In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JULIAN MENDEZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S129501

Riverside County Superior Court, Case No. RIF090811
The Honorable Edward D. Webster, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

STATEMENT OF CASE

On April 20, 2001, the District Attorney of Riverside County filed a second amended information charging appellant Julian Mendez with the premeditated murders of Michael Faria (count 1) and Jessica Salazar (count 2) in violation of Penal Code section 187.[1] It was alleged that the murder of Michael Faria was committed with the special circumstance of multiple murder (§ 190.2, subd. (a)(3)). It was further alleged that the murder of Jessica Salazar was committed with the special circumstances of multiple murder (§ 190.2, subd.(a)(3)), to prevent testimony in a criminal proceeding (§ 190.2, subd. (a)(10)), and during the commission of a kidnapping (§ 190.2, subd. (a)(17)).[2] Additionally, it was alleged as to both counts one and two that a principal was armed with a firearm, within the meaning of section 12022, subdivision (a)(1); both murders were committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1); and a principal personally and intentionally discharged a firearm, causing great injury or death, for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of sections 12022.53, subdivisions (d) and (e), and 186.22, subdivision (b)(1).[3] (1 CT 29-32.)

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[1] Further statutory references are to the Penal Code unless otherwise specified. All references and citations are to the Penal Code as it existed in 2000, when the murders were committed.

[2] The kidnapping special circumstance was later struck by the court because there was no separate purpose underlying the kidnapping other than killing the victim. (8 CT 2314.)

[3] The parties agreed to amend the firearm allegations to allege that Mendez intentionally and personally discharged a firearm, causing death, in order to obtain a verdict that specified whether Mendez was the actual

(continued...)

A trial by jury commenced on July 27, 2004. (7 CT 2028-2030.)[4] On September 8, 2004, the jury found Mendez guilty of the first-degree murder of Michael Faria (count 1), and the first degree murder of Salazar (count 2), and found true the special circumstance allegations of multiple murder and killing to prevent the testimony of a witness within the meaning of section 190.2, subdivisions (a)(3) and (a)(10). (24 RT 3027-3030; 8 CT 2232, 2235, 2237, 2240-2241.) The jury further found true the allegations that Mendez committed both murders for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1); that Mendez personally discharged a firearm causing the deaths of both victims, within the meaning of section 12022.53, subdivision (d); that Mendez personally discharged a firearm causing the deaths of both victims, for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of sections 12022.53, subdivision (e), and 186.22, subdivision (b)(1). (24 RT 3027-3030; 8 CT 2232-2242, 2257-2258.)

On September 20, 2004, the penalty phase commenced. (8 CT 2261-2263.) On September 24, 2004, the jury found death to be the appropriate penalty. (27 RT 3346-3347; 8 CT 2299-2301.) On November 19, 2004, the court denied Mendez's motion for modification of sentence and sentenced Mendez to death for the murders of Michael Faria and Jessica

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shooter. Mendez agreed to this amendment of the information to conform to proof. (22 RT 2762-2764.)

[4] Samuel Redmond, Daniel Lopez, Joe Rodriguez and Jess Vargas were charged as co-defendants with Mendez. (1 CT 29.) On Mendez's motion, Lopez and Rodriguez were tried together with Mendez and a separate jury was empanelled for Mendez. (2 RT 208-215; 1 CT 264.)

Salazar. (28 RT 3369-3377; 8 CT 2312-2318.) Mendez was also sentenced to a consecutive indeterminate term of 56 years to life. (8 CT 2313-2314.)[5] Mendez was ordered to pay a restitution fine in the amount of $10,000, plus restitution to the families for funeral expenses if the families requested that from the court. (28 RT 3378; 8 CT 2314.)

STATEMENT OF FACTS

Mendez Murdered Michael Faria After a Gang Confrontation

On February 4, 2000, 17-year-old Sergio Lizarraga was drinking beer and socializing at his house in Colton, San Bernardino County, with friends, 16-year-old Michael Faria, 13-year-old David Flores, 14-year-old Jessica Salazar, and a few others. (6 RT 818, 821; 11 RT 1482-1485.) About 10:00 p.m., they left the house and headed to a nearby baseball field to continue their party. (6 RT 822-824; 11 RT 1487.)

As the group walked down Michigan Street, a black SUV parked on the street and some men got out. (11 RT 1489.) Salazar stopped to talk to two of the men from the SUV. (6 RT 831; 11 RT 1494.) Lizarraga encouraged his friends to leave, as he believed the men from the SUV looked like gang members. (11 RT 1494, 1496-1498.) One of the men,

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[5]Specifically, Mendez was sentenced to two indeterminate terms of 25 years to life to be served consecutively to the sentence on count 1 and count 2 for the enhancement under section 12022.53, subdivision (d) (personal discharge of a firearm causing death), and to two additional 25 years to life to be served concurrently with counts 1 and 2 for the enhancement under section 12022.53, subdivision (e). The court imposed two separate terms of three years for the gang enhancement (§ 186.22, subd. (b)(1)), to be served consecutively to the sentence in count 1 and 2. (8 CT 2313-2314.) The court struck the enhancements for being armed with a firearm (§ 12022, subd. (a)(1)) in connection with counts 1 and 2, and struck the special circumstance of murder in the commission of a kidnapping (§ 190.2, subd. (a)(17)), in connection with count 2.

Rodriguez, said he thought he knew Salazar, and she went back to talk with him. (11 RT 1494.) Faria asked Rodriguez where he was from. (11 RT 1496.) Rodriguez responded by asking Faria where Faria was from, and Faria said he backed up the Westside. (11 RT 1496.) The man from the SUV – Rodriguez – said, "Fuck the West," and "North Side Colton." (6 RT 832; 11 RT 1500-1501.)

Lizarraga tried to calm the situation, because he understood these comments to be gang challenges that would lead to a fight or worse. (6 RT 839; 11 RT 1499-1502.) He got in between Faria and Rodriguez, telling Faria to "chill" and to walk away. (11 RT 1502.) Lizarraga told Rodriguez to "be cool," and said they did not want trouble, but Rodriguez punched Lizarraga in the face, hard. (6 RT 840; 11 RT 1502-1504.) Even then, Lizarraga said he did not want any trouble and he told Faria to walk away. (11 RT 1504-1505.)

A red car drove up and about five men got out of the second car and came toward Flores, Faria, Lizarraga. (6 RT 834-836.) Lizarraga saw Flores being chased by two men. (6 RT 840; 11 RT 1505.) Lizarraga turned and saw Faria lying on the ground, being "jumped," that is, Faria was being beaten and kicked by a group of more than six men. (11 RT 1509-1511.) Lizarraga went to help Faria. Just before Lizarraga got there, Faria was shot. Lizarraga heard three gunshots. (11 RT 1512-1513.) He ducked behind a brick wall. (11 RT 1517.) Flores, also, heard two or three shots quickly, in a row, after running for about a minute. (6 RT 840-843.) After the gun shots, Flores hid and saw the red car with five or six men in it cruising down the street very slowly. (6 RT 863.) Flores slipped away and walked home. (6 RT 842.)

Michael Faria had been shot on the street in front of 1820 Michigan Street, Colton. (6 RT 801-802.) After the assailants left, Lizarraga checked on Faria. Faria was lying on the street, unconscious and breathing loudly,

like snoring. (11 RT 1518-1519.) Lizarraga left after an ambulance arrived. (11 RT 1519.) Faria was initially taken to a hospital to treat his injuries. He died at the hospital about 12 to 14 hours after being shot. (11 RT 1584.) Faria was shot three times, in the back of the head, on the left side; on the left side of the torso; and in his right forearm. (11 RT 1589-1596.) Three bullet fragments were recovered from his body. (11 RT 1587, 1603.) Faria's death was caused by the gunshot wounds to his head and abdomen. (11 RT 1602.) The gunshot to the head was fatal. The wound to the abdomen caused extensive internal bleeding and might have been fatal. (11 RT 1602.) All of his wounds were consistent with being administered when Faria was lying on the ground with the shooter standing over him. (11 RT 1600.) Police located three spent .22 caliber casings from a semiautomatic firearm on the street near Faria. (6 RT 805; 23 RT 2795.)

Mendez Murdered Jessica Salazar Because She Witnessed the Murder of Her Friend, Michael Faria

Jessica Salazar's body was discovered the next morning, in a deserted area on Pigeon Pass Road, outside the city of Moreno Valley in a hilly area by the old High Grove dump in Riverside County. (7 RT 969, 977, 983.) Salazar was killed with a .380 caliber firearm. Two live .380 caliber rounds and one casing were recovered at the scene. (23 RT 2795.) A bullet entered Salazar's left wrist, exited that wrist and entered her head just above her left ear, traveling from the left back upward to the right front of her brain. (12 RT 1642-1643, 1647-1648, 1654.) This was consistent with holding her forearm up to shield her head, in a defensive posture. (12 RT 1655.)

Lizarraga and Flores Identified Rodriguez As One of the Participants

After the shootings, Lizarraga was shown five different photographic lineups. (17 RT 2078-2082.) He picked out Rodriguez and said he was not 100 percent sure, but thought he was at the confrontation on Michigan Street. (17 RT 2083-2084, 2126.) He thought Rodriguez was the one who punched him. (17 RT 2085.) Lizarraga picked Rodriguez out of a live lineup on March 22, 2000. (11 RT 1534-1537.) Lizarraga told the investigating detective that this suspect, Rodriguez, ran down the street to where Faria was being beaten, and that he was about 75 percent sure that Rodriguez was the one who fired a gun at Faria as Faria lay on the ground. (11 RT 1538, 1543-1544.) At trial four years later, Lizarraga said he could not recognize any of the assailants from the scene. (11 RT 1534.)

Flores also picked Rodriguez out of the live lineup in March 2000, saying he was 70 percent sure he was there. (17 RT 2129-2130.) Flores picked Eddie Limon out of a photo lineup as one of the assailants. (17 RT 2132.) Limon came out of the red car and chased Flores. (17 RT 2133.) Four years later, Flores was in California Youth Authority custody for robbery and vandalism when he testified. (6 RT 816.) He was reluctant to testify, and said he could not identify anyone who was present that night. (6 RT 817, 820.) He claimed that when he picked suspects out of photographic and live lineups in 2000, he was merely repeating what Lizarraga had said. (6 RT 865.) The officers testified, however, that the photographic and live lineups were conducted in the ordinary manner, separating the witnesses at the lineups so they could not be influenced by each other's memory. (See 17 RT 2130.)

Accomplice Samuel Redmond Described the Crimes

Samuel Redmond, the owner and driver of the black SUV carrying Mendez, Lopez and Rodriguez, filled in much of the information of what

had happened that night. Samuel Redmond pleaded guilty on August 29, 2003, to the first-degree murders of Michael Faria and Jessica Salazar with special circumstances in a plea agreement in return for a sentence of life in prison without the possibility of parole. (7 RT 998-999.) He also hoped to be housed in a secure facility outside the state system. (7 RT 999.) He promised to tell the truth at trial, and the District Attorney agreed not to seek the death penalty against him. At the time of trial, in July 2004, Redmond had not been sentenced. (9 RT 1225-1228.)

On February 4, 2000, Redmond was familiar with a gang known as North Side Colton, although he was not a member. (7 RT 1001-1003, 1036.) Redmond was 22 years old at that time. (9 RT 1154.) Redmond knew many members of North Side Colton, including Mendez, since he was little. (7 RT 1001.) Mendez went by the nickname, "Midget." (7 RT 1001.) In 2000, Mendez was 21 years old and had been a member of North Side Colton for about five years.[6] (7 RT 1002; 10 RT 1324.) His older brother, Manuel Mendez, was married to Redmond's sister. (7 RT 1001.)

Mendez was staying at Redmond's apartment since January 2000. (7 RT 1006.) Mendez always had a gun in the time he was living with Redmond. (10 RT 1304.) In fact, Mendez possessed about ten guns while living in Redmond's apartment, including rifles, an AK-47 and shotguns, and kept seven to ten rifles hidden in the air-conditioning duct of Redmond's apartment. (10 RT 1303, 1360, 1363.)

Redmond met Lopez, who was called "Huero," on February 4, 2000. (7 RT 1004.) Lopez had a tattoo on his arm identifying him as a member of North Side Colton. (10 RT 1364.) Lopez had just been released from the Youth Authority. (10 RT 1371.) Redmond had met Rodriguez when he

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[6] Mendez was born on October 7, 1978. (8 CT 2322.)

was younger but had not seen him for a few years when he saw Rodriguez again on February 4, 2000. (7 RT 1007.) Rodriguez went by the nickname, "Gato." (7 RT 1007.) Rodriguez had North Side Colton tattoos on his hand and his arm. (14 RT 1815, 1818.)

Redmond worked for the City of Redlands and owned a car, a Nissan Pathfinder SUV. (7 RT 1005, 1009.) When Redmond finished work on Friday, February 4, 2000, he went home and smoked methamphetamine with Mendez. (7 RT 1009-1010.) Lopez, Mendez and Redmond left the apartment and drove to the Four Seasons Apartments, in Colton, where many of their friends lived.[7] Rodriguez joined them at the apartments. (7 RT 1021-1023.) The four young men, Redmond, Mendez, Lopez and Rodriguez, drove around Colton looking for young women. (7 RT 1027.) They all smoked methamphetamine and drank beer throughout the night. (7 RT 1017.)

Rodriguez suggested they go to the home of other North Side Colton gang members, Art Luna and his brothers, on Michigan Street in Colton. (7 RT 1030-1031.) Redmond parked his car across the street from the Lunas' house. (7 RT 1032.) Redmond saw a group of youngsters walking along the street, on the same side on which he parked his car. (7 RT 1033-1034.) Rodriguez said he knew the girl in that group, Jessica Salazar. (7 RT 1034.) Art Luna drove up at the same time from the opposite direction with a car load of other teenagers, identified as members of East Side Colton, a gang affiliated with North Side Colton. (8 RT 1053.)

Redmond and Lopez walked across the street to talk with Art Luna. (8 RT 1056.) Mendez and Rodriguez stayed to talk with Faria, Salazar, and

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[7]The Four Seasons apartments were known to law enforcement officers as an area where gangsters congregated, claimed by both North Side Colton and East Side Colton. (14 RT 1809.)

the others. (7 RT 1034.) Redmond heard and saw an argument break out among Rodriguez, Mendez, and Faria's group. (8 RT 1057-1059.) The arguing group moved away, running down the street and out of Redmond's sight. (8 RT 1060, 1089.) Rodriguez, Mendez, and a number of others chased the teenagers from Faria's group. (8 RT 1060-1061.)

Rodriguez's brother went in the Luna house, came back out with a gun, and handed it to Art Luna. (8 RT 1061-1062, 1087.) Lopez and Art Luna started down the street toward the fight, but they only got as far as one or two houses when Lopez turned around and ran back. (8 RT 1066; 10 RT 1262.) Lopez told Redmond to hurry up and pick up Mendez. (8 RT 1067; 10 RT 1263.) Redmond and Lopez ran to Redmond's SUV and got into the vehicle. (8 RT 1068.) Redmond was driving, with Lopez in the front passenger seat. (10 RT 1265.) As he was driving, Redmond saw Mendez and Rodriguez running toward his SUV. (8 RT 1069; 10 RT 1265.) Mendez had a small semiautomatic gun in his hand. (8 RT 1069-1070.) Rodriguez and Mendez got into the back seat of Redmond's SUV. (8 RT 1069; 10 RT 1265.)

Salazar was on the sidewalk alone, hysterical and crying. (8 RT 1071.) Mendez told Rodriguez to tell Salazar to get into the car. Salazar got into the car. (8 RT 1074-1075.) Mendez told Redmond to leave quickly. (8 RT 1075.) Redmond said he would drive to the Four Seasons apartments, drop everyone off there and leave. (8 RT 1075.) But at the Four Seasons, Mendez told Redmond he had to drive, and no one got out of the car. (8 RT 1076.) The red car with the younger gangsters was also at the Four Seasons, and Mendez told those young men to "pack up the car" and to meet him at Redmond's apartment. (8 RT 1077.) Mendez told the youngsters that they needed to talk and he would be there in a little bit. (8 RT 1077.)

Mendez told Redmond to "Just drive," and to get on the freeway. (8 RT 1076-1077.) Redmond drove onto the freeway, and drove for a while. (8 RT 1077-1078.) Redmond told the others he needed gas. Mendez offered to pay for gas. (8 RT 1078.) Salazar was "going nuts," crying, hysterical, and repeatedly asking, "Why did you do that?" (8 RT 1078.) Redmond drove to a Shell gas station in Riverside County. (8 RT 1078.) Mendez gave money to either Lopez or Rodriguez and told him to make sure to get a gas receipt. (8 RT 1078-1079.) Either Rodriguez or Lopez stayed at the car and pumped gas while the other three men all went to the restroom. (8 RT 1078-1081.) Salazar stayed in the car, upset but quiet. (8 RT 1079-1080.) Mendez, Redmond and either Lopez or Rodriguez were all in the restroom together and Mendez said, "She's gotta die." (8 RT 1081.) They left the bathroom, returned to the car and Redmond drove away. (8 RT 1083-1084.)

Redmond drove for 20 to 30 minutes. (8 RT 1090.) Mendez offered to drive as Redmond was drunk and his car was slipping on the dirt road, but Redmond insisted on driving his car. (8 RT 1091.) Lopez was in the front passenger seat, with Jessica seated between Mendez and Rodriguez in the back seat. (8 RT 1104.) When the car was on a deserted stretch of Pigeon Pass Road in the hills north of Moreno Valley in Riverside County, one of the men said he had to relieve himself. (8 RT 1092.) Redmond pulled to the side of the road, and all four men got out of the car, even though three of them had used the restroom at the gas station. (8 RT 1092, 1095.) Mendez said again, "She's gotta die." (8 RT 1095.) Mendez told Rodriguez to kill Salazar because she could identify Rodriguez. (8 RT 1095.) But Rodriguez refused, saying he would not kill a girl. (8 RT 1095-1096.) Mendez told Rodriguez to take Salazar out of the car. Rodriguez said she would not come out, so Mendez told him to drag her out. (8 RT 1096.) Lopez went around to the rear door on the other side of the car.

Rodriguez opened the passenger side and pulled Salazar out. (8 RT 1096.) Salazar was resisting, crying and screaming, "Stop it. Don't." (8 RT 1097.) Once Rodriguez got Salazar out of the car, he and Lopez got into the rear seats of the car and closed the doors. (8 RT 1098.)

Mendez, Redmond and Salazar were outside the car. (8 RT 1098.) Mendez had a semiautomatic gun in his hand. (8 RT 1098-1099.) Mendez told Redmond to hold Salazar, so Redmond held her shoulders. (8 RT 1098-1099.) Salazar was shaking and tripped, and Redmond let her fall to the ground. (8 RT 1098.) Salazar was crying and pleading, "Don't," and "Why are you doing this?" (8 RT 1098.) After Salazar fell, Mendez quickly shot her in the head. (8 RT 1100.) Salazar had her hands up in a vain attempt to protect herself or stop the shooting. (8 RT 1100.)

Redmond told Mendez to hurry as a car was coming. (8 RT 1101.) But Mendez wanted to put two bullets into Salazar's head to make sure she was dead. (8 RT 1101.) Mendez tried to shoot Salazar again, but the gun jammed. (8 RT 1101.) Mendez hit the gun against the pavement, trying to unjam it. (8 RT 1101.) Redmond said he was leaving, so Mendez got into the front seat of the car and Redmond drove off. (8 RT 1101, 1105.)

Redmond drove back to his apartment. (8 RT 1101, 1105.) Mendez told Redmond to burn his SUV, but Redmond refused. (8 RT 1105.) Mendez told Redmond to park the car away from the apartment so it could not be seen. (8 RT 1106.) The younger gangsters from the red car were already at Redmond's apartment. (8 RT 1107.) Mendez requested the shoes and clothing of every person involved in the shooting. (8 RT 1108.) They gave Mendez their clothes and shoes, except that Lopez did not turn over his shoes because those were the only shoes he owned. (8 RT 1109.)

Mendez tried to create alibis for the men. Mendez asked Daniella Gonzalez and Priscilla De Soto, associates or members of the North Side Colton gang, to say that Redmond and Lopez had been with them all night.

(8 RT 1109-1110; 7 RT 1019; 14 RT 1827.) Mendez's brother, Manuel Mendez, took Redmond and Lopez to a motel where De Soto and Gonzalez were. (8 RT 1109-1111.) In the morning, Manuel Mendez picked Redmond up to drive him back to his apartment. (8 RT 1111.) Mendez planned to stay at the apartment and say that he had been with his girlfriend all day. (8 RT 1110.)

A few days later Manuel Mendez told Redmond to switch the tires of his car with a car owned by a female friendly with the gang. (8 RT 1112.) Redmond switched the tires. (8 RT 1113.) Mendez was later arrested when he was driving in a white Isuzu that had the tires from Redmond's SUV. (8 RT 1113.) The tires from the white Isuzu that had been on Redmond's car were consistent with the tire tracks at Pigeon Pass Road. (17 RT 2164-2169.) In addition, a fiber on the sole of Salazar's shoe was consistent with the carpet from Redmond's SUV. (17 RT 2171.)

On February 20, 2000, Redmond was stopped by an officer from the Colton Police Department when he was driving his car. (9 RT 1176; 11 RT 1607-1608.) Arthur Luna was sitting in the front passenger seat and Rodriguez was sitting in the rear seat. (11 RT 1610.) A gun was under the back seat of the car, within an arm's length of Rodriguez. The gun was a fully loaded Taurus .38 Special, which is a small revolver. (9 RT 1194; 11 RT 1614-1616.) The handgun had no registered owner. (11 RT 1628.) Redmond was questioned but denied all knowledge of the murders. (9 RT 1207-1210.) He was arrested for possession of a weapon, but he bailed out of custody. (9 RT 1176, 1194-1197, 1242; 10 RT 1361; 11 RT 1617.)

On March 23, 2000, Redmond was detained by Riverside County Sheriff's deputies while he was on his way to work and questioned about the murders. For two or three hours he continued to deny knowledge of the crimes. (8 RT 1082-1083; 20 RT 2092, 2381-2382.) Redmond called his supervisor, as he was worried about missing work. (20 RT 2384.) His

supervisor told Redmond that he was going to be fired. (20 RT 2384.) Investigator Del Valle advised Redmond of his rights, then let Redmond sit alone for a while in the interview room. (20 RT 2385.) Redmond broke down and became extremely emotional, crying. (20 RT 2383, 2386, 2417.) Sergeant Christopher Brown went into the room and filled out a booking sheet on Redmond, in front of Redmond, then left Redmond alone again. (20 RT 2387.) Investigator Del Valle went into the room again. The officers did not offer any deals to Redmond. Redmond told Investigator Del Valle what happened on the night of February 4, 2000, consistent with his testimony at trial. (20 RT 2387-2399.) Redmond became upset when he was told he was going into custody. (20 RT 2421-2422.) He was sobbing at the end of the interview. (20 RT 2430.)

The day after he was arrested, Redmond helped the detectives trace the route from Michigan Avenue, Colton, San Bernardino County, to Pigeon Pass Road, Riverside County, where Salazar had been shot. On the side of Pigeon Pass Road, Redmond directed the officers through a videotaped re-enactment of the murder. (8 RT 1114-1115; 17 RT 2094.) Redmond did not remember the exact route he drove from Colton, but he identified the gas station at Blaine and Iowa at which they stopped. (17 RT 2095.) From there, Redmond directed the detectives on the complicated route from the gas station to Pigeon Pass Road. (17 RT 2095-2096, 2155-2156, 2159-2160.) The videotape of Redmond's re-enactment was played for the jury. (17 RT 2098-2100; 7 CT 2052-2055.) Redmond said all four men got out of the car on Pigeon Pass Road and stood facing the same way as if they were urinating. (7 CT 2053-2054.) Mendez said, "It's got to be done, we got to do it. . . . You guys know what's got to be do[ne] here, we got to hurry up to do this, hurry up, and take her out of the car, throw her out of the car." (7 CT 2054.) Rodriguez opened the car door. Salazar was screaming, "No, leave me alone." They dragged her out. Lopez pushed

Salazar out of the car while Rodriguez pulled. (7 CT 2054.) Once she was out, Lopez and Rodriguez got into the back seats of the car and closed the doors. (7 CT 2054.) Mendez grabbed Salazar, with the gun in his hand. (7 CT 2054.) Salazar was struggling, trying to fight. (7 CT 2054.) Mendez tried to shoot Salazar but his gun jammed. (7 CT 2054.) Mendez told Redmond to help her. As Redmond grabbed for Salazar, she fell to the ground. (7 CT 2054.) Salazar lifted her hands up to shield herself, crying, "No, no." (7 CT 2054.) Mendez shot Salazar. (7 CT 2054.) Mendez said, "You got to [put] two in her head, you got, you got two." (7 CT 2054.) Salazar was already limp, but Mendez moved up and tried to shoot her again but the gun jammed, so Mendez hit the gun on the ground, trying to clear it. (7 CT 2054.) Redmond saw lights coming and said, "Let's go, let's go, let's hurry up." (7 CT 2055.) Redmond and Mendez got back in the car and left. (7 CT 2055.)

Mendez Made Incriminating Admissions to a Friend

On April 9, 2000, Mendez was in jail in Riverside County. A friend of his, Nicole Bakotich, came to visit him. Jail officials taped the conversation, and it was played in court. (19 RT 2309-2314, 2321-2326; 7 CT 2061-2085.) Mendez believed that the law enforcement officers could not identify his phone conversation with Bakotich. (7 CT 2071.) The day before the conversation with Bakotich, Mendez was interviewed by Riverside Investigator John Del Valle.[8] The jury was not informed that Mendez made a statement to the investigator. Throughout the conversation, Mendez formulated a defense to the murder charges. Mendez repeatedly

[8] The trial court ruled that Mendez invoked his right to an attorney, and the prosecutor decided not to offer the portions of the interview before the invocation. (3 RT 315, 317-2, 367-368, 418-419; 12 RT 1660.)

told Bakotich that Redmond was the shooter, but also that he had to tell the other participants to say that.

Mendez said, "I got a little bit of a chance if they can prove I didn't kill the girl, if I can prove I didn't kill no girl then I can probably get manslaughter . . . . *I got myself into this trouble, if I get myself out I get myself out* . . . ." (7 CT 2062 (emphasis added).) As he talked to Bakotich, he considered claiming he shot Faria in self-defense: ". . . 'cause I need to get out of that one [shooting Salazar]. If I can get out of that one I can probably get if anything get self-defense on the guy because they fucken started it, you know what I mean? I mean they started it. . . . I'm going to try self-defense, A, on that one [shooting Faria]." (7 CT 2067-2068.)

Mendez told Bakotich that Redmond was the shooter. (7 CT 2063, 2072, 2082.) But he also said he had to convince the other gang members to say that Redmond was the shooter: "See, what I mean we all know Sam did 'em. You mean I told Rascal [Art Luna] to tell the guys, just fuck it, say that Sam did it." (7 CT 2063.) And later: "We are going to go with that plan thou[gh]. Sam did it. . . . But I got to get them to testify against him and say, yeah he did it, you know what I mean? I already told Artie to tell them to go ahead and go with it. So hopefully they do, you know what I mean?" (7 CT 2072.) Mendez also said he told Artie Luna to tell Eddie Limon to say that Redmond was the shooter. (7 CT 2082.)

According to Mendez, a detective had told Mendez that nine of eleven men arrested, including Redmond and Rodriguez, said that Mendez was the shooter.[9] Mendez believed this was true. He said, "they [law enforcement]

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[9] At Mendez's request, the jury was later told that police officers are given leeway to say things that are not necessarily true. The jury was told that in this jailhouse tape recording, there were references to a re-enactment of the crime by Rodriguez and to identification of Mendez by nine or ten witnesses, but there was no evidence at trial those things actually happened.

(continued...)

don't need a weapon, they got evidence. They got guys saying that I was there and I was the shooter." (7 CT 2062-2065, 2077.) Mendez seemed more surprised that Rodriguez would inform the police that Mendez was the shooter, than outraged that he was being accused of a murder he purportedly did not commit. Bakotich said she never trusted Rodriguez, and Mendez replied: "I grew up with them, A. I grew up with them. . . . I fucken grew up with them, A. Fucken, I helped him out through his mom's problems, everything, A. He's fucken went and done this. . . . He re-enacted the crime and Sam did too. I guess its fucken gay lovers and shit saying I was the shooter." (7 CT 2064.) Mendez seemed more angry and disappointed that a fellow gang member, Rodriguez, would inform law enforcement officers on Mendez, than saddened by the deaths of two young people or outraged that he, Mendez, was being "falsely" accused of shooting the two. It appears that Mendez did not expect the same sort of silence from Redmond, also a childhood friend but not a gang member, and that Mendez was eager to blame Redmond for the shootings.

Bakotich and Mendez discussed the perils of giving evidence about crimes to the police. Bakotich wondered, "[D]on't the two of them [Redmond and Rodriguez] know that they better, hope they never – they are better in prison than they are out." (7 CT 2062.) Further,

> MENDEZ: . . . They think that maybe 'cause I'm in jail I'm not going to be able to touch him. I don't know.
>
> BAKOTICH: There is not any. There is nowhere to hide.
>
> MENDEZ: Yeah.

(...continued)
The recording was to be considered by the jury only for Mendez's state of mind or to the extent he adopted the admissions of others. (23 RT 2910-2911.) See Argument IV, *ante*.

BAKOTICH: They definitely don't what to go into State and be [protective custody], you know what I mean?

(7 CT 2079-2080.)

Mendez was convinced that law enforcement had sufficient evidence to identify him as the shooter of both victims: "Well, if I get convicted on both I get the death penalty. If I beat the girl's, if I can even beat one of them I can probably just get life in prison, but as it looks, A, it's the death penalty." (7 CT 2065.) Further, he said, "All of them. All of them, fuck, said I was there, A. Fucken, if they would have just kept their mouths shut, A. Fucken everything would have been cool and shit, A. But thing is that – that they are fucken saying that I was the fucken shooter, A, you know what I mean? So, I mean, how is that going to look for a jury? You got 8 guys saying that I was the shooter." (7 CT 2077.) Then Mendez admitted that there were fewer than eight people saying he was the shooter, and described the re-enactment done by Redmond, and said the detective told Mendez that Rodriguez had performed a re-enactment of the Faria shooting. (7 CT 2077.) Mendez said, ". . . I got to beat the death penalty, A. I don't want to go. I don't want to go. I don't want to go to death row. I mean, maybe I can go do, maybe. Maybe I can go do 25 to life or something. I can live to 45 or 46 years old maybe get a chance at life again, but if I get death row that's it. . . . *I just wish I had another chance, A.*" (7 CT 2078 [emphasis added].) Mendez also mentioned that Robert would be upset at Mendez: "I know he's [Robert's] going to be mad at me." (7 CT 2082.) If, as Mendez claimed, Mendez had done nothing, there would be no reason for Robert to be mad at him.

An Expert Described Criminal Street Gangs in General, North Side Colton in Particular, and the Animus Between North Side Colton and West Side Verdugo

The parties stipulated: "North Side Colton, goes by the letters NSC, is a criminal street gang within the meaning of Penal Code section 186.22(b) whose members have engaged in a pattern of criminal gang activity, including, but not limited to, murder, attempt murder, drive-by shooting, robberies, carjackings and witness intimidation. Further stipulated . . . is that defendant Mendez, the defendant Rodriguez and the defendant Lopez are, and were at all relevant times members of North Side Colton." (14 RT 1768.)

In addition, Detective Jack Underhill of the Colton Police Department provided expert testimony about gangs in general and North Side Colton in particular.[10] He was an active member of the regional task force San

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[10] Before the prosecution's expert testified the court admonished the jury that evidence of other crimes was not being offered to prove Mendez's propensity, but as evidence bearing on the truth of the gang allegations and special circumstance. The expert testimony might also be relevant to motive, intent, identity, or common scheme or plan. The court specifically instructed:

> That evidence is not being offered, and should not be considered by you, as character or general disposition evidence in the sense that it's generally not allowed in court to prove previous crimes to say because a person did crimes on day one, they did crimes on day two. It's not being offered for that purpose. Does everybody understand that? However, there is a gang allegation specifically alleged and it's also alleged in one of the allegations of special circumstance, so that evidence is being admitted for purposes of those allegations. Also, that evidence may be considered by you as it may be relevant to motive, intent or common scheme or plan. Now, for those purposes you may consider that, and it may even be identity later on, I don't know. But what weight and significance you

(continued...)

Bernardino County Movement Against Street Hoodlums ("S.M.A.S.H."). (14 RT 1769-15 RT 2002.) After describing his training and experience in gang investigations, Detective Underhill testified he was familiar with Mendez, Lopez and Rodriguez, and described some of the history of North Side Colton and of the police department's contacts with them. (14 RT 1769-15 RT 2002.) Much of his information was based on field interview cards or "S.M.A.S.H. cards" filled out after contact with gang members by the officers of the San Bernardino County Movement Against Street Hoodlums. (See 14 RT 1790.)

North Side Colton was one of the most active gangs in the City of Colton. (14 RT 1772.) Gangs establish territorial areas known as their turf, where they are most active and where the gang members live or stay. (14 RT 1773.) North Side Colton claimed the north side of Colton, and shared some area on the north side with the East Side Colton gang. (14 RT 1773.) North Side Colton and East Side Colton were friendly, supported each other and committed crimes together. (14 RT 1787.) South Side Colton operated mostly south of the freeway in the older, established area of Colton. (14 RT 1775.) Detective Underhill showed the jury a map of the most active gangs in the City of Colton, based on talking with gang members and the presence of gang graffiti. (14 RT 1774.) North Side Colton was started in 1989 in an area called the Bloque that was now controlled by a clique or smaller portion of the gang. (14 RT 1774-1775.) The Luna home at 1890 Michigan was in the original Bloque, and that home at times was a buzz of gang activity. (14 RT 1801, 1869.) Bloque members were the older

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(...continued)

> choose to give this evidence will be completely up to you. Does everybody understand that?

(14 RT 1766-1767.)

members or the founding members who grew up along with the gang. (14 RT 1775, 1777.)

West Side Verdugo was a gang that was particularly active on the west side of San Bernardino. (14 RT 1772.) West Side Verdugo was concentrated around the Seventh Street and Mt. Vernon area of San Bernardino. (14 RT 1775.) West Side Verdugo did not claim any territory inside Colton. (14 RT 1775.)

North Side Colton, like other gangs, used graffiti to mark its territory and to communicate to other gangs that the turf "belonged" to North Side Colton. (14 RT 1779.) Detective Underhill showed examples of North Side Colton graffiti and hand signs. Some included "NSC," the number 1, "IE" for Inland Empire and the number 13. (14 RT 1779-1780, 1786-1789.) The N is often reversed in graffiti and in hand signs. (14 RT 1780.) He also explained a photograph of gang artwork with a woman's face. (14 RT 1838.) The art had "Puro North Side Colton Bloque" written on it, meaning 100 percent for the gang, and it said, "tears for my barrio," with a picture of a tear. (14 RT 1838-1839.) "Smile now, cry later" referred to good times or fun when out living the gangster life, then bad times for gangsters and their girlfriends and mothers when the gangsters were locked up in custody. (14 RT 1840.) Many Hispanic gang members had a tattoo of "smile now, cry later." (14 RT 1840.) A gang member or girlfriend might have a tattoo of tears in the corner of their eye for a loved one who was locked up or dead. (14 RT 1840.)

Hispanic gangs divided into sur or surenos, for southerners, and nortenos for those from northern California. The dividing line was somewhere around Fresno. (14 RT 1781-1783.) The southerners used the number 13 for M, the 13th letter of the alphabet, and the northerners used the number 14, for N, for Northern. (14 RT 1782.) M stood for the Mexican Mafia, the prison gang of Southern Hispanics. (14 RT 1782.)

Mendez's older brother, Manuel Mendez, was also a member of North Side Colton, and he was married to Redmond's sister. Manuel Mendez used the nickname Manny. (14 RT 1786.) Appellant Mendez used the nickname or moniker of Midget. (14 RT 1787.)

Detective Underhill was familiar with co-defendant Lopez. (14 RT 1790.) He described a photo of Lopez taken on August 20, 1993, within North Side Colton turf, at which time Lopez said he had been a member of North Side Colton for at least one year. (14 RT 1791-1792.) Lopez wrote his moniker, "Huero," on the back of a S.M.A.S.H. card at that time. (14 RT 1792.) Lopez was contacted on February 6, 1996, in Colton turf, and denied gang membership and denied a nickname. (14 RT 1795.) It was not uncommon for gang members to deny gang membership as they got older and realized additional charges could be added for participating in gang activity, and to thwart gang investigations. (14 RT 1797-1798.) Lopez was contacted on June 13, 1996, in North Side Colton turf, wearing a black Raiders shirt with the number 13 on it, and a black baseball cap with Colton letters. (14 RT 1799, 1805.) Raiders gear was popular because the name has "I" and "E" in it. (14 RT 1800.) Lopez was contacted on August 15, 1997 at 1890 Michigan, the Luna residence. (14 RT 1801.) Lopez was with North Side Colton member Tommy Vazquez. Vazquez was arrested on a felony warrant for robbery. (14 RT 1805.) Vasquez was armed with a gun-handled knife. (14 RT 1806.)

On February 25, 2000, Lopez was served with a S.T.E.P. notice that law enforcement considered Lopez to be a member of a criminal street gang, North Side Colton.[11] (14 RT 1806-1807.) Lopez admitted that he

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[11] S.T.E.P. stands for the Street Terrorism Enforcement and Prevention Act that was added to the Penal Code in 1988, sections 186.20 (continued...)

had been an active member of North Side Colton for the last six years. (14 RT 1807.) Lopez showed the officer his new North Side Colton tattoo, on his left forearm. (14 RT 1808.) On February 29, 2000, officers located Lopez and three other North Side Colton gang members with a stolen Ford Thunderbird at the Four Seasons apartments. (14 RT 1808-1809.) Lopez was holding the keys and remote car alarm button for the stolen car. (14 RT 1810.)

Detective Underhill also knew co-defendant Joe Rodriguez, who went by the nickname "Gato." (14 RT 1810.) He was contacted on January 27, 1994, when he was 13 years old, and voluntarily admitted that he was a member of North Side Colton "for life." (14 RT 1811.) He said he was jumped into the gang two months earlier, meaning he was beaten by fellow gang members as a rite of initiation into the gang. (14 RT 1812.) Some individuals were born into the gang through their family, but they still had to commit crimes, or "put in some work" for the gang to be accepted into the gang. (14 RT 1814.) If an older brother has proven himself enough for a gang, his younger brother may be "courted in," or allowed in without being beaten. (14 RT 1814.) Rodriguez was contacted on June 24, 1995, and again admitted he was a member of the North Side Colton gang, with a moniker of Gato. Rodriguez had "North Side Colton" tattooed on his left hand and "Gato" tattooed on his right hand. (14 RT 1815.) Someone not a gang member would not tattoo a gang name onto himself because he had not "earned" it. (14 RT 1816.)

On October 12, 1995, Arnold Magana, 15 years old, was walking home from school with his sisters and friends when they were approached

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(...continued)
et seq., to punish and deter the criminal activities of criminal street gangs. (See § 186.21.)

by four or five gang members, including Rodriguez. Rodriguez stepped in Magana's path, blocking his way, while another North Side Colton gang member demanded and took Magana's gold necklace, in the 400 block of West Laurel Street, Colton, which is in North Side Colton turf. (14 RT 1816-1817.) Rodriguez also led the officers on a high-speed chase in a car stolen from the 500 block of West Laurel Street, also in North Side Colton turf. Rodriguez admitted he had been a member of North Side Colton for the past five years. (14 RT 1817-1818.) Rodriguez had another tattoo, "Colton," on his right arm by 1995. (14 RT 1818.)

Rodriguez's mother was murdered at the Four Seasons apartment building in July 1998. (14 RT 1818.) First, West Side Verdugo gang members came to the Four Seasons apartments to buy drugs. Some of the apartments at the Four Seasons were known for drug dealing at that time and up through the time of trial in 2004. The West Side Verdugo members were jumped by North Side Colton members and a cell phone was taken from the West Side group. North Side Colton members later called the West Siders using the stolen cell phone to taunt the West Siders to return if they wanted their phone back. West Siders later returned and knocked on the door of an apartment at the Four Seasons. Rodriguez's mother, Cindy Rodriguez, opened the door and was immediately shot to death. (14 RT 1819-1820.) Detective Underhill had spoken with gang members from West Side Verdugo and North Side Colton. Members of both gangs were aware of this murder. This crime was significant to both gangs because the West Side Verdugo gang murdered a member of a North Side Colton gang member's family, so North Side Colton had to retaliate for that murder. There was a long-standing and well-known hatred between those two gangs. (14 RT 1819, 1821.)

In the gang world, fear was considered to be "respect." (14 RT 1821.) The more other gangs feared one's gang, the more one felt he was

respected. (14 RT 1821.) "Respect" was a very important part of gang life. (14 RT 1822.) Therefore, the North Side Colton gang had to get payback against West Side Verdugo because West Side Verdugo murdered someone in North Side Colton turf. (14 RT 1822.) The payback had to be more violent than what was done to North Side Colton's gang, to "save face" or to show that North Side Colton could come back and do more to West Side Verdugo than West Side Verdugo could do to North Side Colton. (14 RT 1822.)

Eddie Limon was a younger brother of co-defendant Joe Rodriguez. (14 RT 1823.) Detective Underhill knew Rodriguez and Eddie Limon. (14 RT 1822-1823.) Rudy Rodriguez was also a brother, older than Eddie Limon and younger than Joe Rodriguez. (14 RT 1823-1824.) All three brothers were members of North Side Colton. (14 RT 1824, 1827.) A newspaper article about the murder of Rodriguez's mother was found at Limon's home, along with a listing of the monikers of North Side Colton members, including Mendez, Lopez, Rodriguez, and the three Luna brothers. (14 RT 1827-1831.) Detective Underhill read the list and identified many of the other North Side Colton gang members listed there, including Armando Garcia, known as "Lil' Smiley," who died in June 1999, and who was the younger brother of Mario Garcia. (14 RT 1868.) Lil' Smiley was killed in a gang confrontation in San Bernardino. (14 RT 1832-1833.)

Detective Underhill identified all the gang members in a photograph of the funeral of North Side Colton gang member Jesse Garcia, known as "Sinner," who was killed in a drive-by shooting on July 6, 1994. (14 RT 1832, 1835-1837.) Among others, Lopez and Andy Luna were in that photograph, and the detective thought another person appeared to be Mendez. (14 RT 1835-1837.) Members of North Side Colton believed that Jesse Garcia was killed by members of the West Side Verdugo gang. (14

RT 1834.) Garcia was killed while walking down the street at Colton Avenue and C Street by people in a vehicle that drove by and opened fire on him. (14 RT 1834.) Detective Underhill said that the funeral represented a significant event between North Side Colton and West Side Verdugo that caused a lot of bad feelings between the two gangs over the years. (14 RT 1834.)

Detective Underhill described a "gang board" on Mendez, Exhibit 76, with photographs from Mendez's police contacts through the years, accompanied by brief descriptions. On May 1, 1994, Mendez was present at the scene when officers were investigating a murder on the sidewalk in front of the Lunas' house. A rival gang member, John Rojas, had been killed with a shotgun. (14 RT 1859.) Mendez admitted that he was outside in front of the Luna house, heard two or three shotgun blasts and saw the victim fall. Mendez left the scene in North Side Colton gang member Daniel Luna's car. (14 RT 1859.) Daniel Luna was charged with the murder of Rojas, but not convicted. Mendez was not charged with any crime. (14 RT 1860, 1870.) Law enforcement made no connection between the death of Rojas and the death of Garcia that was two months later. (14 RT 1863.)

On May 5, 1994, Mendez was a passenger in a car with North Side Colton members Daniel Luna, Jessie Garcia and Jimmy Continola that was stopped for a traffic violation. (14 RT 1860.) On May 12, 1994, Mendez was a passenger in a stolen Honda Prelude that led police on a long high-speed chase and ended by crashing into a patrol car. North Side Colton gang member Enrique "Tiny" Mendez was driving the Prelude. (14 RT 1861.) North Side Colton gang member Jessie Perez was also in the car, along with a slide hammer, which is a tool used to remove ignitions from cars. (14 RT 1861.) Mendez admitted he was a member of North Side

Colton on May 12, 1994, with the nickname Midget. He had "Colton" tattooed on the back of his neck. (14 RT 1862.)

On December 7, 1995, an officer heard multiple gunshots and saw a vehicle in the immediate vicinity driving very slowly. North Side Colton member Paul John Negrete was driving the vehicle and Mendez was a passenger. The vehicle was searched and a fully-loaded .22 caliber handgun was in the center console. A fully-loaded M1 .30 caliber carbine, a loaded SKS 7.62 high-powered rifle, a .38 caliber revolver, and a loaded 12 gauge shotgun, the barrel of which was still warm to the touch, were in the trunk of the car. (14 RT 1864.) Mendez had a .22 caliber live round in his left front pants pocket and two .22 caliber live rounds were found on the ground next to the passenger side of the vehicle. (14 RT 1864.)

On October 20, 1996, Mendez was contacted by Colton gang officers in North Side Colton territory and admitted membership in the North Side Colton gang. (14 RT 1865.)

With respect to the murders at hand, according to gang culture, Faria should not have asked the men in Redmond's car where they were from because they were on North Side Colton turf and Rodriguez, Mendez and Lopez were North Side Colton members. (14 RT 1849.) This was a direct challenge and insult to the North Side Colton group, so Faria was the one who made the first challenge that night. (14 RT 1849-1850.) The North Side Colton gang's reply was, "No. Where are you from." (14 RT 1849.) This was a challenge in response to the insult. (14 RT 1850.) A gang member has to respond to that question by claiming his gang, or he has "punked out," or shown weakness, by not identifying his gang. (14 RT 1850.) So Faria responded with his gang when Rodriguez or Mendez asked where he was from. (14 RT 1852.) This escalated the verbal confrontation, making it more dangerous and more likely to result in a fight. (14 RT

1852.) When Faria and his friends ran away, North Side Colton had saved face and prevailed on the challenge. (14 RT 1854.)

In Detective Underhill's opinion, the killing of Faria was committed for the benefit of, at the direction of, or in association with the North Side Colton gang. (14 RT 1855.) Once Faria challenged North Side Colton, North Side Colton had no choice but to retaliate and attack people who made a challenge on their turf. The rules of the gang dictated that that had to happen. (14 RT 1855-1856.) In the gang culture, it was typical for a group of gangsters to attack an individual as a swarm and to continue beating and kicking when he was on the ground, as here. (14 RT 1854-1855.) Being extremely violent to the individual sent a message back to his gang and to other gangs that North Side Colton responded with force. This created intimidation and fear, which the gangs consider to be respect. (14 RT 1856.) North Side Colton could lose "respect" or fear if it did not respond with a heavy hand. (14 RT 1856.)

Salazar was also killed for the benefit of, at the direction of, and in association with the North Side Colton gang, because she could have identified the gang members. They hoped to avoid going to jail, being arrested and charged with the Faria killing. (14 RT 1857-1858.)

Penalty Phase – Evidence in Aggravation

Victim – Impact Evidence

Michael Faria's father, Richard Faria, testified that Michael was a loving son who was loved by his family. Michael had a younger brother and two younger sisters. All have struggled to cope with the loss of Michael. (25 RT 3056-3063.) Michael's younger sister Brittany and his mother Elaine Serna both expressed their love for Michael and their grief at losing him. (25 RT 3066-3089.)

Jessica Salazar's cousins, April and Martin Salgado, explained the impact of Jessica's murder on the family. (25 RT 3091-3104.) Her mother, Denise Salazar, showed pictures of Jessica as a child, and described her grief at losing her daughter and the impact of her murder on the family. (25 RT 3109-3131.) Jessica's brother, in particular, experienced emotional difficulties as a result of Jessica's death. (25 RT 3118-3120.) Jessica's mother read aloud a poem she had written when Jessica fifth-grader about deaths caused by gangsters. The poem was published in a book for children at risk of joining gangs. (25 RT 3110-3113.) Portions of a videotape of Jessica's sixth grade graduation were played for the jury.[12] (25 RT 3128-3130, 3144.) When Riverside detectives told Mrs. Salazar that her daughter was dead, it was Mrs. Salazar who informed the detectives that Colton police had told her earlier that evening that Jessica had been with a boy named Michael who was shot in Colton the previous day. (25 RT 3125.)

Factor (c) Evidence

It was stipulated that Mendez was convicted of possession of an assault weapon, in violation of section 12280, subdivision (b), a felony, on January 30, 1997, and convicted of felony possession of methamphetamine, in violation of Health & Safety Code section 11377, subdivision (a), on August 5, 1997. (25 RT 3133.)

Penalty Phase – Evidence in Mitigation

Mendez's father, Manuel Mendez, testified and admitted that he had been a drug user for 43 years. (26 RT 3156.) Manuel and Shirley Mendez had six children; appellant Mendez was in the middle. (26 RT 3157.) Mendez was 25 years old at the time of the penalty phase. (26 RT 3239.)

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[12] The jury only viewed the images on the videotape, as it was played without the audio portion of the tape. (Ex. 136; 25 RT 3128-3120.) The edited portions were four to five minutes in total. (See 25 RT 3105.)

Mendez's father took care of his drug addiction first, and bought food for his children only if there was money left over. (26 RT 3158.) Manuel pimped other women – including his wife – to make money for heroin. (26 RT 3159.) He also made his four oldest children, including Mendez, beg for money on the street. (26 RT 3169.) Manuel estimates that he spent about half of his 63 years in prison, starting at the age of 10 or 11. (26 RT 3161.) Manuel brought gangsters to his home where he sold heroin and "speed" and left his children for periods of time with other criminals and drug addicts. (26 RT 3162.) The Mendez family had no stable home because they were frequently evicted. (26 RT 3169.)

After about ten years of marriage, Mendez's mother Shirley also became addicted to heroin. (26 RT 3160.) Manuel gave his wife a large amount of "speed." She had hallucinations and serious mental problems. Shirley Mendez had been in and out of county mental hospitals since then. (26 RT 3162-3163.)

Manuel disciplined Mendez as much as he could, so that Mendez never argued with Manuel. (26 RT 3163-3164.) Manuel and his gang member friends encouraged his sons to fight until they were exhausted and beyond, while the gangsters and Manuel bet on them. (26 RT 3164.)

Manuel had been to prison for drugs, commercial burglaries, car thefts, and for being a felon in possession of a gun. (26 RT 3165.) His two older sons were both in prison at the time of trial. (26 RT 3166.) His daughter, Yvonne, had trouble with drugs, and her children were taken away from her. (26 RT 3166.) Manuel eventually took the two youngest children, Andres and Anthony, to live with his mother, and they ended up being police explorers for the Colton Police Department. (26 RT 3168.)

Extensive drug use by the parents, neglect of the children, their father's frequent incarcerations and their mother's breakdown were confirmed by four of Mendez's siblings, his aunt, his grandmother, and his

brother's girlfriend. (26 RT 3174-3249.) Mendez's older sister said that their father frequently fought with Mendez and beat him. (26 RT 3182-3187.) His two youngest brothers were taken in by their grandmother and both had productive and stable lives. Mendez warned them to avoid the gangster lifestyle, and supported his younger brother's plan to become a police officer. (26 RT 3189-3195, 3209-3214.) Mendez lived with his grandmother when he was 11 or 12, but he went back to his mother and her rule-free life at his mother's request. (26 RT 3241-3244.)

Ray Sanchez, a North Side Colton gang member, knew Mendez since junior high. (26 RT 3250-3251.) When he was testifying, Sanchez had been incarcerated for a gang-related manslaughter since 1995, so he had little personal knowledge of Mendez during the five years before the murders. (26 RT 3250-3253.) Sanchez used to see Mendez wandering the streets as a child. He looked very young. It seemed like he had no family and nowhere to go. So Sanchez and the North Side Colton gang members let Mendez spend time with them. (26 RT 3252.) Sanchez's mother let Mendez stay in her house. (26 RT 3252.) Sanchez explained that gang members join gangs to have a family: "Gang members are all in tight to where they don't join gangs most of the times to hang out with homies, they join gangs because that's pretty much their family. That's what they think of them, you know." (26 RT 3254.) The North Side Colton gang took care of Mendez: "Because they took care of him. We all took care of him. We took him in as one of us, you know what I mean. It started as to where he was just a kid, had nowhere to go, so we let him hang with us. As he got older, that's all he knew right there." (26 RT 3254.) Sanchez mentioned that all the gang members had family members who loved them. (26 RT 3255.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT THAT APPELLANT MURDERED MICHAEL FARIA

Appellant Mendez contends both his conviction for first degree murder and the multiple murder special circumstance finding must be reversed because there was insufficient evidence that he killed Michael Faria. (AOB 46-60.) This contention lacks merit because substantial, credible evidence supports the jury's factual finding that Mendez killed Faria. The jury concluded that Mendez shot Faria because Mendez actively participated in beating Faria down to the ground; Mendez had a gun in his hand right after the shooting; Lopez said it was Mendez that had to get away quickly; Mendez was the shotcaller who directed the others; Mendez was the only one who wanted to kill the witness to the Faria murder; and Mendez's own statements reflected his consciousness of guilt.

Mendez bears a heavy burden to establish that the evidence was insufficient to sustain the conviction. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) To determine sufficiency, the entire record must be reviewed in the light most favorable to the judgment for the presence of substantial evidence. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.) A claim of insufficient evidence is forfeited when the defendant's opening brief includes only facts favorable to him instead of all relevant facts. (*People v. Battle* (2011) 198 Cal.App.4th 50, 62.) Substantial evidence is " 'evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 316 [99 S.Ct. 2781, 61 L.Ed.2d 560].) It is the jury, not the appellate court, that assesses the credibility of the witnesses. (*People v. Friend* (2009) 47 Cal.4th 1, 41.)

Mendez complains there is insufficient evidence he murdered Faria because there was no eyewitness to provide direct testimony of the shooting. But eyewitness or direct testimony is not required, and it is often not available, as here. Strong circumstantial evidence supports the jury's verdict. The same deferential standard of review applies in cases based on circumstantial evidence. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*Ibid.*, quoting *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Mendez and Rodriguez were the ones who initially confronted Faria and chased him down to beat him. (8 RT 1060-1061, 1089.) Six or eight people kicked and beat Faria as he lay on the street. (11 RT 1509-1511.) Mendez was seen with a gun in his hand within seconds after Faria was shot. (8 RT 1069-1070.) No one else with a gun was close enough to Faria to be able to shoot him. While Eddie Limon had gone into the house, obtained a gun, and then handed it to Art Luna, who started toward the fight, Luna did not get to Faria before the shooting. (8 RT 1061-1062, 1066, 1087; 10 RT 1262.) The evidence supports the reasonable inference that Faria was shot before Luna ever reached Faria with a gun. Mendez, on the other hand, was holding a gun in his hand when he ran back from Faria's body, consistent with having just used it. (8 RT 1069-1070.) Moreover, Mendez being in possession of a gun immediately after the shooting was consistent with his habit of always carrying a gun on his

person. (10 RT 1303-1304, 1360, 1363.) Consistent with Mendez being the shooter, Lopez insisted on moving Mendez away from the murder location immediately after the shooting. (8 RT 1067; 10 RT 1263.)

Once they were in the car, it was Mendez who controlled the action. Mendez told Rodriguez to get Salazar, the witness to the shooting, into the car. (8 RT 1074-1075.) Mendez told Redmond to leave quickly. (8 RT 1075.) At the Four Seasons, Redmond told everyone to get out of his car, but Mendez countermanded that order. Mendez told Redmond he had to keep driving, and no one complied with Redmond's direction to get out of the car. Following Mendez's order instead, Rodriguez and Lopez stayed in the car. Redmond, too, followed Mendez's direction to continue driving the men, rather than leaving them and going to his girlfriend's, as he said he wanted to do. (8 RT 1076.) Mendez also directed the younger gangsters from the red car to "pack up the car" and to meet him at Redmond's apartment. (8 RT 1077.) Mendez told the youngsters that they needed to talk and he would be there in a little bit. (8 RT 1077.)

In the car, Mendez told Redmond to drive onto the freeway. (8 RT 1076-1077.) Mendez offered to, and did, provide money for gas, but he delegated to others the jobs of paying for the gas and pumping the gas. (8 RT 1078-1081.) Mendez gathered the other two men in the restroom and ordered, "She's gotta die." (8 RT 1081.) It was Mendez who insisted on killing the young witness. No one questioned this order.

At Pigeon Pass Road, Mendez again called the shots, literally. Outside the car, he repeated that Salazar had to die and told Rodriguez it was his job to do, as Rodriguez was the one she could identify. (8 RT 1095.) Rodriguez refused, saying he would not kill a girl. (8 RT 1095-1096.) Mendez ordered him instead to drag the hysterical Salazar out of the car. Rodriguez and Lopez did what Mendez said, and forced Salazar out of the car. Mendez pulled the trigger, shooting the 14-year-old girl because

she witnessed the murder of Faria. (8 RT 1095-1100.) The jury reasonably concluded from the evidence that Mendez was protecting himself, not Rodriguez, when he murdered the young girl. Even though Rodriguez was the only person Salazar could identify, Rodriguez was not willing to kill her, even at risk of personal jeopardy to himself. Mendez, on the other hand, was willing, if not eager, to murder her.

Back at Redmond's apartment, it was again Mendez who acted to protect the shooter, taking everyone's clothes and shoes to burn and telling Redmond to burn his car. (8 RT 1105-1109.) Mendez, with his brother, created alibis for Redmond and Lopez, shuttling them off to a motel to spend time with some accommodating women. (8 RT 1109-1111.)

Mendez was the one who held a gun in his hand when he and Rodriguez fled after killing Faria. Mendez directed the action of the group from that point on. He was the only one who insisted on killing Salazar, to protect the shooter of Faria. The other men went along with Mendez's orders to take Salazar into the car, then to push her out of the car in a deserted area so Mendez could kill her, but none of the others were willing to do so. In addition, Mendez condemned himself in his statements to Nicole Bakotich when he said, "I got a little bit of a chance if they can prove I didn't kill the girl, if I can prove I didn't kill no girl then I can probably get manslaughter . . . . I got myself into this trouble, if I get myself out I get myself out . . . ." (7 CT 2062.) As he talked to Bakotich, he considered claiming he shot Faria in self-defense: ". . . 'cause I need to get out of that one [shooting Salazar]. If I can get out of that one I can probably get if anything get self-defense on the guy because they fucken started it, you know what I mean? I mean they started it. . . . I'm going to try self-defense, A, on that one [shooting Faria]." (7 CT 2067-2068.)

Mendez told Bakotich that Redmond was the shooter. (7 CT 2063, 2072, 2082.) But he also said he had to convince the other gang members

to say that Redmond was the shooter: "See, what I mean we all know Sam did 'em. You mean I told Rascal [Art Luna] to tell the guys, just fuck it, say that Sam did it." (7 CT 2063.) And later: "We are going to go with that plan thou[gh]. Sam did it. . . . But I got to get them to testify against him and say, yeah he did it, you know what I mean? I already told Artie to tell them to go ahead and go with it. So hopefully they do, you know what I mean?" (7 CT 2072.) Mendez also said he told Artie Luna to tell Eddie Limon to say that Redmond was the shooter. (7 CT 2082.)

Mendez believed that the law enforcement officers could not identify his phone conversation with Bakotich. (7 CT 2071.) In this candid atmosphere, Mendez's state of mind, based on his interview with an officer, was that nine of eleven men arrested, including Redmond and Rodriguez, said that Mendez was the shooter: "they [law enforcement] don't need a weapon, they got evidence. They got guys saying that I was there and I was the shooter." (7 CT 2062-2065, 2077.) Mendez seemed more surprised that Rodriguez would say that Mendez was the shooter, than outraged that he was being accused of a murder he purportedly did not commit. Bakotich said she never trusted Rodriguez, then Mendez replied: "I grew up with them, A [sic]. I grew up with them. . . . I fucken grew up with them, A. Fucken, I helped him out through his mom's problems, everything, A. He's fucken went and done this. . . . He re–enacted the crime and Sam did too. I guess its fucken gay lovers and shit saying I was the shooter." (7 CT 2064.) Mendez seemed more angry and disappointed that a fellow gang member, Rodriguez, would inform law enforcement officers on Mendez, than saddened by the deaths of two young people or outraged that he, Mendez, was being falsely accused of shooting the two. It appears that Mendez did not expect the same sort of silence from Redmond, a childhood friend but not a gang member, and that Mendez was eager to blame Redmond for the shootings.

Mendez was convinced that law enforcement had sufficient evidence to identify him as the shooter of both victims: "Well, if I get convicted on both I get the death penalty. If I beat the girl's, if I can even beat one of them I can probably just get life in prison, but as it looks, A, it's the death penalty." (7 CT 2065.) Further, he said, "All of them. All of them, fuck, said I was there, A. Fucken, if they would have just kept their mouths shut, A. Fucken everything would have been cool and shit, A. But thing is that – that they are fucken saying that I was the fucken shooter, A, you know what I mean? So, I mean, how is that going to look for a jury? You got 8 guys saying that I was the shooter." (7 CT 2077.) Then he admitted that there were fewer than eight people saying he was the shooter, and described the re-enactment done by Redmond, and said the detective told Mendez that Rodriguez had performed a re-enactment of the Faria shooting. (7 CT 2077.) Mendez said, ". . . I got to beat the death penalty, A. I don't want to go. I don't want to go. I don't want to go to death row. I mean, maybe I can go do, maybe. Maybe I can go do 25 to life or something. I can live to 45 or 46 years old maybe get a chance at life again, but if I get death row that's it. . . . *I just wish I had another chance, A.*" (7 CT 2078 [emphasis added].) Mendez also mentioned that Robert would be upset at Mendez: "I know he's [Robert's] going to be mad at me." (7 CT 2082.) If, as Mendez claimed, Mendez had done nothing, there would be no reason for Robert to be "mad" at him.

This was strong and compelling evidence that Mendez shot Faria: Mendez was the leader; he was holding a gun in his hand right after Faria was shot; he was the most intent on killing the witness to the Faria murder; his statements implied his consciousness of guilt. The jury was reasonable in concluding from this evidence, beyond a reasonable doubt, that Mendez shot Faria. This decision was neither physically impossible, nor apparently

false. The jury's verdict is supported by sufficient evidence and must be upheld. (See *People v. Friend, supra,* 47 Cal.4th at p. 41.)

The jury was not compelled to credit the evidence from which it could have inferred that Rodriguez was the one who shot Mendez. While the murder of Rodriguez's mother provided a motive for revenge against members of the West Side Verdugo gang (14 RT 1819, 1821), motive alone does not place the gun in Rodriguez's hand at the time Faria was shot. Lizarraga saw Rodriguez at the murder scene, but his identification of Rodriguez as the shooter was not definite. (11 RT 1543-1544.) On cross-examination, Mendez's attorney asked Lizarraga: "And do you recall telling Detective Brown that you weren't 100 percent sure you saw this or maybe you're assuming it, but you thought that you saw [Rodriguez] actually shoot your friend Mr. Faria?" Lizarraga answered, "Yes, I remember telling him that." (11 RT 1543.)

The jury's verdict that Mendez was guilty of the murder of Faria is fully supported by the evidence. The facts that he held a gun right after the shooting, directed all the activities thereafter, and was the most intent on murdering the witness, along with his admissions to Bakotich, support the finding that Mendez was the shooter. Mendez effectively admitted killing Faria in his statements to Bakotich, suggesting that he could argue self-defense in the shooting of Faria, if he could just evade responsibility for shooting Salazar. (7 CT 2062, 2067-2068.) He also admitted, "I got myself into this trouble, if I get myself out I get myself out . . . ." (7 CT 2062.) Mendez knew he was guilty of killing Faria and, as he expected, the jury found him guilty of that murder.

Moreover, even if the jury determined that Mendez was guilty of Faria's death as an aider and abettor, the conviction for first degree murder, with the special circumstance of multiple murders, would not be reversed. An aider and abettor must act with "the intent or purpose of committing,

encouraging, or facilitating the commission of the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) As a committed gang member, Mendez chased down Faria to beat him into the ground, and carried the gun in his hand as he returned to Redmond's car. He encouraged and facilitated the murder, and had the intent to shoot Faria. Mendez was liable for the special circumstance alleged in connection with Faria's death, having been convicted in one proceeding of more than one offense of murder in the first or second degree. (§ 190.2, subd. (a)(3).) There was more than sufficient evidence of Mendez's intent to kill Faria, shown by his holding a gun immediately after that death; his gang motivation to respond to any challenge with overwhelming force, with particular animus toward West Side Verdugo; and his ruthlessness toward the witness of that murder.

Credible, solid evidence supported the jury's finding and the conviction should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED GANG EVIDENCE

Mendez contends that the trial court's decision to admit evidence of three murders committed by others, including by a rival gang, and of a possible drive-by shooting, was an abuse of discretion and violated his rights under the Fifth, Eighth and Fourteenth Amendments. (AOB 61-100.) This contention lacks merit and exaggerates the record. Expert gang evidence was necessary to prove the charged allegations that Mendez committed the murders for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of sections 186.22, subdivision (b)(1), and 12022.53, subdivision (e).[13] (1 CT 29-32.)

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[13] In 2000, when the murders were committed, the sections provided as follows.

(continued...)

The expert gang evidence was properly admitted to prove that Mendez committed the murders at issue in this case for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048 (*Hernandez*).) Moreover, the expert evidence assisted the jury by showing the motive for the shooting of Faria and explaining the mores and customs of criminal street gangs. The evidence of three other murders by others and of a possible shooting was not prejudicial. Because the murders were by others, this evidence did not imply that Mendez had a propensity to kill. But the gang evidence was relevant to explain to the jury Mendez's deadly burst of violence against Faria and to prove the elements of the charged allegations. The trial court did not abuse its discretion.

(...continued)

> Section 186.22, subdivision (b)(1): "Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion."
>
> Section 12022.53, subdivision (e)(1): "The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved."
>
> Subdivision (d) of section 12022.53 provided for a consecutive term of 25 years to life in prison for those convicted of murder who intentionally and personally discharged a firearm and proximately caused great bodily injury or death.

The three murders of which Mendez complains consist of two killings believed to have been committed by West Side Verdugo members, and a killing in front of the Luna house. First, a photograph was shown of Jessie Garcia's funeral in 1994. The photograph contained pictures of many North Side Colton gang members, whom Detective Underhill identified. (Ex. 78; 14 RT 1832, 1835-1837.) The detective explained that the funeral represented a significant event between North Side Colton and West Side Verdugo that caused revenge and rivalry because the North Side Colton gang members believed that a member of the West Side Verdugo gang committed the murder. (14 RT 1834.) The second murder was the murder of Rodriguez's mother, which gang members believed was also committed by West Side Verdugo gangsters. This murder contributed to the long-standing hatred between the two groups. (14 RT 1819-1821.) Finally, there was evidence that John Rojas, a rival gang member, was shot to death on the sidewalk in front of the Lunas' house in 1994, and that Mendez was present when that shooting occurred. (14 RT 1859.) The jury was specifically told that Mendez was not charged with any crimes in connection with that murder. (14 RT 1860, 1870.)

There was no direct evidence of a "drive-by shooting," but testimony that in 1995, a police officer heard gunshots and stopped a nearby car. Mendez was a passenger and another North Side Colton gang member was driving. A loaded .22 caliber handgun was in the center console of the car, and four other loaded firearms were in the trunk. The barrel of a shotgun in the trunk was still warm to the touch. Mendez had a .22 caliber live round in his left front pants pocket. (14 RT 1864.) During closing arguments at the guilt and penalty phase, the prosecutor inferred that a drive-by shooting had occurred. Mendez did not object to either reference. (23 RT 2847-2848; 27 RT 3302.) These facts showed that Mendez lived in a violent world, but one could not infer that he had a propensity to murder based on

this evidence. The evidence could not have been prejudicial, that is, it did not evoke a unique emotional bias against Mendez as an individual, on grounds not related to the issues at trial. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Further, the evidence was relevant to the charged crimes and allegations. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 819-820 (*Gutierrez*); *Hernandez, supra*, 33 Cal.4th at p. 1047.) "[T]he criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Hernandez, supra*, 33 Cal.4th at p. 1048.)

Mendez objected to gang evidence in general as overly prejudicial under Evidence Code section 352. He also objected to hearsay statements of gang-related facts and to evidence that lacked proper foundation. (12 RT 1672, 1674, 1685, 1696-1697; 13 RT 1725.) He did not specifically object to the gang evidence under Evidence Code section 1101, except to complain "there is a certain degree of propensity evidence that is attendant to the introduction of these particular contacts." (13 RT 1727.)

The court recognized that that there were limits on the hearsay an expert could testify about, to be determined on a case-by-case basis. An expert could rely on the fact that a defendant admitted being a gang member to another officer on a certain date, but not much more. Greater detail about past contacts could be provided by the officer who contacted the subject. (12 RT 1682.) One might, however, agree to waive that foundational witness for fear that he would provide additional adverse detail about the contact. (See 13 RT 1742-1744.)

The court said that if the defendants stipulated that North Side Colton was a criminal street gang for the section 186.22 allegations, then the

prosecutor need not prove other predicate crimes.[14] (12 RT 1700, 1716-1717.) Evidence about the past gang-related behavior of the three defendants was relevant, however, to show the strength of the defendants' allegiances to the gang. As the court explained with respect to the Lopez gang exhibit,

> [T]he fact that it's a continual pattern of being with the North Side Colton, especially in situations where people are being arrested and he is being arrested and he comes back and he still associates with them, suggests that his tie is pretty strong with them and he is going to stand with them no matter what they do, and violations of law are not going to deter it, which would be consistent with a person essentially, no matter what happens, I'm down with my gang and what my gang members do, which is what [the prosecutor's] argument is going to be. [¶] That is far more persuasive and probative to a jury than an abstract stipulation or a gang officer testifying to that when there is in fact direct proof of it based upon actual statements and eyewitnesses.

(12 RT 1680-1681.)

Objections under Evidence Code section 1101 are forfeited because Mendez did not present those objections to the trial court for its consideration, unless his single objection to propensity evidence is deemed to be an objection under Evidence Code section 1101. (*Gutierrez*, *supra*, 45 Cal.4th at p. 819; *People v. Partida* (2005) 37 Cal.4th 428, 438.) Mendez acknowledges in his brief, in a roundabout way, that he did not

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[14] At the time of the murders, in 2000, section 186.22 defined a criminal street gang as a group of three or more persons with a common name or symbol, having as one of its primary activities the commission of specified crimes and whose members had engaged in a pattern of criminal activity. A pattern of criminal gang activity required a showing that the group had members who individually or collectively had engaged in two or more specified crimes committed either on separate occasions or by two or more persons. (§ 186.22, subds. (e), (f).) Those other crimes showing the pattern of criminal gang activity are commonly called the predicate crimes or offenses.

object under Evidence Code section 1101 to the admission of prior bad acts by Mendez: "It is noteworthy that there appear to be only five references to Evidence Code section 1101, subdivision (b) in the entire discussion of other-crimes evidence, four of them . . . pertaining to Rodriguez. [Citations.] Only once did *the court* refer to section 1101, subdivision (b), in connection with appellant Mendez; this single reference came regarding the supposed brain matter on the car." (AOB 72, emphasis added.) The "supposed brain matter on the car" never came into evidence before the jury. (See 14 RT 1803 [withdrawn by prosecutor].) Thus, Mendez did not specifically object to prior bad acts of his being admitted under Evidence Code section 1101. He objected only generally to the prejudicial nature of gang evidence, and the danger of propensity evidence. Any objection other than relevance and prejudice is forfeited on appeal because Mendez failed to give the trial court the opportunity to consider the grounds now raised. (*Gutierrez, supra*, 45 Cal.4th at p. 819; *People v. Partida, supra*, 37 Cal.4th at p. 438.) In addition, his claims lack merit.

The admission of evidence, including evidence from a gang expert, is left to the sound discretion of the trial court and is found to be error only if the trial court abused its discretion. (*Gutierrez, supra*, 45 Cal.4th at pp. 819-820; *People v. Hoyos* (2007) 41 Cal.4th 872, 898.) The same standard applies to the trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405; *People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'A court abuses its discretion when it acts unreasonably under the circumstances of the particular case.' " (*People v. Panah* (2005) 35 Cal.4th 395, 426, *Gutierrez, supra*, 45 Cal.4th at pp. 819-820.) Here, the trial court reasonably concluded that evidence regarding Mendez's affiliation with North Side Colton, his prior activities, actions by other gang members, and the deadly

violence that is common in gang interactions were all relevant to prove the gang enhancement allegations and to illuminate Mendez's motives for the murders. The evidence was not unduly prejudicial or cumulative, particularly because it did not relate to the charged murders and did not show a propensity by Mendez to murder, and because the jury was given an instruction at the time of the testimony that limited its use. (*Gutierrez*, *supra*, 45 Cal.4th at pp. 819-820; see 14 RT 1766-1767.)

Even though Mendez stipulated that North Side Colton was a criminal street gang (14 RT 1768), the People had to prove that Mendez committed the murders for the benefit of, in association with, or at the direction of North Side Colton, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1); see *Hernandez, supra*, 33 Cal.4th at p. 1047.) Gang evidence including evidence of uncharged acts is necessary when a gang enhancement is charged, and it is often relevant and admissible even when a gang enhancement or gang participation is not charged.

> [E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.

(*Hernandez*, *supra*, 33 Cal.4th at p. 1049.)

The gang evidence, including the specific acts of past gang-related behavior that were included on the gang board exhibits, was relevant to show the strength of Mendez's allegiance to the gang. There was a continual pattern of Mendez allying himself with North Side Colton, even after he was exposed to violent situations, and after he was contacted by police numerous times. Mendez had strong ties to the gang over many

years. The evidence of the strength of his gang affiliation was more persuasive and probative on Mendez's specific intent to aid or benefit the gang on February 4, 2000, than an abstract stipulation that he belonged to a gang. (12 RT 1680-1681.) There was little evidence of prior bad acts by Mendez. The violence described by the gang expert was perpetrated by others. Two of the murders discussed were committed against North Side Colton affiliates, and the jury was told that Mendez was not charged in connection with the third murder. There was evidence of Mendez's possession of firearms that was cumulative to testimony by Redmond that Mendez possessed several firearms. (10 RT 1303, 1360, 1363.) Evidence that he was in a stolen car that had fled from police was not violent, in contrast to other evidence at trial. Mendez was not prejudiced with propensity evidence. The prejudice that is forbidden, of course, is not proof of culpability that arises from evidence related to the charge, but the unique emotional bias evoked against the defendant as an individual, and with very little effect on the issues. (*People v. Gionis, supra*, 9 Cal.4th at p. 1214; *People v. Karis* (1988) 46 Cal.3d 612, 638.)

Without the gang expert testimony, the jury might have misconstrued the initial fight between Faria and Mendez, and decided that the shooting of Salazar was only to benefit Mendez. The expert's testimony was relevant to prove the elements of the charged allegations, because the stipulation did not include the elements of "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members." (§ 186.22, subd. (b); see *Hernandez, supra*, 33 Cal.4th at p. 1047.)

As the court explained during discussion of jury instructions, the evidence of uncharged crimes was relevant to the motive, intent and identity that were elements of the gang enhancements. Also, the expert provided the jury with information that was outside its knowledge, on how

gangs operate with respect to each other, other gang members, and others who were not members of any gang. (See 22 RT 2746.) Evidence Code section 720 permits an expert witness who has special knowledge, experience or training. Colton Police Detective Underhill had expertise in the activities and customs of gangs, and had particular knowledge about the North Side Colton gang. He provided background information that was helpful to the jury to understand Mendez's motive and intent when Mendez shot Faria and then Salazar.

Leaving aside evidence that was discussed outside the presence of the jury, the information of other crimes that was actually presented to the jury was probative and certainly not prejudicial.[15] Detective Underhill described the murders of Jesse Garcia and Cindy Rodriguez – both acts that were committed *against* the North Side Colton gang. That evidence was not prejudicial to members of Mendez's gang, but could have been used to argue that Mendez was wary of the gangsters he believed to have committed those murders. Further, evidence of the murder of Cindy Rodriguez was beneficial to Mendez in that it cast suspicion on co-defendant Rodriguez as one who had a deadly grudge against the West Side Verdugo gang that Faria claimed. Mendez argued that Rodriguez had a

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[15] Appellant's discussion of the admissibility of gang evidence includes evidence that was never before the jury as well as that which was actually presented to the jury. (See AOB 63-72.) For example, the prosecutor originally thought that the significance of the Rojas killing in front of the Lunas' house was that body tissue found on a car led to the identification of the shooter, and therefore Mendez wanted Redmond to burn his car because Mendez was afraid he could be identified from bodily materials in the car. (12 RT 1686-1687, 1698-1700, 1710-1715.) Before any such evidence was presented to the jury, however, the prosecutor discovered that there was no body tissue on a car in the Rojas killing was never tested. He withdrew information about the victim's blood and tissue on the car, and no such evidence was presented to the jury. (14 RT 1803.)

greater motive to murder Faria than Mendez, and that Lizarraga believed Rodriguez was the shooter. (23 RT 2858-2859.)

Evidence of the Rojas murder in front of the Lunas' house was minimal, and the jury was clearly told that Mendez was a witness to that murder and not charged with that murder in any way. (14 RT 1859.) There was no evidence of any bad act by Mendez in connection with that killing, only that he was a witness.

Mendez also complains about evidence of a possible drive-by shooting. There was no direct evidence of a drive-by shooting, but the prosecutor did argue in closing arguments that that inference could be drawn from some of the expert's testimony. When Mendez was 17, he was riding in a car with another gang member, right after and near the location where an officer heard gunshots. Several guns were in the car, one of which was still warm to the touch. Mendez had a bullet in his pants pocket and two more bullets were on the ground next to the passenger side of the vehicle, where Mendez had been sitting. (14 RT 1864.) During the guilt phase closing argument, the prosecutor drew the inference that these facts showed a drive-by shooting. (23 RT 2848.) The prosecutor made no suggestion that any person was harmed by the gunshots, and there was no such evidence presented at trial. (See 23 RT 2848; 14 RT 1859.) Evidence of being in a car with guns, after gunshots were heard, was imprecise and did not directly implicate Mendez's character. The prosecutor used this evidence to argue that violence and death were a part of Mendez's life since he was young; he was familiar with guns; he went to a funeral of a young friend when he was still young: "Their fellow gang members snuffed out at this tender age for doing silly little things like this. Nobody is too young to die. Not this kid and not an innocent 14-year-old girl. Nobody is too young to die." (23 RT 2848.)

During the closing argument at the penalty phase, while discussing factor (b) – criminal activity that involved the use or attempted use of force or violence – the prosecutor said, "So he doesn't have a long string of violent felony convictions . . . . Just because he doesn't have other acts of violence beyond the possession of the arsenal in that trunk of that vehicle pulled over right after, what – I think any reasonable person comes to a conclusion that it was a drive-by shooting, rolling by 10 miles an hour. The threat of that violence by having that arsenal in that trunk is so profound when you look at it in terms of all of the other things that he did by being an active member of the gang . . . ." (27 RT 3302; see § 190.3, subd. (b).) It was a reasonable inference that the vehicle with the still-warm firearm in the trunk was involved in a drive-by shooting, but there was no evidence that any person had been targeted or shot, lessening any suggestion that Mendez had the propensity to murder.[16]

Mendez argues that admission of this evidence was an abuse of discretion under Evidence Code section 1101. He forfeited this argument by not raising it in the trial court, and in any event, its admission was not an abuse of discretion. Evidence Code section 1101, subdivision (a), prohibits admission of evidence of a person's character or prior acts to prove his conduct on the instant date. Evidence Code section 1101, subdivision (b), permits the admission of evidence of another crime or act when relevant to prove some fact, such as knowledge, intent, motive or mental state, other

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[16] The prosecutor proposed evidence that high levels of gunshot residue were found on both of Mendez's palms after the car was stopped and searched. The court, however, excluded that evidence under Evidence Code section 352. (13 RT 1729-1730.) Proposed evidence that was excluded before trial is not relevant on this direct appeal, even though Mendez has included many such facts in his opening brief, along with statements by the court or prosecutor made during discussions outside the presence of the jury.

than disposition to commit a crime.[17] Evidence admissible under section 1101 must still be weighed under Evidence Code section 352, which requires that the probative value of the proffered evidence must not be 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. Harrison*, *supra*, 35 Cal.4th at p. 229.)

Most of the uncharged criminal acts that were admitted were not committed by Mendez and therefore were not admitted to, and could not, prove Mendez's conduct on February 4, 2000. (See Evid. Code, § 1101, subd. (a).) The murders of Jesse Garcia, Cindy Rodriguez and John Rojas were committed by other people, as far as the jury knew. Mendez has no claim under Evidence section 1101 because these criminal acts provide no information about Mendez's character or on the likelihood that he was the murderer on February 4, 2000. Evidence of criminal acts by others showed only that he lived in a neighborhood plagued by violence. The jury learned that Mendez claimed membership in North Side Colton from a young age, was consistently in the company of known gang members, and had the

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[17] Evidence Code section 1101 provides:

> Except as provided in this section . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
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> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.
>
> Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

gang name "Colton" tattooed on his neck at the age of 15. This information showed his strong ties to the gang, and was not offered or admitted to prove his conduct on February 4, 2000, or to show a disposition to murder. The only prior bad acts of Mendez admitted into evidence were riding in a stolen car that was involved in a high speed chase in 1994, and being in a car with live ammunition and numerous firearms near a shooting in 1995. The fact that he had access to guns in the past was probative to his opportunity to kill more than unduly prejudicial on a disposition to kill.

The expert gang evidence was critical to proving that Mendez committed the two murders for the benefit of or in association with a criminal street gang. It was also relevant to showing Mendez's motive, and to explain to the jury how such a minor confrontation exploded into violence. Evidence of gang activity is admissible to show motive and intent, including the reason for an attack. (*People v. Ward* (2005) 36 Cal.4th 186, 209; *People v. Williams* (1997) 16 Cal.4th 153, 197.) It is also admissible to explain to the jury the culture and habits of criminal street gangs. (*People v. Ward*, *supra*, 36 Cal.4th at p. 209.) In *Ward*, *supra*, 36 Cal.4th 186, expert gang testimony about gang cultures and habits was admissible to show the motive of the defendant to walk into rival territory and shoot into a group of men, an apparently unprovoked attack. (*Id.* at p. 209.) Here, as in *Ward*, a jury would not understand Mendez's intent and motive without the explanation of the violent rivalry between separate gangs and the fanatical insistence on being feared by all, disguised under the label of "respect." The expert testimony was relevant, helpful and admissible on the issues of intent and motive.

This case was not comprehensible without an explanation of the culture and mores that resulted in the murder two teenagers for what would otherwise be no apparent reason. The trial court carefully scrutinized the evidence before admitting it, even going so far as to raise its own hearsay

and foundational objections when the defendants chose not to do so. (See 14 RT 1846-1847; *People v. Gurule* (2002) 28 Cal.4th 557, 654 [gang evidence must be closely scrutinized by the trial court for its probative value against its prejudicial effect, and may be relevant to show the circumstances of the crime].) The court carefully scrutinized the testimony of prior murders in multiple pre-trial hearings and considered extensive argument by the parties before ruling what was admissible. (See 12 RT 1672-1718; 13 RT 1724-1737; 14 RT 1755-1757, 1826-1827.)

The gang expert testimony was relevant to prove the elements of the gang allegations and it was relevant and helpful to the jury to show Mendez's motive and intent. It painted Mendez's violent world but was not unduly prejudicial and did not inflame the jury to find Mendez guilty just because he was a gang member. (*Guteirrez, supra*, 45 Cal.4th at p. 820.) The expert gang testimony was relevant and not unduly prejudicial; it "was no stronger and no more inflammatory than the testimony concerning the charged offenses." (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) Killing of two young teenagers on a single night, for no good reason, was far more inflammatory than evidence of Mendez's prior proximity to firearms and a stolen car, and evidence of other murders that Mendez knew of. This evidence of his past did not cause the jury to be biased against Mendez for extraneous reasons such as his religion or ethnicity. (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Moreover, the trial court was very careful to instruct the jury on the limited use of gang expert testimony, because this Court's opinion in *Hernandez* was issued during the pendency of the trial. (See 13 RT 1726 [on August 13, 2004, trial court refers to the *Hernandez* case that was issued on August 9, 2004]; *Hernandez, supra*, 33 Cal.4th 1040.) *Hernandez* held that the trial courts must give an instruction limiting the

use of gang evidence upon the defendant's request but had no sua sponte duty to do so. (*Hernandez*, *supra*, 33 Cal.4th at p. 1051.) Mindful of this Court's admonitions, the trial court gave a limiting instruction before the expert started his testimony, that the testimony was being offered only with respect to the gang enhancement allegation and was not offered to prove the underlying charged offenses. (14 RT 1766-1767.) Again, at the end of the case, the judge told the jury:

> There's one other thing I did want to say, and I'm going to reopen the case just for this one point. I do not mean to suggest what weight and significance you give to the gang evidence and / or evidence of other crimes. That is for you, the jury, to decide. However, this evidence, if believed, may not be considered by you just to prove that Mr. Mendez is a person of bad character or that he has a general disposition to commit crimes. Generally speaking, prior misconduct is not allowed into evidence just to show the person is, quote-unquote, a bad person. It may be allowed in to put things in context, to give you an understanding of motive and intent and so forth. But it's only for that limited purpose. So when I give you the instruction "evidence was admitted for a limited purpose," that's what I'm talking about. I just want to be clear about that.

(23 RT 2797-2798.) The court then read the instructions to the jury, including standard CALJIC No. 2.09 [Evidence Limited as to Purpose], and CALJIC No. 2.80 [Expert Testimony – Qualifications of Expert]. The jury thus was instructed a third time that the gang expert testimony was admitted for a limited purpose, and that the jury was not bound by an expert's opinion and should give the expert's opinions "the weight you find it deserves." (23 RT 2808.) These instructions eliminated any possible error. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 820.)

Assuming arguendo any error occurred and was preserved, any possible error that was preserved must be reviewed under the standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at pages 836-837. The reviewing court must ask whether it is reasonably probable the verdicts

would have been more favorable to Mendez absent the error. (*People v. Partida, supra,* 37 Cal.4th at p. 439 (*Partida*).) Federal error is implicated only if the evidence "is so extremely unfair that its admission violates fundamental conceptions of justice." (*Perry v. New Hampshire* (2012) 565 U.S. __ [132 S.Ct. 716, 723, 181 L.Ed.2d 694]; *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Fuiava* (2012) 53 Cal.4th 622, 697-698; *Partida, supra*, 37 Cal.4th at p. 439; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."].) Mendez had a fundamentally fair trial. There is no reasonable likelihood that Mendez would have received a more favorable verdict if the gang expert testimony had been limited or excluded. Accordingly, even assuming error, Mendez cannot show any prejudice.

III. THE EXPERT PROPERLY TESTIFIED TO THE BASES OF HIS OPINIONS, INCLUDING OUT-OF-COURT STATEMENTS ON WHICH HE RELIED, WITHOUT VIOLATING MENDEZ'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

Mendez claims that the gang expert presented testimonial hearsay against Mendez in violation of Mendez's Sixth Amendment confrontation rights, pursuant to the rule of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). (AOB 101-141.) This contention lacks merit. The expert's testimony, including out-of-court statements on which he relied, was admitted as foundational evidence to support the expert's opinions that the murders were both committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of the gang enhancements that were alleged. The out-of-court statements were not admitted for the truth of the matters asserted, or as substantive evidence. Moreover, the out-of-court statements on which the expert relied in formulating his opinions were not testimonial

statements. The admission of out-of-court statements on which the expert relied did not violate Mendez's Constitutional rights. (*Crawford*, at p. 59, fn. 9; *People v. Archuleta* (2011) 202 Cal.App.4th 493, 509-512 (*Archuleta*); *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1131 (*Hill*); *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209–1210 (*Thomas*).)

Mendez objected to the hearsay aspects of the expert's testimony and the trial court acknowledged the need for the expert to provide a sufficient foundation for his opinion. (12 RT 1697-1698.) The trial court, alert to this issue, raised concerns about hearsay and foundation even when the defendants chose not to do so. (See 14 RT 1846-1847.) The court also noted that the defendants might, as a tactical matter, choose not to raise a foundational objection for fear of additional adverse facts being presented. (13 RT 1742-1744.)

The *Crawford* case was decided on March 8, 2004, a few months before trial in this case started in July 2004. In *Crawford*, the United States Supreme Court held that the Confrontation Clause of the federal Constitution "prohibits 'testimonial hearsay' from being admitted into evidence against a defendant in a criminal trial unless (1) the declarant [of the hearsay statement] is unavailable as a witness and the defendant has had a prior opportunity to cross-examine him or her, or (2) the declarant appears for cross-examination at trial." (*People v. Jennings* (2010) 50 Cal.4th 616, 651 (*Jennings*), citing *Crawford*, *supra*, 541 U.S. at pp. 53, 59 & fn. 9.) *Crawford* noted, however, that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford*, *supra*, at p. 59, fn. 9.)

The confrontation clause is concerned solely with hearsay statements that are testimonial. (*Crawford*, *supra*, 541 U.S. at pp. 53-54.) The *Crawford* court did not give a comprehensive definition of the term "testimonial," but it provided further guidance in *Michigan v. Bryant* (2011) __ U.S. __ [131 S.Ct. 1143, 179 L.Ed.2d 93] (*Bryant*) and in *Davis v. Washington* (2006) 547 U.S. 813, 826 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), and this Court has elucidated the term in *People v. Blacksher* (2011) 52 Cal.4th 769, 811-816 (*Blacksher*), and in *People v. Cage* (2007) 40 Cal.4th 965, 984 (*Cage*). Testimony includes formal statements to a police officer who is investigating a crime, other than the immediate reporting of crimes.

> " '[T]the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.' " (*Bryant*, *supra*, 131 S.Ct. at p. 1152, quoting *Crawford*, *supra*, 541 U.S. at p. 50.). . . . "Testimony," in turn, is a " ' "solemn declaration or affirmation made for the purpose of establishing or proving some fact." ' " (*Bryant*, *supra,* 131 S.Ct. at p. 1153, quoting *Crawford*, *supra*, at p. 51.)

(*Blacksher*, *supra*, 52 Cal.4th at p. 811.)

Not all responses to questions by the police are testimonial within the meaning of the Sixth Amendment. (*Bryant*, *supra*, 131 S.Ct. at p. 1153; *Crawford*, *supra*, 541 U.S. at p. 53; *Blacksher*, *supra*, 52 Cal.4th at p. 811.) To date, the term "police interrogation" has only been used to describe " 'interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.' " (*Bryant*, *supra*, 131 S.Ct. at p. 1153, quoting *Davis*, *supra*, 547 U.S. at p. 826; *Blacksher*, *supra*, 52 Cal.4th at p. 812.)

Here, and in gang cases generally, the gang expert police officer based many of his opinions on information gathered by law enforcement officers talking with suspected and actual gang members over a period of years.

This information was written on field identification cards, also called S.M.A.S.H. cards in this case because they were collected by and circulated among the San Bernardino County Movement Against Street Hoodlums. Information collected on field identification cards was not obtained for the purpose of establishing the facts of a past crime. Officers talked to young men for the purpose of collecting information and staying abreast of the people and activities in the community. Field identification cards were used to collect criminal intelligence, not to report crimes or to collect information to prosecute the perpetrator of a crime that has occurred.

As described in *Davis*, *supra*, testimonial statements are elicited when an officer is investigating a specific, completed act that is potentially criminal. Testimonial statements are obtained when the officer engaged in organized and structured questioning that was focused on a specific past event or events that were potentially criminal. The officer prepared a formal written report as a result of the questioning, for the purpose of preparing a prosecution case. (*Davis*, *supra*, 547 U.S. at pp. 819-820, describing the facts of *Hammon v. State* (Ind. 2005) 829 N.E.2d 444; see *Blacksher*, *supra*, 52 Cal.4th at pp. 812-813.) In common law enforcement practice in California, such questioning would result in a police report that included statements from a witness to or victim of a crime. The United States Supreme Court summed up this description of testimonial statements: "Thus, the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements [offered for their truth] are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." (*Bryant*, *supra*, 131 S.Ct. at p. 1155 [fn. omitted]; see *Blacksher*, *supra*, 52 Cal.4th at p. 813.) Typically, those statements are recorded in a police report created by an officer investigating a crime.

This Court stated that the relevant "inquiry is on the *primary* purpose of both officer and declarant," recognizing that both participants may have mixed motives. (*Blacksher*, *supra*, 52 Cal.4th at p. 814 [emphasis in original].) In conducting a field investigation, an officer might have the secondary motive of using the gang intelligence obtained in some subsequent, unknown criminal trial. But the primary purpose of a field interrogation is to collect information, not to investigate a known crime that has already occurred. This is why police officers are free to ask a range of questions in a field interview, because the declarant is not then a suspect in any crime. The officer collects the information to assess the size and spread of gangs in general, to understand the community and its potential trouble points in the future. At the time the questions are posed, the officer has no idea if the declarant will ever be involved in a crime, or if the declarant belongs to a gang or if the gang will engage in criminal activity that will result in a trial. Police reports, on the other hand, are prepared by law enforcement officers when investigating a specific event that is considered a crime, and to record that information for use in a subsequent prosecution. Police reports are not similar to field investigation cards that are informal collections of information without regard to a specific investigation. The primary purpose of field investigation cards are not to establish " 'the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.' " (*Bryant*, *supra*, 131 S.Ct. at p. 1153, quoting *Davis*, *supra*, 547 U.S. at p. 826.) Field investigation cards are not the basis for a criminal prosecution. The two different types of recording information are created for different primary purposes. Statements to officers that are collected on field investigation records are not testimonial within the meaning of the Confrontation Clause, even though made in response to questions by police officers. Not all responses to questions by the police are testimonial within the meaning of the Sixth

Amendment. (*Bryant*, *supra*, 131 S.Ct. at p. 1153 [not all responses to questions by the police are testimonial within the meaning of the Sixth Amendment]; *Crawford*, *supra*, 541 U.S. at p. 53 [same]; *Blacksher*, *supra*, 52 Cal.4th at p. 811 [same].) *Crawford* does not apply to information that gang experts glean from field investigation cards because those statements are not testimonial.

Also, several appellate courts have held that the admission of testimonial out-of-court statements as foundational, basis evidence for an expert does not violate the Confrontation Clause because the out-of-court statements are not admitted into evidence for the truth of the matters asserted. (*Thomas*, *supra*, 130 Cal.App.4th at pp. 1209-1210; *People v. Cooper, supra*, 148 Cal.App.4th at pp. 746-747; *People v. Ramirez, supra*, 153 Cal.App.4th at pp. 1426-1427; *People v. Sisneros, supra*, 174 Cal.App.4th at pp. 153-154.) An out-of-court statement is hearsay only if it is "offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a); accord, *Crawford, supra,* 541 U.S. at p. 59, fn. 9.) An expert of necessity relies on information propounded by others. People gain expertise, and become recognized experts, by gathering, analyzing and synthesizing information in their fields, including hearsay. *Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and to do so generally requires the experts to relate the information and sources upon which they rely in forming opinions. A medical doctor, for example, relies on treatises, articles, textbooks and information from others. He is not restricted to relying only on his own personal experience. Experts are subject to cross-examination about their opinions and the jury must assess the basis for the experts' opinions in order to assess the testimony provided by the experts. These foundational materials are not elicited for the truth of their contents, but to support the

weight of the experts' opinions. (See *Archuleta*, *supra*, at p. 509; *Thomas*, *supra*, at p. 1210; *People v. Cooper*, *supra*, at p. 747.)

This Court has recognized that the out-of-court statements relied on by gang experts are not hearsay under California law because those statements are not offered to prove the truth of the matters asserted. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*) [gang expert testimony is admissible when based on out-of-court statements that are ordinarily relied upon by experts]; see also Evid. Code, §§ 801, subd. (b) [expert may rely on reliable hearsay in forming opinions]; 802 [expert may generally explain basis of opinions on direct examination].) In *Gardeley,* this Court concluded that a gang expert, in opining that an assault in which the defendant participated was gang related, properly relied on and revealed an otherwise inadmissible hearsay statement by one of the defendant's alleged cohorts that he, the alleged cohort, was a gang member. (*Gardeley*, *supra*, 14 Cal.4th at pp. 611-613, 618-619.) *Gardeley* was decided before *Crawford* and the Court did not consider whether the expert's foundational evidence was testimonial. In *Thomas*, however, the appellate court found no Confrontation Clause violation in reliance on *Gardeley* and also because the expert's testimony repeating statements from other gang members was not admitted as substantive evidence of the truth of the statements but for the distinct and permissible purpose of explaining and supporting the expert's opinion that the defendant was a gang member. (*Thomas*, *supra*, 130 Cal.App.4th at pp. 1209-1210.) The court concluded that the gang expert, in opining that the defendant was a gang member, properly relied on and testified to out-of-court statements by other gang members that the defendant was a gang member. (*Id.* at pp. 1206, 1208-1210.) *Crawford* states that the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing their truth. (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.)

On the other hand, in *People v. Hill*, the appellate court suggested that the jury often must determine the truth of the foundational out-of-court statements in order to assess the reliability of the expert testimony. (*Hill, supra*, 191 Cal.App.4th at pp. 1129-1131; see also *Archuleta, supra*, 202 Cal.App.4th at pp. 509-512; *People v. Goldstein* (2005) 6 N.Y.3d 119 [810 N.Y.S.2d 100, 843 N.E.2d 727].) These courts found that when the jury must determine or assume the truth of an out-of-court statement as the basis for an opinion, admission of that out-of-court statement through the medium of an expert violated the Confrontation Clause. (*Hill, supra*, 191 Cal.App.4th at p. 1131; *Archuleta, supra*, 202 Cal.App.4th at pp. 509-512.) *Hill* cited academic commentary that has been critical of the assumption that juries can avoid considering basis or foundational evidence for its truth when the expert relies on that evidence for its truth. (*Hill, supra*, at p. 1130, fn. 16.) The courts in *Hill* and in *Archuleta* found "it is often difficult if not practically or logically impossible for juries to disregard the truth of hearsay evidence when offered as basis evidence to expert opinion." (*Archuleta, supra*, 202 Cal.App.4th at p. 512; *Hill, supra*, 191 Cal.App.4th at pp. 1129-1131.) The California appellate courts concluded, however, they were bound by *Gardeley*. (*Archuleta, supra*, 202 Cal.App.4th at p. 512; *Hill, supra*, 191 Cal.App.4th at pp. 1129-1132, 1135-1137.)

In California, there is a long-established legal precedent distinguishing between the use of an out-of-court statement as substantive evidence of the truth of the matter asserted and its use as expert opinion basis evidence. (See *Gardeley, supra*, 14 Cal.4th at pp. 618-619.) The United States Supreme Court has also acknowledged the legal distinction between the use of hearsay evidence for its truth and for the distinct and permissible purpose of supporting an expert opinion. (*Crawford, supra*, 541 U.S. at p. 59, fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414

[105 S.Ct. 2078, 85 L.Ed.2d 425] [hearsay admissible to impeach defendant's testimony].)

Even in the gang context, however, not all of the foundational evidence must be actually true before being a reliable basis for the expert's opinion. Here, for example, it was irrelevant whether West Side Verdugo members actually murdered Jesse Garcia and Cindy Rodriguez or not. The relevant fact was that North Side Colton members believed that West Side Verdugo was responsible for those murders, and therefore members of North Side Colton had a motive to be especially vicious to those perceived to belong to West Side Verdugo. Information received by Detective Underhill that North Side Colton members believed West Side Verdugo was responsible for those two murders was neither testimonial nor hearsay, as it reflected the state of mind of the North Side Colton members. Evidence of a declarant's state of mind is not inadmissible under the hearsay rule of California. (Evid. Code, § 1250.) Such statements are not hearsay in California, and are admissible under the Confrontation Clause, because the truth of the matters asserted did not matter.

Similarly, prior admissions by Mendez himself to police officers were admissible because they were the admissions of a party-opponent. (Evid. Code, § 1220.) Mendez was available to rebut such statements, if he chose to do so.

Mendez can show no error under the Sixth Amendment and state law and no possible prejudice from any possible hearsay statements repeated by the gang expert. Proof that Mendez murdered Faria and Salazar depended on the jury's evaluation of the credibility of Redmond. If the jury believed Redmond, Mendez murdered Salazar and Faria. If the jury found Redmond incredible, or not credible beyond a reasonable doubt, it would have found Mendez not guilty. Redmond was cross-examined extensively by three experienced attorneys, including on the issue of whether Redmond himself

was a gang member who might be shielding himself. Gang evidence explained the motive for gunning down Faria, and the subsequent murder of Salazar as a witness to that murder, but otherwise provided no evidence of the elements of murder. Mendez stipulated that North Side Colton was a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b), and that Mendez, Rodriguez and Lopez were members of North Side Colton. (14 RT 1768.) The expert opined that the murders were for the benefit of, at the direction of, or in association with a criminal street gang, but that conclusion was clear from the evidence presented by Lizarraga that Rodriguez and Mendez beat and killed Faria after a standard gang challenge to which Faria claimed the West Side. (11 RT 1496-1501.) The gang expert was helpful to the jury members who did not know the mores and motivations of street terrorists, but was not indispensible to the findings of guilt here.

Assuming arguendo that testimonial hearsay was admitted through Detective Underhill for the purpose of proving the truth of the matters asserted by North Side Colton gang members over the years, any such error was harmless, beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].) The crimes were proved by Redmond's testimony, corroborated by Lizarraga's and Flores's testimony, the tracks of Redmond's tires, and the fiber on the sole of Salazar's shoe. The gang allegations were proved by Lizarraga's testimony and Mendez's stipulation. Detective Underhill's testimony was helpful to those not accustomed to the violent, deadly ways of gangsters, but it was not essential to prove the crimes and allegations other than the gang allegations. The gang testimony did not evoke a uniquely emotional bias

against Mendez as an individual, unrelated to the issues at trial. Accordingly, even assuming error, Mendez cannot show prejudice.

IV. ADMISSION OF MENDEZ'S VOLUNTARY STATEMENTS INSIDE THE JAIL TO A FRIEND DID NOT VIOLATE HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

Mendez contends that the admission of a recording of Mendez's jailhouse conversation with a friend violated his right to confront the witnesses against him pursuant to the Sixth Amendment, and his right to a reliable determination of guilt under the Eighth and Fourteenth Amendments. (AOB 142-167.) This contention lacks merit. The contested statements were Mendez's own statements. To the extent he repeated statements of others, he adopted those statements as his own admissions. Moreover, the statements that he repeated reflected his state of mind. The statements were admissible.

Riverside County jail officers recorded a conversation that Mendez had with his friend Nicole Bakotich on April 9, 2000, while Mendez was in custody. (19 RT 2309-2314, 2321-2322.) The recording of this conversation between Mendez and Bakotich was played for the jury. (19 RT 2325-2326.) Mendez now complains about admission of some of the statements he made to Bakotich, but clearly those were his admissions and were properly admitted against him. (Evid. Code, § 1220 [admissions of a party admissible against him].)

Before the tape recording was played for the jury, Mendez objected to the statements attributed to Rodriguez as violating the *Aranda / Bruton* rule. (19 RT 2300-2304; see *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).) His attorney understood, however, the rationale for admission of Mendez's statements of what he had been told or shown, because in his conversation with Bakotich, Mendez was stating "his

reactions to either the ruse or the actual evidence that's been presented." (19 RT 2300.)

The trial court overruled the objections because the statements were made by Mendez. Mendez adopted the statements made by others as his own, and based on those statements tried to plan a defense to the murders. He revealed his consciousness of guilt of the murders. (19 RT 2301-2305.) Previously, Mendez thought that no evidence tied him to the murders and he could deny being there, because the victims could not identify him. But now that he thought he had been identified by his cohorts as being present, he accepted as a fact there was evidence placing him at the murders, and he would have to come up with a different defense. (19 RT 2300.) He did not express outrage that he had been falsely accused, but instead adopted the truth of the statements accusing him of being the shooter. Although he told Bakotich that Redmond was the shooter, the context of the conversation as a whole shows that was not true. Instead, Mendez believed that the truth would come out, that he was the shooter. (19 RT 2300-2305.)

The tape recording of Mendez's conversation with Bakotich was played at trial. (19 RT 2325-2326; 7 CT 2061-2085.) Mendez believed the law enforcement officers would not be able to identify and overhear his phone conversation with Nicole Bakotich. (7 CT 2071.) Bakotich was a close friend. (19 RT 2322.) Mendez told Bakotich that he got himself into this trouble and would get himself out if he could. (7 CT 2062.) He planned out his defense, saying, "Well, if I get convicted on both I get the death penalty. If I beat the girl's, if I can even beat one of them I can probably just get life in prison, but as it looks, A, it's the death penalty." (7 CT 2065.) Mendez calculated that he could evade the death penalty if he could prove that he did not shoot Salazar. (7 CT 2062.) If he could "get out" of murdering Salazar, he could claim self-defense as the reason for shooting Faria. Mendez said:

> I'm going to try self-defense, A, on that one [Faria murder]. I'll probably get 18. 18, if I can beat it. If I can get out of, fucken girl, you know, that's the only thing that – that's the only problem. That's what's giving me the death penalty is her, 'cause they say I killed her. I didn't kill her, fuck. I figure I get, what does self-defense carry[,] 6? . . . 6 on self-defense. Gang enhancements, that's another 5, and then probably 3 for a weapon, probably like 18. I am trying not to get the "L." I'm going to try. See I've got to – it's hard. It's going to be hard, A. It's going to go from death penalty, I've got to beat death penalty, then from death penalty I've got to go life at least 18 or something. So, then I probably get – . So I don't know. See what happens.

(7 CT 2068.)

He also said, ". . . I got to beat the death penalty, A. I don't want to go. I don't want to go. I don't want to go to death row. I mean, maybe I can go do, maybe. Maybe I can go do 25 to life or something. I can live to 45 or 46 years old maybe get a chance at life again, but if I get death row that's it. . . . *I just wish I had another chance, A.*" (7 CT 2078.)

Mendez told Bakotich he was telling the other gang members to say that Redmond committed the shootings. (7 CT 2063, 2072, 2082.) Mendez said, "We are going to go with that plan though. Sam did it. . . . But I got to get them to testify against him and say, yeah he did it, you know what I mean? I already told Artie to tell them to go ahead and go with it. So hopefully they do, you know what I mean?" (7 CT 2072.) Mendez also said he told Artie Luna to tell Eddie Limon to say that Redmond was the shooter. (7 CT 2082.)

Mendez was worried about being being found guilty of having murdered Salazar because he believed that in addition to Redmond, several gang members, including Rodriguez, had told law enforcement officers that Mendez had killed Salazar. Mendez said, "All of them. All of them, fuck, said I was there, A. Fucken, if they would have just kept their mouths shut, A. Fucken everything would have been cool and shit, A. But thing is that

– that they are fucken saying that I was the fucken shooter, A, you know what I mean? So, I mean, how is that going to look for a jury? You got 8 guys saying that I was the shooter." (7 CT 2077.)

There is no evidence anywhere in the record that eight witnesses said that Mendez was the shooter, and it does not matter whether or not eight different people told police that Mendez was the shooter. As the jury was told, the police could have been deceiving Mendez. (See 23 RT 2910-2911.) What is important is that Mendez believed that the police had several eyewitnesses who saw Mendez shoot Faria and Salazar. Mendez was worried that he would get the death penalty for the double murders due to the existence of these eyewitnesses and their apparent willingness to testify against him. Mendez would not have been worried about the death penalty if he knew the police were lying. His reaction shows he adopted and implicitly admitted the officer's premise, that eight people saw Mendez shoot Faria.

Mendez told Bakotich that Redmond was the shooter. (7 CT 2063, 2072, 2082.) But in context this was not credible because he also told Bakotich of his efforts to convince the other gang members to say that Redmond was the shooter: "See, what I mean we all know Sam did 'em. You mean I told Rascal [Art Luna] to tell the guys, just fuck it, say that Sam did it." (7 CT 2063.) And later: "We are going to go with that plan though. Sam did it. . . . But I got to get them to testify against him and say, yeah he did it, you know what I mean? I already told Artie to tell them to go ahead and go with it. So hopefully they do, you know what I mean?" (7 CT 2072.) Mendez also said he told Artie Luna to tell Eddie Limon to say that Redmond was the shooter. (7 CT 2082.)

During his talk with Bakotich, Mendez repeated his belief, based on information from the police officers, that Rodriguez as well as Redmond had identified Mendez as the shooter and re-enacted the crime for the

police. Mendez's response – disappointment that Rodriguez told the truth rather than outrage at being "falsely" implicated – was an implicit admission that Mendez was the shooter.

After closing arguments, Mendez sought additional clarification of the use of the tape. (23 RT 2905-2909.) Mendez's attorney stated that the prosecutor did not argue inappropriately about the evidence on the tape. (23 RT 2906.) The court instructed the jury that police officers have discretion to tell lies about the evidence when interrogating a suspect. In his conversation with Bakotich, Mendez referred to a couple of matters told to him by the police, including a re-enactment of the crime by Rodriguez and the identification of Mendez by nine or ten witnesses. The trial court told the jury there was no evidence that Rodriguez re-enacted the crime or that nine or ten witnesses had identified Mendez. The court instructed that the recording was not introduced for the truth of those references; it was to be considered by the jury only for Mendez's state of mind or to the extent he adopted the admissions of others. (23 RT 2910-2911.) The court reminded the jurors that the statements of the attorneys were not evidence, and then concluded with the final instructions. (23 RT 2911-2914.)

During deliberations, the jury sent a request to see a taped interview with Rodriguez, if there was one. (24 RT 2952.) With the agreement of both attorneys, the court responded, "There is no taped interview with Joe Rodriguez in evidence." (24 RT 2952; 8 CT 2228.)

In *Bruton*, the United States Supreme Court held that the introduction of a co-defendant's confession implicating the defendant in a joint trial violated the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. A jury instruction to consider the confession only against the declarant is insufficient to correct the error. (*Bruton*, *supra*, 391 U.S. at p. 137.) The California Supreme Court issued a similar rule in *Aranda*, about three years before *Bruton*. (*Aranda*, *supra*, 63 Cal.2d at pp.

530-531.)[18] *Aranda* and *Bruton* stand for the proposition that a "nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120-1121.)

There is no *Bruton* error for admission of Mendez's own statements. Mendez's characterization or belief of the substance of Rodriguez's alleged statement was admitted, but the jury was told that there was no evidence that Rodriguez made a statement to the police. (23 RT 2910; 24 RT 2952.) The jury was instructed it could consider whether Mendez believed that Rodriguez told the police that Mendez was the shooter. (23 RT 2910.) It seems clear that Mendez believed that Rodriguez told the police that Mendez was the shooter. (See 7 CT 2064, 2077.) Mendez adopted the statements as his own by the way he repeated the statements and used them in his own conversation with Bakotich. No Rodriguez statement was played for the Mendez jury or admitted into evidence. Instead, the testimony now complained-of was Mendez's own statements, repeating what police officers told Mendez that Rodriguez purportedly said. (AOB 143, 147.) There is no evidence what, if anything, Rodriguez actually said, just Mendez's understanding of his comments. The jury heard Mendez's reaction to Rodriguez's and the detective's statements. It was relevant and probative that Mendez *believed* that the statements and underlying facts

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[18] The *Aranda* was made consistent with *Bruton* in 1982 – "[t]o the extent that [*Aranda*] constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law" – by the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)). (*People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

were true, because he adopted those statements as his own admissions. (See Evid. Code, § 1221.)

Mendez's right to confront Rodriguez was not implicated or violated because Rodriguez's statements were never admitted into evidence. If Rodriguez made a statement to the police about this case it was likely testimonial under *Crawford*, but this is immaterial because no Rodriguez statement was offered or admitted into evidence. (*Crawford*, *supra*, 541 U.S. at pp. 51-53.) Mendez's jury was not given any statements directly by Rodriguez, or by police officers who may have interrogated him. There was no evidence whether Rodriguez spoke to the police and if so, what he said, other than Mendez's own statements to Bakotich. The jury was informed that the officer might have been lying when he told Mendez what Rodriguez had said. It was up to the jury to determine what Mendez believed to be true and what facts he adopted as his own admissions when he was talking with Bakotich.

An adopted admission is admissible for the truth of the matter asserted. Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Whether a statement is an adopted admission is determined upon the facts and circumstances of each case. (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1262; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1121.) Simply stated, "a statement is admissible as an adoptive admission if 'there is evidence sufficient to sustain a finding' (Evid. Code, § 403, subd. (a)) that the defendant heard and understood the statement under circumstances calling for a response and by words or conduct adopted it as true." (*People v. Davis* (2005) 36 Cal.4th 510, 535, 536 (*Davis*).) A party's " 'silence, evasion, or equivocation may be considered as a tacit

admission of the statements made in his presence.' " (*People v. Jennings, supra*, 50 Cal.4th at p. 661.) "[O]nce the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions.*" (*People v. Cruz* (2008) 44 Cal.4th 636, 672 [emphasis in original].) The statement is no longer the statement of a non-testifying witness, but the admission of the party, or defendant, himself. (*Jennings, supra*, 50 Cal.4th at pp. 661-662.) "It follows that the admission of an out-of-court statement as the predicate for an adoptive admission does not violate the principles enunciated in *Crawford* or in *Aranda* and *Bruton*." (*Id.* at p. 662.)

Here, Mendez told Bakotich that Rodriguez had identified Mendez as the shooter. Normally, after repeating an accusation like that, a person would deny it if it were untrue, and Mendez denied it here, saying that Redmond was the actual shooter. But that was not credible because in the next breath Mendez told Bakotich of his efforts to convince the other gangsters to say that Redmond was the shooter. The jury was informed of Mendez's theory that Redmond was the shooter, but it was up to the jury to determine if Mendez was credible when he blamed Redmond for the shootings. While Mendez threw that casual denial into the conversation, the bulk of his comments were about creating his defense to the murders of Salazar and Faria. Mendez tacitly admitted that he shot Faria and Salazar and that he needed a defense to those murders to avoid the death penalty.

The trial court found the evidence sufficient to sustain a finding that Mendez adopted Rodriguez's statements as his own admissions. Mendez heard that Rodriguez said Mendez was the shooter and repeated that statement to his friend, Bakotich. The court found this was a circumstance calling for a response, and that Mendez adopted the statement as true by the substance of his entire conversation with Bakotich. (19 RT 2300-2305.)

A factually similar situation occurred in *People v. Davis*. (*Davis*, *supra*, 36 Cal.4th 510.) There, three co-perpetrators were placed in adjacent cells in pretrial detention. Police officers monitored and recorded their conversations, and portions of the conversations were presented at trial. (*Id.* at p. 521.) The defendant objected to the statements of his co-perpetrators as inadmissible hearsay. (*Id.* at pp. 534-535.) These included the statements by a co-perpetrator recounting his statements to the police. (*Id.* at p. 534.) The trial court instructed the jury to consider statements by the co-perpetrators only to the extent the defendant adopted those statements through his own comments or conduct. (*Id.* at p. 535.) The statements that this Court found to be adoptive admissions by the defendant were evasive or equivocal. For example, in referring to a fourth cohort having told the police that the defendant shot the two victims, the defendant said that no one saw him kill the victims, the fourth cohort just heard the shots but did not see anything. (*Id.* at pp. 537-538.) This was not a direct confession of the murders but tended to prove the defendant's guilt when considered with the other evidence. Statements made by the defendant referring to the damage to him from the information given to the police by another were found by this Court to be admissions of guilt. (*Ibid.* & fn. 10.) Similarly, a different perpetrator said the police asked him 12 times if he saw the defendant kill the victims. The defendant replied, " 'Oh man . . . 12 times.' " (*Id.* at p. 537.) This Court found that "the jury reasonably could have concluded that by not denying that he had shot the victims, defendant had implicitly adopted the substance of [the co-perpetrator's] statement that defendant was the shooter." (*Ibid.*) This Court found, in *Davis*, that all of the excerpts were properly admitted, and there was no violation of the defendant's Fifth and Fourteenth Amendment right to due process of law, his Sixth Amendment right to confront and cross-examine

witnesses, and his Eighth Amendment right to reliability in the guilt and sentencing determinations. (*Id.* at p. 538.)

The standard for admissibility is not that a defendant absolutely, conclusively adopted another's statement as true, but whether that is a reasonable inference that could be drawn. It is then up to the jury to decide what weight to give to the evidence and what inferences to draw from it. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190.) " 'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' " (*Ibid.*, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

Here, one could reasonably infer from Mendez's conversation that he admitted he killed both victims and that he was scrambling to find a defense so that he could avoid the death penalty. The entire recording was properly admitted into evidence, and it was up to the jury to make the ultimate determination whether Mendez acknowledged his guilt of the murders.

In addition to the special instruction after closing argument (23 RT 2910-2911), the jury was instructed that it had to determine whether Mendez made an admission, and if such admissions were true or not. It was warned to view admissions with caution, and that an admission alone was not sufficient to prove the crimes.

> An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission and, if so, whether that statement is true in whole or in part. [¶] Evidence of an oral admission of the defendant not

> made in court should be viewed with caution. . . . [¶] No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial.

(23 RT 2807-2808: 8 CT 2124.) It is presumed the jury followed this instruction. (*Davis, supra*, 36 Cal.4th at p. 537.)

Mendez contends that he did not adopt Rodriguez's purported statements. (AOB 150-151.) Mendez originally heard Rodriguez's purported statements when Mendez was being interrogated by police. Mendez's interrogation was not admitted into evidence, so there is no evidence whether he responded to the police. In any event Mendez might be expected to rely on his Fifth Amendment right to silence when the police confronted him with that statement. Respondent does not assert that Mendez adopted Rodriguez's statements as his own when he first heard it from the police. (See *People v. Riel, supra*, 22 Cal.4th at p. 1189 [no adoptive admission when the defendant is accused of a crime in circumstances that lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment].) Mendez was smart enough not to adopt the truth of the statement attributed to Rodriguez in front of the police. But the situation here is different. Mendez voluntarily repeated Rodriguez's statements to Bakotich, and while he nominally shifted the blame to Redmond, Mendez was absorbed in finding a defense to Rodriguez's apparent statement, now that Mendez could not claim he was not present. In *Riel*, as here, the out-of-court statements of a co-perpetrator that the defendant adopted were admitted for the jury to consider, even though it was elicited on cross-examination that the defendant also said that he did not kill anyone. (*Riel, supra*, 22 Cal.4th at p. 1191.)

Mendez also contends that he did not adopt Rodriguez's statements as true, because he repeatedly told Bakotich that Redmond was the killer.

(AOB 151-152.) But it was for the jury to determine if Mendez was being truthful when he said Redmond was the killer. While stating that Redmond was the shooter, the remainder of Mendez's statements suggest otherwise. Most of the time, Mendez was working out a defense to the murders for himself. He was not outraged that Rodriguez wrongly identified him, or that Rodriguez would lie to protect Redmond at Mendez's expense. Mendez made efforts to convince the others to blame Redmond. There was sufficient evidence to find that Mendez adopted Rodriguez's statements as true, even though he also tried to blame Redmond when talking with his friend. (*Davis*, *supra*, 36 Cal.4th at pp. 535, 536; *People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1191.) That is the standard for admissibility of the hearsay statements, and it was met here.

In *Jennings*, the prosecutor introduced a recording of a police interrogation of the defendant and his wife, over the defendant's objections that his wife's out-of court statements were hearsay and admission violated *Crawford* and *Bruton*. (*Jennings*, *supra*, 50 Cal.4th at pp. 655-666.) The defendant waived his right to silence and participated in a joint police interview with his wife. In addition to his own statements, there were some statements of his wife that the defendant explicitly agreed with and adopted. (*Id.* at pp. 663-664.) In addition, this Court found that the defendant adopted as his own statements made by his wife that the defendant responded to with silence, evasion, or equivocal replies. (*Id.* at pp. 664-665.) There were also statements by his wife that the defendant initially denied, although he later admitted some of those statements, too. This Court found that "for obvious reasons, a statement that is expressly denied by a defendant does not qualify as an adoptive admission," but found harmless the admission of statements of his wife that were denied by the defendant. (*Id.* at p. 665.) That rule should be modified in the circumstances here, when the denial is not credible. Mendez's statement

that Redmond was the shooter was not credible. Here, it was proper, and more likely to lead to an ascertainment of truth, to admit all of Mendez's statements, both his hearsay statement that Redmond was the shooter as well as his other comments that cast doubt on that claim. (See Evid. Code, § 356.) In fact, Mendez's recorded statement that Redmond was the shooter was the only evidence before the jury exonerating Mendez. It was for the jury to determine, as it was instructed, which of Mendez's out-of-court statements he adopted as his own, and which were true. (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1191.)

In the circumstances of this case, the trial court correctly analyzed the transcript and found that Mendez adopted as his own all of the statements Mendez said to Bakotich. There was evidence sufficient to sustain a finding that by his words and conduct, Mendez adopted the statements that he was the shooter. (*Jennings*, *supra*, 50 Cal.4th at pp. 661-662; *Davis, supra*, 36 Cal.4th at pp. 535-536; *Riel*, *supra*, 22 Cal.4th at pp. 1189-1191; *People v. Sample, supra*, 200 Cal.App.4th at p. 1262; *People v. Roberts, supra*, 195 Cal.App.4th at p. 1121.) Mendez's blame of Redmond for the shootings was a lie to make himself look good to Bakotich. He contradicted those statements with his effort to get the other gangsters to blame Redmond, and with his concern for finding a defense for himself to the shootings. His statements on the tape were equivocal: allowing the possibility of more than one meaning, with intent to deceive or mislead. The evidence was sufficient to sustain a finding that Mendez adopted Rodriguez's statement that Mendez was the shooter, and was trying to devise a defense to that fact, and that Mendez was lying when he said that Redmond was the shooter. There was sufficient evidence to present the entire conversation to the jury, and it was then for the jury to determine which statements were true admissions by Mendez.

Once a defendant inferentially adopts the admissions of another as true, those statements become his own admissions. (*Jennings*, *supra*, 50 Cal.4th at p. 661.) As admissions of a party, the statements fall into the well-recognized hearsay exception set forth in Evidence Code section 1220. There is no *Bruton*, *Crawford*, or other confrontation clause violation because they are deemed the defendant's own statements. (*Jennings*, at p. 661.) The veracity or credibility of the original declarant is not at issue. The defendant becomes the declarant.

> Stated another way, when a defendant has adopted a statement as his own, "the defendant himself is, in effect, the declarant. The 'witness' against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant's right to confront the declarant because the defendant only has the right to confront 'the witnesses against him.' [Citations.]"

(*Jennings*, at p. 662, quoting *United States v. Allen* (7th Cir. 1993) 10 F.3d 405, 413; see also *People v. Combs* (2004) 34 Cal.4th 821, 841-843 [no *Crawford* violation when incriminating statements made during joint interrogation were admitted as adoptive admissions]; *People v. Preston* (1973) 9 Cal.3d 308, 313-314 [admission of evidence under the adoptive-admission exception to the hearsay rule does not violate the *Aranda* rule]; *People v. Osuna* (1969) 70 Cal.2d 759, 765 [no *Aranda–Bruton* error when conversation among co-defendants was admitted under adoptive-admission rule].)

Thus, Mendez's conversation with Bakotich was properly admitted because Mendez adopted as true the alleged out-of-court statements by others in the course of repeating those statements to Bakotich. When he adopted those statements as his own, he became the declarant and the statements were admitted for the truth of the matters asserted as admissions by a party-opponent. (See *Jennings*, *supra*, 50 Cal.4th at pp. 661-663 & fn. 16; *Davis*, *supra*, 36 Cal.4th at p. 540.)

In the unlikely event that the jury found as a matter of fact that Mendez did not adopt Rodriguez's statement that Mendez was the shooter, that statement was nonetheless admissible to give context to Mendez's own statements to Bakotich, and to explain his state of mind as he talked about his defense to that adverse fact. (*Davis*, *supra*, 36 Cal.4th at pp. 535-536.) Rodriguez's purported out-of-court statement, repeated by Mendez after hearing it from the police officer, was admissible for the nonhearsay purpose of explaining his state of mind as he talked with Bakotich. (*Ibid.*) Evidence Code section 1250 provides:

> Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion or physical sensation (including a statement of intent, motive, design, mental feeling, pain or bodily health) is not made admissible by the hearsay rule when . . . [t]he evidence is offered to prove or explain acts or conduct of the declarant.
>
> This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

The trial court adroitly recognized that Mendez was talking through his thought process of devising a plan to defend against the evidence, describing Mendez's conversation as "the verbal manifestations of him mentally coming up with a plan, clearly what he is relying upon and what his thought processes are, which is so clearly described here – this is almost a unique view into the creation of a false alibi." (19 RT 2301.) The trial court misspoke in referring to the creation of a false alibi. Mendez was creating a defense of self-defense to the Faria murder, and of blaming Redmond for the murders. (See AOB 154.) But if "defense" is substituted for "false alibi," the trial court was entirely correct that this conversation was a unique view into Mendez's thought process, of going through what he believed the evidence against him to be, including Rodriguez's alleged statement as reported by the police, asserting his defense – that Redmond

was the shooter – and assessing the punishment options he would face under different scenarios – the death penalty, if Rodriguez were believed by the jury, or 18 years with enhancements, if he could "beat" the charge of murdering Salazar and convince the jury that he acted in self-defense against Faria. The conversation as a whole illuminated the state of Mendez's mind. Mendez was accepting the fact that witnesses would testify he was present at the crimes, and Mendez was considering what sort of defense he could use that incorporated his presence at the crimes. As the trial court said, this visible mental process of Mendez could be characterized as admitting that he was present, or reflecting his consciousness that he would be found guilty, or a verbal manifestation of his mental process. (19 RT 2301.) The hearsay statements of others were certainly admissible as evidence of Mendez's state of mind, to prove or explain his acts or conduct. (*Davis*, *supra*, 36 Cal.4th at pp. 535-536.)

If admitted only to show Mendez's state of mind and not as adopted admissions, however, the hearsay statements could not be used for the truth of the matter asserted. (Evid. Code, § 1250, subd. (b).) The prosecutor argued in closing at the guilt phase that Mendez adopted Rodriguez's statement that Mendez shot Faria. (23 RT 2834, 2836, 2890-2896.) This could be error if Mendez's repetition of Rodriguez's alleged statement was admitted only for the effect on Mendez's state of mind. But Mendez's attorney acknowledged that the prosecutor did not commit error in his closing argument. (23 RT 2906.) And the prosecutor's comments did not "infect[] the trial with such unfairness as to make the conviction a denial of due process," the standard for federal prosecutorial misconduct. (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].) Nor did his comments involve " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury,' " which constitutes state

misconduct. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) There was sufficient evidence to sustain a finding that Mendez adopted Rodriguez's statement as his own, and the prosecutor was urging that finding. Even if the jury ultimately rejected that conclusion, there was sufficient evidence to present the full tape recording to the jury. Moreover, Mendez did not object to any alleged misconduct or request admonishment of the jury. To the contrary, Mendez agreed that the prosecutor did not commit misconduct in his closing argument. Any potential claim of prosecutor misconduct has been forfeited, in addition to being baseless. (*People v. Young* (2005) 34 Cal.4th 1149, 1184-1185.)

There was no error under *Crawford*, because the statements were Mendez's own statements and were made to a friend, not to a police officer. (*Crawford*, *supra*, 541 U.S. at p. 59.) The trial court instructed the jury that statements Mendez made, including the statements regarding the re-enactment of the crime by Rodriguez and the identification of Mendez by nine or ten witnesses, were to be considered by the jury only in respect to Mendez's state of mind, or to the extent Mendez adopted those admissions. (23 RT 2910-2911.) The court told the jury there was no evidence that Rodriguez re-enacted the crime or that nine or ten witnesses identified Mendez, and that police officers are "given certain leeway to say things to witnesses or defendants that are not necessarily true." (23 RT 2910.) The court repeated, "Again, there's a lot of things on that tape that you've heard no other evidence about, and it's not being used to prove that other material." (23 RT 2910-2911.) If the jury did not find that Mendez adopted the statements as true, there was no evidence that the statements were true. The jury was informed the police officer could have been deceiving Mendez in an attempt to get him to confess to the crimes.

In *Crawford*, the high court explicitly stated that the Confrontation Clause does not bar the use of testimonial statements for purposes other

than establishing the truth of the matter asserted. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) Moreover, in *Tennessee v. Street, supra*, 471 U.S. 409, an accomplice's confession was introduced for the nonhearsay purpose of rebutting the defendant's testimony that his own confession was coercively derived from the accomplice's statement. (*Id.*, 471 U.S. at p. 410.) Jurors were instructed as to its limited purpose, and were told not to consider the truthfulness of the statement. (*Id.* at p. 412.) In *Tennessee v. Street*, the Court stated, "The nonhearsay aspect of [the accomplice's] confession – not to prove what happened at the murder scene but to prove what happened when [the defendant] confessed – raises no Confrontation Clause concerns." (*Id.* at p. 414.) On the other hand, in 1987 this Court said that for purposes of *Aranda* and *Bruton*, the characterization or purpose of the evidence did not matter. That is, admission of an extrajudicial statement that inculpates the other defendant violates the right of confrontation even if the statement is admitted for some purpose other than the truth of the matter asserted. (*People v. Anderson, supra,* 43 Cal.3d at p. 1125.) This rule is based on the perceived inability of the jury to follow a limiting instruction. But assuming arguendo that error occurred, it was harmless beyond a reasonable doubt. (*Jennings*, *supra*, 50 Cal.4th at p. 652; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] [an otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was harmless beyond a reasonable doubt]; *Harrington v. California* (1969) 395 U.S. 250, 253-254 [89 S.Ct. 1726, 23 L.Ed.2d 284] [*Aranda–Bruton* error subject to harmless error analysis under the rule of *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Mendez also faults the trial court for failing to consider each sentence individually in ruling on admissibility. Rather, the court simply concluded that all of Mendez's statements were either direct or adoptive admissions.

(AOB 153-155.) Bakotich's comments had no inculpatory value and were admitted to give context to Mendez's statements. Mendez does not complain about any of the statements made by Bakotich, but by the statements made by Mendez in which he adopted statements by others as his own. Even had the trial court individually considered each excerpt, there is no reasonable probability that the outcome of the trial would have been more favorable to Mendez. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Davis*, *supra*, 36 Cal.4th at p. 538; see Evid. Code, § 353, subd. (b).) The statements now complained of refer only to Mendez shooting Faria. For example, Mendez adopted a statement purportedly made by Rodriguez that Rodriguez heard shots, looked up, and saw Mendez "standing over the guy." (AOB 147; 7 CT 2062, 2080-2081.) Other statements purportedly refer to a crime, without specifying which one, or to multiple witnesses. There were multiple witnesses at the Faria murder, but only the three known witnesses at the Salazar murder. Mendez's defense to the Faria shooting was that Rodriguez killed Faria. (23 RT 2857-2863, 2865-2867, 2869.) If the jury had any doubt about that, it would have assumed that a statement made by Rodriguez that Mendez shot Faria was false – a false statement either by Rodriguez to the police or a false statement by the police to Mendez. Instead, the jury believed that Mendez's statements to Bakotich that Redmond was the shooter were false.

While Mendez's statements to Bakotich were damning, the primary witness against him was Redmond. Redmond stood up to cross-examination by three defense attorneys with a consistent story of Mendez directing all the action, holding the gun after Faria was shot, and shooting Salazar. The jury had a full opportunity to observe Redmond during direct and cross-examination and to evaluate Redmond's credibility and determine if he were the one who shot Salazar and Faria. Redmond was not a gang member and had no reason to shoot either Faria or Salazar.

There was no evidence contradicting his testimony that he was not involved in beating Faria, and if he did not shoot Faria he had no reason to shoot Salazar. His testimony, stretching over several days, was far more important on the issue of his credibility than the mixed statements made by Mendez. Redmond's testimony was corroborated by Lizarraga and Flores, by the matching tire prints, and by the fiber on Salazar's shoe. Admission of the tape recording was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

V. THERE WAS NO VIOLATION OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN THE TRIAL COURT ADMITTED MENDEZ'S VOLUNTARY STATEMENTS TO A FRIEND

Mendez argues that admission of his same conversation with Bakotich violated his Fifth and Fourteenth Amendment rights against self-incrimination because he repeated to Bakotich some of the statements he made to a police officer during an interrogation. (AOB 168-190.) This contention lacks merit for the same reason as in the previous argument – the statements were all made by Mendez himself, voluntarily, during a jailhouse conversation with a friend. There was no error in admitting Mendez's own statements against him.

Mendez was questioned about the murders on February 24, 2000, and again on April 8, 2000. (Aug. CT 3747-3922.) Mendez moved to exclude the second statement, claiming that Mendez requested an attorney midway through the interrogation, and that the interrogation was coercive. (1 CT 48-59.) The prosecutor agreed not to introduce either statement in the People's case in chief. (See 3 RT 418-419; 12 RT 1660.) The statements were never introduced at trial.

Mendez was in custody on a parole violation on February 24, 2000. (Aug. CT 3747.) Detective Christopher Brown advised Mendez of his rights.[19] Mendez waived those rights and agreed to speak with the officer. (Aug. CT 3748-3750.) Mendez denied being in a gang and denied any knowledge of or involvement in the murders. Toward the end of that interrogation, halfway through the third tape, Mendez said, "No I – I'll just have my attorney present sir. I mean I'm, I'm trying to, trying to be – I mean I tried to answer what I could and – I mean I don't know what's going on or whatever like anybody's saying that I was there or whatever all – all I have to say, if I was there and if it would have been somebody I know and I was there, there's no way I'm gonna let somebody kill that kid in front of me sir." (Aug. CT 3800.) The interview concluded soon after. (Aug. CT 3808.)

In April 2000, Mendez was in Folsom State Prison. He was transported to Riverside for questioning by Riverside Sheriff's Investigator John Del Valle about the murders of February 4, 2000. (See Aug. CT 3839.) The interrogation began at 8:08 p.m. (Aug. CT 3811.) Investigator Del Valle advised Mendez of his *Miranda* rights.[20] When the officer asked Mendez if he wanted to talk, Mendez said he was unsure and he did not know what was going on. The officer told Mendez he did not have to talk with the officer, it was up to Mendez. Mendez then affirmatively agreed to waive his rights and talk with the officer. (Aug. CT 3813.)

Mendez responded to Investigator Del Valle's questions, denying any involvement in the gang or with the other co-defendants. At one point,

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[19] The transcripts show Detective Brown and Investigator Del Valle conducting the interview of February 24, but that is error. Only Detective Brown conducted the first interview. (3 RT 365-366.)

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

Mendez used the restroom and declined the officer's offer of food. (Aug. CT 3829.) After an hour, at about 9:20 p.m., Mendez said he was tired and did not understand what was going on. He said, "I think I should do this with an attorney." (Aug. RT 3847-3848.) The officer said he wanted to play a tape for Mendez, and Mendez agreed to let him continue. (Aug. CT 3848.) After the recording, the officer asked if he could keep talking, and Mendez agreed. (Aug. CT 3848-3849.)

Later, Mendez mentioned he might have said something differently if he had an attorney present.[21] (Aug. CT 3869.) He again denied being present at the murders. (Aug. CT 3869.) Mendez asked what Rodriguez and Lopez had said. Investigator Del Valle said that Rodriguez and Lopez both said Mendez shot the girl, and Redmond did too. Mendez repeatedly said he did not shoot her. (Aug. CT 3878-3884.) Mendez told the officer to look at the video cassette to find out who shot the girl. (Aug. CT 3881.) After denying shooting the girl again, Mendez said, "If I had my – if I had an attorney right here right now I would answer your questions." (Aug. CT 3884.) Mendez said the victim looked like Mendez's fiancée. (Aug. CT 3884.) Investigator Del Valle asked Mendez where he was when Salazar was killed. Mendez replied,

> A. About this, this many feet away.
>
> Q. About six feet away?
>
> A. Uh four. I'm ready to go I'm tired.

(Aug. CT 3885.)

After this exchange, Investigator Del Valle noted that it was ten minutes after 11 o'clock. (Aug. CT 3885.) After that, Mendez agreed with

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[21] The trial court excluded any statements after this point. (3 RT 368.)

Investigator Del Valle that the officer was not mean to him. (Aug. CT 3889.) The officer questioned Mendez:

> Q. Okay. Uhm, I'm not going to do anything to violate your rights, okay? But have I seemed like I was violating did make you strip off your clothes anything like that? No, I'm kinda fair right? Would you say I was a good cop or bad cop?
>
> A. Good cop.
>
> Q. Okay do I seem like a nice guy?
>
> A. Yep.
>
> Q. Okay. Have I stressed you out? Have I made you lie to me? No. Have I? No. But I did do something. This is what I did. All I told you is that I wanted . . .
>
> A. The truth.
>
> Q. Are you sure? You think I want you to lie? No, I have no need to, right?
>
> A. Uhm hmmm [affirmative].
>
> Q. 'Kay have I respected you?
>
> A. Yeah.

(Aug. CT 3890-3891.)

Investigator Del Valle again confirmed with Mendez that Investigator Del Valle did not force Mendez to say anything. (Aug. CT 3892-3894.) The officer then let Mendez make a phone call in private and brought Arthur Luna into the room, and left, so that Mendez and Luna could talk together. (Aug. CT 3894-3922.)

Mendez moved to suppress these two statements. The court and parties discussed this over a few days and ultimately the prosecutor did not use Mendez's statements in his case-in-chief. The parties discussed the motion to suppress briefly during a break in jury selection, but made no final decisions. (3 RT 315-317-1.) During a second discussion later that

day, the trial court made no decision on the first interview. (3 RT 361.) Mendez said nothing inculpatory during that first interview, anyway. During the second interview, Mendez said he was tired and "I think I should do this with an attorney." (Aug. CT 3847-3848.) This was about an hour after he waived his rights and agreed to speak with Investigator Del Valle. (Aug. CT 3848.) The court indicated this was an invocation of the right to counsel, but the prosecutor realized he had misunderstood the discussion, having not included the potential invocation from the first tape. (3 RT 362-363.) The prosecutor voluntarily agreed not to use any portion of the taped interview after page 3869, where Mendez said, " 'Cause I don't have . . . my attorney here.' " (3 RT 368; Aug. CT 3869.)

During trial, while discussing the admissibility of his jailhouse conversation with Bakotich, Mendez objected to admission of his statement to Bakotich that he was six feet away from Salazar when she was shot, on the ground that the court had excluded Mendez's statements to police under the *Miranda* rule. (19 RT 2303-2304.) The court overruled the objection because this was Mendez's statement to his friend, Bakotich, who was not an agent of law enforcement. (19 RT 2304.)

While Mendez was talking to Bakotich within the jail, he told her about part of his interview by Investigator Del Valle, including the fact that Mendez said he was standing six feet away from Salazar when she was killed. (7 CT 2067; see Aug. CT 3884-3885.) Mendez volunteered this statement. It was not in response to any question by Bakotich. (See 7 CT 2066-2067.)

Mendez's statement to Bakotich that he was six feet away from Salazar when she was shot was his own voluntary admission. Mendez was in custody, but he was not being interrogated by a law enforcement officer or agent when he spoke with his friend Bakotich, and therefore no *Miranda* or other constitutional right violation occurred. (*Arizona v. Mauro* (1987)

481 U.S. 520, 529-530 [107 S.Ct. 1931, 95 L.Ed.2d 458] (*Mauro*); *People v. Leonard* (2007) 40 Cal.4th 1370, 1401-1402 (*Leonard*).) In *Mauro*, police officers permitted the defendant's wife's request to talk to the defendant in the presence of an officer, after the defendant had invoked his right to counsel. The High Court found no constitutional prohibition on the courtroom use of the defendant's jailhouse statements to his wife made in front of an officer, stressing that the purpose of *Miranda* is to "prevent[ ] government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." (*Mauro*, *supra*, 481 U.S. at pp. 529-530.) Similarly, in *Leonard*, the defendant was permitted to speak to his father in the sheriff's interview room. Both father and the defendant knew that the conversation was being taped. This Court upheld the trial court's ruling that there was no interrogation within the meaning of *Miranda*, even though the defendant was in custody. (*Leonard*, *supra*, 40 Cal.4th at pp. 1401-1402.) "A defendant's 'conversations with his own visitors are not the constitutional equivalent of police interrogation.' " (*Id.* at p. 1402, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 170.)

Mendez recognizes that his conversation with Bakotich was not a custodial interrogation, and makes no claim that the trial court erred when ruling that Bakotich was not any sort of police agent within the meaning of *Massiah v. United States* (1964) 377 U.S. 201, 202-203 [84 S.Ct. 1199, 12 L.Ed.2d 246]. (AOB 183, 178 & fn. 109.) His argument is that Mendez also made the same statement to a police officer during a previous custodial interrogation. In that earlier interrogation, the detective continued to question Mendez after Mendez said, twice, that he might want a lawyer. Mendez also said that he was tired. He claims his voluntary statement to Bakotich should have been excluded just because he had earlier made the

same statement to Investigator Del Valle. (AOB 180-187.) That argument has no merit.

The Fifth Amendment of the Constitution provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) There was no compulsion or coercion here in Mendez's conversation with Bakotich. Mendez was completely free to direct the conversation in any direction he wished, and to tell or not tell Bakotich whatever he wanted. His comments about his interrogation by the police were not in response to questions asked by Bakotich. (7 CT 2066-2067.) Bakotich was talking about the liability of aiders and abettors, the purported foolishness of providing information to the police, what Art Luna might have said about Eddie Limon, and the three Rodriguez brothers. (7 CT 2066-2067.) In the midst of Bakotich's random comments, Mendez told Bakotich about his interview with the police, and then assessed the punishment he was likely to receive. (7 CT 2066-2068.) Mendez's statements were completely voluntary. As the High Court stated in *Mauro*, the purpose of *Miranda* is to "prevent[ ] government officials from using the *coercive* nature of confinement to *extract* confessions that would not be given in an *unrestrained environment*." (*Mauro*, *supra*, 481 U.S. at pp. 529-530 [emphasis added].) *Miranda* was not implicated here. Bakotich was not a government official. Mendez was not coerced to say what he said to Bakotich. Mendez was in jail, but believed that his conversation was not being monitored.

Mendez argues that his conversation with Bakotich was the "fruit" of his "poisonous" interrogation by the police. But there is no causal connection between the police interrogations and Mendez's conversation with Bakotich. Nothing in the police interrogations in any way coerced or caused Mendez to repeat his statements to Bakotich. That was Mendez's free choice. And as stated by the United States Supreme Court, "The core

rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to *deter police* from violations of constitutional and statutory protections." (*Nix. v. Williams* (1984) 467 U.S. 431, 441 [104 S.Ct. 2501, 81 L.Ed.2d 377] (emphasis added).) There was no police conduct to engineer a visit from Bakotich to Mendez, for Mendez to talk to Bakotich, or for Mendez choosing to tell Bakotich statements that he may have made to the police. In short, there was no police involvement and no error. (*Mauro*, *supra*, 481 U.S. at pp. 529-530; *Colorado v. Connelly* (1986) 479 U.S. 157, 167 [107 S.Ct. 515, 93 L.Ed.2d 473] [statement is voluntary unless there is "coercive police activity"]; *Leonard*, *supra*, 40 Cal.4th at pp. 1401-1402; *People v. Gallego*, *supra*, 52 Cal.3d at p. 170.)

Mendez also contends that his statement to Investigator Del Valle was involuntary, and therefore it could not be used against him for any purpose. (AOB 180-183, citing *Michigan v. Harvey* (1990) 494 U.S. 344, 351 [110 S.Ct. 1176, 108 L.Ed.2d 293].) This matters not as Mendez's own statements to Bakotich were completely voluntary. Mendez's statements to Investigator Del Valle were never admitted into evidence, except to the extent Mendez chose to repeat his statements to Bakotich, whether accurately or not. Moreover, as the transcript of the interrogation shows, it was not an involuntary interrogation that overbore his will. (See *People v. Williams* (2010) 49 Cal.4th 405, 436 [a confession is involuntary, and therefore inadmissible, if the " ' "defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' "].)

Mendez relies on *People v. Neal* (2003) 31 Cal.4th 63, 78, for his contention that his interrogation was involuntary. (AOB 182-183.) The facts of this case are very different from the facts of that case. In *Neal*, the defendant was eighteen years old, inexperienced, minimally educated, and

of low intelligence. (*Id.* at p. 68.) The defendant never waived his *Miranda* rights. (*Id.* at p. 73.) Nonetheless, the law enforcement officer continued interrogating the defendant, although the defendant invoked his right to counsel nine times in all. (*Ibid.*) The officer arrested the defendant and claimed that he was the only one who could help the defendant, if the defendant cooperated. At the same time, he threatened the defendant that "the system is going to stick it to you as hard as they can" unless the defendant cooperated. (*Ibid.*) The defendant was put into a cell overnight without food, water, or necessary facilities until the next morning. (*Id.* at p. 74.) The following morning, defendant asked to speak to the officer, who thereafter met with him, repeated his *Miranda* warnings, then resumed questioning, obtaining two confessions. (*Ibid.*) This Court concluded that those two confessions were involuntary, in light of all the circumstances. (*Id.* at p. 78.)

Mendez tries to shoehorn himself into the facts of *Neal*, but he does not fit. Here, Mendez was advised of his rights and agreed to waive his rights and to speak with the officer at the beginning of both interviews. (Aug. CT 3748-3750, 3813.) Mendez was offered food during the interview itself, and he was free to use the restroom. (Aug. CT 3829.) Investigator Del Valle made neither promises nor threats to Mendez. Mendez was 21 years old and criminally sophisticated. He knew the likely sentence enhancements for using a firearm and for assisting a gang. (7 CT 2068.) At the beginning of both interviews, he was advised of his rights and waived his rights to an attorney. (Aug. CT 3748-3750, 3813.) His will was not overborne. Mendez's statements to the police were voluntary.

When there has been an initial knowing and voluntary waiver, as here, interrogation may proceed "until and unless the suspect clearly requests an attorney." (*Davis v. United States* (1994) 512 U.S. 452, 461 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *People v. Williams*, *supra*, 49 Cal.4th at p. 427;

People v. Martinez (2010) 47 Cal.4th 911, 951.) Mendez's subsequent mentions of an attorney were ambiguous, and the officers obtained consent from Mendez to continue questioning him after seeking clarification of his ambiguous references to an attorney. (Aug. CT 3800, 3848, 3869, 3884; *Davis v. United States*, *supra*, 512 U.S. at p. 459; *People v. Williams*, *supra*, 49 Cal.4th at p. 427.) Mendez was 21 years of age, but sophisticated in criminal justice. He had a good understanding of the penalties for different crimes and enhancements, albeit he may have been poorly educated in academic subjects. (See 7 CT 2068.) It is true, as Mendez claims, that Inspector Del Valle accused Mendez of lying. (AOB 183.) Mendez continually lied to Inspector Del Valle, saying he had no nickname and belonged to no gang. (See Aug. CT 3833-3839.) After letting this go for a while, Investigator Del Valle explained to Mendez that it would look bad for Mendez when the officer said that Mendez had lied to him, even about his street name. (Aug. CT 3877-3878.) And Inspector Del Valle told Mendez he did not want Mendez to get killed, in the context of Mendez informing on other gang members. (See Aug. CT 3817, 3821.) After Mendez told Inspector Del Valle that he was four feet away from Salazar when she was killed, he had the conversation with Inspector Del Valle quoted above, in which Mendez agreed that he was not coerced into making his statements. (Aug. CT 3889-3891.) Under the totality of circumstances, Mendez's statements to Inspector Del Valle were voluntary. (*People v. Williams*, *supra*, 49 Cal.4th at p. 427.) Assuming arguendo that Mendez's statements to Bakotich are considered at all related to Mendez's statements to Inspector Del Valle, there was no error in admitting Mendez's statement to Bakotich that Mendez was six feet from the girl when she was shot. No error occurred. Assuming arguendo error occurred, it was harmless beyond a reasonable doubt for the reasons stated above. (*Chapman*, *supra*, 386 U.S. at p. 24.)

VI. MENDEZ'S RIGHT TO CONFRONT REDMOND WAS NOT VIOLATED; REDMOND NEVER ADOPTED A STATEMENT THAT HE WAS A GANG MEMBER

Mendez contends that the trial court denied him his Sixth Amendment right to confront the witnesses against him because it prohibited counsel for co-defendant Rodriguez from asking Redmond if Redmond told the prosecutor that information under Redmond's name on a People's exhibit – that Redmond was a gang member – was incorrect. (AOB 193-203.) This contention lacks merit. Mendez does not have standing to complain about another defendant's question to a witness. Moreover, Redmond did not adopt any statements from the exhibits created by the prosecutor. The trial court did not abuse its discretion. No possible error occurred.

A. Detective Underhill's Testimony Regarding Redmond's Gang Affiliation

Detective Underhill was asked if Redmond was a known gang member and he explained to the jury Redmond's contact with law enforcement. Colton Police had no gang cards on Redmond. (15 RT 1933.) During the investigation of these murders in 2000, Detective Underhill received verbal information from the San Bernardino Police Department that in May 1996, Redmond had been contacted by San Bernardino City Police Officer Quiroz. That officer filled out a field interview card on Redmond stating that Redmond admitted to being a member of North Side Colton. (14 RT 1843-1846; 15 RT 1929-1930.) On April 10, 2000, Detective Underhill prepared his own field interview card, Defense Exhibit S, combining information from the San Bernardino 1996 contact with Detective Underhill's information from the murder investigation. (15 RT 1932.) Detective Underhill put the date of the murders on the card, February 4, 2000, even though he prepared it in April. (15 RT 1932-1933.) Detective Underhill wrote on the card that Redmond

used the moniker "Devil," a nickname that Redmond did not use until he was in custody in February 2000 for the handgun in his car. Redmond testified that he used that nickname as a way to mask his identity in jail. Detective Underhill stapled to the card a photograph of graffiti at Danielle Gonzalez's home. (9 RT 1189-1191, 1215; 15 RT 1934-1935.) The graffiti photograph, taken on March 30, 2000, shows writing on the wall of Gonzalez's bedroom, with North Side Coltone X3 at the top and "Devil" and "Huero" below. (15 RT 1940.) Gonzalez identified "Devil" as Redmond, whom she met in December, 1999. (15 RT 1935, 2040-2041.) Detective Underhill also noted on the field identification card Redmond's tattoo of a clown on his right calf, obtained from booking information when Redmond was arrested on February 20, 2000. (15 RT 1936.)

In preparation for this trial in 2004, Detective Underhill contacted San Bernardino Police Department to review and obtain the original field interview card on Redmond from 1996. (15 RT 1952.) The San Bernardino Police Department, however, had destroyed the card in the meantime. (15 RT 1954.) At the Colton Police Department, it was standard procedure to purge gang field interview cards that had no further activity for four years, because the department does not want to have gang cards on persons no longer involved in gang activity. (15 RT 1954.) San Bernardino Police Department used a similar purging procedure. (15 RT 1954.) Because Detective Underhill had no information on the circumstances under which Redmond admitted to being a gang member in 1996, he did not rely on that information to form an expert opinion on Redmond's gang membership. (15 RT 1956.) At trial, Detective Underhill was of the opinion that Redmond was an associate of North Side Colton, because Redmond spent a lot of time with North Side Colton gang members, lived with a gang member, and committed crimes with gang members. (15 RT 1959-1961.) He did not know if Redmond was actually

a gang member or not. There was no reliable information that Redmond was a gang member or had admitted to being a member, and Redmond had no tattoos identifying himself as a gangster. (15 RT 1961.)

Redmond testified that he started to use the nickname of "Diablo" or "Devil" when he was in jail after the February 20, 2000, arrest for gun possession. (9 RT 1189, 1215.) Rodriguez called Redmond "Devil" in jail, and explained to Redmond the nickname was for protection, so that others in custody would not know his real name. (9 RT 1191, 1215.) Redmond has a tattoo of a devil on his left calf. (9 RT 1195.)

B. At Trial, Mendez Did Not Ask Redmond If He Told the Prosecutor That the Statement on the Exhibit Was Untrue, and Mendez Forfeited Any Claim That Redmond Adopted as an Admission the Statement on Exhibit 1

The prosecutor initially believed that Redmond was a member of the North Side Colton gang. In advance of trial he prepared an exhibit, Exhibit 1, with pictures of Redmond, Mendez, Lopez and Rodriguez. Annotations under Redmond's photograph said that he had been a North Side Colton gang member since 1996 and that he had a gang moniker of "Devil." During his opening statement the prosecutor said Redmond had a gang moniker. (6 RT 779.) At trial, however, Redmond adamantly denied being a gang member. (7 RT 1036; 9 RT 1174.) Mendez's attorney was the first of the three defense attorneys to cross-examine Redmond. (See 9 RT 1153–10 RT 1288.)[22] Mendez's counsel cross-examined Redmond about Exhibit 1, and Redmond answered all questions posed by Mendez's counsel

[22] Mendez's and Rodriguez's attorneys cross-examined Redmond outside the presence of the jury during a hearing on a statement made by Mendez to Redmond in 2002. (9 RT 1137 – 9 RT 1145.) Respondent is excluding that brief hearing because it was not before the jury and not related to Redmond's gang status.

about that exhibit. Redmond acknowledged that the exhibit designated Mendez, Rodriguez, Lopez, and Redmond as gang members. (9 RT 1173-1174.) But Redmond continued to maintain that he was never a gang member himself. (9 RT 1174.) Mendez's counsel asked the following three questions about Exhibit 1:

> Q. Okay. On – you see your photograph on there too, right?
>
> A. Yes.
>
> Q. Okay. And I guess for the record, it looks as if you've been designated, at least on that exhibit, as a member of North Side Colton?
>
> A. On this exhibit, yes.
>
> Q. Yes. Now, that exhibit which has been presented by the district attorney's office in this case, right?
>
> A. I have no idea who presented it.

(9 RT 1174.) Mendez's counsel then went on to other questions about Redmond's involvement with the gang. (9 RT 1174-1175.) At the end of his cross-examination, Mendez's counsel said he had no further questions, although he left open the possibility of re-opening briefly on re-cross examination if a new subject were raised. (10 RT 1288.)

Rodriguez's counsel and Lopez's counsel cross-examined Redmond next. The prosecutor questioned Redmond on re-direct, then the three defense counsel had another round of re-cross-examination. Mendez's counsel re-cross-examined Redmond briefly, on the issues of Redmond's interviews with law enforcement and his plea bargain deal. (10 RT 1414-1430.) At the end, Mendez's counsel asked a few more questions about Exhibit 1:

> Q. See that Exhibit No. 1 there?
>
> . . .

A. Yes.

Q. Right underneath your photograph here – we've already covered some of this area, right?

A. Yes.

Q. I, sort of, saw this pop out at me yesterday afternoon after I was finished. It says gang since 5-9-96?

A. Correct.

Q. So at least from the prosecution's or – yeah, the prosecution's exhibit, it would appear that it's believed that you are a member of the North Side Colton gang since 1996?

A. Well, it appears that's what it says up there, but it's not true.

Q. My last question is that true or not?

A. It's not true.

(10 RT 1431.) After this round of re-cross-examination, the prosecutor did further re-direct-examination on the issue of Redmond's request to come to court on different dates from the other defendants. (10 RT 1442-1445.) Mendez's counsel had no more questions for Redmond and declined the court's offer to do more cross-examination of Redmond. (10 RT 1445.) Rodriguez's counsel finished the examination of Redmond with a few more questions. (10 RT 1445-1446.) His final question to Redmond was, "Did you tell the district attorney the information under your name [on Exhibit 1] was incorrect?" (10 RT 1448.) The prosecutor objected and the court sustained the objection under Evidence Code section 352. (10 RT 1446.) The court explained that the testimony sought by the question was "equivocal and has little probative value." The court characterized this as a minor point. (19 RT 1448.)

Mendez now complains that Rodriguez's attorney was not permitted to obtain an answer to that last question asked by Rodriguez's attorney.

Mendez has no standing to raise this claim. Mendez did not ask this question when he had the opportunity to do so. Mendez finished his questioning and had no more questions for Redmond before this question was asked. Mendez did not contribute to the argument in support of Rodriguez's question and registered no concerns. Neither Mendez, nor any other counsel, suggested to the court the claim that Mendez now raises – that Redmond adopted as an admission the exhibit caption he was a gang member by failing to tell the deputy district attorney the information on Exhibit 1 was incorrect. Accordingly, Mendez forfeited the claim by failing to make an argument in support of it at trial. Mendez's failure to preserve the claim below is hardly surprising because the answer could not have mattered to Mendez. The question had minimal if any probative value. There is no possibility of harm from the trial court's sustaining of the objection. In any event, Mendez's argument on appeal lacks merit.

C. Redmond Did Not Adopt an Admission That He Was a Gang Member and Mendez's Right to Confront Redmond Was Not Violated

"A statement is admissible as an adoptive admission if 'there is evidence sufficient to sustain a finding' . . . that the defendant heard and understood the statement under circumstances calling for a response and by words or conduct adopted it as true." (*People v. Davis*, *supra*, 36 Cal.4th at pp. 535-536.) Redmond was not in a position that called for him to object to the prosecutor about the exhibit. He was a convicted felon brought into court from jail to answer questions posed by the deputy district attorney.[23] The exhibit had already been prepared, and apparently was behind him.

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[23] The record suggests Redmond had physical restraints when he testified. The court asked him to "raise your right hand as best you can" to be sworn as a witness. (7 RT 997.) Redmond later said he was in chains while testifying. (9 RT 1196.)

Redmond did not know who prepared the exhibit. He was not questioned about Exhibit 1 until after he stated that he was not a member of North Side Colton. (See 9 RT 1154.)

More importantly, Redmond did object to the notation on Exhibit 1 when he testified that he was not a member of North Side Colton, within the first hour of his testimony. (See 7 RT 998, 1036; 7 CT 2032 [Redmond's testimony begins shortly before recess at 3 p.m.; he is asked if he is a gang member shortly before court adjourned at 4 p.m.].) This was a public response that rejected the characterization on the exhibit board. Whether Redmond also noticed the board, had an opportunity to tell the prosecutor it was wrong, or told the prosecutor it was wrong, and if so when, were all irrelevant to the issues at trial. Redmond was cross-examined on whether or not he was a member of North Side Colton. (9 RT 1174-1175, 1188-1189; 10 RT 1348-1351, 1364-1365.) Nearly all of the cross-examination of Detective Underhill was on Redmond's purported gang status. (15 RT 1930-1946, 1952-1963, 1966-1970, 1978-1985, 1991-1994.) Mendez attacked Redmond's credibility during closing argument by arguing that he falsely denied being a member of North Side Colton. (23 RT 2863-2864, 2867-2874.) There is no reasonable likelihood that Mendez would have received a more favorable result if the court had permitted Redmond to respond to the question posed by Mendez's co-defendant. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) This is not a federal issue because it does not implicate the fundamental fairness of the trial. " '[A] state court's application of ordinary rules of evidence – including the rule stated in Evidence Code section 352 – generally does not infringe upon' the constitutional right to offer a defense." (*People v. Fuiava*, *supra,* 53 Cal.4th at pp. 665-666, quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 82.) In any event, there was no possibility of harm to Mendez beyond a reasonable doubt caused by the trial court's ruling, even assuming arguendo

that Mendez had not forfeited this claim below. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) It was, indeed, a minor point with no probative value.

VII. THE TRIAL COURT DID NOT VIOLATE MENDEZ'S RIGHT TO CONFRONT WITNESSES WHEN IT INSISTED THAT THE JURY NOT BE MISLED ON THE FACTS REGARDING REDMOND'S PLEA AGREEMENT

Mendez contends that the trial court violated his right to confront the witnesses against him and his right to present a defense by "threatening" to allow evidence that Redmond passed a polygraph test, in response to defense counsel's questions about an interview Redmond had with a law enforcement officer. (AOB 204-222.) This contention lacks merit. There was no error, and no possible prejudice, in preventing Mendez from asking Redmond whether it was a coincidence that he had an interview in 2003 about ten days before entering his plea agreement. The trial court's ruling was correct, and therefore the decision of the trial court should be affirmed on appeal. (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

Mendez tried to shake Redmond's credibility through cross-examination, just as Rodriguez and Lopez did. Mendez's attorney attacked Redmond's credibility on many fronts, including his plea deal with the prosecution, and whether or not that was conditioned on Redmond not being the shooter. (9 RT 1229-1234.) Redmond repeatedly stated that his plea required him to tell the truth in court. (9 RT 1228.) In addition, in response to leading questions from Mendez's attorney, Redmond said his understanding was that his plea deal was conditioned on Redmond not having been the shooter. (9 RT 1229-1223.) Rodriguez's attorney asked similar questions and received similar answers from Redmond. (10 RT 1333-1338.)

On re-direct examination, the prosecutor emphasized with Redmond that Redmond's deal was just to tell the truth. The prosecutor never told

him that he could not testify that he was the shooter. (10 RT 1398.) The prosecutor proposed a hypothetical question to Redmond: if Redmond testified that he was the shooter, and if that were the truth, Redmond would still get his deal. Redmond agreed. (10 RT 1399.) Redmond reaffirmed that he had told the truth throughout the trial. (10 RT 1402.)

On his second round of cross-examination, Mendez's attorney questioned Redmond on the apparent conflict between Redmond's earlier testimony that his plea deal was dependent on his not being the shooter (9 RT 1229-1234), and Redmond's later responses to the prosecutor's questioning, that Redmond could testify that he was the shooter and would still get the benefit of his bargain – two terms of life without parole – if that were the truth (10 RT 1398-1402). Redmond said he was confused by counsel's earlier questions. (10 RT 1417-1423.) Redmond acknowledged that he had a brief conversation with the prosecutor in the courtroom after cross-examination by Mendez's attorney. The prosecutor reminded Redmond that his deal was contingent only on Redmond telling the truth at trial. (10 RT 1420-1421.) Mendez's counsel asked Redmond about the chronology of his interviews with law enforcement officers. On February 20, 2000, Redmond was interviewed by Riverside Sheriff's Detective Brown, and Redmond denied having anything to do with the murders. On March 23, Redmond had a lengthy interview with Riverside Sheriff's Investigator Del Valle. Redmond denied any knowledge of the crimes for a few hours before changing his mind and giving Investigator Del Valle a full description of the crimes. The next day he had another interview with Deputy District Attorney Allison Barham and Investigator Del Valle, and he walked them through a re-enactment of the crime. (10 RT 1423-1425.) About three years later, Redmond had an interview with a woman from the Department of Justice and gave her a statement of facts consistent with his earlier interview and with his testimony. Redmond signed his plea

agreement about one week after this last interview. (10 RT 1424-1426.) Mendez's counsel then asked:

> Q. Now, you've told us about other coincidences that have occurred in your involvement in this, like going to the secluded spot [where Salazar was murdered] was a coincidence and some other things like that?
>
> A. Yes.
>
> Q. Are you telling us that was just a sheer coincidence that you had another interview a week and a half before you signed your plea agreement?

(10 RT 1426.) The prosecutor objected and the court sustained the objection. (10 RT 1426.)

Outside the presence of the jury, the trial court said that there was a "huge difference" between it being a coincidence that Redmond had a plea deal one week after another interview with law enforcement, and Redmond's plea deal being contingent on passing a polygraph. Impeaching Redmond's credibility with the inference that the fourth interview and the plea deal were just another "coincidence" would be unfair. (10 RT 1426-1427.) Mendez's counsel offered to abandon the question. (10 RT 1426.) The court suggested counsel could ask Redmond if he believed the prosecution team accepted his version as the truth, and if Redmond were to testify that he was the shooter, they would have serious questions about his credibility. (10 RT 1427-1428.) Mendez's counsel said his concern was that the re-direct examination left the impression that Redmond could testify that he shot the two victims and still receive his deal. (10 RT 1429.) The court approved questioning on that line. (10 RT 1429.)

After the sidebar conference, Mendez's attorney established that Redmond was given a deal based on his version of the events that Redmond was not the shooter, and that Redmond believed the district attorney's office accepted his statement as the truth. Redmond understood that if he

testified at trial that he were the shooter, even if that were the truth, there would be serious questions about what the truth actually was and whether Redmond had fulfilled his part of the bargain. (10 RT 1429-1430.)

It appears that Mendez was permitted to, and did, ask Redmond the questions that he wanted to ask. (10 RT 1426-1430.) The question to which an objection was sustained was cumulative and not relevant. Redmond's credibility would not have been impeached whatsoever by the way he answered that question. Sustaining the objection to Mendez's question could not possibly have harmed Mendez.

Mendez established that in 2000, Redmond told the sheriff's detective about the fight on Michigan Street, that Redmond drove Mendez, Salazar and the others to a deserted area where Mendez killed Salazar and left her on the side of the road, and that Redmond drove the four men back to Colton and later changed the tires on his car. He told the same story to another law enforcement person in 2003, and made a plea deal about ten days later. His testimony at trial in 2004 was consistent with both of the earlier statements. As far as Redmond knew, the prosecutor accepted Redmond's pre-trial statements as true. This line of questioning did not impeach Redmond's credibility.

Mendez argues that the trial court's ruling "unfortunately left the jury with the impression that Redmond's DOJ interview was somehow divorced from the plea agreement shortly thereafter sparing him the death penalty – it was 'just a sheer coincidence' the interview occurred a week and a half before the plea – and that Redmond could have told the jury he had killed either Faria or Salazar or both and still not be subject to the death penalty as long as he was telling 'the truth.' " (AOB 211.) This contention is dubious. Mendez has not explained how the proximity in time between the DOJ interview and the plea agreement was relevant. If it was not a coincidence that Redmond was interviewed again in August 2003 and then

entered a plea agreement one week later, so what? The simplest inference is that the narration Redmond gave in 2003 was consistent with his statement in 2000 and his testimony at trial. Repeated consistency bolstered Redmond's credibility, whether it was a coincidence or not. This is not a case where Redmond changed his story to exculpate himself just before receiving a plea deal. Here, Redmond gave his statement of facts three years before receiving a plea bargain, and consistently gave the same facts of the murders over the four years from murders to trial. Similarly, a reasonable jury would infer that if Redmond suddenly gave a different version of events at trial – that Redmond was the shooter – that would raise grave doubts about his credibility both in 2000 and at trial. In response to questioning by Mendez's attorney, Redmond said he understood there would be problems with everybody, including the district attorney, if Redmond testified at trial that he was the killer. (10 RT 1430.) As Redmond testified in response to Mendez's questions:

> Q. Okay. So as far as, like, you coming in here and saying, oh by the way, I'm the shooter, I'm the killer, right, what I told you before is really not the truth, you understand that we would all have problems with that?
>
> A. Yes.
>
> Q. Including the district attorney?
>
> A. I'm sure he would.

(10 RT 1430.)

Mendez continues his argument, "The false impression Redmond had nothing to lose regardless of how he testified served to vouch for his testimony." (AOB 211.) Dubious again. It is doubtful the jury thought that Redmond could testify at trial that he shot Faria and Salazar with no resulting doubt about his credibility. And if the jury had the impression that Redmond could testify at trial with impunity that he was the killer, the

most logical inference is that he would do so. If Redmond could freely confess, partly absolve his cohorts, and free himself from the dangers of being an informant while in prison, he would likely do that. If the jury had the "false impression Redmond had nothing to lose," the jury would more likely expect Redmond to take that opportunity. What vouched for Redmond's testimony was the consistency of the events he described in 2000, in 2003, and at trial in 2004. There was no false impression before the jury. (See AOB 211.) There was no error and no prejudice.

Mendez states his argument a third way that is equally dubious: "It was hardly an 'unfair inference' to suggest that Redmond's guilty plea following his 'DOJ interview' after he had not been interrogated by law enforcement for three years was not just coincidental, but stemmed from the fact Redmond was the one who killed Salazar and realized he could himself escape execution only by agreeing to testify appellant did it." (AOB 215.) Mendez was free to argue this inference at trial if he chose to. Sustaining the objection to the single question above did not prevent him from making that argument or trying to convince the jury of that inference. But fundamentally that argument made no sense, given that Redmond gave the same statement three years before the DOJ interview. Mendez cannot show that the DOJ interview had any impact on Redmond's credibility when Redmond consistently gave the same information before he was arrested in 2000, three years later in 2003, and at trial after pleading guilty to two counts of first degree murder with special circumstances.

The only reason Mendez raises this claim is to assert that outside the presence of the jury the trial court "threatened" to admit evidence that Redmond had passed a polygraph at the 2003 DOJ interview in rebuttal, if Mendez persisted in questioning Redmond about the "coincidence" – code word for "lie" – purportedly implied in having to conform his trial testimony to his 2003 DOJ interview. (AOB 204-215.) This is a red

herring. The reason for the trial court to sustain an objection is immaterial on appeal as long as there was no error in sustaining the objection. A correct ruling for an incorrect reason will be upheld on appeal. A correct decision of the trial court must be affirmed on appeal even if it was based on erroneous reasoning. (*People v. Brown, supra*, 33 Cal.4th at p. 901; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.) The court's comment was not before the jury. Whether mention of the polygraph at the 2003 DOJ interview was permissible rebuttal or not, there was absolutely no error in and no possible prejudice resulting from prohibiting Mendez from asking Redmond if it were a coincidence that he had another interview a week and a half before he signed his plea agreement. (*People v. Fuiava, supra*, 53 Cal.4th at pp. 696-697; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

VIII. THE AUTOPSY PHOTOGRAPH WAS PROPERLY ADMITTED BECAUSE IT WAS RELEVANT, HELPFUL TO THE JURY, AND NOT PREJUDICIAL

Mendez contends that the trial court lacked discretion or abused its discretion in admitting a photograph of the body of Michael Faria at his autopsy, claiming the photograph was either irrelevant or overly gruesome, because it showed there was surgical intervention before Faria died, in an attempt to keep him alive. (AOB 223-240.) This contention lacks merit. The trial court's decision that the photograph was relevant and more probative than prejudicial was not an abuse of discretion. No possible error occurred.

Mendez objected to any autopsy photograph that showed Faria "cut open and disemboweled." (11 RT 1557.) He objected to photographs that showed anything other than the wounds that caused death as inflammatory and prejudicial. (11 RT 1557.) The trial court ruled that almost all photographs of gunshot entry wounds are relevant to premeditation and

deliberation, especially if there were multiple gunshots, but that there was no need for photographs showing the body cut open, because no one was contesting the cause of Faria's death. (11 RT 1558.) The prosecutor offered to put modesty panels over the offending areas of the autopsy photographs before placing the photographs on the "ELMO" or document camera that projects an image onto a more visible screen. (11 RT 1556-1557.) Mendez agreed that the modified photographs chosen by the prosecutor were relevant because they showed the gunshot wounds on Faria's body. (11 RT 1557-1558.)

The specific photograph to which Mendez now objects was designated as Exhibit 42 in the trial and was referred to as photograph number 8 in the discussion about its admissibility that was conducted outside the presence of the jury. The photograph shows the body as it arrived at the coroner's office for autopsy. (11 RT 1560.) The court described it as "a distance photograph to show what the victim looked like when he arrived at the autopsy. . . . It's some distance away. Obviously, it's the, a result of surgical procedure." (*Id.*) The court ruled it was admissible for identification purposes, even though it showed the result of a surgical procedure. (11 RT 1560.) Mendez objected that it was more prejudicial than probative, because the only issue at trial was whether the gunshot wounds were consistent with Faria being supine on the ground when he was shot. (11 RT 1561-1562.) The court said the photograph was not bad, there were many photographs that were worse, and the prosecutor was making efforts to minimize the prejudice by blocking the offending portions of photographs. The court said there was some relevance to the fact that there were surgical procedures done in an effort to keep Faria alive. The court found the photograph not prejudicial compared to other photographs in criminal cases. (11 RT 1561.) The prosecutor wanted to show the condition of the body as it arrived for the autopsy, as it was

helpful to the jury to see the way the autopsy proceeded, with the starting point for the external examination. Photograph 8, Exhibit 42, showed "gauze and looks like medical materials over the abdominal area, but you certainly can't see anything cut open in there." (11 RT 1562.) The court overruled the defense objections: "I think it would be helpful to the pathologist as he explained his testimony. And he can refer to what he was provided with and how he examined the body and that he found other injuries as well, but they were not at all involved with the bullets that killed the person." (11 RT 1562.) The photograph was cropped to hide the injury to the side that was from a medical procedure to save his life. (11 RT 1563.) Mendez agreed the cropping was appropriate. (11 RT 1563.)

When the forensic pathologist testified, he explained that Faria was initially taken to a hospital and had an exploratory laparotomy to try to treat the injuries to his abdomen. Faria survived at the hospital for about 12 to 14 hours before he died. (11 RT 1584.) Surgical / medical tubes were still attached to his body when he was brought in for the autopsy, although the surgical incision was closed. (11 RT 1584.) The photograph of the body as it was brought in to the autopsy was introduced as Exhibit 42. (11 RT 1585.)

The admissibility of autopsy photographs is reviewed only for abuse of discretion. (*People v. Mills* (2010) 48 Cal.4th 158, 190–192; see also, *People v. Scheid* (1997) 16 Cal.4th 1, 13.) Mendez complains that the photograph at issue was not relevant, so that the trial court had no discretion to admit it. (AOB 227-228.) But it is the trial court that must decide relevancy in the first instance, and it has broad discretion to do so. (*People v. Lewis* (2001) 25 Cal.4th 610, 641.) Once the court has determined relevancy, it must weigh the probative value of the photographs against their prejudicial effect. As with other determinations under Evidence Code section 352, this decision is left principally to the trial court.

(*People v. Ramirez* (2006) 39 Cal.4th 398, 453; *People v. Weaver* (2001) 26 Cal.4th 876, 934.) Although the surgical intervention to save Faria's life was not a contested issue at trial, "[t]he state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact." (*People v. Weaver*, *supra*, 26 Cal.4th at p. 934.)

Mendez contends the photograph contained evidence of life-saving surgical procedures that were not relevant to the issues at trial. (AOB 227-228.) The trial court, however, found the photograph relevant and admissible for identification purposes. (11 RT 1560.) And the court found this photograph was taken from a distance and was not unduly prejudicial, dispelling Mendez's argument that the photograph was gruesome and not particularly helpful to the jury. (11 RT 1560-1561; see AOB 229-230.) Photographs of murder victims are often gruesome, because murders and their aftermaths are gruesome. That does not make them prejudicial. (*People v. Ramirez, supra*, 39 Cal.4th at p. 454.) Mendez complains that the gruesome nature of this exhibit is due to unrelated hospital procedures and not to the fact of the murder. The photograph was not sufficiently gruesome to inflame the jury. In *Ramirez*, as here, the autopsy photographs of some of the victims included medical apparatus left over from attempts at saving the victims' lives that were unrelated to the murders or the autopsies. This Court found no abuse of discretion arising from their admission. (*Id.* at pp. 451-452.)

Even if the court had abused its discretion, reversal would not be warranted unless it were reasonably probable the jury would have reached a different result had the photograph been excluded. (*People v. Scheid, supra,* 16 Cal.4th at p. 21; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Given the testimony about the beat-down and shooting of Faria as he was unconscious on the ground, there is no reasonable likelihood the autopsy

photos adversely influenced the outcome of the trial. (Cf. *People v. Scheid*, *supra*, 16 Cal .4th at p. 20.)

Although admission of gruesome photographs theoretically can deprive a defendant of a fair trial, and "trial courts should be alert to how photographs may play on a jury's emotions, especially in a capital case," it is left to the trial courts "to exercise their discretion wisely, both to allow the state fairly to present its case as well as to ensure that an accused is provided with a fair trial by an impartial jury." (*People v. Weaver*, *supra*, 26 Cal.4th at p. 934.) "A state court's application of ordinary rules of evidence –including the rule stated in Evidence Code section 352 – generally does not infringe upon" the constitutional right to offer a defense. (*People v. Fuiava, supra*, 53 Cal.4th at pp. 665-666.)

IX. THE INSTRUCTIONS WERE NOT MISLEADING

Mendez claims that by using the word "innocent" instead of "not guilty" in two instructions, not including the reasonable doubt instruction, that the trial court "diluted the reasonable doubt standard and shifted the burden of proof to appellant." (AOB 231-240.) Mendez forfeited this claim by failing to raise it in the trial court, and in any event, as Mendez acknowledges, the same argument has been repeatedly rejected by this Court. (AOB 231-232.) This Court should reject his contention for the reasons stated in *People v. Richardson* (2008) 43 Cal.4th 959, 1019; *People v. Crew* (2003) 31 Cal.4th 822, 847-848; *People v. Snow* (2003) 30 Cal.4th 43, 97, and other opinions from this Court as Mendez has not stated any reasons for this Court to reconsider its settled law.

To the extent Mendez argues that use of the word "innocent" was ambiguous or confusing, it was incumbent on him to request a clarifying instruction in the trial court. (*People v. Hart* (1999) 20 Cal.4th 546, 622.) His failure to do so forfeits the claim. (*Ibid.*) Assuming arguendo he did not forfeit the claim, there was no prejudicial error. Even if two of the

instructions contrasted the difference between guilt and innocence, and even if other instructions have been modified to use "not guilty" in place of "innocent," the instructions as a whole, along with the arguments of counsel, impressed upon the jury the burden on the prosecution to prove guilt beyond a reasonable doubt. "Jurors are not reasonably likely to draw, from bits of language in instructions that focus on how particular types of evidence are to be assessed and weighed, a conclusion overriding the direction, often repeated in voir dire, instruction and argument, that they may convict only if they find the People have proven guilt beyond a reasonable doubt." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1059.) It is not reasonably likely, or even remotely likely, that jurors would ignore the reasonable doubt instruction along with other instructions and arguments and believe that the prosecutor had only to prove that Mendez was not innocent, or to place on Mendez any burden to prove his own innocence. "Challenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instruction." (*People v. Crew, supra*, 31 Cal.4th at p. 848.) No evidence supports Mendez's speculation.

X. THERE WAS NO ERROR AT THE GUILT PHASE TO ACCUMULATE

Mendez contends that the cumulative effect of errors purportedly arising at the guilt phase of the trial culminated in a fundamentally unfair trial. (AOB 241-243.) There was no error to accumulate, as all of Mendez's claims fail to state any error, let alone errors that denied him a fair trial. Mendez points out that the prosecution case against him depends heavily on the testimony of Redmond. That is correct. And it was the jury's function to assess the credibility of the witnesses, and the jury here found Redmond credible, even after he was cross-examined by three experienced defense attorneys. (*People v. Friend, supra,* 47 Cal.4th at p.

41.) That Mendez does not like that result does not make it unfair or wrong.

Notwithstanding Mendez's arguments to the contrary, the record contains no errors and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by Mendez shows that he received a fair and untainted trial. Even assuming arguendo errors occurred, those errors were not prejudicial to Mendez. Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in the absence of those errors. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) If errors occurred, even when considered together, it is not reasonably probable that Mendez would have received a more favorable result absent the alleged errors, either singly or in combination.

Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial."]) To be fundamentally fair, a defendant must have the " 'basic protections' of an unbiased judge, an impartial jury, and the assistance of counsel without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence [or punishment] . . . and no criminal punishment may be regarded as fundamentally fair.' " (*Neder v. United States* (1999) 527 U.S. 1, 8-9 [119 S.Ct. 1827, 1833, 144 L.Ed.2d 35], quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 3105-

3106, 92 L.Ed.2d 460].) The record shows that Mendez received a fair trial. Accordingly, his claim of cumulative error fails.

XI. THE INSTRUCTIONS AT THE PENALTY PHASE DID NOT PREJUDICE MENDEZ

Mendez claims that he was prejudiced under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under article I, sections 7, 15 and 17 of the California Constitution, because at the penalty phase the trial court did not re-instruct the penalty phase jury with relevant instructions pertaining to general principles of law after instructing it with CALJIC No. 8.84.1 to disregard instructions given in other phases of the trial. (AOB 244-268.) Mendez has forfeited any claim with respect to a failure to instruct with CALJIC Nos. 17.30-17.50 by failing to request these instructions below. Any error in failing to reinstruct the jury on evidentiary principles in CALJIC Nos. 1.01 through 8.88 as recommended by the Use Note to CALJIC No. 8.84.1 is harmless error.

Mendez informed the Court he would not be asking the court to re-instruct the jury with all of the previous instructions. (24 RT 2953-2954; see 8 CT 2266.) In particular, Mendez suggested that the court need not re-instruct on credibility of the witnesses because the evidentiary rules were somewhat relaxed at the penalty phase to permit admission of historical information about the defendant. (24 RT 2961-2962.) Mendez submitted several special instructions, many of which were agreed to by the court. (See 25 RT 3135-3143; 8 CT 2289-2295.) Both parties requested CALJIC No. 8.84.1, without any suggested modification. (25 RT 3136-3137; 8 CT 2266, 2281.) That standard instruction says, in part, "Disregard all other instructions given to you in other phases of this trial." (27 RT 3281; 8 CT 2281.)

The Use Note to CALJIC No. 8.84.1 recommends the trial court re-instruct the jury with "all appropriate instructions beginning with CALJIC

No. 1.01, concluding with CALJIC No. 8.88," when this instruction has been given. (Use Note to CALJIC No. 8.84.1 (7th ed. 2005), p. 445.) This Court has found that "failure to reinstruct on evidentiary principles at the penalty phase, combined with the reading of CALJIC No. 8.84.1, may constitute error." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1277; *People v. Lewis* (2008) 43 Cal.4th 415, 535; *People v. Moon* (2005) 37 Cal.4th 1, 36-39; *People v. Carter* (2003) 30 Cal.4th 1166, 1220-1221.) However, this Court has never found the failure to reinstruct on evidentiary principles to be prejudicial to the defendant. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1276-1279; *People v. Ervine* (2009) 47 Cal.4th 745, 803-804 [jury had written set of guilt phase instructions during deliberation]; *People v. Wilson* (2008) 43 Cal.4th 1, 27-30; *People v. Lewis*, *supra*, 43 Cal.4th at pp. 534-536; *People v. Moon, supra,* 37 Cal.4th at pp. 36-39; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1218-1222.) This case is no different.

Mendez claims that prejudicial error occurred because the court did not provide general guidelines on the interpretation of evidence to the penalty phase jury after instructing the jury with CALJIC No. 8.84.1 to disregard all of the instructions in other phases of the trial. Specifically, he complains of the absence of CALJIC No. 1.02, statements of counsel are not evidence; CALJIC No. 1.03, regarding the prohibition on making independent investigation; CALJIC No. 2.09, use of hearsay and other evidence for any purpose; CALJIC No. 2.13, guidance on prior consistent and inconsistent statements; CALJIC No. 2.20, regarding the credibility of witnesses; CALJIC No. 2.21.1, discrepancies in testimony; CALJIC No. 2.21.2, willfully false witnesses; CALJIC No. 2.22, weighing conflicting testimony; CALJIC No. 2.27, sufficiency of testimony of one witness; CALJIC No. 2.60, failure of the defendant to testify; CALJIC No. 17.30, take no cues from judge; and CALJIC Nos. 17.40, 17.41, the jury's duties in deliberation. (AOB 244-245.)

Notably, the Use Note to CALJIC No. 8.84.1 does not recommend instruction with the concluding instructions, CALJIC Nos. 1730-1750, based upon giving CALJIC No. 8.84.1, and there is no *sua sponte* duty to give those instructions. (*People v. Wilson*, *supra*, 43 Cal.4th at p. 30.) Mendez's complaint regarding the failure to instruct with CALJIC Nos. 17.30, 17.40, and 17.41 was forfeited by his failure to request those instructions be given to the penalty phase jury, and that claim lacks merit. (*People v. Lewis, supra*, 43 Cal.4th at p. 536, fn. 30; *People v. Wilson, supra*, 43 Cal.4th at p. 30.)

Mendez is not entitled to relief based on the trial court's failure to reinstruct *sua sponte* on evidentiary principles after instructing the jury with CALJIC No. 8.84.1 to disregard instructions from other phases of the trial unless there is a reasonable possibility the omission of an applicable standard CALJIC instruction between CALJIC Nos. 1.01 and 8.88 affected the jury's penalty phase verdict. (*People v. Wilson, supra*, 43 Cal.4th at p. 28.) This is equivalent to the *Chapman* test of harmless beyond a reasonable doubt. (*Ibid.*) Contrary to Mendez's claim on appeal, any error in failing to reinstruct the jury *sua sponte* with CALJIC Nos. 1.02, 1.03, 2.01, 2.09, 2.13, 2.20, 2.21.1, 2.21.2, 2.22, 2.27, and 2.60 was harmless error as there is no reasonable possibility that the absence of these instructions affected the verdict. (*People v. Ervine, supra*, 47 Cal.4th at pp. 803-804; *People v. Wilson*, *supra*, 43 Cal.4th at pp. 27-30; *People v. Moon*, *supra*, 37 Cal.4th at pp. 36-39.)

The failure to re-instruct the jury that the statements of attorneys are not facts does not prove the contention that the jury did consider the statements of attorneys as fact. (See *People v. Lewis, supra,* 43 Cal.4th at p. 535; *People v. Carter, supra*, 30 Cal.4th at p. 1221.) Moreover, it is clear that Mendez was not prejudiced because his jury was instructed in the penalty phase to "determine what the facts are from the evidence received

during the entire trial" and to "accept and follow the law that I [the trial court] shall state to you." (27 RT 3281.) Evidence is that which is received in trial. There is no reason to suspect the jury would change its definition of evidence to include argument or statements by attorneys. The court also told the jury to "consider all the evidence which has been received during any part of this trial." (27 RT 3281.) Again, jurors knew that evidence was the facts presented by witnesses. And the jury was told, again, that it is the court that states the law to be followed. By direct implication, the jury was not to follow any legal precepts stated by attorneys that conflicted with the law stated by the judge. Further, in the concluding paragraphs, the court pointed out the dichotomy between evidence and the arguments of counsel. The court told the jury: "After having heard all the evidence, and after having heard and considered the arguments of counsel . . . ." (27 RT 3338.) Evidence and argument are different and there is no basis upon which to conclude the jury did not understand that difference in reaching its penalty phase verdict.

"[T]he jury would have independently applied many of the points made in the instructions, which the jury had already heard at the guilt phase, as a matter of 'common sense' or 'logic.'" (*People v. Ervine, supra*, 47 Cal.4th at p. 804.) Moreover, Mendez has not presented any specific indication of prejudice arising from the failure to provide these instructions. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 535; *People v. Carter*, *supra*, 30 Cal.4th at p. 1221.) The jury asked no questions and requested no clarifications during the penalty phase deliberations, although it did ask questions during the guilt phase deliberations. (Compare 8 CT 2273, 2298-2299, with 8 CT 2226-2231.)

Mendez has tried to shoehorn his case into prejudicial error by emphasizing every inference and argument from the prosecutor's closing statement, drawing the most negative interpretation possible from each of

the prosecutor's statements and then speculating that the jury must have relied on the most negative interpretations possible. However, Mendez does not explain how the prosecutor properly drawing reasonable inferences from the evidence presented at trial or stating his views as to what the evidence shows (see *People v. Huggins* (2006) 38 Cal.4th 175, 207; *People v. Farnam, supra*, 28 Cal.4th at p. 200) would result in the jury failing to distinguish between evidence and argument in reaching a penalty verdict. Without "some specific indication of prejudice arising from the record, [Mendez] 'does no more than speculate' . . . that the absence of the instructions prejudiced him." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 535, quoting *People v. Carter*, *supra*, 30 Cal.4th at p. 1221.)

In *Wilson*, as here, the defendant complained about the failure of the trial court to instruct the jury not to consider the statements of the attorneys as fact. (*People v. Wilson*, *supra*, 43 Cal.4th at p. 29.) This Court found that the defendant was not prejudiced by the absence of instruction with CALJIC No. 1.02, even though the prosecutor had asked an expert an improper question about the defendant's future dangerousness. The penalty phase instructions directing the jury to disregard other aggravating facts or circumstances and any evidence tending to show defendant committed other crimes removed any possible prejudice from the defendant. (*Id.*; see also *People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1221 [no demonstrated error from failure to instruct jury that statements of attorneys were not evidence; *People v. Ervine*, *supra*, 43 Cal.4th at p. 803 [same].) Similarly here, the court's instructions – to determine the facts from the evidence received during trial and to accept and follow the law as instructed by the court – reinforced for the jurors the precepts that evidence is the testimony and admitted exhibits, and the law is stated by the court. (27 RT 3281; 8 CT 2281 [CALJIC No. 8.84.1 – Duties of Jury – Penalty Proceeding].) Without any indication that the jurors acted otherwise, Mendez cannot

show prejudice from the failure to re-instruct on evidentiary principles in the penalty phase.

For all the reasons discussed above, there is no reasonable possibility that the failure to reinstruct the jury with any standard jury instruction regarding evidentiary principle affected the jury's penalty verdict. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1221.)

XII. VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED AT THE PENALTY PHASE

Mendez alleges that his rights were violated under the Eighth Amendment to the United States Constitution by the admission of victim impact testimony and purportedly prejudicial and inflammatory closing argument by the prosecutor. (AOB 268-303.) This contention lacks merit.

Mendez objected to admission of victim impact evidence. (24 RT 2959- 2962; 25 RT 3040-3051; 1 CT 140-159.) Mendez particularly objected to admission of the videotape of Salazar's sixth grade graduation and to the poem she wrote called Jessica's Cry. (25 RT 3040-3051, 3105-3108; see Exhs. 135 [poem], 136 [videotape].) He argued that these two items shifted too much sympathy toward the victims, so that the jury would focus on the life of the victim instead of on Mendez's life. (25 RT 3041.) The court overruled Mendez's objection. (25 RT 3049-3051, 3107.) When the videotape of Salazar's sixth grade graduation was played, there was no transcript or reporting of words on the videotape because, as the trial court noted, Salazar "was not saying things so deep and so intellectual that's going to be the basis for the jurors' decision." (25 RT 3144.) Instead, the purpose of the video was to depict a glimpse into the young life of Jessica Salazar as she and her family enjoyed her sixth grade graduation ceremony.

Mendez acknowledges that his contentions regarding victim impact evidence have been rejected by this Court. (AOB 270-271, citing *People v. Brady* (2010) 50 Cal.4th 547, 574-581; *People v. Cowan* (2010) 50 Cal.4th

401, 483-487; *People v. Verdugo* (2010) 50 Cal.4th 263, 298-299.) He has presented no reasons for this Court to reconsider those decisions. The United States Supreme Court has also rejected the limitations Mendez advocates for victim impact evidence. "The federal Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) None of the victim impact evidence Mendez complains of rendered his trial fundamentally unfair.

As the Supreme Court recognized in *Payne v. Tennessee,* the specific harm caused by a defendant's criminal act is a relevant consideration at sentencing, and in order to understand this harm, states may permit the introduction of victim impact evidence that shows the uniqueness of the victim as a human being. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822-827.) The state should not be prevented from "offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' [citation], or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at p. 822.) Evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision whether to impose the death penalty or not. (*Id.* at p. 827; see also *People v. Dykes* (2009) 46 Cal.4th 731, 781.)

The trial court properly admitted the victim impact testimony of Faria's and Salazar's families under section 190.3, factor (a). The family members' testimony provided a brief glimpse into their short lives, and especially into the devastating impact the murders of the two teenagers had on their families. This testimony, though emotional at times, was not dramatic or inflammatory. It was poignant, because the murder of a young person is always poignant. (*People v. Dykes, supra,* 46 Cal.4th at p. 782; *People v. Smith* (2005) 35 Cal.4th 334, 365.)

There was no better way to demonstrate the uniqueness of Salazar as a human being than to have Salazar's mother read Salazar's own words to the jury, in the form of the poem Salazar wrote when she was in fifth grade. In *People v. Verdugo*, *supra*, the court admitted a tape recording of songs about losing someone or saying goodbye that the victim had recorded and given to her father shortly before her death. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 297.) This Court found the audio tape, although emotionally moving, was within appropriate bounds. The tape demonstrated the close bond between the victim and her father, and the victim gave it to her father shortly before her death. The tape's content was appropriate to show the loss to the family as a result of the victim's family, and the impact her death had on her father. "These were circumstances of the crime appropriately considered by the jury." (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 298.) Here, Salazar's poem was moving not because it decried street murders, but because it showed the loss to her family and to society caused by her death. Moreover, the poem could not inflame the members of the jury when compared to the evidence of Faria being shot while lying unconscious on the street, or Salazar being taken to a deserted area, killed, and dumped. The poem was not irrelevant or inflammatory and did not divert the jury's attention from its normative role, or invite an irrational, purely subjective response. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 298; *People v. Dykes, supra,* 46 Cal.4th at p. 784.)

Also in *Verdugo*, testimony was admitted that the victim's young goddaughter "saw" the victim in her room after death, and other signs that the victim's spirit was still with her. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 297.) Mendez characterizes similar testimony here as "mysticism" that challenges a juror's ability to think rationally. (AOB 300-301.) He puts the testimony that Faria, uncharacteristically, told his father that he loved him before going out in the same category. (AOB 301-302.) While

this testimony was not challenged on that ground in *Verdugo*, the court found no error in the testimony. (*People v. Verdugo*, *supra*, 50 Cal.4th at pp. 297-298.) This testimony shows the " 'residual and lasting impact' " of the murders on the victims' families. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 298, quoting *People v. Brown, supra,* 33 Cal.4th at pp. 397-398.) Mendez's contention that a survivor's spiritual beliefs would cause a jury to become irrational in making its penalty determination is unsupportable speculation.

The home-made video of a happy event in Jessica Salazar's life was properly admitted into evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at pp. 784-785.) In *People v. Dykes*, this Court approved the admission of a video of the nine-year-old victim and his family enjoying a trip to Disneyland. Here, as in that case, the videotape showed a special occasion that any family might want to memorialize. Within that context, it shows a glimpse into the life of Salazar with her family. It humanized Salazar and provided some insight into the loss suffered by her family and society. "The videotape does not constitute a memorial, tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance or sympathy; it . . . is entirely devoid of drama; and it is factual and depicts real events." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 785.) The videotape was acceptable victim impact evidence. (*Ibid.*)

The victim impact testimony was not extensive for a case involving two murders. The prosecutor presented just three witnesses on behalf of each victim. This Court has "rejected the claim that the evidence must be confined to a single witness." (*People v. Dykes, supra,* 46 Cal.4th at p. 783.) Here, Mendez focuses on the 75 pages of reporter's transcript that the

testimony consumed, but that is relatively brief for six witnesses. (*Id.* at p. 782 [rejecting similar claim].)

The victim impact evidence did not inject the proceedings with a legally impermissible level of emotion. Even assuming arguendo any of the victim-impact evidence was inadmissible, any error was harmless beyond a reasonable doubt. Even without any victim impact testimony, the circumstances of the murder itself – the killing of two young and vulnerable teenagers for no reason – would permit the jury to discern the impact of the crime on the victims' parents, friends, and the community. Given that Mendez's mitigating evidence was not particularly strong in comparison to the senseless and brutal murder of two teenagers, the victim impact evidence was not significant to the penalty determination. (See *People v. Harris* (2005) 37 Cal.4th 310, 352; *People v. Brady, supra*, 50 Cal.4th at p. 581; *People v. Cowan, supra*, 50 Cal.4th at pp. 486-487 [error in testimony about the defendant's lack of remorse and the family's desire for the death penalty was harmless beyond a reasonable doubt].)

XIII. ERROR AT THE PENALTY PHASE WAS INCONSEQUENTIAL AND NOT CAUSE FOR REVERSAL

Mendez argues that the cumulative effect of the claimed errors in this case warrants reversal of his judgment and sentence. (AOB 304-305.) The only error here was in the failure to give general instructions on the interpretation of evidence, and that error did not compromise Mendez's right to a fair trial.

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; see also *United States v. Hasting, supra*, 461 U.S. at pp. 508-509.)

XIV. THE TRIAL COURT PROPERLY CORRECTED THE UNAUTHORIZED ORAL PRONOUNCEMENT OF JUDGMENT TO INCLUDE THE MANDATORY PUNISHMENTS FOR THE GANG AND PERSONAL DISCHARGE OF A FIREARM ENHANCEMENTS

Mendez contends that the enhancements for personal discharge of firearm and for street terrorism must be stricken because the court failed to impose sentence on those enhancements when it orally pronounced the sentence of death. (AOB 306-308.) But that court was not legally authorized to strike those enhancements and therefore it properly corrected the judgment to include punishment for those mandatory enhancements, as reflected on the minute order of the sentencing hearing. (8 CT 2313-2314.)

On September 8, 2004, the jury returned its verdict. In addition to finding Mendez guilty of both murders in the first degree and finding the special circumstances to be true, the jury found true the allegations that Mendez committed both murders for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1); that Mendez personally discharged a firearm causing the deaths of both victims, within the meaning of section 12022.53, subdivision (d); and that Mendez personally discharged a firearm causing the deaths of both victims, for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of sections 12022.53, subdivision (e), and 186.22, subdivision (b)(1).[24] (24 RT 3027-

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[24] In 2000, the year the murders were committed, these statutes provided as follows.

> Section 186.22, subdivision (b)(1): . . . [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the

(continued...)

3030; 8 CT 2232-2242.) The verdicts were recorded in the minutes of the court. (24 RT 3031; 8 CT 2257-2258.)

At the sentencing hearing on November 19, 2004, the court imposed two concurrent sentences of death on Mendez but did not orally impose sentence on the enhancements. (28 RT 3372-3377.) The minute order, however, includes sentences on the street terrorism and personal discharge of a firearm enhancements. The trial court imposed sentence on the enhancements as follows. For the enhancement of section 12022.53, subdivisions (d) and (e), in connection with count 1 (Faria murder), the court imposed an indeterminate term of 25 years to life. This enhancement

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(...continued)

> felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two or three years at the court's discretion.
>
> Section 12022.53, subdivision (d): Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a) [including murder], . . . and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused . . . death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition to and consecutive to the punishment prescribed for that felony.
>
> (e)(1) The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved.
>
> (e)(2) An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

for section 12022.53, subdivision (d), was to run consecutive to count 1, and this section 12022.53, subdivision (e), enhancement was to run concurrent to count 1. Also in connection with count 1, the court imposed a term of three years for the gang enhancement (§ 186.22, subd. (b)(1)), to run consecutive to the sentence in count 1. (8 CT 2313-2314.) In connection with count 2 (Salazar murder), the court imposed an indeterminate term of 25 years to life for the section 12022.53, subdivisions (d) and (e), enhancement (personal discharge of a firearm, causing death, when gang enhancement is also pled and proved). The enhancement for section 12022.53, subdivision (d) (personal discharge of a firearm, causing death), was to run consecutive to the sentence for count 1, and the section 12022.53, subdivision (e), enhancement was to run concurrent to the sentence for count 1. The court also imposed the aggravated term of three years for the gang enhancement (§ 186.22, subd. (b)(1)), to run consecutive to the sentence in count 1 (8 CT 2313-2314). The court also struck the enhancements for being armed with a firearm (§ 12022, subd. (a)(1)) in connection with counts 1 and 2, and struck the special circumstance of murder in the commission of a kidnapping (§ 190.2, subd. (a)(17)), in connection with count 2. In total, in addition to the two concurrent sentences of death, Mendez was sentenced to a consecutive indeterminate term of 56 years to life. (8 CT 2313-2314.)

The minute order further states that the sentencing order for the enhancements was "made off the record and to be made part of the record at date of correction hearing." (8 CT 2314.) It was not mentioned at the subsequent correction hearings on January 5, January 21, and February 1, 2005, however. (29 RT 3386-3389.) At the final hearing with Mendez's trial counsel, his trial counsel said he had reviewed the record, including the clerk's record, and had no further modifications or corrections. (29 RT 3389.) On June 29, 2011, this Court granted a motion to augment the

record to include the reporter's transcript of the sentencing enhancements hearing.

The first oral pronouncement of sentence was unauthorized, and therefore it could be corrected at any time, even on appeal.[25] (See *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.) The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction by any court, even on appeal. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) The enhancements were mandatory and thus were correctly imposed by the trial court. (See *ibid.*; *People v. Langston* (2004) 33 Cal.4th 1237, 1241.) In *Dotson*, a trial judge failed to impose a nonstrikeable enhancement, pursuant to section 667, subdivision (a). This Court held that was a legally unauthorized sentence that could, and must, be corrected on appeal. (*People v. Dotson*, *supra*, 16 Cal.4th at pp. 554-555 & fn. 6.)

Before 1998, trial courts had the power to either strike or stay enhancements in the absence of a statutory limitation under, respectively, section 1385 or former section 1170.1, subdivision (h). The latter section was repealed in 1998, leaving courts with the option of either imposing or striking an enhancement. (See *People v. Herrera* (1998) 67 Cal.App.4th 987, 992.) Now, all enhancements must be imposed or stricken by the trial

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[25] Section 1260 provides:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

court. If the court fails to do either, the sentence is not authorized by law and is subject to correction at any time. (*People v. Bradley*, *supra*, 64 Cal.App.4th at p. 391.)

The enhancement for intentionally and personally discharging a firearm causing death, for the benefit of, at the direction of, and in association with a criminal street gang, may not be stricken by the court. Section 12022.53, subdivision (h), provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.[26]" The jury specifically found that Mendez intentionally and personally discharged a firearm, causing the death of both Faria and Salazar, and also found that Mendez was acting at the direction of, for the benefit of, or in association with a criminal street gang. (8 CT 2233-2234, 2236, 2238-2239, 2242.) The only legally authorized sentence that the trial court could impose had to include prison terms of 25 years to life for each such firearm allegation that was pled and proved to the jury.

The gang enhancement also had to be imposed for a lawfully authorized sentence. It could be stricken only in limited circumstances, "in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (d).) The trial court here indicated its choice to impose the additional three-year prison term. (8 CT 2313-2314.) The

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[26] Section 1385, subdivision (a), provided in relevant part:

> The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.

court ordered the two prison terms to run consecutively for the two gang enhancements for the two murders. (8 CT 2313-2314.) Three years was the maximum, aggravated term for that enhancement. (§ 186.22, subd. (b)(1).) The court thus clearly indicated that the interests of justice would not be served by striking the gang enhancements.

The procedure for imposition of upper terms by the trial court that was in use in 2000 has subsequently been found to violate the Sixth and Fourteenth Amendment rights to jury trial when the trial judge, not the jury, found the facts that exposed a defendant to an upper term. (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 860, 166 L.Ed.2d 856].) The Sixth Amendment requires a jury trial and proof beyond a reasonable doubt that the defendant had an aggravating circumstance that made the defendant eligible for the upper term sentence. But as long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been established by the fact finder beyond a reasonable doubt, the trial court can use that or other factors to select the appropriate term. (*People v. Black* (2007) 41 Cal.4th 799, 812 ("*Black II*").) In *People v. Sandoval*, this Court found that in some cases it would be proper to impose the upper term based on circumstances established by the jury's findings. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837.) Here, the jury found beyond a reasonable doubt that Mendez personally and intentionally discharged a firearm, causing two first-degree murders, for the benefit of, at the direction of, or in association with his criminal street gang. (8 CT 2233-2234, 2238-2239.) Those findings establish beyond a reasonable doubt that Mendez's crimes involved great violence and bodily harm, and that Mendez was armed with or used a weapon during the commission of the crime. (See Cal. Rules of Court, rules 421(a)(1), (a)(2).) In addition, Mendez stipulated to the existence of prior felony convictions that proved that Mendez's prior convictions were of increasing seriousness. (See *Black*

II, *supra*, 41 Cal.4th at p. 812; Cal. Rules of Court, rule 421(b)(2).) The terms for the enhancements should be affirmed.

The cases cited by Mendez are not applicable here because the sentence orally pronounced on November 19, 2004, was not legally authorized. (AOB 306-308, citing *People v. Mesa* (1975) 14 Cal.3d 466 (*Mesa*) and *In re Candelario* (1970) 3 Cal.3d 702 (*Candelario*).) In those cases, the defendants admitted prior conviction allegations but the trial court failed to pronounce sentence on them. Those cases were decided at a time when trial courts had greater discretion in imposing enhanced penalties for recidivist behavior and reflected judicial choices rather than unauthorized sentences. In *Candelario*, a defendant convicted of a felony admitted having a prior felony conviction, but the prior conviction was not mentioned in the oral pronouncement of judgment, the minute order of judgment, or the abstract of judgment. The trial court filed an amended abstract of judgment over a month later, adding the prior conviction. This Court inferred that the failure to mention the prior conviction at sentencing was an act of leniency and therefore operated as a finding that the prior conviction was not true. (*Candelario*, *supra*, 3 Cal.3d at p. 706.) This Court held: "Reference to the prior conviction must be included in the pronouncement of judgment for if the record is silent in that regard, in the absence of evidence to the contrary, it may be inferred that the omission was an act of leniency by the trial court. In such circumstances the silence operates as a finding that the prior conviction was not true." (*Ibid.*)

Mesa was similar to *Candelario* in that the defendant was convicted of a felony and admitted two prior felony convictions. In *Mesa*, the trial court did not mention the prior conviction at sentencing, but did mention the prior convictions in the minute order and in the abstract of judgment. There, too, this Court assumed the trial court was exercising its discretionary leniency, and found the trial court's failure to refer to the

charged and admitted priors when it pronounced judgment was an act of leniency. The trial court's silence operated as a finding that the prior was not true. (*Mesa*, *supra*, 14 Cal.3d at p. 472.)

Here, unlike in *Mesa* and *Candelario*, imposition of sentence for the enhancements was mandatory, once the enhancements were found true. The trial court had no option to strike the firearm discharge enhancement. The court had no legally authorized option other than imposing the penalty for that enhancement. The court could have stricken the gang enhancements, but only if it made a finding that the interests of justice would be served by striking those enhancements. A finding of leniency cannot be implied here because the statute, section 186.22, subdivision (d), requires that a finding that the interests of justice would best be served by that disposition be specified on the record and entered into the minutes.[27] This is the opposite of *Mesa* and *Candelario*, where the court's silence at oral pronouncement of judgment could operate as a finding that the prior was not true. *Mesa* and *Candelario* have been abrogated in situations in which statutes do not authorize the striking of enhancements. (See *People v. Turner, supra*, 67 Cal.App.4th at p. 1268.) Here, the jury had found the gang allegations to be true, and the court was statutorily required to impose prison terms for those findings unless it specified on the record reasons for not imposing those terms. *Mesa* and *Candelario* thus are not applicable

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[27] Section 186.22, subdivision (d), provided:

> Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

here. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 532 [" '[I]f the reasons are not set forth in the minutes [as required by section 1385(a)], the order dismissing may not be considered a dismissal under section 1385.' [Citations.]"]; quoting *People v. Orin* (1975) 13 Cal.3d 937, 944.) The orally pronounced sentence was legally unauthorized and the trial court properly corrected the sentence to include the mandatory enhancements.

XV. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Mendez claims that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution were violated by California's death penalty law, both in the abstract and as applied here. (AOB 309-340.) Mendez failed to preserve these claims because he did not raise them below. Mendez acknowledges that these claims have been rejected before by this Court, and that he is raising them in a perfunctory manner for the purpose of preserving a federal challenge. (AOB 309.) Mendez provides no reason for this Court to revisit its previous holdings rejecting his contentions.

Mendez is in the narrow class of California murderers eligible for the death penalty because he murdered multiple people and he murdered a witness to a crime to prevent her testimony in a criminal proceeding. (§ 190.2, subds. (a)(3), 10.) After making an individualized penalty determination, considering Mendez's mitigating circumstances, the jury exercised its discretion and returned a verdict of death. The United States Constitution demands no more than that, and the United States Supreme Court has already approved California's death penalty law. (*Kansas v. Marsh* (2006) 548 U.S. 163, 174 [126 S.Ct. 2516, 165 L.Ed.2d 429]; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275 [118 S.Ct. 757, 139 L.Ed.2d 702]; *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630,

129 L.Ed.2d 750]; *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

A. Section 190.2 is Not Impermissibly Broad

Contrary to Mendez's assertion (AOB 309-313), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil, supra,* 51 Cal.4th at p. 1288; *People v. Verdugo, supra*, 50 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362.) Mendez offers no reason for this Court to depart from its prior rulings on this subject.

B. The Application of Section 190.3, Factor (a), Did Not Violate Mendez's Constitutional Rights

Equally unavailing is Mendez's claim that the application of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 313-316.) Allowing a jury to find aggravation based on the "circumstances of the crime" under section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil, supra*, 51 Cal.4th at p. 1288.) As the United States Supreme Court noted in *Tuilaepa v. California, supra*, 512 U.S. at page 976, "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."

"Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances

present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, " 'each case is judged on its facts, each defendant on the particulars of his [or her] offense.' " (*Ibid.*, quoting *People v. Brown, supra*, 33 Cal.4th at p. 401.)

C. The Jury Is Not Required to Find Beyond a Reasonable Doubt That Aggravating Circumstances Outweigh Mitigating Circumstances Or That Death Is the Appropriate Penalty

Contrary to Mendez's argument (AOB 317-321), the jurors were not constitutionally required to find beyond a reasonable doubt the existence of one or more aggravating factors that outweighed any mitigating factor, and the trial court was not required to instruct the jury that such a finding was required. This Court has already rejected the argument that *Cunningham v. California, supra*, 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], support a claim of constitutional error. (*People v. Bunyard* (2009) 45 Cal.4th 836, 858; *People v. Romero* (2008) 44 Cal.4th 386, 429.) Furthermore, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury 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. Blair* (2005) 36 Cal.4th 686, 753.) In fact, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*Ibid.*)

D. The Jury Is Not Required to Find That the People Had a Burden of Proving Beyond a Reasonable Doubt That Aggravating Circumstances Exist Or That Death Is A More Appropriate Penalty Than Life Without Possibility of Parole

Mendez argues that his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because the jury was not instructed that the prosecution had the burden of proving beyond a reasonable doubt that aggravating factors existed and that death was a more appropriate penalty than life without the possibility of parole. (AOB 321-324.) This Court has already rejected the argument, finding that no burden of proof or burden of persuasion is required during the penalty determination. (*People v. Blair, supra*, 36 Cal.4th at p. 753.) As this Court has explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process–such as burden of proof–are not necessary.' " (*People v. Lenart, supra,* 32 Cal.4th at p. 1137, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.)

Because the penalty determination process is normative, not factual, there is no burden of proof at the penalty phase. Therefore, no instruction on the burden of proof is required, as to either the presence or absence of any such burden. (*People v. Blair, supra,* 36 Cal.4th at p. 753.)

E. There Is No Requirement the Jury Make Written Findings As to the Aggravating Factors

Mendez contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no

requirement for the jury to make written findings about the factors it considered in deciding to impose the death penalty. (AOB 324-327.) This Court has consistently rejected any claim that the jury must make written findings as to aggravating factors. (*People v. Riggs* (2008) 44 Cal.4th 248, 329.) Mendez's arguments to the contrary are not persuasive.

F. California's Death Penalty Law Is Not So Arbitrary As to Require Intercase Proportionality

Mendez contends the failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner. (AOB 327-329.) This Court has repeatedly rejected the contention that intercase proportionality is required and that our death penalty law is arbitrary. It should do so again here. (*People v. Farley, supra,* 46 Cal.4th at p. 1133; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308-309.)

G. No Constitutional Rights Were Violated By the Prosecutor's Reference to Unadjudicated Criminal Activity.

Mendez argues that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because the prosecutor improperly relied on unadjudicated criminal activity as an aggravating factor even though the jury was not required to unanimously find true that activity – a purported drive-by shooting by Mendez. (AOB 329-331.) This contention, like his others, lacks merit.

During the closing argument at the penalty phase, the prosecutor reminded the jury that Mendez had been stopped in a car with a large cache of firearms. Mendez argues that the prosecutor "was stating as *fact* what was only an *inference*" when referring to Mendez and his familiarity with violence and guns. (AOB 329 [emphasis in original].) But the prosecutor

clearly stated his argument as an inference that could be drawn from the facts at trial. The prosecutor argued: "Just because [Mendez] doesn't have other acts of violence beyond the possession of the arsenal in that trunk of that vehicle pulled over right after, what – I think *any reasonable person comes to a conclusion* that it was a drive-by shooting, rolling by 10 miles an hour." (27 RT 3302 [emphasis added].) An inference is a conclusion drawn by a reasonable person from other facts or assumptions. It was not error for the prosecutor to draw reasonable inferences from the evidence presented at trial or to state his views as to what the evidence showed. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 207; *People v. Farnam, supra*, 28 Cal.4th at p. 200.) "Closing argument in a criminal trial is nothing more than a request . . . to believe each party's interpretation, proved or logically inferred from the evidence . . . ." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207.) The uncontested evidence at the guilt phase showed that on December 7, 1995, an officer heard multiple gunshots and saw a vehicle in the immediate vicinity driving very slowly. Mendez was a passenger in the car and had a live bullet in his pocket. A loaded .22 caliber handgun was in the center console of the car, and four more firearms were found in the trunk. The barrel of a shotgun in the trunk was still warm to the touch. (14 RT 1864.) A reasonable person could infer that someone in the car caused the gunshots by shooting the gun that was still warm, or, in other words, that a drive-by shooting had occurred.

In any event, as Mendez acknowledges, this Court has already ruled that "The jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity. *Apprendi* and its progeny do not demand a different result." (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308 [citations omitted].)

Moreover, the penalty jury also had evidence that Mendez was convicted of possession of an assault weapon, a felony, on January 30,

1997. Mendez had stipulated to this as an established fact. (25 RT 3133.) It cannot be said that Mendez's proximity to a warm firearm in the vicinity of gunshots being fired, or a shooting, was any more damaging to Mendez than his felonious possession of an assault weapon. Given the nature of the other aggravating evidence, even assuming arguendo any error occurred, it was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

H. The Use of the Modifiers "Extreme" and "Substantial" Do Not Violate the Constitution

Mendez contends that the use of the "restrictive adjectives" extreme and substantial in factors (d) and (g) precluded the jury from full consideration of mitigation. (AOB 331-332.) Hogwash. The jury was not stupid. "The Fifth, Sixth, Eighth, and Fourteenth Amendments are not violated by the use of the adjectives 'extreme' and 'substantial' in connection with section 190.3, factors (g) and (d)." (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308.)

I. The Trial Court Need Not Identify Mitigating Factors As Mitigating Factors

Mendez complains that he did not received a fair and reliable penalty phase determination because the jury was not instructed which factors were mitigating. He further contends this confusion might have been exacerbated by a special instruction that he requested and that was given by the trial court. (AOB 332-334.) These contentions, too, lack merit for reasons already stated by this Court. And assuming arguendo any error was caused by the special instruction, Mendez invited that error.

This Court has held that the trial court need not label the statutory sentencing factors in mitigation – or in aggravation, for that matter. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 308.) This Court has held that "no reasonable juror could be misled by the language of section 190.3

concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias* (1996) 13 Cal.4th 92, 188; see AOB 333.)

Mendez argues this reasoning is undermined by *People v. Morrison* and *People v. Carpenter,* because in both of those cases the trial courts "confused" mitigating and aggravating factors. (AOB 333, citing *People v. Morrison* (2004) 34 Cal.4th 698, 727-728, and *People v. Carpenter, supra,* 15 Cal.4th at pp. 423-424.) But the trial courts in *Morrison* and *Carpenter* did not consider mitigating circumstances as aggravating ones. Instead, the courts considered the objective circumstances of the underlying crime, which they could properly do under factor (a), under the wrong statutory factor. (*Morrison,* at pp. 727-729; *Carpenter,* at p. 424.) Those cases do not support the claim that reasonable jurors could be misled by the language of section 190.3.

Mendez speculates the special instruction he requested could have confused the jury even more. The instruction was: "The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider." (27 RT 3285; 8 CT 2290; AOB 333.) There is no reasonable likelihood that the jury misapplied or misconstrued the instruction. (*People v. Crew, supra*, 31 Cal.4th at p. 848.) The special instruction simply told the jury that its consideration of any evidence in aggravation was limited to evidence the jury found relevant under an enumerated factor. Constraining consideration of aggravating evidence to the delineated factors was not improper. Moreover, it had no impact on the jury's consideration of mitigating evidence. Mendez cannot point to any mitigation evidence he presented to the jury that the jury would have ignored because of the special instruction. The instruction was neither misleading nor capable of being misconstrued so as to mislead the jury regarding its consideration of aggravating and mitigating evidence.

J. California's Capital Sentencing Law Does Not Violate Equal Protection

Mendez argues California's capital sentencing law violates the Equal Protection Clause of the Fourteenth Amendment because it gives more procedural protections to non-capital defendants. As examples, Mendez complains that in capital cases there is no requirement for the jury to make unanimous findings beyond a reasonable doubt or to record its findings in writing. (AOB 334-337.) This claim, too, has been repeatedly rejected by this Court. (*People v. Carey* (2007) 41 Cal.4th 109, 136-137; *People v. Davis, supra,* 36 Cal.4th at p. 571; see also *People v. Zamudio, supra,* 43 Cal.4th at p. 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

K. California's Death Penalty Law Does Not Violate International Law

Lastly, Mendez contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 337-339.) It is Mendez who violated standards of decency and humanity by gunning down two vulnerable teenagers for no reason. This Court has repeatedly rejected arguments similar to Mendez's, and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1332; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 309.)

L. The California Death Penalty Statute Is Constitutional

This Court and the United States Supreme Court have approved California's death penalty statutes many times. (*Tuilaepa v. California,*

supra, 512 U.S. 967; *Boyde v. California, supra*, 494 U.S. 370; *People v. D'Arcy*, *supra*, 48 Cal.4th at pp. 308-309.) There was no error to cumulate.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: May 16, 2012

Respectfully submitted,

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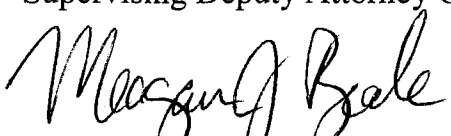

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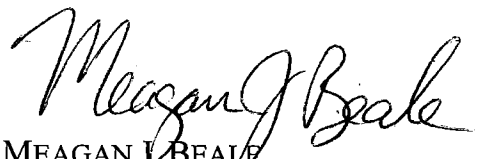
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 45,235 words.

Dated: May 16, 2012

KAMALA D. HARRIS
Attorney General of California



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Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL-CAPITAL CASE

Case Name: **People v. Julian Mendez** Case No.: **S129501**

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 May 17, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Randall Bookout Attorney at Law P.O. Box 181050 Coronado, CA 92178 *Attorney for Defendant/Appellant, Julian Mendez, (2 copies)*	The Honorable Paul E. Zellerbach District Attorney Riverside County District Attorney's Office 3960 Orange Street Riverside, CA 92501
California Appellate Project (SF) 101 Second Street, Suite 600 San Francisco, CA 94105-3647	Sherri R. Carter, Executive Officer Riverside County Superior Court Attn: The Honorable Edward D. Webster, Judge 4100 Main St. Riverside, CA 92501-3626

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 May 17, 2012, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature

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