any such studies, and did not know of any other pathologists working in this field. He did not see the "nexus" between Dr. Posey's work on aircraft accidents and his supposed expertise in the area of the intentionality of gunshots. (11RT 1750.)

The court found:

> The gist of this offer of testimony and the conclusions of this witness from the brief questioning that's gone on essentially is that [appellant] had express malice when he shot [Tram]. And the gist of his opinions relative to the others is that that mental state of malice in his opinion did not exist at the time of the shooting of the other three.
>
> Penal Code section 29 says in the guilt phase of a criminal action any expert testifying about a defendant's mental illness, mental disorder or mental defect, shall not testify as to whether the defendant had or did not have the required mental states, which include but are not limited to purpose, intent, knowledge, or malice aforethought for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

> It sure sounds like the doctor is invading the province of the jury that Penal Code section 29 specifically reserves to the trier of fact.

(11RT 1750-1751.)

The court clarified that the notes accompanying section 29 make clear that the "legislative intent was to keep medical, psychological or other experts from expressing the opinion on the ultimate issue of a person's mental state. And it is not limited to other defect or disorder or anything. [¶] That's the issue that is reserved for the trier of fact." (11RT 1751.) The court made clear that Dr. Posey could testify "to any medical pattern or what have you," but "an opinion as to whether the shooting was intentional, accidental, with malice or without malice is a province that he is not entitled to go into under [section 29]." (11RT 1752.)

Later, the court reiterated that an expert is "not permitted to render an opinion as to whether or not [appellant] had or did not have a specific intent." (11RT 1755.) The court cited two cases, *People v. Coddington* (2000) 23 Cal.4th 529, and *People v. McCowan* (1986) 182 Cal.App.3d 1, for the proposition that while an expert may testify that a defendant suffers from a mental disease or defect, he cannot render an opinion about whether the defendant has the requisite mental state. The court went on to explain that it "would not make sense to permit an expert to render an opinion as to whether or not a defendant had the requisite intent provided he didn't have a mental defect disorder or what have you. The distinction's just baseless." (11RT 1756-1757.) Further, the court noted that the legislature "intended to reserve" the decision of whether a defendant had the requisite mental state to the trier of fact and that "expert testimony to the ultimate issue should not be permitted." (11RT 1757.)

The court also noted that the defense also faced another "dilemma" in that if the court were to rule that there was insufficient evidence to show

that appellant acted in the heat of passion, then Dr. Posey's "testimony that the first shooting was intentional and with express malice would basically concede a first-degree murder [conviction] as to [Tram], and with the doctrine of transferred intent may go over and spill over into first-degree murder as to the other three victims." (11RT 1157.)

Defense counsel countered that the court's ruling violated appellant's state and federal constitutional rights. Counsel argued that Dr. Posey's testimony sufficient to convince the court that he worked in a "legitimate field" and that as a forensic pathologist he had the "expertise to assist the jurors in an area where they don't have that expertise." (11RT 1758.) The prosecutor countered that Dr. Posey had not demonstrated any expertise in the area of "injury pattern analysis" or based on his assertion that he could come to a conclusion about a shooter's mental state. He also reiterated his objection to Dr. Posey's testimony based on section 29. (11RT 1759-1760.)

The court ruled as follows:

> Just so the record is clear, the Court is of the view that Penal Code section 29 precludes the opinions offered by Dr. Posey.
>
> I think the legislative intent as described in [McCowan] indicates that the proffered opinions are not the subject matter of expert testimony in the sense that they are not beyond common experience of a nature that would assist the trier of fact and the trier of fact is capable of doing that.
>
> With all due respect to the qualifications of [Dr. Posey] in terms of medical science, he indeed is qualified or at least I have no reason to question his qualifications with respect to the anatomy, medicine, wounds, and areas typically considered by pathologists and former deputy coroners.
>
> But the Court has very strong reservations as to whether the procedure and process that form the basis of his opinion are

something based in science and whether it is a recognized body of science that includes other individuals of similar background.

The Court is also concerned about the lack of any studies or attempts to verify the issues that are the subject matters of this opinion.

In any event, for all those reasons the opinion will not be allowed.

(11RT 1761-1762.)

After the court's ruling, defense counsel noted that Dr. Posey had testified as an expert in numerous cases, though the prosecutor noted that nowhere in defense counsel's offer of proof did he suggest that Dr. Posey had ever testified as an expert on the issue of firearm discharge intentionality, as he proposed to do in this case. Defense counsel then informed the court that based on its ruling, Dr. Posey would not testify. (11RT 1763-1765.)

B. Applicable Law

Under Evidence Code section 801, an expert witness's testimony in the form of an opinion must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" and "[b]ased on matter (including his special knowledge, skill, experience, training, and education) . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (Evid. Code, § 801.) In *People v. Jones* (2013) 57 Cal.4th 899, this Court found that "[a]lthough [Evidence Code] section 801 permits an expert to 'assist the trier of fact' by testifying to any subject 'that is sufficiently beyond common experience,' such testimony is limited in an important way. '[Although] opinion evidence which is otherwise admissible is not made inadmissible simply because it embraces the ultimate issue to be decided by the trier of fact . . . [t]he cited rule does

not . . . authorize an "expert" to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence.'" (*Id.* at p. 950, quoting *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841; see also Evid. Code, § 805.)

Further, an expert witness may base his testimony on a "wide variety of information so long as it is reliable." (*People v. Jones*, *supra*, 57 Cal.4th at p. 951, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Indeed, "the expert's opinion is no better than the facts on which it is based." (*Ibid.*, internal quotation marks omitted.) The trial court "enjoys broad discretion" when ruling on whether to admit expert testimony, and "such decisions will not be disturbed on appeal absent a showing of a manifest abuse of discretion." (*Ibid.*; see also *People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. San Nicholas* (2004) 34 Cal.4th 614, 663; *People v. Mickey* (1991) 54 Cal.3d 612, 688.)

C. The Trial Court Did Not Abuse Its Discretion

The trial court did not abuse its discretion when finding that, pursuant to section 29, Dr. Posey would not be able to opine as to whether appellant intended to kill three of the victims. The text of section 29 admonishes expert witnesses testifying as to a defendant's "mental illness, mental disorder, or mental defect" from testifying as to "whether the defendant had or did not have the required mental states," including intent to kill.[70] (§ 29.) However, the trial court doubted that the legislature "intended to limit the opinions only where such factors existed" and found that "[i]t would not

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[70] Section 29 mandates that "any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (§ 29.)

make sense" to prevent expert witnesses from opining on a defendant's mental state in the context of a mental illness, disorder, or defect, while at the same time permitting expert witnesses to so opine in other circumstances. As the court noted, drawing a distinction between the mental state testimony of a mental health expert and the mental state testimony of any other expert is simply "baseless." (11RT 1756.) Accordingly, the court found that section 29 "preclude[d]" Dr. Posey from offering his opinions regarding whether appellant acted intentionally when killing three of the victims. (11RT 1761.)

In reaching its decision, the court relied upon this Court's opinion in *People v. Coddington*, *supra*, 23 Cal.4th 529. (11RT 1756-1757.) In *Coddington*, this Court found that "[e]xpert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such an intent is not admissible at the guilt phase of trial." (*People v. Coddington*, *supra*, 23 Cal.4th at p. 582, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; see also *People v. Smithey* (1999) 20 Cal.4th 936, 960-961.) The court likewise relied upon *People v. McCowan*, *supra*, 182 Cal.App.3d 1, where the Court of Appeal found that section 29 "does not forbid an expert from stating his opinion about the accused's mental state"; rather, it forbids an expert from "testifying whether [the] defendant had one of the mental states required for the offenses – for example, malice aforethought." (Id. at p. 14.) Based on *Coddington* and *McCowan*, the trial court did not abuse its discretion in finding that whether or not Dr. Posey were to testify about appellant's mental health, he should not be permitted to invade the province of the jury by opining that appellant lacked the intent to kill three of the victims. The decision of whether appellant intended to kill his victims was rightfully left to the jury, rather than the opinion of Dr. Posey. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 950; Evid. Code, § 801.)

Even so, the court did not abuse its discretion in excluding much of Dr. Posey's supposed "expert" testimony because while the court did not dispute Dr. Posey's qualifications as a medical doctor, and had "no reason to question his qualifications with respect to the anatomy, medicine, wounds, and areas typically considered by pathologists and former deputy coroners," the court expressed its "very strong reservations" as to whether the "procedure and process" that formed the basis of Dr. Posey's opinion "are something based in science and whether it is a recognized body of science that includes other individuals of similar background." The court also expressed its concern about the "lack of any studies or attempts to verify the issues that are the subject matters of this opinion." (11RT 1761-1762.)

Though the court did not cite the case, it is clear that the court evaluated Dr. Posey's proposed testimony regarding the intentionality of gunshots under the test from *People v. Kelly* (1976) 17 Cal.3d 24. In *Kelly*, this Court found that "the proponent of evidence derived from a new scientific technique must establish that (1) the reliability of the new technique has gained general acceptance in the relevant scientific community, (2) the expert testifying to that effect is qualified to give an opinion on the subject, and (3) the correct scientific procedures were used." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 445, citing *People v. Kelly*, *supra*, 17 Cal.3d at p. 30; see also *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.) In essence, "the proponent of expert testimony based on a new scientific technique or procedure [must] demonstrate both the new technique's reliability and that the witness is qualified to give an opinion on the subject." (*People v. Jones*, *supra*, 57 Cal.4th at p. 952.) This Court has found that "[c]aution with evidence involving new scientific techniques is justified because '[l]ay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive

credentials.'" (*Ibid.*, quoting *People v. Kelly*, *supra*, 17 Cal.3d at pp. 31-32.) Indeed, this Court has acknowledged the existence of a "'. . . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.'" (*Ibid.*) Here, Dr. Posey's proposed testimony would not have satisfied the requirements under *Kelly*, and for this reason the court did not abuse its discretion in excluding it.

First, Dr. Posey's testimony did not demonstrate that the supposed field of firearm discharge intentionality had gained general acceptance in the scientific community. The court directly asked Dr. Posey on several occasions for the scientific and medical bases for his opinions, but Dr. Posey's answers consistently revealed a clear lack of support for his theories in the scientific or medical communities. When the court asked where Dr. Posey "[got] this bodily science" that allowed him to make "inferences and conclusions" about firearm discharge intentionality, Dr. Posey did not directly answer the question, testifying instead about his own work in the field over a period of years. (11RT 1738.) Later, the court again asked if there existed a "body of science out there that has conducted research that tries to determine whether a shooting is intentional or accidental." Dr. Posey responded that ballistics work was the "closest" to the type of work he did, though he conceded that he did not know of any other pathologists that did any sort of research or experimentation on the intentionality of gunshots and he admitted that he had not taken part in any research or experimentation in the subject. As a result, Dr. Posey was unable to tell the court how he "confirm[ed] [his] conclusions" with other scientists and doctors to see "whether [his] process or . . . evaluation is in fact correct." (11RT 1747-1748.) Based on Dr. Posey's testimony, the court rightly expressed "very strong reservations" about whether Dr. Posey's supposed field of expertise was a "recognized body of science that

includes other individuals of similar background." (11RT 1761; see *People v. Doolin*, *supra*, 45 Cal.4th at p. 445.)

Second, while the court acknowledged it had no reason to question Dr. Posey's qualifications with respect to the fields "typically considered by forensic pathologists and former deputy coroners" (11RT 1761), it is clear that Dr. Posey lacked the expertise to testify about the supposed field of firearm discharge intentionality. Though Dr. Posey was a medical doctor, he admitted that his focus on firearm discharge intentionality was based only "mostly" on medical science. (11RT 1734.) He conceded that his "training and experience" in the field of "injury pattern analysis" came primarily from his four years investigating aircraft accidents. While he argued that reconstructing aircraft accidents was "exactly the same" as reconstructing the scene of a shooting, he offered no evidence to support his claim. (11RT 1736.) Indeed, as the prosecutor argued (see 11RT 1750), Dr. Posey failed to demonstrate a "nexus" between his knowledge of aircraft accidents and any supposed expertise in the field of firearm discharge intentionality. After Dr. Posey reiterated that his primary training and experience was as a pathologist and deputy coroner, the court asked what factors put him in a "better position" than the jurors to interpret what happened at the International Club. (11RT 1142-1143.) Dr. Posey replied that his expertise came from his "medical opinion." The court challenged him on this, noting that "the medical opinion really deals with the examination of the body and the determination." (11RT 1743.) Dr. Posey then clarified that his was a "forensic opinion," or rather, a "medical forensic opinion," though he conceded that his brand of "forensic medicine" was "maybe not used in our courts today." (11RT 1743.) More damningly for his credibility as an expert, Dr. Posey later conceded that he had not conducted any experiments where a shooting took place in order to verify his opinions, and he conceded that he had "never been involved in

research" on the subject. (11RT 1147) Further, as noted above, he was unable to explain to the court how he confirmed his conclusions with other scientists or doctors to see if his process or evaluation was correct (11RT 1747-1748), prompting the court to express concern about the "lack of any studies or attempts to verify the issues that are the subject matters of this opinion." (11RT 1761-1762.) It is clear, then, that while Dr. Posey might have been an expert in certain fields directly pertaining to his work as a pathologist and deputy coroner, none of his training or experience had any direct bearing on the opinion he hoped to offer at trial. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 445.)

Third, Dr. Posey did not demonstrate that he his conclusion about the intentionality of appellant's gunshots was in any way reliable. As discussed above, Dr. Posey did not know of any doctors or scientists doing research or experimentation in his supposed field, he had not done any such research or experimentation, and he was unable to explain how he verified his results to ensure his process was correct. (11RT 1747-1748.) Indeed, as Dr. Posey conceded, he would "have no clue" whether the gunshots were fired intentionally merely by examining the autopsy records and the crime scene photos, and he noted that the gunshot wounds "individually or in concert" could not lead him to any conclusion on whether the shots were fired intentionally. (11RT 1735-1737.) Instead, he conceded that he was only able to reach his conclusion once he learned from defense counsel that "there was a scuffle after the first shot," and he conceded later that if what defense counsel told him about a "scuffle" was not true, then he would "have no opinion" about whether the shots were fired intentionally. (11RT 1739, 1746.) This demonstrated that his "analysis" of intentionality had far less to do with medical or forensic science, and far more to do with parroting the defense theory of the shooting.

To that end, Dr. Posey's testimony was full of logical inconsistencies that were exposed through the court's questioning. Dr. Posey argued that the gunshots fired at Tram were "purposeful" and that the shots fired at the other victims were not, and he defined "purposefulness" as "discharg[ing] the weapon." However, when challenged by the court regarding his definition of the word "purposefulness," Dr. Posey conceded that he could not tell whether the shooter "intended to pull the trigger," and he noted that pulling the trigger "doesn't mean anything" to him because "anybody can pull a trigger." (11RT 1738-1739.) In response to the court's hypothetical, Dr. Posey testified that if the court reporter was shot in the shoulder, he would not be able to tell if the shot was fired intentionally, though if the reporter was shot in the forehead, he would believe the shot was fired intentionally based on the "location of the bullet." (11RT 1744.) However, in response to the court's next hypothetical about a person shooting themselves in the head playing Russian roulette after thinking the gun was unloaded, Dr. Posey, perhaps recognizing the logical inconsistencies inherent in the court's "parallel," explained that he was "not just using gunshot wounds," and that the gun was "minimally important" to his analysis. (11RT 1744-1746.) He argued that a "shot in the back of the head," like the "well-placed shot[ ]" that killed Tram, would surely be fatal, and thus purposeful, while a shot in the chest would mean only that "chances are the guy isn't going to survive." (11RT 1748-1749.) However, when the court questioned him about whether he was "suggesting anybody who shoots somebody in the chest didn't do so intentionally," Dr. Posey back-peddled and said that if someone was shot in the chest, he "would think [the shooter was] thinking about ending the individual's life or at least stopping them from going forward." (11RT 1749.) Thus, under the court's questioning, Dr. Posey's "theories" about firearm discharge intentionality collapsed under the weight of their logical inconsistencies,

and for this reason proved to be inherently unreliable. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 445.)

Accordingly, because Dr. Posey's testimony was not based in any accepted medical or scientific practice, because he was not able to prove himself to be an expert in the subject, and because his theories were logically inconsistent and unreliable, the court did not err in excluding his testimony under *Kelly*. (*People v. Jones*, *supra*, 57 Cal.4th at p. 952; *People v. Doolin*, *supra*, 45 Cal.4th at p. 445; *People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

Finally, to the extent Dr. Posey intended to testify about an "ultimate issue" in the case, namely appellant's intent to kill, such testimony would have been precluded under Evidence Code section 801. Indeed, that section precludes expert witnesses from testifying to "legal conclusions in the guise of expert opinion." (*People v. Jones*, *supra*, 57 Cal.4th at p. 950.)

D. Even if the Trial Court Erred, Any Error Was Harmless

Even if the trial court erred by excluding Dr. Posey's testimony, any error was harmless. Not only was there "no reasonable probability the verdict would have been more favorable" to appellant had the testimony been admitted, it is clear that admission of Dr. Posey's testimony would have further assured appellant's guilt. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 448.)

As noted above (see Arg. III.D, *ante*), "[a] person who acts intending to kill victim A but who accidentally kills victim B instead may be guilty of B's murder under the doctrine of *transferred intent*." (See *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 653; *People v. Bland*, *supra*, 28 Cal.4th at pp. 320-321.) As the trial court correctly observed, Dr. Posey would have testified that appellant shot Tram "intentional[ly] and with express malice," therefore conceding a first-degree murder conviction as to Tram. Under the

doctrine of transferred intent, appellant's conceded intent to kill Tram would have "spill[ed] over into first-degree murder as to the other three victims." (11RT 1157.) Thus, even if Dr. Posey had testified that appellant intended to kill Tram and that the other murders were an "accidental" consequence of the shots meant for Tram, appellant would have almost certainly received the same verdict from the jury.

Further, despite Dr. Posey's proposed testimony, the evidence overwhelmingly showed that appellant intended to kill all four victims, and that Bui's interference, the supposed "scuffle," did not affect the multiple shots fired at the victims. As discussed above, even before Bui grabbed appellant, he fired between 10 and 14 gunshots at the victims while they remained trapped in the booth. (6RT 918-919, 926; 7RT 991.) Appellant flipped Bui to the ground after "no more than two seconds," and once free of Bui's embrace, he continued to fire into the booth. (6RT 920, 954-955; 7RT 1061, 1070-1071.) Further, the autopsy results demonstrated that the gunshots were intentionally fired at all four victims. Tram suffered four fatal gunshot wounds, including one that entered "towards the top" of Tram's head and "perforated the brain," traveling in a downward trajectory that Dr. Scheinin believed to be consistent with the shooter "standing slightly behind the victim, shooting him in the head and the victim perhaps looking down at the time he was shot." (9RT 1271-1272, 1277-1278.) The three other fatal shots entered Tram's chest and abdomen, and were consistent with Tram already having received the head wound, and then falling to his right and laying down, where he was then shot three times in the side by the standing shooter. (9RT 1272-1273, 1280-1284.) Dr. Scheinin also testified that Tang's wounds were consistent with him being shot in the left arm and face, falling to his right, and then being shot again as the shooter stood over him, and Norman's wounds were consistent with him trying to escape from the booth by crawling away, and then being shot

in the back while he was on the ground in a crawling position and the shooter was standing behind him. (9RT 1294-1295, 1297, 1299.)

Accordingly, even if the court erred by excluding Dr. Posey's testimony, any error was harmless. This claim fails.

V. BECAUSE APPELLANT DID NOT TESTIFY, HE HAS FORFEITED HIS CLAIM CHALLENGING THE TRIAL COURT'S DENIAL OF HIS MOTION TO EXCLUDE IMPEACHMENT EVIDENCE; IN ANY EVENT, THE CLAIM IS WITHOUT MERIT

Appellant contends the trial court deprived him of his constitutional rights when it ruled the prosecutor could present evidence of two uncharged violent acts if appellant testified that the International Club shooting was committed in self-defense, in the defense of another, or as the result of an accident. (AOB 79-97.) However, because appellant did not testify, this claim has been forfeited on appeal. In any event, the claim fails on the merits.

A. Relevant Trial Court Proceedings

As summarized in detail above (see Arg.III.A, *ante*), the prosecutor asked the court for a ruling on whether, assuming appellant testified that he acted in self-defense, the prosecutor would be able to impeach appellant with evidence of "other people he shot," given that such evidence would be "critical as to intent on the issue of self-defense." (8RT 1240-1241.) The trial court agreed with defense counsel's request that it defer its ruling until the conclusion of the People's case so that appellant could hear all the evidence against him before making a decision on whether to testify. (8RT 1245-1247, 1252.)

The court noted that it would "be in a better position" to rule on the scope of cross-examination after the conclusion of appellant's direct examination. (8RT 1253.) Indeed, the court made clear that "[w]hat will become relevant on cross-examination is going to be dictated by what

[appellant] says in direct." (8RT 1252.) If, for example, appellant were to testify that he was not present at the International Club on the night of the shooting, then "whether or not he's been involved in other crimes is just completely immaterial." (8RT 1252-1253.) However, if, on the other hand, appellant were to testify that he shot the victims, that he "would never harm anybody," or if he claimed the killings were inadvertent, that would "open the door to other acts of violence or murder." (8RT 1253.)

Later, during the defense case, defense counsel asked the court to consider the scope of cross-examination if appellant decided to testify, but the court again declined to make a ruling given that "it's really going to depend on what [appellant] says" on direct examination. (10RT 1552.) Later still, the prosecutor reiterated his position that if appellant were to testify that he shot the victims in self-defense, "there is just simply no way to avoid going into the other incidents" that both preceded and followed the International Club shooting. (10RT 1635.) He argued that while the other shootings occurred during robberies, unlike the shooting at the International Club, there was nevertheless a "similarity of intent," in that in each of the incidents, including the International Club incident, appellant pointed a gun at someone. He went that it would not make sense "to allow somebody to testify that the killings of four people under the circumstances that this Court has heard would be accidental" without also allowing "thorough cross-examination of when this person has had guns in the past and under what circumstances" he pointed a gun at somebody else. (10RT 1636.) He argued that this was "critical on the issue on intent, on the issue of deliberation, [and] on the issue of malice." (10RT 1637.)

The court explained that it did not want to make a ruling for two reasons: "One, I'm doing it in a vacuum; two, my ruling could possibly have a chilling effect on the decision of [appellant] of whether or not to testify." (10RT 1637.) The prosecutor then noted that in order to preserve

an appellate challenge to the admission of other crimes evidence, appellant would have to "actually testify." (10RT 1638.) The court explained that appellant would have to "make a decision" based on an understanding that his uncharged criminal conduct might be relevant to impeach him, "depending on the scope," and that "[i]f he elects to testify, the court would address the issue of the scope of the cross-examination "once the direct examination is completed." (10RT 1638.)

The following day, after asking the court for the opportunity to present an offer of proof as to what appellant's testimony would be, defense counsel that appellant would testify that shooting Tram was based on his belief of "self-defense of another party," someone named "Chestnut." He would testify further that when Bui intervened in the shooting of Tram, he inadvertently shot the other victims, and that he had "no intent" to discharge his weapon at the other victims. (11RT 1640-1642.)

The prosecutor countered that based on that offer of proof, he would cross-examine appellant regarding other "similar" crimes in which appellant "went to locations with a gun that was loaded and in those other situations pointed the gun at individuals and pulled the trigger, sometimes killing them, sometimes wounding them, sometimes shooting them in the same parts of the body that these victims were shot in." (11RT 1642-1643.) He argued further that there were "literally a plethora" of incidents fitting that description about which he could question appellant, and that while he would certainly not question appellant about that many incidents, there was "no way" that "an objection would be sustained" to questions "under these circumstances." (11RT 1643.) He argued that while defense counsel would be entitled to present appellant's version of events, he would nevertheless be entitled to "carefully examine [appellant's] credibility," and that "one of the things that goes to credibility as it relates to his intent and what he was thinking at the time he pulled the trigger is that he has been in

this situation both before and after." (11RT 1643.) Indeed, the prosecutor argued "it's the same kind of thing he faced before, because he pointed a gun at people before and made the decision whether or not to end their life. And this goes to his intent. It goes to his ability to premeditate it." (11RT 1644.) The prosecutor asked the court how he could "reliably question [appellant] about his state of mind, his ability to deliberate, [and] how quickly he can deliberate" if he could not inquire of appellant, "have you done this before." He argued defense counsel's offer of proof was "gratuitous," and that he had a "right" and an "obligation" to "carefully and thoroughly cross-examine on that issue." (11RT 1645.) The prosecutor argued further that while the defense was not calling witnesses to say that Tram was a violent person, it "in effect" did that through Le's testimony. (16RT 1646.) Indeed, appellant's testimony would effectively put Tram's character in evidence, "because he is going to say that he was a very violent man that night, armed with a gun." (16RT 1647.)

The prosecutor concluded by arguing that evidence of appellant's uncharged violent conduct was "in effect . . . not other crimes evidence," but rather "other intent evidence" and "other premeditation evidence." He argued that while the court could prevent him from asking appellant about "specific facts of other incidents," he should "clearly" be able to ask, "have you pointed a gun at somebody before" and "have you pulled the trigger before" because these questions address premeditation. (11RT 1649.)

The prosecutor then explained that he would question appellant about (1) the 1997 Thien Thanh incident, (2) the 1998 Wintec Industries incident, (3) the 2001 Traditional Jewelers incident, and (4) the 2001 Jade Galore incident, as well as Christine Chen's testimony linking appellant to each of these incidents. (11RT 1650-1652.) He noted that appellant shot two people at Thien Thanh, killing one them, that a witness positively identified appellant as the shooter, and that appellant admitted his involvement to

Chen. (11RT 1650.) He acknowledged that while he could not show "directly" that appellant shot Pin at Wintec, he could question appellant about his flight to Texas after the incident and how appellant lived and worked there using a fake driver's license and fake social security card. (11RT 1651.) He noted that appellant confessed to Chen that he fired a high-powered weapon into Traditional Jewelers numerous times and that Gomez was shot in the process. (11RT 1651-1652.) Finally, he noted that appellant confessed to Chen that he shot and killed Cambosa at Jade Galore during the course of the robbery. (11RT 1652.) He argued that in addition to appellant's confessions to Chen, ballistics evidence, fingerprint evidence, cell phone records, and other evidence also linked appellant to these four crimes. (11RT 1652-1657.)

Defense counsel countered that if the prosecutor intended to introduce evidence of the uncharged conduct, there would need to be a hearing so that the prosecutor could show that substantial evidence supported appellant's involvement in those incidents. The court noted that police reports indicated that the surviving victim at Thien Thanh identified appellant and that Chen provided evidence of appellant's involvement in the four crimes. (11RT 1657-1658.) Defense counsel then argued that while firearms were involved in the other four incidents, these incidents all involved robberies, making them "completely, absolutely different" from the International Club shooting, and thus "prejudicial" to appellant. (11RT 1658-1659.) He argued he "couldn't envision" a jury only using the other crimes evidence for the "limited purpose" of impeaching appellant's credibility. He then concluded that "if this evidence comes in [appellant] now can't get up and tell his side of the story, can't get up and say what happened in this particular situation . . . ." (11RT 1661.)

The prosecutor reiterated that the evidence would not be offered as "other crimes evidence" but rather to show appellant's "ability to

premeditate . . . and to deliberate under the same kinds of situations – pointing a gun at people – that he has done in the past and deciding whether or not to pull the trigger." (11RT 1662.)

The court ruled that the other crimes evidence could not be introduced as character evidence to show appellant's propensity for violence since no evidence had been introduced showing Tram's propensity for violence. (11RT 1662-1663.) However, as to the issue of "similarity", the court noted that defense counsel's offer of proof was that the shooting was "only a result of [appellant's] subjective belief and a reasonable belief on his part that he was confronted with circumstances that necessitated and required him to act in order to defend another, while the prosecutor's case was that the shooting "almost presumptively suggested express malice." (11RT 1663-1664.) Accordingly, the court ruled as follows:

> If [appellant] testifies in accordance with the offer of proof, this jury is going to have to decide did [appellant] really believe that a necessity existed . . . and if he did, was that belief reasonable.
>
> The gist of his defense is that he shot and killed Mr. Tram only because he was confronted with circumstances. These uncharged acts would have a tendency to refute his subjective belief and the reasonableness of his actions.
>
> Moreover, the offered defense is that the shots that killed the other three individuals were inadvertent and the result of accident. The inference one draws from there is that he did not and would not shoot [a] vulnerable, innocent party. And it was through inadvertence and accident that those individuals died.
>
> The evidence that [appellant] prior to this occurrence and subsequent to this occurrence did shoot a vulnerable and innocent party has a logical and reasonable inference that his claim as to what happened on May 6th is not true.
>
> Any time we bring in evidence of uncharged crimes the law recognizes it's prejudicial. It's always prejudicial because it can be so probative. And the fact that it is prejudicial to

[appellant] in and of itself is not a basis for the Court to exclude that evidence.

Instead, the Court is expected to recognize the prejudicial effect of this testimony and to balance it against its probative value. These incidents obviously have significant probative value in light of the defense offer of proof. And in weighing that probative value against the prejudicial effect and with the understanding that this jury will be instructed specifically and in detail the extent and the manner in which this evidence can be considered leads this Court to conclude that if [appellant] testifies the prosecution will be permitted to question him regarding the [Thien Thanh] incident in San Jose.

In addition, . . . the prosecution will be able to question him regarding the [Jade Galore] incident involving the death of Mr. Cambosa.

The People will not be permitted to question him regarding the [Wintec] matter. Primarily due to the reason of whether or not he in fact was the shooter in that incident. Nor will . . . the prosecution be permitted to question him regarding the [Traditional Jewelers] incident involving the shooting of Rafael Gomez.

(11RT 1664-1665.)

Defense counsel then asked the court to admit only one of the two uncharged incidents, given that the prejudicial effect of two incidents "exponentially" increases. The court countered that even if the prejudicial effect increased, so would the probative value, and that the jury would be instructed only to use the evidence of uncharged conduct for a limited purpose. (11RT 1666-1667.) The court ruled that its tentative ruling would remain, with the caveat that if appellant were to testify in a different manner than presented in the offer of proof, or if his testimony made other incidents relevant, the court would revisit the issue at that time. The court noted further that based on its reading of the case law, a "degree of a required similarity" between incidents "isn't necessary," since "it's often difficult to get similarities in situations where persons are talking about

inadvertence and accident" or where the "affirmative defense of defending another comes into play."[71] (11RT 1668.)

Later, defense counsel indicated that based on the court's ruling, appellant did not believe it was "in his best interest" to testify. After defense counsel made explicitly clear to appellant that he had the right to testify even if counsel did not advise it, appellant responded, "Now I will not testify." (11RT 1685-1686.)

B. Applicable Law

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Steele* (2006) 27 Cal.4th 1230, 1243, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 378-379.)

While evidence that a defendant has committed other crimes is "'not admissible to prove that the defendant is a person of bad character or has a criminal disposition,'" it is "'admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes.'" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Further, "'[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]'" (*Ibid.*)

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[71] After the court made its ruling, defense counsel argued for the record that the introduction of the other crimes evidence violated appellant's federal and state constitutional rights. (11RT 1670.)

The degree of similarity required for admissibility of other crimes evidence "ranges along a continuum, depending on the purpose for which the evidence is received." (*People v. Scott* (2011) 52 Cal.4th 452, 470.) "'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]'" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) '"'[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negat[e] accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.]'" (*People v. Rogers* (2013) 57 Cal.4th 296, 328, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

If the other crimes evidence is "sufficiently similar" to the charged crimes to be relevant as to intent, then the trial court "must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."'" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; Evid. Code, § 352.)

The trial court's ruling regarding the admission of other crimes evidence is reviewed for abuse of discretion. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 326; *People v. Foster*, *supra*, 50 Cal.4th at pp. 1328-1329; *People v. Mungia* (2008) 44 Cal.4th 1101, 1130.) Under this standard, the trial court's decision will not be disturbed unless the court exercised its discretion in an "'arbitrary, capricious, or patently absurd manner that

resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

C. Appellant's Claim Has Been Forfeited

As discussed above (see Arg.III.C, *ante*), this Court in P*eople v. Collins*, *supra*, 42 Cal.3d 378, adopted the United States Supreme Court's "*Luce* rule" when it found that "if a defendant wishes to preserve for appeal an objection to a trial court's *in limine* ruling permitting impeachment by a prior conviction, he or she must take the witness stand and actually suffer such impeachment." (*People v. Sims*, *supra*, 5 Cal.4th at p. 454; see also *Luce v. United States*, *supra*, 469 U.S. at p. 43; *People v. Collins*, *supra*, 42 Cal.3d at pp. 383-388.) In *Sims*, this Court extended the "*Luce* rule" as adopted in *Collins*, and found that a claim challenging a trial court's ruling permitting impeachment with evidence of unadjudicated crimes is likewise not preserved for review unless the defendant actually takes the witness stand. (*People v. Sims*, *supra*, 5 Cal.4th at pp. 454-456.)

Indeed, this Court found that in *Sims*, as in *Collins*, "the trial court had no occasion to ascertain the *precise nature* of defendant's testimony because he elected not to testify," and "the court therefore had no basis for determining whether the probative value of the impeachment evidence would outweigh its prejudicial effect." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1175-1176.) Further, "[r]equiring a defendant to make a proffer of testimony is no answer" to the absence of testimony since the defendant's "trial testimony could, for any number of reasons, differ from the proffer." (*Luce v. United States*, *supra*, 469 U.S. at p. 41, fn. 5; *People v. Collins*, *supra*, 42 Cal.3d at p. 384.)

Here, because appellant elected not to testify, the trial court was necessarily unable to ascertain the "precise nature" of his testimony, and thus had "no basis for determining whether the probative value of the

impeachment evidence would outweigh its prejudicial effect." (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1175-1176.) Accordingly, as in *Sims*, appellant's claim challenging the admission of other crimes evidence has been forfeited. (See *People v. Sims*, *supra*, 5 Cal.4th at pp. 454-456.)

Appellant nevertheless contends that because his waiver of his right to testify was "not knowing, intelligent, and voluntary," this Court should not, "consistent with fundamental fairness," apply the "*Luce* rule" to him. (AOB 83-84.) However, as discussed above, because appellant was not required to personally waive his right to testify (see *People v. Bradford*, *supra*, 14 Cal.4th at p. 1053; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1332), there was thus no requirement that such a waiver be "knowing, intelligent, and voluntary."

Further, appellant cites this Court's opinion in Collins for the proposition that "application of the [*Luce*] rule to a defendant who relied on earlier guidance from the courts would be '"grossly unfair" and would "wreak a substantial inequity."'" (AOB 84; see *People v. Collins*, *supra*, 42 Cal.3d at pp. 388-389, quoting *United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 578.) However, appellant's reliance on the statement from *Collins*, where this Court quoted the Ninth Circuit in *Givens*, is misplaced. In *Givens*, the defendant looked to challenge the trial court's ruling allowing the prosecutor to impeach him with evidence of his prior convictions, were he to testify. Under the prevailing law in the Ninth Circuit at the time of trial, which occurred prior to the United States Supreme Court's decision in *Luce*, the defendant did not need to testify to preserve his claim on appeal. (See *United States v. Givens*, *supra*, 767 F.2d at pp. 577-578; see also *United States v. Cook* (9th Cir. 1979) 608 F.2d 1175, 1186.) The Ninth Circuit found that since the defendant "faithfully relied on the law of the circuit" as it existed at the time of trial, it would be

"grossly unfair" to apply *Luce* retroactively to bar the defendant from appealing the court's ruling. (*Id.* at pp. 578-579.)

Unlike *Givens*, however, the instant case did not present a circumstance in which appellant declined to testify based on his reliance on the state of the law as it existed at the time of trial, only to have a higher court later change the law so that he would have needed to testify to preserve his claim on appeal. Indeed, *Luce*, *Collins*, and *Sims* were all decided at the time of appellant's trial. Despite appellant's contentions to the contrary, the trial court certainly never told him that he could appeal the court's decision even if he did not testify, appellant expressed no confusion or reluctance about his decision not to testify or demonstrated any conflict with counsel about this decision (see *People v. Enraca*, *supra*, 53 Cal.4th at p. 762), and the prosecutor correctly noted during the hearing that for appellant's claim "to be preserved," he "would have had to actually testify." (10RT 1638.) Thus, appellant cannot argue, akin to *Givens*, that it would be "grossly unfair" to bar him from appealing the trial court's ruling. Accordingly, appellant has forfeited the instant claim.

D. In Any Event, the Trial Court Did Not Abuse Its Discretion

Even if this Court were to reach the merits of appellant's claim, the claim must nevertheless fail because the trial court did not abuse its discretion in admitting evidence pertaining to the Thien Thanh and Jade Galore incidents. Appellant's actions in shooting the victims during those incidents were sufficiently similar to his actions in the instant case. (See *People v. Foster*, *supra*, 50 Cal.4th at p. 1328.) Further, the recurrence of similar results in all three incidents tended to negate appellant's arguments that he acted in the defense of another and that he killed three of the victims inadvertently. (See *People v. Rogers*, *supra*, 57 Cal.4th at p. 328.) Accordingly, the court properly found that the probative value of the other

crimes evidence in this case outweighed any prejudicial effect. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328.)

The Thien Thanh and Jade Galore incidents were sufficiently similar to the International Club shooting. In all three incidents, as the prosecutor argued, appellant "went to locations with a gun that was loaded . . . pointed the gun at individuals and pulled the trigger, sometimes killing them, sometimes wounding them, sometimes shooting them in the same parts of the body that these victims were shot in." (11RT 1642-1643.) As the prosecutor argued, during the Thien Thanh incident, appellant shot two men at close range, including fatally shooting one in the chest. (11RT 1650.) During the Jade Galore incident, appellant admitted that he shot and killed Cambosa the security guard at close range because he believed that Cambosa was going to shoot one of appellant's friends as they robbed the store. (11RT 1652.) In both cases, as in the instant case, appellant brought a loaded gun to the scene of the crime, pointed a gun at his victims, and shot them at relatively close range. This was certainly sufficient to satisfy the "least degree of similarity" required to prove intent, as the similarity between the incidents substantially supported the inference that appellant harbored the same intent to kill on each occasion. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328.)

Further, that appellant on several other occasions shot and killed victims at relatively close range had the tendency to refute appellant's claims that he acted in the defense of another at the International Club and that he killed several of the victims inadvertently. (See *People v. Rogers*, *supra*, 57 Cal.4th at p. 328.) Instead, appellant's actions at Thien Thanh and Jade Galore sufficiently established that appellant's actions at the International Club were motivated by a "criminal" intent, and that his actions were not in some way excused or mitigated by other factors. (*Ibid.*)

Given that the requirement for similarity was met, the trial court did not abuse its discretion in finding that the probative value of this evidence outweighed any prejudicial effect. (See *People v. Foster*, *supra*, 50 Cal.4th at p. 1328.) The court acknowledged that evidence of other crimes was inherently prejudicial, but that this alone was not sufficient basis for the court to exclude it, especially when weighed against the probative value of that evidence. Indeed, the court found that because the Thien Thanh and Jade Galore incidents were sufficiently similar to the International Club shooting, evidence of those other crimes would have "significant probative value" to refute appellant's defenses that he acted in defense of another and that he killed several of the victims inadvertently. (11RT 1665; *People v. Rogers*, *supra*, 57 Cal.4th at p. 328.)

Accordingly, the trial court did not abuse its discretion in admitting other crimes evidence to impeach appellant's proposed testimony. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 326.) Had appellant testified, the jury reasonably could have determined that because appellant intended to kill his victims in the other crimes, he likewise intended to kill the four victims at the International Club. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 380.)

E. Even if the Trial Court Erred, Any Error Was Harmless

Even if the trial court erred by admitting evidence of appellant's involvement in the Thien Thanh and Jade Galore incidents, it is not reasonably probable a more favorable result would have occurred for appellant had the court not so erred. (See *People v. Thomas* (2011) 52 Cal.4th 336, 356 [finding the trial court's admission of other crimes evidence harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836].) Indeed, if the evidence were not admitted, and if appellant then elected to testify that he acted in defense of another and that he shot three of the

victims inadvertently, it is not reasonably probable the result of the trial would have been different. As discussed above (see Arg.III.D, *ante*), the evidence overwhelmingly showed that appellant intended to kill all four victims, that he acted with premeditation and deliberation, and that he did not act in defense of another or shoot three of the victims inadvertently.

As discussed above, even before Bui grabbed appellant, he fired between 10 and 14 gunshots at the victims while they remained trapped in the booth. (6RT 918-919, 926; 7RT 991.) Appellant flipped Bui to the ground after "no more than two seconds," and once free of Bui's embrace, he continued to fire into the booth. (6RT 920, 954-955; 7RT 1061, 1070-1071.) Further, based on the autopsy results, it is clear that the gunshots were all fired intentionally at the victims. Dr. Scheinin believed that Tram was killed consistent with the shooter standing behind him and shooting him in the head while he was sitting in the booth. (9RT 1271-1272, 1277-1278.) Dr. Scheinin believed further that Tang's wounds were consistent with him being shot in the left arm and face, falling to his right, and then being shot again as the shooter stood over him, and Norman's wounds were consistent with him trying to escape from the booth by crawling away, and then being shot in the back while he was on the ground in a crawling position and the shooter was standing behind him. (9RT 1294-1295, 1297, 1299.) Further, the fact that appellant brought a loaded gun to the scene of the crime, that he had a motive to kill Tram, and that he shot the victims so many times as they sat defenseless in a booth demonstrates that appellant acted with premeditation and deliberation. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Lee*, *supra*, 51 Cal.4th at p. 636; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295.)

Accordingly, even if the trial court erred by admitting evidence of appellant's involvement in two other crimes, due to the overwhelming evidence offered against him, any error was harmless. This claim fails.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY ADMITTING EVIDENCE THAT APPELLANT WAS A GANG MEMBER

Appellant contends the trial court erred by allowing the prosecutor to "elicit irrelevant and highly inflammatory evidence" "at every opportunity" that appellant was a "tattoo-bearing member of the Lao Family gang who associated with other gang members." To that end, he contends the evidence was inadmissible character evidence under Evidence Code section 1101, that the prejudicial effect of that evidence outweighed its probative value under Evidence Code section 352, and that admission of the evidence violated his constitutional rights. (AOB 97-115.) Appellant's contentions are without merit.

A. Relevant Trial Court Proceedings

On September 25, 2002, defense counsel filed a motion to exclude from trial "[a]ny reference to gang membership, involvement, activity, participation, whatsoever" on the grounds that the probative value of such evidence would be "substantially outweighed" by its prejudicial effect. (1CT 279-287.)

At a pretrial hearing held that same day, the prosecutor argued that while he did not file a gang allegation in the instant case, "the testimony is such that references to various Asian gangs are going to come before the jury." He noted that members of various Asian gangs were at the International Club on the night of the shooting, including Lao Family, of which appellant was an "unquestioned" member. (1RT 124.) He noted that many people, including a percipient witness to the shooting, referred to appellant by a moniker and noted that he was from Lao Family. The prosecutor made clear that he was "not going to emphasize a gang aspect of this case," though "it is going to be difficult for the court to make a blanket

ruling that . . . there cannot be any questioning or any comment or any answer by a witness regarding gang affiliation," especially given that Tram, like appellant, was a gang member. (1RT 125.) Further, the prosecutor noted that if Christine Chen were to testify during the guilt phase, she would testify that appellant admitted to her that Tram was a "rival" of his. Accordingly, the prosecutor believed it would be "extremely difficult" to "sanitize and take out any reference at all to different gangs." The prosecutor made clear that gang affiliation was not something he planned to "harp on," though he did not believe it was possible for there to be no "mention of the various groups that were represented" at the International Club on the night of the shooting. That said, he trusted the court to "make certain rulings that the court feels is appropriate" to limit such testimony. (1RT 126.)

Defense counsel asked the court to "fashion and limit the reference to any gang membership with respect to [appellant] that [appellant] is a member of any gang," specifically Lao Family. He argued that because no gang allegation was levied against appellant, "the fact that [appellant] may or may not" be a gang member was not "relevant to the charge here." (1RT 126-127.) He noted that while several witnesses identified appellant in a photographic lineup, nothing in that lineup "necessarily shows he is a gang member." (1RT 127.)

The prosecutor countered that on several occasions, Bui repeatedly identified the shooter to police as "John from the Lao Family," though Bui consistently refused to testify to that fact, prompting a judge to issue an attachment on Bui so that he could not "skip" town prior to testifying. (1RT 127-128.) The prosecutor argued that what Bui said to police and the circumstances surrounding his identification of appellant were "critical issues in determining whether or not this witness is a credible, reliable witness." (1RT 128.) He argued it would be very difficult for the court to

redact all references to Lao Family from the transcripts and videos of Bui's interviews with police. (1RT 128-129.)

Defense counsel asked the court to review the transcripts and videos of Bui's interviews with police to see it "it would be practical to delete those portions or to redact any of those statements" prior to making a ruling. Counsel agreed that irrespective of the court's ruling regarding references to appellant's gang affiliation, there would be references to the "victims having some types of ties to gangs." (1RT 129.)

The court agreed to review the grand jury transcript as well as the transcripts of Bui's interviews with police. The court then asked the prosecutor to provide the court with an "autobiography and any other evidence pertaining to [appellant's] affiliation with gangs." (1RT 129-130.) The prosecutor agreed to do so, though he reiterated that he did not plan to introduce any such autobiography at trial or show that appellant was a member of Lao Family. However, he made clear that it would be "inescapable" for there not to be gang references during the course of the trial, if the jury were to consider the entirety of Bui's statements to police. The court took the matter under submission. (1RT 130.)

Later, after the jury was sworn to try the case, defense counsel again raised the issue of the gang evidence motion. (6RT 834.) The prosecutor indicated that he planned to call a witness to testify that Tram "had words" with one of appellant's associates shortly before the shooting. He argued that since Tram was a member of a different gang than appellant, "that clearly goes towards motive." (6RT 835.) He noted that appellant was present at the club for a birthday party for Diep, a Wah Ching member, and that he was sitting with members of the Lao Family, the Wah Ching, and the Pomona Boys. (6RT 835-836.) At some point, Tram got into an argument near the restroom with a Lao Family associate of appellant, and then Tram moved to the booth near the bar, where he sat with three people,

two of whom were not gang members.[72] After the argument dispersed, Le saw appellant conversing with Diep and that appellant said something like "Do you want me to do it" or "What do you want me to do." (6RT 836-837.) Several witnesses then saw appellant walk toward the bar area and shoot the four victims sitting there, including Tram. After the shooting, appellant had phone conversations with "at least three other Lao Family members." (6RT 837.)

The prosecutor again noted that while he did not "intend to harp on it, to make a big thing about it, . . . it's going to clearly come out that [appellant] was at this birthday party where members of these three gangs were seated together," and that Tram, who was not a member of one of the three gangs, was killed following the argument. (6RT 837-838.) He explained that Le would identify appellant as a Lao Family member, identify the people appellant spoke with on the phone as Lao Family members, and explain how he knew everybody at the club that night based on their gang affiliations. (6RT 838.) Further, Le would testify that he began to associate with Lao Family members during his divorce, that he began to run drugs for the gang, and that he became an informant after he was caught by police. (6RT 838-839.) Le would also testify that he was introduced to appellant by several members of Lao Family, and that he developed friendships with members of that gang, leading to him being invited to the birthday party on the night in question. He would also testify that later on in the morning after the shooting, he received a call from a Lao Family member to go to a place where appellant, Diep, and Lao Family

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[72] The prosecutor noted that one of the victims, The Hao Tang, "probably was associated" with the same gang as Tram, though "we don't know for sure." (6RT 836.)

members were present, and that he helped Diep destroy the surveillance videotape from the shooting. (6RT 839-840.)

The prosecutor concluded by arguing that this evidence was "clearly going to come out" based on the way "the evidence is going to develop." Further, the evidence "explains some of the interrelationships between the people and it also goes to motive." He noted, "I think one of the things that jurors will want to know is why would a man get up from a bar stool, walk across a bar[,] stand in front of a booth[,] and shoot people in the booth. There has to be a reason for it." Accordingly, the prosecutor argued the gang evidence was relevant. (6RT 840.)

Defense counsel urged the court to rule that given the lack of gang allegations, there should be no reference to appellant as a gang member. He argued further that if it were not possible to completely eliminate all gang references from witness testimony, the court should admonish the witnesses not to make gang references. (6RT 840-841.)

The prosecutor referred the court to appellant's admissions regarding his membership in Lao Family. (6RT 841.) He then argued that "motive has nothing to do with gang enhancement," and that in the instant case, "a gang enhancement is nothing but an impediment to moving the trial along a lot more expeditiously because it cuts out a lot of jury instructions, verdicts that the jury has to make decisions on." He argued that even if charging appellant with a gang enhancement "is not worth the effort . . . that does not mean it's not relevant as to motive." (6RT 842.)

Defense counsel countered, "[t]here can be reference to the location being a gang location and that type [of] testimony, but with respect to [appellant] being an actual gang member I think that's irrelevant." (6RT 843.) He argued further that while there was evidence that appellant was an "original" Lao Family member, there was no evidence that he was still a member. (6RT 843-844.)

The prosecutor countered, "we can't refer to [the International Club] as a gang hangout, refer to some of the victims as gang members, but then completely sanitize [appellant]." Further, he argued that if the court were to find that gang evidence could only be admissible if a gang allegation were filed, then the district attorney's office might well file gang allegations in every case, and that "simply wouldn't make any sense." The prosecutor was not aware of any testimony that indicated that appellant was no longer an active Lao Family member, and he noted that in any case, the evidence was undisputed that appellant was an active member at the time of the shooting. (6RT 844.) He reiterated again that he did not plan to "harp on" appellant's gang affiliation, but he believed that "to lay out in context what happened inside that club that night, the entire relationships between some of these people is critical." (6RT 845.)

The court noted that "the state of the law is clear that evidence of gang affiliation is not limited to situations where a special allegation has been lodged alleging that a crime was carried out for the purpose of promoting a criminal street gang." Further, the court found that based on the prosecutor's arguments and on the grand jury testimony, "it appears there exists a factual issue as to whether or not the shootings were motivated by gang affiliation considerations," given that the argument near the restroom involved appellant's friends and Tram, a rival gang member. (6RT 845.) Accordingly, the court found this evidence "would give the trier of fact at least some motivation or explanation why a person not involved, apparently not involved in the earlier altercation would respond violently toward the individual who was involved and any companions of that individual." (6RT 845-846.)

The court also noted it was "evident" that Bui "expressed some reluctance" about testifying in the instant case and "expressed concerns for his safety." The court explained that Bui identified appellant by

photograph, but "more importantly" by appellant's gang moniker and by his affiliation with a gang. The court found that "the circumstances of being familiar with the moniker and that gang affiliation . . . lends weight or at least arguably lends weight to the accuracy of [Bui's] identification." (6RT 846.) Further, the court noted that Chen was "privy to an alleged admission" by appellant that the "reason for the shooting" was that "one of the victims was a rival of [appellant] and of his friend, and that [appellant] indicated he had concerns for his own safety and took it upon himself to kill that individual." (6RT 846.)

Ultimately, the court ruled that it had "weighed the probative value of the offered testimony versus the potential prejudicial effect and finds that the probative value does outweigh the prejudicial effect." (6RT 846.) The court invited defense counsel to submit a limiting instruction to jury "in terms of how it may consider any references to gang affiliation." The court suggested that a modification of CALJIC No. 2.50 would be appropriate. (6RT 846-847.)

During the jury instruction conference, defense counsel requested the court give CALJIC No. 2.09, "Evidence Limited as to Purpose," and proposed the court modify the instruction with respect to gang affiliation.[73] (11RT 1714.) Later, defense counsel asked that CALJIC No. 2.09 be limited to "identification purposes only" because "there was reference made referring to [appellant] as Big John, or words along those lines," though

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[73] CALJIC No. 2.09 reads as follows: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

"[t]here was no evidence" presented "about what gangs do in particular."[74] The court suggested instead that defense counsel "fashion something along the lines" of CALJIC No. 2.50, instructing that "evidence was presented that, which if believed indicates [appellant] may be associated or affiliated with a gang, that such evidence was not presented for the purpose of demonstrating that he is prone or has propensity for violence, but is limited to any issue of identification by any witness and/or motive, and that they are prohibited from considering it for any other purpose." The court made clear that CALJIC No. 2.50 would "give you all that kind of language" and that those were the "only really relevant areas." (11RT 1840.)

Later still, the court reiterated that a modified CALJIC No. 2.50 would address defense counsel's concerns regarding a limiting instruction as to gang references. Defense counsel asked if the instruction would also apply to Tram, since "[e]vidence is that Mr. Tram is a gang member also." The court replied "[t]hat would be relevant too." The court explained that appellant's "identification is limited to these two matters, not that he is a gang member and he is a bad person, but only to the issue of identity and motive." Likewise, the court noted that Tram's gang affiliation was also relevant to prove identity and motive. Defense counsel asked the court if he was not permitted to "make any reference to Mr. Tram being a gang member." The court replied, "It's just that [CALJIC No.] 2.50 is really for the benefit of a defendant in the sense it tells the jury, look, we are limiting this evidence. We are not trying to say he is a bad person or whatever, but it's only these issues you consider." (12RT 1850.) However, the court noted "[t]here is no such instruction for a witness, that you can argue

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[74] Defense counsel's request that the court instruct the jury with CALJIC No. 2.09 was later withdrawn. (See 4CT 1016.)

whatever inferences you draw from Tram's affiliation, if any." (12RT 1851.)

The court instructed the jury with CALJIC No. 2.50, modified as follows:

> Evidence has been introduced for the purpose of showing that the defendant is or was affiliated or associated with an organization referred to as the "Lau Family" [*sic*]. This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:
>
> The identity of the person who committed the crime, if any, of which the defendant is accused;
>
> A motive for the commission of the crime charged.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(4CT 1030; 12RT 1889-1890.)

B. Applicable Law

Evidence Code section 1101, subdivision (a), provides that "'evidence of a person's character' – whether in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct – 'is inadmissible when offered to prove [the person's] conduct on a specific occasion.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 129, quoting Evid. Code, § 1101, subd. (a).) However, this prohibition does not preclude "'the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than [the person's] disposition to commit such an act,' including 'motive, opportunity, intent, preparation, [or] plan.'" (*Ibid.*, quoting Evid. Code, § 1101, subd. (b).) A trial court's

ruling under Evidence Code section 1101 is reviewed for abuse of discretion. (*People v. Jones*, *supra*, 57 Cal.4th at p. 930.)

Evidence Code section 352 provides that a court "'in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Valdez*, *supra*, 55 Cal.4th at p. 130, quoting Evid. Code, § 352.) "'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.'" (*Ibid.*, quoting *People v. Crew* (2003) 31 Cal.4th 822, 842.)

"While gang membership evidence does create a risk the jury will impermissibly infer a defendant has a criminal disposition and is therefore guilty of the offense charged [citation], 'nothing bars evidence of gang affiliation that is directly relevant to a material issue.'" (*People v. Montes* (2014) 58 Cal.4th 809, 859, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.) Indeed, the People are entitled to introduce evidence of gang affiliation where that evidence is relevant to issues such as motive and identity. (See *People v. McKinnon* (2012) 52 Cal.4th 610, 655; *People v. Williams*, *supra*, 16 Cal.4th at p. 191.) "'The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason.' [Citation.]" (*People v. Montes*, *supra*, 58 Cal.4th at p. 859, quoting *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.)

C. The Trial Court Did Not Abuse Its Discretion

First, to the extent appellant contends that the gang evidence was inadmissible character evidence under Evidence Code section 1101 (see AOB 106-107), this claim has been forfeited on appeal because appellant

failed to object on this basis at trial. (See *People v. Valdez*, *supra*, 55 Cal.4th at p. 130; Evid. Code, § 353.) Indeed, defense counsel only objected to the gang evidence on the grounds that it was irrelevant and unduly prejudicial. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 437 [objection at trial that evidence was "irrelevant and unduly prejudicial under Evidence Code section 352" was insufficient to preserve for appeal claim that evidence was inadmissible under Evidence Code section 1101"].)

However, even if this Court reaches the merits of appellant's Evidence Code section 1101 claim, this contention necessarily fails because the prosecutor did not introduce evidence of appellant's gang membership to prove his bad character, but rather to demonstrate motive and identity. (See *People v. Valdez*, supra, 55 Cal.4th at p. 129.) For the same reason, the trial court did not abuse its discretion in admitting evidence of appellant's gang affiliation under Evidence Code section 352. Any prejudicial effect the evidence might have had was vastly outweighed by the probative value of the evidence as to appellant's motive to kill Tram, as well as to his identity as the killer. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 655; *People v. Williams*, *supra*, 16 Cal.4th at p. 191.)

Evidence of appellant's gang affiliation was certainly relevant to explain appellant's motive to shoot Tram. The prosecutor's offer of proof detailed how the shooting was precipitated by an argument near the restroom in which Tram, a member of a rival gang, "had words" with one of appellant's gang associates, and that this associate told appellant about the argument, prompting appellant to shoot Tram and the other victims. (6RT 834-837.) As the prosecutor correctly asserted, the jurors would certainly want to know why appellant "[got] up from a bar stool, walk[ed] across a bar[,] [stood] in front of a booth," and shot four people in cold blood. Indeed, as the prosecutor made clear, "[t]here has to be a reason" for this behavior, and the gang motive provided that reason. (6RT 840.)

Accordingly, the evidence was clearly relevant to help explain appellant's motive to kill Tram. (See *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 588 ["Testimony linking defendant and [the victim] to rival gangs was admissible because it tended to explain the reason for the fight"].)

Further, the evidence was also relevant to demonstrate appellant's identity as the killer. The prosecutor explained that Le would identify appellant as a Lao Family member, identify the people appellant spoke with on the phone in the hours after the shooting as Lao Family members, and explain how he knew everyone in the International Club that night based on their gang affiliations, including appellant, to whom he was introduced by several members of Lao Family. Further, he would also testify that he received a phone call from a Lao Family member the morning after the shooting to meet at a house where appellant and other Lao Family members were present, in order to destroy the surveillance tape from the club. (6RT 838-840.) The prosecutor likewise argued that Bui repeatedly identified the shooter to police as "John from Lao Family," but that Bui was so afraid to testify to that fact in open court that the judge was forced to issue an attachment on him to ensure he would not "skip" town prior to testifying. As the prosecutor made clear, Bui's identification of appellant to police as a member of Lao Family was "critical" to determining whether or not Bui was a credible witness. (1RT 127-128.) Accordingly, the evidence was also clearly relevant to demonstrate appellant's identity as the shooter.

Based on the prosecutor's offer of proof, the trial court did not abuse its discretion in finding that "there exists a factual issue as to whether or not the shootings were motivated by gang affiliation considerations," given that the argument near the restroom involved appellant's associates and Tram, a rival gang member. (6RT 845.) Accordingly, the court appropriately found this evidence "would give the trier of fact at least some motivation or explanation why a person . . . apparently not involved in the earlier

altercation would respond violently toward the individual who was involved and any companions of that individual." (6RT 845-846.) Further, the court appropriately noted that Bui "expressed some reluctance" about testifying due to concerns for his safety, and that Bui identified appellant to police by appellant's gang moniker and by his affiliation with Lao Family, lending weight to "the accuracy of [Bui's] identification" of appellant. Accordingly, the trial court did not abuse its discretion in finding that the probative value of evidence of appellant's gang affiliation outweighed any prejudicial effect from that evidence. (6RT 846.)

D. Even if the Trial Court Erred, Any Error Was Harmless

Even if the trial court erred in admitting evidence of appellant's gang affiliation, any error was harmless. This Court will not "reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.'" (*People v. Earp* (1999) 20 Cal.4th 826, 878, quoting Evid. Code, § 353, subd. (b). Further, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes that trial *fundamentally unfair.*" (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S. Ct. 475, 116 L.Ed.2d 385].) Absent any "miscarriage of justice" or "fundamental unfairness," "state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Ibid.*, citing *People v. Earp*, *supra*, 20 Cal.4th at p. 878; see *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [finding that the *Watson* standard applies to a claim of erroneous admission of evidence].)

First, the jury was instructed with CALJIC No. 2.50, modified by the court to instruct that while evidence had been introduced linking appellant to Lao Family, that evidence, if believed, was not to be considered by the jurors to "prove that [appellant] is a person of bad character or that he has a disposition to commit crimes," and that it could only be considered "for the limited purpose of determining if it tends to show" the identity of the shooter or the shooter's motive for committing the crime. In fact, the jurors were specifically instructed that they were "not permitted to consider such evidence for any other purpose." (4CT 1030; 12RT 1889-1890.) "A jury is presumed to follow its instructions" (*Weeks v. Angelone*, *supra*, 528 U.S. at p. 234), and appellant has offered no evidence to rebut that presumption.

Second, as discussed in detail above, ample evidence was presented that appellant intended to kill his victims and that he acted with premeditation and deliberation. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Lee*, *supra*, 51 Cal.4th at p. 636; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295.) Further, in addition to Bui's identification of appellant as "John from Lao Family," both Le and Murillo clearly and unequivocally identified appellant as the shooter in photographic lineups and again at trial. (6RT 931-933; 7RT 987; 9RT 1380, 1392-1393.) The prosecution's case against appellant was so strong that any error committed by the court in admitting evidence of appellant's gang affiliation was thus harmless.

Appellant cannot demonstrate that any error committed by the trial court in admitting evidence of appellant's gang affiliation resulted in a "miscarriage of justice" or rendered his trial "fundamentally unfair." As evidence of prejudice, appellant notes that several prospective jurors indicated during jury selection that they were afraid that if the case involved gangs, that they would be the subject of gang retaliation. (AOB 112-113.) He goes on to argue that the supposed prejudice was "amplified"

when by the testimony of several witnesses that they feared for their safety and by the prosecutor's references during closing argument to appellant's gang affiliation. (AOB 113-115.) However, appellant fails to demonstrate that any of these prospective jurors actually made it onto the jury, and in any event, the jury demonstrated by its verdict that it was not influenced by fear of gang retaliation. Further, as discussed above, because the evidence presented against appellant was overwhelming, he cannot now demonstrate that the admission of gang evidence resulted in a "miscarriage of justice" or that it rendered his trial "fundamentally unfair." This claim fails.

VII. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH CALJIC NO. 2.83 REGARDING CONFLICTING EXPERT TESTIMONY

Appellant contends the trial court erred by refusing to instruct the jury with CALJIC No. 2.83 regarding conflicting expert testimony, and that this error violated his rights under the California and United States Constitutions. (AOB 115-119.) Appellant's contention is without merit.

A. Relevant Trial Court Proceedings

On January 23, 2003, just prior to the 402 hearing on the proposed testimony of Dr. Posey, the court discussed with counsel the proposed jury instructions. The court wondered aloud whether CALJIC No. 2.83, which instructs on conflicting expert testimony, should be given in light of Dr. Posey's proposed testimony and the earlier testimony of Dr. Scheinin, the deputy coroner.[75] (11RT 1717-1718.) Defense counsel requested that the instruction be given, though the prosecutor cautioned that a decision on this

[75] CALJIC No. 2.83 reads as follows: "In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the qualifications and believability of each witness, the reasons for each opinion and the matter upon which it is based."

instruction would depend on the content of Dr. Posey's testimony. Defense counsel then noted that he could not recall whether, to that point, more than one expert had testified. The court pointed out that assuming Dr. Posey testified about bullet "trajectories and things of that sort," he might have a "different interpretation" of that evidence than Dr. Scheinin, thus making appropriate the giving of CALJIC No. 2.83. Accordingly, the court "flagged" that instruction for revisiting after the 402 hearing. (11RT 1718.)

The following day, after the 402 hearing and defense counsel's decision not to call Dr. Posey (see 11RT 1761-1762, 1765), and after the both sides rested (see 11RT 1768, 1799), the court again addressed CALJIC No. 2.83. The court asked defense counsel if he was withdrawing his request for CALJIC No. 2.83 "[i]n light of the fact that there are no competing experts in terms of subject matter." Defense counsel acknowledged that the defense did not call an expert to testify, but he argued that because the People produced two pathologists and a firearms expert, it was "appropriate to have that inasmuch as they may have had testimony which was not entirely consistent with one another." The prosecutor replied that the instruction would be appropriate "if Dr. Posey had testified and come to a different conclusion than Dr. Scheinin," but the prosecutor failed to "see any conflict in any of the testimony of the experts." The court then ruled that CALJIC No. 2.83 would not be given, since "[t]here doesn't appear to be competing opinions on similar subject matters." (11RT 1807.)

B. Because There Was No Conflicting Expert Testimony, the Trial Court Properly Refused to Instruct with CALJIC No. 2.83

"'[J]ury instructions must be responsive to the issues' and they 'are determined by the evidence.'" (*People v. Sutic* (1953) 41 Cal.2d 483, 493, quoting *People v. Carmen* (1951) 36 Cal.2d 768, 772-773.) Section 1127b

requires that when an expert witness testifies at trial, the court must sua sponte instruct that the jury "may consider the [expert] opinion with the reasons stated therefor, if any, by the expert who gives the opinion," but the jury "is not bound to accept the opinion of any expert as conclusive." Thus, the jury "should give to it the weight to which they shall find it to be entitled" or simply "disregard any such opinion if it shall be found by them to be unreasonable." Further, the statute notes that "[n]o further instruction on the subject of opinion evidence need be given. (§ 1127b.)

The trial court complied with the requirements of section 1127b by instructing the jury with two instructions addressing expert testimony: CALJIC Nos. 2.80[76] and 2.82[77]. (12RT 1892-1894; 4CT 1031-1032.) However, there was no reason for the court to instruct with CALJIC No. 2.83 regarding conflicting expert testimony because, as the trial court correctly noted (see 11RT 1807), no conflicting expert testimony was presented to the jury. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1161 [finding that the trial court did not err by refusing to instruct with CALJIC No. 2.83 at the penalty phase because "no conflicting expert testimony was presented . . ."].) Indeed, while the People presented the testimony of several expert witnesses, including firearms examiner Deputy

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[76] CALJIC No. 2.80 instructed the jury to "consider the qualifications and believability of the [expert] witness, the facts or materials upon which each opinion is based, and the reasons for each opinion." Further, the jury was instructed that when considering the value of the expert's opinion, it could consider whether "any fact [that] has not been proved, or has been disproved," as well as the "strengths and weaknesses of the reasons on which it is based." Finally, the jury was cautioned to "[g]ive each opinion the weight you find it deserves" or simply "[d]isregard an opinion" it finds to be "unreasonable." (12RT 1892-1893; 4CT 1031-1032.)

[77] CALJIC No. 2.82 instructed the jury on how to interpret an expert witness's answer to a hypothetical question posed by counsel. (12RT 1893-1894; 4CT 1032.)

Fant, deputy coroner Dr. Scheinin, and criminalists Oto and Munoz, all of whom testified in support of the prosecution's theory of the case, the defense did not present any expert testimony. Thus, as the court correctly found, "[t]here doesn't appear to be competing opinions on similar subject matters." (11RT 1807.)

Nevertheless, appellant contends that while defense counsel did not present any conflicting expert testimony, "the prosecution experts gave materially conflicting testimony on similar subject matters." (AOB 117.) However, given that none of the expert witnesses gave conflicting testimony, this claim is clearly belied by the record. Further, even if there were minor discrepancies between the testimonies of the People's expert witnesses, any such discrepancies were, as the jury was instructed, entirely "trivial." (See CALJIC No. 2.21.1; 12RT 1887; 4CT 1028.)

Appellant contends that Deputy Fant testified that "the angles of some of the shots may have been altered because they passed through something," while he contends that Dr. Scheinin was "skeptical" that any of the bullets "passed through another person or object before hitting the victims." (AOB 117.) This supposed distinction mischaracterizes the testimonies of both witnesses, and, in any event, there was no conflict between them. The prosecutor asked Deputy Fant to explain why "some of the shots appear to have been fired almost straight on into the booth where some appear to have been fired from an angle into the booth," and Deputy Fant replied that "[s]ometimes the angle, because we don't have everything exactly the way it is, once the bullet goes through something it could change trajectory." (7RT 1135.) On cross-examination, Dr. Scheinin testified that "in theory," it was possible for a bullet to pass through one victim and enter another, though she did not see evidence of that sort of "ricochet" in this case. (9RT 1337-1340.) Dr. Scheinin, in agreement with Deputy Fant, testified quite explicitly that there was considerable evidence

that Tram, Tang, and Dang all suffered reentry wounds, meaning that appellant's bullets struck the victims at one point in their bodies, only to then reenter their bodies at another point. (See 9RT 1282-1283, 1288-1292, 1300-1301.) Thus, there was no dispute whatsoever between the two witnesses that several of the bullets passed through "something," meaning the victims' bodies, before altering course and reentering elsewhere in those same victims' bodies. Appellant's contention that these two witnesses gave conflicting testimonies is therefore clearly belied by the record.

Appellant likewise contends that criminalist Oto testified that "generally, once the slide or safety is off on a gun, it is easier to pull the trigger," while criminalist Munoz testified that "it becomes no easier to pull the trigger after the safety is off and an initial shot is fired," and Deputy Fant testified that "it was possible for a semi-automatic weapon to discharge at least two bullets accidentally." (AOB 118.) Again, however, appellant's mischaracterizes the witnesses' testimonies, and, in any event, there was no conflict between them. Oto testified on cross-examination that in many semi-automatic handgun models, including the one in question, if the safety is off, the slide pulled back, and the hammer cocked, it would be "easier" for a "more experienced shooter" to fire multiple times in quick succession. (8RT 1194-1195.) Munoz testified on cross-examination that semiautomatic handguns are "self-loading." While he did testify that it is not necessarily "easier" to shoot a second shot from a semiautomatic after the first has been fired because the shooter must still pull the trigger again to fire it, he testified that the shooter of a semiautomatic weapon needs only to "depress the trigger, let go," and then "fire again and again." (11RT 1794.) While appellant focuses on the word "easier," which, in both cases, was used by defense counsel, and not by the witnesses themselves, both witnesses testified to the same thing: that with a semi-automatic handgun, a shooter could pull the trigger multiple times

and fire shots in relatively quick succession. Deputy Fant testified that "accidental discharge[s]" do happen in cases where, "even without a hair trigger, . . . people by mistake pull the trigger and the gun goes off." She further testified that in her experience, accidental discharges only led to one shot being fired, though she had heard of a situation where two shots were fired. She noted, however, that she had never heard of an accidental discharge leading to 10 shots being fired. (7RT 1148-1149.) This testimony did not differ in any material way from the testimonies of Oto or Munoz since Deputy Fant merely confirmed that a semiautomatic handgun could be fired multiple times by pulling the trigger. Her testimony about accidental discharges could not have conflicted with the other testimony because neither Oto nor Munoz testified on the subject. Even so, her testimony only supported what the other witnesses had said, that a shooter can fire a semiautomatic handgun by pulling the trigger, and that shots from such a weapon can be fired quickly. Thus, as with the testimonies of Deputy Fant and Dr. Scheinin, appellant's contention that these three witnesses gave conflicting testimonies is clearly belied by the record.

Accordingly, as the trial court correctly found, because no conflicting expert testimony was presented to the jury, the instruction was unwarranted based on the evidence, and there was no reason to instruct the jury with CALJIC No. 2.83. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1161.)

C. Even if the Trial Court Erred, Any Error Was Harmless

Even if the trial court erred by refusing to instruct the jury with CALJIC No. 2.83, any error was harmless. This Court has found that "'the erroneous failure to instruct the jury regarding the weight of expert testimony is not prejudicial unless the reviewing court, upon an examination of the entire cause, determines that the jury might have rendered a different verdict had the omitted instruction been given.'"

(*People v. Williams* (1988) 45 Cal.3d 1268, 1320, quoting *People v. Lynch* (1971) 14 Cal.App.3d 602, 610, internal citations omitted; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Even without CALJIC No. 2.83, the trial court gave numerous instructions that provided the jury with sufficient guidance to weigh the credibility of the expert witnesses. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1262.) As in *Virgil*, the trial court gave the following instructions: CALJIC No. 2.00, "Direct and Circumstantial Evidence – Inferences"; CALJIC No. 2.20, "Credibility of Witness"; CALJIC No. 2.21.1, "Discrepancies in Testimony"; CALJIC No. 2.21.2, "Witness Willfully False"; CALJIC No. 2.27, "Sufficiency of Testimony of One Witness"; and CALJIC No. 2.80, "Expert Testimony." (12RT 1883-1884, 1886-1888, 1892-1893; 4CT 1026, 1028-1032; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1262.) More importantly, the court gave CALJIC No. 2.22, which instructed the jury on "Weighing Conflicting Testimony." (12RT 1888-1889; 4CT 1029.)

Here, as in *Virgil*, it is clear that "[c]onsidering the instructions as a whole," this Court should be "satisfied the jury received ample guidance on how to evaluate conflicting testimony." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1262; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) It is worth noting as well that in *Virgil*, where the defendant challenged the failure to instruct with CALJIC No. 2.22 regarding the weighing of conflicting testimony, this Court found the error harmless in part because the trial court instructed the jury with CALJIC No. 2.83 regarding the weighing of conflicting expert testimony. (*Ibid.*) Accordingly, here, as in *Virgil*, in the context of the many other instructions given, "there is no evidence the absence of [CALJIC No. 2.83] hampered the jury's ability to evaluate the evidence" in this case. (*Ibid.*)

Further, as discussed at length above, the evidence in this case overwhelmingly showed that appellant intended to kill the victims and that he acted with premeditation and deliberation. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Lee*, *supra*, 51 Cal.4th at p. 636; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295.) Thus, "[b]ecause it is not reasonably probable that the jury would have reached a different result had [CALJIC No. 2.83] been given," any error in refusing to give that instruction was harmless. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1262.) This claim fails.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.25 REGARDING LYING IN WAIT

Appellant contends that the trial court erred by instructing the jury with CALJIC No. 8.25 regarding lying in wait, and that this error violated his rights under the California and United States Constitutions. (AOB 119-126.) Appellant's contention is without merit.

A. Relevant Trial Court Proceedings

During the jury instruction conference, the court raised CALJIC No. 8.25, "[M]urder by means of lying in wait." The court ruled that the last two paragraphs of that instruction, addressing the definitions of premeditation and deliberation, be deleted since those definitions were similar to definitions given in another instruction. Defense counsel objected to this instruction "in its entirety," arguing that it was not "appropriate," "given the evidence that we have here." The court overruled the objection. (11RT 1803.)

The court gave CALJIC No. 8.25, which instructed the jury as follows:

> Murder which is immediately preceded by lying in wait is murder of the first degree.

> The term "lying in wait" is defined as a waiting or watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> The word "premeditation" means considered beforehand.
>
> The word "deliberation" 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.

(12RT 1899; 4CT 1035.)

During the People's closing argument, the prosecutor discussed the theory of lying in wait, as well as CALJIC No. 8.25. (12RT 1971-1979.) The prosecutor explained to the jury that it could find appellant guilty of first degree murder either by finding that appellant committed "willful, deliberate, [and] premeditated" "intentional killings," or that appellant was lying in wait for the victims when he shot them, and that "sufficient evidence" was presented for the jury to convict appellant under either theory. (12RT 1972-1973.) The prosecutor argued that after the argument near the restroom and after Diep spoke with appellant while appellant was seated at a table, appellant got up from his table and walked over to the bar, where he waited for a "period of time" before the shots were fired. From the bar area, appellant would have an "excellent view" of the people sitting in the booth, and the victims were "caught unaware" when they were shot. (12RT 1973-1974.) The evidence showed that appellant waited until Tram was not paying attention to him, and that, based on the gunshot wound to the back of Tram's head, appellant either shot Tram from behind the booth "without being seen" or else shot Tram from the front while Tram was facing away. The prosecutor argued that appellant waited for the

"opportune time to take out" Tram before Tram could pull out a gun, and that by shooting him in the back of the head, appellant "incapacitated" him. (12RT 1974-1975.) Further, after appellant threw Bui to the ground, he continued to fire into the booth, where the victims were "trapped" behind several tables, ensuring they "couldn't get out." In other words, appellant "was able to make a surprise attack," given that he "watched and he waited for the opportune time" to strike. (12RT 1976.)

After the prosecutor finished his closing argument, the court asked whether someone could be convicted of first degree murder on the theory of lying in wait based on implied malice. Defense counsel argued that someone could not be so convicted, and the prosecutor countered that "lying in wait does not require intent to kill." (12RT 1988-1989.) The court noted that according to the use notes for relevant jury instruction, "lying in wait doesn't create murder but it elevates murder to the first degree." The court noted further that "where there is no intent to kill, then if we are going to find murder that's elevated to first degree, that would have to be premised on implied malice." The prosecutor agreed. The court then asked: "My question to you is where there is no intent to kill, then if we are going to find murder that's elevated to first degree, that would have to be premised on implied malice." The prosecutor agreed. (12RT 1989.) The court then asked whether someone who lies in wait and then accidentally kills someone could be found guilty of first degree murder. The prosecutor responded that he could. (12RT 1989-1990.) The court asked counsel to review two cases: *People v. Hyde* (1985) 166 Cal.App.3d 463, and *People v. Thomas* (1953) 41 Cal.2d 470, prior to the next court date. The court explained that it did not want to "have a mistake" in argument, "compounded" by a diagram used by the prosecutor during closing argument that the court was "not certain in myself is correct as far as no intent to kill for lying in wait." (12RT 1990.)

The following day, the court ruled that based on a recently-published case, *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, and a case cited therein, *People v. Ceja* (1993) 4 Cal.4th 1134, "a murder based on implied malice can be elevated to a first-degree murder by virtue of the defendant lying in wait." (13RT 2011-2012.)

Later, during defense counsel's closing argument, he argued that "[t]here is certainly insufficient evidence" to support the lying in wait theory. (13RT 2059.) In the People's rebuttal argument, the prosecutor reiterated that the jury could find appellant guilty of first degree murder under the lying in wait theory without finding that appellant had the intent to kill. (13RT 2072-2073.)

B. Applicable Law

"A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof." (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) The trial court's decision whether to instruct on a particular theory is reviewed de novo. (*Ibid.*) "In so doing, [this Court] must determine whether there was indeed sufficient evidence to support the giving of a lying-in-wait instruction." (*Ibid.*) In other words, this Court must determine "whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder based on a lying-in-wait theory." (*Ibid.*; see *People v. Ceja*, *supra*, 4 Cal.4th at p. 1137.)

Under section 189, a murder committed "by means of" lying in wait "is murder of the first degree." (§ 189.) As a theory of murder, lying in wait is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Ruiz* (1988) 44 Cal.3d 589, 614.) "'The requirements for lying in wait for first degree murder under . . . section 189 are 'slightly different' from the lying-in-wait special circumstance under . .

. section 190.2, subdivision (a)(15).'" (*People v. Moon* (2005) 37 Cal.4th 1, 22, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 388.) Murder by means of lying in wait does not require that the defendant possess the intent to kill, only that he displays "'a wanton and reckless intent to inflict injury likely to cause death." (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1148, quoting *People v. Ruiz*, *supra*, 44 Cal.3d at p. 614; *People v. Streeter* (2012) 54 Cal.4th 205, 246.) By contrast, "the lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . .'" (*Id.* at p. 1149, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) Because the special circumstance requirements for lying in wait are more "stringent" than for first degree murder, if this Court finds that "the evidence supports the special circumstance, it necessarily supports the theory of first degree murder." (*People v. Moon*, *supra*, 37 Cal.4th at p. 22.)

C. Because Substantial Evidence Was Presented in Support of the Lying in Wait Theory, the Court Properly Instructed the Jury with CALJIC No. 8.25

Appellant contends that insufficient evidence was presented in support of CALJIC No. 8.25 because the prosecutor did not prove the elements of "concealment" and "substantial period of watching and waiting." (AOB 120-122.) However, under the prevailing authority in cases like *Moon* and *Gutierrez*, the People did not need to prove true these elements for a reasonable jury to find appellant guilty of first degree under a lying in wait theory. Instead, the People needed only to prove that appellant displayed a "wanton and reckless intent to inflict injury likely to cause death." (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1148; *People v.*

Moon, *supra*, 37 Cal.4th at p. 22.) Given that appellant fired a semiautomatic handgun numerous times at a booth full of victims who were essentially trapped behind several tables and unable to escape the carnage (see 6RT 918-920, 926, 954-955; 7RT 991, 1061, 1070-1071), there was certainly substantial evidence presented to support a finding that appellant displayed a "wanton and reckless intent to inflict injury likely to cause death," and that he was thus guilty of three counts of first degree murder under a lying in wait theory. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1148; *People v. Moon*, *supra*, 37 Cal.4th at p. 22.)

In *People v. Stanley* (1995) 10 Cal.4th 764, a case relied upon by appellant, this Court seemed to apply the more stringent requirement to cases challenging the sufficiency of the evidence for first degree murder under a lying in wait theory, in addition to cases challenging the sufficiency of the evidence for the lying in wait special circumstance. (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 795-796; cited as authority in *People v. Gurule* (2002) 28 Cal.4th 557, 630; but see *People v. Poindexter* (2006) 144 Cal.App.4th 572, 579 [finding that while *Stanley* and *Gurule* used the special circumstance standard "as the definition of lying in wait for first degree murder purposes, . . . other Supreme Court authority arguably undercuts this position"].)

However, even under the more stringent standard for finding true the lying in wait special circumstance, substantial evidence was nevertheless presented for a reasonable jury to find appellant guilty of first degree murder. "The element of concealment is satisfied by showing 'that a defendant's true intent and purpose were concealed by his actions and conduct. It is not required that he be literally concealed from view before he attacks the victim.'" (*People v. Combs* (2004) 34 Cal.4th 821, 853, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 500, internal quotation marks omitted.) For the element of "watching and waiting," being

"watchful" "does not require actual watching; it can include being 'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise." (*People v. Streeter*, *supra*, 54 Cal.4th at p. 247, quoting *People v. Sims*, *supra*, 5 Cal.4th at p. 432.)

Here, after the argument near the restroom, and after Diep spoke with appellant, appellant walked over the bar. (See 6RT 917-918.) Some 10 to 15 minutes after the initial argument, appellant shot the victims. (6RT 911.) As the prosecutor argued in his closing argument, appellant clearly concealed his true intent and purpose from the victims, while remaining alert and vigilant to take them by surprise. Indeed, while the four victims sat in the booth, appellant remained at the bar for some period of time, giving him an "excellent view of the people seated in the booth." He then left the bar area and either approached the victims from behind or else shot Tram while his head was turned, because Tram suffered a bullet wound to the back of the head. He then opened fire on the other victims, catching them "unaware" and trapping them in their seats, unable to escape. (See 12RT 1973-1974.) It is thus clear from the evidence presented that even under the more stringent standard for lying in wait usually applied to the special circumstance, substantial evidence was presented for a reasonable jury to find appellant guilty of murder under the lying in wait theory. (See *People v. Stanley*, *supra*, 10 Cal.4th at pp. 795-796; *People v. Livingston* (2012) 53 Cal.4th 1145, 1172-1173 [finding sufficient evidence in support of the lying-in-wait special circumstance where the defendant watched and waited for an "opportune time to act" before engaging in a "surprise attack on unsuspecting victims from a position of advantage"].)

Appellant also contends the lying in wait instruction was "unconstitutionally inadequate" because it failed to inform the jury that it could not find him guilty of first degree murder based on a lying in wait theory if it found that appellant "acted in anger, in response to

provocation," and that lying in wait "required a substantial period of watching and waiting." (AOB 122-124.) Initially, because appellant failed to "request clarification of an otherwise correct instruction," he has forfeited this claim on appeal. (*People v. Lee*, *supra*, 51 Cal.4th at p. 638.) In any event, there was no reason for the court to instruct the jury on how to interpret provocation evidence. First, there was simply no evidence offered to support a finding of provocation, and second, CALJIC No. 8.25 appropriately instructed the jury that murder by lying in wait demonstrated a state of mind "equivalent to premeditation or deliberation." (12RT 1899; 4CT 1035.) Further, there was no reason for the court to instruct the jury that lying in wait "required a substantial period of watching and waiting" since, as discussed above, this element need not be proven for a reasonable jury to find appellant guilty of first degree under a lying in wait theory. Indeed, CALJIC No. 8.25 appropriately instructs the jury that lying in wait "need not continue for any particular period of time." (12RT 1899; 4CT 1035.)

Accordingly, because substantial evidence was presented for a reasonable jury to convict appellant of three counts of first degree murder under the lying in wait theory, the court was correct to instruct the jury with CALJIC No. 8.25, and there was no reason for the court to instruct the jury as appellant suggests. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1206.)

D. Even if the Trial Court Erred, Any Error Was Harmless

Even if the trial court erred by instructing with CALJIC No. 8.25, any error was harmless. To find such an error harmless, this Court must "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory . . . ." (*People v. Chun*, *supra*, 45 Cal.4th at p. 1203.) In *Chun*, this Court, relying upon a concurring opinion in a United States Supreme Court case, found that in a case like the instant one, an error "'can

be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.'" (*Id.* at p. 1204, quoting *California v. Roy* (1996) 519 U.S. 2, 7 [117 S.Ct. 337, 136 L.Ed.2d 266] (conc. opn. of Scalia, J.).) In other words, "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" for first degree murder without relying upon the lying in wait theory, then any error instructing the jury with CALJIC No. 8.25 is harmless. (*Id.* at p. 1204.)

Here, even without relying on the lying in wait theory, the jury could still nevertheless have convicted appellant of three counts of first degree murder. In addition to CALJIC No. 8.25, the court likewise gave CALJIC No. 8.20, which instructed the jury, in part, that "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." The instruction defined "willful" as "intentional," "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action," and "premeditated" as "considered beforehand." (12RT 1897-1899; 4CT 1034.) Further, the prosecutor argued at length during closing argument that the jury could find appellant guilty of first degree murder based on a theory of premeditation and deliberation. (See 12RT 1961-1971.)

As discussed above, ample evidence was presented that appellant intended the kill his victims and that he acted with premeditation and deliberation. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Lee*, *supra*, 51 Cal.4th at p. 636; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295.) Further, the jury found true as to all counts that appellant "personally and intentionally discharged a handgun" (4CT 1048-1050, 1052), meaning the jury believed that appellant had a loaded

handgun with him at the scene of the crime, which is circumstantial evidence that appellant "had considered the possibility of a violent encounter." (See *People v. Lee*, *supra*, 51 Cal.4th at p. 636.) Thus, even without relying on the lying in wait theory, there is sufficient evidence for this Court to conclude beyond a reasonable doubt that the jury based its verdict on the theory of premeditation and deliberation. For this reason, any error was harmless beyond a reasonable doubt. (See *People v. Chun*, *supra*, 45 Cal.4th at pp. 1203-1204.) This claim fails.

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S RIGHTS TO PRESENT A DEFENSE AND TO CROSS-EXAMINE WITNESSES AGAINST HIM WHEN IT EXCLUDED THE INTERNATIONAL CLUB PERMIT HEARING RECORDS

Appellant contends the trial court improperly excluded International Club permit hearing records that he contends were "relevant" and "essential" to show that he lacked the intent to commit first degree murder as well as to impeach Bui's credibility. (AOB 126-147.) Appellant's contention is without merit.

A. Relevant Trial Court Proceedings

1. Pretrial Proceedings

Prior to trial, defense counsel submitted his guilt phase witness list, including several people involved with the International Club's City of El Monte business permit. (4CT 933.) On December 9, 2012, the prosecutor argued that to the extent defense counsel intended to introduce evidence about "prior incidents" at the International Club and efforts by the City of El Monte to take the club's business permit away, the People would request a 402 hearing so that defense counsel could present an offer of proof regarding the relevancy of that evidence. (3RT 381.) The prosecutor argued that "if there is even any relevancy," that relevancy would be "so

slight and the undue consumption of time in going into a number of previous incidents, hearings before the City of El Monte, would be such that the evidence would not be admissible." (3RT 381.)

Defense counsel agreed that a 402 hearing would be appropriate. He argued that the evidence would be relevant as to Bui's credibility, since Bui was the co-owner of the club. He argued that his proposed witnesses would testify regarding several incidents that occurred at the club and "why there was supposed to be increased security." Ultimately, he argued that "certain conditions" did not exist on the night in question and that that would be "relevant for a jury to consider in terms of Mr. Bui's credibility in this matter." (3RT 385.)

The prosecutor explained that he "want[ed] testimony" because the business permit reports defense counsel intended to introduce contained hearsay that would render them inadmissible, barring an exception. Accordingly, he requested that defense counsel indicate which specific issues he planned to introduce, since testimony regarding these issues would be the "only way" to determine whether the reports were based on hearsay. (3RT 386.)

2. 402 Hearing

On January 6, 2003, the court held the 402 hearing. (3RT 402.)

a. Detective Gary Haidet

El Monte Police Department Detective Gary Haidet testified in June 1999 at a City of El Monte permit committee meeting regarding the International Club. He had been asked to investigate all activity at the club from several years prior to the shooting to and including the date of the shooting. (3RT 407, 409.) He reviewed documented police calls to the club, meaning "any type of call needing response or extra patrol by officers going there." (3RT 408-409.) He found that the International Club had

"more calls for service" than any other club in El Monte, including 51 police calls from several years prior to the shooting to and including the date of the shooting. (3RT 409-411.) Detective Haidet recommended that the committee not renew the International Club's permit, based on the "activity at the location," including "an increase in gang activity, Asian gang activity," as well as the fact that the club's location was not easy to access for police. (3RT 412.) He also heard through interviews that underage persons who were not allowed in through the front door of the club were allowed access through a rear door by club employees or security guards. Detective Haidet had concerns about security at the club, and he learned during an interview that a metal detector at the club was not operable. (3RT 412-413.) He recognized that Bui would have been in charge of security at the club given his position as owner, but he could not recall any specific information regarding any ties between Bui and gang members at the club. (3RT 413-414.) Over the time period in question, Detective Haidet learned that six police calls had been placed regarding shootings at the club. In addition to the 51 radio calls, officers responded to the club on 49 other occasions as part of their patrol duties, given that "any time you have a large crowd at any type of event you're going to have officers keeping an eye just to make sure nothing happens." (3RT 414-415.)

On cross-examination, Detective Haidet testified that prior to being assigned to this investigation, he had been to the International Club five or six times on patrol, and that he visited the club again three or four times during the investigation. He could not recall ever speaking with Bui or the club's other co-owner on any of those occasions, though he recalled speaking to several employees. (3RT 416-418.) While he read the police reports from several of the calls to the International Club, he never conducted any independent investigation into those incidents. He did not

determine how many of the 100 police calls to the club resulted in criminal prosecution, and he noted that the calls could have been for "anything." (3RT 418-420.) He learned that the International Club drew from a relatively large clientele of young Asians, both male and female, and that a "good portion" of the people who visited the club were members of various Asian gangs. (3RT 422-423.) The prosecutor reviewed several of the "major crimes" committed at the International Club over the years, including a murder, a drive-by shooting, an incident where one of the owners brandished a weapon, and several batteries. (3RT 424-426.)

On redirect, defense counsel had Detective Haidet review the International Club's operating permit. (3RT 426-427.) He noted that the permit required the club to satisfy certain security requirements, including that the club use the services of a private security company which employs licensed security guards to provide on-site security. (3RT 427-428.) The permit also required the club to have video surveillance and a metal detector. He acknowledged that in deciding to recommend against the International Club renewing its permit, he considered the fact that the club was not abiding by its permit's security requirements. (3RT 428-429.)

b. Detective William Howell

Los Angeles County Sheriff's Department Detective William Howell had a background in the investigation of Asian organized crimes, and he recognized the International Club as an Asian gang "hangout." (3RT 431-432.) Based on his investigation into the club, he did not believe that Bui was a member of any gang. (3RT 432-433.) However, he knew that two factions of the Wah Ching gang and a faction of the V-Boys gang frequented the club. Detective Howell could not recall testifying at a permit hearing for the International Club or providing information for such a hearing. (3RT 433-434.)

On cross-examination, Detective Howell testified that in his capacity as Asian organized crime investigator, he visited the International Club several times. (3RT 435-436.) He knew the club to be a hangout for Asian gangs though he did not know Bui to have any gang affiliation. At some point during one of Detective Howell's investigations, appellant admitted to him that he was a member of Lao Family. (3RT 436-438.)

c. Argument by Counsel

Defense counsel argued that the evidence adduced at the hearing was both "relevant" and "admissible" with respect to how the International Club shooting occurred. (3RT 439.) He argued it was "extremely vital" for the jury to hear evidence that the club was not abiding by its own security requirements, and that this was relevant to a determination of Bui's credibility, since he was in charge of the club's security, and yet he did not ensure that proper security procedures were being followed. (3RT 440.)

The prosecutor replied that even if the court were to find the evidence admissible, "there's some real problems with hearsay objections and having the appropriate people testify." (3RT 440.) The prosecutor admitted that "this was an establishment that unfortunately drew a large number of Asian gang members." (3RT 441.) He did not know whether anyone could testify that the metal detector was not working on the night in question. However, he argued that whether or not the metal detector was working, and whether or not Bui abided by the security requirements set forth in the permit, this "might be evidence in a civil case," but "in no way is it evidence in a criminal case." (3RT 442.) He argued that to let in the evidence in question would be "extremely time consuming" since it would involve delving into a great deal of past incidents at the club, and he did not understand the relevance of it. Further, he argued that any testimony regarding the past police reports would be based on hearsay. (3RT 442-443.) He asked the court how evidence of 100 service calls, including

roughly half of them "self-initiated," would help the jury reach a verdict in this case, especially since Detective Haidet could not recall ever speaking with Bui during any of those service calls. (3RT 443.)

d. Trial Court's Tentative Ruling

The trial court tentatively sustained the prosecutor's objection to the evidence adduced at the 402 hearing, since "it's clear what the two witnesses have to offer." The court sustained the objection on "hearsay and relevancy" without prejudice so the defense could perhaps explain the relevance of the evidence during Bui's testimony. (3RT 443.) The court made clear that it "kind of escapes me" how the evidence would be relevant to the trial or to Bui's credibility, and the court noted "there's an enormous amount of hearsay evidence here." However, the court explained it would "revisit the ruling" after Bui testified on direct examination, that it did not intend to limit defense counsel's cross-examination of Bui regarding "whatever motivations he's had," and that it would "just have to take objections as they come" during defense counsel's cross-examination. (3RT 444.)

3. Bui's Testimony

Bui testified on direct examination that when he saw people arguing near the restroom, it was his "job as an owner" to "talk" to them and encourage them to "be friendly with each other, don't fight, don't argue." (7RT 1053.) On cross-examination, defense counsel asked Bui if "part of [his] duties at the International Club" involved "assum[ing] security concerns." Bui replied "[n]o," but he acknowledged his earlier comment that he would address problems as they arose in the club. He explained that he transferred security concerns to his co-owner, but that on the night in question he "assume[d] such a duty" because his co-owner was not there. (7RT 1083.) He explained further that he went to the club that night "for

fun" and that he could not "handle everything from A to Z," but that when he saw the argument by the restroom, he "just had to solve it." (7RT 1084.) He employed security guards at the club and the club had a metal detector, though he did not check that night to see if it was working properly, since he was "not in charge" that night. (7RT 1086.) He later clarified that the club's manager was in charge at the time. (7RT 1100-1101.)

4. Trial Court's Final Ruling

Later, after Bui testified, defense counsel asked the court to permit him to bring in evidence that the International Club was a "gang hangout" and "information having to do with Mr. Bui being involved as a security person." Counsel argued that Bui's testimony "gave the jurors the idea that in fact he didn't do these things" and he believed "that that's contrary to what some witnesses may testify to." (8RT 1247.)

The court responded that based on the testimony presented to that point, "it's clear . . . that persons associated with at least three criminal street gangs were present that evening, and that on the night of this event Mr. Bui was in the location." However, the court noted that "by his own testimony he did not involve himself in any sense of the word to security other than his attempt to intervene when the first gunshot took place." (8RT 1250.) The court informed defense counsel that "unless you have some additional argument or some additional evidence, the Court's intention is to abide by its earlier ruling in this area." (8RT 1250-1251.)

Defense counsel replied that Bui's role at the club that night was "different than what he testified to here by virtue of the investigation that was done and found that in fact he played a more active role." Counsel cited the incident where Bui supposedly brandished a gun, "suggest[ing] that he was doing it in some fashion as to provide security to that club." He argued that Bui was "acting as a security person" when he intervened that night, and counsel did not "want the jury to think . . . that Mr. Bui has never

done this, he just happened to be there and jumped in." Counsel explained that Bui's "job description and what he's done in the past would lead a juror to believe that, in fact, he's very comfortable at jumping in between these two, and he's done it in the past and that's what he does there." (8RT 1251.)

The court asked for the relevance of that evidence. Defense counsel explained Bui's testimony that he intervened in the shooting and then falling down to the ground and covering his head was not "consistent with how he has conducted himself in the past in that role as a security agent or officer." (8RT 1251-1252.)

The court did not "see the relevancy." The court explained that while Bui might have had a gun in the past, there was no evidence to suggest he had a gun on the night in question, and "perhaps if he did he might have intervened sooner." The court made clear that "the facts are the facts," that Bui "did what he indicated," and that his testimony "corresponds with at least some other witness." The court explained that if defense counsel presented the testimony of a percipient witness who would offer a "different account," then the court would revisit the issue at that time." (8RT 1252.)

B. Applicable Law

"[O]nly relevant evidence is admissible (Evid. Code, § 350), and relevance is defined as 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' (*Id.*, [Evid. Code,] § 210)." (*People v. Jones*, *supra*, 57 Cal.4th at p. 947.) "Evidence that is relevant still may be excluded if it creates a substantial danger of prejudicing, confusing, or misleading the jury, or would consume an undue amount of time." (*People v. Brady* (2010) 50 Cal.4th 547, 558.) The trial court has "broad discretion" to determine whether evidence is relevant, and the trial court's determination shall not be disturbed unless the

court "acted in an arbitrary, capricious or patently absurd manner." (*People v. Jones*, *supra*, 57 Cal.4th at p. 947; see also *People v. Gurule*, *supra*, 28 Cal.4th 557, 614; *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.)

Further, the trial court has "wide latitude under state law to exclude evidence offered for impeachment that is collateral and has no relevance to the action." (*People v. Contreras*, *supra*, 58 Cal.4th at p. 152; see *People v. Homick* (2012) 55 Cal.4th 816, 865; *People v. Mayfield* (1997) 14 Cal.4th 668, 748.) "This exercise of discretion necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature." (*Ibid.*) This broad discretion "'empowers courts to prevent criminal trials from degenerating into nitpicking wars or attrition over collateral credibility issues.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 301, quoting *People v. Wheeler* (1992) 4 Cal.4th 284, 296.)

"'"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." [Citation.]'" (*People v. Gurule*, *supra*, 28 Cal.4th at p. 620, citing *People v. Jones* (1998) 17 Cal.4th 279, 305; see also, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Indeed, "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

The confrontation clause of the Sixth Amendment guarantees the right of an accused to be confronted with the witnesses against him. The "'"main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*"' [Citation]." (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137, quoting *Delaware v. Van Arsdall*

(1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674].) However, the confrontation clause guarantees only the "*opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*People v. Wilson* (2008) 44 Cal.4th 758, 794, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [106 S.Ct. 292, 88 L.Ed.2d 15].) While it is true that cross-examination to test the credibility of prosecution witnesses is given wide latitude (*People v. James* (1976) 56 Cal.App.3d 876, 886), "'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.'" (*People v. Harris* (2008) 43 Cal.4th 1269, 1292, quoting *People v. Ayala*, *supra*, 23 Cal.4th at p. 301.) Moreover, "if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 996.)

C. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Sixth Amendment Rights

Appellant contends the evidence pertaining to the International Club's permit was relevant for a number of reasons, mostly to impeach Bui's credibility. (AOB 135-136.) However, the trial court did not abuse its "broad discretion" in finding that any collateral evidence pertaining to the club's permit was entirely irrelevant.

The trial court appropriately did not "see the relevancy" of the club permit evidence, either as to the substance of the trial or to impeach Bui's testimony. (8RT 1252.) As to the substance of the trial, it is difficult, if not impossible, to understand how evidence suggesting the International Club had trouble maintaining its business permit could have been at all relevant.

The club's alleged security problems and history of violent activity had absolutely no tendency to prove or disprove any disputed fact of consequence in this case, which centered primarily on whether appellant intended to kill the victims. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 947.) Even if the club had a history of violent activity and even if the club's metal detector did not work in the past or on the night in question, these issues had no bearing whatsoever on appellant's intent to kill the victims and had no bearing on appellant's defense: that he acted in the defense of another when he shot the victims. Accordingly, the court was correct when it found that evidence of the club's permit problems would have been entirely irrelevant to the substance of the case.

As to the impeachment of Bui, the court acted well within its broad discretion in excluding evidence to impeach the witness on collateral matters, such as the club's security history. As the court noted, whether or not the club had security problems in the past, whether or not the club's metal detector was working properly on the night in question or in the past, and whether or not Bui was in charge of security at the club on the night in question, Bui's actions that night were not in dispute. As the court made clear, "the facts are the facts" and Bui "did what he indicated." (8RT 1252.) Bui testified that he broke up the argument near the restroom before sitting with Tram and the other victims at the booth near the bar, and that when appellant started shooting, Bui jumped up and tried to stop him before being thrown to the ground. (See 7RT 1053-1061.) As the court noted, if defense counsel were to present the testimony of a percipient witness who would offer a "different account" than Bui, then the court would perhaps revisit the issue of impeaching him on collateral matters. (8RT 1252.) However, because defense counsel did not present any such witness to contradict in any way Bui's retelling of the events surrounding the shooting, the court had "wide latitude" to restrict defense counsel's

impeachment of Bui with entirely collateral matters. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 152.)

Further, even if the evidence had any relevancy to the instant case, opening the door to this line of evidence would have caused undue delay to the trial and confused the jury. (See Evid. Code, § 352; *People v. Contreras*, *supra*, 58 Cal.4th at p. 152.) As the trial court noted as part of its tentative ruling, appellant's proposed evidence contained an "enormous amount of hearsay evidence." (3RT 444.) Indeed, the prosecutor argued that to allow one of the officers to testify as to police reports from the numerous prior incidents at the club would necessarily mean that the entirety of the officers' testimony would "deal[ ] with hearsay." (3RT 442-443.) To that end, the prosecutor argued further that hearing testimony on a number of past incidents, some from years before the shooting, would create an "undue consumption of time," such that it would vastly outweigh any probative value the evidence might have. (3RT 381.) Indeed, to allow defense counsel to present evidence pertaining to various incidents from the club's history, some going back several years, would necessitate many "trials within a trial" that would have entailed an "undue investment of time" and would certainly have "distracted the jury" from what should have been the focus of their deliberation. (See *People v. Fuiava*, *supra*, 53 Cal.4th at p. 723.)

Appellant's constitutional rights were not violated in this case. As stated above, the trial court properly exercised its discretion when it precluded defense counsel from cross-examining Bui on issues pertaining to the club's history of security problems. This limitation was reasonable and appellant was not denied the opportunities to cross-examine Bui or to present a defense. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-679.) Any evidence regarding the history of club security was entirely irrelevant to the issues before the jury and entirely collateral to any issues

of impeachment, and introducing such evidence would have caused undue delay and confused the jury. Accordingly, any such evidence was, at best, "subsidiary," and thus the exclusion of this evidence did not impair appellant's due process right to present a defense. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1103.)

The reasonable limitations imposed by the trial court did not violate the confrontation clause as well because defense counsel was able to thoroughly cross-examine Bui. On cross-examination, defense counsel questioned Bui about his co-ownership of the club about his level of involvement with the club's security. Bui testified that he was not in charge of security at the club, though he acknowledged that when a problem arose in the club when his co-owner was not there, he would take care of it. (7RT 1083-1084.) Bui also testified that the club employed security guards and a metal detector, though he did not know whether the metal detector was working on the night of the shooting. (7RT 1086-1087.) Defense counsel also questioned Bui about Tram's conduct that night, about the argument near the restroom that preceded the shooting, about Bui's attempt to break up that argument, and about the shooting itself. (7RT 1088-1094.) Defense counsel questioned Bui about the statement he gave to police several hours after the shooting, and about whether or not Bui grabbed appellant's gun during the shooting. (7RT 1094-1099.) Defense counsel also questioned Bui about his grand jury testimony that he covered his face after he was thrown to the ground, prompting Bui to clarify that he saw the "first few shots" before he covered his face. (7RT 1104-1105.) Thus, the record shows that defense counsel had ample opportunity to challenge Bui's credibility and pursue his theory that Bui somehow interfered with appellant's gun or the firing of it, causing appellant to kill three of the victims inadvertently. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-679.) Indeed, the confrontation clause

did not guarantee appellant the opportunity to cross-examine Bui "in whatever way, and to whatever extent" he wished. (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 20.) Therefore, there was no confrontation clause violation.

D. Even if the Trial Court Erred, Any Error Was Harmless

Assuming error, reversal is not warranted unless, after examining the entire case, "it is reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1093 [finding the failure to admit defendant's proffered evidence harmless under *Watson* because "it is not reasonably probable that admission of the proffered evidence would have garnered a more favorable result for defendant"].) Federal constitutional error must be harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Whether an error is harmless depends on a host of factors, including the importance of the testimony, "whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Here, the evidence clearly shows that any alleged error was harmless under either standard. Indeed, as discussed at length above, ample evidence was presented that appellant intended the kill his victims and that he acted with premeditation and deliberation. (See *People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Lee*, *supra*, 51 Cal.4th at p. 636; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295.) The prosecution's case against appellant was so strong that any error committed by the court in

restricting the cross-examination of Bui using wholly irrelevant evidence was thus harmless under any standard. This claim fails.

X. TO THE EXTENT APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT HAVE BEEN PRESERVED FOR REVIEW, THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT AT THE PENALTY PHASE

Appellant contends the prosecutor committed misconduct on several occasions when he made "highly improper and prejudicial arguments" during closing argument which deprived appellant of his state and federal constitutional rights to "a fair trial, due process and a reliable penalty determination." (AOB 148-151.) To the extent appellant's claims have been preserved for review, they are without merit.

A. Relevant Trial Court Proceedings

During the People's closing argument at the penalty phase, the prosecutor argued as follows:

> Ladies and gentlemen, there's no easy way out in this case. [¶] Remember something. You will have to look yourselves in the mirror for the rest of your life. And if you take an easy way out, I suggest that at some point in time, some day when you look yourself in the mirror, you will know in your heart you did the wrong thing.
>
> In life there's tough decisions that sometimes have to be made. And if we make those decisions honestly, we make the tough decisions, we don't take the easy way out. I dare say, ladies and gentlemen, if you follow the evidence in this case, if you follow the evidence, there's but one conclusion to come to. And that's not an easy conclusion. But if you come to it, you will always be able to look yourself in the mirror and say, you know what, I got summoned into court, it's something I would have rather not have done, it was a very difficult decision, one I may think about daily for the rest of my life. But I know this, I know that I made the decision that was the right decision to make.
>
> And regardless of how hard decisions are in life, ladies and gentlemen, we never can have regrets or feel bad if we make the

> right decision. And we always know, human beings in their heart, deep down, always know what the right decision is.

(17RT 2898-2899.)

Shortly thereafter, the prosecutor explained that "[s]ometimes jurors are told that life imprisonment without the possibility of parole is like being on a boat alone in the middle of an ocean surrounded by sharks," in that "the prison is the ocean and the other inmates are the sharks." The prosecutor noted that while he did not want to "arouse hatred or malice" toward appellant, he was going to be "very candid" in his remarks concerning appellant's conduct. With that in mind, he argued the jurors "might well say that based on the evidence presented [appellant] is the shark." (17RT 2900.) He then asked the jury what appellant's appropriate punishment should be, given that appellant shot Robert Norman in the International Club "as he crawled away," and "aimed and fired" at 71-year-old Chau Quach out of "pure meanness and spite" after appellant had "already gotten the money." (17RT 2900-2902.) The prosecutor then described how even after the Thien Thanh incident, appellant masterminded the Wintec incident, where Pin was shot and killed, and how appellant "manipulated" and "took advantage" of Christine Chen to aid him in the Jade Galore incident, where Cambosa was killed. (17RT 2902-2904.) The prosecutor described appellant as a "manipulator," a "user," and a "cold-blooded killer," and argued that "nothing will ever change it." (17RT 2904, 2906.) The prosecutor went on to detail appellant's involvement in the Thien Thanh incident, the Wintec incident, the Traditional Jewelers incident, and the Jade Galore incident. (17RT 2908-2915.) The prosecutor asked the jury if appellant's conduct was that "of a man that in any way will ever, ever be anything but a threat to other people," that if the jury gave him LWOP, "his conduct will ever change" or that he "will not be a danger." (17RT 2913.)

The prosecutor then argued before granting appellant mercy, the jurors should consider that he took the lives of his victims "without one shred of remorse of mercy." (17RT 2915-2917.) After discussing the statutory factors the jury was to consider when determining appellant's penalty (see 17RT 2917-2920), the prosecutor returned to the subject of mercy. He introduced an excerpt from a book called "The Killing of Bonnie Garland," and explained that the jurors might find the passage "relevant," but that the jurors could "disregard" it if they believed the passage to be irrelevant. (17RT 2920.)

Defense counsel objected, though the prosecutor explained that the language from that book had been specifically approved by this Court in *People v. Rowland* (1992) 4 Cal.4th 238, 277-288, fn. 17. (17RT 2920-2921.) The trial court did not see "anything inappropriate" about the prosecutor's proposed reading. Defense counsel then argued that the prosecutor impermissibly "commented . . . on the area of future dangerousness and LWOP," and how if appellant was given LWOP, he could be a "danger . . . in the future." The prosecutor countered that he was "entitled" to make such an argument, "especially when it's violent criminal activity," and that he was entitled to argue that "there is no reason to believe that [appellant's] conduct is going to change." (17RT 2921-2922.) The court overruled defense counsel's objections. (17RT 2922.)

The prosecutor then read the following excerpt from "The Killing of Bonnie Garland":

> When one person kills another there is an immediate revulsion in the nature of the crime. But in the time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an identifiable figure. To those individuals in the community of good will and sympathy and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate, and that is always the criminal. The dead person ceases to be a part of everyday reality, ceases to

> exist. The victim is only a figure in a historic event. And we inevitably turn away from the past toward the ongoing reality of everyday life. And the ongoing reality is that the criminal, trapped, anxious, now helpless, isolated, perhaps badgered, perhaps bewildered, is all that's left. He takes away compassion that is justly the victim's. And he will steal away his victim's moral constituency along with the victim's life.

(17RT 2922-2923.) The prosecutor urged the jury not to "let that happen," and argued that appellant did not deserve the jury's "sympathy," "good will," "pity," "compassion," "mercy," or "leniency." The prosecutor argued that instead, appellant deserved and was entitled to "an honest decision based on the evidence." (17RT 2923.) Accordingly, the prosecutor concluded the "only appropriate punishment for what [appellant] has done is the punishment of death." (17RT 2924.)

B. Applicable Law

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 444, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44.) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*Ibid.*, citing *People v. Cook* (2006) 39 Cal.4th 566, 606.) "Generally, a claim of prosecutorial misconduct is not cognizable on appeal unless the defendant made a timely objection and requested an admonition." (*Ibid.*) "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1202-1203, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

C. To the Extent Appellant's Claims of Prosecutorial Misconduct Have Been Preserved for Review, These Claims Have No Merit

First, appellant contends the prosecutor committed misconduct when he argued the jury had "no easy way out." (AOB 148.) However, "to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm," and because appellant neither objected during closing argument to the prosecutor's comment, nor requested an admonition from the court, this claim has been forfeited. (See *People v. Frye* (1998) 18 Cal.4th 894, 969-970, overruled on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421.) In any event, the prosecutor's comments did not constitute misconduct. In *People v. Adcox* (1988) 47 Cal.3d 207, this Court found that when the prosecutor made a very similar argument to the jury when advocating for the death penalty rather than LWOP, that argument did not constitute misconduct. There, the prosecutor argued that the jurors should not "yield" to "compassion," or "yield to temptation just to shuck it all and compromise and just say let's take the easy way out and not make a decision based on the evidence." (*Id.* at p. 259.) This Court found that these comments were "not misconduct," and that the prosecutor merely "urged the jury not to decide defendant's fate based on untethered compassion for him . . . ." (*Ibid.*) When the prosecutor in the instant case argued that if the jurors "follow the evidence in this case, . . . there's but one conclusion to come to" (17RT 2899), he was merely urging the jurors not to decide appellant's fate based on compassion, but to weigh the evidence presented before reaching a determination. Accordingly, as in *Adcox*, the prosecutor here did not commit misconduct.

Second, appellant contends that by arguing that evidence of appellant's multiple violent crimes would make him a "shark" in prison if

he were given LWOP, the prosecutor made an "improper argument regarding the question of [appellant's] future dangerousness, which defense counsel had not put before the jury." (AOB 148-149.) However, this Court has found on numerous occasions that where supported by evidence of the defendant's conduct rather than by expert opinion, "a prosecutor may argue in the penalty phase that if the defendant is not executed, he or she will remain a danger to others." (*People v. Montes*, *supra*, 58 Cal.4th at p. 891; *People v. Edwards* (2013) 57 Cal.4th 658, 765; *People v. Lopez* (2013) 56 Cal.4th 1028, 1077; *People v. Thomas*, *supra*, 52 Cal.4th at p. 364.) Here, the prosecutor did not present expert testimony regarding appellant's future dangerousness. Instead, the prosecutor detailed appellant's long and violent criminal history, a history that included shooting innocent victims like 71-year-old men and people who were attempting to crawl away to safety. He further cited appellant's history as a "manipulator," a "user," and a "cold-blooded killer" to argue that "nothing will ever change" appellant's behavior. (17RT 2900-2915.) In spite of the mountain of evidence portraying him as a violent and manipulative individual, appellant nevertheless contends that because future dangerousness "is not an aggravating factor under California's sentencing scheme," it was improper for the prosecutor to present that argument because the defense had not yet put the issue before the jury. (AOB 149.) However, this Court has previously rejected this argument. (See *People v. Thomas*, *supra*, 52 Cal.4th at p. 364; *People v. Michaels* (2002) 28 Cal.4th 486, 540-541.) Accordingly, the prosecutor did not commit misconduct by arguing that if given LWOP, appellant would be a continued danger to other prisoners.

Third, appellant contends the prosecutor committed misconduct when he argued that appellant "had shown a lack of remorse." (AOB 149-150.) First, however, because appellant neither objected during closing argument to the prosecutor's comments, nor requested an admonition from the court,

this claim has been forfeited. (See *People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970; *People v. Montes*, *supra*, 58 Cal.4th at p. 889 [finding that by failing to object or request an admonition, the defendant forfeited his claim challenging the prosecutor's comment at closing argument "asking the jurors to show defendant the same level of mercy he showed the victim, which was none"].) In any event, this Court has found on numerous occasions that a prosecutor's comments regarding a defendant's lack of remorse do not constitute misconduct. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 889; *People v. Rountree*, *supra*, 56 Cal.4th at p. 859; *People v. Collins* (2010) 49 Cal.4th 175, 230; *People v. Benavides* (2005) 35 Cal.4th 69, 109; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465.)

To the extent appellant contends the prosecutor's statements regarding appellant's lack of remorse for his crimes "misstate[s] facts" and constitutes a "deliberate misrepresentation" of the evidence (AOB 149-150), this claim has been forfeited because appellant never raised such an objection during closing argument (see *People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970), and is nevertheless belied by the record. As noted by the prosecutor (see 17RT 2904-2905), appellant told Chen that he "shot up" Traditional Jewelers because he was "pissed that he couldn't get anything," and that on the way home from the store, after he not only "shot up" the store, but also shot and nearly killed Gomez, the security guard, appellant and his friends stopped to eat at McDonalds. (15RT 2631.) Further, after the Jade Galore robbery, where appellant and his friends shot and killed Cambosa, the security guard, appellant and the others dumped the stolen watches on a bed and divvied them up, each taking one as a "souvenir." (15RT 2643-2645.) While the men were disappointed with the overall take from the robbery, they were nevertheless "okay," and they celebrated the robbery by going on a shopping spree in San Francisco. (15RT 2646.) Several weeks later, appellant and the others took the proceeds from the robbery and purchased

several high-end motorcycles, with appellant "handing out cash" to his friends for the purchases. (15RT 2623; 16RT 2743-2748, 2759.) While Chen testified that appellant was upset when he learned that Cambosa was killed (15RT 2681), his actions here speak far louder, and they demonstrate, as the prosecutor argued to the jury, that appellant lacked remorse for his actions. Accordingly, there was no misconduct here.

Finally, appellant challenges the prosecutor's reading of the excerpt from "The Killing of Bonnie Garland." (AOB 150-151.) However, as appellant acknowledges, this Court has on several occasions found "nothing objectionable" about a prosecutor reading to the jury the specific excerpt appellant now challenges. Instead, this Court has found the excerpt appropriate as "a reminder that the victims of murder are absent from the courtroom, but the living defendant is present." (*People v. Cook*, *supra*, 39 Cal.4th at pp. 612-613, fn. 8; see also *People v. Gurule*, *supra*, 28 Cal.4th at pp. 658-659, fn. 32; *People v. Hines* (1997) 15 Cal.4th 997, 1063, fn. 17; *People v. Clark* (1994) 5 Cal.4th 950, 1033-1034, fn. 41, overruled on another ground by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421; *People v. Rowland*, *supra*, 4 Cal.4th at pp. 277-278, fn. 17.) Appellant nevertheless cites *People v. Virgil*, *supra*, 51 Cal.4th at p. 1286, for the proposition that the prosecutor's reading of the excerpt "invited the jury to compare the victims in this case to Bonnie Garland, despite the fact that the jury knew nothing about her or the facts of that case." (AOB 150.) However, unlike in *Virgil*, the prosecutor was not making a "factual comparison" of the instant case to the murder of Bonnie Garland; in fact, he discussed none of the facts of that earlier case. (See *People v. Virgil*, *supra*, 51 Cal.4th at p. 1286.) Instead, the prosecutor was simply reminding the jury, as this Court found appropriate in *Cook* and other cases, that while the victims of appellant's actions were "absent from the courtroom," appellant himself still remained. (See *People v. Cook*, *supra*, 39 Cal.4th at p. 613.)

Accordingly, to the extent appellant's claims of prosecutorial misconduct have been preserved for review, the prosecutor in this case did not commit misconduct, and appellant's contentions to the contrary are entirely without merit.

D. Even if the Prosecutor Committed Misconduct, Any Error Was Harmless

"Under California law, and in the context of capital sentencing, reversal for prosecutorial misconduct requires prejudice manifested by a reasonable possibility of an effect on the outcome." (*People v. Williams* (2010) 49 Cal.4th 405, 467.) "'In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt.'" (*People v. Williams* (2013) 58 Cal.4th 197, 274, quoting *People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35.)

Here, even if the prosecutor committed misconduct, appellant cannot demonstrate that he suffered any prejudice given, as in *Williams*, "the clear guidance afforded to the jury by the court's instructions, the brevity of the challenged remarks in comparison to the prosecutor's careful and extended discussion of the statutory factors, and the overwhelming nature of the factors in aggravation, including the heinous facts underlying both the charged crime[s]" and the four uncharged acts. (*People v. Williams*, *supra*, 49 Cal.4th at p. 467.)

First, the jury was instructed during the guilt phase as well as the penalty phase of the trial that "[s]tatements made by the attorneys during trial are not evidence" (12RT 1880; 17RT 2843; 4CT 1025, 1143), and "[a] jury is presumed to follow its instructions." (*Weeks v. Angelone*, *supra*, 528 U.S. at p. 234.) Second, the relatively brief remarks challenged by appellant were vastly outweighed by the prosecutor's "careful and extended discussion of the statutory factors" and the "overwhelming nature of the factors in aggravation," including the "heinous" facts of the International

Club shooting as well as of the four uncharged acts. (See *People v. Williams*, *supra*, 49 Cal.4th at p. 467.) Indeed, the prosecutor discussed in detail the factors the jury was to consider when reaching a determination on appellant's penalty. (17RT 2917-2020.) The prosecutor also explained to the jury in great detail how appellant murdered four people in the International Club, including Norman as he crawled away, and how he was also responsible for the deaths of Chau Quach in the Thien Thanh incident, Pin in the Wintec incident, and Cambosa in the Jade Galore incident, as well as the injuries to Gomez in the Traditional Jewelers incident. (See 17RT 2900-2915.) It is very clear in this case that the challenged remarks very clearly paled in comparison to the prosecutor's "careful and extended discussion of the statutory factors" and the "overwhelming nature of the factors in aggravation." (See *People v. Williams*, *supra*, 49 Cal.4th at p. 467.)

Accordingly, even if the prosecutor committed misconduct by making the remarks now challenged by appellant, any error was harmless under either standard. This claim fails.

XI. TO THE EXTENT APPELLANT'S CLAIMS CHALLENGING THE VICTIM IMPACT TESTIMONY PRESENTED AT THE PENALTY PHASE HAVE BEEN PRESERVED FOR REVIEW, THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT TESTIMONY

Appellant contends the trial court erred by permitting the prosecutor to present victim impact testimony. (AOB 151-161.) Specifically, appellant contends the victim impact testimony presented by Dang's father, Mach, was overly prejudicial. (AOB 154-155.) He further contends the court erred by permitting "victim impact testimony pertaining to allegations unrelated to the capital crime," and that appellant was not put on notice regarding the presentation of this testimony. (AOB 155-157.) Finally, he contends that the supposed victim impact testimony offered regarding the impact of appellant's uncharged violent conduct should have been excluded

under Evidence Code section 352. (AOB 157-158.) To the extent appellant's claims have been preserved for review, they are without merit.

A. Relevant Trial Court Proceedings

On June 17, 2002, several months prior to trial, the People filed a "Notice of Intent to Introduce Evidence of Aggravating Factors at Penalty Phase Pursuant to Penal Code section 190.3." In it, the prosecutor indicated that he planned to introduce evidence relating to eight different incidents, as well as victim impact evidence relating to the murders of the four victims in this case. (1CT 183-184.) Later, defense counsel filed a "Notice of Motion to Exclude Victim Impact Evidence," on the grounds that such evidence would "vitiate[ ] the prohibition against cruel and unusual punishment" under the Eighth and Fourteenth Amendments to the United States Constitution, as well as under section 190.3 and Article I, section 17 of the California Constitution. (1CT 251-257.)

At a pretrial hearing held on September 25, 2002, the court expressed its intent to "defer" addressing any motions pertaining to victim impact evidence until if and when a penalty phase proved necessary. However, defense counsel asked the court to rule on his motion to exclude prior to jury selection because "it's a fairly straightforward motion and it's important in terms of what direction I would take in the penalty phase." (1RT 116.) The prosecutor clarified that he would only present evidence as to four incidents (Thien Thanh, Wintec, Traditional Jewelers, and Jade Galore) and that he would only present victim impact evidence as to two victims: Norman and Dang. The court limited the evidence in aggravation to the evidence identified by the prosecutor. The court noted, however, that as to the admissibility of the victim impact evidence, the court would address that issue at a later time. (1RT 117-120.)

Later, at the penalty phase, the prosecutor stated that he planned to present victim impact evidence as to Norman and Dang. (13RT 2155-

2156.) The court asked defense counsel if there was "any more need to address" what the penalty phase evidence the People intended to introduce. Defense counsel replied that he "[did not] believe so," since the issue was "addressed back in September of last year," and because he understood that the prosecutor intended to introduce as victim impact evidence "the two victim statements." The court asked the prosecutor and defense counsel to confer as to whether there was any additional need for the court to address "any part of that offered testimony." (13RT 2175-2176.) Defense counsel later confirmed that he had spoken to the prosecutor regarding the victim impact evidence and that they "were going to be able to resolve that." The court noted that victim impact evidence was a "proper subject of testimony," though "not per se without limitations." The court "tentatively" found that "if a question were asked that ran beyond the scope," then defense counsel could object, allowing the court to "address it based on the question that is being elicited." (13RT 2181.)

Later still, as the prosecutor prepared to call his first victim impact witness, defense counsel requested a 402 hearing regarding Norman's mother's testimony. He argued that he "want[ed] to know exactly what she is going to be testifying to" because he believed he was "entitled to limit the scope of her testimony with respect to victim impact." Counsel argued further that he had "not received any discovery what she is going to say," though the prosecutor countered that he had faxed to defense counsel a copy of that discovery several days prior. (16RT 2764.) Soon after, defense counsel acknowledged that the prosecutor was planning to call three witnesses for victim impact. He asked for a 402 hearing so that the court could "review a copy of what their intended statements are" and "address those statements accordingly." (16RT 2765.)

Defense counsel objected to the introduction of the victim impact evidence on that grounds that it violated appellant's rights under the Fifth,

Eighth, and Fourteenth Amendments to the United States Constitution, as well "all applicable state statutes and standards." He argued that no evidence was presented that appellant knew any of the victims other than Tram, or that he knew the victim impact witnesses. (16RT 2766-2767.) He argued further that the probative value of the victim impact testimony would be "minimal or nonexistent," and that for this reason, it should be excluded. He then argued that even if the court were to find the probative value of the victim impact testimony to be "significant," such testimony should be limited only to "one survivor for each victim," given that victim impact testimony is "highly emotional" and that it could become "excessive and unduly prejudicial" against appellant. (16RT 2767.) He noted that "the circumstances in this crime need to be significantly limited" so as to protect appellant's right to a fair trial. He then argued that while section 190.3, factor (a) "allows evidence on the specific harm caused by the defendant including the impact on the family of the victim," this "only allows evidence which logically shows the harm caused by the defendant to the family members," and "any evidence of circumstances of which the defendant could not reasonably have been aware of at the time of the offense" should be limited. He argued that there would be "no probative value" to victim impact witness testimony regarding "any opinions . . . about the crime, about [appellant] or about the appropriate sentence." Accordingly, defense counsel asked the court to exclude "any emotional evidence which is likely to provoke arbitrary or capricious action by the jury" toward appellant, and ensure that victim impact testimony be "factual and free of inflammatory comments." (16RT 2768.)

The court responded that victim impact evidence "has been found not to be a violation of the [Eighth] Amendment," and that section 190.3, factor (a) "specifically provides for its admissibility." The court noted that in most instances, victim impact evidence is "highly relevant to the

circumstances of the crime," and that factors such as "the victim's age, his or her vulnerability, his or her innocence, evidence that the victims themselves did not contribute in any form to their passing is highly relevant to the circumstances of the crime." Further, the court observed that "[t]he passing of a loved one" is an "emotional experience" that "obviously has impact on those who are left behind," and that "one cannot argue that the circumstances of the crime never touched those who mourn the passing of others." The court went on to note that to require a defendant to "be familiar with the background of his victim and his or her loved ones" would "reward those who take the lives of strangers for no apparent reason as opposed to those who take the lives of individuals with whom they have some familiarity." There was, the court argued, "no basis for such a distinction." The court noted that while the law recognizes that victim impact evidence is "not without limit," "[t]he fact that it is emotional in and of itself does not dictate that it should be excluded," and that case law indicates that such evidence should only be excluded where it is "inflammatory" or "outrageous[ ]." (16RT 2769.) The court did not believe the law limited victim impact evidence to one witness per victim. Even so, the court noted that Dang left parents behind, and that "of more significance and of more probative value," her sister was present at the scene and witnessed the shooting, ensuring that her testimony would "not be cumulative." (16RT 2770.) Accordingly, the court ruled that the witnesses would be able to testify as set forth in the report submitted by the prosecutor, and that if any of the testimony "approach[ed] the nature of being inflammatory," it would be the responsibility of defense counsel to object. (16RT 2771.)

Defense counsel asked the court to limit the testimony of Dang's father and sister on the subject of their fears of gang reprisal for testifying in this case, on the grounds that such testimony would be "unduly

prejudicial and excessive in nature." The court initially overruled defense counsel's request, but the prosecutor subsequently agreed not to question the witnesses about their fears of gang reprisal. (16RT 2770-2771.)

B. Applicable Law

The United States Supreme Court has specifically authorized the use of victim impact evidence during the penalty phase of a capital trial. (*Payne v. Tennessee* (1991) 501 U.S. 808, 823-827.) The Court in *Payne* ruled that individual states are free to conclude that "evidence about the victim and about the impact of the murder on the victim's family" is "relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) In reaching this conclusion, the United States Supreme Court overruled its prior decisions in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876]. In *Booth*, the Court had held that victim impact evidence was inadmissible per se, except to the extent that it "relate[d] directly to the circumstances of the crime." (*Booth v. Maryland, supra*, 482 U.S. at p. 507, fn. 10.) In *Gathers*, the Court extended the rule articulated in *Booth* to prohibit a prosecutor from arguing the personal qualities of the victim to the jury during the penalty phase of a capital trial. (*South Carolina v. Gathers, supra*, 490 U.S. at pp. 810-812.) In *Payne*, the Court abrogated its prior rulings, and concluded that victim impact evidence "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) The Court noted that, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." (*Id.* at p. 827.)

More importantly, the Court recognized in *Payne* that its decisions in *Booth* and *Gathers* had resulted in an inequity. (*Payne v. Tennessee, supra,*

501 U.S. at p. 822.) Under *Booth* and *Gathers*, a defendant could present any relevant mitigating evidence, irrespective of whether it directly related to the circumstances of his offense, while the State was prevented from "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Ibid.*) The Court explained:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

(*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825, quoting *Booth v. Maryland*, *supra*, 482 U.S. at 517 (dis. opn. of White, J.).)

In articulating its ruling, the *Payne* Court noted:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy. [Citation.] As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

(*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.) The Court did not place any limitations on the type or amount of victim impact evidence that could be admitted during a penalty phase, but explained that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth

Amendment provides a mechanism for relief." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Shortly after the United States Supreme Court's decision in *Payne*, this Court ruled that victim impact evidence was admissible as a circumstance of the crime under section 190.3, factor (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Section 190.3, factor (a), permits the prosecution to show aggravating factors through the circumstances of the crime. The circumstances of the crime include not only temporal and spatial circumstances, but also factors that "materially, morally, or logically" attend the crime. (*Ibid.*; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.)

Under section 190.3, factor (a), the specific harm caused by the defendant may be shown, including the psychological and emotional impact on surviving victims, family members, and close personal friends. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833; see *People v. Prince* (2007) 40 Cal.4th 1179, 1289 [victim impact evidence is not limited to family; close personal friends may also testify about their loss and suffering]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183 [same].) Family members may also testify about the impact of the loss on other family members, not just themselves. (*People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495.) Additionally, the trial court may admit "victim impact testimony from multiple witnesses who were not present at a murder scene and who described circumstances and victim characteristics unknown to the defendant." (*People v. Zamudio* (2008) 43 Cal.4th 327, 364; accord, *People v. Hartsch* (2010) 49 Cal.4th 472 [ruling that victim impact evidence should not be limited to only witness for each victim].)

Moreover, this Court has repeatedly reaffirmed that both victim impact evidence and related "victim character" evidence are admissible as

circumstances of the crime. (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah*, *supra*, 35 Cal.4th at p. 495; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Brown*, *supra*, 33 Cal.4th at pp. 396-398; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1181.) The prosecution may admit, as evidence of the specific harm caused by the defendant, the loss to society and the victim's family of the unique individual who was killed. (*People v. Huggins* (2006) 38 Cal.4th 175, 238.)

On the other hand, proper victim impact evidence does not include opinions or characterizations about the crime, the defendant, or the appropriate punishment by the victim's family or friends. (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.) Evidence and argument on emotional but relevant subjects that could provide legitimate reasons for the jury to show mercy or to impose the death penalty should be allowed, while "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards*, *supra*, 54 Cal.3d at 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; see also *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180 [evidence admissible if it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"].)

C. The Trial Court Properly Permitted Victim Impact Testimony

At the close of his testimony, Mach Dang, victim Dang's father, made the following unprompted statement: "Sir, I first of all I thank you God for getting this defendant here because he is not able to kill another person." (16RT 2777.) Defense counsel objected on the ground that there was no question pending. The prosecutor then admonished the witness and thanked him for his time. (16RT 2777-2778.) Appellant contends the trial court's "failure to admonish the jury to disregard this outburst violated

[appellant's] Eighth and Fourteenth Amendment rights to a reliable penalty determination." (AOB 154-155.)

While it is true that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836, internal quotation marks omitted), Mach's comment was neither "irrelevant" nor "inflammatory." Mach had already testified about the tremendous emotional toll his daughter's murder had taken on his family, how he suffered from continuous chest pain and how neither he nor his wife had been able to sleep since the murder. (16RT 2776-2777.) That he briefly expressed his gratitude that appellant had been convicted and that he would no longer be able to hurt anyone was thus entirely relevant to his state of grief regarding the death of his daughter. Further, while appellant attempts to portray Mach's statement as an "outburst," he cannot seriously contend that Mach's very brief statement constituted "inflammatory rhetoric" that would have elicited from the jury an "irrational or emotional response untethered to the facts of the case." (See *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.) In any event, after defense counsel's objection to Mach's statement, the prosecutor quickly "curtailed" any further statements by admonishing Mach and dismissing him from the witness stand. (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) Thus, appellant cannot demonstrate that Mach's statement prejudiced his right to a fair penalty determination.

Appellant contends next that the trial court impermissibly permitted "victim impact testimony pertaining to allegations unrelated to the capital crime" when it allowed Michael Jeng and Rafael Gomez to testify. (AOB 155-158.) However, because defense counsel never objected to the testimony of either man as impermissible victim impact testimony, any claim challenging their testimony as improperly admitted victim impact

testimony has been forfeited. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1276.) In any event, appellant's challenge to this testimony must nevertheless fail because, as this Court has found, "[t]he circumstances of uncharged violent criminal conduct, including its impact on the victims of that conduct, are admissible under section 190.3, factor (b)." (*People v. Brady*, *supra*, 50 Cal.4th at pp. 581-582; see also *People v. Bramit* (2009) 46 Cal.4th 1221, 1241; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39.)

Even so, it should be noted that Jeng did not present victim impact testimony. He simply testified that victim Pin was disabled, that he wore a brace on his leg, and that his wife also worked at Wintec, though she was not present when he was killed. (14RT 2319-2320.) None of this testimony in any way touched on the psychological, emotional, or physical effects that Pin's death had on Pin's family. (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 852.) Likewise, while Gomez testified about the lasting physical effects of his injuries, and he mentioned that he had parents and siblings (see 14RT 2487), he in no way testified about the effect of his injuries on anyone other than himself. As discussed above, this testimony was admissible under section 190.3, factor (b). (See *People v. Brady*, *supra*, 50 Cal.4th at pp. 581-582.) Accordingly, appellant's assertion that "the jury heard victim impact testimony about [Pin], Mr. Gomez, and their families" (AOB 156), is simply untrue. However, even if this testimony constituted victim impact testimony, appellant cannot seriously contend that brief testimony regarding Pin's disability and the effects of Gomez's injuries was "so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.)

Still, appellant contends the prosecutor misinformed him about the evidence he intended to introduce at the penalty phase and that appellant was not put on notice that Jeng and Gomez would be presenting victim

impact testimony. (AOB 156-157.) "'[S]ection 190.3 provides that in a capital case the prosecution may present evidence in aggravation only if it has given the defendant "notice of the evidence to be introduced . . . within a reasonable period of time as determined by the court, prior to trial." [Citation.] . . . To be sufficient as to content, the notice must afford the defendant "'a reasonable opportunity to prepare a defense to the allegation[ ].'" [Citation.]'" (*People v. Tully* (2012) 54 Cal.4th 952, 1032-1033, quoting *People v. Mayfield, supra*, 14 Cal.4th at p. 798.)

To the extent appellant contends his constitutional rights were violated by the prosecutor's supposed failure to give proper notice regarding the proposed victim impact testimony, this claim has been forfeited by appellant's failure to object on that ground at trial. (See *People v. Hajek and Vo, supra*, 58 Cal.4th at p. 1235; *People v. McDowell* (2012) 54 Cal.4th 395, 421.) In any event, appellant's claim is without merit. As discussed above, Jeng's testimony was by no means victim impact evidence. Further, to the extent Gomez provided victim impact evidence when he testified about his injuries suffered during the Traditional Jewelers incident, the People gave the defense abundant notice of its intent to introduce evidence in aggravation, including victim impact testimony, when it filed its "Notice of Intent to Introduce Evidence of Aggravating Factors at Penalty Phase Pursuant to Penal Code section 190.3." (1CT 183-184.) This document was filed with the trial court several months prior to the start of trial, and in it, the prosecutor explained that he would present evidence at the penalty phase pertaining to eight incidents (later reduced to four) and that it would present victim impact evidence pertaining to all four victims (later reduced to just Norman and Dang). (1CT 183-184; 1RT 117-120.)

Later, at the outset of the penalty phase, the prosecutor again reiterated that he planned to present evidence in aggravation as to the four

incidents, including three victim impact witnesses for Norman and Dang. When the court asked defense counsel if he had been notified by the prosecutor regarding the People's proposed evidence in aggravation, defense counsel replied that there was no more need to address the People's proposed evidence, since the issue had been "addressed back in September of last year." He acknowledged that the People would present evidence pertaining to the four incidents as well as victim impact testimony as to the two victims. (13RT 2175-2176.) Soon after, defense counsel confirmed that he had spoken with the prosecutor regarding the victim impact evidence and that they "were going to be able to resolve that." (13RT 2181.) Accordingly, based on defense counsel's repeated acknowledgements that he was familiar with the prosecutor's proposed evidence in aggravation, including victim impact testimony, it is clear that appellant was put on abundant notice of the evidence to be presented at the penalty phase. (See *People v. Tully*, *supra*, 54 Cal.4th at pp. 1032-1033; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 798.)

Finally, to the extent appellant challenges the testimony of Jeng and Gomez on the grounds that the trial court should have excluded this evidence under Evidence Code section 352 (AOB 157-158), this claim has likewise been forfeited. While appellant objected on Evidence Code section 352 grounds to the Norman's mother and Dang's father and sister, he did not likewise object on these grounds to the testimony of Jeng and Gomez. (See *People v. Hinton* (2006) 37 Cal.4th 839, 893, fn. 19.) Even so, this claim fails because the trial court properly exercised its "broad discretion" when admitting the evidence. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 196.) First, as discussed above, Jeng's testimony was not, under any definition, victim impact testimony. Second, as discussed above, to the extent Gomez's testimony was victim impact testimony, evidence of uncharged violent criminal conduct and its impact on the victims of that

conduct is properly admissible. (See *People v. Brady*, *supra*, 50 Cal.4th at pp. 581-582.) Appellant offers no support for his claim that this evidence was "irrelevant" to the jury's penalty determination, or that it was "unduly prejudicial" and "confusing." (See AOB 157-158.) Accordingly, this claim likewise fails.

D. Even if the Trial Court Erred, Any Error Was Harmless

Assuming the trial court erred by admitting victim impact evidence, any error was harmless beyond a reasonable doubt "when considered in the context of all of the penalty phase evidence presented." (*People v. Montes*, *supra*, 58 Cal.4th at pp. 879-880, citing *Chapman v. California*, *supra*, 386 U.S. at p. 36.) The People presented a great deal of evidence in aggravation, even excluding the victim impact evidence. As summarized in great detail above, the People introduced evidence that appellant was the mastermind of four incidents involving extremely violent conduct, including the Thien Thanh incident, the Wintec incident, the Traditional Jewelers incident, and the Jade Galore incident. In each of these incidents, innocent people were shot, and in three of these incidents, innocent people were killed. As the prosecutor noted in his closing argument, the overwhelming evidence in aggravation painted appellant as a "manipulator," a "user," and a "cold-blooded killer." (17RT 2904, 2906.) Thus, even without the victim impact evidence, there was more than sufficient evidence presented at the penalty phase for the jury to impose the death penalty upon appellant. For this reason, any error in admitting the victim impact evidence was harmless beyond a reasonable doubt. (See *People v. Montes*, *supra*, 58 Cal.4th at pp. 879-880.) This claim fails.

XII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AS INTERPRETED AND APPLIED IN APPELLANT'S TRIAL

Appellant contends that California's death penalty statute and instructions are unconstitutional because they all but "guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (AOB 161-174.) However, as set forth below, appellant has failed to provide any reasons for this Court to reconsider its prior rulings, which have repeatedly rejected his challenges to the death penalty statute. As such, this claim must be rejected.

A. Section 190.2 Is Not Impermissibly Broad

Contrary to appellant's claim, section 190.2 – which outlines the circumstances that render a defendant eligible for the death penalty – is not impermissibly broad. (See AOB 161-162.) This Court has consistently held that California death penalty statute "adequately narrows the category of death-eligible defendants in conformity with the requirements of the federal constitution." (*People v. Montes*, *supra*, 58 Cal.4th at pp. 888-899; see *People v. Jackson* (2014) 58 Cal.4th 724, 773; *People v. Jones* (2012) 54 Cal.4th 1, 85; *People v. Thomas* (2011) 51 Cal.4th 449, 506.)

Although appellant argues that "the ballot arguments in favor of Proposition 7, 'which became the current death penalty law, reflect an intent to expose every murderer to the death penalty, [this Court has] rejected that assertion as a misconstruction of the ballot arguments.'" (*People v. Duff* (2014) 58 Cal.4th 527, 569, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 358, and citing *People v. Gray* (2005) 37 Cal.4th 168, 237, fn. 23; see *People v. Crittenden* (1994) 9 Cal.4th 83, 156 ["the death-eligibility component of California's capital punishment law does not exceed constitutional bounds"].) This claim must be rejected.

B. The Death Penalty Statute Does Not Allow Arbitrary and Capricious Imposition of Death

Appellant argues that factor (a) of section 190.3 has been applied in "such a wanton and freakish manner" that it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 162-163.) As this Court has repeatedly done in the past, this claim must be rejected. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 899 ["Section 190.3, factor (a), which allows the jury to consider the "circumstances of the crime" as an aggravating factor, is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty"], citing *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 333; accord *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Jones*, *supra*, 54 Cal.4th at pp. 85-86; *People v. Manriquez* (2005) 37 Cal.4th 547, 589.)

C. The Death Penalty Statute and Accompanying Jury Instructions Set Forth the Appropriate Burden of Proof

1. The Jury Was Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Existed, That They Outweighed the Mitigating Factors, or That Death Was the Appropriate Sentence

Appellant contends the jury should have been required to find beyond a reasonable doubt that aggravating factors existed, that the aggravating factors outweighed the mitigating factors, and that death was the appropriate penalty. (AOB 163-164.) But this Court has found that California's death penalty statute "is not invalid for failing to require . . . proof of all aggravating factors beyond a reasonable doubt, . . . findings that aggravation outweighs mitigation beyond a reasonable doubt, or . . . findings that death is the appropriate penalty beyond a reasonable doubt." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43, quoting *People v. Snow*,

supra, 30 Cal.4th at p. 126; accord *People v. Gamache* (2010) 48 Cal.4th 347, 406-407; *People v. Davis* (2009) 46 Cal.4th 539, 628; *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 358-359; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Indeed, an instruction regarding the burden of proof is not required during the penalty phase in California. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43.)

Citing *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], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], appellant argues that the aggravating factors must be found true by the jury beyond a reasonable doubt. (AOB 163-164.) Consistent with its prior decisions, this Court should reject this claim.

The Supreme Court of the United States found that Arizona's death penalty statute, which was at issue in *Ring*, was unconstitutional to the extent it allowed a sentencing judge to find true an aggravating circumstance necessary to impose the death penalty. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) Ring is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death." (*People v. Stanley* (2006) 39 Cal.4th 913, 964, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Thus, *Ring*'s holding does not apply to California's death penalty scheme because any finding of aggravating factors does not increase the penalty for a crime beyond the prescribed statutory maximum. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 964; see *People v. Booker* (2011) 51 Cal.4th 141, 195, fn. 31.) This Court has also held that *Apprendi*, *Ring*, and *Blakely* do not warrant reconsideration of its previous decisions regarding California's

death penalty law. (*People v. Morrison* (2004) 34 Cal.4th 698, 730-731; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.)

Appellant also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 163-164.) As this Court has repeatedly found, a jury is not constitutionally required to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 731; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 510; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) Nor does the trial court need to instruct the jury on the burden of proof at the penalty phase. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray*, *supra*, 37 Cal.4th at p. 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360.) Accordingly, appellant's claim should be rejected.

Indeed, to the extent appellant contends the burden of proof for factual determinations should be beyond a reasonable doubt, "[i]t is settled . . . that California's death penalty law is not unconstitutional in failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of aggravating circumstances, the comparative weight of aggravating and mitigating circumstances, or the appropriateness of a sentence of death." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1331, citing *People v. Stanley*, *supra*, 39 Cal.4th at p. 964, *People v. Brown* (2004) 33 Cal.4th 382, 401, *People v. Lenart* (2004) 32 Cal.4th 1107, 1136, and *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 510-511; accord *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Carrington*, *supra*, 47 Cal.4th at p. 200.) Thus, appellant's claim should be rejected.

2. The Trial Court Was Not Required to Instruct the Jurors That the Prosecution Bore the Burden of Persuasion Regarding the Existence of Aggravating Factors

Appellant contends the jury should have been instructed that "the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." (AOB 165.) However, this Court has found that jury instructions "are not constitutionally defective for failing to require the state to bear the burden of proof beyond a reasonable doubt or even the burden of persuasion that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 149, citing *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250.)

Indeed, this Court has "rejected the claim that the prosecution bears the burden of persuasion at the penalty phase." (*People v. Lenart*, *supra*, 32 Cal.4th at p. 1137; *People v. Sapp* (2003) 31 Cal.4th 240, 317; *People v. Kipp*, *supra*, 18 Cal.4th at p. 381; *People v. Benmore* (2000) 22 Cal.4th 809, 859.) In *People v. Hayes* (1990) 52 Cal.3d 577, this Court found that "[b]ecause the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.] The jurors cannot escape the responsibility of making the choice by finding the circumstances in aggravation and mitigation to be equally balanced and then relying on a rule of law to decide the penalty issue. The jury itself must, by determining what weight to give the various relevant factors, decide which penalty is more appropriate." (*Id.* at p. 643.)

3. The Jury's Death Verdict Did Not Need To Be Premised on Unanimous Jury Findings

Appellant contends that his constitutional rights were violated because there were no unanimous jury findings regarding the aggravating circumstances or the unadjudicated criminal activity. (AOB 165-167.) However, this Court has on numerous occasions found that unanimity is required only as to the appropriate penalty, and that there is thus no constitutional requirement for unanimous jury findings as to the existence of aggravating circumstances, including unadjudicated criminal activity. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1036 [noting this Court has rejected claims alleging "failure to require a unanimous jury finding on the unadjudicated acts o violence"]; *People v. Cowan* (2010) 50 Cal.4th 401, 489 ["There is no requirement . . . that penalty phase jurors unanimously agree on the existence of aggravating factors that support the imposition of the death penalty, including the existence of other criminal activity under [section 190.3,] factor (b)"]; *People v. Taylor* (2010) 48 Cal.4th 574, 651 [noting this Court has "found no requirement under the Sixth, Eighth, or Fourteenth Amendment that the jury unanimously agree on the existence of unadjudicated criminal conduct beyond a reasonable doubt"]; *People v. Salcido* (2008) 44 Cal.4th 156, 167; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893, quoting *People v. Blair* (2005) 36 Cal.4th 686, 753 ["'The Eighth and Fourteenth Amendments do not require that a jury unanimously find the existence of aggravating factors . . .'"].)

To the extent appellant contends that the Supreme Court's decisions in *Apprendi*, *Ring*, *Blakely*, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] compel that the aggravating factors must be found true beyond a reasonable doubt by a unanimous jury, this Court should, as discussed above, reject this claim, consistent with its prior decisions. Further, this Court has held that *Cunningham* "merely extends

the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to California's capital sentencing scheme." (*People v. Salcido*, *supra*, 44 Cal.4th at p. 167, citing *People v. Prince*, *supra*, 40 Cal.4th at p. 1297.)

4. Language in CALJIC No. 8.88 Is Not Impermissibly Broad

The trial court instructed the jury with CALJIC No. 8.88 that "[t]o return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (17RT 2892-2894; 4CT 1205-1206.) Appellant contends the phrase "so substantial" is an "impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing." (AOB 168.) However, this Court has determined on numerous occasions that this language is "'not unconstitutionally vague.'" (*People v. Brown* (2014) 59 Cal.4th 86, 119, quoting *People v. Linton* (2013) 56 Cal.4th 1146, 1211; *People v. Lopez*, *supra*, 56 Cal.4th at p. 1083; *People v. Whalen* (2013) 56 Cal.4th 1, 85-86; *People v. Lightsey* (2012) 54 Cal.4th 668, 731-732.)

5. Language in CALJIC No. 8.88 Appropriately Advises the Jury How It Should Arrive at Its Penalty Determination

Appellant contends that by instructing the jury that it can reach a death verdict if the aggravating evidence "warrants" the death penalty, CALJIC No. 8.88 "does not make . . . clear to jurors" that the ultimate question in the penalty phase is "whether death is the appropriate penalty." (AOB 168-169.) However, this Court has determined on numerous occasions that CALJIC No. 8.88 "'adequately advises jurors on the scope of their discretion to reject death and to return a verdict of life without

possibility of parole.'" (*People v. Chism*, *supra*, 58 Cal.4th at p. 1329, quoting *People v. McKinnon*, supra, 52 Cal.4th at p. 696; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Stitely* (2005) 35 Cal.4th 514, 531.)

6. CALJIC No. 8.88 Was Not Improper for Failing to Instruct the Jury to Impose a Sentence of Life Without Parole if It Found That the Mitigating Circumstances Outweighed the Aggravating Circumstances

Appellant contends that CALJIC No. 8.88 failed to instruct the jury to "impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances." (AOB 169-170.) However, this Court has found on numerous occasions that there is need for the trial court to instruct the jury in this manner, given that the instruction as given "adequately explains the circumstances in which the jury may return a verdict of death." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315; see *People v. Manibusan* (2013) 58 Cal.4th 40, 100; *People v. Valdez*, *supra*, 55 Cal.4th at p. 179; *People v. Jones*, *supra*, 54 Cal.4th at p. 78; *People v. Carrington*, *supra*, 47 Cal.4th at p. 199.)

7. The Jury Instructions Were Not Improper Because They Failed to Instruct the Jury Regarding the Standard of Proof as to Mitigating Circumstances

Appellant contends the penalty phase jury instructions failed to "set forth a burden of proof" as to mitigating circumstances. (AOB 170.) However, as noted above, "California's death penalty law is not unconstitutional in failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of . . . the comparative weight of aggravating and mitigating circumstances . . . ." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1331.) Further, this Court has found on numerous occasions that "'[t]he death penalty statute is not unconstitutional for failing to provide the jury with

instructions on the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination.'" (*People v. Chism*, *supra*, 58 Cal.4th at p. 1333, quoting *People v. Morrison*, *supra*, 34 Cal.4th at pp. 730-731; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Homick*, *supra*, 55 Cal.4th at p. 902.)

8. The Trial Court Was Under No Obligation to Instruct the Jury on the Presumption of Life, and the Court Did Not Err By Failing to so Instruct

Appellant contends the trial court's failure to instruct the jury that "the law favors life and presumes life imprisonment without parole to be the appropriate sentence" violated appellant's constitutional rights. (AOB 170-171.) However, this Court has repeatedly found that "[t]he death penalty statute is not deficient because it does not require that the jury be instructed on the presumption of life, nor was there any error because the jury was not so instructed." (*People v. Homick*, *supra*, 55 Cal.4th at p. 904, citing *People v. Young* (2005) 34 Cal.4th 1149, 1233; see also *People v. Russell* (2010) 50 Cal.4th 1228, 1272; *People v. Gamache*, *supra*, 48 Cal.4th at p. 407; *People v. Geier* (2007) 41 Cal.4th 555, 619.)

D. The Jury Was Not Required to Make Written Findings

Appellant contends that the jury must make written findings during the penalty phase. (AOB 171.) But this Court has consistently rejected appellant's claim. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1067; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1331-1332, citing *People v. Jurado* (2006) 38 Cal.4th 72, 144; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 777-778.)

E. The Jury Instructions on Mitigating and Aggravating Factors Were Proper and Did Not Violate Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in Mitigating Factors Was Proper

Appellant challenges the use of the adjectives "extreme" in section 190.3, factors (d) and (g) and "substantial" in factor (g). He argues that these adjectives "acted as barriers to the consideration of mitigation." (AOB 171-172.) He is mistaken. "The use of certain adjectives such as 'extreme' and 'substantial' in the list of mitigating factors in section 190.3 does not render the statute unconstitutional." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, citing *People v. Thompson* (2010) 49 Cal.4th 79, 144, and *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; accord *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 42.)

2. No Rule of Constitutional Law Requires the Trial Court to Delete Inapplicable Sentencing Factors

Appellant contends that "[m]any of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable" to his case, and that by failing to omit these factors from the jury instructions, the trial court "likely confus[ed] the jury and prevent[ed] the jurors from making any reliable determination of the appropriate penalty," in violation of appellant's constitutional rights. (AOB 172.) However, this Court has found that "[n]o rule of constitutional law requires the jury instructions to delete inapplicable sentencing factors or to state that some factors are mitigating only." (*People v. Jones*, *supra*, 57 Cal.4th at p. 980, citing *People v. Mills* (2010) 48 Cal.4th 158, 210; *People v. Manibusan*, *supra*, 58 Cal.4th at p. 100; *People v. Valdez*, *supra*, 55 Cal.4th at p. 180.)

3. The Trial Court Was Not Required to Instruct That Mitigating Factors Were Relevant Solely as Potential Mitigators

Appellant contends that the trial court erroneously failed to instruct the jury which factors were relevant as mitigating or aggravating circumstances. (AOB 172-173.) No error occurred, however, because the trial court was not required to instruct the jury which factors are relevant as mitigating circumstances and which factors are relevant as aggravating circumstances. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 899, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 862; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773, quoting *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.) "Nor was the trial court constitutionally required to instruct the jury that section 190.3's mitigating factors could be considered only as mitigating factors and that the absence of evidence supporting any one of them should not be viewed as an aggravating factor." (*People v. Duff*, *supra*, 58 Cal.4th at p. 570, citing *People v. Lightsey*, *supra*, 54 Cal.4th at p. 731, *People v. Jones*, *supra*, 54 Cal.4th at p. 87, and *People v. Gamache*, *supra*, 48 Cal.4th at p. 406.)

F. Intercase Proportionality Review Is Not Required

Appellant contends that California's death penalty statute permits arbitrary, capricious, discriminatory, and disproportionate imposition of the death penalty because it forbids intercase proportionality review. (AOB 173.) On the contrary, "[t]he absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments to the United States Constitution." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, citing *People v. Thompson*, *supra*, 49 Cal.4th at p. 143; *People v. Jackson*, *supra*, 58 Cal.4th at p. 774; *People v. Jones*, *supra*, 54 Cal.4th at p. 87; *People v.*

Demetrulias, *supra*, 39 Cal.4th at p. 44; *People v. Snow*, *supra*, 30 Cal.4th at p. 126.)[78]

G. California's Death Penalty Scheme Does Not Violate the Equal Protection Clause

Appellant contends that California's death penalty scheme provides "significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes," thereby depriving those facing a death sentence of the equal protection of the laws. (AOB 173-174.) However, as this Court has consistently held, "California's capital sentencing procedures do not violate principles of equal protection of the law on the ground that they provide safeguards different from those found in noncapital cases." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, quoting *People v. Williams* (2008) 43 Cal.4th 584, 650; accord *People v. Jackson*, *supra*, 58 Cal.4th at pp. 773-774; *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Jones*, *supra*, 54 Cal.4th at p. 87.) Because appellant does not provide any new or valid reasons for this Court to revisit its prior holdings, this claim must be rejected once again.

H. California's Use of the Death Penalty Does Not Violate International Law and/or the Constitution

Appellant contends that use of the death penalty as a "regular form of punishment" violates international law and the Eighth and Fourteenth Amendments. (AOB 174.) But as this Court has repeatedly held, "California does not employ the death penalty as a regular punishment for substantial numbers of crimes, and its imposition does not violate international norms of decency or the federal Constitution." (*People v.*

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[78] California does "provide *intracase* proportionality review." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 653, fn. 7, citing *People v. Rountree*, *supra*, 56 Cal.4th at p. 860.)

Jackson, *supra*, 58 Cal.4th at pp. 773-774, quoting *People v. Clark* (2011) 52 Cal.4th 856, 1008 [quotations omitted]; see *People v. Duff*, *supra*, 58 Cal.4th at pp. 570-571; *People v. Loker* (2008) 44 Cal.4th 691, 756; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

XIII. APPELLANT IS NOT ENTITLED TO RELIEF AS A RESULT OF THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

Finally, appellant contends the cumulative impact of the errors at the guilt and penalty phases prejudiced him. (AOB 174-176.) As explained above, there were no errors in this case and, thus, appellant is not entitled to any relief. Whether considered individually or for their cumulative effect, the claimed errors did not affect the outcome of the trial. (*People v. Jackson*, *supra*, 58 Cal.4th at p. 774; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Maciel* (2013) 57 Cal.4th 482, 554.) Appellant was entitled to a fair trial, not a perfect one. (*Lutwak v. United States* (1953) 344 U.S. 604, 619-620 [73 S.Ct. 481, 97 L.Ed.2d 593]; *People v. Anzalone* (2013) 56 Cal.4th 545, 556; *People v. Cunningham* (2001) 25 Cal.4th 826, 1009.) Because he received a fair trial, this claim must be rejected.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence of death should be affirmed in its entirety.

Dated: October 13, 2014

Respectfully submitted,

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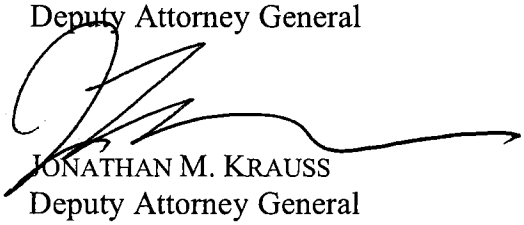

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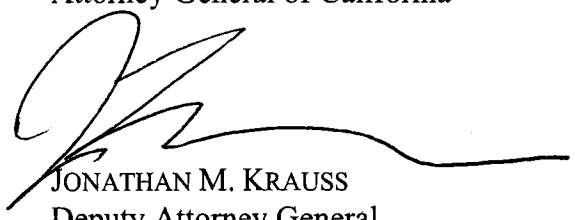
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13-point Times New Roman font, and contains 66,101 words.

Dated: October 13, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. Anh The Duong***

No.: **S114228**

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 October 13, 2014, I served the attached **RESPONDENT'S BRIEF – CAPITAL CASE,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On October 13, 2014, I caused 13 copies of the **RESPONDENT'S BRIEF – CAPITAL CASE**, in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by On Trac Overnight Carrier, Tracking No. B10303155758.

On October 13, 2014, I caused one electronic copy of the **RESPONDENT'S BRIEF – CAPITAL CASE**, in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 October 13, 2014, at Los Angeles, California.

C. Esparza
Declarant


Signature

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