In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SANTIAGO PINEDA,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S150509

Los Angeles County Superior Court Case No. NA061271
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On August 8, 2002, in Los Angeles County Superior Court Case No. NA051943, appellant was charged by information with the March 7, 2002 murder of Rafael Sanchez, also known as Juan Armenta (hereafter "Armenta").[1] (Pen. Code, § 187, subd. (a).) At that point, no special circumstances under Penal Code section 190.3 were charged. (1CT 102-03.) Appellant pleaded not guilty. (1CT 104.)

A jury trial commenced on April 2, 2004. (1CT 159-60.) At trial, Raul Tinajero testified under a grant of use-immunity (1CT 138-142) that he was with appellant at the time of Armenta's murder and that appellant was the killer. (2CT 285-292.) Due to the serious illness of appellant's trial attorney, a mistrial was declared during the People's case-in-chief on April 12, 2004. (2CT 413; 4Supp CT 55-59.)

On April 20, 2004, about two weeks after his trial testimony, Tinajero was murdered in his jail cell in the Los Angeles County Jail. (3CT 426-436 [confidential].)

In a felony complaint filed on May 11, 2004 in Los Angeles County Superior Court Case No. NA061271, appellant was charged with the murder of Tinajero, with the special circumstance that appellant killed the victim because the victim was a witness to a crime (Pen. Code, § 190.2, subd. (a)(10).) (3CT 480-82.)

After Case No. NA051943 was consolidated into Case No. NA061271 (3CT 497-498), appellant was charged by information with the murders of Armenta (Count One) and Tinajero (Count Two). The information alleged

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[1] The information identified the victim as Rafael Sanchez. (1CT 102; see also 4CT 749.) The trial testimony established that the victim was known by both that name and Juan Carlos Armenta. (10RT 1660; 10 RT 1668, 1676 [stipulation re identification].) Because the victim was identified at trial mostly as Armenta, respondent uses that name here.

the special circumstances of murder while engaged in robbery (Pen. Code ,§ 190.2, subd. (a)(17); Count One only), murder of a witness (Pen. Code ,§ 190.2, subd. (a)(10); Count Two only), and multiple murder (Pen. Code, § 190.2, subd. (a)(3); both counts). (4CT 749-751.) Appellant pleaded not guilty. (4CT 770.)

A second jury trial commenced on October 25, 2006. (5CT 1138.) On December 11, 2006, the jury found appellant guilty of first degree murder (Pen. Code, §§ 187, 189) in both counts and found all charged special circumstances true. (6CT 1304-1307.) Following the penalty phase of trial, the jury returned verdicts of death for Count Two on January 23, 2007, and for Count One on January 25, 2007. (6CT 1446, 1455.)

The trial court denied appellant's automatic motion for modification of sentence (Pen. Code, § 190.4) and sentenced appellant to death on both counts on February 15, 2007. (6CT 1475-81; 4Supp CT 129-32.) This automatic appeal follows.

STATEMENT OF FACTS

A. The People's Case-In-Chief, Guilt Phase

1. The March 6-7, 2002, Murder of Juan Armenta

Raul Tinajero was appellant's neighbor. They both lived on O Street in Wilmington, California. (11RT 1794, 1810, 1989.) On the night of March 6 to 7, 2002, appellant and Tinajero were riding in a car driven by a friend of appellant's. (11RT 1798, 1853, 1855.) Appellant and Tinajero both had drunk several beers, and they continued to drink in the car. (11RT 1801, 1855.) The car stopped next to a white Infiniti at a red light at Avalon Boulevard and Pacific Coast Highway. Appellant spoke with Juan Armenta, the sole occupant of the Infiniti. (11RT 1799-1801.) Armenta appeared to be drunk. (11RT 1801.) Neither Tinajero nor appellant (to Tinajero's knowledge) had ever met Armenta before. (11RT 1803.)

Through their car windows, appellant handed Armenta a bottle of tequila. (11RT 1801-1802, 1857.) Armenta drank from the bottle and handed it back. (11RT 1802.)

Driving the Infiniti, Armenta followed appellant and Tinajero to appellant's house on O Street in Wilmington. (11RT 1803-1805, 1810, 1857.) Appellant, Tinajero, and Armenta "hung out" in front of the house for awhile. (11RT 1809.) The three then decided to go to Long Beach to "pick up some girls." (11RT 1809, 1812, 1857.) Armenta drove appellant and Tinajero in the Infiniti. (11RT 1813.) In Long Beach, they stopped to visit one of Armenta's friends, Eduardo Quevado,[2] and to pick up appellant's cousin. (10RT 1645-1647; 11RT 1813-1814, 1857.) They later stopped in an alley where appellant, appellant's cousin, and Armenta got out of the car to urinate, while Tinajero stayed in the car. (11RT 1814-1815, 1860-1861.) Appellant and his cousin ran back to the Infiniti and appellant drove it away with his cousin and Tinajero inside, leaving Armenta behind in the alley. (11RT 1816, 1863.) They returned to Wilmington, left the Infiniti on Colon Street, one block from O Street, and walked to appellant's house. (11RT 1816-1817, 1820, 1890.)

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[2] Armenta knocked on the door of Quevado's second-floor apartment at about 11:00 p.m. (10RT 1645-1647.) Armenta was drunk. (10RT 1650, 1663.) From his apartment door, Quevado saw appellant standing near the stairway of the building and another man standing by Armenta's parked car. (10RT 1646-1649.) Quevado had not met appellant and the other man before. (10RT 1651.) Armenta told Quevado that appellant and the other man were his friends from the mechanic's shop where Armenta used to work. (10RT 1651, 1660-1661.) Quevado offered to let Armenta stay at his apartment, or to drive Armenta home, but Armenta declined. (10RT 1650, 1661, 1665.) Armenta drove away in the Infiniti with appellant and the other man as passengers. (10RT 1650-1651.)

Armenta returned to Quevado's apartment on foot, alone, and he appeared to be upset. (10RT 1651-1652, 1663-1664.) Armenta told Quevado that the two men he came with earlier had beaten him and stolen his car. (10RT 1651-1652.) Quevado and his wife drove Armenta toward his home. (10RT 1653-1654.) However, a few blocks from home, Armenta asked Quevado to take him instead to the mechanic's shop in Wilmington where Armenta worked. (10RT 1654, 1658.) Quevado dropped off Armenta at the shop and left, but parked a few blocks away to watch out for Armenta because Quevado was concerned about his welfare. (10RT 1654, 1665.) Sometime later, Quevado saw Armenta drive by in a Honda heading toward Long Beach. (10RT 1654-1655, 1658.) Quevado tried to follow Armenta but lost him. (10RT 1655-1656.)

While appellant and Tinajero were standing in front of appellant's house, Armenta returned, driving a Honda. (11RT 1817-1819; see also 1864, 1822-1823, 1830, 1833 [the other car was a Honda].) Armenta was upset and appeared to be very drunk. (11RT 1817, 1864.) Armenta said he wanted his Infiniti and that he would kill appellant if he did not get it back. (11RT 1817-1818, 1864.) Although the Infiniti was actually parked only a few blocks away, appellant told Armenta that his car was in Long Beach, and agreed to go with Armenta to get it. (11RT 1818, 1820.) Appellant and Tinajero entered the Honda, and Armenta drove them toward Long Beach. (11RT 1820-1821, 1864-1865.)

About 1:30 a.m., they stopped at Armenta's sister's home, and Armenta went inside for a few minutes while appellant and Tinajero waited by the car. (10RT 1668-1670; 11RT 1821-1822, 1873.) Armenta angrily told his sister, Patricia Armenta, that two people who lived on Blinn Street[3]

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[3] Appellant's house was on O Street near Blinn Street. (11RT 1806-1807.)

in Wilmington had stolen his car. (10RT 1669-1670, 1675.) Armenta said that some people were outside waiting for him. (10RT 1669-1670, 1676, 1678-79.) He left, and Patricia never saw him alive again. (10RT 1679.)

While Armenta was inside his sister's home, appellant told Tinajero that he wanted to choke Armenta and steal his Honda. (11RT 1824, 1874, 1893.) Appellant asked Tinajero to help him, but Tinajero refused to be involved. (11RT 1825.) Appellant and Tinajero switched seats, so that appellant was sitting in the back seat when Armenta returned to the car and drove away. (11RT 1825-1826, 1874.)

Eventually, Armenta drove into an alley in Long Beach and stopped the car. (11RT 1826-1828.) Appellant, seated behind Armenta, put his hands around Armenta's neck and strangled him until he appeared to be unconscious. (11RT 1826-1829, 1849-1850, 1876-1878.) While Tinajero remained in the car, appellant opened the driver's door, pushed Armenta out of the Honda, and took Armenta's place behind the wheel. (11RT 1829-1830, 1849-1850.) Driving the car backward and forward, appellant ran over Armenta repeatedly. (11RT 1830-1831.)[4] Appellant drove the newly-stolen Honda back to Wilmington, parked the Honda on Colon Street, and retrieved the first stolen car, the Infiniti. (11RT 1833, 1890.) With Tinajero again as a passenger, appellant drove the Infiniti back to the same alley in Long Beach where he had run over Armenta. (11RT 1833.)[5] Appellant told Tinajero that he wanted to check the area. (11RT 1833.)

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[4] According to Tinajero, appellant ran over Armenta five or six times. (11RT 1830.) However, he admitted he was not keeping a precise count. (11RT 1908.)

[5] While driving back to his apartment, Quevado saw Armenta's Infiniti drive by at high speed toward Long Beach, but Quevado could not see who was driving it. (10RT 1656, 1658, 1665.)

Appellant drove the Infiniti through the alley at high speed and ran over Armenta again. (11RT 1834, 1894-1895.)

Virginia Ramos and David Rodriguez lived on Palmer Court, an alley in Long Beach. (9RT 1517, 1539; 10RT 1684-1685, 1691.) On the night of March 6 to 7, 2002, they noticed a dark-colored Japanese car parked in the alley with two or three people standing near it. (10RT 1684, 1691-1693, 1702-1703.) Several minutes later, Ramos's and Rodriguez's dog barked. (10RT 1686, 1693, 1700-1701, 1704.) Rodriguez went outside and saw a man in the alley moaning and crawling away from where the dark car had been parked. (10RT 1693-1694, 1698, 1701, 1705, 1709.) Thinking the man might be drunk or injured, Rodriguez called 911. (10RT 1686, 1694, 1705, 1708.) Rodriguez later saw a small white car drive south through the alley quite fast—about 25 to 35 miles per hour—with its headlights on. (10RT 1687, 1694-1696, 1706, 1711.) Fearing that the man would be run over, and not wanting to witness such a thing, Rodriguez turned to go back inside. (10RT 1695, 1706, 1711.) Ramos and Rodriguez both heard two thumps as the white car drove past. (10RT 1687, 1689, 1695, 1707, 1709.) The white car made a three-point turn and drove north, back through the alley. (10RT 1687, 1696, 1707.) Ramos called 911 and reported that the man in the alley whom they had previously called about had just been hit by a car. (10RT 1687-1688.)

At 1:57 a.m., Captain Jorge Pedroza and Engineer Christoper Tave of the Long Beach Fire Department arrived at Palmer Court in a rescue truck with lights and sirens activated in response to a dispatch call regarding a man staggering in the alley. (9RT 1539, 1544, 1546, 1549, 1551-1552, 1554-1555.) When the fire department rescue truck entered the alley southbound, it came face-to-face with the northbound Infiniti, which was attempting to exit the alley. (9RT 1541-1542, 1555-1556; 10RT 1697, 1707; 11RT 1834, 1838.) Captain Pedroza and Engineer Tave saw two

Hispanic men in the white car. (9RT 1545, 1556-1557.) The car had front-end damage and a broken windshield. (9RT 1542-1543, 1552, 1556.) Because the alley was narrow, the Infiniti had to back into a driveway to allow the rescue truck to squeeze past. (9RT 1544, 1557-1558; 11RT 1838-1839.) The white car drove away, exiting the alley to the north. (9RT 1544, 1557-58; 11RT 1838-1839.) Captain Pedroza reported to dispatchers that a white compact car with a damaged front-end was exiting Palmer Court. (9RT 1544.)

The fire department personnel found Armenta lying in the alley. (9RT 1544-1545, 1547-1549; 10RT 1697.) Armenta had no pulse and was not breathing. (9RT 1549.) According to Captain Pedroza, he was "in critical condition with very little life left in him." (9RT 1539.) Paramedics were unable to restart his pulse or breathing. (9RT 1549-1550.) He was taken to the hospital, and at some point, he died. (9RT 1549-1550; 11RT 1935.)

At about 2:00 a.m., responding to a radio call about the incident, Long Beach Police Officer Norman Mikkelson saw a white Infiniti on Locust Avenue one block from the crime scene on Palmer Court.[6] (9RT 1516-1517, 1519-1521, 1529, 1531-1532.) The Infiniti had its reverse lights on and no headlights. (9RT 1520, 1532.) When Officer Mikkelson's patrol

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[6] Tinajero identified photographs of the Infiniti in which he and appellant were arrested (Exs. 49, 50 [identified as Exs. 2, 3 at first trial]). (11RT 1796-1797.) Officer Mikkelson, Captain Pedroza, and Engineer Tave each identified the same photographs as depicting the white car they encountered. (9RT 1525-1526, 1541-1542, 1551, 1560.) According to Tinajero's testimony, after running over Armenta and leaving Palmer Court, appellant and Tinajero parked a block away and walked back to the alley, where they saw paramedics attend to Armenta. (11RT 1840.) They returned to the Infiniti and started to drive back toward Wilmington when they were stopped by the police and arrested. (11RT 1841.) At that point, appellant was still the driver. (11RT 1795-1796, 1841.)

car approached, the reverse lights on the Infiniti went off, and the Infiniti drove forward with no headlights and turned onto another street. (9RT 1521, 1532.) The patrol car followed the Infiniti a few more blocks and eventually made a traffic stop. (9RT 1521-1523.) The front bumper, grill, hood, and both headlights of the Infiniti were damaged, and the passenger's side of the windshield was shattered. (9RT 1925-1926, 1590.)[7] A belt was tied around the bumper. (9RT 1590.) Appellant was driving the Infiniti, and Tinajero was in the passenger seat. (9RT 1526-1527, 1529.) Officer Mikkelson smelled alcohol on appellant's breath and person. (9RT 1533, 1535.) Appellant's eyes were watery and blood-shot, but he did not have slurred speech. (9RT 1535.) Another officer examined appellant for drug and alcohol use and extracted a blood sample. (9RT 1534.) Captain Pedroza and Engineer Tave arrived, and identified the Infiniti as the same car they had encountered while driving the rescue truck on Palmer Court. (9RT 1550, 1559.)

Both appellant and Tinajero were arrested. (9RT 1529, 1537.) When questioned by police on the date of his arrest, Tinajero denied having any involvement in the incident. (11RT 1842, 1879-1880.) Tinajero was released that day. (11RT 1897, 1905.)

Investigating the crime scene on Palmer Court, Detective Gerald Wood of the Long Beach Police Department found fresh blood and tire marks with heavy rubber residue consistent with a tire hitting an obstruction and dragging on the pavement. (9RT 1574-1578.) Some of the blood appeared to be on top of the tire marks. (9RT 1578.) A trail of tire marks led south down the alley, into a parking area on the side, then back out of that parking area, and then north up the alley (i.e. a three-point turn).

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[7] Detective Gerald Wood opined that the damage pre-dated the March 7, 2002 incident. (9RT 1590-1591.)

(9RT 1583-1584, 1588.) The greatest concentration of blood was found at the point where Armenta's body was found. (9RT 1581.) There were other blood drops north of that point but no other blood south of that point. (9RT 1581, 1585-1586) This led Detective Wood to conclude that Armenta was first struck by the car north of where his body came to rest, and that the car which struck him was likely traveling south.[8] (9RT 1585-1586.) Detective Wood also found in the alley a pair of black shoes, a blue shirt, a belt buckle, and a portion of a belt. (9RT 1577, 1579-1580.)[9]

While the Infiniti was impounded, Detective Wood examined the undercarriage and found a large amount of a freshly-dried red substance, scrape marks, and what appeared to be fresh damage to the oil pan. (9RT 1594, 1596.) According to the detective, the damage to the undercarriage indicated that the oil pan struck something and that an object lodged against the undercarriage was dragged along the pavement. (9RT 1595, 1597.)

Detective Wood opined that Armenta was lying flat on the ground at the moment of impact with the Infiniti. (9RT 1598-1599.) The detective explained that there were no markings on the bumper, damage to the grill, or hair, skin, blood, or clothing on the hood or windshield. The Infiniti was dirty, but there was no disturbance of the dust pattern on the windshield or hood. Although the windshield was cracked, no glass was found in the alley. (9RT 1591, 1599.) Detective Wood also opined, based on the crime scene evidence and the vehicle condition, that the Infiniti struck Armenta only once, at 30 to 35 miles per hour. (9RT 1600-1603; 10RT 1621-1622,

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[8] Detective Wood was assigned to the Accident Investigation Detail and had substantial training and experience in accident investigations. (9RT 1565-1567.)

[9] When Armenta arrived at the hospital, he did not have a shirt or shoes. (9RT 1577, 1579.) The color and fabric of the pants he wore – dark blue in the style of a mechanic's uniform – matched that of the shirt found in the alley. (9RT 1579.)

1627-1628.) However, the detective could not rule out the possibility that the victim was also struck another time at a lower speed. (10RT 1630.)[10]

On March 15, 2002, Detective Wood brought Tinajero to the police station to question him further. (11RT 1843, 1854, 1880-1881, 1904-1906.) At that point, Tinajero told the police the truth about appellant's choking Armenta, pushing him out of the car, and running over him. (11RT 1843-1844, 1885.) Tinajero later told Detective Birdsall essentially the same thing – that he and appellant had stolen cars from Armenta and that appellant ran over Armenta with two different cars. (11RT 1845.)

Miguel Aranda owned the automobile repair shop where Armenta was briefly employed. (11RT 1923-1924, 1929.) In March of 2002, Aranda brought his wine-colored 1986 Honda Accord[11] to the shop and asked Armenta to fix an oil leak. (11RT 1924, 1927, 1930.) The Honda was still in the shop that afternoon, and Armenta was scheduled to close the shop for the evening. (11RT 1925, 1930.) The next morning, the door to the shop was open and the Honda was missing. (11RT 1925, 1930-1931.) Aranda found the car two days later, parked on Colon Street. (11RT 1925.) He drove it back to the shop and discovered it had a gasoline intake problem which did not exist before. Aranda had the gas pump replaced. (11RT 1926-1928.) The original oil leak problem had already been repaired. (11RT 1932.)

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[10] Detective Wood did not see the coroner's report, which he admitted could have shed more light on the number of times Armenta was run over. He also never examined the Honda. Detective Wood was assigned to the case for only a short time because the matter was transferred from the Accident Investigation Detail to the Homicide Detail. (10RT 1627-1628, 1630-1631.)

[11] At trial, Quevado identified Aranda's Honda from photographs as the car he saw Armenta drive from the repair shop on the night of the murder. (10RT 1655; see 11RT 1924, 1984.)

On May 17, 2002, Detective Birdsall came to Aranda's repair shop and obtained his permission to impound and inspect the 1986 Honda. (11RT 1928-1929, 1931-1932, 1985, 1995.) The Honda, including particularly the undercarriage, was very clean for a 16-year-old car with over 80,000 miles, and at that point – more than two months after Armenta's death – the detective found no physical evidence that the car had been used to run over a person. (11RT 1985, 1987.)

Swabs of the reddish-brown liquid taken from the undercarriage of the Infiniti on the morning of March 7, 2002 tested positively for human blood and showed a one-in-564-trillion match to Armenta's DNA. (10RT 1639-1640, 1715-1717, 1719, 1721, 1723, 1729-1735.)[12]

An autopsy by medical examiner Dr. Jerry Gutstadt of the Los Angeles County Coroner's Office revealed that Armenta died of multiple traumatic injuries causing massive internal bleeding. (11RT 1935-1936, 1978.) Armenta's ribs, clavicle and pubic bone were fractured, and his lungs, liver, pancreas, mesentery, bladder, prostrate gland, and a testicle were lacerated. (11RT 1953-1960, 1963.) These were "crushing type injuries" indicating a large amount of downward pressure on Armenta's torso. (11RT 1954-1955, 1978-1979.) About one quart of hemorrhaged blood was found in Armenta's chest cavities. (11RT 1960-1961, 1978-1979.)

Armenta had several external linear abrasions on his torso, buttocks, and leg. Different sets of parallel abrasions ran in different directions across his body, showing pressure from sources aligned in different directions. (11RT 1938-1939, 1943-1949, 1965, 1979-1981.) Based on the directions and number of such injuries, Dr. Gutstadt, who had performed

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[12] Other red liquid found under the Infiniti proved to be sealant, not blood. (9RT 1595.)

600 to 700 autopsies of people reportedly hit by cars, opined that Armenta was run over more than once. (11RT 1965-1966.) Dr. Gutstadt further opined that a person with Armenta's injuries could live from 5 to 40 minutes, depending on the rate of bleeding. (11RT 1962.)

Armenta's hyoid—a small, delicate bone in the neck—was also fractured. According to Dr. Gutstadt, this was consistent with strangling or with blunt force trauma directly to the bone. (11RT 1963, 1974.) Armenta had hemorrhages in the sclera of his eyes, also consistent with strangling. (11RT 1963-1964.) However, Dr. Gutstadt did not determine strangulation to be a cause of Armenta's death. (11RT 1975.) Armenta's blood alcohol level at the time of the autopsy was 0.16 percent. All other drug tests were negative. (11RT 1964-1965, 1972-1973.)

At the first trial in 2004, Tinajero testified about appellant's commission of the murder of Armenta, including, specifically, appellant's strangling of the victim and running over him with both the stolen Infiniti and the stolen Honda while Tinajero was a passenger in each car. (11RT 1824-1834, 1849-1850, 1874, 1893-1895.)[13] Tinajero explained that on the date of his arrest, he falsely denied his involvement to the police because he was afraid. (11RT 1842, 1879-1880.) Appellant did not instruct Tinajero to do so. (11RT 1843.) The district attorney's office granted Tinajero immunity from being prosecuted based on his testimony. (11RT 1845-1847, 1851-1853.) At the time of the first trial, Tinajero was serving a prison sentence for convictions of vehicle-taking and forgery in another case. (11RT 1848, 1851.)[14] Tinajero was not given any deals or plea bargains regarding that case in exchange for his testimony in the current

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[13] Tinajero's testimony was read to the jury at the second trial in 2006. (11RT 1793-1910.)

[14] Tinajero also had a burglary conviction in 2002. (11RT 1851.)

case. (11RT 1848.) Tinajero told the prosecutors that he feared for his life if he testified because he would be regarded as a snitch in prison. (11RT 1848-1849.)

2. Between The Two Murders

Appellant's first trial for the murder of Armenta, at which Tinajero testified, ended in a mistrial on April 12, 2004. (12RT 2146.) Following the mistrial, appellant and Tinajero were both housed at Men's Central Jail in Los Angeles. (16RT 2875.)[15] The Los Angeles County Sheriff's Department, which operated the jail, was ordered to keep appellant away from Tinajero because the latter was a witness against appellant. (12RT 2033-2034; 16RT 2756.)

On March 13, 2003, during a search of appellant's cell, a shank made from a piece of metal bar with one end sharpened to a point was found inside a green canvas bag. (15RT 2641-2645.) The bag, which was found on appellant's bunk, also held appellant's belongings, including letters addressed to him. (15RT 2645, 2467.) Appellant shared the cell with five or six other inmates. (15RT 2647; 16RT 2892; 17RT 2999.)

On December 19, 2003, inmate Luis Montalban, who was housed in the same dorm as appellant, was to be transported from Men's Central Jail to the sheriff's station in West Hollywood to serve as a trusty in an outside setting, a position that would involve a significant amount of freedom to move around. (15RT 2699, 2701.) When Montalban's name was called for the transport, appellant demanded Montalban's wristband and threatened to physically assault Montalban or to have him "regulated" (beaten) by other inmates if he did not comply. (15RT 2699-2700, 2702-2703, 2705, 2707-

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[15] Tinajero was in custody for another, unrelated matter. He was temporarily sent to Men's Central Jail to be held as a witness at appellant's retrial. (17RT 3005-3008.)

2708.) Out of fear, Montalban gave appellant his wristband, and appellant used it to board the bus in Montalban's place. (15RT 2700-2701.) A few hours later, appellant was returned by bus from West Hollywood to the Inmate Reception Center adjacent to Men's Central Jail, as a "trusty roll up" to be disciplined. (16RT 2774-2775.) Appellant was wearing Montalban's wristband and a light green jumpsuit which a trusty would have received at the West Hollywood sheriff's station. (16RT 2775-2778.) Appellant was carrying a jail-issued green mesh bag for his belongings. (16RT 2776.) Inside the bag were a pass for transport to West Hollywood and a Long Beach police report for appellant's case. (16RT 2778-2781.) Deputies returned appellant to his proper dorm, where they found Montalban, missing a wristband. (16RT 2781-2782.)

While in jail, appellant developed a telephonic and pen-pal relationship with Irma Limas, a receptionist who worked in a business office. (14RT 2465-2466, 2468, 2486-2487; 16RT 2886.)[16] Although

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[16] The evidence in the People's case-in-chief overwhelmingly supported the inference that appellant was the person communicating with Limas by telephone and by mail, a fact which appellant later admitted while testifying. (19RT 3352-3353.) The telephone caller referred to himself as "Santi" (i.e., short for appellant's first name, Santiago) and as "Chingon," a nickname appellant admittedly used. (14RT 2465, 2469; 15RT 2687.) Telephone records showed that collect calls were made from appellant's jail cell to Limas's office phone number. (14RT 2467-2468; 15RT 2631-2632; 16RT 2885-2886.) The letters Limas received came from jail and bore appellant's booking number, 7205334, and some were variously signed "Chingon," "Chingon Santi," "Pineda" or "Santiago Pineda Hernandez Chingon." (14RT 2476-2480, 2483; 15RT 2620; 16RT 2887.) The letters were addressed to "Irma Gardea," the false name Limas used in her telephone conversations with the caller. (14RT 2469, 2472.) The caller referred to a prosecution witness named "Raul," which was Tinajero's first name. (14RT 2470-2471.) Limas's phone number under the name "Irma Gardea" was written in a phone book found in appellant's possession. (14RT 2472-2473.) The same telephone book bore the name "El Chingon." (continued...)

appellant and Limas communicated by telephone and mail, they never met in person. (14RT 2471, 2488.) At appellant's request, Limas sometimes set up three-way calls between appellant and others (purportedly appellant's mother and sister). (14RT 2469-2470.) Appellant told Limas that he was in jail for murder for running over someone. (14RT 2471.) He also mentioned that he once took a wristband from another inmate and used it to attempt to escape. (14RT 2472.) At one point, appellant told Limas that he needed to get in touch with a "clown" named Raul who was testifying against him. Appellant asked Limas to look on the internet to see if and where Raul was housed in the county jail system. (14RT 2470-2471, 2485.) Limas declined to do so. (14RT 2485.) Appellant later told Limas that he was able to get that information from a "homie." (14RT 2485.)

3. The April 20, 2004 Murder of Raul Tinajero

Tinajero was housed in module 2200, row D, cell 13. (16RT 2875.) That cell was at the end of the D row, farthest from the cage where the module officer worked. (12RT 2019-2021, 2125, 2155; 13RT 2298, 2348.) The D row could not be seen from the module officer's cage. (13RT 2343.) Cell D13 had four bunks but actually housed six inmates, a common situation at Men's Central Jail in 2004. (12RT 2014-2015.) Some inmates would sleep on the floor under the bottom bunks or share bunks with cellmates. (12RT 2025-2026, 2132; 14RT 2518.) Tinajero's cellmates on April 20, 2004 were Anthony Sloan, Matthew Good, Shad Davies, Gregory

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(...continued)
(15RT 2687; 16RT 2876.) Limas told detectives that the full name of the person she was corresponding with was "Santiago Pineda." (16RT 2886.) Limas was not receiving telephone calls from anyone else in jail, nor had she given anyone else the false name, Irma Gardea. (14RT 2473-2474, 2481.)

Palacol, and Ramon (whose full name is not indicated in the record). (12RT 2125-2126; 13RT 2280, 2345; 14RT 2384.)

On April 20, 2004, Ramon left the cell in the morning to go to court, and Palacol left to attend a parole screening. (12RT 2126-2127; 13RT 2280-2281; 14RT 2385; see 13RT 2345.) After the parole screening, Palacol was sent to the "laundry room" in his module.[17] (14RT 2388-2389, 2492.) That same morning, appellant also left his cell with about 38 other inmates who were called for court, even though appellant did not have a court pass for that date. (15RT 2620-2622; 17RT 3000-3001.) Appellant reached the Inmate Reception Center, a separate, attached unit of the county jail system through which inmates must pass to be transported to court. (15RT 2620-2622; see 15RT 2615-2617; 17RT 3016.) When it was eventually discovered that appellant did not have a court pass and was not on the list of inmates with court appearances, appellant was sent back into Men's Central Jail. (15RT 2621, 2624.) Pursuant to normal practice, appellant would have been directed to return to his own housing module, unescorted. (15RT 2622-2623.) Instead, appellant made his way to the laundry room in Tinajero's module. (14RT 2389-2390.)

In the laundry room, appellant saw Palacol and asked him what cell he was in. (14RT 2389-2391, 2492.) Palacol had never met appellant before. (14RT 2505.) When Palacol told appellant that he was in cell D13 in the 2200 module, appellant asked whether "Smoky" from the Westside gang was also in that cell. Palacol said that he was. (14RT 2391.)[18] Appellant

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[17] Each module had a so-called "laundry room," a large, empty room used as a general holding area for inmates before returning to their cells. (14RT 2388-2389; 16RT 2753-2754; 17RT 2998.)

[18] Palacol knew that Tinajero used the nickname "Smoky." (14RT 2391, 2395, 2403-2404.)

picked up a homemade cross on a string that lay on the floor, broke off the cross, and put the string in his pocket. (14RT 2391-2392, 2494, 2505.)

When Palacol left the laundry room and returned to his module, appellant followed him and entered cell D13 with him. (12RT 2128; 13RT 2281-2283, 2323; 14RT 2392-2393, 2493-2494.)[19] Like the other inmates in that module, appellant wore blue jail clothing and standard, county-issued shoes. (12RT 2022, 2152; 14RT 2395-2396, 2400-2401.) Tinajero was asleep on an upper bunk at the time, with his head facing the wall, wearing only boxers and a T-shirt. (12RT 2129, 2132-2133; 13RT 2284; 14RT 2398, 2402.) Sloan, Good, Davies, and Palacol were also in the cell. (12RT 2130-2131, 2145.) When Sloan asked appellant what he was doing in their cell, appellant said that Tinajero was his "crimee" (crime partner) and was going to testify against appellant. (12RT 2129; 13RT 2205.)

Appellant sat on the toilet, took off his blue jail shirt, and put on a pair of gloves which he had brought with him in a green bag. (12RT 2284, 2324, 2326, 2331; 14RT 2393, 2458.) Appellant jumped onto the bunk, wrapped his arm around Tinajero's head, putting him in a headlock, and pulled Tinajero off the bunk. (12RT 2132-2133; 13RT 2206, 2284, 2324; 14RT 2395-2397.) Appellant strangled Tinajero, while the latter struggled in vain to get free. (12RT 2133-2135; 13RT 2284-2285; 14RT 2397-2398, 2446-2447.) When Tinajero stopped moving, appellant put Tinajero's head in the toilet and plugged and flushed it to fill it with water. (12RT 2134-2135; 13RT 2285-2286, 2325; 14RT 2398-2399, 2451-2452.) Appellant

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[19] Sloan recognized appellant from having previously been transported to and from the Long Beach courthouse with him. On that occasion, appellant told Sloan that his coperpetrator was going to testify against him. (12RT 2173-2174; 13RT 2202-2203, 2226; 16RT 2890-2891; see 17RT 3009-3010.) Appellant had a recognizable gap in his teeth. (12RT 2174; 16RT 2891.)

held Tinajero's head underwater for a minute or longer, then threw Tinajero's body on the floor and stomped on his chest or neck, causing a loud cracking or snapping sound. (12RT 2134, 2136; 13RT 2285-2286; 14RT 2400, 2452.) Appellant dressed Tinajero in appellant's own blue jail shirt and pants. (14RT 2401-2403.) Appellant then put Tinajero's body on a mat, shoved him under the bottom left bunk, and put a sheet over him. (12RT 2136, 2138; 13RT 2286-2287; 14RT 2401-2403, 2450.) Appellant also took out the string he had retrieved from the laundry room floor, tied it around Tinajero's neck, removed Tinajero's wristband,[20] and flushed it down the toilet. (12RT 2136-2138; 13RT 2316; 2324-2325; 14RT 2403-2404, 2449-2451, 2494-2495, 2505.)

At some point during the murder of Tinajero, appellant told Tinajero's cellmates – all of whom were awake – to look away. (12RT 2136, 2193; 13RT 2207, 2288; 14RT 2440.) Sloan, Good, and Palacol nevertheless looked back repeatedly and saw what appellant did. (12RT 2193; 13RT 2288; 14RT 2440.) While appellant was attacking Tinajero, none of the cellmates called out for help or did anything to interfere or save Tinajero. (12RT 2155; 13RT 2207, 2296, 2322, 2324; 14RT 2409, 2425.) The inmates feared that intervening could endanger their own lives. (14RT 2409, 2425.) According to Sloan and Good, yelling down the row to the module officer for help would have exposed them to deadly retaliation as "snitches." (12RT 2155-2156; 13RT 2228, 2234, 2296-2299, 2425.) Moreover, if Tinajero's murder had been ordered from higher up in the inmate hierarchy, interference with the "hit" could have put their lives in jeopardy. (13RT 2228, 2297-2299, 2310.)

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[20] Inmates were required to wear wristbands at all times, which indicated the inmate's name and booking number. (12RT 2148; 13RT 2301; 15RT 2588.)

Using towels that had been placed around the toilet to stop a leak, appellant cleaned himself, the floor, the bars and other areas of the cell he had touched. (12RT 2138-2139; 13RT 2289, 2326, 2331; 14RT 2404.) He put the towels in a trash bag and hung it from the cell bars for collection, a common practice in the jail. (12RT 2029, 2139-2140; 14RT 2404.) Appellant flushed his gloves and Tinajero's paperwork down the toilet. (13RT 2289, 2326, 2331.) Appellant then made several phone calls. (12RT 2141 13RT 2289-2290; 14RT 2404-2405.)[21] Sloan could tell that one of the calls was a three-way-call, apparently to appellant's sister. (12RT 2141-2142.) (Appellant blew into the phone to muffle the three-way-connecting click so that the call would not be automatically cut off, a technique well-known in the jail. [12RT 2142.]) During one call, appellant said, "Tell them it's a touch down." (12RT 2143.) Appellant also sent a "kite" (a note) from the cell to someone else via a trusty. (12RT 2144; 13RT 2217.)

Appellant told the cellmates after the killing that Tinajero was his crimee on a 2002 murder case, that they had been caught in the deceased victim's car,[22] that Tinajero had testified against appellant, and that appellant's trial ended in a mistrial because his attorney had heart or medical problems. (12RT 2146; 13RT 2290-2291; 14RT 2448.) Appellant said that he was going to be retried, and that it would be better for his case

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[21] The cell was equipped with a phone that inmates could use to make collect calls. (12RT 2141.) Telephone records showed that two calls were made from cell D13 to Limas, and two other calls were made from that cell to Estrelita "Star" Barrios, whose phone number was written in appellant's personal phone book. (14RT 2466-2467 [Limas identifies her phone number on exhibit 85; 15RT 2627-2628 [authenticating exhibit 85 as phone records from cell D13]; 16RT 2877-2880, 2894.)

[22] According to Palacol, appellant admitted that when he murdered Armenta, appellant choked him, threw him out of a car, ran over him with the car, and stole the car. (14RT 2406.)

if Tinajero was not there to testify. (12RT 2146-2147; 13RT 2290-2291; 14RT 2407.) Appellant looked at the names and booking numbers on each cellmate's wristband and wrote them in a small telephone book, while making either an express or implied threat of retaliation against them if they "snitched." (12RT 2148-2150; 13RT 2301-2302, 2313-2314; 14RT 2414-2415, 2455-2456.)[23]

At about 2:15 p.m., while appellant was still in cell D13, Deputy Alexander Khasaempanth conducted a laundry exchange of linens, T-shirts, boxers, socks, sheets, and towels in the module. (12RT 2015-2017, 2022, 2151-2153; 13RT 2299-2300; 14RT 2408, 2416.) Following standard practice, he made an announcement on a loud speaker and waited 15 minutes for inmates to hang their old laundry items on the bars, then went down the rows with trusties collecting the laundry and providing clean exchanges. (12RT 2017-2018; 13RT 2207, 2299.) Deputy Khasaempanth noticed nothing unusual when he conducted the exchange at cell D13. (12RT 2024, 2031.) None of the inmates informed Deputy Khasaempanth that there was a dead body in the cell. (12RT 2152-2153; 13RT 2299-2300; 14RT 2408.) It was not Deputy Khasaempanth's practice to wake sleeping inmates for laundry exchanges, nor to converse with the inmates unless necessary. (12RT 2024, 2026-2027.) Sometime later, a trusty served lunch while appellant was still in the cell. (12RT 2153; 13RT 2208; 14RT 2408.)

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[23] Sloan recalled that while writing down their names and numbers, appellant expressly warned the cellmates about "what happens to snitches," which Sloan understood to be a threat that he would be killed like Tinajero if he said anything about what happened. (12RT 2148, 2150.) Good testified that appellant did not say this verbally, but that "Taking down the booking numbers and names pretty much says it all." The implied message, according to Good, was "That if anything is said, that he'll be able to find out where I am, where I'm at in the facility." (13RT 2301-2302.) Palacol testified that he understood appellant's use of the phone book as a threat. (14RT 2415.)

Appellant remained in the cell with the other inmates and the dead body for several hours. During that time, he smoked a cigarette and read a magazine. (12RT 2144-2145, 2172-2173; 13RT 2194-2195, 2217, 2287; 14RT 2405-2406, 2409-2410, 2424.) According to Sloan and Palacol, appellant acted "[j]ust like nothing happened," and "[j]ust like everyday thing, you know. He didn't show any remorse." (12RT 2147; 14RT 2410.)

Sometime between 3:00 and 3:30 p.m., there was a call for inmates, including Davies, who were transferring to the Wayside jail facility. (12RT 2145, 2154; 13RT 2293, 2349-2350, 2357; 16RT 2745; 17RT 3002-3003.) When cell D13 was opened for Davies to exit, appellant exited with him. (12RT 2145, 2154; 13RT 2287, 2293, 2338; 14RT 2411-2412, 2494.) As the module officer, Deputy Otoniel Avila, checked the inmates in the transfer line against a list of transferees, appellant—whose name was not on the list—walked swiftly past him, attempting to leave the module. (13RT 2350-2352, 2354, 2357, 2361-2363.) Deputy Avila asked appellant where he was going and what was his name. (13RT 2350.) Appellant showed the deputy his wristband and admitted that he was on the wrong floor, but claimed he was visiting a cousin. (13RT 2350; 16RT 2747.) Deputy Avila sent appellant to the laundry room of the 2200 module, where another deputy eventually sent him back to his own floor. (13RT 2352; 16RT 2746-2747.) Appellant was carrying a blanket or a sheet at that time. (16RT 2749-2750.)

After appellant left cell D13, the cellmates discussed how they were going to inform the jail authorities about the murder. (12RT 2171; 13RT 2216-2217, 2294, 2322-2323, 2333; 14RT 2412-2413, 2449.) Good suggested that they say they were facing away the entire time and did not see the killing or know the identity of the perpetrator. (13RT 2294, 2323, 2333.) Sloan made phone calls to his mother, at 3:19 p.m., and to his attorney, Andrew Stein, at 3:24 p.m. (12RT 2155-2156, 2168-2172; 13RT

2241-2245, 2259-61, 2294; 14RT 2416.) Sloan told Stein that a man had entered his cell, ordered him to "turn around and don't look what I'm about to do. If you do, I'll do the same thing to you," and then killed one of Sloan's cellmates. (13RT 2242.) Sloan said he was in the cell with the killer and the dead body for a long time. (13RT 2245.) During the call to Stein, Sloan sounded hysterical and on the verge of tears. (13RT 2242.) After Sloan's call, Stein obtained Sloan's housing location from a sheriff's department website, called a watch commander or sergeant at Men's Central Jail, and told him the information Sloan had given him. (13RT 2243-2244 ,2253; 14RT 2537-2538.) Meanwhile, Palacol called a parole agent from the cell and reported that someone in the cell was dead. The parole agent likewise called the watch commander at the jail and relayed the information. (12RT 2175; 13RT 2270-2271, 2274-2276; 14RT 2413-2414.)

About 4:20 p.m., cell D13 was opened for Ramon, who was returning from court. (12RT 2176, 2344-2345; 14RT 2416.) Sloan, Good, and Palacol used that opportunity to leave the cell with their belongings and report to the module officer, Deputy Avila, that there was a "man down" in their cell. (12RT 2176-2178; 13RT 2296, 2345-2346; 14RT 2416-2417.) Deputy Avila locked cell D13 and directed Sloan, Good, and Palacol to a holding area known as a "day room." (13RT 2218, 2325, 2346; 14RT 2417.) There, the inmates were placed in separate corners and were watched by a guard. (13RT 2218, 2296, 2325, 2346-2347.)

Deputy Avila, Lieutenant Aguilar, and Sergeant Allyn Martin inspected the vacated cell D13. (13RT 2347-2348; 14RT 2512-2513, 2516, 2538-2540.) Tinajero's dead body, covered with a blanket, lay on a mat under a bunk. (13RT 2347; 14RT 2518-2520, 2540, 2579.) Tinajero was wearing socks, boxer shorts, and blue jail pants, but no shirt or T-shirt. (14RT 2526, 2535; 15RT 2579, 2607.) The pants were pulled up to his

waist only in the front, not the back. (15RT 2603.) Tinajero's wristband was missing. (14RT 2527; 15RT 2578.) Tinajero had a ligature tied around his neck, with bruising under the ligature. (14RT 2520, 2527, 2531-2532, 2554, 2560.) The ligature was tied in three knots, so tight that a criminalist and a deputy medical examiner from the coroner's office could not slip their fingers between the ligature and the victim's neck. (14RT 2531-2532; 16RT 2840.) Tinajero's neck also bore a pattern of evenly-spaced linear wounds which resembled the sole pattern of jail-issued shoes, as well as gash wounds or bruises which could have been caused by fingers or fingernails. (14RT 2560-2561; 15RT 2579-2580, 2600.) There were blood stains around Tinajero's mouth and on an index finger, his chest, thigh, knee, and calf, and on his boxers and socks. (14RT 2527-2529, 2533, 2556-2559; 15RT 2602-2603.) But there was no blood on the pants and there were no apparent wounds in the areas of the body which could have been the source of the blood. (14RT 2530, 2555-2559; 15RT 2580, 2603.) It appeared to homicide Detective Thomas Kerfoot and coroner's investigator Jerry McKibben, both of whom examined Tinajero's body in cell D13, that the body was re-dressed in the jail pants after the blood was deposited on the body and the boxers. (14RT 2556; 15RT 2603.) A jail-issued shoe was found hanging on the cell bars above an upper bunk. (15RT 2600-2601.)

Based on Tinajero's liver temperature taken at 7:59 p.m., a coroner's investigator estimated he died about eight hours earlier. (14RT 2553-2554.) A criminalist obtained swabs of the blood stains on Tinajero's body and boxers; the swabs were sent to a crime laboratory. (14RT 2527-2529, 2580.) The blood stains taken from Tinajero's body matched his own DNA. (15RT 2723-2724.) The ligature—a piece of synthetic twine—held DNA from at least four contributors. The major contributor was Tinajero;

appellant could not be excluded as one of the minor contributors. (15RT 2720-2722, 2727.)

That evening, Detectives Tim Cain and Bob Kenney interviewed Palacol, Good, and Davies about the incident. (13RT 2300, 2318; 14RT 2417; 16RT 2887-2888, 2897.) On the way to the interview room, Good passed by appellant, causing Good to feel unnerved. (13RT 2303.) Good gave only "generic" answers to the detectives' questions. He claimed that he was facing the wall throughout the incident in cell D13 and did not see anything. (13RT 2300-2302; 16RT 2898.) However, Good hinted to the detectives that they should look up the case in which Tinajero was scheduled to testify. (16RT 2898-2899.) The detectives showed Good a series of photographs which included one of appellant. Although Good recognized the murderer of Tinajero among the photographs, he falsely told the detectives that he could not identify anyone in the photographs, although he added that even if he could recognize the murderer, he would decline to identify him. (13RT 2302-2305; 16RT 2899.) Good appeared to be very frightened. (16RT 2899.) Davies refused to cooperate in the interview and responded "no statement" to most questions. (16RT 2888, 2897.)

The detectives interviewed Sloan on April 21, 2004.[24] (12RT 2147, 2179-2180; 16RT 2896-2897.) Sloan told the detectives what he had witnessed during the murder, and identified appellant from a six-photograph lineup as Tinajero's murderer. (12RT 2181-2185; 16RT 2896-

[24] When the detectives initially contacted Sloan on April 20, 2004, he stated that he wanted to consult with his attorney before speaking with them. Sloan then called his attorney, Stein, who advised him to cooperate and to tell the truth. Stein did not tell Sloan that he would get any benefits or deals in exchange for his cooperation. (12RT 2178-2179; 13RT 2246-2247.)

2897.) Palacol likewise identified appellant from a six-photograph lineup as the murderer of Tinajero during a follow-up interview.[25] (14RT 2419-2421.)[26]

When Detectives Cain and Kenney interviewed appellant on April 22, 2014, appellant had scratches on his hands. (16RT 2895-2896, 2900-2901.) None of Tinajero's cellmates had visible injuries when the detectives interviewed them. (16RT 2902.)

Shortly before midnight on April 20, jail deputies searched appellant and obtained the blue jail clothing and socks he was wearing, and a personal phone book they found in appellant's pocket. (12RT 2036, 2040-2041, 2045; 15RT 2683-2687; 16RT 2755-2759.) Appellant's pants had

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[25] Although there was no express testimony on the record that the photograph which Sloan and Palacol selected was appellant's, this evidently was clearer upon observation at trial. The series of six photographs showed to the inmates was collectively labeled Exhibit 90. (13RT 2304.) Good and Palacol each identified Exhibit 90 as the set of photographs the detectives showed them on or shortly after April 20, 2004. In court, Good and Palacol each pointed at the photograph within Exhibit 90 from which they had recognized the murderer. (13RT 2305; 14RT 2419.) Regarding Good's selection, the prosecutor stated without objection, "For the record, it's the one that on the back says, 'Santiago Pineda.'" The trial court responded, "Okay." (13RT 2305.) Regarding Palacol's selection, the prosecutor stated without objection, "For the record, he's picked out the one that now has the blue evidence tag on it." The trial court again responded, "Okay." (14RT 2420.) The copy of the photograph lineup on which Sloan identified and circled a photograph was labeled Exhibit 87. (12RT 2182-2183.) The jury had the opportunity to compare the photographs the witnesses selected in Exhibits 87 and 90 with appellant, who was present in court.

[26] Previously, while Palacol was in the day room after the murder, a sheriff's deputy showed Palacol a photograph of appellant. The deputy explained that the person depicted had been getting into trouble for possessing shanks, and the deputy asked Palacol whether this was also the person who entered his cell and murdered Tinajero. Palacol answered that it was. (14RT 2421, 2424, 2454.)

stains on the legs which tested positive for blood. (12RT 2038-2039; 15RT 2686, 2716; 16RT 2758.) Those blood stains were a one-in-110-quadrillion match for Tinajero's DNA. (15RT 2716-2718.) In a search of appellant's cell, deputies found a transcript of Tinajero's testimony and a copy of the police report from appellant's arrest. (16RT 2759-61.)

The phone book found in appellant's pocket had "El Chingon," "ES Wilmas," and several names and numbers handwritten inside, including the phone numbers for Limas and for appellant's attorney from the first trial. (12RT 2041; 15RT 2687; 16RT 2876, 2885.)[27] The names and booking numbers of Sloan, Palacol, Good, and Davies, and the county jail's public information telephone number—which one could call to inquire about the housing of inmates by booking number—were written on one page of the phone book. (16RT 2883-2885; 18RT 3152.) On another page were the initials "RT" followed by a seven-digit number that was only one digit off from Tinajero's booking number. (16RT 2880-2882.)

Deputy Medical Examiner, Doctor Raffi Djabourian performed an autopsy and determined that Tinajero died from asphyxia due to strangulation. (16RT 2833-2834.) Tinajero had a groove around his neck from the ligature, as well as blunt trauma, bruises, and linear and curved abrasions to the front and back of his neck. (16RT 2834-2835, 2838-2839.) The cricoid (a bony cartilage area below the larynx) was fractured, an indication of strangulation. (16RT 2835, 2840.) According to Dr. Djabourian, if the perpetrator had broken the victim's cricoid by stomping on the victim's neck, this would have caused a snapping or cracking sound.

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[27] At trial, Palacol identified the phone book found in appellant's possession as the same one he used to write down the names and booking numbers of the inmates in cell D13. (14RT 2415.) Sloan similarly testified that the same item looked like the phone book appellant used for that purpose in cell D13. (12RT 2149-2150.)

(16RT 2840-2841.) The neck muscles attached to the hyoid bone had hemorrhaged. (16RT 2835, 2846-2847.) Tinajero also had pinpoint hemorrhages in both eyes, another common indication of strangulation. (16RT 2835, 2841-2842.) Some of Tinajero's injuries could have been caused by his struggling to free himself from a headlock choke hold. (16RT 2838-2839, 2847-2848, 2854.)

However, Dr. Djabourian could not determine with certainty whether the fatal strangulation was caused by the ligature or by being manually choked, nor could he tell whether the ligature was applied before or after death. (16RT 2849-2850, 2852, 2860-2861.)[28] Dr. Djabourian did not find a significant amount of water in Tinajero's lungs which would have indicated death by drowning. (16RT 2852-2853.) However, Tinajero had aspirated vomit into his airways, which could have absorbed the water and masked drowning. (16RT 2848-2849, 2863.) Moreover, Dr. Djabourian would not expect to find water in the lungs if Tinajero had stopped breathing before his head was placed underwater. (16RT 2862-2863.)

4. After the Murder of Tinajero

On April 21, 2004, one day after the murder of Tinajero, appellant's security classification was increased to the highest (i.e. most dangerous)

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[28] Dr. Djabourian's autopsy report stated, "The mechanism of death is neck compression from ligature strangulation; however, such injuries as seen in this case, particularly the neck abrasions and cryode fracture, may be seen with both manual strangulation as well as arm holds of the neck. Thus, additional mechanism, neck compression cannot be excluded. Though in any case, the manner of death is homicide." (16RT 2851, 2859-2860.) When he wrote the report, Dr. Djabourian had not heard the witnesses' accounts of the murder but had seen the ligature on Tinajero's neck. (16RT 2851, 2855-2856, 2866-2867.) At trial, he testified that the physical evidence from the autopsy was consistent with either manual strangulation or strangulation by ligature as the specific cause of death. (16RT 2849-2852, 2860-2862, 2866-2867.)

level, and he was thereafter housed in the "high power" module. (15RT 2584-2586, 2655; 16RT 2814, 2959; 17RT 3037.) In that module, the inmates were housed in one-person cells. (15RT 2655; 16RT 2797.)

Los Angeles County Sheriff's Deputy Jesus Argueta, who worked at Men's Central Jail, grew up in appellant's neighborhood, knew appellant in Junior High School, and had some level of rapport with him. (17RT 2960, 2962-2963, 2971.) In early May of 2004, while appellant was in "the hole," a disciplinary unit of the jail, appellant asked Deputy Argueta if he had heard what happened on the 2000 floor. (17RT 2958-2961, 2964.) Appellant told Deputy Argueta that he was being accused of going to module 2200 and killing his "crimee." (17RT 2960-2961.) Appellant explained that he and his "crimee" had committed a murder together out on the street, and that "now this fucker's snitching on me so we had to get rid of him." (17RT 2961.) Appellant added, "Now that he's dead, they're going to have to offer me a deal." (17RT 2961.) Appellant asked Argueta to find out why appellant was in the "hole." (17RT 2962.)

Deputy Josue Torres had a good rapport with appellant, because appellant had once worked as a trusty in Deputy Torres's module. (17RT 3041-3042, 3050-3053, 3063-3064.) On May 3, 2004, while appellant was returning from court, he told Deputy Torres, "Hey, Torres, I did it." (17RT 3041-3042.) Appellant confessed to Torres that he "killed the fool who snitched on [him]." (17RT 3042, 3044.) Appellant said that he first showed "paperwork" to a higher gang member who ran the 2000 floor to get approval to "take care of [his] business." (17RT 3043-3044, 3051.) Appellant explained that he borrowed a "homie's" court pass early one morning and went with the inmates in the court line from his module to the Inmate Reception Center. (17RT 3044-3045.) Eventually, the Inmate Reception Center sent him back because the court pass did not belong to him. (17RT 3045.) Instead of returning to his own floor, appellant went to

the 2000 floor, entered Tinajero's module by lying to the module deputy that he lived there, and walked into Tinajero's cell. (17RT 3045.) Tinajero was lying on his side on a bed. Appellant got on top of Tinajero, flipped him over, and strangled him. Appellant and Tinajero struggled on the bunk until they both fell to the floor. (17RT 3045-3046, 3059.) Appellant wrapped his arm around Tinajero's neck to choke him, then pushed the victim's head into the toilet and flushed it to drown him. Appellant used his knee to hold Tinajero's head down in the toilet until the victim stopped moving and had no pulse. (17RT 3046-3048, 3060.) Appellant then cleaned up some blood from the floor, found a piece of tongue, and flushed it down the toilet. He removed Tinajero's wristband and flushed that down the toilet as well. (17RT 3048.) To make sure Tinajero was dead, appellant stomped on his chest to see if the victim reacted (he did not), and then he stretched a plastic trash bag and tied it tightly around Tinajero's neck. (17RT 3049, 3060-3061.) Appellant then wrote the names and booking numbers of Tinajero's cellmates in a phone book, and left the cell during a transfer line call. (17RT 3048-3050.)

Appellant had a pleased, proud and excited demeanor during his confession to Deputy Torres. Appellant said that he was very happy he did it because Tinajero used to laugh and smirk at appellant in court, and because Tinajero had been snitching on him. (17RT 3050-3051.) At the time, Deputy Torres did not know that appellant was suspected of the murder of Tinajero, nor did he know the specific facts of the murder. (17RT 3058, 3068.)

In a search of appellant's one-man cell on July 13, 2004, deputies found a needle syringe and a razor blade which had been removed from a razor, both of which could be used for weapons. (16RT 2796-2804, 2807, 2809-2811, 2827-2828.)

In early October of 2004, appellant removed his wristband without permission and had to receive a new one. Appellant was warned not to do it again. (15RT 2593.) About one week later, on October 13, 2004, appellant again removed his wristband. When told that he would be written-up for the offense, appellant responded that he did not care. (15RT 2586-2587, 2590.) On November 5, 2004, when appellant was escorted in handcuffs to the shower, he was again not wearing his wristband. The wristband was found, intact with no cut or scratch marks, on the table in appellant's cell. (16RT 2788-2789.)

On June 17, 2005, while appellant was away from his cell for a shower, deputies searched his cell and found an altered paperclip which could be used for unlocking handcuffs. (15RT 2656-2657; 16RT 2789-2793.) On July 30, 2005, appellant escaped from a locked shower stall in the high power module, possibly by climbing through the handcuff portal, a narrow opening used for unlocking inmates' handcuffs for showers. (15RT 2663-2669.)[29]

At trial, a mockup of Tinajero's jail cell was displayed in the courtroom, and the jurors were given an opportunity to examine it up close. (12RT 2105-2108; 14RT 2429-2433, 2439.) The parties stipulated that it accurately represented the actual jail cell. (12RT 2168.) During Palacol's

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[29] Appellant was found in his cell nude with soap lather all over his body and a large red horizontal mark across his back. (15RT 2670-2671.) Upon inspection, deputies could find no problems or malfunctioning of the shower door. (15RT 2671-2672.) The shower door could not be pried open while locked, nor could it have been kept from closing all the way and locking. (16RT 2806.) In an investigation to determine how appellant could have escaped the locked shower, a trusty who was appellant's size was placed in the locked shower. The trusty lathered himself and crawled out through the handcuff portal, likewise sustaining a red mark across his back. (15RT 2672-2673, 2676; 16RT 2806-2807, 2809.)

testimony, Palacol and five stand-ins sat or lay in the cell to demonstrate the positions of the inmates at the time of the murder. (14RT 2394-2411.)

Sloan, Good, and Palacol positively identified appellant at trial as the inmate who entered cell D13 and murdered Tinajero. (12RT 2128, 2185; 13RT 2282, 2313; 14RT 2389-2390, 2424.)

5. Expert Testimony Regarding the Jail System

According to Sheriff's Deputy John DeVries, who worked in dozens of modules throughout Men's Central Jail for 14 years (17RT 2975-2977), that jail facility housed a largely transitory inmate population in 2004. (17RT 3036.) About 6,000 passes were issued per day at Men's Central Jail for inmate movements, such as entry, release, transfer to other facilities, movement to or from a module, attorney conferences, visitations, parole screenings and hearings, or visits to the medical clinic. (17RT 2979, 2981, 2996, 3029) Additionally, about 900 inmates per day were issued court passes. (17RT 2987.) Men's Central Jail was staffed by 120 to 155 deputies, of whom only 55 to 60 were available to supervise inmate movements on passes. (17RT 2978, 2980.) Movements of general population inmates (i.e. those without a heightened security level)[30] were normally unescorted, and non-handcuffed. The inmate would receive a printed pass and then be directed to walk to his destination on his own; deputies would not always check inmates' passes or wristbands to make sure they were where they belonged. (17RT 2981-2986, 2996-2998, 3028, 3031.)

Inmates with court appearances would be called by name, issued court passes, and escorted in groups of 120 to 150 to the Inmate Reception Center (technically a separate jail facility physically contiguous with Men's

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[30] Appellant was a general population, K-3 inmate on April 20, 2004. (17RT 2997, 2999.)

Central Jail) where their identification wristbands would be checked before they boarded buses to various courts. (17RT 2986-2988, 2990-2992, 3029.) Inmates remaining at the Inmate Reception Center without a court pass would eventually be discovered after the last court bus departed, and would be sent back into Men's Central Jail, (often initially to the "laundry room") and from there to their home modules, unescorted. (17RT 2993-2995, 2998-2999, 3017-3018, 3029-3030.)

According to Deputy DeVries, a general population inmate who borrowed or stole another inmate's court pass in 2004 would have been able to go from his own module to the Inmate Reception Center, and from there to a different module on another floor in Men's Central Jail. (17RT 3001, 3021-3022, 3024.) At trial, Deputy DeVries authenticated and described a video tour, played to the jury, showing the route an inmate could take from appellant's cell in the 3800 module to the Inmate Reception Center, then to the laundry room, to Tinajero's cell in the 2200 module, and then back to appellant's cell. (17RT 3011-3021.)

In April of 2004, a member of the public could access the Los Angeles County Sheriff's Department website to find an inmate's module and cell number. (17RT 3007-3009.) One could also get that information via a telephone call to the Inmate Information line at Men's Central Jail. In 2004, that telephone service was manned by female inmates. (18RT 3152.)

According to Deputy Dan DeVille of Operations Safe Jail, the custodial gang unit of the Los Angeles County Sheriff's Department (16RT 2755, 2761), "paperwork" proving that an inmate had "snitched" on another inmate could be used to obtain a "green light" from the shot-callers of Hispanic jailhouse gangs to attack the "snitch" in jail. (16RT 2762-2763, 2766-2768.) Deputy Torres likewise testified, based on his personal experience and training, that to get approval for an attack on another

inmate, a gang member in jail would need to show a higher ranking gang member "some kind of evidence, some kind of paperwork." (17RT 3044.)

Detective Javier Clift of the Los Angeles County Sheriff's Department, who had extensive experience and training regarding street gangs and jail/prison gangs (18RT 3109-3111), testified that the Surenos, also known as "Southsiders," are an umbrella of Hispanic street gangs aligned with the Mexican Mafia, a prison-based gang organization. (18RT 3111, 3138-3139.) Outside of custody, the various Sureno gangs might be rivals of one another, but in jail, they work together. (18RT 3111-3112.) The Surenos control and operate various types of "business" in the jails including taxing inmates, running "kites" (messages), conducting criminal activities by telephone, and killing snitches in custody. (18RT 3136-3137, 3146.) In Detective Clift's opinion, a non-gang member in jail would not get involved in Sureno business, including a gang-approved killing of a snitch, nor would a non-gang member be ordered to do so. (18RT 3136-3138, 3143-3144, 3174-3175.)

Detective Clift had personal interactions with appellant and knew him to be quite talkative with both inmates and sheriff's deputies. (18RT 3162.) In his letters to Limas and to a female inmate in another jail facility, appellant identified himself as "Chingon Sur"—with three dots and two lines (Aztec characters adopted as Sureno symbols) under "Sur"—and he claimed membership in the Ghost Town clique of the East Side Wilmas, a Surenos-affiliated gang. (14RT 2480-2481; 18RT 3141-3142, 3163.) From this, Detective Clift opined that appellant was a member of a Surenos-affiliated gang. (18RT 3141, 3143.)

B. The Defense Case; Guilt Phase

1. Evidence of Intoxication During 2002 Armenta Killing

On March 7, 2002, when appellant was detained as a suspect in the hit-and-run murder of Armenta, he admitted to police officers that he had taken methamphetamine and marijuana two hours earlier. (18RT 3206, 3209.) In field sobriety tests conducted about 2:15 or 2:20 a.m (18RT 3213), appellant displayed very little impairment. Although his reactions were a little slow, he followed instructions and answered questions logically, his Romberg Test (estimating 30 seconds with eyes closed) was accurate to within one second, and his walk-and-turn and finger-to-nose tests were "completely normal." (18RT 3208-3210.)

At the police station, appellant was administered a breathalyzer test at 2:34 a.m., and provided blood and urine samples. (18RT 3204-3206, 3213, 3215.) The breathalyzer indicated a blood alcohol level of .05 to .06 percent, which is within the legal limit for driving. (18RT 3209.) The blood sample showed zero alcohol, while the urine sample contained .109 percent alcohol, which would indicate a blood alcohol level of about .08 percent. The urine sample also tested positive for amphetamine, marijuana and cocaine. (18RT 3219-3220.)[31] According to Long Beach Police Officer Lawrence Solin, a drug recognition expert called by the defense, the level

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[31] Although the standard, accepted procedure is to have a subject void his or her bladder 20 minutes before providing a urine sample, the police did not do so here. (18RT 3207, 3221, 3228-3229.) According to criminalist Gregory Gossage, who testified for the defense, the lack of prior voiding renders a urine test inaccurate and worthless. (18RT 3221-3222.) Gossage also explained that the liver of a habitual drinker can eliminate alcohol faster than the average rate, while cocaine and marijuana can further speed up that process. Gossage opined that this could explain the zero alcohol finding in the blood sample. (18RT 3222-3223.)

of drugs and alcohol in appellant's system at the time of his arrest would not have rendered a person unable to make decisions, nor would it have been inconsistent with a person deliberately running over a victim with a car, leaving the scene, returning later with another car, and deliberately running over the same victim again. (18RT 3211-3212.)

2. Appellant's Testimony

Appellant testified in his own defense as follows. Appellant never graduated from high school or received a driver's license. (19RT 3250, 3278.) He worked as an unlicensed carpenter. (19RT 3250, 3269, 3361.) He had drug and alcohol problems, and had been arrested for contracting without a carpentry license, grand theft of an automobile, and driving with a suspended license. He was convicted in 2001 of a crime involving car-stripping. (19RT 3248-3250, 3269, 3328.) Appellant lived in the Ghost Town neighborhood on the east side of Wilmington. (19RT 3277.) Although he had claimed membership in the East Side Wilmas gang since high school and associated with members of that gang, he was never officially "jumped into" the gang. (19RT 3277-3278, 3294-3295.) He was therefore not a member of any Surenos-affiliated gang. (19RT 3277, 3292.) Appellant's father had given appellant the nickname "Chingon," meaning "Bad Ass," when appellant was very young. (19RT 3292, 3383-3384.)

Appellant and Tinajero were neighbors and friends. Appellant went to high school with Tinajero, got together with him often to drink and party, and knew Tinajero's family well. (19RT 3270-3271, 3346-3348.) Armenta was also appellant's friend. (19RT 3302.) Appellant knew him for two to three weeks before March 7, 2002. Armenta worked at a repair shop in appellant's neighborhood and was one of several people who would "kick back" at appellant's house to drink and take drugs. (19RT 3251, 3299-3300.)

On the night of March 6 to 7, 2002, appellant and Tinajero drank beer and used drugs together. (19RT 3247, 3250-3251, 3267, 3270.)[32] Notwithstanding his use of drugs and alcohol, appellant had a very good memory of that night's events. (19RT 3299.) Armenta came to appellant's house that evening, and appellant and Tinajero went with Armenta in the white Infiniti to get more drugs. (19RT 3251-3253, 3263-3264, 3312.) Contrary to Tinajero's testimony, they were not looking for girls. (19RT 3252, 3264, 3268.) After trying unsuccessfully to obtain drugs at the home of one of Armenta's friends, Eduardo, they picked up appellant's brother-in-law, Fernando Lopez, and then stopped in an alley in Long Beach to urinate. (19RT 3252-3253, 3307, 3312-3314.) As a "trick" or gag, appellant drove away in the Infiniti with Tinajero and Lopez, leaving Armenta behind in the alley. (19RT 3252, 3254, 3307, 3314-3315.) Appellant drove back to his neighborhood in Wilmington, dropped off Lopez, and then drove the Infiniti back to the alley in Long Beach with Tinajero to pick up Armenta. (19RT 3252-3254, 3315.) Seeing that Armenta was no longer there, appellant and Tinajero drove back home again. (19RT 3254.)

When appellant and Tinajero arrived back at appellant's house, Armenta was there, driving a Honda Accord. (19RT 3254-3255.) Armenta asked appellant why he took the Infiniti, and appellant explained that he had intended only "to fuck with him, play with him." (19RT 3255.) Continuing their quest for drugs, Armenta drove appellant and Tinajero in the Honda[33] to Armenta's sister's house to ask for money. (19RT 3256-3257.) From there, they drove to Palmer Court, an alley in Long Beach

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[32] Appellant was on probation at the time. (19RT 3267.)

[33] The Infiniti was parked in front of appellant's house. (19RT 3255-3256.)

where Armenta claimed he could buy drugs. (19RT 3257.) At Palmer Court, they encountered a group of men. (19RT 3258-3259.) Armenta stepped out of the car and spoke with the men to negotiate a drug transaction. (19RT 3258, 3319.) The other men hit and fought with Armenta. (19RT 3258-3259.) One of the men held an object which might have been a gun. (19RT 3259.) Fearing that the men were armed – as appellant knew was often true in drug deals – appellant drove away in the Honda with Tinajero, again abandoning Armenta. (19RT 3259-3260.)

Appellant drove the Honda back to Colon Street in his neighborhood in Wilmington to obtain a gun. (19RT 3260, 3320.) The gun belonged to a group of appellant's friends who kept it in a hiding place in case anyone needed it. (19RT 3322-3323.) After retrieving the gun, which was loaded, appellant left the Honda on Colon Street, and drove back with Tinajero in the Infiniti to Palmer Court in order to rescue Armenta. (19RT 3260-3261, 3322-3324.)

Appellant drove fast through Palmer Court with his headlights off to avoid alerting the drug dealers. (19RT 3247, 3261-3262.) As he drove, he felt a bump and the sensation of something dragging under the car. (19RT 3262.) Appellant made a U-turn in the alley, and saw that he had run over Armenta. (19RT 3262.)[34] Appellant wanted to take Armenta to a hospital. (19RT 3262.) However, a fire truck arrived, and appellant—a convicted thief on probation—did not want to be found in possession of a gun while driving under the influence of alcohol and drugs. (19RT 3263, 3266-3267.) Appellant therefore drove away with Tinajero. (19RT 3263.) Appellant and Tinajero stopped one block away, walked back to the alley to see that

[34] Appellant denied having run over Armenta ten times, but admitted he ran over Armenta once, accidentally, causing Armenta's death. (19RT 3245, 3247, 3267-3268.)

Armenta was being treated by paramedics, then returned to the Infiniti and drove off (19RT 3263.) Seeing a police car, appellant instructed Tinajero to throw the gun out the window before they were stopped. (19RT 3264-3265.)

Upon his arrest, appellant admitted to the police that he had run over a man in the alley. (19RT 3246, 3297.) In a video-taped interview later that day, appellant told a detective that the Infiniti he was driving belonged to a man whose name appellant did not know. (19RT 3301-3303.) Appellant falsely claimed he met that man only a few hours before appellant's arrest; they were both in cars at the intersection of Pacific Coast Highway and Avalon Boulevard when appellant handed the Infiniti driver a bottle of Tequila. (19RT 3302, 3305, 3308-3309.)

Following the arrest, appellant served as a trusty in Men's Central Jail for three months. (19RT 3266, 3278, 3280, 3329.) In 2003, appellant used inmate Montalban's pass to be transported to West Hollywood in order to escape. (19RT 3276-3277, 3353.) Appellant did not use force to obtain Montalban's wristband. (19RT 3277.) In the escape attempt, appellant took with him the "paperwork" (police report) which showed that Tinajero had "snitched" on him. (19RT 3357.) During February of 2004, appellant was a trusty in the module where Tinajero was housed. The two men talked about Tinajero's possible testimony, and Tinajero told appellant he would not testify. (19RT 3282-3283, 3328-3331.)

In order to "keep track of" Tinajero, appellant obtained Tinajero's new booking number[35] and wrote it (with one digit incorrect) in his phone book after the initials "RT." (19RT 3366-3368.) When Tinajero testified against appellant at the first trial, appellant reported that fact to inmates in

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[35] According to the prosecutor, Tinajero was first issued that booking number on April 1, 2004. (19RT 3367.)

the jail system. (19RT 3341.) Appellant understood that Tinajero's acts of "snitching"—including both his statements to law enforcement and his testimony—were in violation of Sureno rules and would put Tinajero's life in jeopardy. (19RT 3368-3369, 3376.)

On the afternoon of April 19, 2006, one day before Tinajero was murdered, appellant learned from a "kite" sent by inmates in the gang module that some inmates were going to Tinajero's cell to "regulate" (i.e. beat) Tinajero. (19RT 3273, 3278-3279, 3332, 3336, 3355-3356, 3368.) Tinajero was not supposed to be killed. (19RT 3272-3273, 3279.) Appellant wanted to prevent the assault because Tinajero was a friend and because an attack on Tinajero would have been damaging to appellant's defense case. (19RT 3279, 3286-3287.) Further, appellant was concerned that if someone went too far and killed Tinajero, there would be repercussions for appellant from other inmates. (19RT 3272, 3281.) Appellant therefore decided to go to Tinajero's cell to stop the attack. (19RT 3331-3332, 3337, 3340.)

The next morning, April 20, 2006, when inmates from appellant's module were called for court appearances, appellant went with the inmates in the court line to the Inmate Reception Center. (19RT 3338-3339.) When the Inmate Reception Center discovered appellant had no court date, he was "scanned out" and sent back into Men's Central Jail, where he managed to get to the laundry room. From there, he was able to go to Tinajero's module and cell unescorted. (19RT 3342-3343.) Appellant knew where Tinajero was housed because his cell number had been written on the "kite." (19RT 3340-3341.) When appellant arrived at Tinajero's cell, Tinajero's dead body was already under the bunk. (19RT 3271, 3354.) Tinajero's cellmates told appellant that things "got out of hand," resulting in Tinajero's death. (19RT 3355.) Appellant did not kill Tinajero, nor did he want Tinajero to be murdered. (19RT 3271, 3374.)

Concerned that he would be blamed for Tinajero's death, appellant made telephone calls from Tinajero's cell, asking people what to do about the situation. (19RT 3270-3272.) Tinajero's cellmates also had discussions with appellant about what to say about the incident. (19RT 3271-3273, 3344.) They all agreed to say nothing about the killing. (19RT 3344, 3349.) Appellant wrote the names and booking numbers of those cellmates for his own protection; if other inmates accused appellant of killing Tinajero and sought retaliation, appellant would be able to call upon the cellmates to vouch for his innocence. (19RT 3282.) Appellant took advantage of an inmate transfer call to leave Tinajero's cell and return to his own. At the request of Tinajero's cellmates, appellant took with him the blood-stained blanket that had been covering Tinajero's body, in order to dispose of it outside the cell. (19RT 3271, 3354-3355, 3365, 3375.)

When the detectives questioned appellant about the murder in a recorded interview, appellant did not tell them the truth, nor did he implicate anyone else. (19RT 3272.) Appellant falsely told the detectives that on the day of the murder, he never left his cell. (19RT 3244-3345.)

After the murder, appellant developed an "I don't care" attitude. (19RT 3285.) He had problems with the deputies, particularly with Deputy David Florence. (19RT 3284-3285.)[36] Once, appellant threatened to stab a deputy in jail. (19RT 3289.) Appellant kept a razor blade in his cell to use as a pencil sharpener. (19RT 3286.) He never used it as a weapon. (19RT 3286, 3289.) Appellant escaped from the locked shower stall just to aggravate the deputies. (19RT 3286 ,3289-90.) How to do so was common knowledge in jail. (19RT 3285-3286, 3290.)

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[36] Deputy Florence, the supervisor of the high power module, testified during the People's case regarding the altered paperclip found in appellant's cell and regarding appellant's escape from a locked shower stall. (15RT 2652-2682.)

Appellant acknowledged writing a letter in jail in which he repeatedly claimed to belong to the Ghost Town Locos clique of the East Side Wilmas gang. (19RT 3293-3295.)[37] The letter stated that "Grumpy," appellant's next-cell neighbor in the high power module, told appellant about someone who had "turned over the dime" (i.e., snitched) on Grumpy regarding a murder. (19RT 3293, 3370, 3372-3373.) Appellant further stated in the letter, "We ride for the Sur. . . . One for all, all for one." (19RT 3293.) According to appellant, to "ride for the Sur" does not necessarily indicate being a member of the Surenos; it means only that appellant followed the rules of the Surenos or Southsiders while in jail. (19RT 3293-3295.)

Appellant obtained permission from the inmate hierarchy to testify at trial. (19RT 3272-3273.)

C. The People's Rebuttal Case – Guilt Phase

On March 7, 2002, at the police station after his arrest, appellant told Officer Soldin that he was coming from a "homie's" home on Palmer Court when he was pulled over and that he did not know why he was stopped. Appellant denied being involved in an accident. He did not admit to Officer Soldin that he had run over a person. (20RT 3408-11.)

D. The People's Case-in-Chief – Penalty Phase

On June 30, 2002, appellant had reddened knuckles on both of his hands and scratches on his back after a fight which reportedly took place in the day room of the 3000 module. (23RT 3979-3982.)

On November 5, 2004, in the high security module, Deputy Saucedo saw appellant drink pruno, a prohibited, inmate-made liquor. (23RT 4001-

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[37] The letter (People's Exhibit 158) was dated September 26, 2006. (17RT 3072.) Detective Clift testified outside the presence of the jury that he intercepted that letter from appellant. The letter was addressed to Della Rose Santos. (17RT 3082.)

4002, 4036-4037.) Deputy Saucedo summoned Deputy Jason Argandona to assist him. The deputies twice ordered appellant to give them the pruno before appellant complied. After the pruno was confiscated, appellant threatened to stab Deputy Saucedo when he "least expected it." (23RT 4002-4003, 4010-4011, 4037-4038, 4044.) Appellant was very drunk at the time. (23RT 4054.) Deputy Florence, the supervisor of the high security module, assisted other deputies in removing appellant from his cell. (23RT 4044.) During that process, appellant was combative and non-compliant with orders, resisted handcuffing, and said to Deputy Florence, "Fuck you, fag. I'll come out when I'm ready." (23RT 4003, 4044, 4046-4048, 4051-4052.) Appellant tried to get rid of items in his cell by swallowing them or flushing them down the toilet. (23RT 4052.) He thrashed about with his legs, hips and feet to hinder the deputies from moving him, and he kicked Deputy Florence in the leg and spat at him. (23RT 4003, 4014, 4021, 4049-4050, 4056-4057, 4059.)

On December 7, 2004, while Deputy Argandona was escorting appellant to his cell after a court appearance, appellant concealed something in his hands and tried to put it in his waistband. When the escorting deputy asked to see appellant's hands, appellant grasped the hidden object, ducked down, and turned away. Deputy Argandona confiscated the object – a bag of potato chips which appellant was not allowed to have because he was on "loss of privileges" status – while appellant called the deputy a "fag" and a "pussy." (23RT 4003-4007, 4015.)

On June 7, 2005, in the high power module, appellant yelled at a fellow inmate, "Fuck you, Benji. You're a rat."[38] (23RT 4023-4024.) When Deputy Andrew Cruz ordered appellant to stop yelling this, appellant

[38] The inmate had previously informed the deputies about rule violations by other inmates. (23RT 4025.)

incited other inmates on the row to join him in repeatedly yelling, "Benji is a rat." (23RT 4027.) According to Deputy Cruz, publicly denouncing an inmate as a "rat" (a synonym for "snitch") would place the targeted inmate in danger of being assaulted. (23RT 4024, 4026-4027, 4030-4031.)

On September 26, 2006 (one month before the second trial began), Deputy Clift intercepted a letter written by appellant which stated in part, "Grumpy told me about the guera that turned over the dime. They're treating him bad, but that will be straightened out soon. We ride for the Sur. Tu sabes babe. One for all, all for one." (23RT 4078-4079.)[39] Grumpy, an inmate housed on the same row as appellant, was a gang member charged with murder. (23RT 4080-4081.) Based on his expertise in Sureno gangs (23RT 4076-4077; see also 18RT 3109-3111), Deputy Clift interpreted the letter to mean that Grumpy's crime partner had snitched ("turned over the dime") on Grumpy and that appellant, out of loyalty to the Surenos ("we ride for the Sur"), was offering to help ensure that the informant was attacked and most likely murdered ("taken care of"). (23RT 4080-4084, 4086-4087.) Appellant signed the letter with his nickname, Chingon, followed by dots and dashes representing the Aztec numeral 13, a number associated with the Mexican Mafia. (23RT 4079-4080.)

Victim Armenta's mother Maria Guadalupe Sanchez, his sister Patricia Armenta, and his close friend, Eduardo Velasquez, testified about their relationships with Armenta and the impact of the murder on their lives. At the time of his death, Armenta had a wife and an infant daughter who lived in Minnesota. (24RT 4109, 4123.) Armenta was kind and loving, smiled most of the time, and generously helped others in need.

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[39] As previously noted, appellant admitted in his guilt phase testimony that he wrote the letter. (19RT 3293-3295.)

(24RT 4103-4104, 4109, 4112, 4119-4120, 4128-4129.) He often performed free mechanical work for strangers he would find stranded on the roadside with car problems. (24RT 4104, 4113, 4121.) He cooked meals for the hungry, brought people medicine, and borrowed money to give to others who needed it. (24RT 4120-4121.) He frequently bought groceries for his sister and her children, took them out to eat and treated them to movies. (24RT 4113, 4117.) Armenta planned someday to open his own mechanic's shop and to rent or buy a house where he could live with his mother, his sister, and her children. (24RT 4116-4117, 4125.)

Since the murder, Armenta's mother stopped taking care of herself, going to the doctor, or taking her thyroid medication. (24RT 4128.) According to Maria, "My life has no meaning as it had before. It was cut, everything. That person that did this cut out my life. He does not know the damage he has done to me." (24RT 4128.)

E. The Defense Case – Penalty Phase

Appellant was born in Acapulco, Mexico in 1981. (24RT 4187.) His mother, Julia Pineda, was poor and had three older daughters,[40] each born only a year apart, living in a home with no running water and only soup, beans, and tortillas to eat. (24RT 4188, 4192-4194.) Not wanting to bring another child into a life of poverty, Julia repeatedly tried to induce a miscarriage, by falling and by hurting herself in other ways, when she was three months pregnant with appellant. (24RT 4188-4192.) Nevertheless, after appellant was born, Julia gave him unconditional love. (25RT 4259-4260.)

In June of 1981, when appellant was an infant, he and his mother were smuggled into the United States in the trunk of a car. (24RT 4198-4200;

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[40] Eventually, the family would grow to include nine children. (25RT 4239, 4257.)

25RT 4260-4261.) The family (including appellant's father and sisters who arrived separately) settled in Wilmington, where their standard of living was much better than it was in Acapulco. (24RT 4200-4201.)

Because it was customary for boys to be reared by their fathers, Julia gave appellant's father, Santiago Pineda Sr. ("Santiago Sr."), responsibility for raising appellant starting when appellant was five years old. (24RT 4195-4196, 4198-4199, 4201, 4225-4228.) Santiago Sr. disciplined appellant by hitting him and kicking him. He would beat appellant about twice a week with whatever was in a reach—a shoe, a stick, a hose, an electrical cord. (24RT 4201-4202; 25RT 4228-4231, 4343, 4355, 4360, 4364; 26RT 4460-4462, 4495, 4505-4506, 4517-4518.) Nevertheless, appellant loved and was loyal to his father. (25RT 4237-4238, 4254; 26RT 4437-4438, 4465.) The physical discipline lessened as appellant grew older. (25RT 4363; 26RT 4403, 4409.)

Santiago Sr. worked as a carpenter and owned a very successful cabinet-making shop. (24RT 4202; 25RT 4229-4230, 4243, 4264-4265, 4272, 4274; 26RT 4396.) Beginning when appellant was about eight to ten years old, appellant worked with his father after school. His mother and siblings also worked in the shop. (24RT 4202; 25RT 4222, 4230, 4265, 4361; 26RT 4396, 4404-4405, 4407-4408, 4424, 4427-4428, 4462-4464, 4478-4479, 4495; 27RT 4589-4590.) Santiago Sr. was regarded as an excellent carpenter, and he taught and encouraged appellant to excel in that trade as well. (24RT 4198; 25RT 4231-4232, 4235, 4238, 4246; 26RT 4432, 4478.) At the same time, appellant also worked as a gardener with his uncle. (25RT 4240, 4246.) According to his mother, appellant "was never allowed to be a child. . . . He started working when he was eight years old. Instead of being in school or involved in sports, he was working." (25RT 4240-4241, 4245, 4253.) However, appellant did have time to play basketball and football in the park. (25RT 4258-4259.)

Santiago Sr. pushed appellant to be tough and to fight to defend himself when others tried to pick on him. (25RT 4232, 4235, 4340-4341, 4377-4380; 26RT 4414, 4506, 4516-4517.) He urged appellant to be a "Chingon," which could mean either to be a "bad ass" (i.e., tough, strong, competitive and macho) or to excel (i.e. "kick ass") at his work. (25RT 4231-4232, 4235, 4279, 4377; 26RT 4400-4401, 4466, 4498, 4506, 4513-4515.)

Santiago Sr. was an alcoholic. He would consume about six to seven 46-ounce bottles of beer or wine a day. He would come home from work drunk and stumbling. (24RT 4196-4198, 4202; 25RT 4217, 4223-4225, 4341-4342, 4352-4353, 4356; 26RT 4427, 4468, 4494, 4498-4499, 4501-4502.) Santiago Sr. would drink in the presence of his children. Appellant, as a young child, sometimes drank from his father's alcoholic beverages. (25RT 4223, 4366; 26RT 4500-4501, 4504-4505; 27RT 4572.) When appellant was eleven or twelve years old, Santiago Sr. attempted to quit drinking and suffered an "attack" of shaking and convulsions in the shower. After appellant helped remove him from the bathroom, Santiago Sr. was taken to the hospital. (25RT 4218-4222, 4236-4237, 4364; 26RT 4430.) This was the first of four such "attacks" for which Santiago Sr. was hospitalized or placed in rehabilitation. (25RT 4218-4221, 4236-4237.) In 1994, when appellant was 13 years old, Santiago Sr. joined a sobriety program and abstained from alcohol for the next seven years. (25RT 4218-4219, 4265-4266, 4278, 4381; 26RT 4397, 4428-4429, 4468-4469, 4518-4519; 27RT 4532, 4554, 4560.)[41]

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[41] Santiago Sr.'s employee, Salvador Hernandez, testified that after Alcoholics Anonymous meetings, he and Santiago Sr. would go to a bar, but that Santiago Sr. would have only soft drinks, not alcohol. Appellant, who was a teenager during his father's years of sobriety, sometimes

(continued...)

Appellant attended Wilmington Park Elementary School. (24RT 4162-4163.) Before third grade, appellant scored in the 23rd percentile in reading (in Spanish) and the 28th or 38th percentile in math.[42] At the end of third grade, he scored in the 44th percentile in reading (Spanish) and the 25th percentile in math. (25RT 4301-4303, 4307.) From third through fifth or sixth grade, appellant repeatedly failed to do his homework and was sent to a different classroom to complete the work. (24RT 4163, 4166-4167, 4171, 4173-4175; 25RT 4298, 4304-4305, 4309; 27RT 4603, 4605.) He was respectful and presented no behavioral problems during those homework make-up sessions. (24RT 4167, 4172-4173, 4181; 27RT 4600-4601.) According to his third grade teacher, appellant was an average student who had no behavioral problems or learning disabilities. Appellant was able to express himself well and had the ability to learn. (25RT 4309-4310.) Teacher Rebecca Escobar, who was not appellant's regular teacher but supervised about twelve of his homework-completion sessions, described appellant as playful and mischievous but never malicious. (24RT 4145, 4170, 4172.) Escobar believed that appellant had difficulty following school rules, and she was concerned that he might someday become involved in gangs. (24RT 4167-4169.)

Appellant was frequently truant from school. (26RT 4507.) His father eventually allowed or encouraged him to drop out of school

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(...continued)
accompanied his father to bars to play pool, but appellant likewise drank only soft drinks. (27RT 4561-4563, 4569-4570.)

[42] Appellant's third grade teacher, Mary Escamilla, testified based on her review of school records that appellant scored in the 38th percentile in math at the beginning of the year, but that his score "went down three points" to the 25th percentile. (25RT 4303.) She later testified, in response to a leading question, that appellant scored in the 25th percentile at an unspecified time. (25RT 4307.)

completely to work full time. (25RT 4380; 26RT 4507-4508, 4515; 29RT 4845.) Santiago Sr. reasoned that if appellant was skipping school anyway, it would be better for him to work and learn a trade than to be out on the streets. (26RT 4507-4508, 4515.)

When appellant was 18 or 19 years old, he and his siblings went to stay with appellant's oldest sister in the state of Washington for several months while their father went to Mexico to care for appellant's ailing grandmother. (25RT 4239-4240, 4243, 4265-4267.) In Washington, appellant worked with his brother-in-law in a "venture company" which set up parties and events. (25RT 4267.) After appellant's grandmother died, appellant, his parents, and most of his siblings returned to Wilmington. (25RT 4267.)

After several years of sobriety, Santiago Sr. resumed drinking upon his return from Mexico in 2001. (25RT 4265-4266; 26RT 4469; 27RT 4532.) Because of his alcohol problem, Santiago Sr. failed to complete carpentry jobs, and his cabinet business eventually failed. (25RT 4238, 4240; 27RT 4558, 4566.) The family had difficulty paying bills. Appellant's mother applied for welfare and obtained financial help from extended family members. (25RT 4238-4241, 4268, 4273.) Appellant's family was evicted from their home and lived for awhile in Santiago Sr.'s former cabinet shop, before being taken in by appellant's uncle. (25RT 4241, 4244-4245, 4268, 4270-4271; 26RT 4396.) Appellant and each of his siblings worked to help support the family, buy food and clothing, and pay the utility bills. (25RT 4241-4243, 4246-4247, 4252, 4279; 26RT 4424-4426, 4433-4434, 4463-4464, 4471-4472, 4509.) Appellant worked as a cabinet maker and, like his father, was regarded as excellent in that craft. (25RT 4239-4240, 4246; 26RT 4404, 4431-4432, 4470-4471, 4481-4482, 4508-12; 27RT 4542, 4545.) Appellant completed a kitchen

remodeling job for a relative that Santiago Sr. failed to complete. (27RT 4608-4609.)

As a young adult, appellant used heroin, cocaine and LSD. (25RT 4366, 4369-4371.) He told one of his sisters that he wanted to quit using drugs. (25RT 4370.) Appellant's sisters described appellant as a very loving and supportive brother and uncle who worked hard to help the family. (26RT 4412-4413, 4424, 4470-4471.)

Clinical psychologist, Dr. Adrienne Davis, interviewed several of appellant's family members and teachers (but not appellant himself), and read appellant's school records, the police reports from the two murders, and investigators' reports of family member interviews. (29RT 4800-4805, 4839.) According to Dr. Davis, a combination of several factors in appellant's life, over which appellant had no control, predisposed him to criminal behavior. These risk factors included: economic difficulties, his father's alcoholism, learning difficulties,[43] large family size, family dysfunction, parental rejection, child abuse, marital conflict, family instability (evinced by frequent moves), and a surrounding community in which crime is condoned or promoted. (29RT 4809-4812, 4819-4822, 4844-4845, 4865-74.) Appellant bonded strongly with his father who

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[43] According to Dr. Davis, appellant exhibited the symptoms of Attention Deficit-Hyperactivity Disorder, which apparently went untreated in school. Her review of school records revealed a long history of difficulties keeping up with school work, reading, and transitioning from Spanish-based to English-based instruction. Appellant displayed poor attention skills, difficulty remaining in his seat, and aggressive and disruptive behavior with peers. (29RT 4806-4808, 4840.) A recommendation for a psychological evaluation appeared in appellant's school records, but there was no indication appellant ever received such an evaluation. (29RT 4807.) Interviews of family members confirmed that appellant was hyperactive. (29RT 4809.) One doctor, whose report Dr. Davis reviewed, opined that appellant had average or above average intelligence. (29RT 4947-4948.)

taught him to be an excellent carpenter, but who also abused appellant and modeled negative ways of responding to situations and dealing with people. (29RT 4812-4814, 4829, 4851-4852, 4876-4877.) As a result, according to Dr. Davis, appellant had low self-esteem, coupled with rage and the sense that violence and aggression are acceptable responses to adverse situations or people. (29RT 4827-4828.)

James Esten, a former correctional counselor who served on the Reception Center Classification Committee of the California Department of Corrections and Rehabilitation (CDCR) (28RT 4676-4678, 4686), testified that if appellant were sentenced to life without the possibility of parole, he would automatically be classified as a level four security inmate and would be housed in a maximum-security prison. (28RT 4684-4685, 4687, 4735, 4751.) Based on appellant's history and Esten's consultations with a current inmate classifications official, Esten opined that appellant would likely be sent from the CDCR's reception center immediately into a Security Housing Unit (SHU) for an indefinite term. (28RT 4688, 4692, 4741, 4753-4756, 4758.) There, he would be confined most of the time to a one- or two-man cell with a high level of monitoring. (28RT 4688, 4692, 4725-4727, 4733-4734, 4741, 4753, 4755-4756, 4758, 4760-4761.) Nevertheless, Esten acknowledged that even in SHU facilities, inmates manage to obtain weapons and conduct gang-related "business" such as orchestrating a "hit" on another person. (28RT 4756-4757, 4760, 4772.) Moreover, an inmate serving an indeterminate SHU term can be released from SHU to the general population, in as short as one year, for good behavior. (28RT 4741, 4775-4778.)

F. The People's Rebuttal Case – Penalty Phase

Contrary to defense witness Esten's testimony, if appellant is sentenced to life in prison without possibility of parole, he could not be

placed directly in a SHU facility upon receipt by the CDCR based on his misconduct in county jail. (29RT 4891-4892.) Rather, according to CDCR Classification Staff Representative Luis Puig, an inmate can be sent to SHU only for violations committed as a state prisoner in CDCR custody. (29RT 4891-4892.)[44] Therefore, unless he commits new violations in state prison, appellant would be in the general population of a level four facility. (29RT 4891-4892, 4895; 30RT 4945.) There, he would likely be assigned a prison job, possibly in the kitchen or carpentry where he would have access to knives and tools. (29RT 4899-4901; 30RT 4934-4936, 4939-4941, 4945, 4948.) Level four general population prisoners are permitted to walk from place to place unhandcuffed and unescorted within the prison (i.e. to the doctor, to the yard, to make a phone call, or to attend a religious service), and can have yard time with as many as 600 other prisoners. (29RT 4902, 4905-4906.) Several types of make-shift weapons have been found in the possession of level four prisoners. (29RT 4909-4911.)

On January 4, 2007 (during the penalty phase of trial) appellant was carrying a sealed envelope labeled "legal mail" while preparing to be escorted to the court line in Men's Central Jail. (30RT 4951-4953.) Inside the envelope were other sealed envelopes holding personal letters written by appellant. (30RT 4955-4956, 4959-4963, 4964.)[45]

In one letter, addressed to a female inmate of a state prison (30RT 4968, 4972), appellant mocked the trial proceedings and boasted that he had become a celebrity and would be signing autographs. (30RT 4968-

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[44] Puig acknowledged that an inmate can be housed *temporarily* in administrative segregation in one of the CDCR Reception Centers while awaiting assignment to permanent housing. (29RT 4893-4895.)

[45] This appeared to be an effort to avoid having the personal letters searched for contraband, in violation of jail rules. (30RT 4956-4957.)

4970.)[46] The letter stated, "I'm a dedicated Sureno to the fullest, and death and throughout my life style, I stood for mines. When I got torcido [arrested] I cut the old boy loose and put on the zapatos [shoes] to fight it myself. But el destino [destiny] have plans for him. You know the rest." (30RT 4968-4969.) Appellant's letter asked the inmate whether it was possible to get from certain cell blocks and yards to others within her prison in order to talk to other prisoners, and whether she was able to obtain drugs or pruno. (30RT 4971-4972.) Appellant noted that a coperpetrator of the violent crime for which the female prisoner was convicted had not taken fair responsibility for that crime. Appellant therefore offered to speak to a "senor" [Mexican Mafia member] to get clearance to do something to the coperpetrator. (30RT 4973-4976.) The letter was signed, "Chingon, East Side Wilmas GTL," referring to appellant's gang and the Ghost Town clique, followed by "Kanpol," with three dots and two underlines -- symbols of the Surenos. (30RT 4967, 4976.)

In another letter, addressed to an inmate housed on the same row as appellant in Men's Central Jail (30RT 4963),[47] appellant stated, "Young E Wilmero got found guilty and the specials being found true also. I ain't tripping. This is the way gangsters roll. The party ain't over It's just getting started," followed by a smiley face. (30RT 4977-4978.) He added, "On the other hand, la Dona [referring to appellant's mother] has taken it hard. I express what's in the near future and she felt better. She just blames herself for my lifestyle and she shouldn't. I chose this vida [life], and I'm gonna die living it, the love for my jefa [boss] goes without saying,

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[46] At trial, Detective Clift read portions of the letters to the jury and explained their terminology based on his gang expertise. (30RT 4968-4975.)

[47] Several other letters found in appellant's "legal mail" envelope appeared to be outgoing mail from that same inmate. (30RT 4963.)

but I lead a life that I can no longer walk away. She understands." (30RT 4978-4979.) The letter further advised the other inmate not to get personally involved in Sureno politics, opining that the inmate may not have the fortitude to do what the Surenos would demand of him. (30RT 4978-4980.) Appellant offered, in the letter, to contact Mexican Mafia members and others himself to help the inmate if he had a problem with anyone. (30RT 4980-4981.) That letter was also signed, "Chingon," with three dots and two underlines signifying the Surenos. (30RT 4977.)

ARGUMENT

I. THE TRIAL COURT VALIDLY EXCUSED FOR CAUSE A PROSPECTIVE JUROR WHO STATED THAT HE WOULD REFUSE TO CONVICT A DEFENDANT OF CAPITAL MURDER REGARDLESS OF THE EVIDENCE IN ORDER TO AVOID A PENALTY PHASE

Appellant contends that the trial court erred by excusing prospective juror J.W.[48] for cause upon finding that he could not serve as an impartial juror. He argues that the error violated both the California Constitution and appellant's Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury, and that automatic reversal of his death sentence is required. (AOB 106-132.) Respondent disagrees. The prospective juror's written questionnaire responses, viewed in light of his voir dire statements, provided substantial evidence supporting the trial court's ruling.

A. Juror J.W.'s Questionnaire Responses

All prospective jurors were asked to complete a 23-page, written questionnaire before voir dire. (5CT 1138; 4RT 665.) In J.W.'s questionnaire responses, when asked, "Can you set aside any sympathy,

[48] The reporter's transcript refers to J.W. initially by the last four digits of his juror identification number, 7076, and subsequently by his seat number, "Juror No. 12." (7RT 1158; see 5CT 1978.)

bias, or prejudice you might feel toward any victim, witness or defendant?", J.W. circled "No," and explained, "You need to be honest." (8CT 1989.) Responding to, "Will you consider along with all of the other evidence presented, the testimony of an unavailable witness (for example, one who is too ill to come to court) whose prior testimony is read to you?", J.W. circled "No," and explained, "It's hard to except (sic) 2nd hand information." (8CT 1989.) But when asked, "Will you automatically reject the testimony of an unavailable witness merely because the actual witness is not present?", J.W. circled "No." (8CT 1990.)

One question asked: "If you believed it was wrong for the prosecution to ask the Court to grant immunity from prosecution or to give special consideration in another case in exchange for a witness testifying here, would you hold that against the prosecution and refuse to convict even if shown the defendant is guilty?" J.W. circled "Yes," and explained, "If you have committed a crime, there should be immunity." (8CT 1990.)

A section of the questionnaire titled, "Attitudes Toward Capital Punishment," set forth a description of the two-phase procedure for capital cases. The questionnaire specifically explained that a penalty phase to determine whether the penalty will be death or life without possibility of parole would not take place unless the jury finds the defendant guilty of first degree murder and the special circumstances to be true. The questionnaire then listed the statutory penalty-phase aggravating and mitigating factors. (8CT 1991-1992.) After setting forth the charges of two counts of first degree murder and the three special circumstance allegations, and briefly summarizing the alleged facts regarding the Armenta and Tinajero murders, the questionnaire asked, "No matter what the evidence shows, would you refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase, where death or life in prison without possibility of

parole is decided?" J.W. circled "Yes." (8CT 1993.) Conversely, the questionnaire next asked, "No matter what the evidence shows, would you always vote guilty as to first degree murder and true as to the special circumstances in order to get the case to the penalty phase, where death or life in prison without possibility of parole is decided?" J.W. circled "No." (8CT 1993.)

Responding to other questions in the questionnaire, J.W. indicated that in a penalty phase, he would neither always vote for, nor always vote against, the death penalty regardless of the evidence, that he would "possibly" consider background information about a defendant's life in the penalty phase because, "The life of the defendant might make a difference," that he considered life in prison without possibility of parole to be worse for a defendant than death because the former would be "[b]oring with no life," and that to J.W., a life-without-parole sentence means "No life." (8CT 1994.) When asked whether he feels the death penalty is imposed too often, too seldom, randomly, or about right, J.W. circled "about right," and explained, "Hard to take a life." (8CT 1994.) J.W. had previously considered his position on the death penalty. When asked whether anything specific caused him to evaluate his opinion, J.W. responded, "Having to judge the right or the wrong." (8CT 1995.) J.W.'s opinion of the death penalty had not changed over the years, and he was not a member of any organization that takes a position for or against the death penalty. The view of his religious organization, if any, regarding the death penalty was that, "Only God has the right." When asked if he felt obligated to accept that view, J.W. circled, "Yes," and explained, "Same as above." (8CT 1995.)

When asked, "Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole instead?", J.W. answered, "Yes." Conversely, when asked, "Given the fact

that you will have two options available to you, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty instead?", J.W. answered, "No." (8CT 1995-1996.) Regarding whether he agreed with the statement, "Anyone who kills another person should always get the death penalty," J.W. checked "strongly agree," and explained, "An eye for an eye." Regarding the statement, "Anyone who intentionally kills another person should never get the death penalty," J.W. answered, "strongly disagree," and explained, "Same as above." (8CT 1996.)

Regarding other topics, the questionnaire informed the jurors that the testimony of a single witness is sufficient to prove any fact if the juror believes the witness. The questionnaire then asked, "Would you require more proof if you believe the witness is telling the truth?" J.W. responded, "Yes," and explained, "I need to be sure." (8CT 1997.) The questionnaire informed the jurors that it is the obligation of every juror to freely discuss the evidence and instructions with the other jurors during deliberations. The questionnaire than asked, "Will you agree to tell the Court if anyone refused to deliberate with the rest of the jury?" J.W. answered, "No," and explained, "What is said in the room stays in the room." (8CT 1998.)

B. Voir Dire of Juror J.W. And The Trial Court's Ruling

During voir dire, the trial court asked J.W. what he meant by his questionnaire response indicating that he could not set aside any sympathy, bias or prejudice toward a victim, witness, or defendant because "You need to be honest." (See 8CT 1988-1989.) J.W. replied, "Oh, probably because of the circumstances of how the trial is going to be run, whether, you know, if I try to set myself aside and say, okay, I think he's not guilty or he is guilty. [¶] I would have to have a little bit more information as far as what I need to say or what I need to do." (7RT 1160-1161.)

The trial court explained the concept of witness immunity to J.W. and the rest of the venire, and then asked J.W. if he had any problem with that practice. J.W. answered, "No problem." (7RT 1163-1164.)

The trial court asked J.W. what he meant by his statement, "An eye for an eye," in the portion of the questionnaire regarding attitudes toward the death penalty. Specifically, the court asked whether that meant that a person who kills someone should be executed, regardless of the other evidence. J.W. answered, "Well, you know, I thought about that question, and I had mixed emotions about it. And I wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question." (7RT 1164-1165.)

J.W. stated that he had indicated his philosophical opinion on the death penalty was "neutral" (see 8CT 1993), "Because I was undecided." The trial court asked if he was undecided about whether he believes in the death penalty, J.W. added, "Well, in some of the cases I – I think a life sentence would be more – more to the liking on my side rather than the death penalty." The court asked, "So you think instead of like an eye for an eye, you commit murder, you should be executed, you think the opposite? Even if you commit a murder, you should get life without parole?" J.W. responded, "Right." (7RT 1165-1166.)

The trial court questioned J.W. about his questionnaire statements that he felt obligated to follow the view of his religious organization regarding the death penalty, namely that "Only God has the right." J.W. answered, "Well, at the time I answered that question, I had my mind fixed, but as it turns out, if I were in the same predicament, I would want – I would want to be tried fairly so that, you know - - ." (7RT 1167.) He explained that if he were on trial, "I would want him [a juror] to judge me fairly." He added, "If it's a death penalty, I deserve to have a death penalty, but if there's some circumstances in there that says, well, maybe I wasn't totally within

my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway." (7RT 1167.)

In voir dire by the defense, J.W. repeatedly stated – or agreed with defense counsel's suggestions – that he could be fair and open-minded in both phases of trial. (7RT 1168-1172 ,1175.)

In voir dire by the People, the prosecutor questioned J.W. about his questionnaire statement that only God has the right to impose the death penalty. (7RT 1175-1176.) When asked whether, in light of that view, he can serve as a juror in this case, J.W. responded:

> Now that I think of it, yeah, I could. We'll all be judged some time, and we'll be judged. . . . At some time in our life or after life, we'll all be judged, so if I make – if I make a mistake now, I would be judged for it, but I will be forgiven. Okay? [¶] So now if I – if I said yes, I can abide by the death penalty and then again I could say yes parole without the or – I could honestly make an honest judgment at that time knowing that what I say I may be forgiven for, whether I make the wrong choice or not.

(7RT 1176.) But J.W. acknowledged that while deliberating in the jury room, he would be concerned about whether he was going to be forgiven. (7RT 1176.) Responding to a hypothetical by the prosecutor, J.W. said that he would be able to render a death verdict even if appellant's family and children were in the courtroom. (7RT 1177.)

At sidebar, the People moved to excuse J.W. for cause. The prosecutor argued that although J.W. said on voir dire that he thinks he can serve fairly, he indicated in his written paperwork that he could never do so. (7RT 1178.) The prosecutor said, "I feel like this juror, the way he's answering questions was trying to – trying to actually get on this jury and answer how he thought would keep him on. [¶] That's the impression that I got from this juror, and I'll submit." (7RT 1179.) Defense counsel

suggested that J.W., like other prospective jurors, had changed his mind regarding his questionnaire responses, and that he had now "passed the test" by affirming that he could be fair and could return a death verdict. (7RT 1179.) The court granted the motion to excuse J.W. for cause, explaining:

> The problem is he lists in the wind. He's got in the questionnaire as far as the penalty is concerned "an eye for an eye," which would suggest you commit the crime of murder, you are to be executed. [¶] On the other side, he says only God can take a life. Then I've tried to clarify which it is, one extreme or the other, and he has not made it clear which one it is. [¶] His statement that he can be fair isn't the final conclusion. [¶] He also is so inexact in his answers. When he says to the question, "Can you set aside sympathy, bias or prejudice, you need to be honest," and I asked him what the heck that means, and he doesn't give a valid answer to any of these questions. [¶] I think he's disqualified both on the general circumstances of the answers that he's given and on his penalty phase answers, and I will allow the challenge.

(7RT 1179-1180.)

C. Substantial Evidence Supported The Trial Court's Finding That J.W. Was Disqualified To Serve On The Jury

The Sixth and Fourteenth Amendments guarantee a state criminal defendant the right to a fair trial, which includes the right to be tried by a panel of "impartial 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751].) Applying this rule to capital trials, the United States Supreme Court has held that prospective jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its

infliction." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-523 [88 S.Ct. 1770, 20 L.Ed.2d 776].) On the other hand, the State has a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." (*Wainwright v. Witt* (1985) 469 U.S. 412, 416 [105 S.Ct. 844, 83 L.Ed.2d 841]; accord, *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["[T]he State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes"].)

A prospective juror whose views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" may be dismissed for cause. (*Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581]; accord, *Gray v. Mississippi* (1987) 481 U.S. 648, 657-58 [107 S. Ct. 2045, 2046, 95 L. Ed. 2d 622]; *Witt, supra*, 469 U.S. at p. 424, quoting *Adams* in reaffirmation; *People v. Williams* (2013) 58 Cal.4th 197, 276; *People v. Duenas* (2012) 55 Cal.4th 1, 10.) The prospective juror's bias against the death penalty need not be proven with "unmistakable clarity;" instead, an excusal may be warranted if the trial court "'is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.'" (*People v. Gray* (2005) 37 Cal.4th 168, 192, quoting *People v. Jones* (2003) 29 Cal.4th 1229, 1246-1247.) The dismissal of such a prospective juror comports with constitutional guarantees. (See *People v. Edwards* (2013) 57 Cal.4th 658, 752; *People v. Friend* (2009) 47 Cal.4th 1, 56.)

It is the trial judge's duty to determine whether a party's challenge to a prospective juror for cause is proper. (*Witt, supra*, 469 U.S. at pp. 423-424.) "When the prospective juror's answers on voir dire are conflicting or

equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence." (*Duenas*, *supra*, 55 Cal.4th at p. 10, citing *People v. Wilson* (2008) 44 Cal.4th 758, 779, and *Witt*, *supra*, at p. 424; accord, *Uttecht*, *supra*, 551 U.S. at p. 9 ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."]; *Edwards*, *supra*, 57 Cal.4th at p. 752 ["'On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous'"].)

Here, substantial evidence supported the trial court's finding that J.W. was unable to serve as a juror in this case. J.W. indicated in his questionnaire responses that he would refuse to convict a defendant in the guilt phase, regardless of the evidence, in order to avoid a penalty phase (8CT 1993), that he felt obligated to accept the view of his religious organization that "only God has the right" to impose death (8CT 1995), and that he could not see himself, even in an appropriate case, rejecting life imprisonment without the possibility of parole and instead choosing the death penalty (8CT 1996). He further indicated that he could not set aside sympathy, bias, or prejudice toward a victim, witness or defendant, because "You need to be honest;" that he would not consider the prior testimony of an unavailable witness read to the jury in the courtroom (which, here, would be a major portion of the People's case regarding the Armenta murder); that although instructed that the testimony of a single witness is sufficient if believed, he would require more proof, even if he believed the

witness; and that he would fail to report to the court a juror who refuses to deliberate . (8CT 1989, 1996, 1998.)[49]

Although other responses in J.W.'s questionnaire conflicted or appeared to conflict with some of those statements (e.g., 8CT 1990 [he would not automatically reject the testimony of an unavailable witness], 1993 [he would neither always vote for nor always vote against the death penalty], 1996 [he "strongly disagree[d]" with the statement that a person who intentionally kills should never get the death penalty]), *id.* ["an eye for an eye"]), it was the province of the trial court to resolve those conflicts. (*Duenas*, *supra*, 55 Cal.4th at p. 10; *People v. Clark* (2012) 52 Cal.4th 856, 895; *People v. Weaver* (2001) 26 Cal.4th 876, 910 ["A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause."].) In fact, on voir dire, J.W. explained that his questionnaire statement, "an eye for an eye," was not intended to convey staunch, automatic support for the death penalty. To the contrary, he *claimed* he meant that he doubted his ability to vote for

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[49] Although appellant focuses only on J.W.'s questionnaire and voir dire responses specifically pertaining to the death penalty, there is no reason to so limit the analysis. Even in a capital case, a juror may be validly disqualified from serving in a criminal trial for reasons having nothing to do with the death penalty. (*People v. Clark* (2011) 52 Cal.4th 856, 901 ["To the extent defendant suggests that a court may not properly excuse a prospective juror for cause in a capital case for reasons other than his or her unyielding support for, or opposition to, the death penalty, he is wrong. A juror whose personal views on any topic render him or her unable to follow jury instructions or to fulfill the juror's oath is unqualified."].) Here, the trial judge expressly found that J.W. was "disqualified *both* on the *general circumstances* of the answers that he's given *and* on his penalty phase answers." (7RT 1180, italics added.) Moreover, it is proper to look at the entirety of a juror's voir dire in assessing the credibility of his or her responses.

a death sentence. Given his "mixed emotions," he "wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question." (7RT 1164-1165.) J.W. agreed with the proposition that "Even if you commit a murder, you should get life without parole?" (7RT 1165-1166.)

Although J.W. stated orally on voir dire that he could be a fair juror, and that he was willing to vote for the death penalty if appropriate (7RT 1166, 1168-1171, 1177-1178), the trial judge, who was in the best position to observe J.W.'s demeanor was not required to believe those statements. (*People v. Bryant* (2014) 60 Cal.4th 335, 401-402; *Clark*, *supra*, 52 Cal.4th at p. 895.) In *Bryant*, as here, a prospective juror indicated in her questionnaire responses that she was opposed to the death penalty for religious reasons because "no one has the right to take a life." Her questionnaire responses further stated that she would automatically vote for a life sentence regardless of the evidence. Like J.W., the *Bryant* juror contradicted some of those statements on voir dire, claiming that she had modified her views in light of the trial judge's explanation of the law, and that she would fairly perform her duties and could vote for the death penalty if required, following her "civic duty." (*Bryant, supra*, 60 Cal.4th at p. 401.) This Court deferred to the trial court's finding that the juror's voir dire statements were "simply incredible," and held that the court validly dismissed the juror for cause. "The fact that the prospective juror at times claimed she believed she could perform her duties as a juror 'did not prevent the trial court from finding, on the entire record, that [she] nevertheless held views . . . that substantially impaired her ability to serve.'" (*Id.* at p. 402, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 561; see also *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1284-1285 [trial court properly dismissed for cause a prospective juror who gave

"conflicting and confusing responses," notwithstanding her voir dire statements that she could be objective and consider the death penalty].)

Likewise here, the trial court was not obligated to believe J.W.'s voir dire statements that he could be fair to the prosecution. As the trial court validly noted, "His statement that he can be fair isn't the final conclusion." (7RT 1180.) The prosecutor observed that, "the way he's answering the questions" gave her the impression that J.W. was merely saying whatever he believed he needed to say in order to get onto the jury. (7RT 1179.) The trial judge apparently had the same impression, commenting that "The problem is, he lists in the wind," signifying that the juror tended to shift and lean in the direction of the prevailing current and therefore was not credible. (7RT 1179.) As the trial judge further observed (7RT 1180), J.W. gave no satisfactory explanation for his questionnaire statement that he could not set aside sympathy, bias, or prejudice. (See 8CT 1989.) Instead, he gave only "inexact," confusing and non-sequitur responses to the court's inquiry in that regard. (7RT 1160-1161.) Accordingly, there was a rational basis for the trial court to discredit J.W.'s voir dire statements.

Appellant argues that J.W. "made clear on voir dire that he could vote for death if he believed it to be the appropriate penalty." (AOB 119.) But that argument is predicated upon the assumption that this Court must accept J.W.'s voir dire statements uncritically. To the contrary, as noted, this Court has held that a trial court is entitled to discredit a juror's voir dire statements, and that this Court will defer to the trial court's judgment. (*Bryant, supra*, 60 Cal.4th at p. 401; *Griffin, supra,* 33 Cal.4th at p. 561.)

Observing that "[t]his Court frequently relies on prospective jurors' concluding answers in determining whether they were qualified to serve," appellant argues that prospective jurors tend to "crystalize" their views on the death penalty and their ability to serve only after undergoing voir dire. (AOB 121-122, & fn. 45.) But by the same token, while undergoing voir

dire, prospective jurors are likely to become more sophisticated regarding the "right answers" necessary to remain on (or be dismissed from) the jury. This Court has never held that trial courts are obligated to credit a prospective juror's "concluding" voir dire answers over his or her earlier answers or questionnaire responses.

Appellant argues that J.W.'s excusal "was not based on demeanor," and that no deference should therefore be given to the trial court's decision. (AOB 131.) Appellant apparently assumes that a trial court must expressly state that its decision is based on demeanor (see AOB 123) in order to warrant deference to the court's findings. There is no basis for appellant's assumption. Evaluation of a juror's demeanor is inherent in the voir dire process, as it is in the examination of any person under oath, and it would be nonsensical to assume the trial court merely accepted J.W.'s confusing and conflicting voir dire statements at face value without judging his credibility. In any event, the court's comments that J.W. "lists in the wind," that he failed to provide clear responses, and that he "is so inexact in his answers," strongly suggest the court considered the juror's demeanor in evaluating his credibility.

Appellant further claims there was no basis for the trial court's opinion that J.W. was "so inexact in his answers." (AOB 129; see 7RT 1180.) To the contrary, J.W. displayed a pattern of circuitous, non-responsive answers to several of the court's voir dire questions. In the written questionnaire, he indicated that his son was a *victim* of a crime. Regarding "What happened?", he stated, "90 days in jail." (8CT 1983.) Following up on this on voir dire, the trial court asked J.W., "Who went to jail for 90 days?" J.W. inexplicably answered, "Yes." The trial court had to question the juror again to learn that it was actually his son who went to jail for the incident. (7RT 1160.) The trial court later sought to clarify J.W.'s questionnaire statement that he could not set aside any sympathy,

bias, or prejudice toward the victim, witnesses, or defendant, because "You need to be honest." (See 8CT 1989.) When asked what he meant by that, J.W. gave another oblique answer: "Oh, probably because of the circumstances as to how the trial is going to be run, whether, you know, if I try to set myself aside and say, okay, I think he's not guilty or he is guilty. [¶] I would have to have a little bit more information as far as what I need to say or what I need to do." The court followed up, explaining that a juror is required to make a decision based on the evidence rather than "emotional feelings like sympathy, bias or prejudice," and asked J.W., "Can you make a decision that way?", to which J.W. answered, "Yes." (7RT 1160-1161.)

Regarding his written questionnaire response that "Only God has the right." (see 8CT 1995), the court asked J.W., "Is it your view that only God has the right to impose the death penalty?" J.W. gave yet another non-sequitur answer: "Well, at the time I answered that question, I had my mind fixed, but as it turns out, if I were in the same predicament, I would want – I would want to be tried fairly so that, you know – ." The court asked him to repeat that, and J.W. stated, "If I were in the same predicament, I would want to be tried fairly." (7RT 1166-1167.) Apparently puzzled about what being "tried fairly" had to do with the question the court had asked, the court posed multiple follow-up questions regarding what J.W. meant by his response, but J.W. gave the following, similarly unhelpful answers: "Well, if I was facing the same predicament and there was someone in the jury, I would want him to judge me fairly;" and "If it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, well, maybe I wasn't totally within my own faculty, you know when I did something, then I'm sorry I did it, but I did it anyway." (7RT 1167.) J.W. likewise gave the court a roundabout, imprecise explanation of the "eye for an eye" statement in his written questionnaire. (7RT 1164-1165; see 8CT 1992.)

Finally, appellant argues that the trial court conducted inadequate voir dire of J.W. before finding him disqualified. Specifically, he claims that the court should have asked clarifying, follow-up questions when J.W. stated that, in some cases, a life sentence would be "more to the liking on my side rather than the death penalty" (7RT 1165-1166), and that in some circumstances, a defendant may not have been "totally within [his] own faculty" (7RT 1167.) But as discussed above, the trial court did make several, unsuccessful efforts to elicit clearer answers from J.W. before turning voir dire over to the attorneys. A trial court is not required to persist in a quixotic quest for "unmistakable clarity" when a prospective juror simply cannot or *will not* give straightforward answers. As the United States Supreme Court has explained:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: *many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"*; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Footnote omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Witt, supra*, 469 U.S. at pp. 424-426, italics added.)

J.W.'s written questionnaire responses, viewed in light of his answers and demeanor on voir dire, provided substantial evidence for the court's finding that J.W. was disqualified to serve as a juror in this case – i.e., that

his "views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Gray, supra,* 481 U.S. at pp. 657-658; *Witt, supra*, 469 U.S. at p. 424, *Adams, supra,* 448 U.S. at p. 45; *Williams, supra,* 58 Cal.4th at p. 276; *Duenas*, 55 Cal.4th at p. 10.) This Court should therefore reject appellant's claim of error.[50]

II. EVIDENCE OF APPELLANT'S UNCHARGED ACTS OF MISCONDUCT IN JAIL WAS RELEVANT AND PROPERLY ADMITTED

Appellant contends that the trial court erred in the guilt phase by permitting the People to present evidence of various acts of uncharged misconduct that he committed in jail. Specifically, he challenges the admission of evidence of the following: (1) appellant's December 19, 2003, escape attempt, including his robbery of another inmate to obtain his wristband; (2) appellant's March 13, 2003, possession of a shank in jail; (3) appellant's July 13, 2004, possession of a razor and a syringe; (4) appellant's failure to wear his wristband on October 13 and November 5, 2004; (5) appellant's June 17, 2005, possession of an altered paperclip; (6) appellant's July 30, 2005 escape from a locked shower stall; and (7) appellant's letters and phone calls to Limas. Appellant claims that this evidence should have been excluded as irrelevant, as unduly inflammatory under Evidence Code section 353, and as improper propensity evidence under Evidence Code section 1101. He further argues that the admission of the evidence violated his Fourteenth Amendment rights to due process and

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[50] Should this Court find J.W. was erroneously excused for cause, reversal would be required only regarding the death sentences, not appellant's convictions of first degree murder or the special circumstance findings. (*People v. Stewart* (2004) 33 Cal.4th 425, 455 [erroneous excusal of juror under *Witt* does not require reversal of the guilt judgment or special circumstance finding]; *People v. Heard* (2003) 31 Cal.4th 946, 966.)

a fair trial and his Eighth Amendment right to a reliable determination of guilt in a capital case. (AOB 133-176.) These contentions are meritless. Furthermore, appellant's contention regarding evidence of his communications with Limas has been forfeited.

A. Trial Court Proceedings and Ruling

Before the second trial, the People filed a motion to permit evidence of uncharged acts under Evidence Code section 1101, subdivision (b). The motion encompassed each of the incidents listed above,[51] except for the Limas correspondence and telephone calls.[52] (5CT 1127-1135.) The People asserted that the evidence was relevant and admissible to show appellant's "knowledge of the inner-workings of the jail, and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another, in order to commit the murder." (CT 1128, 1131-1132; see 4RT 732-735.) The People further argued that evidence of the 2013 escape attempt corroborated appellant's identity as the person who made incriminating statements to Limas about trying to find a snitch named "Raul" in jail. In those statements the speaker also described the escape attempt. (CT 1128, 1132-1133; 4RT 735-737.)

In a motion in limine, appellant sought to exclude the same evidence under Evidence Code sections 1101 and 352, arguing that the incidents had

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[51] The People's written motion described the contraband found on July 13, 2004 as "shank weapons." (5CT 1128.) Based on the prosecutor's oral argument on the motion, this apparently referred to the razor and the syringe found in appellant's cell on that date. (4RT 734, 737.)

[52] As discussed *post*, appellant's communications with Limas cannot properly be characterized as "section 1101, subdivision (b) evidence" as they were not evidence of appellant's character or of uncharged crimes or bad acts. Hence, the People had no reason to include them in the pre-trial motion.

no tendency to establish intent, common plan or scheme, or identity, and that any probative value of the evidence was outweighed by the danger of undue prejudice. (5CT 1148-1157; 4RT 731-732, 738-739.)

The trial court ruled that the proffered evidence of each of the incidents was admissible. (4RT 739-741.) The court explained:

> I do think that the prosecution's description at the beginning of page 2 is an accurate way of analyzing it. They seek to introduce evidence – into evidence a number of the defendant's actions while incarcerated in Men's Central Jail to show his knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder. [¶.] So I will allow that evidence, with the exception of the jailhouse liquor. [[53]] [¶] . . . But as far as the events that occurred even after April 20, 2004, I think they are probative on the issue of his knowledge, his sophistication, the ability to move around the jail and to do what was necessary to elude the authorities there. [¶] It is a very illuminating description of how this can be done, not just how somebody else can do it but how this defendant did that. [¶] And I totally agree that the lay person is going to think that if you're locked into a jail cell, that's the end of it, you don't get out of that cell, you don't get into someone else's cell that's locked down, just not a possibility. They have to explain how that could happen, and this does explain that. [¶] So except for the jailhouse made liquor,

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[53] The People had also sought admission of evidence that appellant possessed jail-made liquor on July 13, 2004. (5CT 1128.) That request was denied as to the guilt phase (4RT 740), but the People were later permitted to present that evidence in the penalty phase (23RT 4001-4002, 4036-4037), a ruling which appellant does not challenge on appeal.

People's request is granted and the objections are overruled. [¶] Whether it's 1101(b), we're still talking about the method, motive and opportunity to move around that jail freely, and he did that even after the homicide in this case, so it tends to suggest, though less persuasively, that it occurred before the homicide.

(4RT 739-741.)

During trial, just before Deputy Aaron Dominguez testified about the shank found in appellant's cell in March 13, 2003, the court admonished the jury that Deputy Dominguez's testimony, and that of Deputy Milliner (who had previously testified about finding appellant not wearing his wristband on October 13, 2004), regarding "things that occur in the jail, they're offered only to show the defendant's knowledge of operations of the jails and the limitations placed on inmates, not to show that he's a person of bad character." The court added, "And there may be others as well on this general subject. Yes. It's all limited to showing Mr. Pineda's knowledge of the operation of the jail and the limitations placed on inmates." (15RT 2640-2641.)

Later, just before Deputy Juan Rivera testified about the syringe and razor found in appellant's cell on July 13, 2004, the trial prosecutor informed the court in the presence of the jury that "with regards to Deputy McCarty and Deputy Saucedo[54] as well as Rivera and the next witness Musharbush, they would be the witnesses that the court needed to give the limiting instruction on of knowledge of the jail system." (16RT 2794.)

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[54] Deputy McCarty had recently testified about appellant's December 19, 2003, escape attempt. Deputy Saucedo had testified about appellant's November 5, 2004, failure to wear his wristband, and the June 17, 2005, discovery of an altered paperclip in appellant's cell. Deputy Musharbush would later give additional testimony about the altered paperclip found in appellant's cell.

The court told the jury, "All right. Obviously we're going through a number of incidents that don't relate specifically to the homicides charged in counts 1 and count 2. This goes to the knowledge of Mr. Pineda of the jail rules and any incidents involving the ability to circumvent those rules." (16RT 2794-2795.)

During the guilt phase jury instructions, the court instructed the jury as follows:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(5CT 1260-1261; CALJIC No. 2.09.)

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. [¶] You are not permitted to consider such evidence for any other purpose.

(5CT 1263; 21 RT 3617-3618; CALJIC No. 2.50, modified; see 20RT 3491-3493 [discussion and agreement upon the wording of this instruction].)

Within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence[55] that a defendant committed crimes other than those for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crimes. [¶] If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

(5CT 1263; RT 3618-3619; CALJIC No. 2.50.1.)

B. Under Evidence Code Section 1101, Subdivision (b), Evidence Of Uncharged Acts Is Admissible To Show Knowledge and Opportunity

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Brady* (2010) 50 Cal.4th 547, 558.) In general, "all relevant evidence is admissible" unless excluded by law. (Evid. Code, § 351; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Relevant evidence is evidence tending in reason to prove or disprove any disputed fact that is of consequence to the instant case. (Evid. Code, § 210; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

Evidence Code section 1101, subdivision (a), "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th

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[55] The jury was instructed on the meaning of "preponderance of the evidence." (5CT 1235; RT 3619; CALJIC No. 2.50.2.)

380, 393.) However, "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 motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); *Ewoldt, supra*, at p. 393.)

Upon a finding that proffered evidence of uncharged conduct is relevant and probative of a material fact other than disposition to commit the charged offense, the trial court must apply Evidence Code section 352 to determine whether the probative value of the evidence is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Rogers, supra,* 57 Cal.4th at p. 326; *Ewoldt, supra,* 7 Cal.4th at p. 404.) Unless these dangers *substantially outweigh* the probative value, an objection under section 352 must be overruled. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 ["'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].'"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

A trial court's rulings under Evidence Code sections 1101 and 352, including those made at the guilt phase of a capital trial, are reviewed for abuse of discretion. (*Rogers, supra,* 57 Cal.4th at p. 326; *People v. Mungia* (2008) 44 Cal.4th 1101, 1130.) "'Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.) As discussed below, the trial court did not abuse its discretion, nor violate appellant's

constitutional rights, in admitting the evidence of appellant's uncharged misconduct in jail.

C. Appellant's Escape Attempt—In Which He Used A Stolen Wristband To Get Out Of His Module, Through The Inmate Reception Center, And Onto A Bus—Was Highly Relevant To His Knowledge And Ability To Move Throughout The Jail, And Thus His Opportunity To Murder Tinajero.

Appellant contends that the trial court erred by admitting evidence of his 2003 escape attempt because it supposedly "had no probative value." (AOB 158-159.) That claim is plainly meritless.

As noted in the Statement of Facts, the People presented evidence at trial that on December 19, 2003, appellant robbed fellow inmate Montalban of his identification wristband by threatening to assault Montalban or to have him "regulated." Appellant used the wristband to enter an inmate-transfer line in Montalban's place, leave the module and the floor, undergo processing through the Inmate Reception Center, and board a bus to the West Hollywood sheriff's station where Montalban was to serve as a trusty. (15RT 2699-2708.) A few hours later, appellant, still wearing Montalban's wristband and carrying Montalban's transport pass, was returned by bus from West Hollywood to the Inmate Reception Center as a "trusty roll up" to be disciplined. (16RT 2774-2782.)[56]

Contrary to appellant's claim, this evidence was highly relevant to demonstrate appellant's knowledge and ability to use a ruse to move

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[56] Although not revealed to the jury, appellant was charged in in Los Angeles County Superior Court Case No. BA260961 with the December 19, 2003 attempted escape from custody and with other charges related to his July 13, 2004 possession of the razor and syringe . (See 4CT 752, 763, 768.) The People's motion for joinder of Case No. BA260961 with the current case was denied. (4CT 850; 2RT 4.) Some time before the second trial, appellant pleaded guilty to the attempted escape. (3RT 480-481.)

through checkpoints from one secure area of the jail to another. This, in turn, supported the conclusion that appellant had the opportunity to gain access to Tinajero's cell and murder Tinajero, nothwithstanding that Tinajero was housed on a different floor pursuant to a "keepaway" order. The nearly successful escape attempt also illustrated serious security lapses at the jail, and, most importantly, appellant's knowledge of how to take advantage of them.

As the trial court correctly surmised, one key task for the prosecution at trial was explaining to the jury how appellant could have gotten into Tinajero's cell to commit the second murder. Appellant was housed in a locked cell within a locked module on a different floor from Tinajero, who was likewise housed in a locked cell within a locked module. Moreover, the sheriff's department had been ordered to keep appellant away from Tinajero. (12RT 2033-2034; 16RT 2756.) Evidence demonstrating appellant's "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4RT 740) was therefore highly relevant and probative.

In fact, the defense highlighted this issue from the outset of trial when defense counsel declared in his opening statement:

> The prosecution is going to ask you to believe that a high school dropout outsmarted the entire Sheriff's Department, was able to go into a locked cell with five other inmates, four other inmates, five inmates and kill one of them and nothing was done and nothing occurred. That's a bit much.

(9RT 1510.) The evidence of the attempted escape, and all of the other evidence of appellant's jail conduct at issue, was relevant to rebut this aspect of the defense theory by showing the jury how this particular "high

school dropout" was indeed able to outsmart the security system of Men's Central Jail, enter the locked cell, and kill Tinajero.

Appellant ultimately admitted in his testimony that he entered Tinajero's cell on the day of the murder. (19RT 3271, 3354.) He further admitted that he took advantage of an inmate court call that day to leave his cell and floor, go to the holding area for court-bound inmates, and make his way to Tinajero's floor and cell. (19RT 3338-3340, 3354-3355.) But as the defense opening statement illustrates, the prosecutor could not have anticipated those testimonial admissions before the defense presented its case.[57] In fact, the defense opening statement strongly hinted at a theory that Tinajero's cellmates, who had obvious access to the victim without having to pass through any barriers, were the actual killers. (9RT 1509.) To rebut that theory, it was essential for the People to prove that appellant had the knowledge and opportunity to find and enter Tinajero's cell.

Appellant argues that the escape attempt was not sufficiently similar to the circumstances of Tinajero's murder to be admissible under Evidence Code section 1101, subdivision (b). (AOB 158-159.) This Court has frequently addressed the varying degrees of similarity between the charged crime and the uncharged acts required for admissibility under Evidence Code section 1102, subdivision (b), to prove intent, common design or plan, and identity. (*Foster, supra,* 50 Cal.4th at p. 1328; *Ewoldt, supra,* 7 Cal.4th at p. 402; *People v. Robbins* (1988) 45 Cal.3d 867, 879.)[58]

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[57] In light of appellant's testimonial admissions, it is not surprising that, as appellant notes, the prosecutor did not emphasize the "other-acts" evidence in her guilt phase arguments to the jury. (AOB 171.)

[58] The least degree of similarity is required to prove intent; the charged and uncharged conduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*Rogers, supra,* 57 Cal.4th at p. 326; *Ewoldt, supra,* 7 Cal.4th at p. 402; *Robbins, supra,* 45 Cal.3d at p. 879.) "A greater degree of

(continued...)

However, neither respondent nor appellant (see AOB 155) is aware of any decision by this Court specifically applying a similarity requirement to evidence offered under section 1101, subdivision (b), to show *opportunity* or *knowledge*. (See *People v. Hendrix* (2013) 214 Cal.App.4th 216, 241 ["[W]e find no California case that discusses whether similarity is required to prove knowledge, and if so, what degree of similarity is required.".)

According to the Third Appellate District, "Whether similarity is required to prove knowledge and the degree of similarity required *depends on the specific knowledge at issue* and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*Hendrix, supra,* 214 Cal.App.4th at p. 241, italics added.) In *Hendrix*, in which the defendant was convicted of using force or violence to resist a police officer in the performance of his duties (Pen. Code, § 69), the "specific knowledge at issue" was the fact that the victim was a police officer rather than a private security guard. (*Id.* at pp. 221, 223-224.) For *that* purpose, and under the specific facts of that case, the appellate court held that the "probative value *in the context of the evidence in this case* turns on the similarity of the prior incidents." (*Id.* at pp. 239, 242, italics added.)

Hendrix held that the defendant's prior acts of resisting officers were not sufficiently similar to warrant admission under Evidence Code section

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(...continued)
similarity is required to prove a common design or plan. . . . [Such] evidence of uncharged conduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" (*Ewoldt, supra,* 7 Cal.4th at p. 402.) "The greatest degree of similarity is required to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*Id.* at p. 403.)

1101, subdivision (b). The court explained, "[T]o establish knowledge when that element *is akin to absence of mistake*, the uncharged events must be sufficiently similar to the circumstances of the charged offense to support the inference that what defendant learned from the prior experience provided the relevant knowledge in the current offense." (*Hendrix, supra,* 214 Cal.App.4th at pp. 242-243, italics added.) Nevertheless, *Hendrix* observed that in other contexts in which section 1101, subdivision (b) evidence is offered to prove knowledge, "other crimes evidence may be admissible even though similar only in a general way . . . ." (*Id.* at p. 241.)

Here, the "specific knowledge at issue"—the lapses in security that would enable an inmate to use another inmate's identity or pass to get out of one's own module and floor, the manner in which inmates proceed to the Inmate Reception Center and ultimately back to the housing modules, and the feasibility of going from the Inmate Reception Center to a different floor—did not depend upon a high degree of similarity between the escape attempt and the murder. Unlike in *Hendrix*, that knowledge was not "akin to absence of mistake" but instead pertained to appellant's *ability* to carry out the crime. The evidence was not offered to prove that appellant knew the nature and consequences of his conduct when he killed Tinajero, but rather to demonstrate that he knew how to evade security measures and move between floors and modules of the jail, and thus had the *opportunity* to commit the murder.[59] As such, the probative value of the evidence did

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[59] In that respect, the People's "knowledge" theory of admissibility can perhaps more accurately be described as "opportunity," a theory which the People likewise asserted and which the trial court adopted. (5CT 1128, 1131; 4RT 735, 740-741.) Although the word "opportunity" did not appear in the trial court's limiting instruction to the jury, that concept was fairly encompassed by the charge that the jury may consider the evidence to show "knowledge of jail procedures and rules as well as methods to overcome them." (5CT 1263; 21 RT 3618.)

not turn on the degree of similarity between the escape attempt and the murder.

In any event, the two events did share important common features. In both events, appellant took advantage of an inmate movement—a court line or an inmate transfer call—to leave his module and travel to another area where he was not permitted to be. (12RT 2154; 13RT 2293, 2350-2352, 2354, 2357; 14RT 2411-2412, 2494; 15RT 2699, 2701; 17RT 3000-3003.)[60] In both incidents, appellant accomplished this by obtaining another inmate's virtual "bus ticket"—by stealing a wristband or by borrowing a court pass. (15RT 2623, 2699-2700; 16 RT 2781; 17RT 3044-3045; 19RT 3338-3340.) In both incidents, appellant passed through the Inmate Reception Center. (15RT 2620-2622; 16RT 2774-2775.) The latter fact is particularly important because on his return from the escape attempt, appellant would have been in a position to observe how feasible it would be to go from the Inmate Reception Center to a floor or module other than his own.

In addition to opportunity and knowledge, the escape attempt was also relevant to corroborate Limas's testimony regarding appellant's correspondence and telephone conversations with her. In those conversations, a jail inmate named "Santi" and nicknamed "Chingon" told Limas that he needed to get in touch with a "clown" named Raul [Tinajero's first name] who was testifying against him. "Santi" asked Limas to look up information on-line for him regarding where Raul was

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[60] On the day of the Tinajero murder, appellant did this *twice*. Before the murder, he took advantage of a court call to leave his floor and go to the Inmate Reception Center en route to Tinajero's floor and cell. (14RT 2492-2494; 17RT 3000-3001, 3044-3045; 19RT 3338-3340.) After the murder, he used an inmate transfer call as his opportunity to leave Tinajero's cell. (12RT 2154; 13RT 2293, 2350-2352; 14RT 2411-2412, 17RT 3002-3003, 3049.)

housed in the county jail system. "Santi" later told Limas that he was able to get that information from a "homie." (14RT 2470-2471, 2485.) In at least one of those conversations, "Santi" also told Limas that he once took a wristband from another inmate and used it to attempt to escape. (14RT 2472.) Limas could not be asked to identify appellant in court as the caller because she had never met appellant in person. (14RT 2472.) Montalban's testimony, independently confirming that appellant had committed just such an escape attempt, tended to establish appellant's identity as the "Santi" who made the incriminating admissions regarding "Raul" to Limas by telephone. Although appellant later admitted in his testimony that he had sent letters and made telephone calls to Limas (19RT 3352-3353), the prosecutor could not have anticipated that concession before appellant testified.

Finally, the probative value of the evidence was not "substantially outweighed" by dangers of undue prejudice within the meaning of Evidence Code section 352.[61] Again, the probative value of the evidence was strong, as it demonstrated appellant's ability to take advantage of security lapses and move in and out of supposedly secure places in the jail, an important issue for the People's case. It also corroborated Limas's

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[61] A trial court's weighing of the probative value of evidence against the dangers of undue prejudice under Evidence Code section 352 may be inferred from the record even in the absence of an express statement by the trial court. (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) Here, the trial court expressly referred to section 352 as the basis for excluding one item of evidence proffered in the People's motion, appellant's possession of jail-made liquor. (4RT 740.) It can therefore be inferred that the court considered and rejected appellant's section 352 objection regarding the other items. (*People v. Harris* (2013) 57 Cal.4th 804, 845 [from trial court's exclusion of some of the evidence as unduly prejudicial it can be inferred that the court performed a section 352 analysis regarding the admitted items of evidence].)

testimony about appellant's efforts to find Tinajero. Although the escape attempt involved threats of violence, it was not inflammatory when compared with the gruesome details of the Armenta and Tinajero murders. (See *People v. Jones* (2011) 51 Cal.4th 346, 371 [The uncharged "robbery was not particularly inflammatory when compared with the horrendous facts of the charged crimes."]; *People v. Lindberg* (2008) 45 Cal.4th 1, 25 ["[N]one of the uncharged conduct was particularly inflammatory compared to the manner in which defendant brutally murdered Ly|by stomping on his head, repeatedly stabbing him, and slicing the veins in his neck."]; *Ewoldt, supra,* 7 Cal.4th at p. 405 [potential for prejudice was *decreased* where evidence "describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses"].) The trial court did not abuse its discretion in admitting the evidence.

D. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Of Appellant's Possession of A Shank, A Syringe, A Razor, And An Altered Paperclip Which Could Be Used To Pick Handcuff Locks.

Appellant contends that the trial court erred by admitting evidence that, at various times before and after the Tinajero murder, he was found in possession of shanks, a syringe, a razor, and an altered paperclip. (AOB 160-161.) Respondent disagrees.

At trial, sheriff's deputies testified to the following. On March 13, 2003, during a search of the cell which appellant shared with five or six other inmates, deputies found a shank made from a piece of metal bar with one end sharpened to a point. The shank was found inside a green canvas bag on appellant's bunk that also held appellant's letters and belongings. (15RT 2641-2647.) In a search of appellant's one-man cell in the high power module on July 13, 2004, deputies found a needle syringe and a

razor blade which had been removed from a razor, both of which could be used as weapons. (16RT 2796-2804, 2807, 2827-2828.) On June 17, 2005, while appellant was away from his cell for a shower, deputies searched his cell and found an altered paperclip which could be used to unlock handcuffs. (15RT 2656-2657; 16RT 2789-2793.)

The trial court did not abuse its discretion by admitting this evidence under Evidence Code section 1101, subdivision (b). As the People stated in their written motion, "The defendant's opportunity to get around jail rules, regulations, and security is highlighted by his ability to obtain weapons even when housed as a K-10 high security inmate. [¶] The evidence that the People wish to admit shows that the defendant was able to illicitly obtain weapons, though he was housed alone, and escorted everywhere in the jail facility by a guard." (5CT 1132.) Appellant's possession of contraband, even while under the highest level of security, demonstrated that "he was himself well-versed in 'prison culture' and was most likely in contact with others who would give the defendant information on how to 'work the jail system.'" (5CT 1132.) As the prosecutor further argued below, the evidence was relevant because it "shows his overall knowledge and sophistication in the jail system. He's not some nuby [sic: newbie] who just got in the system who doesn't know his way around the jails and who's just sort of there trying to survive." (4RT 732.) The trial court, aptly summarizing the prosecutor's argument, noted,

> I think the essence of the prosecution's position is that it explains the circumstances to the average person that allow them to understand that just because somebody is in jail doesn't mean they're locked inside a cell without the ability to go through the system, move through the system, and in this case also violate the provisions by having weapons, meaning shanks and handcuff keys and changing identity.

(4RT 730.)

Appellant argues that the contraband items at issue, which indisputably were not the murder weapons, had no relevance to appellant's ability to make his way from his own cell to Tinajero's to commit the murder. (AOB 160.) But the problem of moving around the jail, from one module to another and back again, was not the only hurdle appellant had to overcome in order to carry out the murder of Tinajero. Another significant hurdle was the likelihood that appellant would have to commit the murder in front of other inmate-witnesses in a jail environment monitored by sheriff's deputies. The murder therefore required knowledge that appellant could rely on the silence and non-interference of other inmates and the inattentiveness of the deputies. Yet another hurdle appellant faced was learning the location of Tinajero's cell, a task which would require communication and connections within the jail. (See 14RT 2485 [appellant told Limas that he was able to obtain Tinajero's housing information from a "homie"]; 19RT 3340-3341 [appellant testified that he learned Tinajero's cell number from a "kite"].) Evidence that appellant was able to obtain contraband—such as shanks, a syringe, a razor, and an altered paperclip—demonstrated appellant's connections and sophistication regarding the way Men's Central Jail operated—both the "official" administration of the jail by the sheriff's deputies, and the "unofficial" operations of the inmate hierarchy. It was therefore probative of appellant's "knowledge" and "opportunity" within the meaning of Evidence Code section 1101, subdivision (b).[62]

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[62] The fact that some of these incidents occurred after the April 20, 2004, murder of Tinajero did not render the evidence non-probative or inadmissible. (*People v. Balcolm* (1994) 7 Cal.4th 414, 425 ["The circumstance that the uncharged offense occurred after the charged offense does not lessen its relevance in demonstrating a common design or plan."];

(continued...)

Finally, under Evidence Code section 352, the probative value of the evidence was not substantially outweighed by dangers of undue prejudice. Appellant's possession of the contraband at issue was far from inflammatory even in the abstract, and certainly not in comparison with the evidence of how appellant committed the murders. (See *Jones, supra*, 51 Cal.4th at p. 371; *Lindberg, supra*, 45 Cal.4th at p. 25.) The latter evidence showed appellant strangled Armenta and ran over him with two different stolen cars, strangled Tinajero, forced his head in a toilet to drown him, stomped on his chest or neck until it made a cracking or snapping sound, and tied a ligature around his neck. In light of those facts, there was absolutely no danger that the passions of the jury would be inflamed by evidence that appellant possessed at various times an altered paperclip, a syringe, a sharpened piece of metal, and a razor. The trial court did not abuse its discretion in admitting the evidence.

E. Evidence That Appellant Repeatedly Removed His Wristband Was Relevant Both To Appellant's General Knowledge And Ability To Evade Jail Security Rules And To The Circumstances Of The Murder In Which Tinajero's Wristband Was Removed.

Appellant contends that the trial court erred by admitting evidence that he defied jail rules by repeatedly removing his identification wristband. (AOB 161-163.) This claim is without merit.

(...continued)
People v. Taylor (1986) 180 Cal.App.3d 622, 636 ["Nor is it necessary that an uncharged act be prior to the charged offense to be relevant."]; *People v. Williams* (1970) 10 Cal.App.3d 638, 643 ["Evidence of a second crime need not be excluded merely because the second crime occurred after the crime charged."].) Here, the jury could, within reason, infer that because appellant possessed a certain level of knowledge and sophistication regarding the jail system on dates before and after the murder, he possessed it at the time of the murder.

Deputy James Milliner testified that inmates at Men's Central Jail were required to wear wristbands at all times. (15RT 2587.) In early October of 2004, while appellant was housed in the high power module, appellant removed his wristband. Deputy Milliner issued appellant a new one and told him not to do it again. (15RT 2593.) About one week later, on October 13, 2004, Deputy Milliner again saw appellant without his wristband. Appellant told Deputy Milliner that he had removed it. When told that he would be written-up for the offense, appellant responded that he did not care. (15RT 2585-2587, 2590.) Deputy Asael Saucedo testified that on November 5, 2004, when appellant was escorted in handcuffs to the shower, he was again not wearing his wristband. The wristband was found, intact with no cut or scratch marks, on the table in appellant's cell. (16RT 2788-2789.)

The trial court did not err in admitting this evidence. As the prosecutor argued below, "The fact that he's always taking off his wristbands shows that he knows the system. He knows that wristbands identify who you are. If you don't have your wristband on and you're somewhere out in the population, you can tell the deputy you're whoever you want to tell them, and until they can live scan your fingerprints, they're not going to know what – who you are or what – where you're supposed to be." (4RT 733.) Tellingly, the October 13, 2004, incident happened while appellant was among a group of inmates who were scheduled to go to court. (15RT 2586-2587.) By shedding his identity, appellant might have been hoping to blend in with the court-bound inmates, a situation similar to his merging with both a court line and an inmate transfer line on the day of the Tinajero murder.

The fact that appellant was able to slip out of his wristband with apparent ease, leaving the band intact with no cut or scratch marks (16RT 2788-2789), was also particularly relevant to the circumstances of the

murder. Tinajero's body was found without a wristband. (14RT 2527; 15RT 2578.) According to cellmate Palacol, the murderer removed Tinajero's wristband and flushed it down the toilet. (14RT 2403, 2450-2451.) Appellant was evidently conscious of the importance of wristbands in the jail system and understood that destroying Tinajero's identification could slow the investigation of the murder and delay the discovery that the victim was a "keepaway" who had been brought to Men's Central Jail to testify against appellant. Appellant also examined the wristbands of Tinajero's cellmates and recorded their booking numbers in his phone book. (12RT 2148; 13RT 2313-2314; 14RT 2455-2456.) The evidence of appellant's subsequent, repeated removals of his own wristband demonstrated not only that he was adept at removing the bands—which likely were designed to be difficult to remove—but also that he was particularly focused on wristbands and their significance, and was concerned about the information that wristbands carried.

The wristband removal incidents also tended to corroborate the evidence of appellant's 2013 escape attempt. In that incident, appellant was apparently able to slip out of his own wristband and transfer Montalban's intact wristband to his own arm within a brief period of time, just after the inmate transfer call was announced. (15RT 2700-2703.) That evidence, in turn, was highly probative of appellant's ability to move through secure areas of the jail, as discussed *ante*.

For all of these reasons, the October and November 2004 wristband incidents were probative of appellant's knowledge of the jail system and his ability to evade security. And, again, the probative value of that evidence was not "substantially outweighed" by the danger of undue prejudice for purposes of Evidence Code section 352, especially in light of the horrific circumstances of the two murders. The trial court did not abuse its discretion.

F. Appellant's Escape From A Locked Shower Stall Was Relevant To His Knowledge And Ability To Evade Jail Security

Deputy Florence testified that on July 30, 2005, appellant escaped from a locked shower stall in the high power module and returned to his cell. A subsequent investigation showed that he may have accomplished this feat by lathering his body with soap and climbing through the shower stall's handcuff portal, a narrow opening used for unlocking inmates' handcuffs for showers. (15RT 2663-2676; 16RT 2806-2809.)[63] Appellant argues that the trial court erred by admitting this testimony because it had no probative value to the charged offenses. (AOB 163-165.) Respondent disagrees.

Like the December 19, 2003, escape attempt discussed *ante*, the July 30, 2005, incident was probative of appellant's exceptional knowledge and ability to escape from secure areas and avoid immediate detection. Although the circumstances were different from those surrounding his escape from his own floor and module, and later from Tinajero's, on the date of the murder, any differences related to the weight and probative value of the evidence and did not require its exclusion. Again, this Court has never held that a degree of similarity between the charged and uncharged offenses is required in order for evidence of the latter to be admissible to show *knowledge* and *opportunity* under Evidence Code section 1101, subdivision (b). (See *Hendrix*, *supra*, 214 Cal.App.4th at p. 241.) Even in light of the differences in facts, the probative value of the shower escape evidence was not "substantially outweighed" by the danger

[63] About six weeks earlier, while appellant was taking a shower, deputies searched his cell and found the altered paperclip discussed *ante* in subsection D. (15RT 2656-2657; 16RT 2789-2793.) Hence, appellant's reason for escaping the shower and returning to his cell on July 30, 2005, may have been concern that his cell was being searched again.

of undue prejudice within the meaning of Evidence Code section 352. The fact that appellant climbed out of the shower only to return immediately to his own cell was hardly inflammatory in comparison with the facts of the murders.

The trial court's ruling admitting this evidence was not an abuse of discretion.

G. Appellant Forfeited His Challenge To The Admission of His Conversations And Correspondence With Limas; Regardless, Those Statements Were Highly Relevant And Did Not Implicate Evidence Code Section 1101.

Appellant contends that the trial court erred by admitting evidence of his communications with Limas from jail. Relying on an incorrect premise that those statements constituted "other acts evidence" and were admitted under Evidence Code section 1101, subdivision (b), appellant argues that the trial court failed to assess whether the evidence met the "high standard governing the admission of other-acts evidence to prove identity." He further argues that the evidence had no probative value regarding his "knowledge of the inner workings of the jail" or opportunity to commit the charged murders. (AOB 165-166.) This contention has not been preserved for appeal, and in any event, fails on its merits.[64]

At trial, Limas testified that appellant developed a telephonic and pen-pal relationship with her while he was in jail. (14RT 2465-2466, 2468, 2486-2487; 16RT 2886.) Appellant told Limas that he was in jail for murder based on having run over someone. (14RT 2471.) He also mentioned that he once took a wristband from another inmate and used it to attempt to escape. (14RT 2472.) At one point, appellant told Limas that he

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[64] Insofar as appellant's statements and letters to Limas made references to his gang affiliation and moniker, the relevance and admissibility of that evidence is discussed *post* in Section III.

needed to get in touch with a "clown" named Raul who was testifying against him. Appellant asked Limas to look on the internet to see if and where Raul was housed in the county jail system. (14RT 2470-2471, 2485.) Limas declined to do so. (14RT 2485.) Appellant later told Limas that he was able to get that information from a "homie." (14RT 2485.) On April 20, 2004, the day Tinajero was murdered, two telephone calls were made to Limas from the telephone in Tinajero's cell. (14RT 2466-2467; 15RT 2627-2628; 16RT 2876-2880, 2892-2893.)

Except insofar as it constituted evidence of the December 19, 2013, escape attempt (5CT 1150),[65] appellant never objected in the trial court to Limas's testimony. Appellant had ample notice of the nature of Limas's testimony. The People provided the defense with discovery regarding Limas (see 12RT 2004-2005 [referring to previously provided and new discovery]), and Limas testified (as "Witness 50") at the second preliminary hearing on September 13, 2004, two years before trial (3CT 700-715 [Limas's testimony], 716-717 [Detective Cain's testimony re phone book and phone records linking appellant to phone calls to Limas]). The prosecutor referred to that proposed testimony both in her written motion to admit evidence under Evidence Code section 1101, subdivision (b) (5CT 1132-1133), and in oral argument on that motion (4RT 735-736). Therefore, appellant clearly had the opportunity to object.

Yet, the evidence of communications with Limas was not among the items appellant moved in limine to exclude under Evidence Code sections 352 and 1101. (5CT 1148-1157.) Neither did defense counsel seek exclusion of Limas's testimony during oral argument on both parties'

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[65] That evidence was properly admitted as discussed in subsection C, *ante*.

section 1101 motions (4RT 731).[66] By failing to object to this evidence at trial as improper propensity evidence under Evidence Code section 1101 or as inflammatory under Evidence Code section 352, appellant has forfeited those contentions on appeal. (*People v. Hajek* (2014) 58 Cal.4th 1144, 1208 [Evid. Code, § 1101 objection forfeited by failing to object at trial]; *People v. Alexander* (2010) 49 Cal.4th 846, 912 [same].)

Not only has appellant failed to preserve his claim for appeal, it is also groundless. Contrary to appellant's characterization of the evidence, Limas's testimony was not admitted under Evidence Code section 1101, subdivision (b), to show "knowledge of jail procedures and rules as well as methods to overcome them," nor did that testimony even implicate Evidence Code section 1101 at all.[67] Her testimony did not constitute evidence of uncharged acts or of character traits offered circumstantially to create an inference that appellant acted in conformity with that character during the charged offense. (See *Ewoldt, supra*, 7 Cal.4th at p. 393 ["Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific

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[66] During discussions about whether to include questions about gangs in the juror questionnaire, the prosecutor stated that she planned to call a witness who received calls from someone in jail who identified himself by the nickname "Chingon" from "West Side Wilmas." Defense counsel proposed, "And before the People call the witness, perhaps we can have a 402 hearing?" (3RT 489-490.) However, the defense never made any objection to Limas's testimony, nor asked again for an Evidence Code section 402 hearing, even after the prosecutor mentioned Limas again in her written motion and oral arguments on the admissibility of Evidence Code section 1101, subdivision (b) evidence. (5CT 1132-1133; 4RT 735-737.)

[67] Although mentioned in the People's written and oral arguments on the section 1101 motion, Limas's testimony was not, itself, proffered under section 1101, subdivision (b). Rather, the prosecutor explained that some of the proffered section 1101, subdivision (b), evidence was relevant, in part, because it would *corroborate* Limas's testimony. (5CT 1132-1133; 4RT 735-737.)

instances of uncharged misconduct, to prove the conduct of that person on a specified occasion."]; *People v. Stern* (2003) 111 Cal.App.4th 283, 301, Mosk, J., concurring ["Section 1101 is implicated when evidence of a person's character is 'offered to prove his or her conduct on a specified occasion.'"].) Rather, appellant's statements to Limas were *directly* relevant to the Tinajero murder itself. The statements constituted admissions that appellant was angry at Tinajero (the "clown") for testifying against him, that appellant was actively trying to find Tinajero in the jail system, and that he ultimately succeeded in learning Tinajero's whereabouts from a "homie," all of which evinced appellant's preparation for the murder.

Appellant's statements to Limas were also probative of both motive and identity, *not by inference from "other acts"* as appellant assumes, but rather as *direct evidence* in the form of appellant's own incriminating statements pertaining to the murder itself. Because the relevance of Limas's testimony was not based upon section 1101, subdivision (b), there was no logical need for the People to establish any degree of similarity between the murder of Tinajero and appellant's telephone calls and letters to Limas. (See *Stern, supra*, 111 Cal.App.4th at p. 493, Mosk, J., concurring ["Because this use of evidence concerning prior misconduct does not require the inference that if Stern was involved in a stabbing in the past he is likely to have acted in a specific manner on the occasion in question, section 1101 does not apply here."].)

Appellant's belated challenge to the evidence under Evidence Code section 352 is equally meritless. Appellant has pointed to nothing inflammatory about Limas's testimony. Because appellant's communications with Limas were plainly relevant, posed no danger of undue prejudice, and did not implicate Evidence Code section 1101, and

because appellant failed to object to the evidence at trial, his claim must fail.

H. Any Error Did Not Deprive Appellant Of His Federal Constitutional Rights And Was Harmless

Not only has appellant failed to establish error in the admission of the evidence, he has likewise failed to establish prejudice. Errors in admitting evidence of uncharged crimes under Evidence Code section 1101 are subject to the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Harris* (2013) 57 Cal.4th 804, 1226-1227.) Under that standard, a reviewing court will not disturb the judgment unless it is reasonably probable that absent the evidence, appellant would have received a more favorable outcome. (*Watson, supra,* at pp. 836-837.)

Appellant contends that the claimed errors violated his Fifth and Fourteenth Amendment right to due process and a fair trial, and his Eighth Amendment right to a reliable determination of guilt in a capital case. He therefore claims that the standard of prejudice announced in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], applies, requiring reversal unless the errors were harmless beyond a reasonable doubt. (AOB 173-174.) To the contrary, "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair.*" (*People v. Partida* (2005) 37 Cal.4th 428, 439 [italics in original], citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [87 S.Ct. 648, 17 L.Ed.2d 606]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Here, the challenged evidence did not render appellant's trial fundamentally unfair or unreliable, and for the same reasons, any error was clearly harmless under either the *Watson* or the *Chapman* standard.

First, the jury was repeatedly admonished during trial regarding the limited purpose for which the evidence of appellant's uncharged misconduct in jail was offered. (15RT 2640-2641, 2794-2795.) At the close of the guilt phase, the court instructed the jury that the evidence of other crimes may be considered "only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them," that it "could not be considered by you for any purpose other than the limited purpose for which it was admitted," that it specifically "may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes," and that it could not be considered for any purpose at all unless the jury found that the People met their burden of proving by a preponderance of the evidence that appellant committed the other acts. (5CT 1260-1261, 1263; CALJIC Nos. 2.09, 2.50, 2.50.1, 2.50.2.) Jurors are presumed to follow the court's instructions and admonitions. (*People v. Anzalone* (2013) 56 Cal.4th 545, 557.)[68]

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[68] Appellant argues that the jury instructions were inadequate to alleviate prejudice because they did not explain to the jury *how* appellant's knowledge of jail procedures and methods of overcoming them could be inferred from the evidence. (AOB 173.) But the more relevant consideration, for purposes of harmless error analysis regarding "other acts" evidence, is that the instructions were amply clear about how the jury *should not use* that evidence – namely, to prove that appellant is "a person of bad character or that he has a disposition to commit crimes." (5CT 1263.) In any event, the trial court was not required sua sponte to give a potentially argumentative instruction explaining how the other acts evidence might support an inference of knowledge or opportunity. (See *People v. Bryant* (2014) 60 Cal.4th 335, 436-437 [trial court not required to give instruction specifically identifying which "other crimes" evidence could be considered for which purpose, as the parties were free to argue that point and the jurors were capable of disregarding evidence they did not find logically applicable or convincing]; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1615 [CALJIC No. 2.50 sufficiently set forth the

(continued...)

Second, as appellant acknowledges (AOB 171), the prosecutor did not highlight the "other acts" evidence in her guilt phase arguments to the jury. (20RT 3448-3488, 3555-3572.) This, again, was not surprising because appellant's unexpected testimonial admission that he went to Tinajero's cell on the day of the murder (19RT 3271, 3354) made it unnecessary for the prosecutor to focus on the other acts evidence in her arguments.

Third, as discussed *ante*, the "other acts" evidence was not particularly inflammatory, especially in comparison to the facts of the two murders. If the other properly admitted evidence did not convince the jury beyond a reasonable doubt that appellant committed the brutal first-degree, special-circumstance murders of Armenta and Tinajero, it is implausible that the jurors would nevertheless have been moved to convict him of two counts of capital murder because of his possession of an altered paperclip, razor, syringe, and shank, his escape from a shower cell, or even his 2013 attempt to escape custody.

Finally, the evidence of appellant's guilt of both murders was compelling. Regarding the murder of Armenta, the police detained appellant while he was driving Armenta's stolen Infiniti within minutes of using it to run over Armenta only a few blocks away. (9RT 1521-1523, 1526-1527.) Armenta's DNA was found on the blood-stained undercarriage of that car. (10RT 1639-1640, 1715-1717, 1721, 1729-1735.) Appellant admitted in his testimony that he ran over Armenta with the Infiniti, albeit only once and by accident. (19RT 3245, 3262, 3267-3268.) The track marks on Armenta's body showed he was run over multiple times, negating appellant's claim of accident. (11RT 1938-1939,

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inferences that could be drawn from other acts evidence, and trial court had no duty to give argumentative instruction regarding how the evidence related to the issues].)

1943-1949, 1965-1966, 1979-1981.) Further negating accident, Armenta had hemorrhages in his eyes and a broken hyoid bone in his neck (a part of his body not run over by the car), both of which were consistent with having been non-fatally strangled before being run over by the two cars. (11RT 1963-1964, 1974-1975.)

The physical evidence of strangulation and of multiple tire tracks corroborated Tinajero's eyewitness testimony that appellant strangled Armenta, ran over him back-and-forth with the Honda, and then later ran over him again with the Infiniti. (11RT 1824-1834, 1849-1850, 1874-1878, 1893-1895.) If Tinajero had fabricated this story merely to explain his own presence in the Infiniti with appellant shortly after the murder, he would have had no reason to complicate the story by conjuring up a second car, the Honda, and tying it to a separate, earlier roll-over of the victim. Yet Tinajero's testimony regarding appellant's first roll-over of the victim with a Honda was corroborated by Aranda's testimony that his wine-colored Honda was missing from the garage where Armenta had been working on it, and that Aranda found the Honda after the murder, parked one block from appellant's house. (11RT 1924-1925, 1927, 1930-1931.) The involvement of the Honda was further corroborated by Quevado's testimony that he saw Armenta drive by in a Honda (10RT 1654-1655), and by Ramos's and Rodriguez's testimony that they saw two or three people standing near a dark Japanese car in the alley, and several minutes later saw a man moaning and crawling away from where the dark car had been (10RT 1684-1685, 1691-1694, 1698, 1701-1703).

Additionally, appellant confessed his guilt of the Armenta murder to Palacol just after murdering Tinajero. Specifically, appellant told Palacol that he choked the victim, threw him out of a car, ran over him with the car, and stole the car. (14RT 2406.) Appellant also confessed to Deputy Argueta that he and his "crimee," the inmate he was accused of murdering

on the 2200 floor (i.e. Tinajero), had committed a murder together out on the street. (17RT 2961.) Of course, appellant's subsequent murder of Tinajero in jail to prevent his testimony was also strong evidence of appellant's consciousness of guilt pertaining to the Armenta murder.

Regarding the Tinajero murder, the evidence showed appellant had a strong motive to kill the victim, both to retaliate for Tinajero's having "snitched" in the first trial and to prevent him from testifying again in the second trial. Tinajero's DNA was found on the pants appellant was wearing when deputies contacted him in his own cell on the 3000 floor hours after the murder. (12RT 2038-2039; 15RT 2686, 2716-2718; 16RT 2758.) Appellant admitted in his testimony that he went to Tinajero's cell that day. (19RT 3271, 3354.)

Despite the danger to their lives from snitching, three of Tinajero's cellmates – Sloan, Palacol, and Good – provided chilling and largely consistent eyewitness testimony that appellant arrived in the cell while Tinajero was sleeping on an upper bunk, put Tinajero in a headlock, pulled him off the bunk, strangled him, held his head underwater in the toilet to drown him, stomped on his chest or neck, put him under a bunk, and tied a ligature around his neck. (12RT 2132-2138; 13RT 2206, 2284-2287, 2316, 2324-2325; 14RT 2395-2404, 2447-2452, 2492-2495, 2505.) The injuries found in the autopsy were consistent with the cellmates' account. (16RT 2833-2835,2838-2842, 2846-2852, 2854, 2860-2862, 2866-2867.)[69] All

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[69] The autopsy revealed distinct, individual hemorrhages in Tinajero's front neck muscles attached to the hyoid bone, pinpoint hemorrhages in the sclera and conjunctiva of both eyes, deep bruising in the middle of the tongue, and a fractured cricoid (the cartilage area beneath the larynx). All of those are common indications of neck compression and strangulation (16RT 2835, 2840-2842, 2846-2848), corroborating the eyewitnesses' testimony that appellant manually choked Tinajero. The cricoid could also have been fractured by stomping on Tinajero's neck,

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three eyewitnesses reported that appellant wrote down their names and booking numbers in a phone book. (12RT 2148-2150; 13RT 2301-2302, 2313-2314; 14RT 2414-2415, 2455-2456.) That testimony was corroborated by the phone book found in appellant's pocket in which the cellmates' names and booking numbers, as well as Tinajero's booking number (one digit off) and Limas's telephone number were written. (12RT 2036, 2039-2041; 15RT 2687; 16RT 2758-2759, 2883-2886.) Moreover, the cellmates testified that appellant told them accurate details about the Armenta murder case – that the killing occurred in 2002, that appellant and Tinajero had been caught in the victim's car, that Tinajero testified against him at trial, and that the trial ended in a mistrial because appellant's defense attorney was ill. (12RT 2146; 13RT 2290-2291; 14RT 2406, 2448.)

Furthermore, appellant confessed to Deputy Torres that he "killed the fool who snitched on [him]." (17RT 3042, 3044.) Appellant gave Torres a detailed account of how he got from his own cell to Tinajero's, described

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which according to Deputy Medical Examiner Djabourian would have made a cracking or snapping sound. (16RT 2840-2841.) This corroborated the cellmates' testimony that appellant stomped on Tinajero's chest or neck, producing such a sound. (12RT 2134, 2136; 13RT 2285-2286; 14RT 2400, 2452.) Linear and curved abrasions on Tinajero's neck were consistent with the victim being in a choke-hold and trying to pry the attacker's arm away (16RT 2838-2839, 2847-2848.) The medical examiner found knots tied in the ligature around Tinajero's neck. (16RT 2839.) That appellant was able to take the time to tie knots, and to make the ligature so tight that a criminalist and deputy medical examiner could not insert their fingers under it (14RT 2531-2532; 16RT 2840), suggests that Tinajero was no longer struggling at the time the ligature was applied, consistent with all three testifying cellmates' accounts. (12RT 2136; 13RT 2316; 2324-2325; 14RT 2403-2404, 2449-2451.) Internal bruising in Tinajero's back was consistent with Palacol's testimony that appellant's knee was pressed into Tinajero's back while appellant held the victim's head in the toilet. (14RT 2398-2399; 16RT 2845.)

his acts of strangling Tinajero, drowning him in the toilet, stomping on his chest, tying a piece of plastic around his neck, and writing the names and booking numbers of the cellmates in his phone book. Appellant told Torres that he was happy about what he did because Tinajero had snitched on him in court. (17RT 3043-3051, 3058-3061.) At the time, Deputy Torres did not know that appellant was suspected of the murder of Tinajero, nor did he know the specific facts of the murder. (17RT 3058, 3068.) Appellant also confessed to Deputy Argueta, in reference to the inmate killed on the 2200 floor, that "now this fucker's snitching on me so we had to get rid of him." (17RT 2960-2961.)

In light of the abundant evidence of guilt regarding both murders, as well as the admonitions and instructions given to the jury, any error in admitting evidence of uncharged acts was clearly harmless under any standard.

III. THE EVIDENCE REGARDING JAILHOUSE GANGS AND THE EAST SIDE WILMAS WAS HIGHLY RELEVANT AND RESPONSIVE TO MATTERS RAISED BY THE DEFENSE; APPELLANT FORFEITED HIS CHALLENGES TO THE ADMISSION OF MOST OF THAT EVIDENCE

Appellant complains that his trial was tainted by the admission of gang-related evidence. Specifically, he contends that the court erred in admitting: (1) references to his membership in the East Side Wilmas gang in his statements and letters to Limas; (2) Detective Clift's expert testimony regarding gang culture in jail; and (3) a letter offered to impeach his testimony denying that he was affiliated with the Surenos. According to appellant, this gang-related evidence was irrelevant and prejudicial, violating his Fifth and Fourteenth Amendment rights to due process and a fair trial, and his Eighth Amendment right to a reliable determination of guilt and penalty. (AOB 177-201.)

By failing to object at trial, appellant has forfeited his claims of error regarding gang references in his statements and letters to Limas, and regarding the impeachment of his testimony denying affiliation with the Surenos. In any event, none of appellant's challenges to the admission of gang-related evidence has merit. To the contrary, the evidence was relevant to identity, to impeachment of appellant's testimony, and to rebut the theory that the *defense* asserted from the outset of trial, namely, that Tinajero was killed by his own cellmates pursuant to an order by the Surenos or "Southsiders" jail house gang. Moreover, if any error occurred, it was harmless in light of the abundant evidence of appellant's guilt.

A. Appellant Has Forfeited Any Objection To Gang References In His Statements And Letters To Limas; Regardless, That Evidence Was Relevant To His Identity

Limas testified at trial that she received a series of telephone calls from a county jail inmate who called himself "Santi" and "Chingon" from the East Side Wilmas. (14RT 2465, 2469.) During the calls, the inmate told Limas that he was in jail for murder based on running over a victim, and that he needed to get in touch with a "clown" named Raul who was testifying against him. (14RT 2470-2471, 2485.) The inmate asked Limas to find information for him regarding where Raul was housed in the county jail system, but she did not do so. The inmate later told her that he learned Raul's housing location from a "homie." (14RT 2485.) Limas also received letters from the inmate bearing appellant's booking number and signed "Chingon," "Chingon Santi," "Pineda" or "Santiago Pineda Hernandez Chingon." (14RT 2476-2480, 2483; 15RT 2620; 16RT 2887.) The letters likewise made references to the "Big Bad Ass ES Wilmas," and "ES Wilmas Ghost Town Locos." (14RT 2480-2481.) Limas testified that the East Side Wilmas was a street gang. (14RT 2481.)

Appellant now evidently claims for the first time that the trial court should have precluded Limas from referring to appellant's gang affiliation. (AOB 177-179.) Appellant has forfeited that claim, and in any event, it is meritless.

1. Forfeiture

Appellant cannot complain on appeal about the references to his gang membership in Limas's testimony or in the letters he wrote to Limas because he neither objected to, nor moved to preclude, that evidence in the trial court. Again, appellant's motion in limine to exclude evidence under Evidence Code sections 352 and 1101 made no reference to evidence of his communications with Limas nor to his gang affiliation. (5CT 1148-1157.) Neither did defense counsel seek exclusion of those matters during oral argument on both parties' Evidence Code section 1101 motions. (4RT 731.) Appellant likewise had no objection to the admission of his letters to Limas (Exhibits 96, 97; see RT 2474-2475) into evidence. (18RT 3179, 3184.)

During Limas's trial testimony itself, appellant objected only twice. First, appellant objected to the prosecutor's reading aloud a portion of one of the letters to Limas on the grounds that "I think the letter speaks for itself." (14RT 2480.) Second, he objected solely on "lack of foundation" grounds when the prosecutor asked Limas, "Who calls themself East Side Wilmas?" (14RT 2482.) Neither of those objections sought the exclusion of references to appellant's gang affiliation on due process, relevance, or Evidence Code section 352 grounds. Therefore, appellant has forfeited those issues on appeal. (Evid. Code, § 353, subd. (a); *People v. Boyette* (2009) 29 Cal.4th 381, 424 [a timely objection on the same ground is required to preserve an evidentiary issue for appeal]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1118 ["Counsel's objection to this testimony on

the sole ground of relevance, however, did not preserve for appeal his present contention that the testimony was improper character evidence."], disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Mattson* (1990) 50 Cal.3d 826, 854 ["Specificity [of grounds for an objection] is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence."].)

Apparently claiming to the contrary that he *did* object below, appellant cites a pre-trial discussion between the court and all counsel about drafting the juror questionnaire. (AOB 177-178.) But in that discussion, defense counsel merely indicated his tactical preference not to ask the prospective jurors about their attitudes toward gang evidence. He did not object per se to the admission of gang-related evidence at trial.

In the pre-trial discussion, the prosecutor proposed that the questionnaire include questions regarding whether the jurors would be unfairly influenced by evidence of gang membership. She explained that although "this is not a gang case in the typical sense," it would be advisable to screen the jurors regarding that subject matter because some of the evidence at trial would make reference to appellant's gang affiliation and moniker. Specifically, the prosecutor said she intended to offer a phone book found in appellant's possession with "Chingon" and "West Side Wilmas" written inside, and to call a witness to testify about statements made to her by someone identifying himself as "Santee" and as "Chingon from West Side Wilmas." (3RT 487-488.)

Defense counsel replied, "Your honor, I would strongly disagree with the People with respect to this being a gang case. I agree with that. And I don't believe any references to gangs should be made. [¶] Gangs is very prejudicial, and the identification I believe by the witness, the operative witness is established by her familiarity with the person that was speaking

to her, and gangs doesn't – gangs is only prejudicial." (3RT 488.) The trial court explained to counsel that "The only reason it would be in the questionnaire is to make sure that the jury is not overwhelmed emotionally by gang evidence of whatever kind comes in," and asked defense counsel if he preferred not to have the panel prescreened for jurors who had adverse experiences with gang members. Defense counsel stated, "That's correct, your honor," and added, "And I believe the People should make an offer of proof as to why Wilmas and Chingon is important . . . [o]r relevant to this case in terms of identification." (3RT 488-489.) The prosecutor further explained that evidence obtained through discovery would link appellant with the nickname, Chingon, while the phone book found in appellant's possession and his statements to the witness identify him as Chingon of Wilmas. (3RT 489-490.)

The trial court stated it would "leave it up to the defense team" whether they would prefer, for tactical reasons, not to mention gang membership in the questionnaire. Defense counsel replied, "Yes. That would be my request that it be left out. [¶] And before the People call the witness, perhaps we can have a 402 hearing. . . . with respect to that issue." (3RT 490.) The court responded, "Sure. But you're assuming for this position that she's going to get that evidence in. . . . And in that case you don't want the questions in the questionnaire?" Defense counsel responded affirmatively. (3RT 490-491.)

Although defense counsel expressed strong concerns about gang-related evidence, the issue at hand in the above discussion was whether to include questions regarding gangs in the jury questionnaire.[70] Defense

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[70] In fact, earlier in the discussion, defense counsel stated that he had received notice of the People's Evidence Code section 1101, subdivision (b), motion, and that he would oppose that motion, but that "we (continued...)

counsel's statements, "And I don't believe any references to gangs should be made" (3RT 488), and "That would be my request that it be left out" (3RT 490) referred in context to the *questionnaire*, not the trial evidence. No motion or objection regarding the admissibility of gang-related evidence was placed before the court for a ruling at that time. Defense counsel never followed up with his request for an Evidence Code section 402 hearing regarding Limas, not did he ever seek the exclusion of all references to appellant's moniker or gang affiliation. Appellant therefore forfeited any objection. (*Rundle, supra,* 43 Cal.4th at p. 181 [Evid. Code, § 352 claim forfeited where defendant merely asked the trial court for a hearing on the admissibility of a witness's testimony but never objected to the admission of her testimony], overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 819 [failure to object at trial to testimony about defendant's gang affiliation forfeited the issue on appeal]; see also *People v. Maciel* (2013) 57 Cal.4th 482, 528 ["A defendant cannot simply remain silent while evidence he believes is prejudicial and has been excluded is presented to the jury."].)

Even assuming that defense counsel's statement, "And before the People call the witness, perhaps we can have a 402 hearing" (3RT 490), was intended as an objection to gang references in Limas's testimony, appellant nevertheless forfeited this issue by failing to clarify that he *was* objecting and to *press for a ruling* from the trial court. (*People v. Valdez* (2012) 55 Cal.4th 82, 143 [failure to press for a ruling on a motion to exclude evidence forfeits appellate review]; *People v. Ramos* (1997) 15

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can argue that at a later time." (3RT 486.) Thus, counsel understood that the issue under discussion at that time was the juror questionnaire, not the admission or exclusion of evidence at trial.

Cal.4th 1133, 1171 [where defendant made no specific objection to the admission of a photograph and failed to obtain a ruling on his more general motion to exclude items seized in a search, he forfeited his claim of error for appeal]; *People v. Morris* (1991) 53 Cal.3d 152, 195 [where the trial court never ruled on defendant's motion to exclude certain testimony, the defendant's failure to renew his objection and press for a ruling forfeited the issue for appeal], disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) For these reasons, appellant has not preserved this issue for appeal.

2. The Merits

Assuming appellant's contention were preserved for appeal, the references to Chingon of the East Side Wilmas gang in appellant's own statements and letters to Limas were relevant to his identity and therefore admissible.

As noted, appellant made incriminating statements to Limas that he needed to get in touch with a "clown" named Raul who was testifying against him, that he wanted Limas to help him find Raul by looking up his housing information on-line, and later, that he had succeeded in getting that information from a "homie." (14RT 2470-2471, 2485.) Those statements were highly probative of appellant's motive, planning activity, and intent to find Tinajero in the jail system and prevent him from testifying. But *because Limas never met appellant in person*, she had no foundation to identify him as the *person who made those statements*. (14RT 2471, 2488.) The People—who could not have known that appellant would later acknowledge his telephone calls to Limas in his trial testimony (19RT 3352-3353)—were therefore required to link appellant to the statements by other means.

Although the telephone records from Tinajero's jail cell showed that two collect calls were made from that cell to Limas's office telephone number in the late afternoon on the date of the murder (14RT 2467-2468; 15RT 2631-2632; 16RT 2885-2886, 2892), that evidence alone did not prove conclusively that appellant was the caller. Other inmates were in the cell at the time, a point that the defense had been quick to make on cross-examination of Detective Cain at the preliminary hearing. (3CT 718.) Hence, the evidence that appellant referred to himself in his phone calls and letters to Limas as "Chingon" of the Ghost Town Clique of the East Side Wilmas gang (14RT 2477-2481, 2483; 16RT 2887), combined with evidence that "Chingon," "ES Wilmas GTLs," and Limas's telephone number were handwritten in the phone book found in appellant's pocket (15RT 2687; 16RT 2876, 2878) and other evidence that appellant claimed to be a member of the Ghost Town Clique of the East Side Wilmas with the moniker, "Chingon" (15RT 2687; 18RT 3141-3142), was important to establish that appellant was the person who had made the incriminating statements to Limas revealing his planning, intent and motive to find Tinajero in the jail system.

Furthermore, Limas testified *after* the defense had already cross-examined Sloan, Good and Palacol about their connections to the Southsiders (a.k.a. Surenos) jailhouse gang to support the defense theory that Tinajero was killed by his own cellmates pursuant to Surenos orders. (13RT 2203-2205, 2318-2320, 2329; 14RT 2453-2454.) Thus, as discussed *post* in subsection B, the defense had already opened the door to gang-related evidence before any evidence was aired regarding appellant's use of gang monikers in communications with Limas. The People were entitled to present gang-related evidence to rebut the defense theory.

The evidence that appellant referred to himself in communications with Limas as Chingon of the East Side Wilmas was therefore relevant, probative, and admissible.

B. Detective Clift's Expert Testimony Regarding Jail Culture, Including The Role Of The Surenos Gang In The Jail System, Was Relevant To Rebut The Defense Theory That Tinajero's Cellmates Were The True Killers

Appellant contends that Detective Clift's expert testimony about the Surenos gang, affiliated street gangs, and their role in jailhouse culture was irrelevant and deprived him of a fair trial. (AOB 177, 179-184.) This contention is ironic because it was the *defense* that first injected that issue into the trial, by pursuing a theory that Sloan, Good, Palacol and Davies murdered Tinajero on orders from the Surenos for being a "snitch." The trial court did not abuse its discretion in permitting the People to present expert testimony explaining why that defense theory was implausible.

1. Trial Proceedings Leading To Detective Clift's Expert Testimony On Jailhouse Gangs And Culture

In his opening statement to the jury, defense counsel announced appellant's defense theory regarding the Tinajero murder, namely that Tinajero's four cellmates were the actual killers acting on orders to eliminate a "snitch."

Defense counsel told the jury:

> Mr. Tinajero was what's known in the jail as a rat or a snitch, and when you are a rat and a snitch in the jail, there is some liability, there is some danger based on that. [¶] I think the evidence will show Mr. Tinajero was placed in a cell with what, four other convicted felons, four other convicted felons. He wasn't a keep away, at least from the other four convicted felons, and he ends up

dead in the cell. That's not that strange when you are a rat or a snitch in jail. [¶] I think the evidence will show that at the time of Mr. Tinajero's death, that the police jumped to a quick conclusion as to who had been involved. And, in fact, they didn't conduct any investigation of the four inmates that was in the cell. Their clothes wasn't – Mr. Pineda's clothes was examined, but the four individuals in the cell, they never took their clothes to see about DNA.

(9RT 1509.) Defense counsel further asked the jury rhetorically:

Is it really believable that a person, some stranger is going to come into a cell, kill one of your cellmates, and you not do anything at all? You're not yelling "Man down? Fight?" [¶] I think that's a bit much to expect, and that's what the prosecution is going to ask you to expect.

(9RT 1509.) The defense opening statement also noted that "before the body was discovered, all three or four of the cellmates sat together and discussed what they would tell the police, and that their first comments to the police were not true. They sat and discussed what they would tell the police." (9RT 1509-1510.)

During cross-examination of each of Tinajero's three testifying cellmates, Sloan, Good, and Palacol, the defense explored the witnesses' supposed connections to the Surenos (or "Southsiders") gang and the notion that "hit" orders typically issued from the gang unit where three of the cellmates once served as trusties.[71] On cross-examination of Sloan, defense

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[71] Appellant's suggestion that the *prosecutor* first introduced the theory that the murder was a gang hit merely to rebut that theory, and that the defense brought up that subject only in response to testimony elicited by the People (AOB 192-193), is flatly contrary to the record, as shown in detail below. Furthermore, appellant did not object to any of the direct or (continued...)

counsel elicited testimony that Sloan, Good, and Davies were trusties in the 3700 module before being transferred to the 2200 module where the murder occurred. (13RT 2203-2204.) Defense counsel then engaged in the following inquiry with Sloan:

Q: Now, 3700, is that the gang module?

A: Yes.

Q: And based on your experience in jail, the gang module, is it a fair statement – let me put it that way, is it a fair statement that a number of the – a lot of the violence in the jail is generated from the gang module?

A: I don't understand.

Q: Well, let's say, for example, that there is going to be a hit in the jail or there's going to be fighting, that the gang module is usually the individuals who carry it out, individuals in the gang module?

A: Yes.

Q: And you were a trusty at that module; is that correct?

A: That's correct.

Q: That means that you took kites from different members of that module, you did things for them. Is that a fair statement?

A: Yes.

Q: And, in fact, when you're a trusty then, you have to have not only the trust of the deputies but also the inmates?

A: That's correct.

(...continued)
redirect examination testimony by Sloan, Good, or Palacol which he now cites as gang-hit-related evidence offered by the prosecutor. (13RT 2231-2232 ; 13RT 2307-2309; 14RT 2506; see AOB 193.) Thus, to the extent his opening brief might be construed to challenge the admission of that testimony, appellant has forfeited such a claim.

Q: So you, Mr. Good and the other gentleman, you were all transferred into this module where Raul [Tinajero] was already; is that correct?

A: Yes.

Q: From the gang module?

A: Yes.

(13RT 2204-2205.) Defense counsel elicited testimony that Sloan was six feet tall, weighed 180 pounds, and was "fairly fit . . . in good condition;" that Good was also at least six feet tall and weighed about 200 pounds; and that Tinajero's other two cellmates were also about the same size. Appellant, in contrast, appeared to be about five feet, six inches tall and to weigh about 170 pounds. (13RT 2206-2207.) Defense counsel later revisited the theme that Sloan, Good, and Davies were good friends and served as trusties together in the 3700 module before being transferred as a group to the 2200 module. In a line of questioning, the defense insinuated that Sloan and the others specifically requested to be housed in that module. (13RT 2222-2223.)

On redirect examination, the prosecutor elicited Sloan's testimony explaining his former position as a trusty in the gang module. Sloan testified that he was not a gang member. (13RT 2226.) Sloan explained that the 3700 module was a "Southsider" module, that the Southsiders were a Hispanic gang. Because of "the politics" in jail, only White inmates were made trusties in the 3700 module because they were not members of the Southsiders, yet they were not automatically disrespected by the Southsiders like, for example, African-American trusties would be. (13RT 2226-2227.)

On recross examination of Sloan, defense counsel delved further into the Southsiders gang, asking him about the Northern and Southern California factions of the Hispanic jail and prison gangs. (13RT 2232-

2233.) Defense counsel then opened a new area of inquiry about the high power module, asking, "And that's where the shot callers are normally housed. Is that a fair statement?" and "And when prison hits are done, isn't the – doesn't the high power basically send the order down to the gang module?" (13RT 2233.)

Next, during cross-examination of Good, the defense similarly elicited testimony that Good was previously a trusty in the 3700 module, "the gang module," before being transferred to the 2200 module where the murder occurred. (13RT 2318-2319.) Defense counsel then questioned Good as follows:

Q: And there is a module 1700 that's called high power; is that correct?

A: Yes.

Q: Is that where most of the orders are made or come from?

A: It could come from there, it could come from a prison up north, it can come from a lot of different places.

Q: And it goes to the gang module to be carried out for the most part?

A: Yes.

Q: And that's where you worked?

A: Yes.

(13RT 2318-2319.) Defense counsel further queried Good about the fact that he happened to be housed with Tinajero in the same cell as two other former trusties from module 3700. (13RT 2320.)

Appellant's counsel asked Good about whether he did favors for inmates as a trusty in module 3700 and whether it was important to gain the inmates' approval in that position. (13RT 2327-2328.) This led into the following line of questioning by the defense:

Q: Now, as a trusty in 3700, you were affiliated with the Southsiders; is that correct?

A: Affiliated, no, but I mean I worked with them. It was Maravilla and the Southsiders.

Q: And Southsiders, that's the prison gang from the Southern California area?

A: Yes.

(13RT 2329.) After eliciting Good's testimony that on the date of the murder he was awaiting transfer to state prison, defense counsel asked Good, "And did you think that your affiliation with the Southsiders would help you once you arrived at state prison?" The trial court sustained the People's objection that the question misstated the evidence, so defense counsel rephrased it, "Your contacts with Southsiders would help you in state prison?" Good answered, "Absolutely not." (13RT 2331.) On recross examination, the defense asked Good if there were bounties on snitches. Good stated he did not know about any bounties. (13RT 2338.)

During cross-examination of Palacol, defense counsel asked the witness if he had ever heard of the Southsiders, and if he associated with the Southsiders in the county jail and in state prison. Palacol responded, "I hung out with them when I was in county jail," and while he was serving his first prison term. (14RT 2453-2454.) Defense counsel also insinuated, in a line of cross-examination, that Palacol arranged to bring appellant to cell D13 to show appellant Tinajero's murdered body. (14RT 2495-2496.) On redirect examination by the prosecutor, Palacol testified that the Southsiders were just a "group of people," rather than a gang, and that by "hung out," he meant that he would "[j]ust kick it with them" while he was in jail. Palacol explained that according to the "politic" of the jail, White and Mexican inmates would hang out with each other, while Black inmates would hang out with other Black inmates. (14RT 2500.) Because Palacol,

a Filipino, was often mistaken for Mexican, he would hang out with Mexican inmates. (14RT 2501.) Palacol was in protective custody for his second prison term because he had snitched in this case. According to Palacol, if hypothetically he had been ordered to kill Tinajero and he carried out that order, the Southsiders would have treated him like a king, and he would not have needed protective custody in prison. (14RT 2501-2502.) On recross examination, the defense asked Palacol, "If Southside gave you an order, would you do it or not?" Palacol answered that he would not do it, even though his refusal would result in his being "Checked, beat up." (14RT 2507-2508.) The defense further asked whether Palacol received any orders from Southside in state prison. Palacol answered, "No." (14RT 2509.)

Subsequently, regarding the 2003 escape attempt, inmate Montalban testified on direct examination by the prosecutor that on the morning of the escape attempt, appellant threatened "to beat me up and other people fuck me up too" if Montalban did not let appellant steal his wristband. (15RT 2700.) On cross examination, defense counsel pursued the following line of questioning:

Q: And did he tell you that if you didn't give over your wristband, that someone would regulate you, you'd be regulated?

A: Yes.

Q: What does "regulated" mean?

A: That I'd get beat especially by other people in the dorm.

Q: So he didn't – he did not indicate that he would beat you up but that someone would regulate you; is that correct?

A: Yeah.

(15RT 2706.) Although the prosecutor did not ask Montalban any questions about this line of inquiry on redirect examination, defense

counsel launched the following colloquy with Montalban on recross examination:

Q: Are you a Southsider?

A: Yes.

Q: And how long have you been a Southsider?

A: Since I've been coming to jail.

Q: And is that one of the reasons you knew the term regulate –

A: Yeah.

(15RT 2708.)

Later in the People's case-in-chief, Deputy DeVille testified that during the search of appellant's cell following the Tinajero murder, he found transcripts of Tinajero's testimony and an arrest report regarding the Armenta murder. (16RT 2759-2761.) When the prosecutor asked Deputy DeVille about the significance of appellant's possessing those documents, appellant successfully objected based on lack of foundation. (16RT 2761.) The prosecutor laid a further foundation regarding Deputy DeVille's experience in the Los Angeles County Sheriff's Department's custodial gang unit, Operation Safe Jails, and his knowledge of jail culture. Appellant's renewed objection on foundation grounds was overruled. (16RT 2761-2762; see also 16RT 2755.) Deputy DeVille testified that "paperwork," such as transcripts and police reports proving that an inmate had "snitched" on another inmate, could be used to obtain a "green light" from the shot-callers of Hispanic jailhouse gangs to attack the "snitch" in jail. (16RT 2762-2763, 2766-2768.) Apart from the foundational objection noted above, the defense made no objection to Deputy DeVille's testimony regarding "paperwork," "green lights," and gangs. Instead, defense counsel explored the topic further on cross-examination of Deputy DeVille. (16RT 2763-2764, 2766, 2770-2772.) Among other things, the defense asked whether "hits" were normally carried out through the gang module and

whether a "green light" could be carried out by any gang member. (16RT 2766-2768.)

In a sidebar conference later during the People's case-in-chief, appellant's counsel stated, "I think the D.A. had indicated earlier that she might want to bring in a witness concerning gang activity and also gang relationship between the defendant and Mr. Tinajero. We'd like to have a hearing on that before the witness actually testifies." The prosecutor and the trial court agreed to that request. (17RT 2974.)

Deputy Torres later testified about appellant's confession to having "killed the fool who snitched on him." (17RT 3042, 3044.) Among appellant's statements to Deputy Torres was that "he had spoken to his homie on the 2000 floor, and he had gotten approval to take care of – take care of his business," and that in order to obtain that approval, appellant showed paperwork to the "person that runs the 2000 floor." (17RT 3043-3044, 3051.) Without objection from the defense, Deputy Torres explained, based on his training and experience, that to get approval for a jailhouse murder, an inmate "has to have some kind of evidence, some kind of paperwork, meaning they have – he can present something to his upper, whoever he has to answer to as far as the person that's running the jail, somebody higher up, some high gang member." (17RT 3044.) According to Torres, there are two sources of power within the jail: the deputies and the inmates. (17RT 3051.)

At an Evidence Code section 402 hearing later that day, the People's gang expert, Detective Clift, testified outside the jury's presence about his expertise on jailhouse gangs. (17RT 3081-3082.) Detective Clift read the September 26, 2006, letter from appellant to inmate Della Rose Santos regarding "Grumpy." Based on his knowledge of gang terminology, Detective Clift opined that in the letter, appellant was offering to assist or solicit an attack on a snitch in another, unrelated case involving the murder

of a sheriff's deputy. (17RT 3082-3085.) Detective Clift also interpreted appellant's statement in the letter, "We ride for the Sur. Tu sabes babe. All for one and one for all," to refer to the Surenos, also known as Southsiders, a jailhouse-based alliance of various Southern California Hispanic street gangs. (17RT 3083.) According to Detective Clift, if an order is issued to a Surenos-affiliated gang member, the member must obey it or he will be targeted for attack himself. (17RT 3085.)

At the section 402 hearing, appellant objected to the admission of the September 26, 2006, letter *in the penalty phase* on the ground that the letter did not constitute a criminal threat admissible as other "criminal activity" evidence under Penal Code section 190.3, subdivision (b). (17RT 3074-3075, 3079, 3086; see also 5CT 1241-1246 [subsequently filed defense motion to exclude the letter].) However, appellant made no objection at that point to Detective Clift's proposed expert testimony in the guilt phase regarding jailhouse culture or jailhouse gangs.

The next day, just before Detective Clift testified in front of the jury in the guilt phase, the prosecutor explained to the court that the detective would testify as an expert on "gang culture" to rebut "the defense theory that it was the people in the cell that committed the murder." The prosecutor further explained, "Well, the defense has been trying to imply that it was the four guys living in the cell that killed Tinajero instead of Mr. Pineda. He'll explain why that would not be." (18RT 3104.) The court recalled, "There was something about a gang expert. Is that the person we are talking about?" The prosecutor confirmed that this was the gang expert, and the court asked, "Was there a problem with Mr. Clift, with his testimony?" Hearing no response to that question, the court commented:

> This isn't a case involving gang activity specifically, but the relevance of gangs is present to the extent that as we've heard some of the testimony, Mr. Pineda received items, apparently clothing as

well as wrist bands apparently through the use of threats of gang retaliation or group retaliation if an individual didn't give it up, so it's relevant. [¶] But I want to be cautious about the use of gang testimony because the California Supreme Court said it's highly prejudicial.

(18RT 3105.) The prosecutor responded:

This evidence, your Honor, is – it goes to – it goes to the fact because the defense in their opening statement said they were going to blame it on the other people in the cell. [¶] So it's the – and he's done it even with Mr. – like with Mr. Palacol, he implied that he did it, not even implied, he flat out asked it, didn't you do it and bring Mr. Pineda in to show you had done it. [¶] They asked about the gang module, and that's where the hits come down. This witness would be testifying about the gang culture and how and why the people in the cell would not be the ones that would participate in this particular crime and sort of a system of how the jail system works and the gang culture within the jail itself.

(18RT 3105-3106.) Defense counsel did not respond to the court's or the prosecutor's remarks and voiced no objection at that point to Detective Clift's proposed expert testimony.

The People subsequently called Detective Clift to testify before the jury. Early in Detective Clift's testimony, appellant objected on "lack of foundation" grounds to a question seeking the detectives' opinion "as to whether the three White inmates would have harmed Mr. Tinajero on their own[.]" The objection was overruled, and Detective Clift testified that he did not believe they were involved in the murder, given that they were in custody "for light-weight felonies, drunk driving and narcotics charges." (18RT 3113-3114.) Appellant moved for a mistrial on the ground that the expert was essentially testifying that appellant was guilty. The trial court

denied that motion, but agreed to strike Detective Clift's answer because it appeared to the court that he had based his opinion on the inmates' criminal histories rather than on his expertise regarding the interplay of race and gangs in jail. (18RT 3114-3117.)

In another hearing outside the presence of the jury, Detective Clift explained why, in his opinion, Tinajero's cellmates did not commit the murder. His opinion was based on multiple factors including the inmates' individual backgrounds, the fact that the victim was a Sureno testifying against another Sureno, and general jailhouse culture and politics in which White inmates with no gang ties would not likely become involved in handling "Sureno business." (18RT 3119-3121.) Appellant renewed his objection that the expert was essentially giving an impermissible opinion on appellant's guilt, usurping the role of the jury. (18RT 3121-3123.) Sustaining the objection, the trial court ruled that Detective Clift could give a general opinion that White, non-gang member inmates would not carry out orders to kill on behalf of Hispanic gangs, but he not could not state an opinion that these particular inmates did not kill Tinajero. (18RT 3123.)

Although appellant thus far had made no objection to the admission of gang expert testimony, the prosecutor provided a detailed offer of proof regarding the remainder of Detective Clift's testimony as a precaution. According to the prosecutor, the detective would testify that non-gang members would not likely carry out Surenos "business," that appellant was a Sureno as evidenced by statements in his letters, that inmates need permission to carry out a "hit" in jail, that Tinajero was not on a Surenos "green light list," and that a Surenos member who committed a murder for personal reasons rather than on Surenos "business" would generally do so on his own without others participating. Detective Clift would also testify about shot callers and the jailhouse hierarchy, how "hits" are carried out in jail, the significance of going into someone's "house" (i.e. jail cell) to

commit a crime, and whether Palacol would have needed protective custody if he had committed the murder on the Surenos' orders. (18RT 3132-3133.)

Appellant's counsel responded:

> Just to reply, your Honor, it seems to be the same old issue revisited again, trying to do indirectly what she cannot do directly. [¶] I believe the People have tried to create an issue of gangs where it does not exist. There is no – we have not introduced any testimony at this point to show that this is a gang hit. The People have invented this issue, and now they're trying to go further and call an expert to say it was not a gang killing, and I would submit it.

(18RT 3133-3134.) The prosecutor replied, "They brought up the gang issue. We didn't go into it. They got into the gang module and how the hits come through the gang modules and the three witnesses lived in the gang module, so they opened the door." The court agreed and overruled appellant's objection. (18RT 3134.)

Detective Clift testified in the presence of the jury that the Surenos, also known as "Southsiders," are an umbrella of Hispanic street gangs aligned with the Mexican Mafia, a prison-based gang organization. (18RT 3111-3112, 3138-3139.) The Surenos control and operate various types of "business" in the jails including taxing inmates, running "kites," conducting criminal activities by telephone, and killing snitches in custody. (18RT 3136-3137, 3146.) In Detective Clift's opinion, a non-gang member in jail would not get involved in Sureno business, including a gang-approved killing of a snitch, nor would a non-gang member be ordered to do so. (18RT 3136-3138, 3143-3144, 3174-3175.) Detective Clift observed that in letters to Limas and to a female inmate in another jail facility, appellant identified himself as "Chingon Sur," used Aztec characters adopted as Surenos symbols, and claimed membership in the Ghost Town clique of the

East Side Wilmas, a Surenos-affiliated gang. (18RT 3141-3142, 3163.) From this, Detective Clift opined that appellant was a member of a Surenos-affiliated gang. (18RT 3141, 3143.)

2. Because The Defense Created The "Gang Issue" At Trial, The Trial Court Properly Allowed The People To Offer Expert Testimony In Response To The Defense Theory.

The trial court did not abuse its discretion by admitting Detective Clift's expert testimony regarding jailhouse gangs and jail culture. The testimony was highly relevant to rebut the defense theory that appellant had already aired during the People's case-in-chief; namely, that Tinajero was murdered by his own cellmates for being a snitch.

A trial court's admission of evidence, including gang-related evidence, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) Under that standard, the trial court's decision must be upheld unless the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Foster, supra,* 50 Cal.4th at pp. 1328-1329.)

As this Court has recognized, "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see also *People Williams* (1997) 16 Cal.4th 153, 193 [trial court did not abuse its discretion by admitting gang evidence that was relevant to motive and identity].)

> Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . [¶] However, gang evidence is inadmissible if introduced only to "show a defendant's criminal disposition or bad character as a

means of creating an inference the defendant committed the charged offense. [Citations.]" [Citations.]

(*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.)

Moreover, it is well-established that evidence which should otherwise be excluded may become admissible once the defense "opens the door" by pursuing a theory to which that evidence is pertinent. (*People v. Banks* (2014) 59 Cal.4th 1113, 1266 [bad character evidence is admissible on rebuttal if the defendant "opens the door" by presenting good character evidence]; *People v. Clark* (1993) 5 Cal.4th 950, 1016 [previously inadmissible prosecution evidence of lack of remorse became admissible when the defense expert testified about the defendant's guilty conscience], disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390 421, fn. 22.) More specifically, this Court and lower courts have held *gang-related* evidence admissible where relevant to matters placed at issue by the defense. (*People v. Martinez* (2010) 47 Cal.4th 911, 965 [after the defense raised the issues of prison gangs and future dangerousness on cross-examination of a witness, the prosecutor was entitled to elicit follow-up testimony on those subjects]; *People v. Loza* (2012) 207 Cal.App.4th 332, 345-346 [defense cross-examination of witness and defendant's own testimony "opened the door" to evidence of defendant's gang membership]; *People v. Parrish* (2007) 152 Cal.App.4th 263, 279 [defense theory of duress caused by gang members opened the door to the prosecution's expert testimony about the gang's hierarchy, turf, cliques, criminal activities, and tattoos, relevant to rebutting that theory]; *People v. Jordan* (2003) 108 Cal.App.4th 349, 365-366 [defendant "opened the door" to previously excluded evidence of his own gang membership by presenting a defense theory attributing possession of the narcotics to gang members].)

Here, appellant plainly opened the door to the admission of Detective Clift's expert testimony regarding the role of the Surenos in jailhouse

politics and culture. From the outset of trial, the defense strategy regarding the Tinajero murder was to create reasonable doubt by suggesting that Tinajero's cellmates—Sloan, Good, Palacol and Davies—were the actual killers. To do so, it was imperative that the defense demonstrate a motive for the cellmates to commit the murder, especially given appellant's own obvious motive. Relying heavily on the fact that three of the cellmates were former trusties in the gang module, the defense pursued a theory throughout the People's case-in-chief that the cellmates were carrying out a "hit" order from the Surenos (or "Southsiders") gang to punish Tinajero for being a "snitch."

Appellant signaled that theory clearly in his opening statement, noting that it is not strange for a "snitch" housed in a cell with "four convicted felons" to end up dead in his cell, that the four "felon" cellmates coordinated their stories and initially lied to the police, that the sheriff's department never investigated the four cellmates or checked their clothes for DNA, and that it was implausible that four inmates would stand idle while a stranger entered their cell and murdered their cellmate. (9RT 1509-1510.) Appellant then brought out the *Surenos gang-related component* of his defense during cross-examination of cellmates Sloan, Good, and Palacol. There, he pursued lines of questioning to suggest that "hit" orders for inmates were generally issued by the Surenos in the high power module to be carried out by inmates from the gang module; that Sloan, Good, and Davies were trusties in the gang module; that to hold that position the trusties often did favors for the Surenos; that Sloan, Good, and Davies somehow managed to get themselves transferred together to the same cell in the 2200 module where Tinajero would be housed; and that Palacol, although not a trusty, was affiliated with the Surenos and would likewise carry out their orders. (13RT 2203-2205, 2222-2223, 2232-2233, 2318-2320, 2327-2331, 2338; 14RT 2453-2454, 2507-2509.)

The defense even injected the issue of the Surenos gang into the testimony regarding appellant's 2003 escape attempt. While the prosecutor's direct examination of inmate Montalban presented the incident without reference to gangs, the defense chose to elicit Montalban's Surenos affiliation and to invoke the jailhouse gang terminology, "regulate," in a manner that suggested appellant had the right connections to have Montalban "regulated" in the jail. (15RT 2706, 2708.)

Perhaps recognizing the integral role the Surenos played in the defense strategy, the defense chose not to object (except on foundational grounds) to the testimony of Deputies DeVille and Torres regarding "paperwork," "green lights," and gangs. Rather, on cross-examination of Deputy DeVille, the defense further explored its theory that "hits" were normally carried out through the gang module. (16RT 2766-2768.)[72]

The People were entitled to rebut the defense theory by presenting Detective Clift's expert testimony regarding how the Surenos gang operated in the county jails. The aim of that testimony was not to smear appellant with a "gangster" label, but to explain to the jury why it was

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[72] In fact, the first time appellant *ever* objected to the admission of gang-related evidence on relevance grounds was in response to the prosecutor's *volunteered* offer of proof at sidebar in the midst of Detective Clift's testimony. Even then, appellant made merely a vague complaint – which the trial court treated (and overruled) as an "objection" – that "I believe the People have tried to create an issue of gangs where it does not exist. . . . The People have invented this issue, and now they're trying to go further and call an expert to say it was not a gang killing, and I would submit it." (18RT 3133-3134.) Appellant's previous objection and motion for mistrial during Detective Clift's testimony were on the ground that the expert improperly opined on the ultimate issue of appellant's guilt, not on the ground that gang expert testimony was irrelevant, inflammatory, or otherwise inadmissible. (18RT 3114-3127.) Therefore, to the extent appellant's current challenge to the admission of gang-related evidence might be construed broadly to include any evidence presented before that point, his contention has been forfeited.

improbable that inmates who were not members of Surenos-affiliated gangs would become involved in Surenos "business" including the gang-ordered killing of a Surenos-affiliated inmate for "snitching" on another Surenos-affiliated inmate.

Appellant argues to the contrary that he did not "open the door" to gang expert testimony at trial. Appellant asserts that although the defense theory posited that Tinajero's cellmates were the actual killers, the defense introduced no evidence that the killing was a "gang hit," nor did the defense opening statement suggest that a gang hit was involved. (AOB 192 & fn. 68.) That argument fails in light of the defense cross-examination of the People's witnesses discussed above, highlighting the cellmates' prior status as trusties of the gang module and the supposition that all gang hit orders came through that module.

In any event, whether the defense theory specifically involved a "gang hit" is beside the point. It is undisputable that the defense proposed that Tinajero was killed by his cellmates for being a snitch. Detective Clift's expert testimony was relevant to discredit that theory. To demonstrate why the defense theory was implausible, it was necessary for Detective Clift to explain the operation of the Surenos gang, the jailhouse politics involving that gang, the permission required to carry out a hit against an inmate, the manner in which "green lights" against snitches are executed, and the unlikelihood that non-Surenos members would carry out such orders. In short, even assuming the defense theory did not explicitly involve a "gang hit," it made expert testimony regarding the Surenos gang relevant.

The words of the trial judge in *Parrish* are strikingly fitting here:

> "You opened the door with your duress defense which I allowed you to fully present to the jury. The People are entitled to rebut that. Your client talked about the green light situation, you talked about—you brought all the information about what it is to be a

snitch and all of that . . . You can't have your cake and eat it too. You presented your defense, they're allowed to present evidence to rebut it."

(*Parrish, supra*, 152 Cal.App.4th at p. 277, ellipses in original.) Appellant's defense theory, which he highlighted throughout the People's guilt phase case-in-chief, likewise placed at issue the very subject on which Detective Clift provided expert testimony. The trial court did not abuse its discretion in permitting the People to present that testimony.

C. The People Were Validly Permitted To Use Appellant's Letter To Impeach His Testimony That He Was Not A Member Of The Surenos; And Appellant Has Forfeited His Contention That The Impeachment Was Irrelevant Or Inflammatory.

Appellant testified on *direct* examination in the guilt phase that he was not a member of the Surenos. He now claims that the People should not have been allowed to impeach that testimony by asking him about a letter in which he wrote, "We ride for the Sur." (AOB 184-186.) He argues that the letter was irrelevant and unduly inflammatory and that its admission denied him his constitutional right to a fair trial.[73] Appellant has forfeited this contention by not objecting on *that ground* at trial. Regardless, his claim is meritless, as the People had the right to impeach his testimony.

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[73] In his opening brief, appellant makes no specific argument explaining why the admission of the letter for impeachment was error. Instead, he apparently makes a general claim that *all* of the gang-related evidence addressed in Section III of his brief (his statements to Limas, Detective Clift's expert testimony, and his impeachment with the "ride for the Sur" letter) was irrelevant, unduly inflammatory under Evidence Code section 352, and violated his federal constitutional rights to due process, a fair trial, and a reliable adjudication of guilt in a death penalty case. (AOB 186-201.)

Appellant testified on direct examination that he lived in the "Ghost Town" section of the neighborhood of Wilmington, but that he was not a member of the Surenos. Appellant explained that, "To be a Sureno, you have to be jumped in the neighborhood, and you have to actually be in prison, actually have experience to go to prison. That's a prison gang." (19RT 3277.) Appellant added that he was never "jumped" into Wilmas, but that since he lived in that neighborhood, he associated with the Wilmas, "went to high school with them, partied with them and everything." (19RT 3278.)

Before cross-examining appellant, the prosecutor informed the court and defense counsel of her intent to impeach appellant with his September 26, 2006 letter in which appellant claimed that he "ride[s] for Sur." (19RT 3287.) Appellant objected on the ground that the letter was beyond the scope of his direct examination testimony. The trial court overruled the objection, finding the letter relevant to impeachment. (19RT 3288.)

On cross-examination, appellant again testified that he was not a member of the Surenos. (19RT 3292.) However, he acknowledged writing a letter, intercepted by Detective Clift, stating "We ride for the Sur. Tu sabes babe. One for all, all for one." (19RT 3293.) Appellant claimed that to "ride for the Surenos" is not the same thing as to *be* a Sureno. He explained, "Well if you read the sentence, it says, 'We ride for the Surenos,' it doesn't say I'm a Sureno. When you're in jail, you can only go – you have certain choices who to run with, and that's the Southside, so a Southside runs with the Surenos, but the Surenos is only a prison gang, not an L.A. County Jail gang." (19RT 3294.) When asked, "Oh, so you're not a Sureno, you're a Southside county jail gang member?" appellant answered, "No. I'm a – I run with the Southsiders, but it's not a – you can say it's a gang, but." (19RT 3294.) Appellant denied that the Southsiders control the county jail under the supervision of the Surenos. He admitted

that since he was in high school, he "always claimed" the East Side Wilmas gang, but that he was never "jumped into" or "walked into" the gang. (19RT 3294.) Specifically, he claimed to be a member of the Ghost Town Locos clique of the East Side Wilmas. (19RT 3295.)

Appellant further explained that, "We ride for the Sur," meant, "Well, if – since there's different people you run with in jail, if something happens, you have to go along with what happens." (19RT 3295.) Appellant acknowledged that a person who "rides for the Sur" must therefore go along with the Surenos' requirements for dealing with snitches, but he denied that the Surenos require all snitches to be killed. (19RT 3295-3296.) According to appellant, "One for all, all for one," meant, "Well, we're a group. If something happens to one, then we all help him." (19RT 3297.) The letter itself, People's Exhibit 158, was admitted into evidence *without objection.* (20RT 3444.)

Appellant has forfeited his contentions that the admission and use of his "ride for Sur" letter for impeachment was irrelevant, inadmissible under Evidence Code section 352, or violated his federal constitutional rights. He made no such objections at trial. Rather, when the prosecutor gave notice of her intent to use the letter during cross-examination, defense counsel said only, "Obviously we oppose that line of questioning on the letter itself, but would appear to be that the other matters can be, but the letter, I don't believe that was mentioned in direct." (19RT 3288.) In other words, appellant objected solely on the ground that the proposed line of questioning was beyond the scope of the direct examination.[74] Because

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[74] By this time, appellant had also objected to the People's proposed use of the letter in a possible *penalty phase* on the ground that his act of writing the letter did not constitute a crime involving threats of violence within the meaning of Penal Code section 190.3, subdivision (b). (17RT 3079, 3086; 18RT 3097-3098, 3102.)

appellant did not object at trial on the same grounds now urged on appeal, his claim is forfeited. (Evid. Code, § 353, subd. (a); *Boyette, supra,* 29 Cal.4th at p. 424; *Mattson, supra,* 50 Cal.3d at p. 854.)

In any event, appellant's contention is meritless. Appellant broached the subject of his gang affiliation in his own testimony on *direct examination* when he stated under oath that he was not a member of the Surenos, nor was he officially "jumped" into the Wilmas. (19RT 3277-3278.) Appellant's statement in his letter that "We ride for the Sur," had a "tendency in reason" to disprove his direct examination testimony. It was therefore relevant to impeach the credibility of his testimony overall. (Evid. Code, § 780, subds. (h), (i) [in determining the credibility of a witness, the jury may consider "any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony" including a "statement made by him that is inconsistent with any part of his testimony" or the "existence or nonexistence of any fact testified to by him."].) Neither state law nor the federal Constitution prohibits impeachment of a defendant with his own written statements showing that a matter to which he testified on direct examination was false. There was no error.

D. Any Error Was Harmless In Light Of The Compelling Evidence Of Appellant's Guilt

Assuming the trial court erred in admitting any of the three items of gang-related evidence challenged on appeal, that error was harmless. Contrary to appellant's contention, the claimed errors would have implicated only California evidentiary law, and did not render trial "fundamentally unfair" in violation of his federal right to due process. (*Estelle, supra,* 502 U.S. at p. 70; *Partida, supra,* 37 Cal.4th at p. 439; *Falsetta, supra,* 21 Cal.4th at p. 913.) Therefore, the *Watson* standard of prejudice applies, requiring affirmance unless it is reasonably probable that absent the evidence, appellant would have received a more favorable result.

(*Watson, supra*, at pp. 836-837.) Regardless, even assuming the claimed errors violated the federal Constitution, they were harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.)

Again, the evidence of appellant's guilt of both murders was compelling. Regarding the murder of Armenta, there was no dispute that appellant ran over the victim at least once with the Infiniti, given appellant's testimonial admission of that fact, the circumstances and location of his arrest, and the presence of Armenta's DNA on the undercarriage of the car. Tinajero's testimony showed that the hit-and-run was no accident, and that appellant strangled Armenta before running him over multiple times with two different stolen cars. That testimony was corroborated by the multiple, differently-aligned track marks on Armenta's body; the physical evidence of strangulation found in the autopsy; the testimony of Aranda, Quevado, Ramos and Rodriguez indicating the use of a second car, the Honda; and appellant's confessions to Deputy Argueta and to Palacol.

Regarding the Tinajero murder, three of the victim's cellmates gave largely consistent eyewitness testimony establishing appellant's guilt and describing how appellant killed the victim. That testimony was corroborated by the autopsy, the presence of blood containing Tinajero's DNA on appellant's pants, appellant's obvious motive to kill Tinajero, appellant's testimonial admission that he went to Tinajero's cell on the day of the murder, appellant's phone book with the names and booking numbers of Tinajero (off by one digit) and his four cellmates handwritten inside, appellant's statements to Limas that he was trying to find a "clown" in jail named Raul who was testifying against him and that he was ultimately able to find Raul's housing information, and appellant's confessions to Deputies Argueta and Torres—the latter in great detail—that he killed Tinajero.

In light of the abundant evidence of appellant's guilt of both murders, any error in admitting evidence regarding gangs at trial was clearly harmless under any standard.

IV. PALACOL'S BRIEF REFERENCE TO A DEPUTY'S STATEMENT ABOUT "SHANKS" WAS ADMISSIBLE FOR NON-HEARSAY REASONS AND WAS HARMLESS

Appellant contends that the trial court erroneously permitted Palacol to testify about a hearsay statement by a sheriff's deputy regarding appellant's possession of "shanks and stuff." He claims the testimony violated California evidentiary rules as well as the Fifth, Sixth, and Fourteenth Amendments. (AOB 202-210.) Respondent disagrees. As the trial court found, the statement was admissible for a non-hearsay purpose: to explain the circumstances regarding Palacol's photograph identification of appellant. Furthermore, the evidence was plainly harmless.

A. Background

Palacol testified that on the day of Tinajero's murder, after the cellmates exited the cell and reported that there was a "man down," he and the other cellmates were sent to different corners of the day room and were later questioned separately by Detectives Cain and Kenney. (14RT 2416-2417.) The detectives interviewed Palacol twice. In the second interview, the detectives gave Palacol a standard admonition regarding identifications and showed Palacol six photographs, from which Palacol appellant as the murderer. (14RT 2417-2421; Exhs. 90, 94.)

After eliciting the above testimony, the prosecutor asked Palacol about a different photograph (Exh. 95). Palacol testified that while he was in the day room after the murder, a sheriff's deputy showed him that photograph. The prosecutor asked Palacol, "What were the circumstances of you being shown that photograph?" and Palacol began to answer, "He

just – he said that he was having – ." Appellant objected on hearsay grounds. The prosecutor stated that the statement was "Not offered for the truth at this time." (14RT 2421-2422.)

At sidebar, defense counsel stated that based on discovery, he anticipated Palacol would testify that the deputy told him he had been having problems with the inmate in the photograph, because the inmate had been found in possession of shanks. Defense counsel argued that the deputy's statement to Palacol was hearsay, was irrelevant for any non-hearsay purpose, and should additionally be excluded as more prejudicial than probative. The prosecutor explained that the photograph showed appellant in jail, handcuffed, wearing county-issued blue pants and no shirt. According to the prosecutor, testimony regarding the deputy's statement was relevant to explain the circumstances of why the deputy showed Palacol the photograph and asked if he could identify it—namely, because the deputy was having problems with appellant regarding possession of shanks. The prosecutor argued that there would be no prejudice because the trial court had already ruled that the People could present other evidence of appellant's possession of shanks, "So it's not like evidence that they're not going to have. The prejudicial value is really minimal, given the fact it's coming in anyway." The trial court overruled appellant's objection, and appellant did not ask the court for a limiting instruction regarding the non-hearsay use of the statement. (14RT 2423.)

Palacol then testified that when the deputy showed him Exhibit 95, "He said he was having trouble with this person finding shanks and stuff on him, and he just showed it to me and asked me if that was the guy that was in his cell that did that – in my cell that did that [i.e., the murderer]." Palacol told the deputy that the person in the photograph was the person who committed the murder. (14RT 2424.) On cross-examination, Palacol testified that the deputy showed him only a single photograph and did not

give him an admonition beforehand that this may or not be the actual perpetrator. Palacol estimated that this initial photograph identification occurred "a couple days" before the detectives showed him the six photographs. (14RT 2454.)

B. The Trial Court Properly Permitted The Testimony To Explain The Circumstances Of Palacol's First Photograph Identification Of Appellant, And Any Error Was Harmless

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subdivision (a).) Hearsay is generally inadmissible except where permitted by an exception to the "hearsay rule." (Evid. Code, § 1200, subdivision (b).) However, evidence of an out-of-court statement is not hearsay if it is offered for a relevant non-hearsay purpose – that is, for a purpose other than to prove the truth of the matter stated. (*People v. Farley* (2009) 46 Cal.4th 1053, 1107 ["testimony about what Elliott heard was not hearsay because it was not offered for its truth"]; *People v. Crew* (2003) 31 Cal.4th 822, 841.)

Even where evidence is relevant and otherwise admissible, trial courts have discretion under Evidence Code section 352 to exclude evidence if its probative value is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Rogers, supra,* 57 Cal.4th at p. 326; *Ewoldt, supra,* 7 Cal.4th at p. 404.) Unless these dangers *substantially outweigh* the probative value, an objection under section 352 must be overruled. (*Tran, supra,* 51 Cal.4th at p. 1047 ["'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].'"]; *Jenkins, supra,* 22 Cal.4th at p. 1008.)

Here, in overruling appellant's objections, the trial court implicitly found that the deputy's statement to Palacol was relevant for the non-hearsay purpose urged by the prosecutor: to explain the circumstances regarding the deputy's inquiry and Palacol's identification of the photograph. Neither that decision, nor the court's implicit finding that the dangers of undue prejudice did not substantially outweigh probative value (see *Prince, supra,* 40 Cal.4th at p. 1237), was an abuse of discretion.

Palacol's interview by the deputy in the day room was his *first* photographic identification of appellant. At that time, Palacol was shown only a single photograph of appellant, not a six-photograph lineup. Had the prosecutor not asked Palacol about the circumstances surrounding the deputy's inquiry, the jury would have been left to wonder why the deputy showed Palacol only that one photograph of appellant, rather than presenting him with a photographic lineup as the detectives later did. This would have fueled a defense argument that the single photograph show-up was a suggestive identification that tainted Palacol's subsequent six-photograph identification with the detectives, and that the sheriff's department had prejudged the matter and was deliberately targeting appellant to take the blame for the murder.[75]

But because the trial court overruled appellant's objection, the jury was able to hear testimony suggesting that the purpose of the deputy's inquiry was not to investigate the murder, but rather to follow up on a far

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[75] In a similar vein, presenting evidence of the earlier identification and the deputy's statement served the interests of candor and fairness because an argument could be made that Palacol's one-photograph identification of appellant, accompanied by the deputy's statement, may have influenced his later identification of appellant from a six-photograph lineup.

less serious rule violation by appellant. Therefore, the testimony was relevant for a non-hearsay purpose.

Furthermore, the trial court did not abuse its discretion by overruling appellant's objection under Evidence Code section 352. As previously discussed in Section II(d) of this brief, appellant's possession of a shank was hardly inflammatory in comparison with the horrible details of both the Armenta and Tinajero murders. Furthermore, Palacol's testimony about the deputy's statement was very brief.

In any event, the testimony about the statement was harmless. Because any error would implicate only state law,[76] reversal is not warranted unless the record shows a reasonable probability that appellant would have obtained a more favorable verdict but for the claimed error. (*Watson, supra,* 46 Cal.2d at p. 836; see *People v. Chism* (2014) 58 Cal.4th 1266, 1298 [*Watson* standard applies to errors in the admission of evidence in the guilt phase of a capital trial].)

Appellant cannot meet that standard here. Apart from Palacol's testimony, the jury heard other, competent, *non-hearsay* testimony in the guilt phase that appellant possessed "shanks"—in the form of a sharpened piece of metal, a razor, and a syringe with a hypodermic needle—while in custody. (16RT 2641-2647, 2796-2804, 2807, 2827-2828.) The deputy's hearsay statement that appellant possessed "shanks and stuff" therefore told the jury nothing new. The *firsthand* testimony regarding appellant's

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[76] Again, notwithstanding appellant's claims of federal constitutional error (AOB 209), "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair.*" (*Partida, supra,* 37 Cal.4th at p. 439 [italics in original], citing *Estelle,* 502 U.S. at p. 70; *Falsetta, supra,* 21 Cal.4th at p. 913.) That was not the case here. Regardless, any error here was "harmless beyond a reasonable doubt" under the standard applicable to federal constitutional errors. (*Chapman, supra,* 386 U.S. at p. 24.)

shanks was properly admitted under Evidence Code section 1101, subdivision (b), as discussed *ante* in Section II(d) of this brief. Even if the section 1101, subdivision (b), evidence was erroneously admitted, Palacol's testimony about the deputy's statement did not add anything prejudicial to the state of the evidence.

Further, the jury was instructed that the evidence of other uncharged crimes may be considered "only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them," that it "could not be considered by you for any purpose other than the limited purpose for which it was admitted," that it specifically "may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes," and that it could not be considered for any purpose at all unless the jury finds that the People have met their burden of proving by a preponderance of the evidence that appellant committed the other acts. (5CT 1260-1261, 1263; CALJIC Nos. 2.09, 2.50, 2.50.1, 2.50.2.)

As noted, there was abundant evidence of appellant's guilt of the Tinajero murder, including his confessions of guilt to Deputies Torres and Argueta, the presence of Tinajero's DNA on appellant's pants; the detailed eyewitness testimony of three of Tinajero's cellmates; the physical corroboration of the cellmates' testimony by the coroner's findings and the phone book found in appellant's possession; appellant's clear and obvious motive to kill Tinajero to retaliate for his having "snitched" and to prevent him from testifying; appellant's admissions to Limas that he was looking for a "clown" named Raul who was testifying against him and that he was eventually able to obtain Raul's housing location from a "homie;" and appellant's testimonial admission that he went to Tinajero's cell on the day of the murder.

For all of these reasons, it would strain credibility to find that the jury convicted appellant of two counts of capital murder because of Palacol's testimony that a deputy told him appellant had "shanks." There is no reasonable probability that appellant would have received a more favorable verdict but for that testimony (*Watson, supra,* 46 Cal.2d at p. 836.) For the same reasons, any arguable federal constitutional error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.)

V. APPELLANT FORFEITED HIS COMPLAINT REGARDING HEARSAY TESTIMONY DURING THE PENALTY PHASE ABOUT A FIGHT IN THE DAY ROOM; NO PREJUDICIAL ERROR OCCURRED

In the penalty phase, Deputy Morean testified for the People about a June 30, 2002 incident in the day room of appellant's module. Appellant now claims the deputy's testimony was inadmissible hearsay which violated his Sixth Amendment right to confront witnesses. (AOB 211-228.) Appellant is entitled to no relief on this claim. Deputy Morean testified about his own personal observations of appellant's reddened knuckles and scratched back after the incident. Assuming any portion of Deputy Morean's testimony was inadmissible hearsay admitted for the truth of the matter asserted, appellant forfeited any objection thereto. Finally, any error was harmless.

A. Background

On December 7, 2006 while the jury was deliberating regarding the guilt phase, the court and counsel discussed evidentiary issues pertaining to a possible penalty phase. The prosecutor stated that she intended to offer evidence of a fight between inmates in one of the day rooms of Men's Central Jail. According to a report, it was undetermined who started the fight, which was labeled "mutual combat," but that appellant had red knuckles afterward. Defense counsel made no comments or objections at

that time. The trial court deferred ruling on the admissibility of evidence of the incident and requested legal authority on whether mutual combat was admissible in the penalty phase under Penal Code section 190.3, subdivision (b) (hereafter "factor (b)"). (22RT 3822-3823.)

In further discussion of the issue on December 14, 2006, appellant argued that the day room incident was inadmissible because it "does not come within *Phillips*" (i.e., it did not qualify as criminal activity under factor (b)).[77] (22RT 3907.) The prosecutor stated that according to a report, which she acknowledged was hearsay, appellant instigated the fight. Nevertheless, she argued, it was unnecessary to determine who instigated the fight. She explained that in true "mutual combat" situations, as opposed to situations where one party is the aggressor and the other acts solely in self-defense, both participants are guilty of battery, a crime for purposes of factor (b). According to the prosecutor, the People were not required to disprove self-defense in order to present the evidence in the penalty phase. At no time during that day's discussion did appellant object to the proffered evidence on hearsay grounds. The trial court again deferred ruling. (22RT 3907-3909.)

On January 2, 2007, the first day of the penalty phase, the trial court ruled that the day room incident was admissible. The defense made no objection at that time. (23RT 3969.)

Deputy Morean, the first penalty phase witness, testified that on June 30, 2002, while he was assigned to the 3000 floor, he became aware of an incident that occurred in the day room. He could not recall how he was alerted about the incident. (23RT 3979.) The prosecutor asked the deputy,

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[77] In *People v. Phillips* (1985) 41 Cal.3d 29, 65-72, this Court held that evidence of "other criminal activity" admitted in the penalty phase under Penal Code section 190.3, subdivision (b), must relate to a crime prohibited by statute.

"But there was something that you were alerted to?" Deputy Morean answered, "Yes." The prosecutor then asked, "And what was it?" Deputy Morean answered, "A fight had occurred inside of the day room." (23RT 3979.) Appellant made no objection to the above colloquy on hearsay or any other grounds.

Deputy Morean further testified that in response to the information, he went to the day room and saw appellant, whom he identified in court. (23RT 3979-3980.) Other deputies were already present and had separated and started to interview the inmates. Deputy Morean added, "One of the deputies that was doing the interviewing said – ." At that point, appellant objected for the first time on hearsay grounds. The trial court sustained the objection "as to what was said," and the witness did not finish that last sentence. (23RT 3980.) The prosecutor next asked the witness, "Do [sic] you obtain any information as to who started the fight?" Deputy Morean replied, "Yeah. I was told that – ." Appellant again objected on hearsay grounds. The prosecutor offered that the question was relevant to the deputy's state of mind. The court sustained the objection. (23RT 2980.)

Without revealing the contents of what he was told, Deputy Morean testified that he obtained information about who started the fight. He further testified he personally saw that appellant had reddened knuckles on both of his hands and scratches on his back. (23RT 3981.) Deputy Morean wrote a disciplinary report regarding appellant based on the information he obtained about the incident. (23RT 3982.)

On cross-examination, Deputy Morean testified that he had no current recollection of the incident at the time of trial, and that he was relying on his report (apparently the disciplinary report). (23RT 3982-3893.) Morean saw appellant's scratches and red knuckles but did not see the actual incident, nor did he personally see appellant or anyone else strike or swing at anyone. (23RT 3983-3984.) Morean's report described the incident as

"mutual combat," a term which, according to the deputy, could refer to self-defense scenarios. (23RT 2983, 2985-2986.) Morean used the term "mutual combat" in the report because he did not know who struck whom first. (23RT 3985.) Deputy Morean did not write disciplinary reports regarding any other inmates based on this incident, nor did he know whether other deputies wrote reports on any other inmates. (23RT 2984-2985.) Deputy Morean did not know whether appellant actually received any administrative discipline or criminal charges as a result of the incident. (23RT 3987.) Deputy Morean likewise did not know whether appellant was "singled out" by the other deputies to take the blame for the fight. (23RT 3988.) According to Deputy Morean, fights were very common at Men's Central Jail at that time. (23RT 3986.)

On redirect examination, the prosecutor asked Deputy Morean if he had information that appellant was not the victim in the incident. (23RT 3988-3989.) Appellant objected on hearsay grounds, and the witness did not answer. At sidebar, the prosecutor asserted that even though the question called for second-hand information, appellant had opened the door to such testimony by asking the witness whether appellant might have been acting in self-defense and whether the deputies had "singled him out." The prosecutor explained that according to Deputy Morean's report, he had information that appellant started the fight. That information would be relevant for the non-hearsay purpose of demonstrating the deputy's state of mind. (23RT 3989.) Defense counsel argued that this still amounted to hearsay, and indicated that he was planning to ask the court to strike the deputy's entire testimony based on lack of firsthand knowledge and present recollection of the incident. Defense counsel then "renew[ed] his motion to strike for lack of firsthand knowledge" (a motion he had never previously made). The trial court sustained appellant's objection, but denied his

motion to strike testimony, ruling, "As to what he's testified to, that motion is denied. He is a witness to the injuries on the defendant." (23RT 3990.)

Deputy Morean further testified on redirect examination (over another defense objection on unspecified grounds) that if he had been told that appellant was the victim in the incident, he would not have written a disciplinary report against appellant. Therefore, based on the fact that he wrote a disciplinary report, he believed that appellant violated disciplinary rules by being involved in a fight. (23RT 3991-3992.) On recross examination, the deputy reiterated that he did not see appellant either initiate any force or violence or defend himself against force or violence. Except for the deputy's personal observation of appellant's knuckles and back, all of his information was based on matters reported to him. (23RT 3992.) Defense counsel's renewed motion to strike the witness' testimony was denied. (23RT 3993.)

B. Appellant Has Forfeited Any Claim Of Inadmissible Hearsay Or Violations Of The Confrontation Clause

The only arguable hearsay testimony by Deputy Morean came early during the initial direct examination of the witness. After the deputy testified that he had been "alerted to" information about an incident in the day room, the prosecutor asked what that information was. Deputy Morean answered, "A fight had occurred inside of the day room." (23RT 3979.) As noted, appellant made no objection to that colloquy on hearsay or any other grounds.[78] He has therefore forfeited his claims on appeal that this

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[78] Appellant's previous, general objection to all evidence of the day room incident on the ground that it was not a "criminal act" for factor (b) purposes (22RT 3907) did not preserve his current hearsay or Confrontation Clause claims for appeal. (Evid. Code, § 353, subd. (a); *Boyette, supra,* 29 Cal.4th at p. 424 [a timely objection on the same ground is required to preserve an evidentiary issue for appeal]; *Guerra, supra,* 37 Cal.4th at p.

(continued...)

statement was inadmissible hearsay and that it violated his Sixth Amendment confrontation rights. (*People v. Riccardi* (2012) 54 Cal.4th 758, 827, fn. 33 [failure to object forfeited claim that testimonial hearsay statement violated Confrontation Clause]; *People v. Eubanks* (2011) 53 Cal.4th 110, 142 [failure to object at trial forfeited claim of inadmissible hearsay].)

Appellant's motion to strike Deputy Morean's testimony in its entirety (23RT 3990) did not constitute a timely and specific objection sufficient to preserve a claim of error regarding the testimony that "a fight had occurred in the day room." Appellant waited to make that motion during a sidebar in the midst of redirect examination – after the conclusion of both the prosecutor's initial direct examination and appellant's initial cross-examination. As this Court long ago established, "When the nature of a question indicates that the evidence sought is inadmissible, there must be an objection to the question; a subsequent motion to strike is not sufficient." (*People v. Perry* (1972) 7 Cal.3d 756, 780, overruled on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 28-34; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 21; *People v Abbott* (1956) 47 Cal.2d 362, 372 ["The general rule is that, when it is apparent from the face of a question that the evidence sought to be elicited will necessarily be inadmissible, a motion to strike is not available unless there has been preliminary objection."].) "A party cannot hazard whether the reply of a witness to an objectionable question will be favorable or unfavorable to him, and, when it appears unfavorable, then object to it. He must object when the question is asked, and before the answer is given, and, if he does not, he waives his right to

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(...continued)
1118.) All of appellant's *subsequent* hearsay objections to other specific matters during Deputy Morean's testimony were sustained, and no hearsay testimony was actually aired in response. (23RT 3980, 3988-3989.)

complain of the admission of the testimony under the answer." (*People v. Scalamiero* (1904) 143 Cal. 343, 345.) "'Any other rule would in a great measure do away with the necessity of interposing seasonable objections and enlarge the motion to strike out.'" (*Demetrulias, supra*, 39 Cal.4th at pp. 21-22, quoting *Scalamiero, supra*, 143 Cal. at p. 346.)

Here, appellant had the opportunity to object to the prosecutor's question regarding what Deputy Morean was "alerted to" and to the deputy's answer. He chose to forgo that opportunity, to hear all of the witness's initial direct examination testimony, to complete his own cross-examination of the deputy, and then to hear part of the People's redirect examination before moving at sidebar to strike Deputy Morean's testimony in its entirety. He never made a specific objection to the one line of arguable hearsay aired, namely that "A fight had occurred inside of the day room." This claim is therefore forfeited.

C. The Statement That A Fight Had Occurred Was Relevant For A Non-Hearsay Purpose And Was Not "Testimonial" For Confrontation Clause Purposes.

In any event, no error, let alone federal constitutional error, occurred. As noted previously, "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subdivision (a).) Hearsay is generally inadmissible except where permitted by an exception to the "hearsay rule." (Evid. Code, § 1200, subdivision (b).) However, evidence of an out-of-court statement is not hearsay if it is offered for a relevant non-hearsay purpose – that is, for a purpose other than to prove the truth of the matter stated. (*Farley, supra,* 46 Cal.4th at p. 1107; *Crew, supra,* 31 Cal.4th at p. 841.)

Again, the only out-of-court statement actually aired by the People during Deputy Morean's testimony was that the deputy was "alerted" that

"[a] fight had occurred inside of the day room." (23RT 3979.) But that statement was relevant for a non-hearsay purpose (i.e. a purpose other than to prove its truth). The statement explained the deputy's subsequent conduct in going to the day room. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1093 [out of court statement was admissible to explain the witness' subsequent conduct].) Although there was no admonition to the jury limiting the use of that statement to non-hearsay purposes, appellant never requested one (because, again, he never objected to that particular testimony).

Even assuming the statement, "A fight had occurred inside of the day room," was inadmissible hearsay, it did not violate the Confrontation Clause of the Sixth Amendment. The admission of hearsay statements implicates the Confrontation Clause only if the out-of-court statements are "testimonial." (*Michigan v. Bryant* (2011) 562 U.S. 344 [131 S.Ct. 1143, 179 L.Ed.2d 93]; *Crawford v. Washington* (2004) 541 U.S. 36, 60-69 [124 S. Ct. 1354, 158 L. Ed. 2d 177]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812; *People v. Page* (2008) 44 Cal.4th 1, 48.) Although the United States Supreme Court has not defined precisely when a hearsay statement is "testimonial" for Confrontation Clause purposes, this Court has observed that two critical components are required.

> First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity. [Citations.] The degree of formality required, however, remains a subject of dispute in the United States Supreme Court. [Citations.] [¶] Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be.

(*People v. Lopez* (2012) 55 Cal.4th 569, 581-582; see also *People v. Dungo* (2012) 55 Cal.4th 608; *People v. Rutterschmidt* (2012) 55 Cal.4th 650.) Here, nothing in the record establishes that the unnamed declarant's statement to Deputy Morean that "A fight had occurred inside of the day room," was made with any "degree of formality or solemnity," nor that its primary purpose pertained to a criminal prosecution. Rather, the apparent purpose of the statement was merely to prompt Deputy Morean to go to the day room to assist other deputies. Hence, it was analogous to a statement made "to enable police assistance to meet an ongoing emergency." (*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] [finding such statements "nontestimonial"].)[79] Therefore, appellant fails to show from the record that his Sixth Amendment right to Confrontation was violated.

D. Any Error Was Harmless

Finally, any error was utterly harmless. Because the record does not establish that the purported hearsay statement was "testimonial" for Confrontation Clause purposes, the purported error implicates only state law. "State law error occurring during the penalty phase will be considered

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[79] Had appellant *timely objected* to the testimony on hearsay and Confrontation Clause grounds, the trial court could have conducted an inquiry about the circumstances surrounding the statement to determine if it was "testimonial." By failing to object, appellant is to blame for the lack of such findings in the record. Appellant has the burden of showing error from the record. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Absent any facts in the record establishing that the statement was "testimonial," this Court must presume that it was not. "On appeal, we presume that a judgment or order of the trial court is correct, '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v. Giordano* (2007) 42 Cal.4th 644, 637-638; *Garza, supra*, 35 Cal.4th at p. 881 [on appeal, a judgment is presumed correct].)

prejudicial when there is a 'reasonable possibility' such an error affected a verdict." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.)

> In deciding whether it is "reasonably possible" that a given error or combination of errors affected a verdict, we will "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker . . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

(*People v. Brown* (1988) 46 Cal.3d 432, 448, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 695 [104 S.Ct. 2052, 80 L.Ed.2d 674].) A "'mere or "technical" possibility that an error might have affected a verdict will not trigger reversal." (*Brown, supra*, at p. 448.) Instead, appellant must show a "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Ibid*, parenthesis in original.)

Appellant cannot meet that standard here. The statement, "A fight had occurred inside of the day room," revealed nothing about the nature of the fight or who was involved. Deputy Morean admitted that he never saw appellant swing at or strike anyone else, and did not know who struck whom. (23RT 3983-3985.) According to the deputy, fights were very common in Men's Central Jail. (23RT 3986.) There was no evidence that anyone was seriously injured in the fight.

Most importantly, appellant's possible involvement in a commonplace fight in jail in 2002, two years before the Tinajero murder, was hardly significant as aggravating evidence in light of the highly aggravating circumstances of the two murders themselves. In the guilt phase, the jury unanimously found, beyond a reasonable doubt, that appellant committed

the first degree murders of Armenta and Tinajero with the special circumstances of multiple murder, murder for robbery, and murder of a witness. (6CT 1304-1307.) The guilt phase evidence showed that appellant strangled Armenta, threw him out of a car in a dark alley, and used that car to run over Armenta back and forth, merely for the purpose of stealing the car. Concerned that Armenta may not have died, appellant returned to the dark alley in another car which he had likewise stolen from Armenta that night, and ran over Armenta again.

The guilt phase evidence further showed that appellant managed to evade a "keepaway order" and jail security to get into Tinajero's cell, where he brazenly murdered Tinajero—purportedly appellant's close friend for many years—in front of four terrified eyewitnesses to retaliate for Tinajero's testimony and to prevent him from testifying again. The manner in which appellant killed Tinajero was gruesome and excessive. Appellant ambushed Tinajero in his sleep, pulled him off his bunk, put him in a headlock, squeezed Tinajero's neck with his bare hands until the victim stopped moving, forced the head of his inert victim underwater in the toilet to drown him, and then stomped on Tinajero's upper neck or chest, causing a cracking or popping sound audible to the cellmates. In case all of those acts were not enough to ensure Tinajero was dead, appellant tied a ligature around Tinajero's neck so tightly that the medical examiner and a criminalist were later unable to slip their fingers between the ligature and Tinajero's neck.

Once he was finally satisfied that Tinajero was dead, appellant wrote down the names and booking numbers of the four cellmate witnesses and either expressly or implicitly threatened to do the same thing to the them if they "snitched." He then made telephone calls from Tinajero's jail cell to brag about his "touch down." While appellant remained in the cell with the dead body for hours, he calmly smoked a cigarette, read a magazine, and

acted "[j]ust like nothing happened," and "[j]ust like everyday thing, you know. He didn't show any remorse." (12RT 2144-2145, 2147; 14RT 2405.) In fact, while he was later housed in the high power module, appellant had the sheer bravado to brag about the killings to two sheriff's deputies and to declare gleefully, "Now that he's dead, they're going to have to offer me a deal." (16RT 2961; 17RT 3042-3051, 3059-3060.)

Further, the People presented other, more compelling penalty phase evidence of violent and threatening conduct by appellant in jail which appellant *does not challenge on appeal.* On November 5, 2004, after deputies confiscated appellant's pruno, appellant threatened to stab Deputy Saucedo when he "least expected it." (23RT 4002-4003, 4010-4011, 4037-4038, 4044.) During that process, appellant was combative and non-compliant with orders, resisted handcuffing, and said to Deputy Florence, "Fuck you, fag. I'll come out when I'm ready." (23RT 4003, 4044, 4046-4048, 4051-4052.) Appellant tried to get rid of items in his cell by swallowing them or flushing them down toilet. (23RT 4052.) He thrashed about with his legs, hips and feet to hinder the deputies from moving him, and he kicked Deputy Florence in the leg and spat at him. (23RT 4003, 4014, 4021, 4049-4050, 4056-4057, 4059.) Unlike the evidence of the day room incident, the evidence of the November 5, 2004 consisted of eyewitness accounts of the ongoing acts of violence and of an explicit threat.

Additionally, as explained *post* in Section VI, the trial court properly admitted evidence of appellant's numerous other criminal activities involving the use of implicit threats of force of violence under factor (b).

Given the extremely aggravated nature of the two murders demonstrated by the *guilt phase* evidence, plus the other penalty phase evidence, any error regarding the admission of Deputy Morean's testimony, was patently harmless. There is no reasonable, realistic possibility that the

jury would have rendered a different verdict had that testimony not been admitted. (*Brown, supra*, 46 Cal.3d at p. 448.)

VI. IN THE PENALTY PHASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT'S JAILHOUSE CONDUCT UNDER FACTOR (B) OR AS REBUTTAL EVIDENCE; APPELLANT HAS FORFEITED HIS OBJECTIONS TO MOST OF THE EVIDENCE AT ISSUE

Appellant contends that the trial court erred in the penalty phase by permitting evidence of acts which did not amount to crimes within the meaning of factor (b). Specifically, he claims that the evidence of the following was wrongly admitted: (1) the December 7, 2004, incident in which he concealed an object—a bag of chips—from Deputy Argandona; (2) appellant's September 26, 2006, "ride for the Sur" letter to Della Rose Santos; (3) the June 7, 2005, incident in which appellant incited the inmates to chant "Benji is a rat;" (4) appellant's June 17, 2005, possession of an altered paperclip which could be used as a handcuff key; and (5) appellant's January 4, 2007, attempt to smuggle out personal letters as "legal mail."[80] Appellant claims that these errors violated his federal constitutional rights to due process, equal protection, and a reliable penalty determination. (AOB 229-281.)

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[80] In the "Introduction" to this section of his opening brief, appellant also mentions that the People presented evidence of the previously discussed June 30, 2002, day room incident as factor (b) evidence. (AOB 229.) However, appellant's opening brief makes no argument that the day room incident did not amount to a crime involving force or violence admissible under factor (b). Instead, a footnote in the opening brief referring to the day room incident states, "Appellant addresses the trial court's error in admitting evidence relating to this incident in Argument V, *ante*." (AOB 229, fn. 88.) Because "Argument V" asserts only hearsay and Confrontation Clause issues regarding Deputy Morean's testimony, as well as an Eighth Amendment claim predicated solely on the hearsay issue (AOB 211-228), respondent assumes those are the only arguments appellant intends to raise regarding the June 30, 2002, incident.

Respondent disagrees. Appellant has forfeited his objections to most of the evidence listed above by failing to make a timely objection in the trial court. In any event, the evidence was properly admitted, and if any error occurred, it was harmless.

A. Appellant's Challenge To The December 7, 2004, Incident Involving Deputy Argandona Has Been Forfeited And Is Meritless

Appellant claims that evidence of a December 7, 2004, incident in which appellant concealed an object from Deputy Argandona should have been excluded from the penalty phase because it did not qualify as a factor (b) crime. (AOB 235-239.) However, appellant never asked the trial court to exclude that evidence. He has therefore forfeited this claim. Regardless, his contention is meritless.

1. Background

On May 8, 2006, the People filed a Supplemental Notice of Evidence to be Introduced in Aggravation, which stated that the People would offer penalty phase evidence of "[a]ny incidents involving the use or attempted use of force or violence or the express or implied threat to use force or violence." The notice indicated that the People had previously provided to the defense appellant's disciplinary records from June 13, 2002, through July 30, 2005, and that "[c]ontained within the reports are incidents involving the defendant possessing weapons, fighting with other inmates, threats to Sheriff's personnel and combative behavior." (5CT 1076.)

At an October 30, 2006, hearing, two months before the penalty phase commenced, the prosecutor explained in more detail the factor (b) evidence she planned to present in the penalty phase. (4RT 761-763.) Among that evidence was an incident in jail "where he's got a bag of potato chips in his hand but he's hiding his hands, and they tell him let me see your hands, and

instead of removing his hands, he gets into a fighting stance." The prosecutor added that the incident was in the disciplinary records provided to the defense. (4RT 761.) The prosecutor agreed to give the defense a written list of the factor (b) incidents so that the defense would have an opportunity to ask for a hearing regarding whether the proffered evidence constitutes a crime for factor (b) purposes. (4RT 762-763.) At no point in the record did the defense ask for such a hearing regarding the incident specifically described above or move to exclude evidence of that incident.

On January 2, 2007, in proceedings outside the presence of the jury just before opening statements in the penalty phase, defense counsel stated:

> I would – make *People v. Phillips* objection to various acts of violence which is factor (b) type evidence as not constituting a crime, and I believe the court has made tentative rulings as to some of them and not to others. [¶] I feel that some of the matters that the People have listed as factor (b) evidence are not consistent with the People's – with the *Phillips* case in that I don't believe that they show a crime or an attempt to commit a crime, and before the matter goes to the jury, I would like for the court to just ask the People what witnesses they plan to call and what will they – whether or not it constitutes a crime.

(23RT 3947-3948.) The trial court asked the prosecutor whether she intended to offer any additional factor (b) evidence for which the trial court had not already ruled on admissibility. The prosecutor responded that the trial court had tentatively ruled two factor (b) incidents admissible—the day room incident in which appellant had red knuckles (see Section V of this brief, *ante*) and the incident in which appellant called another inmate a rat. She added that the court had made final, non-tentative findings of admissibility regarding other items, including a letter in which appellant made threats against another person. (23RT 3948-3949.)

After attending to other matters regarding jurors and witnesses, the court returned to the issue of the admissibility of penalty phase evidence. The court finalized its tentative ruling that the day room incident was admissible, and indicated that the People could not present evidence of appellant's possession of pornography without first seeking an Evidence Code section 402 hearing. (23RT 3969-3970.) The defense did not raise any additional evidentiary issues or ask for further rulings at that point.

In the People's penalty phase opening statement, the prosecutor described to the jury a series of acts by appellant in jail on which she would be presenting evidence. Among them was an incident in which appellant kept his hands hidden in his waistband, refused to comply with a deputy's order to remove his hands, and instead took a fighting stance, although the only thing appellant was concealing in his hands was a bag of chips. (23RT 3975.) Appellant did not object or request a sidebar conference during or after the opening statement to challenge the admissibility of the evidence the prosecutor had just described.

Deputy Argandona, the People's second penalty phase witness, testified that afternoon as follows. On December 7, 2004, Deputy Argandona was escorting appellant from the court line to his cell. Appellant was classified as a K-10 (high security) inmate at the time. (23RT 4003-4004.) Deputy Argandona saw that appellant was concealing something in his hands and trying to put it in his waistband. The deputy was concerned about the possibility that appellant was concealing a weapon, as appellant was known to carry razor blades. (23RT 4004-4005.)[81] Deputy Argandona personally knew that appellant had previously

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[81] Appellant objected to the reference to razor blades as hearsay and character evidence and moved to strike that testimony. The court "sustained" the objection "except to the extent of the witness's knowledge (continued...)

possessed weapons. (23RT 4005.)[82] When the deputy asked appellant to show him what he had in his hands, appellant grasped the hidden object to further conceal it, lowered his center of gravity, ducked down in "a defense stance or possibly an offensive stance," and turned away from the deputy. (23RT 4005-4006, 4017.) Thinking appellant was concealing a weapon, Deputy Argandona grabbed him, placed him against the wall, pulled his hand around, and removed the hidden object—a bag of potato chips—from appellant's waistband. Appellant was not allowed to have chips or other canteen items because he was on "loss of privileges" status. (23RT 4006, 4015-4016.) While the deputy grabbed appellant to remove the object, appellant called him a "fag" and a "pussy." (23RT 4007, 4015.)

2. Appellant Has Forfeited This Claim

Appellant has forfeited his challenge to the admission of this evidence by failing to object in the trial court. As shown above, appellant was provided discovery of the disciplinary reports which included the December 7, 2004, incident some time before May 8, 2006, and was served notice that the People intended to offer evidence of those incidents under factor (b) in the penalty phase. (5CT 1076.) On October 30, 2006, two months before the penalty phase commenced, the prosecutor specifically described the December 7 incident as one of several matters she intended to

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(...continued)
of prior acts, but not what those acts are, meaning based on what he knew about the defendant, he was concerned and can explain that concern." (23RT 4004.) Thus in effect, the court ruled the testimony admissible only for non-hearsay purposes.

[82] Deputy Argandona testified that he was also present one month earlier on November 5, 2004 when appellant threatened to stab Deputy Saucedo when he "least expected it" and kicked and spat at Deputy Florence while physically resisting extraction from his cell. (23RT 4002-4003, 4010-4011, 4021, 4037-4038, 4049-4050, 4056-4057, 4059.)

present as factor (b) penalty phase evidence. (4RT 761.) Although defense counsel mentioned the possibility of bringing an Evidence Code section 402 hearing or "*Phillips* hearing" in the future to determine whether the various incidents constituted crimes for factor (b) purposes (4RT 695, 762-763), appellant never brought such a motion regarding the December 7, 2004, incident. (*Rundle, supra,* 43 Cal.4th at p. 181 [merely asking for a hearing regarding admissibility is insufficient to preserve evidentiary issue for appeal].)

Significantly in contrast, appellant *did* make specific, express objections to the admission of evidence of *other* proffered factor (b) evidence—including the June 30, 2002, day room incident, and the September 26, 2006 letter regarding "Grumpy"—on the grounds that they did not qualify as factor (b) crimes under *Phillips*. (17RT 3079, 3086; 18RT 3097-3098; 22RT 3812-3814, 3907.) The trial court and prosecutor were therefore entitled to infer that those were the only items of factor (b) evidence to which appellant intended to object.

When the prosecutor later described the December 7, 2004, incident in her penalty phase opening statement (23RT 3975), the defense remained silent and acquiescent. Before Deputy Argandona testified that afternoon, there was a lunch break followed by a brief conference in which the court asked the parties whether there was "[a]nything we need to take up before the jurors come in?" The prosecutor obtained a ruling from the court regarding another evidentiary issue—the admissibility of appellant's possession of pruno. At no time during that conference did appellant ask the court to preclude evidence of the December 7, 2004, incident. (23RT 3993-3996.)

In fact, appellant did not even seek to strike Deputy Argandona's testimony about the December 7 incident *after* the deputy testified, nor did he ask the court to admonish the jury to disregard that incident.[83] In notable contrast, appellant *did* ask for such an admonition regarding both the June 30, 2002, day room incident and the June 7, 2005, "Benji is a rat" incident on the ground that they did not qualify as factor (b) crimes. (23RT 4032-4034.)

By failing to object to the evidence in the trial court, appellant has forfeited any objection on appeal. (*Banks, supra*, 59 Cal.4th at p. 1197 [failure to object to the admission of penalty phase evidence forfeited claim on appeal]; *Maciel, supra,* 57 Cal.4th at p. 528.) Furthermore, even if anything in the record could somehow be construed as a specific objection to evidence of the December 7, 2004, event, appellant failed to press for a ruling on that objection. Accordingly, he has not preserved his claim for appeal. (*Valdez, supra,* 55 Cal.4th at p. 143; *Ramos, supra,* 15 Cal.4th at p. 1171; *Morris, supra,* 53 Cal.3d at p. 195.)

3. The December 7, 2004, Incident Was Properly Admitted Under Factor (b).

Assuming appellant's challenge to the evidence was preserved for appeal, it is meritless. Penal Code section 190.3, subdivision (b), permits juries to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" when determining the

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[83] Respondent does not intend to suggest such a post hoc objection would have sufficed to preserve the issue for appeal. (See *Demetrulias, supra*, 39 Cal.4th at p. 21; *Perry, supra,* 7 Cal.3d at p. 780; *Abbott, supra,* 47 Cal.2d at p. 372; *Scalamiero, supra,* 143 Cal. at p. 345.) Nevertheless, this omission illustrates that appellant made no effort, even a belated one, to object to the evidence at trial.

appropriate penalty for a capital offense. "[E]vidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime." (*People v. Moore* (2011) 51 Cal.4th 1104, 1135; see *Phillips, supra,* 41 Cal.3d at p. 72.) The question of an express or implied threat to use force or violence "'can only be determined by looking to the facts of the particular case.' " (*People v. Cruz* (2008) 44 Cal.4th 636, 683, quoting *People v. Mason* (1991) 52 Cal.3d 909, 955.) The trial court's admission of factor (b) evidence in the penalty phase is reviewed for abuse of discretion. (*Edwards, supra,* 57 Cal.4th at p. 753; *People v. Tully* (2014) 54 Cal.4th 952, 1027.)

Here, jurors could reasonably find that appellant's conduct on December 7, 2004, constituted the crime of resisting or obstructing a law enforcement officer in the performance of his or her duties. (Pen. Code, § 148, subd. (a)(1).) This Court's decision in the capital case of *People v. Lightsey* (2012) 54 Cal.4th 668, is on point. There, in the penalty phase, the People presented evidence of an incident in the county jail in which the defendant refused to comply with a detention officer's commands during a search of his cell, and then "squared up," taking what the officer described as a "combative stance" with fists at his sides. This prompted the officer to tackle the defendant to the floor, handcuff him, and remove him from his cell. (*Id.* at p. 727.) This Court held that evidence of the incident was properly admitted under factor (b), explaining:

> We agree with the trial court, however, that the jury could reasonably find from the officer's testimony that after the officer found contraband in defendant's cell, he tried to search the cell for other improper items, but defendant only reluctantly complied with his orders to move from his bed and then assumed a threatening stance, which the officer viewed as combative. As a result of these actions, the officer could not at that time complete the search of

> defendant's cell, but instead determined it was necessary to restrain defendant before the incident escalated. From this, the jury could find the incident constituted obstructing the officer during his lawful duties, and defendant's actions carried an implied threat of violence.

(*Id.* at p. 728.)

Similarly here, the evidence was sufficient to establish resisting or obstructing an officer. It is important to consider the surrounding circumstances. The incident occurred *after* appellant's 2003 escape attempt and his April 20, 2004, murder of Tinajero in his jail cell, both of which involved appellant's evading security within the jail. Deputy Argandona previously knew about appellant's possession of weapons in custody, including a razor (23RT 4004-4005) and had personally witnessed appellant's threat to stab Deputy Saucedo and his violent altercation with Deputy Florence (23RT 4002-4003, 4010-4011, 4021, 4037-4038, 4049-4050, 4056-4057, 4059). The latter occurred on November 5, 2004, only one month before the incident at issue, and likewise began with appellant's failure to comply with deputies' commands. Deputy Argandona further knew that appellant was a K-10, high-security-level inmate and had just returned from court—outside the confines of Men's Central Jail—where he might have been able to obtain shanks or other contraband from other inmates in lockup. (23RT 4003-4004.) Accordingly, the deputy had reason for concern when appellant hid an object in his hands and tried to put it in his waistband while being escorted from the court line to his cell. (23RT 4004-4005.) Appellant failed to comply with the deputy's commands that appellant show him what he had in his hands. Instead, appellant grasped the hidden object to further conceal it, lowered his center of gravity, and assumed what Deputy Argandona described as "a defense stance or possibly an offensive stance." (23RT 4005-4006, 4017.) In light of all the

surrounding circumstances, the jury could reasonably "find the incident constituted obstructing the officer during his lawful duties, and [appellant's] actions carried an implied threat of violence." (*Lightsey, supra*, 54 Cal.4th at p. 728.)

Appellant argues that his conduct was less threatening and combative than the defendant's in *Lightsey*, who "squared up," clenched his fists, and had not yet been handcuffed. (AOB 239.) But *Lightsey* does not establish the minimum threshold for admission of factor (b) evidence of resisting an officer. In any event, in concluding that his conduct was less "threatening" than that in *Lightsey*, appellant fails to consider the known circumstances surrounding the December 7, 2004, incident. Unlike appellant, there was no indication that the *Lightsey* defendant was a high security inmate who had just returned from outside the jail, and who was known to have possessed weapons in jail, to have attempted escape, to have murdered an inmate in jail approximately seven months earlier, to have violently lashed out at a deputy while resisting orders one month earlier, and to have threatened to stab another deputy (in the presence of the currently involved deputy) when he "least expected it," also only one month earlier.

Relying on a lower appellate court decision, *People v. Quiroga* (1993) 16 Cal.App.4th 961, appellant argues that his mere failure to respond quickly to Deputy Argandona's order did not amount to a violation of a criminal statute. (AOB 237-239.) Appellant's reliance on *Quiroga* is not well-placed. In *Quiroga*, police officers entered an apartment after seeing an occupant holding a marijuana cigarette. As the officers entered, the defendant stood up from a couch and walked toward a hallway. One officer ordered the defendant to sit back down. The defendant argued before complying with the order. (*Id.* at p. 964.) Moments later, the officer, noticing that the defendant was reaching with his right hand between the couch cushions, ordered the defendant to put his hands on his lap. "Again

[the defendant] was 'very uncooperative' but 'finally' obeyed the order." (*Ibid.*) Shortly thereafter, the officer ordered the defendant to stand up. The defendant "refus[ed] several times" before finally complying. (*Ibid.*) *Quiroga* held that the defendant's mere "failure to respond with alacrity" to the officer's commands did not amount to a Penal Code section 148 violation. (*Id.* at p. 966.)

Unlike the defendant in *Quiroga*, appellant was not merely slow to respond to orders, but actively resisted Deputy Argandona's command by further clenching and concealing the item he was hiding in his hands, crouching, and assuming "a defense stance or possibly an offensive stance." (23RT 4005-4006, 4017.) While *Quiroga* occurred in a private home, the current incident occurred in the more restricted environment of a jail where appellant was a high security inmate and could lawfully be expected to comply with orders quickly. And again, the circumstances of appellant's recent dangerous conduct, known to the deputy at the time, added to the threatening nature of the encounter.

For all of these reasons, appellant's contention is meritless.

B. Appellant's September 26, 2006, Letter Threatening The "Guera" Who "Turned Over The Dime" on "Grumpy" Was Properly Admitted As Factor (b) Evidence

Appellant contends that evidence of his September 26, 2006, letter to Della Rose Santos regarding a "guera" who snitched on appellant's fellow inmate, Grumpy, should have been excluded from the penalty phase because it did not qualify as a factor (b) crime. (AOB 240-252.) This contention is meritless.

As discussed *ante*, appellant was cross-examined during his *guilt phase* testimony about a letter he had written letter in jail in which he repeatedly claimed to belong to the Ghost Town Locos clique of the East

Side Wilmas gang. Appellant admitted that he wrote the letter. (19RT 3293-3295.) The letter stated in part, "Grumpy told me about the guera that turned over the dime. They're treating him bad, but that will be straightened out soon. We ride for the Sur. Tu sabes babe. One for all, all for one." (19RT 3293 (19RT 3293-3295.) Appellant testified that "Grumpy," his next-cell neighbor in the high power module, was charged with a murder, and that "the guera that turned over the dime" referred to a person who snitched on Grumpy regarding the murder. (19RT 3370, 3372-3373.) The letter itself was admitted into evidence in the guilt phase. (20RT 3444.)

The People offered to present additional evidence regarding the same letter, including gang expert Detective Clift's testimony explaining the threatening nature of the letter, during the penalty phase as factor (b) evidence. The prosecutor asserted that the letter related to the crime of threatening a witness (Pen. Code, § 140). (5CT 1289-1298; 17RT 3072-3073, 3076; 18RT 3092-3096, 3099-3101; 22RT 3812, 3815-3820.) Appellant repeatedly objected to that proffer on the ground that the act of writing the letter to a third party, without intent that its contents be conveyed to the "guera" whom appellant was allegedly threatening, did not amount to a crime involving the use or threatened use of force or violence within the meaning of factor (b). (17RT 3079, 3086; 18RT 3097-3098, 3102; 22RT 3812-3814.) After much discussion, the trial court agreed with the People that the evidence could support a violation of Penal Code section 140, and the court therefore overruled appellant's objection. (22RT 3821-3822.)

Detective Clift testified for the People in the penalty phase that he intercepted the letter from appellant on September 26, 2006, one month before the second trial began. (23RT 4078.) According to Detective Clift, an inmate nicknamed "Grumpy" housed in the high security module on the

same row as appellant, was a gang member charged with murder. (23RT 4080-4081.) Based on his expertise in Sureno gangs (23RT 4076-4077; see also 18RT 3109-3111), Deputy Clift interpreted the letter to mean that Grumpy's crime partner had snitched ("turned over the dime") on Grumpy and that appellant, out of loyalty to the Surenos ("we ride for the Sur"), was offering to help ensure that the informant was attacked and most likely murdered ("taken care of"). (23RT 4079-4084, 4086-4087.) Appellant signed the letter with his nickname, Chingon, followed by dots and dashes representing the Aztec numeral 13, a number associated with the Mexican Mafia. (23RT 4079-4080.)

The trial court did not abuse its discretion in admitting this evidence under factor (b) in the penalty phase. (See *Edwards, supra,* 57 Cal.4th at p. 753 [admission of factor (b) evidence in the penalty phase is reviewed for abuse of discretion].) Again, factor (b) permits juries to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b).) As the trial court correctly held, the jurors could reasonably find from the evidence regarding the September 26, 2006 letter that appellant committed the crime of "Threatening witnesses, victims or informants" in violation of Penal Code section 140. That statute provides:

> Except as provided in Section 139,[84] every person who willfully threatens to use force or violence upon the person of a witness to,

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[84] Penal Code section 139, subdivision (a) states: "Except as provided in Sections 71 and 136.1, any person who has been convicted of any felony offense specified in Section 12021.1 who willfully and maliciously *communicates* to a witness to, or a victim of, the crime for which the person was convicted, a credible threat to use force or violence upon that person or that person's immediate family, shall be punished by (continued...)

or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or informant has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

In light of Detective Clift's expert testimony, a juror could reasonably find that appellant's letter was an offer to ensure that the informant (the "guera that turned over the dime") was attacked and most likely murdered ("taken care of"). Hence, it was a "threat[] to use force or violence" against a witness or informant. (23RT 4079-4084, 4086-4087.)[85]

(...continued)
imprisonment in the county jail not exceeding one year or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years." (Italics added.) Penal Code section 71 states, in pertinent part: "Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly *communicated* to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense punishable as follows: . . ." (Italics added.)

[85] For good reason, appellant no longer appears to argue, as he did at trial, that Penal Code section 140 requires *communication* of the threat to the intended victim. That view was rejected persuasively in *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842. As the Sixth Appellate District noted, "If communication were an element of section 140, the Legislature would have included the words "communication of the threat to the victim" in the statute," as it did in Penal Code sections 71 and 139. (*Id.* at p. 841.) "The obvious intent of the statute is to preserve and protect witnesses. Protection of witnesses does not require that the witness be personally aware of the threat involving force or violence." (*Id.* at p. 842.)

Appellant argues that under a "fair reading" of his letter, his statements did not constitute a "threat" – which the United States Supreme Court and this Court have defined as a "'serious expression of an intent to commit an act of unlawful violence'" (*People v. Lowery* (2011) 52 Cal.4th 419, 427, quoting *Virginia v. Black* (2003) 538 U.S. 343, 359 [123 S.Ct. 1536, 155 L.Ed.2d 535]) – but was rather "an accurate comment on the 'guera's' predicament: he had snitched, and for that reason he was now in danger at the hands of virtually any Sureno member with whom he came in contact." (AOB 248, 252.) But the fact that the letter was subject to different possible interpretations does not defeat its admissibility under factor (b). Rather the interpretation of the letter was ultimately for each juror to decide.

Accordingly, the trial court did not abuse its discretion in admitting the evidence.

C. Appellant Has Forfeited His Objection To Evidence That He Confronted Inmate Benjamin Gonzalez And Incited Inmates To Chant "Benji Is A Rat;" In Any Event, The Evidence Was Properly Admitted

Appellant contends that the trial court erroneously admitted evidence in the penalty phase regarding his June 7, 2005, confrontation with inmate Benjamin Gonzalez. Again, he claims the incident did not qualify as a factor (b) crime. (AOB 252-260.) Appellant has forfeited this claim by failing to timely object at trial *before* the testimony was aired, despite having a clear opportunity to do so. In any event, his argument is meritless.

1. Background

On October 18, 2006, the People filed a Supplemental Notice of Evidence To Be Introduced In Aggravation Regarding Death Penalty,

stating, "The people [sic] will put on evidence regarding the incident discussed on discovery page 002990[86] where the defendant caused a jailhouse disturbance by yelling insults and profanities at another inmate, including calling him a 'rat.'" (5CT 1137.) In court proceedings on October 30, 2006, two months before the penalty phase, the prosecutor described the incidents from the disciplinary records which she intended to present. She stated that among others, "We've got the incident involving where he's calling the witness or person in the other K-10 cell a rat and getting all the other inmates to start calling him a rat." (4RT 762.) Defense counsel stated that he wished to review the various incidents and to have an opportunity to ask for a hearing regarding whether certain incidents constitute crimes for factor (b) purposes. (4RT 762-763.) But the defense never asked for such a hearing regarding the "rat" incident described above, nor did he move to exclude evidence of that incident.

On December 7, 2006, the court and parties discussed the admissibility of the People's proffered factor (b) evidence in the event of a penalty phase. Regarding the incident now at issue, the prosecutor stated:

> There is also the instance where the defendant was on the row screaming at another inmate, a Benji Gonzalez I believe was the inmate, calling him a snitch and a rat and inciting other inmates to do the same, and it was – the People would be requesting to be allowed to use that under the same theory. [¶] Especially within the jail culture, advising others that an inmate is a rat or a snitch is basically it's intimidation of a witness. It's the 136, the one crime that that would fall under.

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[86] This apparently referred to appellant's county jail disciplinary records from June 13, 2002 through July 30, 2005 which the People provided to the defense in discovery sometime before May 8, 2006. (5CT 1076.)

(22RT 3822.) Defense counsel said nothing regarding that incident. The prosecutor and the court then discussed another matter, the June 30, 2002 day room incident. (22RT 3822-3823.) Turning back to the "rat" incident, the prosecutor asked the court, "As to the incident where he's yelling at the other inmate, does the court have a tentative ruling or a ruling on that?" The court responded, "Yes, I would think that qualifies. I didn't get a defense argument on it yet. I've got something, but that seems correct." (22RT 3823-3824.)

On January 2, 2007, in a hearing just before penalty phase opening statements, defense counsel stated that, "I would – make *People v. Phillips* objection to various acts of violence which is factor (b) type evidence as not constituting a crime, and I believe the court has made tentative rulings as to some of them and not to others." Defense counsel added that "some of the matters that the People have listed as factor (b) evidence" did not amount to a crime or an attempt to commit a crime. (23RT 3947-3948.) The prosecutor subsequently pointed out that the trial court had tentatively ruled two factor (b) incidents admissible – the day room incident and the incident in which appellant called another inmate a rat. Defense counsel made no objection to the admission of the "rat" incident, nor to any other specific item of factor (b) evidence at that time.

In the People's penalty phase opening statement, the prosecutor told the jury she would present evidence of a June, 2005 incident in which appellant yelled at another inmate in the high security module, "Benji, you rat, you fucking rat," because Benji had provided information to the deputies, and that appellant incited the other inmates to yell "Benji, you rat." (23RT 3975.) Appellant did not object or request a sidebar conference during or after the opening statement to challenge the admissibility of the evidence the prosecutor had just described.

Deputy Andrew Cruz testified in the penalty phase as follows: On June 7, 2005, in the high power unit, appellant yelled at fellow inmate Benjamin Gonzalez, "Fuck you, Benji. You're a rat." (23RT 4023-4024.) When Deputy Cruz ordered appellant to stop yelling this, appellant incited other inmates on the row to join him in repeatedly yelling, "Benji is a rat." (23RT 4027.) Gonzalez had previously informed the deputies about rule violations by other inmates. (23RT 4025.) According to Deputy Cruz, publicly denouncing an inmate as a "rat"—a synonym for "snitch"—would place the targeted inmate in danger of being assaulted. (23RT 4024, 4026-4027, 4030-4031.) On recross examination, Deputy Cruz testified that he did not cause criminal charges to be brought against appellant based on this incident. The deputy believed that the incident constituted a jail violation but not a crime. (23RT 4031.)

After Deputy Cruz was excused at the conclusion of his testimony, appellant moved at sidebar for the court to admonish the jury to disregard his testimony on the ground that the incident described did not qualify as a factor (b) crime. (23RT 4032-4034.) The prosecutor argued, "It's intimidating a witness. You have 136.1, 139, 137, 140, and there's probably special ones that go along with the jail." The prosecutor added that Deputy Cruz was not a legal expert and did not make charging decisions. (23RT 4033-4034.) The court denied appellant's request, noting that "it calls for extreme measures for the person to be called a rat," and that "any inmate who hears that is likely to attack the person in custody in a situation where he can't defend himself." (23RT 4034.)

2. Appellant Has Forfeited This Claim

Although he had ample notice of the People's intention to present this evidence in the penalty phase and had numerous opportunities to object, appellant never objected to the admission of the "Benji is a rat" incident at

any time *before* Deputy Cruz testified. Instead, he chose to wait until after the testimony was aired – and after the prosecutor, relying on appellant's complete acquiescence, told the jury she would present evidence of the incident (23RT 3975)—before he moved at sidebar to have the court "tell the jury to ignore" the testimony. (23RT 4032-4033.)[87]

Appellant's belated request was insufficient to preserve a claim of error regarding the admission of the evidence. (Evid. Code, § 353, subd. (a) [a "timely made" objection is required to preserve an issue for appeal regarding the erroneous admission of evidence].) Again, when the objectionable nature of the evidence is known in time to object, a party must object in advance or contemporaneously, and "a subsequent motion to strike is not sufficient." (*Demetrulias, supra,* 39 Cal.4th at p. 21; *Perry, supra,* 7 Cal.3d at p. 780; *Abbott, supra,* 47 Cal.2d at p. 372; *Scalamiero, supra*, 143 Cal. at pp. 345-346.) Appellant has therefore forfeited any claim of error regarding Deputy Cruz's testimony about the June 7, 2005 incident.

3. The Evidence Was Admissible Under Factor (b)

Not only did appellant fail to preserve this claim of error, it is also meritless. The evidence was admissible under factor (b) because a juror could reasonably find that appellant's conduct violated Penal Code section 140. Again, that statute provides that "every person who willfully threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, . . . because the witness, victim, or informant has provided any assistance or information to a law enforcement officer" is guilty of a crime. Understood in the context of jail culture, as explained by

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[87] Defense counsel specifically stated that he was *not* asking the court to "strike" the testimony, but rather just to "tell the jury to ignore it." (23RT 4032.)

Deputy Cruz, appellant's incitement of fellow inmates to chant, "Benji is a rat," was an implied threat. (23RT 4024, 4026-4027, 4030-4031.) As the trial court found, "any inmate who hears that is likely to attack the person" being labeled a "rat." (23RT 4034.) Calling the inmate a "rat" also signified that Gonzalez was targeted specifically because he provided "assistance or information to a law enforcement officer." This inference was further supported by Deputy Cruz's testimony that Gonzalez had previously informed the deputies about rule violations by other inmates. (23RT 4025.)

Appellant argues that appellant's statement, "Benji is a rat," was not a threat for Penal Code section 140 purposes because it was not a "serious expression of an intent to commit an act of unlawful violence" (See *Lowery, supra,* 52 Cal.4th at p. 427.) "At most," he argues, "the statement expressed scorn or contempt for snitches." (AOB 259.) But again, the possibility that his statements or actions could be interpreted in a manner more favorable to appellant does not render them inadmissible under factor (b). In any event, appellant's conduct at issue was not merely calling Gonzales a rat, but inciting other inmates in the row to chant "Benji is a rat" repeatedly, sending a loud and clear message to everyone within earshot in the high power module that Gonzales was a snitch. (23RT 4027.) As Deputy Cruz testified (23RT 4024, 4026-4027, 4030-4031), and as the trial court found (23RT 4034), within jail culture, that is an invitation for a physical attack.

Therefore, the trial court did not abuse its discretion in admitting the evidence (without objection) or in denying appellant's subsequent request to "tell the jury to ignore" the evidence.

D. Appellant Has Forfeited Any Objection To His Own Expert Witness's Testimony, And That Of A Rebuttal Expert, About The Use Of Paperclips As Handcuff Keys; In Any Event That Testimony Was Properly Elicited, And No Evidence Of Appellant's Possession Of An Altered Paperclip Was Presented As Factor (b) Evidence.

Appellant contends that the trial court erroneously admitted evidence of his possession of an altered paperclip under factor (b) in the penalty phase. (AOB 260-264.) The premise of this claim of error is faulty, because no such evidence was presented under factor (b) in the penalty phase. Rather, the prosecutor cross-examined the defense prison expert, *without objection*, regarding inmates' common use of paperclips as handcuff keys, in order to rebut the expert's direct examination testimony about the secure conditions appellant would be subjected to as a life prisoner. The People's prison expert then testified on rebuttal, *again without objection*, about how easily paperclips can be used for that purpose. Therefore, this contention has not been preserved for appeal. It is also meritless.

1. Background

During the penalty phase, James Esten provided expert testimony in the defense case as a "correctional consultant." The evident purpose of Esten's testimony was to persuade the jury that appellant could be safely housed in prison under a life sentence. On direct examination, Esten testified that if sentenced to life in prison without possibility of parole, appellant would be classified as a level four security inmate and would likely be sent from the CDCR's reception center immediately to the security housing unit (SHU) of a maximum security prison for an indefinite term. (28RT 4684-4685, 4687-4688, 4692, 4725-4727, 4733-4736, 4741.) According to Esten, inmates in SHU are housed one or two to a cell for 23

hours a day, they are not given prison jobs, they have controlled yard access for 50 minutes per day in small groups to ensure no fights, and they are constantly "under the gun" of an armed correctional officer in a watch tower with a "no warning shot policy." (28RT 4688-4690, 4692, 4725-4726.)

Esten further testified that at Pelican Bay State Prison, a SHU facility, inmates walk in "chain gangs" handcuffed and chained to one another, and are escorted by more staff, than are non-SHU inmates. Esten narrated a video, played to the jury, showing chained and handcuffed SHU inmates escorted in that fashion. According to Esten, SHU inmates visiting the law library arrive cuffed and must put their hands through a cuff port to be uncuffed in order to be free to work on their legal work. (28RT 4725-4726.) Defense counsel asked Esten, "Would he [appellant] pose a danger to either inmate or staff if he's put in a secure housing unit?" Esten answered, "I can't say that. I can only tell you that the California Department of Corrections and Rehabilitation has means and ways of dealing with inmates of every ilk." (28RT 4741.)

On cross-examination, Esten acknowledged that even in SHU, inmates have been found in possession of contraband weapons. Esten further acknowledged that, in the video of the chain gang at Pelican Bay, only two correctional officers were escorting a line of about four inmates. (28RT 4772.) The prosecutor asked Esten, "And based on what you know of the prison systems, have you ever heard of somebody fashioning something like maybe a paper clip to use as a handcuff key?" Esten responded that it was not uncommon. (28RT 4774.) In response to further questioning by the prosecutor, Esten testified that most inmates in the prison system are not in handcuffs and therefore would not need a handcuff key. An inmate in SHU wears a waist restraint in addition to handcuffs, making it impossible for the inmate to reach with one hand to unlock the

cuff on his other hand. But Esten admitted that paperclips have been used to release handcuffs, and that a skilled inmate could do that in a matter of seconds "or less." Handcuffs can be unlocked faster with a paperclip than with an actual key. (28RT 4774-4775.) Appellant made no objection to any of this testimony.

In the People's penalty phase rebuttal case, Luis Puig, a Classification Staff Representative for the CDCR, testified as a prison expert in response to Esten's testimony. According to Puig, a prisoner cannot be placed directly in SHU without first committing violations as a state prisoner. (29RT 4891-4892.) The prosecutor asked Puig to address Esten's testimony that it would be very difficult for prisoners in SHU to unlock handcuffs with a paperclip due to their waist restraints. Puig disagreed with Esten, explaining that when a group of inmates is escorted in handcuffs, one inmate could use the paperclip to unlock another's cuffs and vice-versa. Puig testified that this actually happens in prisons. (29RT 4896-4897.) Appellant did not object to this testimony.

2. Appellant Has Forfeited Any Objection To Esten's Or Puig's Testimony Regarding Paperclip Handcuff Keys

The only testimony in the penalty phase regarding paperclips used as handcuff keys was that of Esten and Puig. Appellant did not object to any of that testimony. Therefore, assuming appellant is currently challenging the admission of that testimony (see AOB 261 [referring to Esten's and Puig's testimony]), this is a very clear and straightforward case of forfeiture. (Evid. Code, § 353, subd. (a); *Banks, supra*, 59 Cal.4th at p. 1197 [failure to object to the admission of penalty phase evidence forfeited claim on appeal].)

Appellant, nevertheless, appears to contend that he preserved this issue for appeal based on his pre-trial objection to the admission of

evidence of his possession of an altered paperclip as factor (b) evidence in the penalty phase. (AOB 260-261.) On October 30, 2006, the trial court heard the People's motion to admit evidence of other acts in the guilt phase under Evidence Code section 1101, subdivision (b), and the court and parties also discussed potential penalty phase evidence. (4RT 728-746.) Defense counsel stated that some of the matters in appellant's disciplinary reports did not amount to crimes admissible under factor (b), and cited, for example, appellant's possession of an altered paperclip.[88] The trial judge, without actually ruling on the matter, stated that he had seen caselaw holding that a jail-made handcuff key was admissible as aggravating evidence. (4RT 758-759.)

However, that objection had no bearing whatsoever on Esten's or Puig's penalty phase testimony. The People did not present any evidence of appellant's possession of an altered paperclip in the *penalty phase* as factor (b) evidence of appellant's criminal activity. In fact, neither Esten nor Puig referred to *appellant's possession* of an altered paperclip at all. (28RT 4774-4775; 29RT 4896-4897.) To preserve for appeal an issue regarding the admission of evidence, an appellant must make a timely objection at trial to the same evidence on the same ground urged on appeal. (Evid. Code, § 353, subd. (a); *Boyette, supra,* 29 Cal.4th at p. 424; *Guerra, supra,* 37 Cal.4th at p. 1118.) Appellant's objection to evidence of his possession of an altered paperclip on the grounds that it did not amount to a crime involving threats of violence under factor (b) was insufficient to preserve an objection to Esten's or Puig's testimony.

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[88] The record does not clearly show that the prosecutor—who did not comment on the paperclip evidence at the time—was actually seeking to use that incident as factor (b) evidence in the penalty phase.

3. Appellant's Claim Fails On Its Merits

Not only has appellant forfeited his claim of evidentiary error, the claim is also meritless. Citing *People v. Lancaster* (2007) 41 Cal.4th 50, 92-93, [89] appellant argues at length that his mere possession of an altered paperclip was not a crime within the meaning of factor (b) and *Phillips, supra*, 41 Cal.3d at pp. 65-72, because there was no showing that he actually used that item as a handcuff key or otherwise employed it in a threatening manner. (AOB 261-263.) But that argument is based on the false premise that evidence of appellant's possession of an altered paperclip was in fact admitted as factor (b) evidence. It was not.

The only evidence of appellant's possession of an altered paperclip was presented in the *guilt phase*. (15RT 2656-2657; 16RT 2789-2793.) For reasons discussed *ante* in Section II, D, of this brief, that and other evidence was properly admitted under Evidence Code section 1101, subdivision (b), to show appellant's knowledge of the jail system and ability to evade security restrictions. No further evidence of appellant's possession of the item was presented in the penalty phase. Neither Esten nor Puig referred in their testimony to appellant's own possession of such an item. (28RT 4774-4775; 29RT 4896-4897.) Moreover, the trial court never indicated that the evidence regarding the paperclip previously admitted in the guilt phase was also admitted for purposes of factor (b) in the penalty phase. As appellant acknowledges (AOB 263), the penalty phase jury instruction (CALJIC No. 8.87, as modified) listing the factor (b)

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[89] In its *Lancaster* opinion, issued four months after the penalty phase in the current trial, this Court held that mere possession of a handcuff key in jail does not qualify as factor (b) "criminal activity" without additional evidence connecting it to an actual escape attempt or other crime involving the use or threatened use of force or violence. (*Lancaster, supra,* 41 Cal.4th at pp. 92-93.)

incidents the jury may consider *did not* include appellant's possession of an altered paperclip. That instruction further stated, "A juror may not consider any evidence of any other criminal acts as an aggravating circumstance." (6CT 1427.)

Appellant asserts that the jury may nevertheless have mistakenly believed the paperclip evidence could be considered under factor (b) because the prosecutor's penalty phase argument to the jury mentioned appellant's possession of an altered paperclip in the midst of her discussion of the various factor (b) incidents. (AOB 263.) Specifically, the prosecutor stated,

> Then we have June 17, 2005, he has an altered paper clip. Well, we heard from both the defense expert and from our expert that people that have altered paper clips, they can get out of handcuffs quicker that the deputies can get them out with cuff keys, and when you have an individual like the defendant who is constantly showing his willingness to commit violence, to have weapons, his ability to get himself uncuffed is frightening.

(31RT 5076-5077.) But appellant has raised no claim of prosecutorial misconduct regarding that argument, likely because appellant recognizes that such a claim would be forfeited because appellant made no objection to the prosecutor's argument at trial, nor did he request a curative admonition. (*People v. Stanley* (2006) 39 Cal.4th 913, 952; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) In any event, although the prosecutor made these remarks in the midst of her summary of factor (b) evidence, her argument did not actually apply a factor (b) analysis to that evidence. Instead, the prosecutor directly related appellant's possession of an altered paperclip to the expert testimony about the ease with which inmates could use such items as handcuff keys. As such, her argument was proper rebuttal of the defense theory that appellant could be securely housed as a life prisoner.

Finally, assuming appellant intends to challenge the admission of Esten's and Puig's testimony regarding the ability of inmates to use paperclips as handcuff keys (see AOB 261), that testimony was fully admissible. Appellant elicited Esten's direct examination testimony regarding the tight security measures imposed on SHU inmates. Esten specifically described on direct examination the manner in which groups of SHU inmates were escorted handcuffed and chained together. The defense even presented a video depicting such a "chain gang." (28RT 4725-4726.) The prosecutor's brief cross-examination of Esten regarding the ability of inmates to pick handcuff locks with paperclips, and Puig's short testimony on that subject, were fair rebuttal.

In short, the trial court did not admit any improper evidence of appellant's possession of an altered paperclip as factor (b) evidence in the penalty phase.

E. Appellant's Letter to Ursula Gomez And Evidence Of His Attempt To Smuggle It Through Legal Mail Were Properly Admitted In The People's Penalty Phase Rebuttal Case.

Appellant contends that during the People's rebuttal case in the penalty phase, the trial court erroneously admitted into evidence a letter appellant wrote to state prison inmate Ursula Gomez,[90] and testimony that appellant attempted to smuggle that letter in his outgoing legal mail. He claims that neither the letter itself nor its concealment in a legal mail envelope qualified as a crimes under factor (b). (AOB 264-275.) Respondent disagrees. Because the letter contained implied threats of

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[90] The People also presented evidence regarding another letter written to Robert DeLaCruz, which was found in appellant's "legal mail" envelope along with the Gomez letter. (30RT 4963, 4977-4980.) The defense stipulated to the admissibility of that letter (30RT 4994), and appellant does not challenge its admission on appeal. (See AOB 266, fn.4.)

criminal violence against a third party, it was admissible under factor (b). The letter was also relevant to rebut the defense evidence in the penalty phase that appellant could be safely housed in prison for life. The trial court therefore did not abuse its discretion.

Two sheriff's deputies testified in the penalty phase rebuttal case that on January 4, 2007 (a date on which the penalty phase was already in progress), appellant was carrying a sealed envelope labeled "legal mail" while preparing to be escorted to the court line in Men's Central Jail. (30RT 4951-4953.) Inside the envelope were other sealed envelopes holding personal letters written by appellant. (30RT 4955-4956, 4959-4963, 4964.) One of those letters was addressed to Ursula Gomez, a state prison inmate. (30RT 4968, 4972.)

Detective Clift read to the jury excerpts of the Gomez letter and explained its contents based on his previously established jailhouse gang expertise. (30RT 4968-4975.) In the letter, appellant boasted that he had become a celebrity and joked that he would be signing autographs. (30RT 4968-4970.) The letter then stated, "I'm a dedicated Sureno to the fullest, and death and throughout my life style, I stood for mines. When I got torcido [arrested] I cut the old boy loose and put on the zapatos [shoes] to fight it myself. But el destino [destiny] have plans for him. You know the rest." (30RT 4968-4969.) Appellant further stated in the letter, "The D.A. is a joke. I was laughing throughout my trial. All of them compliments from her and the judge, serio [serious], both kept saying I'm a smart mother fucker, and that's why I should get death to stop anything in the future they assume I'll do up state. Again all lies. I'm just a little guy trying to survive." (30RT 4969-4970.) After "survive," appellant drew a cartoon face with a wink and a smile. According to Detective Clift, that cartoon indicated that what appellant had just stated was meant as a joke. (30RT 4970-4971.)

Appellant's letter asked Gomez whether it was possible to get from certain cell blocks and yards to others within her prison in order to talk to other prisoners, and whether she was able to obtain drugs or pruno. Appellant stated, "I like to cook too and know how to work with this canteen stuff, so manda some recetas so I can hook it up when I hit state. I don't know if this canteen stuff you girls get is the same as for us in a level 4 yard, but I think it's cool, que no." (30RT 4971-4972.)

Later in the letter, appellant noted that "Cris," a coperpetrator of the violent crime for which Gomez was convicted, had not taken fair responsibility for that crime. The letter then stated, "Listen, if I run into Cris, I will advise him to do right and I won't mention we talked about it. I'm also gonna talk to a senor and see his response." (30RT 4973-4974.) According to Detective Clift, this meant that appellant was offering to speak to a "senor" [Mexican Mafia member] to get clearance for Cris to be threatened, taxed, beaten, or killed for failing to take the blame for Gomez's conviction offense. (30RT 4973-4976.) The letter was signed, "Chingon, East Side Wilmas GTL," referring to appellant's gang and the Ghost Town clique, followed by "Kanpol," with three dots and two underlines—symbols of the Surenos. (30RT 4967, 4976.)

The trial court did not abuse its discretion by allowing the People to present this evidence. First, insofar as the letter indicated appellant would arrange with a "senor" to have Cris attacked, it related to a threat to "use force or violence upon the person of a witness to a crime" in violation of Penal Code section 140. As such, it was admissible under factor (b) as evidence of "criminal activity" involving implied threats of force or violence.

But independently of factor (b), the letter as a whole was admissible to rebut the defense penalty phase evidence. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92 ["evidence offered to rebut defense mitigating evidence

need not relate to any specific aggravating factor listed in section 190.3"].) As noted, one theme of appellant's penalty phase defense was that if sentenced to life without possibility of parole, appellant would be housed in a highly secure setting where he would not be a danger to other inmates. Appellant's correctional expert, Esten, testified that appellant would be classified as a level four security inmate and would likely be kept in SHU at a maximum security prison. There he would be housed in a one or two-man cell with minimal, tightly controlled yard access, he would be escorted everywhere in handcuffs with waist restraints, and he would be constantly "under the gun." (28RT 4684-4685, 4687-4692, 4725-4727, 4733-4736, 4741.) Esten assured the jury that "the California Department of Corrections and Rehabilitation has means and ways of dealing with inmates of every ilk." (28RT 4741.)

However, the Gomez letter demonstrated that appellant did not take those prospects seriously and was not intimidated by a life sentence. Rather, he was already surreptitiously contacting a state prisoner, making plans to obtain pruno and "cook" up contraband when he is sent "up state," and offering to contact a "senor" of the Surenos to arrange a hit on another inmate. That evidence, along with Puig's expert rebuttal testimony, had a tendency in reason to rebut the defense theory that appellant could be safely housed in prison for life.[91]

The trial court likewise did not abuse its discretion in permitting evidence that appellant attempted to circumvent jail rules by concealing the

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[91] As the trial court noted in overruling appellant's objection to the letter, "We've gone into a lot of what has happened in the county jail, and that's why I'm allowing the defense to go into the circumstances of his confinement if he gets an L-WOP sentence from the jury, and so this is part of an exploration of that issue. Is he going to be – present a future danger if he's in L-WOP custody, whatever that turns out to be." (27RT 4635.)

Gomez letter among other letters within a larger envelope labeled "legal mail." "Under section 190.3, factor (b), the prosecution may introduce evidence to show not only the conduct establishing the criminal violation, but also evidence of any relevant surrounding circumstances." (*People v. Kipp* (2001) 26 Cal.4th 1100, 113-1134; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013–1014; *People v. Ashmus* (1991) 54 Cal.3d 932, 985.) The fact that appellant took the precaution of concealing the letters in that manner to avoid detection demonstrated his awareness of the illicit nature of their contents. This, in turn, added weight to Deputy Clift's expert interpretation of the letter as offering to contact a Surenos "senor" to arrange an attack on Cris. (30RT 4973-4976.)

Accordingly, the trial court did not abuse its discretion in permitting the People to present the challenged evidence.

F. If Any Of The Challenged Evidence Was Erroneously Admitted, It Was Patently Harmless In Light Of The Other Penalty Phase Evidence And The Highly Aggravating Circumstances Of The Two Murders.

Not only has appellant failed to demonsrate that the trial court erred by permitting the People to present any of the items of penalty phase evidence discussed above, he has also failed to demonsrate prejudice.

The erroneous admission of penalty phase evidence which does not qualify as criminal activity under factor (b) is subject to the "reasonable possibility" standard of prejudice. (*Lancaster, supra*, 41 Cal.4th at p. 94-95 [finding evidence that defendant possessed a makeshift handcuff key in jail harmless].) Again, under that standard, error is reversible only if there is a *reasonable*, *realistic* possibility—not a mere or technical possibility—that the jury would have returned a life verdict but for the error. (*Brown, supra*, at p. 448.)

That standard cannot be met here. The combined effect of *all* of the challenged penalty phase evidence pales in comparison with the highly aggravating circumstances of the two murders. As noted, the guilt phase evidence showed that appellant strangled Armenta, threw him out of a car in a dark alley, and used that car to run over Armenta back and forth, merely for the purpose of stealing the car. Concerned that Armenta may not have died, appellant returned to the dark alley in another car which he had stolen from Armenta that night, and ran over Armenta again.

The guilt phase evidence further showed that appellant managed to evade a "keepaway order" and jail security to get into Tinajero's cell, where he brazenly murdered Tinajero—purportedly appellant's close friend for many years—in front of four terrified eyewitnesses to retaliate for Tinajero's testimony and to prevent him from testifying again. The manner in which appellant killed Tinajero was gruesome and excessive. Appellant ambushed Tinajero in his sleep, pulled him off his bunk, put him in a headlock, squeezed Tinajero's neck with his bare hands until the victim stopped moving, forced the head of his inert victim underwater in the toilet to drown him, and then stomped on Tinajero's upper neck or chest, causing a cracking or popping sound audible to the cellmates. In case all of those acts were not enough to ensure Tinajero was dead, appellant tied a ligature around Tinajero's neck so tightly that the medical examiner and a criminalist were later unable to slip their fingers between the ligature and Tinajero's neck.

Once he was finally satisfied that Tinajero was dead, appellant wrote down the names and booking numbers of the four cellmate witnesses and either expressly or implicitly threatened to do the same thing to the them as he had done to Tinajero if they "snitched." He then made telephone calls from Tinajero's jail cell to brag about his "touch down." While appellant remained in the cell with the dead body for hours, he calmly smoked a

cigarette, read a magazine, and acted "[j]ust like nothing happened," and "[j]ust like everyday thing, you know. He didn't show any remorse." (12RT 2144-2145, 2147; 14RT 2405.) In fact, while he was later housed in the high power module, appellant had the sheer bravado to brag about the killings to two sheriff's deputies and to declare gleefully, "Now that he's dead, they're going to have to offer me a deal." (16RT 2961; 17RT 3042-3051, 3059-3060.)

Furthermore, the People presented other, more compelling penalty phase evidence of violent and threatening conduct by appellant which appellant *does not challenge on appeal.* On November 5, 2004, after deputies confiscated appellant's pruno, appellant threatened to stab Deputy Saucedo when he "least expected it." (23RT 4002-4003, 4010-4011, 4037-4038, 4044.) During that process, appellant was combative and non-compliant with orders, resisted handcuffing, and said to Deputy Florence, "Fuck you, fag. I'll come out when I'm ready." (23RT 4003, 4044, 4046-4048, 4051-4052.) Appellant tried to get rid of items in his cell by swallowing them or flushing them down the toilet. (23RT 4052.) He thrashed about with his legs, hips and feet to hinder the deputies from moving him, and he kicked Deputy Florence in the leg and spat at him. (23RT 4003, 4014, 4021, 4049-4050, 4056-4057, 4059.)

Given the extremely aggravated nature of the two murders demonstrated by the *guilt phase* evidence, plus the other penalty phase evidence, any error in the admission of any of the items of penalty phase evidence challenged on appeal was patently harmless. There is no reasonable, realistic possibility that the jury would have rendered a different verdict had that evidence not been admitted. (*Brown, supra*, 46 Cal.3d at p. 448.) This Court should therefore reject appellant's claim.

VII. CALJIC NO. 8.87, REGARDING FACTOR (B) EVIDENCE OF OTHER CRIMINAL ACTIVITY, DID NOT USURP THE ROLE OF THE JURY OR VIOLATE THE FEDERAL CONSTITUTION

Appellant contends that CALJIC No. 8.87, the standard jury instruction given at the penalty phase regarding evidence of other "criminal acts" offered under Penal Code section 190.3, subdivision (b), unconstitutionally usurped the jury's role in determining whether appellant's uncharged criminal acts involved force or violence, or threats thereof. (AOB 282-300.) This contention is meritless and has already been rejected repeatedly by this Court.

As given at appellant's trial, CALJIC No. 8.87 stated:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts *which involve the express or implied use of force or violence or the threat of force or violence*: physical assaults and threats against guards, possession of weapons, an attempted escape by violence, refusing to comply with guards' orders where compliance would reduce danger to the guards, a fight with another inmate, creating a disturbance which endangered another inmate and sending threatening letters. [¶] Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. [¶] A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(6CT 1427; 31RT 5157-5158, italics added.)

Appellant takes issue with the language italicized above. He argues that it was the role of the jury to decide whether the uncharged criminal acts in evidence "involve[d] the express or implied use of force or violence or the threat of force or violence." By labeling the crimes as such, appellant argues, the instruction removed that issue from the jury. (AOB 283-284.)

But this Court has already rejected precisely this contention in several cases. (*People v. Bryant* (2014) 60 Cal.4th 335, 451-452 ["Instructions referring to the factor (b) evidence as 'criminal activity' and 'criminal acts . . . which involved the express or implied use of force or violence or the threat of force or violence' (see CALJIC No. 8.87) did not improperly remove from the jury any issue it was required to resolve."]; *People v. Burney* (2009) 47 Cal.4th 203, 259; *People v. Thomas* (2012) 53 Cal.4th 771, 833-834; *People v. Loker* (2008) 44 Cal.4th 691, 745; *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) "We have previously held that the question of whether the acts occurred is a factual issue for the jury, but 'the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.'" (*Thomas*, *supra*, 53 Cal.4th at p. 834.)

Appellant offers no compelling reason to depart from this well-established rule. This Court should, once again, reject the argument here.

VIII. CALIFORNIA'S DEATH PENALTY STATUTES AND STANDARD PENALTY PHASE JURY INSTRUCTIONS ARE CONSTITUTIONAL

Appellant asserts a series of challenges to the constitutional validity of California's death penalty and to standard penalty phase jury instructions. He acknowledges that this Court has repeatedly rejected each of these challenges. To preserve or exhaust these issues for the federal courts, he asks this Court to reconsider its decisions, but he offers no new, compelling

arguments for overturning this Court's precedents. (AOB 301-317.) Appellant's claims should therefore be rejected.

A. California's Death Penalty Statutes Meaningfully Distinguish or "Narrow" the Class of Death Eligible Murders.

Appellant argues that the special circumstances enumerated in Penal Code section 190.2 fail to meaningfully distinguish or narrow the class of death penalty eligible murders from the general class of homicides, as required by the Eighth Amendment. (AOB 301-302; see *Zant v. Stephens* (1983) 462 U.S. 862, 878 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Furman v. Georgia* (1972) 408 U.S. 238, 312 [92 S.Ct. 2726, 33 L.Ed.2d 346], White, J., concurring.) But as this Court has held, "California homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty . . . ." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43; accord *People v. Moore* (2011) 51 Cal.4th Cal.4th 1104, 1144.) Appellant offers no reason for this Court to depart from that holding.

B. Factor (A) Is Not Unconstitutionally Vague or Overbroad

Appellant argues that Penal Code section 190.3, factor (a), which allows the jury in the penalty phase to consider the "circumstances of the crime" as an aggravating factor, is vague and overbroad, and therefore permits the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 302-303.) This Court has consistently rejected this claim and should do so again here. (*People v. Montes* (2014) 58 Cal.4th 809, 899; *People v. Lewis* (2001) 26 Cal.4th 334, 394.)

C. The Federal Constitution Does Not Require The Jury's Penalty Phase Determination To Be Beyond A Reasonable Doubt

Appellant contends that California's death penalty is unconstitutional because juries (including his jury) are not instructed in the penalty phase that they must find that aggravating factors outweigh mitigating factors beyond a reasonable doubt. This, he claims, violates the Sixth Amendment principle announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], that any fact which increases the statutory maximum sentence must be found by a jury beyond a reasonable doubt. Appellant further argues that even setting aside the Sixth Amendment *Apprendi* rule, California's failure to apply the reasonable doubt standard to the penalty phase violates the Eighth Amendment and due process. (AOB 303-305.)

But as this Court has held, appellant's Sixth Amendment claim is meritless because penalty phase aggravating factors do not increase the maximum sentence. Rather, the maximum sentence for first degree murder with at least one special circumstance under Penal Code section 190.2 is death. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1278-1279; *People v. Prieto* (2003) 30 Cal.4th 226, 263.) This Court has also repeatedly rejected appellant's due process and Eight Amendment argument because the jury's determination in the penalty phase is not a finding of facts susceptible to a burden of proof quantification, but rather an inherently moral and normative decision to which the reasonable doubt standard cannot logically be applied. (*People v. Davis* (2009) 46 Cal.4th 539 628; *Demetrulias*, *supra*, 39 Cal.4th at p. 40.)

D. The Federal Constitution Does Not Require Juries To Be Instructed That There Is A Presumption In Favor Of A Life Sentence, That The People Have The Burden Of Proof In The Penalty Phase, Or That There Is No Burden Of Proof.

Appellant contends that the standard penalty-phase instructions given in his trial are unconstitutionally defective because they do not inform the jury that there is a presumption in favor of a life sentence or that the People have the burden of proof or persuasion in the penalty phase. (AOB 305-306, 313.) These contentions are meritless and have been rejected by this Court. (*People v. Gamache* (2010) 48 Cal.4th 347, 407 [trial court is not required to instruct jury on any burden of proof in the penalty phase because "there is no burden of proof, only a normative judgment for the jury."]; *People v. Cruz* (2008) 44 Cal.4th 636, 681 ["And except for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), the court need not instruct regarding a burden of proof, or instruct the jury that there is no burden of proof at the penalty phase."];[92] *Demetrulias, supra*, 39 Cal.4th at p. 40; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137 [trial court is not required to instruct the penalty jury on a "presumption of life."].)

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[92] Here, regarding factor (b), the trial court instructed that no juror may consider evidence of other uncharged criminal acts unless that juror is convinced beyond a reasonable doubt that appellant committed those acts. (6CT 1427; CALJIC No. 8.87.) Regarding factor (c), prior felony convictions, the trial court instructed that no juror may consider evidence of appellant's prior conviction of grand theft of an automobile (see 19RT 3249, 3328) unless the juror is satisfied beyond a reasonable doubt that appellant was convicted of that crime. (6CT 1426; CALJIC No. 8.86.) The jury was further instructed that appellant is presumed innocent of unadjudicated criminal acts unless the People meet their burden of proving him guilty of those acts beyond a reasonable doubt. (6CT 1427; CALJIC No. 2.90.)

Alternatively, appellant contends that if no such presumption or burden of proof is required by either the federal Constitution or California law, the court erred by failing to instruct the jury that there is no burden of proof. He argues that without such an instruction, there is a danger the jury may have erroneously allocated a non-existent burden of proof to the defense. (AOB 307.) That contention must also fail. (*People v. Scott* (2015) __ Cal.4th __ [2015 WL 3541280], *29; *People v. Dement* (2011) 53 Cal.4th 1, 55-56.) Since the penalty phase determination is not a factfinding function but a normative or moral judgment to which a "burden of proof" cannot logically apply, there is no danger that the jury misallocated a non-existent "burden."

In any event, the jury was instructed, "The law never requires the jury to return a verdict of death" (6CT 1422 CALJIC No. 8.84), and that the jury cannot reach a verdict of death unless they are unanimously "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1428; CALJIC No. 8.88.) From those instructions, no juror could reasonably conclude that the defense had any burden in the penalty phase.

E. The Federal Constitution Does Not Require Unanimous Jury Findings On Specific Aggravating Factors, Including Other Unadjudicated Crimes.

Appellant contends that California's death penalty law is unconstitutional because it does not require unanimous jury findings on each specific factor used in aggravation at the penalty phase, including the "circumstances of the crime" (Pen. Code, § 190.3, subd. (a)) and other "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" (Pen. Code, § 190.3, subd. (b)). He argues that unanimous jury

findings are required by the Sixth Amendment under *Apprendi, supra*, 530 U.S. 466, *Blakely, supra*, 542 U.S. 296, and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 307-309.) But as appellant acknowledges, this Court has rejected this argument in decisions subsequent to *Ring*.

> While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors. As such, the penalty phase determination 'is inherently moral and normative, not factual . . . .' [Citation.] Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' [Citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.

(*Prieto, supra,* 30 Cal.4th at p. 263, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779, and *Apprendi, supra*, 530 U.S. at p. 490; accord *People v. Mendoza* (2011) 52 Cal.4th 1056, 1096; *People v. Ward* (2005) 36 Cal.4th 186, 221-222.)[93]

Appellant also argues that the absence of an instruction requiring unanimity on aggravating factors may somehow have misled the jury to believe unanimity was required in order to find mitigating factors. He apparently bases this contention entirely on the fact that the jury was instructed in the guilt phase that unanimity was required for either a conviction or an acquittal. (AOB 313.) There is no merit to appellant's

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[93] Appellant's equal protection challenge to the lack of a unanimity requirement (AOB 308) is discussed *post* in subsection J.

argument. Although the jury was instructed that "In order to make a determination as to the penalty, all twelve jurors must agree" (6CT 1428; CALJIC No. 8.88), nothing in that or any other instruction suggested that unanimous findings were required regarding the existence of any specific mitigitating factor. This Court has therefore repeatedly rejected appellant's argument (*Mendoza, supra*, 52 Cal.4th at p. 1097; ["Our standard penalty phase instructions do not call for jury unanimity on mitigating factors; nor do they mislead a jury into believing such unanimity is required"]; *People v. Crew* (2003) 31 Cal.4th 822, 860) and should do so again here.

F. The Penalty Phase Jury Instructions Did Not Provide An Unconstitutionally Vague And Ambiguous Standard For Determining The Penalty

Under CALJIC. No. 8.88, the jury was instructed that it could not return a verdict of death unless it finds unanimously that "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1428.) Appellant contends that the phrase, "so substantial," is so vague and ambiguous that it permits arbitrary and capricious sentencing in violations of the Eighth Amendment. (AOB 310.) This Court has repeatedly rejected the claim, explaining that those words "plainly convey the importance of the jury's decision and emphasize that a high degree of certainty is required for a death verdict. Far from undermining defendant's cause at the penalty phase, they assisted defense counsel in emphasizing the gravity of the jury's task, which included the choice of death as a penalty." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1194; accord *People v. McKinzie* (2012) 54 Cal.4th 1302, 1361; *People v. Jackson* (1996) 13 Cal.4th 1164, 1243.) Appellant offers no reason for this Court to reconsider those decisions.

G. The Federal Constitution Does Not Require Specific, Written Jury Findings In The Penalty Phase

Appellant contends that his death sentence violates the Sixth, Eighth, and Fourteenth Amendments and his right to meaningful appellate review because the jury was not required to make specific, written findings in the penalty phase. (AOB 314.) Appellant offers no reasons for this Court to reconsider its previous decisions rejecting this claim. (*McKinzie, supra* 54 Cal.4th at p. 1364.; *Mungia, supra*, 44 Cal.4th at p. 1142; *People v. Fauber* (1992) 2 Cal.4th 792, 859.)

H. CALJIC No. 8.85 Is Not Rendered Unconstitutional By Its Use of The Words "Extreme" And "Substantial," Its Inclusion Of Inapplicable Factors, Or The Absence Of Guidance As To Which Factors Can Only Be Mitigating.

Appellant contends that CALJIC No. 8.85[94] is unconstitutional because it: (1) limits factor (d) to "*extreme* mental or emotional

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[94] CALJIC No. 8.85, as given at appellant's trial, stated:

In determining which penalty is to be imposed, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in this present proceeding and the existence of any special circumstances found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(continued...)

disturbance" and limits factor (g) to acting "under *extreme* duress or under the *substantial* domination of another person" (italics added); (2) it did not omit inapplicable factors;[95] and (3) because it did not inform the jury which factors were aggravating and which factors could only be mitigating, or instruct the jury that the absence of a mitigating factor was not an

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(...continued)

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of his offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.

(6CT 1425-1426.)

[95] Appellant identifies only two factors which he contends were inapplicable: factor (e) "Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;" and factor (f): "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." (AOB 315.)

aggravating factor. (AOB 315.) This Court has repeatedly rejected each of these arguments (*People v. McKinnon* (2011) 52 Cal.4th 610, 692 [rejecting all three of these contentions]; *People v. Dykes* (2009) 46 Cal.4th 731, 815-816; *Lindberg, supra*, 45 Cal.4th at pp. 50-51) and should do so again here.

I. The Federal Constitution Does Not Require Inter-Case Proportionality Review Of Death Sentences, And The Absence Of Such A Requirement Under State Law Does Not Violate Due Process.

Appellant claims that California's death penalty procedure violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because it does not require so-called "inter-case proportionality review" of death sentences either in the trial courts or in this Court on appeal. (AOB 316.) This Court has already rejected that claim repeatedly (*People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Cox* (2003) 30 Cal.4th 916, 969–970; *Prieto, supra*, 30 Cal.4th at p. 276), and appellant offers no reason to reconsider those decisions.

J. Capital Defendants Are Not Denied Procedural Protections Given To Non-Capital Defendants In Violation of Equal Protection

Appellant contends that California's death penalty procedure violates the Equal Protection Clause because capital defendants are not afforded certain procedural protections given to non-capital defendants. Specifically, he claims that in non-capital cases, a unanimous jury finding beyond a reasonable doubt is required for every fact increasing the maximum sentence, even including one-year sentence enhancements, but that there is no unanimity or reasonable doubt requirement for aggravating factors supporting a death sentence in the penalty phase. He also asserts that in non-capital cases, the sentencing court must provide specific, written

reasons for its sentencing choices, while no specific written findings are required for a death penalty verdict. (AOB 308, 316-317)

This argument must fail because it is based on a misunderstanding of the nature of the penalty phase determination. The jury's penalty determination is not the equivalent of a sentence enhancement finding because it does not increase the maximum penalty for the crime. (*Prieto, supra*, at p. 263.) Rather, the special circumstance findings under Penal Code section 190.2 serve that function, by rendering a defendant death eligible. Here, appellant received unanimous jury findings, beyond a reasonable doubt, regarding his guilt of two counts of first degree murder and regarding the special circumstances of multiple murder, murder for robbery, and murder of a witness. (6CT 1304-1307.) Therefore, appellant was not afforded less protection than defendants charged with one-year sentence enhancements.

In fact, he was afforded *more* protection. In a non-capital case, once a jury unanimously convicts a defendant of an offense beyond a reasonable doubt and unanimously finds a sentencing enhancement true beyond a reasonable doubt, thereby rendering the defendant eligible to receive the maximum penalty for the offense and the enhancement, the defendant is not entitled to a second phase of trial in which a jury unanimously determines whether to impose the maximum sentence and enhancement or to grant leniency regarding both. Capital defendants, like appellant, *are* given that extra procedural protection. This Court should therefore reject appellant's equal protection claims, as it has done previously. (*People v. Burney* (2009) 47 Cal.4th 203, 268 [lack of reasonable doubt standard, unanimity requirement, or written findings requirement regarding penalty phase aggravating factors does not violate equal protection].)

K. The Death Penalty Does Not Violate International Law, the Eighth Amendment, Or Evolving Standards Of Decency

Appellant contends that California's "regular use of the death penalty," or alternatively the death penalty in general, violates international law, the Eighth Amendment, and "evolving standards of decency." (AOB 317.) This Court has already rejected these claims repeatedly. (*Manriquez, supra*, 37 Cal.4th at p. 547; *People v. Samayoa* (1997) 15 Cal.4th 795, 864–865; *People v. Snow* (2003) 30 Cal.4th 43, 127.)

IX. ANY CLAIMED ERRORS, EVEN WHEN VIEWED CUMULATIVELY, WERE HARMLESS AND DID NOT PREVENT A FAIR TRIAL

Appellant argues that this Court must reverse his convictions and death sentence based on the cumulative effect of all the errors he has alleged, which he claims undermined the fundamental fairness of the trial and reliability of the death judgment. (AOB 318-321.) But where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) The essential question is whether the defendant's guilt and penalty were fairly adjudicated, and a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1219.) For the reasons explained *ante*, there was no error in appellant's trial. Even if there were errors, they were harmless whether viewed individually or cumulatively.

CONCLUSION

For the reasons stated herein, respondent respectfully asks that the judgment be affirmed.

Dated: June 26, 2015

Respectfully submitted,

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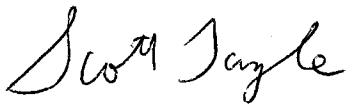

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **53,356** words.

Dated: June 26, 2015

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DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **People v. Santiago Pineda** **Case** No.: **S150509**

I declare:

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

On June 29, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

On June 29, 2015, I caused eight (8) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDERAL EXPRESS, Tracking # 8075 8393 5201**.

On June 29, 2015, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 29, 2015, at Los Angeles, California.

E. Obeso
Declarant


Signature

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