In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CUITLAHUAC TAHUA RIVERA,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S153881

Colusa County Superior Court Case No. CR46819
The Honorable S. William Abel, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On May 2, 2005, the Merced County District Attorney filed a first amended information in case number 29331 charging appellant, Cuitlahuac Tahua Rivera, with the following offenses: count I, first degree murder (Pen. Code,[1] § 187); counts II and VII, possession of a firearm by a prohibited person (§ 12021, subd. (a)(1)); counts III and IV, shooting at an occupied vehicle (§ 246); and counts V and VI, assault with a semiautomatic firearm (§ 245, subd. (b)). Three special circumstances were alleged as to count I: (1) that appellant intentionally killed a peace officer who was engaged in the course of performance of his duties (§ 190.2, subd. (a)(7)); (2) that he intentionally killed the victim while appellant was an active participant in a criminal street gang (§ 190.2, subd. (a)(22)); and (3) that appellant committed the murder for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody (§ 190.2, subd. (a)(5)). The information also contained a special allegation as to count I that the victim was a peace officer who was killed while engaged in the performance of his duties, that appellant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his duties, and appellant either (1) intended to kill the peace officer, (2) intended to inflict great bodily injury on a peace officer within the meaning of section 12022.7, or (3) personally used a firearm in the commission of the offense within the meaning of section 12022.5 (§ 190, subd. (c)). It was further alleged as to all counts that appellant committed the crimes for the benefit of, in association with, or at the direction of a criminal street gang with the specific intent to promote, further or assist criminal conduct by gang

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

members (§ 186.22, subd. (b)(1)). It was further alleged as to count I that appellant intentionally and personally discharged a firearm proximately causing great bodily injury within the meaning of section 12022.53, subdivision (d). As to counts III and IV, the information contained special allegations that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c).[2] It was further alleged as to counts III through VI that appellant carried a firearm with a detachable magazine within the meaning of section 12021.5, subdivision (b). As to counts V and VI, the information set forth special allegations that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). The information also contained special allegations that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b). (3 CT 551-559.) On that day, appellant entered pleas of not guilty and denied the allegations. (3 CT 565.)

On August 2, 2005, appellant filed a motion for a change of venue. (4 CT 820-853.) On August 11, 2005, the parties stipulated to, and the court approved, a change of venue from Merced County to Colusa County. (4 CT 854-856.)

A jury was sworn to try the case on April 12, 2007. (45 CT 13069.) On May 3, 2007, the jury found appellant guilty on all counts and found all the special circumstance and enhancement allegations to be true, except that it found the gang special circumstance to be not true. (47 CT 13582-13603.) On May 22, 2007, the jury found that the aggravating circumstances substantially outweighed the mitigating circumstances and

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[2] The first amended information was later amended by interlineation to change the firearm enhancement in count III from section 12022.53, subdivision (c), to section 12022.53, subdivision (d). (47 CT 13559-13560.)

the appropriate penalty to be imposed on count I was death. (48 CT 13765, 13769.)

On June 14, 2007, appellant filed a motion to dismiss for failure to disclose exculpatory evidence. (49 CT 13940-13953.) Appellant also filed a motion for new trial on that date. (49 CT 13954-13980.) The prosecution filed responses to both motions. (49 CT 13981-13988.) On June 21, 2007, the court denied both motions. (49 CT 13989-13990.) The court set aside the section 190, subdivision (c) true finding. (49 CT 13991.) The court also set aside and struck duplicate section 667.5, subdivision (b) true findings. (49 CT 13991.)

The trial court issued a statement of reasons for the denial of the automatic motion to modify the sentence under section 190.4. (49 CT 13993-13996.) It imposed the death penalty on count I. (49 CT 13997-14000.) The trial court sentenced appellant to state prison for an aggregate indeterminate term of 80 years to life based on consecutive terms of 15 years to life on counts III and IV and 25 years to life on the firearm enhancements in counts I and III. The court also sentenced appellant to a consecutive aggregate determinate term of 37 years 8 months based on five years on count II and the corresponding gang enhancement, one year eight months on count VII and the corresponding gang enhancement, 10 years on the gang enhancement in count I, 20 years on the firearm enhancement in count IV, and one year on the prior prison term enhancement.[3] Appellant was sentenced to 19 years each on counts V and VI and the corresponding

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[3] The court orally pronounced a sentence of 20 years on the section 12022.53, subdivision (c) firearm enhancement on count IV. (14 RT 3058.) The minute order and abstract of judgment incorrectly reflect a sentence of 20 years to life on that enhancement. (49 CT 14004, 14007.) If the minute order or abstract of judgment conflicts with the trial court's oral judgment, the trial court's oral pronouncement of judgment controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

enhancements, to be stayed pursuant to section 654. The section 12021.5, subdivision (b) enhancements in counts III and IV were also stayed pursuant to section 12022.53, subdivision (f). (49 CT 14003-14004, 14007-14010, 14036-14037.)

STATEMENT OF FACTS

A. Guilt Phase – The People's Case

1. Background

Appellant, of Mexican and black heritage, lived in Merced in April 2004. (47 CT 13391.) He was on parole. (6 RT[4] 1226; 47 CT 13331.) He had been a member of the Merced Gangster Crips street gang for years. (5 RT 1017; 6 RT 1224, 1229; 9 RT 1628.) He associated with other gang members often. (6 RT 1227; 7 RT 1511.) His girlfriend, Jamilah Peterson, tried to convince him to change his life and move away from the gang lifestyle, but appellant did not change his ways. (6 RT 1229-1230.)

2. Appellant's prior contacts with Officer Stephan Gray

Merced Police Department Officer Stephan Gray was a member of the Gang Violence Suppression Unit (GVSU). (5 RT 955, 1014; 9 RT 1824; 10 RT 1941.) He was specifically assigned to monitor the Merced Gangster Crips gang. (9 RT 1825.)

Appellant and his family claimed that Officer Gray was always harassing him. (6 RT 1236.) In fact, appellant told his stepbrother that he was "going to do something" to Officer Gray because he was tired of being harassed by him. (7 RT 1442.)

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[4] Respondent will refer to the volumes of reporter's transcript containing the trial proceedings in Colusa County as "RT." Respondent will refer to the two separately-paginated volumes of reporter's transcript containing the pretrial proceedings in Merced County as "Pretrial RT."

LaDonna Davis-Turner described a pre-2001 incident during which Officer Gray arrested appellant in her presence. (7 RT 1499.) Appellant had been drunk and was very aggressive. (7 RT 1499.) It took Officer Gray a minute to get appellant to calm down, and he had to slam appellant to the ground to do so, but he acted professionally. (7 RT 1499-1501.)

Peterson described another encounter between appellant and Officer Gray during which Officer Gray conducted a parole search of appellant and his residence because he was looking for Freddie Mays, another Merced Gangster Crip gang member. (5 RT 958-959, 979-980, 987, 6 RT 1237.) Officer Gray simply explained to appellant that he would be watching appellant and would come get appellant if he was caught doing anything wrong. (6 RT 1236-1237.) According to Peterson, Officer Gray acted professionally during the contact. (6 RT 1236.) Based on her observations, Peterson did not believe Officer Gray was harassing appellant or acting unprofessionally. (6 RT 1238.)

In March 2004, appellant ran from Officer Gray when Gray attempted to contact him. (6 RT 1138-1139.) Appellant abandoned Peterson's car on the side of the road so that he would not be stopped by Officer Gray. (6 RT 1232.) Peterson called Officer Gray to get her car back, and Officer Gray told her she could have it back if appellant would talk to him. (6 RT 1232-1233.) Appellant refused to talk to Officer Gray. (6 RT 1233.)

3. The shooting of Aaron McIntire and Kimberly Bianchi on April 11, 2004 (Counts III through VII)

On Easter Sunday, April 11, 2004, appellant and Peterson were at a family function at the park. (6 RT 1259-1260.) Appellant, fellow Merced Gangster Crips gang member Gustavo Reyes, and Peterson's stepfather Anton Martin left in Peterson's car to retrieve items from their apartment. (6 RT 1260-1262.) As they were driving, they stopped at an intersection at the same time as a vehicle driven by Aaron McIntire. (9 RT 1640-1646,

1676.) Kimberly Bianchi was McIntire's passenger. (9 RT 1640.) Neither McIntire nor Bianchi were gang members or affiliated with a gang. (9 RT 1647, 1677.) Appellant and his passengers stared at McIntire in a threatening way and threw their hands up like they had a problem with him. (9 RT 1644-1645, 1677.) McIntire threw up his hands back at them as if to say, "What is your problem?" (9 RT 1646, 1678.)

As McIntire began to turn his vehicle, appellant pointed a gun at McIntire's vehicle from out of his window. (9 RT 1647-1649, 1678.) Appellant[5] fired three shots at the vehicle. (9 RT 1649, 1680-1681.) One of the bullets hit McIntire in the ankle. (9 RT 1651, 1681.) He received treatment at the hospital and was on crutches for a few weeks. (9 RT 1683.) There was a bullet hole in the driver's door and another bullet hole in the rear bumper. (9 RT 1725.) Three shell casings were obtained from the scene and a bullet was obtained from McIntire's vehicle. (9 RT 1724-1727.)

The GVSU and Special Operations Unit (SOU) were involved in the investigation of the Easter shooting. They wanted to talk to appellant, who

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[5] Bianchi and McIntire identified appellant as the shooter in court. (9 RT 1645-1646, 1680, 1711-1712.) When they saw appellant's photograph in the newspaper after Officer Gray was murdered, McIntire knew appellant had shot him but Bianchi was unsure because his hair looked different. (9 RT 1669-1670, 1684, 1750.) When shown a different photograph of appellant, Bianchi said it more closely resembled the shooter than the newspaper photograph. (9 RT 1669-1670.) Both of them identified Peterson's vehicle as the one driven by the shooter. (9 RT 1650-1651, 1661-1662, 1668-1669, 1685-1686, 1702.) During the preliminary hearing, both of them stated that appellant resembled the shooter. (9 RT 1665-1666, 1668, 1698-1700.) When shown a photo lineup a couple months after the shooting, Bianchi could not identify appellant but McIntire did, although it was unclear on the written form who he had identified because of a mistake by law enforcement. (9 RT 1657-1661, 1704-1709, 1757-1761; 46 CT 13283-13284, 13287.)

was a "possible suspect" or "person of interest" in relation to the shooting. (5 RT 980, 1013-1021.) The perpetrators of the shooting had been described as a Hispanic male adult and a Black male adult and were possibly connected to the Merced Gangster Crips. (5 RT 1016-1017.)

4. The murder of Officer Gray on April 15, 2004 (Counts I and II)

On April 15, 2004, at approximately 7:00 p.m., appellant was riding in Peterson's green Mazda Protégé that she was driving with their small child in the back seat. After hanging out with other Merced Gangster Crips gang members earlier that evening, appellant had asked Peterson to drive him to The Hut, a gang hangout. (6 RT 1223-1226, 1230-1231, 1304-1305.) They arrived at a four-way stop sign at about the same time as a vehicle driven by Officer Gray. (6 RT 1240.) They recognized Officer Gray immediately. (6 RT 1241.) As they continued on, they realized that Officer Gray had started following them. (6 RT 1241.) When Peterson told appellant they had nothing to worry about, appellant exclaimed, "Mother-fucker, why did – why is he always bothering me? Why is he harassing me? Why don't he just leave me alone?" (6 RT 1242.) Appellant then asked to use Peterson's cell phone. (6 RT 1244.) He called Martin, told him that Officer Gray was following them, and asked him to come to where they were. (6 RT 1244-1245.)

Officer Gray initiated a traffic stop on the Protégé. (5 RT 955-956; 6 RT 1148-1149, 1246-1248.) As he did so, appellant called Clint Ward, who hung around with the Merced Gangster Crips and often gave gang members rides. (6 RT 1225-1226, 1246-1247.) Appellant asked Ward to come get him. (6 RT 1248.) Peterson exited the vehicle before Officer Gray walked up and asked why she was pulled over, but Officer Gray ordered her back into the vehicle. (6 RT 1151, 1250-1252.)

Officer Gray walked around to the passenger side of the vehicle where appellant was sitting. (6 RT 1252.) Appellant was still on the phone so Officer Gray told him to get off the phone. (6 RT 1252.) Officer Gray asked when appellant had last seen his parole officer and confirmed with dispatch that he did not have any outstanding warrants. (6 RT 1253.) Officer Gray then ordered appellant out of the vehicle so that he could search him. (6 RT 1253.) Officer Gray acted politely and professionally. (6 RT 1254.) Witnesses did not see any physical contact between appellant and Officer Gray up to that point. (6 RT 1190.)

As Officer Gray prepared to search appellant approximately three feet from the car, appellant pushed him away and started running down the sidewalk. (6 RT 1154, 1165, 1255; 7 RT 1310-1311.) Officer Gray chased after appellant and said, "I don't know why you're running. You're going to get caught anyway." (6 RT 1255.) Officer Gray began catching up to him. (6 RT 1169, 1194.) Appellant looked over his left shoulder at Officer Gray and continued running. (6 RT 1161, 1166, 1169.) Then appellant lifted his sweatpants and grabbed a gun from the waistband as he continued to run. (6 RT 1161-1162.)

Peterson claimed that appellant did not turn his body and that he just put his right hand with the gun under his left arm next to his body. (6 RT 1257-1258.) She did not see the gun pointed at any time. (6 RT 1258.) Other witnesses explained, however, that appellant aimed the gun at Officer Gray as he twisted his body 90 to 180 degrees to his right toward the officer. (6 RT 1162, 1166-1167, 1170, 1174, 1179, 1195-1196.) After a few more steps, when Officer Gray was approximately six feet from appellant, appellant shot at Officer Gray. (6 RT 1171, 1174, 1178-1179, 1183.) Within a few seconds, as Officer Gray continued to run toward him, appellant fired a second shot at the officer. (6 RT 1171-1174, 1180, 1196-1197.) Officer Gray fell to the ground after taking a few more steps, just

before he reached appellant. (6 RT 1171, 1181, 1183, 1194, 1201.) The chase had covered close to 100 feet. (46 CT 13084.) Officer Gray asked bystanders to stay with him and to call 911. (6 RT 1174.) Appellant continued to run away. (6 RT 1195, 1257.) In the aftermath, witnesses observed Peterson talking on her cell phone. (7 RT 1349, 1359.) They heard her say, "I didn't think he would do it" (7 RT 1349-1350), and "I can't believe he shot him in the face" (7 RT 1359). When Peterson's stepfather arrived, she gave him her cell phone. (7 RT 1361.)

Law enforcement quickly responded to the scene. (5 RT 962-965, 1002.) Officer Gray was lying face down on the sidewalk. (5 RT 965.) He was bleeding, was conscious, and was breathing shallowly. (5 RT 966, 1003.) He appeared weak as he attempted to raise himself up off the ground. (5 RT 966.) The holster containing Officer Gray's firearm was still snapped secure. (5 RT 969.) It did not appear that he had drawn his gun or any of the other weapons he possessed on his person. (5 RT 969-770.) Officer Gray was wearing his regular daily patrol uniform known as a "Class B" uniform, which was the uniform that members of the GVSU wore while on duty. (5 RT 956-957, 999-1000.) He did not have anything over his blue uniform shirt. (5 RT 983.)

Officer Gray had been shot twice. The first bullet travelled through his left arm. (5 RT 1061-1062, 1069-1070; 46 CT 13095, 13098.) The position of the bullet wounds in the arm was consistent with a defensive posture or with using the arm to operate a piece of police equipment at the time of the shot. (5 RT 1063.) The wounds were consistent with a large caliber handgun. (5 RT 1062.)

Officer Gray had also been shot in the right side of his chest above his ballistics vest. (5 RT 1004-1005, 1064-1066; 46 CT 13085.) The bullet fractured his clavicle, cut a large artery, travelled through the lung, struck the third and fourth thoracic vertebrae in the spinal column, cut the spinal

cord, and came to rest in the soft tissue of the left chest. (5 RT 1065-1066.) The bullet would have instantly paralyzed Officer Gray and rendered inoperative the muscles necessary for breathing. (5 RT 1066.) The ultimate cause of death was a combination of suffocation and bleeding into the chest over the course of several minutes. (5 RT 1067-1068, 1071.) Officer Gray had abrasions and lacerations on his forehead and face as well as chipped teeth, all characterized as blunt force injuries that were consistent with the unprotected fall of someone who was running and lost all muscle tone in his body. (5 RT 966-967, 1003-1004, 1064-1065, 1067; 46 CT 13085-13086.)

Two .45-caliber shell casings were located approximately 10 yards from Officer Gray's body. (5 RT 971-974, 1043, 1048-1050; 5 CT 13089-13090.) The murder weapon was never recovered. (6 RT 1118.)

5. Appellant's flight and subsequent arrest

Shortly after the shooting, appellant walked directly into the residence of Daniel Flores and Ricardo Munoz, which was just a couple blocks from the shooting. (7 RT 1362-1365, 1382-1383.) Flores and Munoz might have seen appellant previously but neither of them knew appellant.[6] (7 RT 1365, 1384-1386.) Appellant told Flores to sit down, stay put, and get him some clothes. (7 RT 1366-1372.) Munoz gave appellant his red shirt. (7 RT 1390.) Appellant asked for a ride but Munoz refused. (7 RT 1391.) Munoz gave appellant his cell phone, which Ward returned to Munoz the next day. (7 RT 1395, 1402.) Appellant fled the residence out the back door. (7 RT 1400.)

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[66] Flores and Munoz denied that they were affiliated with a gang, but a photograph showed them displaying gang signs. (7 RT 1370-1371, 1375, 1385.) Munoz also admitted that Ward, a Merced Gangster Crips gang member, used to come to his house. (7 RT 1404-1405.)

Soon after, appellant and Ward were seen entering Merced Liquor, which was just around the corner from the residence of Flores and Munoz. (7 RT 1417-1425.) They were in the store for only a few minutes or less before leaving. (7 RT 1433.) When appellant exited, he left in the direction of the residence of Flores and Munoz. (7 RT 1424-1425.)

A few days later, Davis-Turner and Dabreka Thompson drove appellant to San Diego after gang members pressured them to help out the "homie." (7 RT 1451-1477, 1510-1518.) Thompson told law enforcement that she saw appellant with a gun in the car, but she claimed on the stand that it was a lie. (7 RT 1518-1519.) Appellant explained to the females in the car that Officer Gray was a "bad cop" that harassed a lot of people. (7 RT 1475.) He later said, "I hate Officer Gray. I hate Officer Gray. Fuck Officer Gray." (7 RT 1493.) Appellant stayed at their apartment in San Diego for three to five days. (7 RT 1479-1486.) Appellant stored some of his things in a backpack in Davis-Turner's room. (7 RT 1487-1488, 1520-1521; 10 RT 1942-1943.)

At some point, the police came to the apartment while Davis-Turner and appellant were at the movies. (7 RT 1489, 1523.) Law enforcement recovered the backpack, in which was found a .40-caliber handgun. (6 RT 1136-1137; 7 RT 1525; 9 RT 1850-1851; 10 RT 1941-1942.) The gun was not used in either of the two shootings in this case. (10 RT 1942.) The handgun was one of 82 firearms stolen in a burglary in Ontario, California, three of which have been associated with Merced Gangster Crips gang members. (9 RT 1851-1852.)

When Davis-Turner and appellant returned and saw police activity at the apartment, they stayed the night in a motel five miles away. (7 RT 1489-1490.) The next morning, Davis-Turner left appellant at an apartment complex and contacted the police. (7 RT 1492.) She and Thompson

agreed to help law enforcement capture appellant back in Merced. (7 RT 1503, 1524.)

Appellant contacted several known Merced Gangster Crips gang members and their family members while he was at large. (7 RT 1546-1553.) On April 24, 2004, Alfred Huerta drove from Merced to San Diego, picked up appellant, and drove him back to Merced. (7 RT 1551-1552.)

Davis-Turner and Thompson also returned to Merced. (7 RT 1502.) Davis-Turner arranged to meet appellant at her grandparents' house under the ruse that they would drive him back to San Diego. (7 RT 1503-1504, 1554.) Law enforcement arrested all three of them near a truck stop south of Merced on May 2, 2004. (7 RT 1504-1505, 1555-1558.)

6. Appellant's interview with law enforcement

Detective Ray Sterling conducted an interview of appellant after he was arrested.[7] (5 RT 1087.) Appellant explained that he and his girlfriend were pulled over by Officer Gray. (47 CT 13318-13319.) Appellant admitted he was on parole at the time. (47 CT 13331.) He claimed that Officer Gray searched him and was going to let him go. (47 CT 13319-13320.) Appellant was not carrying a gun and had never been in possession of a gun. (47 CT 13319, 13329-13330.) All of a sudden, an Asian with long hair from across the street started shooting so appellant ran away. (47 CT 13319-13321, 13349-13350.) Appellant claimed that he had never been to San Diego. (47 CT 13332-13333.) Appellant also claimed that he was a former member of the Merced Gangster Crips. (6 RT 1118; 47 CT 13351, 13385.)

According to Detective Sterling, law enforcement did not obtain any evidence suggesting that Officer Gray had searched appellant. (6 RT

[7] The interview was recorded, transcribed, and played for the jury. (5 RT 1088, 1098-1099; 6 RT 1112-1113; 47 CT 13318-13405.)

1114.) Had appellant been searched and a gun been found, appellant would have been arrested immediately, tried for a new offense, and ultimately returned to prison. (6 RT 1115.)

7. Firearms evidence

George Luczy testified as an expert in firearms. He opined that the shell casings found at the Officer Gray murder scene and the shell casings from the McIntire shooting were all fired by the same firearm. (9 RT 1796-1797.) He further opined that the bullet that was recovered from the body of Officer Gray and the bullet recovered from McIntire's vehicle were fired by the same firearm. (9 RT 1797.)

8. Prior convictions and uncharged misconduct

On September 30, 2000, appellant shot at rival gang members of the Merced Bloods.[8] (6 RT 1140, 1264-1266; 9 RT 1629-1634, 1832.) He was ultimately convicted of a felony offense involving the use of a firearm in connection with that shooting. (6 RT 1142.)

In 2001, appellant was involved in an encounter with Adel Mohammed, the owner of Merced Liquor, and Mohammed's friend, Larry Gonzalez. (7 RT 1425.) Appellant was in one vehicle while Mohammed and Gonzalez were in another. (7 RT 1425-1426.) Appellant and Gonzalez were giving each other dirty looks. (7 RT 1425-1426.) They exchanged words and both men acted as though they were going to exit their vehicles. (7 RT 1426-1427.) Appellant then pointed a gun at Gonzalez and Mohammed. (7 RT 1427.) Appellant warned them not to report the incident to the police. (7 RT 1429.)

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[8] Marlon Bradley, one of the persons who appellant shot at, claimed that he was not a gang member but admitted to associating with the Bloods. (9 RT 1628.)

On February 13, 2001, appellant was convicted of being a felon in possession a firearm (§ 12021, subd. (e)). (46 CT 13307, 13311; 9 RT 1836.) On October 1, 2001, appellant was convicted of possession of cocaine base for sale (Health & Saf. Code, § 11351.5). (46 CT 13307, 13311; 9 RT 1836.)

9. Expert gang evidence

Sergeant Tom Trinidad testified as an expert in gangs. He had received 600 hours of specialized training related to criminal street gangs. (9 RT 1807.) He had been a gang training instructor. (9 RT 1807-1808.) He had contacted approximately 4,000 criminal street gang members and investigated approximately 200 gang-related crimes in his career. (9 RT 1808-1812.) Sergeant Trinidad explained that criminal street gangs come together for mutual benefit and may be comprised of family members, friends, or neighborhoods. (9 RT 1810.) Gang members typically identify themselves by various mannerisms, including tattoos, specific colors, hand signs, and haircuts. (9 RT 1812.) They gain influence and power through fear and violence so that ultimately law enforcement is the only thing that stands in their way. (9 RT 1818-1819.)

Sergeant Trinidad stated that 24 criminal street gangs operated in Merced in April 2004. (9 RT 1820.) The gangs would often work cooperatively with each other to deal drugs or take care of problems with other gangs. (9 RT 1820-1821.)

The Merced Gangster Crips were one of the criminal street gangs that existed in Merced at the time of Officer Gray's murder. (9 RT 1820.) It had approximately 86 members. (9 RT 1828-1829.) The numbers "47" and "2100" refer to different sects of the Merced Gangster Crips that ultimately came together to form one gang. (6 RT 1268-1269; 9 RT 1833-1834.) That gang was primarily associated with drug dealing and armed robberies, and it used violence to further its criminal activities. (6 RT

1228-1229; 9 RT 1821-1823.) The Hut was an informal social club where gang members would congregate. (9 RT 1824.) Although Crips gangs are generally African-American, the Merced Gangster Crips also included Hispanics and whites because of the low African-American population in Merced. (9 RT 1826-1827.) The North Side Piru gang, associated with the Bloods, was a rival to the Merced Gangster Crips. (9 RT 1828.)

Appellant was a validated member of the Merced Gangster Crips criminal street gang. (9 RT 1834-1835.) His gang monikers were Bullet and Trigger because he was quick to pull the trigger and because he liked to use guns. (9 RT 1830-1832.) He had previously suffered convictions for possession for sale of rock cocaine and possession of a firearm by a prohibited person, two of the gang's primary activities. (9 RT 1836-1837.) Appellant had two gang-related tattoos: a "CN" tattoo for Northern Crip, and a "4700 Gangster" tattoo for the Merced Gangster Crips. (9 RT 1848-1850.)

Sergeant Trinidad explained that killing a police officer would enhance a criminal street gang's power and reputation immensely. (9 RT 1850.) This is so because police officers are the only people that can prevent the gang from doing whatever they want. (9 RT 1850.) Killing a police officer is not taboo within the gang culture. (9 RT 1886.) A gang member had once threatened to kill Sergeant Trinidad. (9 RT 1893.)

Based on his training and experience, Sergeant Trinidad opined that the McIntire shooting benefited the Merced Gangster Crips because it enhanced the reputations of the shooter and the gang and instilled fear in the community. (10 RT 1931-1932.) The other gang members in the vehicle would brag about the shooting and bolster the image of the gang. (10 RT 1933.) Sergeant Trinidad also opined that the shooting of Officer Gray was committed for the benefit of, in association with, and at the direction of the Merced Gangster Crips because the shooting increased the

gang's power, influence, and reputation within the gang community. (10 RT 1930-1933.) In fact, a gang member had stated after the fact that "somebody had to smoke his ass," referring to Officer Gray, which indicated the murder enhanced the reputation of the gang. (9 RT 1892; 10 RT 1934-1936.)

Department of Justice Special Agent Dean Johnston, a narcotics investigator, testified that the Merced Gangster Crips gang was involved in the large-scale distribution of cocaine base, cocaine powder, and marijuana in Merced. (7 RT 1558-1559.) In the wake of Officer Gray's death, the Merced Gangster Crips profited greatly from the drug trafficking trade. (7 RT 1565-1568.) The gang brought in at least $80,000 to $100,000 per week to be distributed amongst the gang members. (7 RT 1566.) The investigation of the Merced Gangster Crips drug dealing activity had to start over from scratch after the death of Officer Gray because he was the individual with the most knowledge about the gang. (7 RT 1567.) It was not until several months later that many of the gang members were arrested and convicted for drug trafficking. (7 RT 1560, 1564.)

B. Guilt Phase – Defense Case

Detective Sterling testified that he initially received a report of two witnesses who claimed a female had shot Officer Gray. (10 RT 1949-1950.) Both witnesses described the shooter's attire similar to other witness descriptions of a male shooter, just with feminine attributes. (10 RT 1949-1950.) Neither of those witnesses had seen the actual shooting. (10 RT 1950.)

Professor emeritus Jose Lopez testified as an expert on gangs. He explained that not everything a gang member does is a gang-related crime. (10 RT 1966-1967.) He also explained that in the gang culture, under no circumstances should a gang member kill a police officer. (10 RT 1967, 1981.) Killing a police officer would "bring down the heat," which would

not be good for business. (10 RT 1967.) A premeditated, planned hit on a police officer would have to be ordered by the prison gangs. (10 RT 1968-1969.)

Professor Lopez agreed that the Merced Gangster Crips were a criminal street gang at the time of the shootings. (10 RT 1971.) He also believed that appellant was an active member of the Merced Gangster Crips. (10 RT 1971.) Appellant could have received his gang monikers for various reasons. (10 RT 1974-1977.) Professor Lopez opined that the murder of Officer Gray was not a gang-related crime because appellant was simply trying to escape. (10 RT 1971-1972.) He admitted that he believed the Merced Police Department and Officer Gray were partially to blame for Officer Gray's death. (10 RT 2001-2002.)

C. Guilt Phase – Rebuttal Case

Sergeant Trinidad explained that a particular piece of graffiti by the Merced Ghetto Boys had been lined out, consistent with conduct between rival gang members. (10 RT 2089-2090.)

There was no way to tell from the dispatch recording how much time elapsed between Officer Gray initially spotting appellant's vehicle and when he was shot. (10 RT 2092-2093.)

D. Penalty Phase – People's Case

1. Victim impact evidence

Officer Gray and three siblings grew up without their father because of his problems with drugs and alcohol. (12 RT 2624, 2651-2652.) Their mother raised them, but she worked shifts from 4:00 p.m. to midnight so the children had to take care of each other. (12 RT 2625-2628, 2652-2654.) Officer Gray kept all of his siblings in line and made sure they did what they were supposed to do. (12 RT 2628, 2656.) According to Officer Gray's brother, Tony, the siblings were all close. (12 RT 2625.) Officer

Gray was always there to support Tony and to encourage him. (12 RT 2632-2633.)

According to his mother, Lonather, Officer Gray had been a good student and a good kid. (12 RT 2654-2655.) He excelled in lots of sports. (12 RT 2628, 2655.) He never gave his mother any trouble. (12 RT 2656.)

Officer Gray decided to become a police officer one day when he saw someone stealing a watch at Wal-Mart where he worked as a loss prevention officer. (12 RT 2630, 2668.) He confronted the thief and got him to give the watch back. (12 RT 2630-2631.) The police officer that responded to the scene encouraged Officer Gray to fill out a job application. (12 RT 2631.)

Officer Gray was always very loyal to his family. (12 RT 2627.) After he became a police officer, got married, and had children, he continued to take care of his whole family. (12 RT 2659.) He worked nights so he could stay home during the day and take care of his son, Isaiah, while his wife, Michelle, was in nursing school. (12 RT 2669.) He always made the extra effort to be there for his children because his father had been absent in his own life. (12 RT 2671.) According to Michelle, Officer Gray was a "wonderful superior father." (12 RT 2671.)

The night before Officer Gray was killed, he and Michelle had decided to sell their house. (12 RT 2678.) Officer Gray did not like that they lived on a busy street where their children could not play out front, and sometimes gang members would drive by and yell out their car windows. (12 RT 2678.) They had started looking at property to build a new home. (12 RT 2678.) Officer Gray also gave Michelle an early Mother's Day present, which they were going to open together the night he was killed. (12 RT 2679-2680.) Even though Officer Gray wanted to move, he refused to relocate offices or change jobs, even after he received a death threat on the job. (12 RT 2673.)

Retired Police Chief Mark Dossetti testified that he was on the panel that interviewed Officer Gray for employment prior to his hiring. (12 RT 2587.) Officer Gray was energetic and motivated. (12 RT 2587.) He earned an assignment to the gang unit because he worked hard making contacts with people in the community, gang members, and potential gang members. (12 RT 2589.) Chief Dossetti described Officer Gray's performance as a gang officer as "outstanding." (12 RT 2589.) He was loved and respected by everyone in the police department. (12 RT 2596.)

When Chief Dossetti first learned that Officer Gray had been shot, the first thing he did was order an officer to notify Officer Gray's family, though that officer unfortunately delayed the task. (12 RT 2591-2592.) Michelle learned from her neighbor that her husband had been shot. (12 RT 2680-2682.) She did not arrive at the hospital to see her husband until after he had been declared dead. (12 RT 2683.) Michelle put Officer Gray's front teeth back in his mouth so that his mother would not see him without them when she came. (12 RT 2685.) The next morning, Michelle told six-year-old Isaiah that his father had been killed and was not coming home. (12 RT 2686.)

The investigation of Officer Gray's death continued. A lot of off-duty officers responded to the scene and wanted to help with the investigation. (12 RT 2593-2594.) Over the next several days, many officers operated on little or no sleep and refused to leave the police department building. (12 RT 2595.) When they were ordered to leave and get some rest, many of the officers simply used the time to bond together and grieve. (12 RT 2595-2596.) Many officers put up memorials around the police department. (12 RT 2600-2601.)

Officer Gray's funeral was held at the local Catholic church, even though Officer Gray was not Catholic, because the venue was one of the few local places large enough to accommodate a great number of people.

(12 RT 2597.) Officers from different agencies throughout California, Nevada, and other states attended the funeral. (12 RT 2597.) At the conclusion of the funeral, there was a procession through the streets of Merced. (12 RT 2598.) The streets were lined "two and three deep" with citizens of the community in support of Officer Gray, his family, and the police department. (12 RT 2598.) Funeral detail officers from San Francisco commented that they had never seen a community come out in support of a police department like Merced had. (12 RT 2598-2599.)

After Officer Gray's death, Chief Dossetti devoted every department resource he could to the murder investigation while still maintaining the day-to-day operations of the department. (12 RT 2602-2603.) Many citizens declined to report minor incidents so as to allow the police department to focus on the murder investigation. (12 RT 2603-2604.)

As a result of Officer Gray's death, the City of Merced passed a tax measure to hire more police officers. (12 RT 2604, 2691-2692.) A section of Highway 99 in Merced was renamed Officer Stephan Gray Memorial Highway. (12 RT 2692.) Many citizens became more active in reporting suspicious activity such as gang activity and narcotics activity. (12 RT 2604.)

Sergeant Christopher Goodwin and Officer Gray were partners as beat officers when Gray was first hired and they later worked together in the gang unit. (12 RT 2608, 2611, 2614-2615.) They became very close friends. (12 RT 2612.) Officer Gray pushed Sergeant Goodwin to be a better officer, made him a better person, and taught him how to be sensitive to the needs of the community. (12 RT 2609, 2618-2620.) Officer Gray knew everybody in the community and remembered everything about everybody. (12 RT 2610.) He always took the extra step when serving his community. (12 RT 2618, 2689-2691.)

After Officer Gray died, Sergeant Goodwin helped escort his body to the morgue. (12 RT 2617.) He also escorted Officer Gray's family and spoke at the funeral. (12 RT 2618.) Sergeant Goodwin got a tattoo in Officer Gray's memory. (12 RT 2622.)

Officer Gray's oldest daughter, Landess, was only 13 years old when he was murdered. (12 RT 2640.) She stood in the closet in her room and cried for a long time when she learned her father was dead. (12 RT 2641.)

Life was "extremely difficult" for Landess after her father's death. (12 RT 2642.) Her father had always been a symbol of strength and a source of encouragement for her. (12 RT 2649-2650.) She became confused and mostly kept her feelings inside. (12 RT 2642, 2686.) She stopped seeing a counselor because she did not like counseling. (12 RT 2643.) No one around her at school could understand what she was going through. (12 RT 2643.) She had been looking forward to her father taking pictures of her for school dances and being at her graduation. (12 RT 2646-2647.) She honored her father by getting good grades in school. (12 RT 2647-2648.)

For six weeks after Officer Gray's death, his two-year-old daughter, Cameron, would cry, hit Michelle, and demand that she call Heaven and bring her daddy home. (12 RT 2687.) Cameron kept asking why he was never coming home and Michelle could not answer her. (12 RT 2687.) Landess felt bad that Cameron was not going to have much memory of her father. (12 RT 2648.)

Isaiah remained in denial for a long time. (12 RT 2687.) He saw a child therapist, but he eventually declared that he did not want to talk about his father anymore with the therapist. (12 RT 2687-2688.) Six or seven months after the murder, Isaiah hysterically burst into tears and finally started talking about his father with Michelle. (12 RT 2688.) He was afraid that the same man who killed his father would kill the rest of their

family. (12 RT 2688.) He would wake up at night and cry for his father. (12 RT 2688.) He would often experience outbursts of rage because he was upset about his father being gone. (12 RT 2648.)

Michelle never went back to work as a nurse. (12 RT 2688.) She would not be able to care for her patients without seeing her husband. (12 RT 2689.)

Lonather testified that her life had been horrible since her son had been killed. (12 RT 2663.) Officer Gray was always on her mind. (12 RT 2663-2664.)

Tony explained that he stopped getting together with his mother on Christmas Day after Officer Gray's death because he could not bare the hurt and pain of his brother not being there. (12 RT 2635-2636.) He avoids driving through Merced and he had not seen Officer Gray's wife and children in two years. (12 RT 2636.) Tony had attempted suicide twice since the murder and was seeking counseling. (12 RT 2636.) He got divorced and lost his kids, house, and cars because of his depression. (12 RT 2637-2638.)

2. Prior adjudications

As a juvenile, appellant was supervised by the Merced County Probation Department. (12 RT 2579-2581.) He was made a ward of the court when he suffered felony adjudications for making criminal threats and brandishing a deadly weapon on August 19, 1998. (12 RT 2582.) He was also adjudicated for two counts of threatening a school official on January 25, 1999. (12 RT 2582.)

3. Behavior while in custody

On April 18, 2006, appellant was in custody at the Merced County Jail. (12 RT 2566-2567.) He was housed in the Administrative Segregation (Ad-Seg) unit of the jail. (12 RT 2570.) Appellant was angry

that he could not be rehoused with the jail's general population so he flooded his jail cell by bailing water out of the toilet. (12 RT 2567.) The water ran out into the hallway. (12 RT 2567.) He complained that it was unfair that he could not be housed with the general population "just because some pig got killed." (12 RT 2568.) Appellant refused to come out and lay down in his cell, so he had to be forcefully removed from his cell. (12 RT 2571-2572, 2575.)

E. Penalty Phase – Defense Case

1. Character evidence

Appellant's mother testified that appellant's father left the home when she was two months pregnant with appellant. (13 RT 2828.) Appellant never met him. (13 RT 2828.) Appellant's stepfather left the family when appellant was about nine years old. (13 RT 2829-2830.) Appellant became the father figure of the house for six siblings. (13 RT 2835.)

Appellant was protective of his mother. One day before his stepfather left, his stepfather was aggressive with his mother about three times, although he was never violent to her. (13 RT 2830-2831.) Appellant attempted to get between them and warned his stepfather not to do anything to his mother. (13 RT 2830-2831.) On another occasion, appellant's oldest brother threw a shoe at their mother, hitting her in the foot, after which appellant told him not to do anything to their mother. (13 RT 2831-2832.)

Appellant became a loner. (13 RT 2830.) He often came home from school beaten up and with gum in his hair. (13 RT 2834.)

Appellant's youngest sister explained that appellant had a positive influence on her life because he was always telling her to stay in school and hang out with the right crowd. (13 RT 2809, 2813.) Appellant acted like a second father to her. (13 RT 2820.) He encouraged her to be a role model for her nieces. (13 RT 2810.) She was the only family member allowed to

visit appellant when he was in custody in Merced County Jail. (13 RT 2812.) She also explained that appellant was close with his grandfather, who passed away around the same time as the shootings in this case. (13 RT 2815-2816.) Appellant had once saved his grandfather's life by pulling him out of a van after it had flipped in a motor vehicle accident. (13 RT 2816-2817.)

Appellant's niece testified that she had never seen appellant angry. (13 RT 2796.) He was like a father figure to her. (13 RT 2797, 2802.) He always played with her and encouraged her to try hard, go to school, and be a better student. (13 RT 2797-2801.)

When appellant's daughter was born, he became very focused on her. (13 RT 2835.) He spent as much time as he could with her. (13 RT 2835.)

Appellant's mother did not believe appellant murdered Officer Gray. (13 RT 2840.)

2. Evidence of mental disease or defect

Psychiatrist Avak Howsepian reviewed documents provided to him by the defense and interviewed appellant, his family members, and other people related to the case. (13 RT 2733-2734.) He made two main diagnoses of appellant: post traumatic stress disorder, and impulse control disorder not otherwise specified. (13 RT 2734, 2749.)

As to the post-traumatic stress diagnosis, Howsepian noted that appellant had been traumatized by a series of events throughout his life, beginning at an early age. (13 RT 2735-2738.) At the age of three or four, appellant witnessed someone die in a motorcycle accident. (13 RT 2738-2739.) Appellant then took his new bicycle apart because he was afraid the same thing might happen to him if he rode it, a symptom of avoidance. (13 RT 2739-2741.) Appellant had difficulty sleeping after that event. (13 RT 2740-2741.) The trauma of the event was exacerbated by the fact that appellant had grown up without a father or protector. (13 RT 2741.)

Another set of events told to Howsepian by appellant, and relied upon by him for the diagnosis, involved alleged assaults to appellant's mother. Appellant's stepfather, who had become a surrogate father to appellant, assaulted appellant's mother, essentially betraying appellant's trust. (13 RT 2741-2742.) Appellant fought off his stepfather and skipped school several times to stay home and protect his mother. (13 RT 2742.) Appellant's brother, who had significant mental problems, also attacked their mother on a couple of occasions. (13 RT 2742.) Appellant threw his brother into a wall in response. (13 RT 2742.)

From second grade to junior high school, appellant was bullied on almost a daily basis at school. (13 RT 2743.) Appellant obeyed his mother's direction not to fight back until she finally said it was ok after he had been physically attacked. (13 RT 2743.)

Another traumatic event, specifically related to Officer Gray, occurred when appellant was 16 years old. Officer Gray responded to the scene when appellant was in a fight with another man. (13 RT 2743-2744.) According to appellant, he ended up unintentionally striking Officer Gray, who was trying to break up the fight. (13 RT 2743-2744.) Officer Gray initiated some physical contact that caused appellant to fall down and hit his head on the ground. (13 RT 2744.) Appellant had to be taken to the emergency room afterwards. (13 RT 2744.) Howsepian believed appellant received a mildly traumatic brain injury from the incident. (13 RT 2752-2753.) This incident heightened appellant's suspicion toward Officer Gray, who was just another in a long line of individuals who was supposed to protect him but instead abused him. (13 RT 2743-2744.) Appellant subsequently developed a paranoia about Officer Gray that continued for years. (13 RT 2745-2746, 2753-2754.) Appellant probably perceived him not only as a physical threat but also as a threat to the integrity of his family. (13 RT 2754-2755.)

Howsepian's second main diagnosis of appellant was impulse control disorder not otherwise specified. (13 RT 2734, 2749.) Individuals with this disorder quickly become uncontrolled, aggressive, and violent due to some kind of trigger and often cannot remember what they did during that time. (13 RT 2749.) Appellant had described a number of incidents in his life in which he behaved in this way. (13 RT 2750.) Appellant's triggers included whenever someone dear to him was assaulted. (13 RT 2750-2751.) Officer Gray's death was an outcome from the same kind of uncontrolled, violent response. (13 RT 2751.) Appellant felt threatened by Officer Gray and acted very violently in response. (13 RT 2751.)

Howsepian also made other diagnoses. He diagnosed appellant with adult antisocial behavior, a condition in which someone's environment tends to influence them to engage in antisocial acts. (13 RT 2752.) In Howsepian's opinion, appellant had a history of a psychotic disorder. (13 RT 2752.) The ways appellant acted during his interactions with Officer Gray and after the killing were of such intense paranoid quality that they would be considered psychotic. (13 RT 2752.) Appellant also had histories of alcohol, marijuana, and hallucinogen abuse and oppositional defiant disorder. (13 RT 2752.)

The fact that appellant malingered and lied to him did not change Howsepian's opinions. (13 RT 2771, 2779-2780, 2785.) The additional information provided to Howsepian by the prosecutor based on the evidence in the case, of which he was previously unaware, also did not change his opinions. (13 RT 2785.) Howsepian admitted that his opinions were based on incomplete data. (13 RT 2786.)

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE MURDER OF OFFICER GRAY WAS DELIBERATE AND PREMEDITATED

Appellant contends that there was insufficient evidence that the murder of Officer Gray was deliberate and premeditated. (AOB 45-55.) He claims that the evidence indicated "unconsidered, impulsive conduct." (AOB 46.) Respondent asserts that there was ample evidence to support the true finding on the premeditation allegation.

In reviewing a claim regarding the sufficiency of the evidence, the appellate court must determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.) The reviewing court does not ask whether it believes that the trial evidence established guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781].) The court presumes the existence of every fact the jury could reasonably deduce from the evidence that supports the judgment. (*Ibid.*; *People v. Avila* (2009) 46 Cal.4th 680, 701.) The same standard applies if the verdict is supported by circumstantial evidence. (*Ibid.*; *People v. Stanley* (1995) 10 Cal.4th 764, 792, 793.) An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) It is appellant's burden to affirmatively establish that the evidence was insufficient to sustain a conviction. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

A finding that a murder was willful, deliberate, and premeditated requires more than a showing of intent to kill. "'Deliberation' refers to careful weighing of considerations in forming a course of action;

'premeditation' means thought over in advance. The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, citations and quotation marks omitted.) Premeditation and deliberation can occur in a brief interval. (*People v. Memro* (1995) 11 Cal.4th 786, 814, 863.) The required deliberation and premeditation need not be directly shown by the evidence but may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. (*People v. Eggers* (1947) 30 Cal.2d 676, 685.)

Appellant relies on this Court's decision in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, to argue that the evidence is insufficient to establish premeditation. In *Anderson*, this Court distilled certain guidelines "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) *Anderson* identified three categories of evidence pertinent to this analysis: planning, motive, and manner of killing. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.) First degree murder verdicts will be sustained typically when there is evidence of all three types, extremely strong evidence of planning, or evidence of motive in conjunction with evidence of either planning or manner of killing. (*Ibid.*) The categories of evidence do not represent an exhaustive or exclusive list of evidence that could sustain a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight. (*Ibid.*; *People v. Perez, supra*, 2 Cal.4th at p. 1125.) The

categories were intended only to provide a framework to aid in appellate review. (*People v. Perez, supra*, 2 Cal.4th at p. 1125.)

In *People v. Hernandez* (1988) 47 Cal.3d 315, this Court found sufficient evidence of premeditated murder even though it noted the evidence of premeditation and deliberation "was not great." (*Id.* at p. 349.) Although the evidence of planning was "admittedly slim" and the manner of killing used involved a sudden explosion of violence rather than a calculated killing, the Court still held that there was sufficient evidence to permit two premeditated murder convictions. (*Id.* at pp. 349-351.) In doing so, this Court remarked that the defendant was in a violent mood at the time of each murder and that evidence of motive was clearly present. (*Id.* at p. 350.)

There was ample evidence of premeditation and deliberation in this case as well. There was at least some evidence of all three categories to support a finding that appellant's murder of Officer Gray was deliberate and premeditated.

Although there was no evidence that appellant knew when he would encounter Officer Gray or that appellant went looking for Officer Gray specifically to kill him, once he realized that Officer Gray was following his vehicle, there was some evidence of planning. (See *People v. Wells* (1988) 199 Cal.App.3d 535, 540 ["Although the record lends no support for the inference appellant targeted the victim prior to the events of that evening, planning could have begun moments before appellant fired a shot . . . ."].) Immediately after commenting about Officer Gray harassing him (6 RT 1242), appellant made two phone calls for people to come get him. The first was to Martin, who had been with him days earlier during the Easter shooting. (6 RT 1244-1245.) The second was to Ward, who was either a fellow member or associate of the Merced Gangster Crips who often gave rides to other gang members (6 RT 1225-1226, 1246-1248) and

who ultimately came to appellant's aid in this case (7 RT 1402, 1417-1424). Significantly, appellant possessed a loaded .45-caliber handgun on his person at that time. (See *Wells,* at pp. 540-541 [carrying concealed loaded handgun is consistent with intent to kill even if not solid evidence of prior planning to kill a particular victim]; *People v. Morris* (1988) 46 Cal.3d 1, 23 [defendant's possession of a weapon in advance of the shooting and his rapid escape support inference of planning activity], disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Appellant had also previously threatened that he was "going to do something" to Officer Gray. (7 RT 1442.) A jury could reasonably infer that appellant made those phone calls because he was planning to kill Officer Gray and needed the help of trusted associates to escape capture. Also telling was that appellant did not attempt to give the handgun to Peterson, hide it in the vehicle, or otherwise dispose of it. Instead, he maintained possession of the gun so that he could use it to kill Officer Gray.

Peterson's behavior was also evidence that appellant planned to kill Officer Gray. She heard appellant's phone calls and observed his behavior before Officer Gray contacted them. A jury could have reasonably inferred, as the prosecution argued, that Peterson's attempt to get out of the car and confront Officer Gray was a conscious effort to stall him and prevent a situation in which appellant would try to kill him. (11 RT 2269-2270.) Her subsequent statement of "I didn't think he would do it" (7 RT 1349-1350) showed that Peterson had been aware of appellant's intent to kill Officer Gray before he executed the plan.

Appellant suggests the fact that he ran from Officer Gray and did not move him to facilitate the killing indicates a lack of planning activity. (AOB 50.) However, a rational jury could have rejected this interpretation. It could have inferred that appellant ran from Officer Gray so as to put

enough distance between them so that appellant could grab his gun and shoot Officer Gray before the officer had time to react. Officer Gray had not even unsnapped his holster before his death (5 RT 969), so appellant clearly accomplished this goal. Even if appellant had not intended to kill Officer Gray before he started running, during his run of approximately 100 feet with Gray on his tail (46 CT 13084), appellant had sufficient time to reflect on his decision and weigh the considerations for and against turning around and shooting Officer Gray. (See *People v. Memro, supra*, 11 Cal.4th at p. 863 [a rational jury could conclude that premeditation and deliberation occurred during the time it took the defendant to run about 60 yards].) The lack of forceful movement of Officer Gray is irrelevant. It is highly unlikely that appellant would have been able to kidnap and bind Officer Gray so as to move him to a secluded location for the killing like the defendant did in *People v. Hovey* (1988) 44 Cal.3d 543, 556. Any effort by appellant to reach into his waistband to retrieve his firearm within view of Officer Gray would have caused the officer to immediately subdue appellant or grab his own weapon. Appellant's best chance to kill Officer Gray involved the element of surprise.

Additionally, because of the gang culture appellant belonged to, he was already mentally prepared to commit violence and kill a police officer if the opportunity presented itself. Members of the Merced Gangster Crips commonly committed violent acts to increase their power and reputation (9 RT 1818-1822), and a jury could reasonably conclude from the evidence that a gang member would seek to enhance the gang's power and reputation even more through the killing of a police officer (9 RT 1819, 1850; 10 RT 1930-1933). Appellant's gang monikers, Bullet and Trigger, specifically indicated his fondness and mental preparedness for shooting if the opportunity arose. (9 RT 1830-1832.) Because of appellant's tendency to shoot quickly, a jury could have reasonably concluded that he had sufficient

time to engage in the reflection and weighing of considerations necessary for premeditation and deliberation, and that the murder of Officer Gray was deliberate and premeditated.

There was also ample evidence of motive. Appellant had a long history with Officer Gray, who was tasked with monitoring and investigating appellant's gang. Appellant hated Officer Gray and felt that Gray had harassed him for years. (6 RT 1236, 1242; 7 RT 1493.) Even after Officer Gray died, appellant exclaimed, "I hate Officer Gray. I hate Officer Gray. Fuck Officer Gray." (7 RT 1493.) According to appellant, Officer Gray was a "bad cop" who harassed a lot of people. (7 RT 1475.) On at least one occasion, he had threatened to "do something" to Officer Gray. (7 RT 1442.) A jury reasonably could have inferred that appellant murdered Officer Gray because of his hatred and to fulfill his previous threat.

Moreover, when Officer Gray began following appellant shortly before appellant killed him, appellant knew he unlawfully had on his person a handgun—the same handgun that had been used just days earlier in the Easter shooting. A jury could reasonably infer that appellant feared Officer Gray was likely to search him or the vehicle based on appellant's parole status, and that Gray would find the gun. A jury reasonably could find that appellant decided to kill Officer Gray to avoid being caught with the gun and to escape certain incarceration. Thus, there was evidence of a motive to kill Officer Gray.

Additionally, as previously discussed, appellant's gang commonly committed violent acts to increase its power and reputation (9 RT 1818-1822), which would be enhanced even more by the killing of a police officer (9 RT 1819, 1850; 10 RT 1930-1933). The prospect of enhancing his and his gang's reputation was another fact that a jury reasonably could have concluded provided appellant with a motive to kill Officer Gray.

Third, the way the shooting was carried out supports a finding of premeditation and deliberation. As previously discussed, a jury reasonably could have concluded that appellant ran from Officer Gray so that he had sufficient time to turn, shoot, and kill before the officer was able to react. Appellant did not fire any warning shots in the air or at the ground. He only shot twice but he hit Officer Gray with each shot and did not stop shooting until Officer Gray was clearly incapacitated. Appellant fired the shots with enough time in between each to take careful aim of Officer Gray. (6 RT 1173-1174, 1180, 1196-1197; see *People v. Wells, supra*, 199 Cal.App.3d at p. 541.) Both shots were aimed at Officer Gray's upper body. Although the first shot missed the mark slightly and hit Officer Gray in the arm, the second shot hit him in the chest directly above his ballistics vest. (5 RT 1004-1005, 1064-1066; 46 CT 13085.) A jury reasonably could have found that appellant clearly decided to kill before turning and shooting because he shot Officer Gray not once but twice, hitting Officer Gray in the critical area of the chest above the ballistics vest, in such rapid fashion that Officer Gray did not have the ability to return fire before becoming incapacitated — "a manner of killing from which the jury could reasonably infer that the wounds were deliberately calculated to result in death." (*People v. Anderson, supra*, 70 Cal.2d at pp. 33-34.)

There was evidence of each of the three factors articulated in *Anderson*, and certainly more evidence of premeditation and deliberation than existed in *Hernandez*. A rational jury reasonably could have inferred from the evidence that appellant's planning and motive culminated in his cold, calculated decision to turn and kill Officer Gray. Therefore, there was sufficient evidence that the murder was committed with deliberation and premeditation. Consequently, the claim fails.

II. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE CALJIC NO. 8.71 INSTRUCTION

Appellant contends that the trial court prejudicially erred when it gave a flawed version of the CALJIC No. 8.71 instruction. He specifically claims that the instruction lowered the prosecution's burden of proof by making first degree murder the de facto default finding and deprived him of the assurance that the jurors unanimously found the prosecution proved every fact necessary to constitute the crime of first degree murder beyond a reasonable doubt. He argues that the instruction violated his state and federal constitutional rights to due process and a fair trial as well as rendered the verdict unreliable under the Eighth Amendment standard applicable in capital cases. (AOB 56-66.) Appellant's argument should be rejected.

A. Relevant Instructions Given

The jury was fully and repeatedly instructed on the proper burden of proof and the requirement of proof beyond a reasonable doubt. (E.g., 48 CT 13790, 13804, 13811; CALJIC Nos. 2.01, 2.61, 2.90.) The jury also was instructed on the elements of murder and the differences between first degree and second degree murder. (48 CT 13814-13817; CALJIC Nos. 8.10, 8.11, 8.20, 8.30.) It was instructed with CALJIC No. 8.70, which stated that, if the jury found appellant guilty of murder, it must state in its verdict whether it found the murder to be of the first degree or second degree. (48 CT 13819.) The jury was also instructed under the 1996 edition[9] of CALJIC No. 8.71, which provided:

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[9] After *People v. Moore* (2011) 51 Cal.4th 386 was decided, CALJIC No. 8.71 was amended to instruct each individual juror to give the benefit of the doubt regarding degree where the juror had a reasonable doubt about degree, thereby removing the problematic language in the 1996 version that might affect a juror's evaluation. (See *Moore*, at p. 411.) The (continued...)

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(48 CT 13820.) Relatedly, the jury was further instructed with CALJIC No. 8.74:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree.

(48 CT 13821.)

The trial court also instructed the jury on the duty of individual jurors to decide the case for themselves. Using CALJIC No. 17.40, the court instructed:

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

(...continued)
current version states: "If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree."

> Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(48 CT 13842.)

The court further instructed the jury with CALJIC No. 17.50, which provided, in relevant part:

> In order to reach a verdicts [sic], all twelve jurors must agree to the decision and to any finding you have been instructed to include in your verdict. As soon as you have agreed upon a verdict, so that when polled each may state truthfully that the verdicts expresses [sic] his or her vote, have them dated and signed by your foreperson, and then return with them to this courtroom.

(48 CT 13845.)

The jury was instructed, pursuant to CALJIC No. 1.01, not to single out any particular sentence or any individual point or instruction to the exclusion of others. (48 CT 13782.) Rather, the jury was to consider the instructions as a whole and each in light of all the others. (48 CT 13782.) The jury was also instructed that some instructions might not apply and to disregard any instruction which does not apply to the facts determined by the jury. (48 CT 13841; CALJIC No. 17.31.)

B. Standard of Review

This court reviews a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) When considering a challenge to a jury instruction, the court does not view the instruction in artificial isolation but rather in the context of the overall charge. (*Cupp v. Naughten* (1973) 414 U.S. 141, 146-147 [94 S.Ct. 396]; *People v. Espinoza* (1992) 3 Cal.4th 806, 823-824.) "'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.'" (*People v. Burgener* (1986) 41 Cal.3d 505, 539, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 229.) In assessing

whether an ambiguous instruction violates a defendant's federal constitutional rights, a reviewing court must inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction in a way that violates the Constitution in light of all the instructions given, the entire trial record, and the arguments of counsel. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475]; *Boyde v. California* (1990) 494 U.S. 370, 381-386 [110 S.Ct. 1190]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-527.) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

C. Relevant Case Law

Three published decisions have analyzed the particular instructional language at issue in this case. The Third District Court of Appeal rejected similar challenges to CALJIC No. 8.71 in *People v. Pescador* (2004) 119 Cal.App.4th 252, 255-258 (*Pescador*), and again in *People v. Gunder* (2007) 151 Cal.App.4th 412, 424-425 (*Gunder*). This Court subsequently rejected a challenge to the CALJIC No. 8.71 instruction in *People v. Moore* (2011) 51 Cal.4th 386, 409-412.[10]

In *Pescador,* the Court of Appeal held that the trial court properly instructed the jury with CALJIC No. 8.71. (*Pescador, supra*, 119 Cal.App.4th at p. 257.) The court examined the instruction in the context of the overall instructions, particularly CALJIC Nos. 17.11 and 17.40. (*Ibid.*) CALJIC No. 17.11 provided that the jury was required to find the defendant guilty of second degree murder if it found him guilty of murder but had a reasonable doubt as to whether it was of the first or second

[10] These decisions also involved challenges to the CALJIC No. 8.72 instruction. The CALJIC No. 8.72 instruction was not given in this case and appellant does not raise any challenge relating to that instruction.

degree, while CALJIC No. 17.40 instructed that the parties were entitled to the individual opinion of each juror and that each juror must decide the case for himself or herself. (*Ibid.*) In light of the instructions as a whole, the court held that jurors did not misinterpret CALJIC No. 8.71 to require them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree. (*Ibid.*)

The Court of Appeal reached a similar conclusion in *Gunder.* (*Gunder, supra*, 151 Cal.App.4th at p. 425.) Although the trial court had not given the CALJIC No. 17.11 pattern instruction, it had given both CALJIC Nos. 8.75 and 17.40 instructions concerning the returning of verdicts. (*Ibid.*) The court noted that if CALJIC No. 8.71 had reasonably instructed the jury that it needed to make a unanimous finding, the absence of the CALJIC No. 17.11 instruction was not dispositive, since it was "mere icing on the cake" to the other instruction on the duty to deliberate individually. (*Ibid.*) The court described the critical inquiry as follows:

> What *is* crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in *decisionmaking*. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for *returning verdicts*, as indeed elsewhere the jurors are told they cannot *return* any verdict absent unanimity and cannot *return* the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder.

(*Ibid.*, italics in original.) The court thus held that nothing in the CALJIC No. 8.71 instruction was likely to prevent a minority of jurors from voting against first degree murder in favor of second degree murder. (*Ibid.*)

In *Moore*, this Court acknowledged the holdings in both *Pescador* and *Gunder*. (*People v. Moore, supra*, 51 Cal.4th at pp. 410-411.) The court observed that the CALJIC No. 8.71 instruction carried "at least some potential for confusing jurors about the role of their individual judgments in

deciding between first and second degree murder," but noted that the jury's role was fully explained in the CALJIC No. 8.75 instruction. (*Id.* at pp. 411-412.) Although the *Moore* court concluded the "better practice" was to avoid the use of the 1996 version of CALJIC No. 8.71, it did not hold the instruction was given in error and it expressly declined to decide whether *Gunder* was correct that giving CALJIC No. 17.40 in conjunction with CALJIC No. 8.71 removed the danger of jurors being confused by the unanimity language in CALJIC No. 8.71. (*Ibid.*) Instead, *Moore* held that any error in the instructions was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]) because the jury was precluded from finding guilt on any of the lesser offenses in light of its true findings on the robbery-murder and burglary-murder special circumstances, necessarily establishing that the jury had found first degree murder on those same felony-murder theories. (*Moore,* at p. 412.)

D. The CALJIC No. 8.71 Instruction Did Not Violate Appellant's Constitutional Rights

Appellant claims that the CALJIC No. 8.71 instruction in this case constituted a "dangerously misleading" and incorrect statement of the law because it suggested that a juror was to give the benefit of the doubt as to the degree of murder only if all jurors unanimously had a reasonable doubt as to the degree. He argues that the instruction made first degree murder the de facto default finding and deprived him of the benefit of the judgment of individual jurors, thus diminishing the prosecutor's burden of proof, as it related to the jury's fixing of the degree of murder. (AOB 59-61.) It appears that the issue in this case mirrors the one that was addressed in *Gunder* and left undecided in *Moore*. Respondent submits that *Gunder* was correctly decided. Even though there may have been "at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder" (*People v. Moore, supra,*

51 Cal.4th at p. 411), in light of the instructions as a whole, there was no reasonable likelihood that the jury here misunderstood and misapplied the CALJIC No. 8.71 instruction in an unconstitutional manner.[11]

The CALJIC No. 8.71 instruction would not have caused the individual jurors to abandon any of their individual judgments regarding reasonable doubt as to first degree murder and to acquiesce to a verdict of first degree murder if some other jurors did not have the same reasonable doubt. The jurors were specifically instructed that the parties were entitled to their individual opinions and that each juror must decide the case for himself or herself. (CALJIC No. 17.40.) The jurors were also instructed to not decide any question in a particular way based on the decisions of other jurors. (CALJIC No. 17.40.) Thus, the jurors were expressly instructed on the concept of individual *decisionmaking*, which, as *Gunder* explained, is the crucial aspect in determining whether appellant's posited interpretation was reasonably likely. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 425.)

The jurors were appropriately instructed on the requirement of unanimity for returning verdicts as well. The instructions in CALJIC Nos. 8.74 and 17.50 reminded the jurors that all of their findings, including the determination as to the degree of murder, had to be unanimous before the jury could return a verdict. These instructions reinforced the necessity that each juror come to his or her own individual judgments for each finding. Appellant's interpretation of CALJIC No. 8.71 requires a finding that the jurors ignored the instructions of CALJIC Nos. 8.74, 17.40, and 17.50. But

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[11] Appellant relies solely on *Moore*'s statement that it is better practice not to use the given CALJIC No. 8.71 instruction to argue his claim of instructional error. (AOB 60.) Appellant does not address *Gunder*, *Moore*'s treatment of *Gunder*, or the effect of other instructions on his claim of error.

jurors "are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez, supra,* 26 Cal.4th at p. 852.) A reasonable juror would have viewed the CALJIC No. 8.71 statement about unanimity in its proper context of the procedure for returning verdicts in light of the other instructions. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 425.)

The lack of a CALJIC No. 17.11 instruction, like the one given in *Pescador*, does not change the result in this case.[12] That instruction is "mere icing on the cake" and does not address the unanimity language in CALJIC No. 8.71 any more directly than the CALJIC No. 17.40 instruction. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 425.)

Likewise, the lack of a CALJIC No. 8.75 instruction in this case, which was given in *Moore*, does not change the result.[13] The trial court here instructed the jury with CALJIC No. 8.74, which provided that the jurors must agree unanimously on the degree of murder, should they find appellant guilty of murder, before returning a verdict. CALJIC Nos. 8.74 and 8.75 have the same effect of informing the jury that it must agree unanimously on the degree of murder before returning a verdict.

In any event, the instructions in this case, read as a whole, adequately explained the concepts described in the omitted instructions. The court instructed appellant's jury to consider the instructions as a whole and that

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[12] The CALJIC No. 17.11 instruction given in *Pescador* stated, "If you find the defendant guilty of the crime of murder, but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." (*People v. Pescador, supra*, 119 Cal.App.4th at p. 257.)

[13] The CALJIC 8.75 instruction given in *Moore* fully explained that the jury must unanimously agree to not guilty verdicts on first degree murder before the jury as a whole may return a verdict on second degree murder. (*People v. Moore, supra*, 51 Cal.4th at pp. 411-412.)

each should be considered in light of all the others (CALJIC No. 1.01), and appellant's counsel repeated that direction (11 RT 2325). The jury was instructed with the crucial instructions regarding the burden of proof concerning all crimes. (48 CT 13790, 13804, 13811; CALJIC Nos. 2.01, 2.61, 2.90.) The jury was also properly instructed as to the role of each juror's individual judgments and the requirement of unanimity for the return of verdicts. (48 CT 13842, 13845; CALJIC Nos. 17.40, 17.50.) Additionally, the jury was thoroughly instructed on the crime of murder and the differences between first degree murder and second degree murder. (48 CT 13814, 13816-13817; CALJIC Nos. 8.10, 8.20, 8.30.)

The record demonstrates that the jury did not struggle with the CALJIC No. 8.71 instruction or with its determination that the murder was of the first degree. The jury's only question, which came just a few hours into deliberations (47 CT 13562-13563, 13571), asked about one of the special circumstances (47 CT 13604), which permits an inference that the jury was not confused by the distinctions between first and second degree murder. The jurors were unanimous as to their verdict, as was required by the court's instructions. Indeed, each juror verified that the guilty verdict as to first degree murder reflected his or her vote. (11 RT 2400-2401; see 48 CT 13845.)

Based on all the instructions given as a whole, there was no reasonable likelihood that the jury misunderstood and misapplied the CALJIC No. 8.71 instruction so as to deprive appellant of the benefit of individual judgments and find that the murder was of the first degree even if some jurors had a reasonable doubt as to the degree. Therefore, appellant's federal constitutional rights, including his rights to a reliable guilt and penalty determination, were not violated. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1382; *People v. Espinoza, supra,* 3 Cal.4th at pp. 823-824.)

In any event, any error in giving the CALJIC No. 8.71 instruction was harmless. Because there is no reasonable likelihood that the jury misunderstood or misapplied the trial court's instructions, and no federal constitutional error has occurred, any error is evaluated for prejudice under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Prettyman* (1996) 14 Cal.4th 248, 273-274.) Under that test, a reviewing court asks whether it is "reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error." (*Id.* at p. 274.) But even if the more onerous federal harmless beyond a reasonable doubt standard is applied (see *People v. Moore, supra*, 51 Cal.4th at p. 412; *Chapman v. California, supra*, 386 U.S. at p. 24), any error in giving the CALJIC No. 8.71 instruction was harmless beyond a reasonable doubt for the reasons explained above.[14] Additionally, any error was harmless because the evidence and proof of guilt with respect to deliberation and premeditation was overwhelming, as shown in Argument I.[15]

III. THE TRIAL COURT DID NOT COMMIT ERROR BY GIVING AN ACQUITTAL-FIRST INSTRUCTION ON COUNT I

Appellant contends that the CALJIC No. 8.71 instruction was an acquittal-first instruction and that giving it violated his constitutional rights to due process, trial by jury, and the full, fair, and reliable jury consideration of lesser included offenses in capital cases. (AOB 67-75.)

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[14] Appellant argues that the prejudice caused by the instructional error was compounded by the giving of an acquittal-first instruction on count I. (AOB 66.) For the reasons explained in Argument III, *post*, the giving of any such instruction was not error and could not have contributed to any prejudice.

[15] *People v. Aranda* (2012) 55 Cal.4th 342 is distinguishable because the jury in this case was adequately instructed on the concept of proof beyond a reasonable doubt, and the standard reasonable doubt instruction was not erroneously omitted.

The giving of an acquittal-first instruction is permissible and no error occurred.

"Under the acquittal-first rule, a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110.) This rule serves and protects the interests of both defendants and prosecutors. (*People v. Anderson* (2009) 47 Cal.4th 92, 114; *People v. Fields* (1996) 13 Cal.4th 289, 309.) An acquittal-first instruction, however, may not prohibit a jury from *considering* or *discussing* the lesser offense before returning a verdict on the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329.)

Constitutional challenges to acquittal-first instructions that direct the jury on how to return its verdicts on homicide but do not direct it on how it is to deliberate have been routinely rejected by this Court. (*People v. Bacon, supra*, 50 Cal.4th at pp. 1109-1110 [CALJIC No. 8.75 and similar special instruction]; *People v. Jurado* (2006) 38 Cal.4th 72, 125 [CALJIC No. 8.75]; *People v. Nakahara* (2003) 30 Cal.4th 705, 715 [CALJIC Nos. 8.75 and 17.10]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201; *People v. Dennis* (1998) 17 Cal.4th 468, 536-537 [CALJIC No. 17.10]; *People v. Mickey* (1991) 54 Cal.3d 612, 673 [CALJIC Nos. 8.75 and 17.10].) In fact, this Court has specifically encouraged trial courts to continue the practice of giving acquittal-first instructions. (*People v. Fields, supra*, 13 Cal.4th at p. 309.)

The standard CALJIC No. 8.75 instruction most directly addresses the acquittal-first rule and the order-of-deliberations issue relating to the determination of the degree of murder. (See *People v. Bacon, supra*, 50 Cal.4th at pp. 1109-1110; *People v. Kurtzman, supra*, 46 Cal.3d at p. 330.) The CALJIC Nos. 17.10 and 17.11 instructions evoke the issue somewhat

but not as clearly as CALJIC No. 8.75. (*Kurtzman,* at p. 330.) None of these instructions were given in appellant's case. The CALJIC No. 8.71 instruction that the jury was instructed with is most comparable to the CALJIC No. 17.11 instruction.

While the jury may have been required to find appellant not guilty of first degree murder before it could have returned a verdict of second degree murder under the CALJIC No. 8.71 instruction given here (48 CT 13820), the instruction did not impermissibly direct the jury on how to deliberate. It merely instructed the jury to return a verdict of second degree murder if it believed appellant committed murder but had a reasonable doubt whether the murder was of the first or of the second degree. It did not direct the jury to consider second degree murder *only* if it first found appellant not guilty of first degree murder. It did not concern the order of deliberations at all. And it certainly did not *preclude* the jury from *considering* the offense of second degree murder before returning a verdict on first degree murder. Based on the standard of review and in light of the other instructions discussed in Argument II, there was no reasonable likelihood that the jury construed the CALJIC No. 8.71 instruction in an unconstitutional manner. (See *People v. Bacon, supra*, 50 Cal.4th at p. 1110; *People v. Dennis, supra*, 17 Cal.4th at pp. 536-537.)

Appellant argues that this Court's prior holdings on the acquittal-first rule should be reconsidered. (AOB 68-73.) In support of his argument, appellant cites several cases from other jurisdictions, all having evaluated the acquittal-first principle no more recently than 1998. Some of those cases were expressly considered by this Court in reaffirming California's acquittal-first instruction practice. (See *People v. Bacon, supra*, 50 Cal.4th at pp. 1109-1110; *People v. Fields, supra*, 13 Cal.4th at p. 309; *People v. Kurtzman, supra*, 46 Cal.3d at p. 334 & fn. 12.) Appellant fails to

demonstrate error, and offers no reason for this Court to revisit the issue and reconsider its previous decisions.

Assuming arguendo that the trial court erred in the manner in which it phrased any instruction that could be construed as an acquittal-first instruction, any such error would be harmless. Assuming error regarding any alleged acquittal-first instruction, there is no reasonable doubt that it contributed to the jury's verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Also, appellant cannot show that he would have obtained a more favorable result but for such an alleged erroneous acquittal-first instruction. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

IV. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY SUA SPONTE ON PROVOCATION

Appellant contends that the trial court prejudicially erred when it failed to instruct the jury sua sponte that provocation may reduce premeditated first degree murder to second degree murder. He claims that the failure to so instruct resulted in a violation of his constitutional rights to due process, a jury trial, and a reliable death verdict. (AOB 76-88.) The trial court was not required to instruct the jury sua sponte on provocation.

Here, the jury was instructed on the offenses of first degree murder and second degree murder. (48 CT 13814-13817, 13819-13821.) The CALJIC No. 8.20 instruction on first degree murder instructed the jury, in relevant part:

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and *not under a sudden heat of passion or other condition precluding the idea of deliberation*, it is murder of the first degree.

(48 CT 13816, italics added.) The jury was not instructed on the offense of manslaughter. The jury did not receive any instruction expressly discussing

the concept of provocation and its potential to reduce first degree murder to second degree murder. Appellant never requested any instruction relating to manslaughter or any instruction related to provocation, such as CALJIC No. 8.73 or CALCRIM No. 522.

Appellant claims that the trial court should have instructed the jury that provocation may suffice to negate premeditation and deliberation and reduce the crime of first degree murder to second degree murder, similar to CALJIC No. 8.73 or CALCRIM No. 522. The existence of provocation may raise a reasonable doubt as to whether the defendant's killing was deliberate and premeditated. (*People v. Valentine* (1946) 28 Cal.2d 121, 132.) Such an instruction is a pinpoint instruction because it relates evidence of provocation to the specific legal issue of premeditation and deliberation. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-880 [CALJIC No. 8.73]; see *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1334 [CALCRIM No. 522]; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) The trial court need not give such a pinpoint instruction sua sponte. (*People v. Rogers,* at pp. 878-880.)

The burden was on appellant to request the jury be instructed that it could consider whether provocation could negate premeditation and deliberation to reduce the crime to second degree murder. (*People v. Jennings* (2010) 50 Cal.4th 616, 675.) Therefore, appellant's failure to request the instruction forfeits his claim that the trial court erred in failing to give it. (*Ibid.*)

Even if the failure to give a provocation instruction could have possibly constituted error, any such error was harmless under any standard. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.) The jury was clearly instructed that acting under a sudden heat of passion or any condition precluding the idea of deliberation would negate first degree murder and reduce the crime to second degree

murder. (48 CT 13816-13817; CALJIC Nos. 8.20, 8.30.) The jury would have understood provocation to be a condition that would negate premeditation and deliberation.

However, there was no evidence or argument that would have supported an instruction that appellant was provoked. Notably, appellant's counsel never argued that appellant was precluded from deliberating because of any provocation. He simply argued that appellant did not deliberate or premeditate the murder, an argument the jury rejected. Additionally, there was no evidence from which a reasonable jury could have concluded that appellant formed the intent to kill as a direct response to provocation and that he acted immediately upon forming that intent when he murdered Officer Gray. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.). It was several minutes between the time Officer Gray began following appellant's vehicle and the time appellant ran from Officer Gray and then shot him, during which appellant had sufficient time to cool down and deliberate. Although appellant had appeared agitated when he first learned Officer Gray was following his vehicle, he did not attempt to assault Officer Gray at that moment, but instead made two phone calls to coordinate assistance and escape. He also did not appear to be in an emotional state after the murder occurred as he attempted to avoid capture. Appellant's demeanor in the moments immediately preceding the murder and then after the murder did not show that he had acted while under "the actual influence of a strong passion." (*People v. Wickersham, supra*, 32 Cal.3d at p. 327.)

Even assuming appellant became provoked when Officer Gray began following his vehicle and he complained to Peterson about being harassed, any such provocation did not preclude the idea of deliberation because appellant obviously deliberated before he killed the officer. He did not act

immediately upon forming the intent to kill. He made two phone calls to coordinate his escape and then waited for the most opportune moment to distance himself enough from Officer Gray to shoot and kill him. The evidence that appellant suggests supports provocation consists of appellant's prior history with Officer Gray. Appellant's history of perceived harassment by Officer Gray was just one of multiple motives leading him to deliberate the murder. There was no indication that any perceived harassment caused appellant to enter a sudden state of such rage that he was incapable of deliberation in the moments preceding the murder.

For all these reasons, appellant's argument must be rejected.

V. ANY ERROR IN THE INSTRUCTION CONCERNING THE SECTION 190.2, SUBDIVISION (A)(5) SPECIAL CIRCUMSTANCE ALLEGATION WAS HARMLESS

Appellant contends that the jury was instructed on a legally inadequate theory in connection with the section 190.2, subdivision (a)(5) special circumstance allegation. Although he does not dispute that the first theory that he committed the murder for the purpose of avoiding or preventing a lawful arrest was a valid theory, he claims that the alternate theory that he committed the murder for the purpose of perfecting or attempting to perfect an escape from lawful custody was invalid because appellant was not in lawful custody at the time of the murder. He claims that the instruction on a legally inadequate theory resulted in a violation of his constitutional rights to due process, a jury trial, and a reliable death verdict. (AOB 89-100.)

Respondent submits that the alternate theory of murder for the purpose of perfecting or attempting to perfect an escape from lawful custody was a factually inadequate theory. Therefore, any instructional error was merely state law error and was harmless under the state standard. Even if the alternate theory constituted a legally inadequate theory, any

instructional error was harmless beyond a reasonable doubt. The record demonstrates that the true finding on the special circumstance was based on the valid theory that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

A. Relevant Background

Section 190.2, subdivision (a)(5), allows for a penalty of death for a defendant who is found guilty of first degree murder if the special circumstance that "[t]he murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody" is found true. As one of three special circumstances to count I, the prosecution alleged that the murder of Officer Gray was committed "for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody, within the meaning of Penal Code section 190.2(A)(5)."

The jury was instructed on the three alleged special circumstances with CALJIC No. 8.80.1. (48 CT 13822.) That instruction described the section 190.2, subdivision (a)(5) special circumstance as follows:

> (3) That the defendant committed the murder for the purpose of avoiding or preventing a lawful arrest.

(48 CT 13822.) The jury was specifically instructed on that special circumstance with CALJIC No. 8.81.5:

> To find that the special circumstance referred to in these instructions as murder to prevent arrest or to perfect an escape is true, the following facts must be proved:
>
> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest; or
>
> 2. The murder was committed to perfect, or attempt to perfect, an escape from lawful custody.

(48 CT 13823.)

In closing argument, the prosecutor briefly argued that the jury should find the special circumstance true because appellant committed the murder to prevent Officer Gray from arresting him:

> The third special circumstance, the defendant killed Officer Gray who was about to make a lawful arrest. There can be little dispute that fleeing from an officer when you're a felon and a parolee is going to result in your arrest. Even more, fleeing from an officer when you're a felon and a parolee and in possession of a loaded .45 is going to result in your arrest.

(11 RT 2281.)

The jury ultimately found the special circumstance to be true. The verdict form read:

> *We, the jury further find* that the defendant committed this murder for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody, within the meaning of Penal Code section 190.2(a)(5), Special Circumstance 3 to Count 1 of the Information.

(47 CT 13592.)

B. The Theory of Murder for the Purpose of Perfecting or Attempting to Perfect an Escape from Lawful Custody Was a Factually Inadequate Theory

There is no question that the prosecutor's theory that the murder was committed for the purpose of avoiding or preventing a lawful arrest under section 190.2, subdivision (a)(5) was a valid theory. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1083; *People v. Cummings* (1993) 4 Cal.4th 1233, 1299-1301.) Appellant contends, however, that the second theory that the murder was committed to perfect, or attempt to perfect, an escape from lawful custody was a legally inadequate theory and that the jury should not have been instructed on it. Respondent submits that the second theory was a factually inadequate theory, not a legally inadequate theory.

People v. Guiton (1993) 4 Cal.4th 1116 addressed the distinction between a legally inadequate theory and a factually inadequate theory. A legally inadequate theory of guilt is one that is contrary to law or that "fails to come within the statutory definition of the crime." (*Id.* at p. 1128, citing *Griffin v. United States* (1991) 502 U.S. 46, 59 [112 U.S. 466].) A factually inadequate theory, on the other hand, is one that suffers from an insufficiency of proof that is purely factual. (*Ibid.*) A theory that is legally correct but has no application to the facts of the case is a factually inadequate theory. (*People v. Perez* (2005) 35 Cal.4th 1219, 1233; see *People v. Guiton, supra*, 4 Cal.4th at p. 1129.)

The theory that the murder was committed to perfect, or attempt to perfect, an escape from lawful custody was factually inadequate because there was insufficient proof that appellant was in the lawful custody of Officer Gray. The ultimate inquiry in determining whether an individual is in custody is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (*Stansbury v. California* (1994) 511 U.S. 318, 322 [114 S.Ct. 1526], internal quotations omitted; see *People v. Arnold* (1967) 66 Cal.2d 438, 444-445 & fn. 6, 448, overruled on another point by *Walker v. Superior Court* (1988) 47 Cal.3d 112, 123; *People v. Nicholson* (2004) 123 Cal.App.4th 823, 832; *People v. Parker* (1978) 85 Cal.App.3d 439, 443; see also §§ 834, 835.)[16] It is undisputed that although Officer Gray detained appellant for the purpose of a parole search (5 RT 955-956; 6 RT 1148-1149, 1246-1248, 1252-1253),

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[16] Being in the physical custody of a jail or prison and being charged with an offense may be indications that someone is in custody but they are not required for a finding of "lawful custody" under section 190.2, subdivision (a)(5), as appellant suggests (AOB 91). (See *People v. Cruz* (2008) 44 Cal.4th 636, 676-677 ["lawful custody" under section 190.2, subdivision (a)(5), does not require the defendant be "booked" for an offense]; *People v. Nicholson, supra*, 123 Cal.App.4th at pp. 832-833.)

he did not arrest appellant, nor did he have probable cause to arrest appellant before appellant ran from him. The defect in the instruction was not that it was contrary to law or failed to come within the statutory definition of the special circumstance; it was that there was insufficient evidence that appellant was in the lawful custody of Officer Gray immediately preceding the shooting. The theory that appellant committed the murder for the purpose of perfecting an escape from lawful custody was legally correct but had no application to the facts of this case because appellant was not in custody.

C. Any Instructional Error Was Harmless

When the jury is instructed on a valid theory and a factually inadequate theory, the error is only an error of state law, not one of federal constitutional dimension. (*People v. Guiton, supra*, 4 Cal.4th at pp. 1129-1130.) Therefore, the error is subject to the traditional state harmless error test and only requires reversal if a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the factually inadequate theory. (*Id.* at p. 1130.) If the jury based its verdict on the valid theory, or on both the valid theory and the invalid theory, then there was a valid basis for the verdict and there was no prejudice. (*Ibid.*) The reviewing court must assess the entire record, including the facts, instructions, arguments of counsel, any communications from the jury, and the entire verdict to determine whether there was prejudice. (*Ibid.*) For the reasons explained below, any error was harmless under the state law standard.

Even if this Court determines the jury was instructed on a legally inadequate theory, any error was harmless under the federal standard as well. When a trial court instructs a jury on two theories of guilt, one of which was legally correct and the other legally inadequate, the error may be found harmless if the reviewing court concludes beyond a reasonable doubt

that the jury based its verdict on a legally valid theory. (*People v. Chun* (2009) 45 Cal.4th 1172, 1201-1203; see *People v. Cross* (2008) 45 Cal.4th 58, 69-71 (conc. opn. of Baxter, J.); *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-61 [129 S.Ct. 530]; *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827].) One way of finding instructional error harmless is to rely on other portions of the verdict. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167; *People v. Guiton, supra*, 4 Cal.4th at p. 1130.[17]) Another appropriate test for harmlessness is whether "the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." (*People v. Chun, supra*, 45 Cal.4th at p. 1204-1205, quoting *California v. Roy* (1996) 519 U.S. 2, 7 [117 S.Ct. 337] (conc. opn. of Scalia, J.).) In other words, if other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary to support the valid avoiding or preventing a lawful arrest theory, then the erroneous escape from lawful custody instruction was harmless. (*People v. Chun, supra*, 45 Cal.4th at p. 1205.) Instructional error in this context may also be found harmless if, based on overwhelming evidence, the jury would have based its verdict on a valid theory had it been correctly instructed. (*People v. Cross, supra*, 45 Cal.4th at p. 72 (conc. opn. of Baxter, J.).)

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[17] *Guiton* surmised that there may be additional ways by which a court can determine that error caused by reliance on a legally inadequate theory is harmless and reserved that question for future cases. (*People v. Guiton, supra*, 4 Cal.4th at p. 1131.) Justice Baxter emphasized in his concurring opinion in *Cross* that the standard articulated in *Guiton* was not the only test for harmlessness and that the harmless error analysis depends on proof beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, not simply on proof that the jury actually rested its verdict on a proper ground. (*People v. Cross, supra*, 45 Cal.4th at pp. 69-71.)

Any error from including the "escape from lawful custody" language in the CALJIC No. 8.81.5 instruction was harmless beyond a reasonable doubt. Reliance on the verdicts alone may not show that the jury necessarily reached a true finding on the section 190.2, subdivision (a)(5) special circumstance based on the valid theory, but using the other appropriate tests for harmlessness, this Court should conclude beyond a reasonable doubt that any error was harmless.

Based on the evidence in this case, there is no reasonable doubt that the jury made the findings necessary to support the valid avoiding or preventing a lawful arrest theory rather than on an escape from custody theory. The jury found that appellant intentionally killed Officer Gray while Gray was engaged in the performance of his duties, or in retaliation for the performance of his duties. (47 CT 13591; 48 CT 13824-13825, 13830-13831.) The jury also found appellant guilty of being a felon in possession of a firearm when he ran from Officer Gray. (47 CT 13594; 48 CT 13832.) Thus, appellant certainly would have been arrested for possessing the firearm and for fleeing from Officer Gray after he had been lawfully detained.

It is impossible, based on the evidence, that the jury found the section 190.2, subdivision (a)(5) special circumstance to be true without finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Both theories were based on appellant's act of killing Officer Gray while running from him, but there was no evidence that he had been arrested or that he was in custody at the time he ran. Under the facts presented, however, the jury would have found that appellant's arrest was imminent, because he was a felon in possession of a firearm who was about to be searched and because he fled from Officer Gray prior to the search, and that appellant knew his arrest was imminent. So the act of murdering Officer Gray necessarily would have been for the purpose of avoiding or

preventing a lawful arrest, not for perfecting an escape from lawful custody. For the jurors to conclude that appellant killed Officer Gray to perfect an escape from lawful custody but not to avoid or prevent a lawful arrest, they would have had to believe (1) that appellant could not have known that, as a felon on parole, his possession of a firearm would result in his imminent arrest, and (2) that appellant's act of pushing and running from Officer Gray also would not result in his lawful arrest. This scenario is so inconceivable that the jury must have found that appellant killed Officer Gray to avoid or prevent a lawful arrest when it found the special circumstance true. Moreover, the only ground the prosecution argued to support the special circumstance was the valid ground that appellant killed Officer Gray to avoid or prevent a lawful arrest. (11 RT 2281.) Thus, there is no reasonable doubt that the jury made the necessary findings to support the section 190.2, subdivision (a)(5) special circumstance on a valid ground.

The jury would have based its true finding on the special circumstance on the valid theory had it been correctly instructed. The evidence supporting the special circumstance was overwhelming. When appellant was contacted by Officer Gray, he was a felon and parolee in illegal possession of a firearm. Moreover, the firearm he possessed was the same firearm that had been used in a shooting just days earlier, a fact which law enforcement would surely discover if the firearm was seized during the impending parole search. Objectively, the facts were clearly sufficient for an arrest. Appellant obviously knew that he would be arrested for (1) possessing the firearm as soon as Officer Gray searched him, (2) pushing Officer Gray, and (3) running from Officer Gray. Officer Gray even warned appellant as they were running that he was "going to get caught anyway." (6 RT 1255.) The evidence was so overwhelming that the prosecutor devoted only three sentences to the special circumstance in his

closing argument. (11 RT 2281.) And in that closing argument, the only ground that he argued to support the special circumstance was the valid ground that appellant killed Officer Gray to avoid or prevent a lawful arrest. (11 RT 2281.) Therefore, the jury would have found the special circumstance true based on the valid theory if it had been correctly instructed.

For these reasons, any instructional error was harmless.

VI. THE TRUE FINDING ON ENHANCEMENT 1 TO COUNT I, CONCERNING THE ALLEGATION THAT THE VICTIM WAS A PEACE OFFICER WHO WAS KILLED WHILE ENGAGED IN THE PERFORMANCE OF HIS DUTIES, WAS SET ASIDE BY THE TRIAL COURT

Appellant also contends that the true finding on Enhancement 1 to Count I must be stricken because the special finding that the victim was a peace officer who was killed while engaged in the performance of his duties under section 190, subdivision (c), only applies to a conviction of second degree murder. (AOB 101-103.) Respondent agrees that the jury's special finding did not apply to first degree murder. This Court need not take action, however, because the finding has already been set aside by the trial court.

Penal Code section 190, subdivision (c), provides:

> Every person guilty of *murder in the second degree* shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, and any of the following facts has been charged and found true:
>
> (1) The defendant specifically intended to kill the peace officer.

(2) The defendant specifically intended to inflict great bodily injury, as defined in Section 12022.7, on a peace officer.

(3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of Section 12022.

(4) The defendant personally used a firearm in the commission of the offense, in violation of Section 12022.5.

(Italics added.)

In the first amended information, Enhancement 1 to Count I, which alleged first degree murder, alleged a violation of section 190, subdivision (c). (3 CT 552.) The jury was instructed with CALJIC No. 8.36, which directed it to determine the truth of the allegation if it found appellant guilty of second degree murder. (48 CT 13818.) The separate verdict forms for first degree murder and the lesser included offense of second degree murder both included Enhancement 1 as a finding to be made by the jury. (47 CT 13592 [first degree murder], 13606 [second degree murder].) The jury found Enhancement 1 to be true when it found appellant guilty of first degree murder. (47 CT 13591-13592.)

The section 190, subdivision (c) special finding does not apply to first degree murder. The trial court recognized this and, on defense counsel's motion, set aside the jury's true finding on that enhancement. (49 CT 13991; 14 RT 3031-3032.) The trial court correctly noted that the enhancement had been properly pled and would apply if appellant stood convicted of second degree murder rather than first degree (14 RT 3031-3032), so striking the finding would not be appropriate.

Because the trial court properly set aside the true finding on the section 190, subdivision (c) enhancement, this Court need not take any further action on the issue.

VII. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRUE FINDINGS ON THE GANG ENHANCEMENTS AS TO COUNTS I AND II

Appellant contends that there was insufficient evidence to support the true findings on the section 186.22, subdivision (b)(1) gang enhancements as to his first degree murder conviction in count I and his felon in possession of a firearm conviction in count II. (AOB 104-121.) He claims that the evidence was insufficient that (1) the offenses were gang-related (AOB 109-117), and (2) the offenses were committed with the specific intent to promote, further, or assist in any criminal conduct by gang members (AOB 117-121). Respondent asserts that there was ample evidence to support the true findings on the gang enhancements as to counts I and II.

The standard of review articulated in Argument I applies here as well. Courts review the sufficiency of the evidence to support an enhancement using the same standard applied to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

Section 186.22, subdivision (b)(1), enhances the sentence for any person who is convicted of a felony that is (1) committed for the benefit of, at the direction of, or in association with any criminal street gang, (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Albillar* (2010) 51 Cal.4th 47, 59.)

A. There Was Sufficient Evidence That Appellant Committed the Offenses for the Benefit of, at the Direction of, or in Association with a Criminal Street Gang

Appellant first claims that there was insufficient evidence to prove that he committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (AOB 109-117.) To prove this first

prong of the gang enhancement, the People were only required to show the offenses were gang-related in one of the three ways. (See *People v. Albillar, supra*, 51 Cal.4th at pp. 60-64.) There was substantial evidence to support findings that the murder was committed for the benefit of or in association with the gang.

There was ample evidence that appellant murdered Officer Gray for the benefit of the Merced Gangster Crips. Appellant was a dedicated Merced Gangster Crips gang member. He bore gang tattoos (9 RT 1848-1850), participated in and benefited from the gang's lucrative drug trade (46 CT 13307, 13311; 7 RT 1558-1559, 1566; 9 RT 1836), possessed firearms for the gang (9 RT 1851-1852), and committed shootings and other acts of violence and intimidation for the gang. Indeed, just days prior to his killing of Officer Gray, appellant possessed a firearm and committed another shooting, both of which the jury found to be gang-related in counts III through VII. His gang monikers, Bullet and Trigger, indicated that he was known among his gang brethren for using guns aggressively. (9 RT 1830-1832.)

Appellant was also intimately aware of Officer Gray's role as the officer assigned to monitor the activities of the Merced Gangster Crips. As a result of Officer Gray's monitoring, appellant had a long history of contacts with Officer Gray, which he perceived as nothing but harassment. One of the contacts involved not only a parole search of appellant but also inquiries into another Merced Gangster Crip gang member. (5 RT 979-980, 987; 6 RT 1237.) Officer Gray was the largest obstacle standing between appellant, the Merced Gangster Crips, and their goals. Nobody in law enforcement knew more about them than Officer Gray. (7 RT 1567.) A gang member's postmortem statement that "somebody had to smoke his ass" exemplified the animosity of Merced Gangster Crips gang members had towards Officer Gray and his determined efforts to combat their

criminal activity. (9 RT 1892; 10 RT 1934-1936.) Appellant undoubtedly knew that the gang's activities, especially its large-scale drug distribution efforts, would benefit if Officer Gray was eliminated. The evidence showed that after Officer Gray's death, the Merced Gangster Crips in fact profited greatly from the drug trafficking trade. (7 RT 1565-1568.)

Although there was no outward expression of gang involvement at the time of the shooting, such as the display of gang signs or the yelling of gang slogans, such intimidation methods were not necessary because of the identity of the victim. Officer Gray was the police officer specifically assigned to monitor the Merced Gangster Crips. He had the most knowledge of the gang, its members, and its activities out of anyone in law enforcement. (7 RT 1567.) No additional calling card was necessary for the gang to take credit and enhance its reputation for the killing.

Appellant also possessed the firearm used in the Easter shooting at the time he was contacted by Officer Gray. He was, in essence, the caretaker of the weapon used in a gang-related shooting. He would have known that allowing Officer Gray to search him and recover that firearm would have likely led to the apprehension of himself, Martin, and Reyes, a fellow gang member, the reduction of the gang's arsenal, and additional attention paid to the gang's activities. By killing Officer Gray, appellant ensured that the firearm did not fall into law enforcement hands and significantly enhance an investigation into a shooting that was "possibly connected to the Merced Gangster Crips" (5 RT 1016-1017).

A finding that appellant committed the murder to benefit the gang was also supported by gang expert testimony. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 [expert opinion that particular criminal conduct, if the jury found it in fact occurred, would have been for a gang purpose or benefited a gang can be sufficient to support gang enhancement]; *People v. Albillar, supra*, 51 Cal.4th at p. 63 [expert opinion that particular criminal

conduct benefitted a gang by enhancement its reputation for viciousness can be sufficient].) Sergeant Trinidad testified that killing a police officer would enhance a criminal street gang's power and reputation immensely, especially because it eliminated the gang's primary opposition. (9 RT 1850.) He explained that citizens would be afraid to cooperate with law enforcement and report crimes because of a gang's use of force or violence, and the murder of a police officer, particularly the main officer in charge of monitoring the gang, would only increase that fear and intimidation. (9 RT 1818-1819.) Subsequent bragging about the murder by gang members showed that the murder did in fact enhance the reputation of the gang. (9 RT 1892; 10 RT 1934-1936.) Ultimately, based on a hypothetical drawn from the details of the crime, Sergeant Trinidad opined that the murder was committed for the benefit of, in association with, and at the direction of the Merced Gangster Crips because the shooting increased the gang's power, influence, and reputation within the community. (10 RT 1930-1933.)

The murder of Officer Gray was similar to the shooting of several security guards in *People v. Livingston, supra*, 53 Cal.4th at pp. 1171-1172. In *Livingston*, the court held that the shooting of the security guards was gang-related. (*Ibid.*) A reasonable jury could have concluded from the evidence that the defendant shot the security guards to enhance his gang's reputation, to show that the gang rather than the security guards were in charge of a designated area, or to retaliate for their role in an investigation of an earlier gang shooting. (*Ibid.*) Although no other gang members were present with appellant during the shooting, like in *Livingston*, the evidence here was sufficient to permit a reasonable jury to make similar findings.

Additionally, there was ample evidence that appellant committed the murder in association with the Merced Gangster Crips. It is true that no other gang members were present when appellant murdered Officer Gray. However, several gang members aided appellant in facilitating his escape.

Immediately before the murder, he called to enlist the help of Martin, who had committed a gang-related shooting with him, and Ward, a gang member or associate who often gave gang members rides. (6 RT 1225-1226, 1244-1247.) Their common gang association ensured that appellant could rely on their cooperation and loyalty in carrying out his kill-and-escape plan and that their working together would benefit the gang. (See *People v. Albillar, supra*, 51 Cal.4th at p. 62.) Immediately after the murder, appellant received help from Ward and from Flores and Munoz, who had at least some association with the gang or gang members. (7 RT 1370-1371, 1402-1405.) And it was gang members who secured appellant safe transport and accommodations with Davis-Turner and Thompson as he fled to San Diego to avoid capture.

Appellant argues that the evidence showed that he murdered Officer Gray for purely personal reasons. Certainly the evidence shows that one possible and probable reason for the murder was appellant's personal animosity toward the officer. But that need not be the only reason. The evidence establishes that appellant had multiple motives for killing Officer Gray. It was within the province of the jury to reject appellant's claim that he murdered Officer Gray for personal reasons only. And, of course, the jury was not compelled to accept the defense expert's claim that gang culture dictates a gang member should never kill a police officer (10 RT 1967, 1981), especially in light of the prosecution's expert testimony to the contrary (9 RT 1850, 1886, 1893). Based on all of the evidence presented in this case, including the gang expert testimony, and viewing the evidence in the light most favorable to the verdict, a rational jury could have found that appellant murdered Officer Gray, at least in part, for the benefit of or in association with the Merced Gangster Crips.

There was also substantial evidence that appellant possessed the firearm for the benefit of the Merced Gangster Crips to support the

enhancement finding in count II. Appellant's gang monikers of Bullet and Trigger indicated that one of his roles in the gang was to use firearms in his work on behalf of the gang. (9 RT 1829-1832.) As respondent has explained, appellant had recently used the firearm in another gang-related shooting (9 RT 1796-1797), so it was incumbent upon him to keep the gun from falling into the hands of law enforcement. It appears that the Merced Gangster Crips gang was also involved in the acquisition of stolen firearms as part of its gang activities. (9 RT 1851-1852.) Moreover, as Sergeant Trinidad described, "guns are a major component to gang lifestyle" and were used by the gang in the course of dealing drugs and committing robberies. (9 RT 1821-1822, 1852.) Based on the evidence, a rational jury could have found that appellant possessed the firearm for the benefit of the Merced Gangster Crips.

B. There Was Sufficient Evidence That Appellant Committed the Offenses with the Specific Intent to Promote, Further, or Assist in Criminal Conduct by Gang Members

Appellant also claims that there was insufficient evidence to prove that he committed the offenses with the specific intent to promote, further, or assist in criminal conduct by gang members. (AOB 117-121.) The record contains substantial evidence that appellant committed the offenses with the specific intent to promote, further, or assist in criminal conduct by members of the Merced Gangster Crips.

Much of the evidence supporting the first prong of the gang enhancement also supports this second prong. Unlike the cases cited by appellant (AOB 118-120), there was evidence other than mere expert opinion to support a finding that appellant committed the offenses with the specific intent to promote, further, or assist in criminal conduct by gang members. By killing Officer Gray, appellant guaranteed that the firearm in his possession, which had been used in the recent gang-related shooting by

gang members, would not be recovered by law enforcement. The murder not only assisted the gang and its members in its efforts to avoid investigation and prosecution for the prior shooting, but it also enabled appellant, at least for the time being, to get away with his own criminal conduct of illegally possessing a firearm, pushing Officer Gray, and fleeing from him. Based on the use of the firearm in this case, a jury reasonably could have inferred that additional crimes would be committed by appellant or other gang members with that same firearm. And finally, appellant's murder of Officer Gray rid the Merced Gangster Crips of the strongest opposition to its criminal activities and enabled its drug-dealing enterprise, in which appellant was a participant and beneficiary, to profit greatly as a result. The jury here did not have an expert opinion to rely on that specifically addressed whether the offenses were committed with the specific intent to promote, further, or assist in criminal conduct by gang members, but the gang expert's general testimony concerning the gang combined with the rest of the evidence presented was sufficient to prove that appellant committed the offenses with the requisite intent.

Accordingly, the gang enhancements are supported by substantial evidence and appellant's claim fails.

VIII. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE ELEMENTS OF ASSAULT DOES NOT REQUIRE REVERSAL

Appellant contends that the trial court failed to instruct the jury on all the elements of assault for purposes of instructing on the offense of assault with a semiautomatic firearm in counts V and VI. He claims that the failure to define assault violated his federal constitutional rights to due process, a jury trial, and a reliable death verdict, constitutes structural error,

and requires reversal of those convictions.[18] (AOB 122-130.) Respondent agrees that the trial court erred by not instructing the jury on the elements of assault, but submits that the error does not require reversal.

A. The Trial Court Committed Instructional Error by Failing to Instruct on the Elements of Assault

Appellant was charged with assault with a semiautomatic firearm against McIntire and Bianchi in counts V and VI. The jury was instructed on the offense of assault with a semiautomatic firearm with a CALJIC No. 9.02.1 instruction, which provided:

> Defendant is accused in Counts 5 and 6 of having violated section 245, subdivision (b) of the Penal Code, a crime.
>
> Every person who commits an assault upon the person of another with a semiautomatic firearm is guilty of a violation of Penal Code section 245, subdivision (b), a crime.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was assaulted; and
>
> 2. The assault was committed with a semiautomatic firearm.

(48 CT 13828.) The instructions to the jury did not define assault.[19]

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[18] Even if appellant's claim is construed to also include claims under the California Constitution, the state Constitution affords no greater protection than the federal Constitution for error in omitting elements of an offense in jury instructions. (*People v. Mil* (2012) 53 Cal.4th 400, 415.)

[19] It appears that appellant initially proposed instructing the jury on the offense of assault with CALJIC No. 9.00. (48 CT 13854.) It also appears that the prosecution initially proposed an instruction relating to the prior assault with a firearm on Bradley that included the elements of assault, but that instruction was later withdrawn. (48 CT 13901.) The record is silent as to why an instruction with the elements of assault was not given.

The trial court must instruct sua sponte on the general principles of law relevant to and governing the case and specifically on the essential elements of a charged crime. (*People v. Mil* (2012) 53 Cal.4th 400, 409; *People v. Cummings, supra,* 4 Cal.4th at p. 1311.) In cases charging assault with a semiautomatic firearm, the trial court has a duty to instruct on the elements of assault. (See *People v. Simington* (1993) 19 Cal.App.4th 1374, 1380-1381 [assault with a deadly weapon]; *People v. McElhany* (1982) 137 Cal.App.3d 396, 403 [assault on a peace officer and assault with a deadly weapon while armed with a firearm]; see *People v. Hoyos* (2007) 41 Cal.4th 872, 915 [sua sponte duty to define terms that have a technical meaning peculiar to the law].) Because the trial court did not define assault in this case, it committed instructional error.[20]

B. The Instructional Error Was Not Structural Error

An instructional error that omits one or more elements of a charged offense is not necessarily structural error. An instructional error that improperly describes or omits an element of a charged offense generally is not a structural defect and is subject to harmless error review under *Chapman v. California, supra*, 386 U.S. at p. 24. (*Neder v. United States, supra*, 527 U.S. at pp. 8-15; *People v. Flood* (1998) 18 Cal.4th 470, 502-504.) This Court has held that the omission of *two* elements from the jury instructions may also be subject to harmless error review and "differs markedly" from the structural errors that have been found to defy harmlessness review. (*People v. Mil, supra*, 53 Cal.4th at pp. 410-411.) The omission of some—but not all—of the elements of an offense does not necessarily vitiate *all* the jury's findings so as to constitute structural error.

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[20] No objection is required to preserve a claim for appellate review that the jury instructions omitted one or more essential elements of the charge. (*People v. Mil, supra,* 53 Cal.4th at p. 409.)

(*Id.* at p. 411.) "Although it may prove more difficult, as a practical matter, to establish harmlessness in the context of multiple omissions, that is not a justification for a categorical rule forbidding an inquiry into prejudice." (*Id.* at p. 412.)

The applicable standard of review in cases where elements of a charged offense have been omitted from the jury instructions will differ on a case-by-case basis. (*Hedgpeth v. Pulido, supra*, 555 U.S. at p. 61; *People v. Mil, supra*, 53 Cal.4th at pp. 411-415.) As *Mil* explained:

> To be sure, the federal Constitution bars a court from directing a verdict for the prosecution in a criminal trial by jury. (*Rose v. Clark, supra*, 478 U.S. at p. 578.) And our own case law has held that the omission of "substantially all of the elements" of a charged offense is reversible per se. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1315 [18 Cal. Rptr. 2d 796, 850 P.2d 1] (*Cummings*).) But these limitations derive not from an arbitrary counting game, but from the effect of the omission on the function and importance of the jury trial guarantee. Here, as in *Flood*, we do not foreclose the possibility that "there may be some instances in which a trial court's instruction removing *an* issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury—an error that clearly would be a 'structural' rather than a 'trial' error." (*Flood, supra*, 18 Cal.4th at p. 503, italics added.) The critical inquiry, in our view, is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration. Where the effect of the omission can be "quantitatively assessed" in the context of the entire record (and does not otherwise qualify as structural error), the failure to instruct on one or more elements is mere "'trial error'" and thus amenable to harmless error review. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307–308 [113 L. Ed. 2d 302, 111 S. Ct. 1246].)

(*People v. Mil, supra,* 53 Cal.4th at pp. 413-414; see *People v. Magee* (2003) 107 Cal.App.4th 188, 194-195 [rejecting use of mathematical computation to determine when reversal is required].) Thus, *Mil* summarized, the omission of one or more elements of a charged offense is subject to harmless error review as long as the omission "'neither wholly

withdrew from jury consideration substantially all of the elements ... , nor so vitiated all of the jury's findings as to effectively deny defendant[] a jury trial altogether.'" (*Id.* at p. 415, quoting *People v. Wims* (1995) 10 Cal.4th 293, 312.)

Appellant argues that the instructional error in this case omitted "substantially all of the elements of an offense" and constituted structural error like in *People v. Cummings, supra.* (AOB 127-130.) Respondent is constrained to agree that the instructions omitted "substantially all of the elements of the offense." Although the jury was instructed on one element of assault with a semiautomatic firearm—that the assault be committed with a semiautomatic firearm—the jury was not instructed on what constituted an assault, the gravamen of the offense. It does not necessarily follow, however, that the error constitutes structural error like in *Cummings*. Respondent submits that the error was not structural.

In *Cummings*, the prosecution argued that the error was harmless because the defendant did not dispute the existence of the predicate facts and the evidence overwhelmingly established all of the elements of the charged crimes. (*People v. Cummings, supra*, 4 Cal.4th at p. 1312.) The court refused to apply that proposed harmless error analysis because other instructions did not require the jury to find, and the jury did not find, the existence of the facts necessary to establish that the omitted elements had been proved beyond a reasonable doubt. (*Id.* at pp. 1312-1315.) In doing so, the court expressly determined that the record did not support the application of a harmless error analysis under the *Chapman* harmless beyond a reasonable doubt standard applied in *Rose v. Clark* (1986) 478 U.S. 570, 580-582 [106 S.Ct. 3101]. (*Cummings*, at pp. 1313-1315.) Therefore, the error was structural and reversal was required. (*Id.* at p. 1315.)

In *Mil*, this Court clarified that whether the omission of an element of an offense in the jury instructions is a structural error or a trial error depends on whether the effect of the omission can be "quantitatively assessed" in the context of the entire record. (*People v. Mil, supra*, 53 Cal.4th at pp. 413-414.) An error that can be quantitatively assessed in the context of the entire record is a mere trial error and is subject to harmless error review under *Chapman*. (*Mil*, at pp. 409-417.) An error that falls under the *Sedeno*[21] exception to the reversible per se rule can be quantitatively assessed because it can be determined from the record that the jury found the existence of the facts necessary to establish the omitted elements were proved and therefore is not structural error. (*People v. Marshall* (1996) 13 Cal.4th 799, 851-852; see *People v. Kobrin* (1995) 11 Cal.4th 416, 428, fn. 8 [harmless error analysis is still appropriate when *Sedeno* exception is satisfied].)

As explained below, the jury necessarily found the existence of the facts establishing that appellant assaulted McIntire and Bianchi. Therefore, the instructional error may be quantitatively assessed and is merely trial error, not structural error. The error is thus subject to the *Chapman* harmless error standard. But even if this Court determines that the instructional error here is subject to the reversible per se rule rather than the *Chapman* test, reversal is still not required because the *Sedeno* exception is satisfied.[22]

C. The Instructional Error Does Not Require Reversal

Whether the instructional error here is subject to the reversible per se rule and an accompanying *Sedeno* exception or to a harmless error analysis

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[21] *People v. Sedeno* (1974) 10 Cal.3d 703, 721.

[22] The *Sedeno* test is as rigorous, if not more so, than *Chapman*. (*People v. Glover* (1985) 171 Cal.App.3d 496, 506.)

under *Chapman*, reversal is not required for counts V and VI. The record demonstrates that the jury did in fact find every fact necessary to establish the omitted elements of the offense beyond a reasonable doubt.

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (§ 240.) The omitted instruction would have informed the jury that an assault required proof that: (1) a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; (2) the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and (3) at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. (48 CT 13854; CALJIC No. 9.00.)

The jury found the existence of the facts necessary to establish that appellant assaulted McIntire and Bianchi. The jury expressly found that in committing the assaults with a semiautomatic firearm in counts V and VI, appellant personally used a firearm in violation of section 12022.5, subdivision (a)(1), which required a finding that appellant "intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it" as to each victim. (47 CT 13599, 13601; 48 CT 13836 [CALJIC No. 17.19].) In finding the firearm use enhancements true, the jury necessarily found beyond a reasonable doubt that appellant willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force to McIntire and Bianchi and that he had the present ability to apply physical force to both victims. (*People v. McMakin* (1857) 8 Cal. 547, 548 [act of pointing a loaded gun at another person in a threatening manner sufficient to sustain a conviction for assault with a firearm]; *People v. Laya*

(1954) 123 Cal.App.2d 7, 16 ["The mere pointing of a gun at a victim constitutes an assault with a deadly weapon whether or not it is fired at all"]; see *People v. Colantuono* (1994) 7 Cal.4th 206, 219 [an act, under circumstances that denote intent existing at the time, with present ability of using actual violence against the person of another, is an assault].)

Arising out of the same facts, the jury also found appellant guilty of shooting at an occupied vehicle (§ 246) as to both McIntire and Bianchi in counts III and IV. (47 CT 13595, 13597; 48 CT 13829.) In order to reach guilty verdicts on those counts, the jury was required to find that appellant discharged a firearm at an occupied vehicle and that the discharge was willful and malicious. (48 CT 13829 [CALJIC No. 9.03].) As to count III against McIntire, the jury found that appellant intentionally and personally discharged a firearm and caused great bodily injury in the commission of the offense under section 12022.53, subdivision (d). (47 CT 13595.) As to count IV against Bianchi, the jury found that appellant intentionally and personally discharged a firearm in the commission of the offense under section 12022.53, subdivision (c). (47 CT 13597.)

Based on the jury's verdicts in counts III and IV and its true findings on the various firearm enhancements, the jury necessarily found that appellant assaulted McIntire and Bianchi. Therefore, it found every fact necessary to establish the omitted elements of the offenses in counts V and VI beyond a reasonable doubt.

Reversal of count V is not required for another reason as well. An assault is an attempt to commit a battery. (*People v. Rocha* (1971) 3 Cal.3d 893, 899.) The jury necessarily found that a battery was committed against McIntire, who was shot in the ankle, when it found the section 12022.53, subdivision (d) enhancement true. In finding the battery, the jury necessarily resolved that appellant attempted to commit one, encompassing facts necessary to find that appellant had committed an assault. Therefore,

any error was harmless. (*People v. Simington, supra*, 19 Cal.App.4th at p. 1381 [failure to define assault harmless under *Sedeno* because jury found defendant guilty of battery with serious bodily injury].)

Assuming the instructional error here is reviewed under the *Chapman* harmless beyond a reasonable doubt standard, the error was also harmless because the evidence relevant to the proof of assault was overwhelming. That the shooting of McIntire and Bianchi occurred was undisputed; appellant only contested that the government failed to prove that it was he who committed it. (11 RT 2325-2329.) Both victims, however, repeatedly either identified appellant as the shooter, identified his vehicle, or identified someone resembling appellant as the shooter. (9 RT 1645-1646, 1661-1662, 1665-1670, 1680, 1684-1686, 1698-1709, 1711-1712, 1750, 1757-1761.) The gun used in the shooting was the same gun appellant used to murder Officer Gray just four days later. (9 RT 1797.) The jury clearly rejected appellant's argument and found that appellant was the shooter based on the overwhelming evidence against him. (47 CT 13595, 13597, 13599, 13601.) There is no reason to believe that the jury verdict would have been any different had it been instructed on the elements of assault. Therefore, any error was harmless beyond a reasonable doubt. Reversal of counts V and VI is not required.

IX. APPELLANT FORFEITED ANY CLAIM OF PROSECUTOR ERROR; THE PROSECUTOR DID NOT COMMIT ERROR AND ANY ERROR WAS HARMLESS

Appellant contends that the prosecutor committed several instances of misconduct during guilt phase closing argument, resulting in the violation of his state and federal constitutional rights to due process, effective assistance of counsel, and a fair jury trial. (AOB 131-150.) He claims that the prosecutor committed the following acts of error or misconduct: (1) arguing the existence of facts not in evidence (AOB 137-138); (2) vouching

for the witnesses (AOB 139-140); (3) appealing to passion and fear (AOB 140-143); (4) misstating the law on first degree premeditated murder (AOB 143-145); and (5), suggesting unethical conduct by the defense expert (AOB 145-146). Respondent submits that the claims of prosecutorial misconduct have been forfeited because appellant failed to make timely objections at trial. In any event, either the prosecutor did not commit error or any error was harmless.[23]

A. Forfeiture

To preserve for appeal a claim of prosecutorial error or misconduct, the defense must make a timely objection at trial and request an admonition. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) Only if an admonition would not have cured the harm is the claim of misconduct nevertheless preserved for review. (*Ibid.*) Appellant did not make timely objections to preserve his claims of prosecutorial misconduct and immediate admonitions would have cured any harm caused.

Appellant did not make a single objection during the prosecutor's closing argument during the guilt phase. (11 RT 2257-2285.) After the argument was completed, outside the presence of the jury, appellant argued that the prosecutor had committed three acts of prosecutorial misconduct during the argument and requested curative instructions. (11 RT 2287-2289.) First, he alleged that the prosecutor improperly argued to the jury

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[23] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 ("We observe that the term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error."); see also ABA House of Delegates, Resolution 100B (August 9-10, 2010) (adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct").)

that the defense expert had been unethical by reaching an opinion that he was paid to reach. (11 RT 2287.) Second, he alleged that the prosecutor improperly appealed to the passions of the jury by arguing that it should honor society by finding him guilty. (11 RT 2287.) Third, he alleged that the prosecutor improperly told the jury that he could have called other witnesses would have testified similarly to the witnesses he did call. (11 RT 2287-2288.) In response, the prosecutor noted appellant's responsibility to object at the time of misconduct and argued appellant was not allowed to "lay in wait" until after closing argument to make multiple objections. (11 RT 2288.) He also disputed that misconduct occurred. (11 RT 2288-2289.) After reviewing the issues and the transcript, the trial court ruled, "I don't think any of those justify a curative instruction. You made your record. [¶...¶] Request is denied." (11 RT 2293.)[24]

Appellant's objections were not timely. Appellant was required to object to the instances of alleged misconduct at the time they occurred so that the court could have immediately cured the harm caused by any misconduct. To the extent appellant may claim that objecting during closing argument would only have disrupted the prosecution and emphasized the offending argument (see 14 RT 3024), such an argument would effectively consume the rule for timely objections. It would excuse the timely objection requirement in nearly every conceivable situation. Moreover, if such a strategy were permitted, defendants could effectively deprive prosecutors of any opportunity to reformulate their arguments in response to any sustained objection or curative admonition. Appellant was

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[24] Appellant raised the same prosecutorial misconduct claims in his motion for new trial. (49 CT 13960-13969.) The prosecution opposed the motion for new trial on prosecutorial misconduct grounds. (49 CT 13981-13982.) The trial court found the prosecutorial misconduct theories without merit and denied the motion for new trial. (14 RT 3023-3025.)

not timely in his objection and request for an admonition that the jury disregard the purportedly offending argument. (*People v. De Vries* (1921) 52 Cal.App. 705, 710 [court is not bound to consider misconduct claims on appeal when objections not made until after conclusion of prosecutor's argument].) Had an admonition been given immediately, any harm would have been cured. (*People v. Dickey* (2005) 35 Cal.4th 884, 914 [proper admonishment by the trial court precluded reversal on grounds of improper vouching]; *People v. Harris* (1989) 47 Cal.3d 1047, 1084 [reference to uncalled witness that did not recite content of proposed testimony was not so "clearly improper" as to excuse forfeiture because admonition would have been adequate to cure any harm].)

Appellant might argue that the trial court's ultimate refusal to give any admonition excuses the forfeiture here, but it does not. It is not clear from the trial court's ruling whether the trial court denied the request because appellant's objection was untimely, because no misconduct occurred, or because any misconduct did not justify an admonition. The trial court may have ruled differently had appellant objected at the time of the alleged misconduct rather than after the closing argument was complete. The fact that a trial court denies relief in response to an untimely objection does not in itself mean that a timely objection would have been futile.

Friend addressed the exception to the requirement that trial counsel must object to each instance of misconduct to preserve it on appeal. It explained that the exception applies when the "'misconduct [is] pervasive, defense counsel [has] repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile.'" (*People v. Friend, supra*, 47 Cal.4th at p. 29, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502.) In *Friend*, defense counsel objected frequently and the trial court sustained several objections, yet this Court still concluded that several of the

defendant's prosecutorial misconduct claims were forfeited. (*Friend*, 47 Cal.4th at pp. 29-30.)

Here, appellant's counsel made *no* attempt to curb any perceived misconduct when it occurred. Appellant certainly cannot show that any objection during argument would have been futile based on a poisonous courtroom atmosphere. Thus, the exception to the forfeiture rule should not be applied in appellant's case. For these reasons, appellant has forfeited all of his claims of prosecutorial error or misconduct on appeal.

Appellant's fourth claim of prosecutorial error or misconduct, regarding the prosecutor's alleged misstatement of the law, is forfeited for an additional reason. Appellant never objected in the trial court to alleged prosecutorial misconduct based on any misstatement of the law. Thus, the trial court was never given any opportunity to cure any harm caused by the alleged misconduct. Therefore, that claim of prosecutorial misconduct has been forfeited on appeal for this reason as well.

B. General Law Regarding Prosecutorial Error or Misconduct

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such '"unfairness as to make the resulting conviction a denial of due process."'" (*People v. Friend, supra,* 47 Cal.4th at p. 29, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464].) "'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.]" (*People v. Friend, supra*, 47 Cal.4th at p. 29.) A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. (*People v. Kennedy* (2005) 36 Cal.4th 595, 618.)

Prosecutors are given wide latitude during closing argument, including commenting on the reasonable inferences and deductions that can be drawn from the evidence. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928; *People v. Hill* (1998) 17 Cal.4th 800, 819.) When a claim of misconduct is based on the prosecutor's comments to a jury, "'"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*People v. Friend, supra*, 47 Cal.4th at p. 29.) In conducting this inquiry, the reviewing court will not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) A prosecutor's statements must be viewed in light of the argument as a whole. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.)

C. Arguing the Existence of Facts Not in Evidence and Vouching for the Witnesses

Appellant's first and second claims of prosecutorial misconduct arise out of the same statements made by the prosecutor. In closing argument, the prosecutor argued:

> Members of the Jury, this case has gone faster than we anticipated because frankly, and sadly, the facts just aren't very complex. Many of the witnesses we could have called would have been repetitive, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings. There isn't much more to add. Unfortunately, sometimes a murder just isn't very complicated despite everything that follows in its wake. And especially when you're dealing with a person so obviously willing and prepared to commit one.

(11 RT 2284.) Appellant claims that by referring to witnesses that could have been called on behalf of the prosecution but were not and stating that the prosecution was "completely satisfied" that the jury understood the facts of the case, the prosecutor improperly argued the existence of facts not

in evidence (AOB 137-138) and improperly vouched for the prosecution's witnesses (AOB 139-140).

It is prosecutorial error or misconduct for a prosecutor to refer to facts not in evidence during closing argument. (*People v. Hill, supra,* 17 Cal.4th at pp. 827-828; *People v. Bolton* (1979) 23 Cal.3d 208, 212.) It is also improper to suggest that evidence available to the government but not before the jury corroborates the testimony of a witness. (*People v. Linton* (2013) 56 Cal.4th 1146, 1207; *People v. Cook* (2006) 39 Cal.4th 566, 593.) Offering unsworn testimony not subject to cross-examination is improper and can be "dynamite" to the jury because of the special regard the jury has for the prosecutor. (*People v. Hill, supra*, 17 Cal.4th at p. 828; *People v. Bolton, supra*, 23 Cal.3d at p. 213.) It is also misconduct for a prosecutor to express his personal belief or opinion as to the reliability of a witness to bolster the testimony in support of the prosecution's case by reference to facts outside the record. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207; *People v. Perez* (1962) 58 Cal.2d 229, 245-246.)

Here, the prosecutor improperly stated that he could have called other witnesses who would have testified similarly to the witnesses that he did call. The prosecutor's statement that he and co-counsel were "completely satisfied" that the jury understood what happened in the case was not necessarily improper, though. That statement did not refer to the credibility of any particular witness in any attempt to bolster the evidence in support of the prosecution's case. It was reasonably likely that the jury understood it as a comment on the thorough presentation of evidence during the course of the trial despite previous expectations that the trial would last much longer. But to the extent that the "completely satisfied" statement could be understood to reference the existence of the uncalled repetitive witnesses or something other than the evidence adduced at trial, it was improper as well.

Prosecutorial misconduct must be prejudicial to merit reversal. Prosecutorial error or misconduct that violates the federal Constitution requires reversal unless it is harmless beyond a reasonable doubt. (*People v. Cook, supra,* 39 Cal.4th at p. 608, citing *Chapman v. California, supra,* 386 U.S. at p. 24.) Violations of state law require reversal when it is reasonably probable the defendant would have received a more favorable result without the prosecutor's misconduct. (*Cook,* at p. 608.) In either case, only misconduct that prejudices a defendant requires reversal. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

The prosecutor's comments were harmless under either standard. The statement was but a fleeting remark amidst an extensive closing argument that focused overwhelmingly on the evidence actually presented. The court twice instructed the jury that it was to determine the facts "from the evidence received in the trial and not from any other source." (48 CT 13781 [CALJIC No. 1.00], 13784 [CALJIC No. 1.03].) The CALJIC No. 1.00 instruction also directed the jury to follow the court's instructions if anything said by the attorneys in their arguments conflicted with the court's instructions. (48 CT 13781; CALJIC No. 1.00.) The jury was further instructed that statements made by the attorneys during the trial, including closing argument, are not evidence. (48 CT 13783; CALJIC No. 1.02.) The CALJIC No. 2.11 instruction informed the jury that neither side was required to call all persons with knowledge of the events as witnesses. (48 CT 13793.) The jury is presumed to have followed the court's instructions and disregarded the prosecutor's statements to the extent they suggested it should determine witness credibility based on anything other than the evidence that was presented. (*People v. Lewis* (2008) 43 Cal.4th 415, 461.) Defense counsel also reminded the jury multiple times that the prosecutor's statements were not evidence and that it must decide the case based on only the evidence that was presented to it and not what the prosecutor said about

what other evidence might exist that was not presented. (11 RT 2295, 2296, 2332.) Therefore, any error was harmless. (*People v. Boyette* (2002) 29 Cal.4th 381, 452-453 [misconduct for claiming that uncalled witnesses would have testified to certain facts, among other improper acts, was harmless because the jury was properly instructed].)

Additionally, the evidence was overwhelming as to each crime charged. As for the shooting of McIntire and Bianchi, McIntire and Bianchi both affirmatively identified appellant at trial as the shooter in the Easter Sunday incident. (9 RT 1645-1646, 1680, 1711-1712.) They also both identified Peterson's car as the vehicle driven by appellant. (9 RT 1650-1651, 1661-1662, 1668-1669, 1685-1686, 1702.) Any prior difficulties witnesses had in identifying appellant, or hesitancies in identifying him with 100 percent certainty, were undoubtedly disregarded by the jury because of other corroborating evidence. The testimonies of McIntire and Bianchi were corroborated by Peterson's testimony, which placed appellant in her car in the same area at the same time as the shooting. (6 RT 1259-1262; 9 RT 1729-1732.) Law enforcement investigation suggested that the shooter was Hispanic and possibly related to the Merced Gangster Crips (5 RT 1016-1017), both of which accurately described appellant. And the evidence also showed that the firearm used in the shooting was the same firearm that appellant used to kill Officer Gray just a few days later. (9 RT 1796-1797.)

The evidence was also overwhelming as to the murder of Officer Gray. Appellant conceded that he killed Officer Gray. Only the degree of murder, special circumstances, and enhancements were contested. The evidence overwhelmingly showed that, as argued in Argument I, appellant premeditated the murder. Upon seeing Officer Gray and before Gray contacted him, he called his gang associates to come get him. (6 RT 1244-1248.) He knew that the only way he could avoid being caught with the

firearm from the Easter Sunday shooting was to kill Officer Gray, an intent that was also revealed by the lack of any attempt to hide the gun. Appellant waited until the most opportune moment to distance himself enough from Officer Gray and then shot him twice in deliberate succession, hitting him in the critical area of the chest above his ballistics vest. The evidence also showed that appellant had previously threatened to "do something" to Officer Gray after what he claimed was a long history of perceived harassment (7 RT 1442). And Peterson's later statement that she "didn't think he would do it" (7 RT 1349-1350) shows that she also had been aware of appellant's intent to kill Officer Gray. Gang expert testimony further explained that appellant was mentally prepared for the shooting based on his gang monikers (9 RT 1830-1832), and that killing Officer Gray would enhance his gang's power and reputation (9 RT 1819, 1850; 10 RT 1930-1933). Appellant presented gang expert testimony to the contrary, but the expert's investigation and credibility were so suspect that the jury would have most certainly rejected that testimony in the absence of any error. (See Section F, *post.*)

This case is distinguishable from *Hill.* In *Hill*, this Court held that the prosecutor committed error when she commented in closing that she could have called an expert witness that would have testified favorably for the prosecution.[25] (*People v. Hill, supra*, 17 Cal.4th at pp. 828-829.) The court ultimately reversed the judgment, but the reversal was due to numerous serious errors during the trial. (*Id.* at pp. 844-848.) The most egregious instances of prosecutorial misconduct included patent misstatements of the facts in closing argument, improper references to alleged facts outside the

[25] The court excused trial counsel's failure to object because objections would have been futile and counterproductive in light of the "constant barrage" of the prosecutor's unethical conduct. (*People v. Hill, supra*, 17 Cal.4th at pp. 820-821.)

record (other than the possible expert witness), multiple misstatements of law, a threat to charge a defense witness with perjury, and reliance on Biblical doctrine. (*Id.* at pp. 823-839.)

Here, on the other hand, the prosecutor did not engage in "serious, blatant and continuous misconduct." The prosecutor's statement was a brief remark in closing argument. None of the prosecutor's other challenged statements amounted to misconduct, and even if they did, they would not rise to the level of egregious misconduct, nor would they combine with numerous serious trial errors, to warrant reversal. Thus, *Hill* is distinguishable.

Equally distinguishable is *People v. Perez*, *supra*, 58 Cal.2d 229, which appellant cites (AOB 139). In *Perez*, the prosecutor committed several instances of misconduct in a case in which the People's evidence, which relied solely on the testimony of a single police officer, although sufficient to support the judgment, was far from overwhelming and presented a "close question" as to the defendant's guilt. (*Id.* at pp. 234-237, 248.) The prosecutor twice improperly cross-examined a defense witness without a sufficient showing of good faith, made several arguments in closing based on facts that were not in evidence, and impermissibly offered his personal opinion as to a defense witness' credibility. (*Id.* at pp. 237-246.) Yet in this case, the prosecutor here did not engage in multiple acts of misconduct and the evidence presented was far more extensive than the evidence in *Perez*. This was not a case in which there was a "close question" as to appellant's guilt.

People v. Woods (2006) 146 Cal.App.4th 106, which appellant cites (AOB 138), is also distinguishable. In *Woods*, the reviewing court determined that the prosecutor committed misconduct by vouching when she suggested that unidentified, nontestifying police officers could have testified consistently with the other officers who did testify. (*Id.* at pp. 114-

115.) The court reversed the judgment because of the cumulative effect of this and other errors committed by the prosecutor. (*Id.* at pp. 117-119.) In addition to the improper vouching, the prosecutor had erred by arguing multiple matters outside the evidence, imposing a burden of proof or persuasion upon the defendant (which was "especially" significant), and denigrating defense counsel. (*Id.* at pp. 111-119.) Moreover, the trial court had implicitly endorsed the misconduct by overruling defense counsel's objections. (*Id.* at p. 118.) The isolated and brief prosecutorial error here does not compare to the multiple instances of misconduct in *Woods*, particularly since the trial court did not endorse the prosecutor's conduct.

Because of the court's instructions, defense counsel's arguments, the fact that the prosecutor's statement was fleeting in the context of his extensive closing argument that focused on the evidence presented, and the overwhelming evidence, the prosecutor's statements were harmless beyond a reasonable doubt and did not contribute to the verdicts. The jury would have returned the same verdicts even if the offending statements had not been made.[26]

D. Appealing to Passion and Fear

Appellant contends in his third claim that the prosecutor committed misconduct by appealing to the passions and fears of the jury. (AOB 140-143.) Appellant's claim is based on several comments made throughout the closing argument.

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[26] If this Court determines that the prosecutorial error was not harmless, reversal of all counts is not required. Appellant expressly conceded that he was guilty of second degree murder in count I (11 RT 2339-2340) and did not dispute guilt of being a felon in possession of a firearm in count II. Thus, count I would only require a reduction to second degree murder, and no reversal would be required as to count II.

It is improper for a prosecutor to make an appeal to the jury's passion and prejudice. (*People v. Cornwell* (2005) 37 Cal.4th 50, 92-93, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In other words, it is improper for a prosecutor to make arguments that give the jury the impression that it should make its determinations based on emotion and to present inflammatory rhetoric that diverts the jury's attention from its proper role or invites a purely subjective response. (*People v. Redd* (2010) 48 Cal.4th 691, 742.)

The first challenged statement occurred during the introduction of the prosecutor's closing argument in the guilt phase, during which he thanked the jurors for their service and discussed the great responsibility of citizens to act as jurors: "On the homefront, one of the most important acts of citizenship that any person can be asked to perform is now being performed by you in your service as jurors; and more so, in a murder trial in which the penalty being sought is death." (11 RT 2258-2259.) Appellant argues that the prosecutor's reminder that the death penalty was being sought served to encourage the jury to return a verdict based on passion. (AOB 141-142.) Even when appellant eventually objected to an appeal to the passions of the jury, he did not object to the prosecutor's reference to seeking the death penalty or request a curative admonition on that basis. Therefore, his challenge to this statement has been forfeited on appeal.

In any event, the prosecutor's reference to the fact that the death penalty was being sought was not improper. The point of the prosecutor's remark was simply that, "in general, jurors in a capital case play a particularly important role in the criminal justice system." (*People v. Lang* (1989) 49 Cal.3d 991, 1041.) No reasonable juror would have construed the statement as urging the jurors to base its decisions on emotion rather than the evidence. The jury was already fully aware that the case was a death penalty case. Appellant's counsel also made brief reference to the

penalty phase during his guilt phase closing argument. (11 RT 2339.) Mere reference to that fact did not encourage a verdict based on passion, distract the jury from its task during the guilt phase, or improperly suggest that the jury consider punishment when determining the question of guilt. The statement was not made in error. And even if it could be considered error, it was harmless because the jury was already cognizant of the fact that it would subsequently determine whether to impose the death penalty upon appellant if it found him guilty of the special circumstance murder. Moreover, the jury was instructed that it must not be influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (48 CT 13781 [CALJIC No. 1.00].) The jury was also instructed that it was to reach a just verdict "regardless of the consequences." (48 CT 13781 [CALJIC No. 1.00].)

The second challenged statement occurred when the prosecutor addressed appellant's status as a gang member as it related to a finding of premeditation. He argued that appellant came from a gang culture that glorified murder and violence. (11 RT 2275.) Appellant carried his gun in public with an eye towards opportunities to commit murder and had already premeditated the concept of murder. (11 RT 2275.) Thus, the prosecutor argued, "gangsters don't deserve second-degree murder because they already come from a murder mindset. Murder is already part of their culture. It was already a part of their culture. It was already part of the defendant's lifestyle, part of who he is." (11 RT 2276.) In his rebuttal argument, the prosecutor reiterated that same theme. (11 RT 2350, 2360.) Appellant argues that these statements encouraged the jury to evaluate the case based on a fear of gangs and gang members. (AOB 142.)

The prosecutor's statements about gang members did not improperly appeal to the passions of the jury. The prosecutor's statements were based on the evidence and reasonable inferences therefrom concerning appellant's

status as a gang member and the gang culture in general. They referenced no more than what the prosecution reasonably thought the evidence proved. The evidence showed that gangs in general, and the Merced Gangster Crips in particular, rely heavily upon violence in conducting their gang activities. (6 RT 1228-1229; 9 RT 1818-1823, 1850.) The evidence of his gang monikers and his prior acts of violence also showed that appellant, specifically, was quick to pull the trigger and made decisions to shoot quickly. The prosecutor properly argued that appellant's status as a gang member should inform the jury's determination as to whether he premeditated the killing of Officer Gray because of his proclivity for guns and violence. This was not error. And if it was, it was also harmless. No reasonable jury would have understood the prosecutor's remark as urging it to decide the case based on fear or passion or anything other than the evidence presented and its own common sense.

Appellant also claims that the prosecutor's final statement to the jurors during his initial closing argument appealed to the passions of the jury. At the end of his closing argument, the prosecutor referenced the long-standing history of the Colusa County Superior Court courthouse. He concluded, "We would ask you, Ladies and Gentlemen, to bring a verdict into this courtroom that honors its more than 150-year tradition of justice." (11 RT 2285.) Appellant argues that such a reference encouraged a verdict based on passion related to a desire to uphold a societal tradition of justice. (AOB 140-141.)

The above statement did not constitute misconduct. The prosecutor's reference was merely an appeal for the jury to take its duty seriously, rather than an effort to incite the jury against appellant. (See *People v. Adanandus* (2007) 157 Cal.App.4th 496, 513 [pleas to "restore justice" were not misconduct]; *People v. Wash* (1993) 6 Cal.4th 215, 261-262 [no misconduct where prosecutor urged "jury 'to make a statement,' to do 'the

right thing,' and to restore 'confidence' in the criminal justice system by returning a verdict of death"]; *People v. Lang, supra*, 49 Cal.3d at p. 1041 [prosecutor's remarks that "if you want to have a voice in your community and an effect upon the law in the community, this is your opportunity" not improper].) No reasonable juror would have construed the prosecutor's comment to urge the jurors to disregard their own judgment and render a verdict based solely on community sentiment. Additionally, the record shows that no objection was made by appellant when the prosecutor made a similar comment during his opening statement (5 RT 945). In any event, any error was harmless because the remark was brief and isolated and the jury was properly instructed by the court. (*People v. Medina* (1995) 11 Cal.4th 694, 759-760 [prosecutor's brief and isolated comments to "do justice" for the victim was harmless].)

E. Misstating the Law on First Degree Premeditated Murder

Fourth, appellant claims that the prosecutor misstated the law regarding premeditated first degree murder. (AOB 143-145.) He bases this claim on the same gang-related statements used to support his previous claim: [G]angsters don't deserve second-degree murder because they already come from a murder mindset. Murder is already part of their culture. It was already a part of their culture. It was already part of the defendant's lifestyle, part of who he is." (11 RT 2276, 2350, 2360.)

It is misconduct for a prosecutor to misstate the law during closing argument. (*People v. Whalen* (2013) 56 Cal.4th 1, 77.) In this case, the prosecutor's comments did not misstate the law or advocate for an objective rather than subjective standard regarding appellant's intent. The prosecutor merely argued that the jury should find that appellant premeditated the murder of Officer Gray, in part, because his gang lifestyle allowed him to conceive the idea of killing Officer Gray, and to make the

decision to kill with less reservation than a non-gang member might harbor. The prosecutor's argument was fairly based on the reasonable inferences and deductions that could be drawn from the evidence. A reasonable juror would have understood the prosecutor's argument as the statements of an advocate. The trial court adequately instructed the jury on what constituted premeditation and deliberation (48 CT 13816), and the jury was also instructed to follow the court's instructions to the extent they conflicted with anything said by the attorneys during argument (48 CT 13781). The court's instructions are determinative in their statement of law, and it is presumed the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. (*People v. Sanchez* (1995) 12 Cal.4th 1, 70, disapproved on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) For the same reasons, any error was harmless.

F. Comments Regarding the Defense Expert

Appellant's fifth and final claim of prosecutorial misconduct is that the prosecutor improperly suggested the defense expert engaged in unethical conduct. (AOB 145-146.)

In response to the defense expert's testimony, the prosecutor argued in closing:

> We would suggest that based on the flawed manner in which the defense expert, Professor Lopez, conducted his research, you can completely disregard the testimony that this murder was not committed for the benefit of the street gang. Didn't talk to any other than one member of MGC, spent two hours with the defendant, didn't talk to Sergeant Trinidad, didn't talk to any Merced police officers, get the lay of the land. That's not research. That's not an investigation. That's taking money and trying to arrive at a conclusion that the money was paid to secure.
>
> Sergeant Trinidad and Special Agent Dean Johnston told you this killing benefited the Merced Gangster Crips, benefited

their agenda, and you have not been given any credible evidence to contradict their testimony.

(11 RT 2280-2281.)

A prosecutor's "harsh and colorful attacks" on the credibility of opposing witnesses are permissible. (*People v. Pearson* (2013) 56 Cal.4th 393, 442; *People v. Arias* (1996) 13 Cal.4th 92, 162.) A prosecutor may remind the jurors that a paid witness may accordingly be biased and that his testimony may be unbelievable or unsound. (*Ibid.*; see Evid. Code, § 722, subd. (b).) In *Arias*, the prosecutor emphasized that the defense expert was paid for his testimony described him as a "so-called expert, so-called because a real scientist would never stretch any [principle] for a buck." (*People v. Arias, supra*, 13 Cal.4th at pp. 161-162.) This Court held that the prosecutor did not commit misconduct because it focused on the evidentiary reasons why the expert's opinions could not be trusted. (*Id.* at p. 162.) Similarly, in *Blacksher*, the prosecutor argued that the defense expert "looked ridiculous and didn't make any sense." (*People v. Blacksher* (2011) 52 Cal.4th 769, 839.) This Court held that the argument was permissible because it was supported by evidence that the expert opinion based his opinion in part on information provided by the defendant who was untrustworthy. (*Ibid.*)

The argument made in this case is very similar to the statements at issue in *Arias* and *Blacksher*. The prosecutor argued that Dr. Lopez's opinions could not be trusted because he was a paid witness whose opinions were supported by an inadequate and deeply-flawed investigation. His argument was supported by an extensive cross-examination of Dr. Lopez that revealed that Dr. Lopez, prior to forming his opinions, did not talk to any members of local law enforcement about the Merced Gangster Crips, only talked to appellant and one other gang member (that he could not name), and that Dr. Lopez did not discuss with the other gang member

whether appellant's crimes were gang-related. (10 RT 1991-1997, 2027-2029, 2048-2054, 2068-2076; 11 RT 2280-2281.) Dr. Lopez's opinions were based largely on his knowledge of gangs other than the Merced Gangster Crips. (10 RT 1964-1974, 1981-1982.)

There is no likelihood that the jury would have understood the comments as anything beyond criticism of the method in which the expert reached his conclusions. The prosecutor's argument was no worse than the statements in *Arias* and *Blacksher*. Like in *Arias* and *Blacksher*, the prosecutor's statements were based on the evidence and were not misconduct.[27] Even if it could have constituted error, the court's instructions that an attorney's argument is not evidence rendered the error harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 733.)

G. Cumulative Effect

Appellant contends the cumulative prejudice caused by the alleged "numerous and varied instances of egregious prosecutorial misconduct" in this case requires reversal. (AOB 148-150.) "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra*, 17 Cal.4th at p. 844 [finding cumulative prejudice due to numerous instances of prosecutorial misconduct, improper shackling of the defendant, allowing the bailiff to testify and continue in his role as bailiff, and an

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[27] Appellant cites *State v. Hughes* (1998) 193 Ariz. 72, 84-86 [969 P.2d 1184], in support of his claim for misconduct. (AOB 145.) Notwithstanding the fact that the Arizona Supreme Court case is not binding on this Court, *Hughes* is distinguishable because the prosecutor in *Hughes* argued that the defense expert fabricated a diagnosis without any evidentiary support. (*Id.* at p. 84.) In appellant's parenthetical to the cite, he omits the latter portion of the rule of law articulated in *Hughes* which clarifies that it is "improper for counsel to imply unethical conduct on the part of an expert witness *without having evidence to support the accusation.*" (*Id.* at p. 86, italics added.)

erroneous jury instruction].) Here, the prosecutor only committed one instance of prosecutorial error which was harmless. There was no pattern of egregious misconduct that would support an assertion of cumulative prejudice. For that reason, there is no cumulative prejudice that would require reversal. (*People v. Tully* (2012) 54 Cal.4th 952, 1049.)

X. THIS COURT MAY REVIEW SEALED MATERIALS TO DETERMINE WHETHER THE TRIAL COURT CORRECTLY RULED ON THE *PITCHESS* MOTION

On April 21, 2005, appellant filed a *Pitchess*[28] motion requesting discovery of certain personnel records of Officer Gray. (3 CT 516-540.) The City of Merced opposed the motion (3 CT 541-544), and appellant filed a reply (3 CT 560-562). On May 10, 2005, after providing the City of Merced with copies of certain police reports (see 2 Pretrial 312-316), appellant filed an amended *Pitchess* motion. (3 CT 613-705.) The City of Merced opposed the amended motion. (3 CT 706-727.) On May 31, 2005, the trial court determined that there was good cause to conduct an in camera review of the entire personnel file for Officer Gray. (4 CT 791; 2 Pretrial RT 343-345.) On June 6, 2005, the trial court conducted an in camera review and ordered certain information be disclosed to appellant. (Supp. CT S 0002 – S 0038 [sealed transcript]; 2 Pretrial RT 346-347, 355, 359, 361; 4 CT 796-799 [sealed documents].) On June 15, 2005, after the City of Merced declined to appeal the ruling, the City disclosed the information and was ordered to provide a redacted copy of the *Pitchess* hearing transcript. (4 CT 794; 2 Pretrial 355-358, 361-362.)

On July 27, 2005, the City of Merced filed a motion for reconsideration and a request to reopen the in camera review. (4 CT 812-819.) Specifically, the City of Merced requested the court to withdraw its

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[28] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

order for redacted transcript and reopen the in camera hearing to place additional information on the record. (4 CT 812.) On August 11, 2005, the court ordered the City of Merced to review the transcript for the purpose of making a record that all the relevant materials were in fact presented for review to the court. (4 CT 854; 2 Pretrial 375-378.) On August 30, 2015, the court held another hearing on the *Pitchess* motion, ordered certain documents to be sealed, and again ordered the City of Merced to provide a proposed redacted transcript. (4 CT 858, 860-1030 [sealed court exhibits]; 2 Pretrial RT 381-389 [sealed]; see 2 Pretrial 391-392.)

Appellant asks this Court to review the trial court's ruling for error by examining the in camera hearing transcripts and the documents reviewed by the trial court. (AOB 151-160.) The sealed documents and related in camera hearing transcripts are in possession of this Court.

Respondent agrees that this Court should review the record of the in camera hearing under the appropriate standard. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) A *Pitchess* motion is addressed solely to the sound discretion of the trial court and a review of the lower court's ruling is subject to an abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670; see *People v. Martinez* (2009) 47 Cal.4th 399, 453 [defining "materiality" for purposes of in camera review on appeal of sealed records]; *People v. Fuiava* (2012) 53 Cal.4th 622, 646-648.)

XI. THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE OF PRIOR UNCHARGED CONDUCT

Appellant contends that the trial court prejudicially erred when it admitted two prior instances of uncharged conduct. (AOB 161-177.) He claims that admission of the evidence constituted an abuse of discretion because the evidence was irrelevant and more prejudicial than probative under Evidence Code section 352. (AOB 167-173.) He also argues that the admission of the evidence in violation of state law also deprived him of his

federal constitutional rights to due process and a fair trial. (AOB 173-177.) Respondent disagrees.

A. Relevant Background

Before trial, the prosecution signaled its intent to offer two instances of prior uncharged conduct as predicate acts in support of the gang allegations in the case: (1) appellant's assault with a firearm on Mohammed and Gonzalez, and (2) appellant's shooting at Bradley and the Merced Bloods. (5 RT 899.) Appellant's counsel argued that the evidence was not relevant and was more prejudicial than probative[29] because appellant was willing to stipulate, among other things, that the Merced Gangster Crips were a criminal street gang under section 186.22, that they engaged in a pattern of criminal gang activity, and that appellant was an active participant of that gang. (5 RT 900-901.) However, appellant refused to stipulate that his acts in this case were committed for the benefit of, at the direction of, or in association with the gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (5 RT 901.) The trial court ruled that the prosecution had a right to present its case and could not be forced to accept appellant's stipulations. (5 RT 904.) The evidence was therefore admissible. (5 RT 904.)

At trial, the prosecution presented evidence of both instances of prior uncharged conduct as well as evidence of appellant's prior convictions.

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[29] When the prosecution makes clear that the evidence will show the commission of an uncharged crime and the defendant objects on relevancy grounds, the objection is sufficient to preserve claims under Evidence Code sections 1101, subdivision (b), and 352 on appeal. (*People v. Williams* (1988) 44 Cal.3d 883, 907.) A sufficiently definite and express ruling on a motion in limine may serve to preserve a claim without an objection at the time the evidence is presented at trial. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

The jury heard that on September 30, 2000, appellant shot at rival gang members of the Merced Bloods, including Bradley, after a conflict at a party. (6 RT 1140, 1264-1266; 9 RT 1629-1634, 1832.) A Merced Gangster Crips gang member, Gerard Roberts, also known as "Cane," yelled "hit them niggers," and then appellant started shooting. (6 RT 1224; 9 RT 1631-1632.)

The jury also heard that in 2001, appellant was involved in an encounter with Mohammed and Gonzalez. (7 RT 1425.) Appellant was in one vehicle while Mohammed and Gonzalez were in another. (7 RT 1425-1426.) Appellant and Gonzalez were giving each other dirty looks. (7 RT 1425-1426.) They exchanged words and it appeared as if both men were going to exit their vehicles. (7 RT 1426-1427.) Appellant then pointed a gun at Gonzalez and Mohammed. (7 RT 1427.) Appellant warned them not to report the incident to the police. (7 RT 1429.)

The jury also heard about appellant's prior convictions. Appellant was convicted of being a felon in possession a firearm in violation of section 12021, subdivision (e), in connection with the Bradley shooting. (6 RT 1142-1143; 9 RT 1836; 46 CT 13307, 13311.) On October 1, 2001, appellant was convicted of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. (46 CT 13307, 13311; 9 RT 1836.)

The jury was instructed with a version of CALJIC No. 2.50 regarding evidence of uncharged crimes. (48 CT 13800.) That instruction explained that the jury could consider the evidence only for the limited purposes of determining if it tended to show: (1) the evidence of the intent which is a necessary element of the crime charged; (2) a motive for the commission of the crime charged; (3) appellant had knowledge of the nature of things found in his possession; (4) appellant had knowledge of or possessed the means that might have been useful or necessary for the commission of the

crime charged; and (5) that the crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (48 CT 13800.) The jury was instructed not to consider the evidence for any other purpose, including to prove that appellant was a person of bad character or that he had a disposition to commit crimes. (48 CT 13800.) The jury also received a version of CALJIC No. 17.24.3 regarding gang evidence, which further instructed that evidence of criminal street gang activities could not be considered as evidence that appellant had a bad character or a disposition to commit crimes. (48 CT 13839.)

B. The Admission of Prior Uncharged Conduct Evidence Was Proper under State Law

The admission of the evidence of appellant's prior uncharged conduct in this case was proper under state law. First, it was relevant evidence. Second, the probative value of the evidence was not substantially outweighed by any substantial danger of undue prejudice, confusing the issues, or misleading the jury under Evidence Code section 352.

1. The evidence was relevant

Relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) Evidence of a person's character or a trait of his character is inadmissible when offered to prove his conduct on a specified occasion unless specifically permitted otherwise. (Evid. Code, § 1101, subd. (a); *People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Nothing in Evidence Code section 1101, subdivision (a), however, prohibits the admission of evidence that a person committed a crime 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 disposition to commit such an act. (Evid. Code, § 1101,

subd. (b); *People v. Foster, supra*, 50 Cal.4th at p. 1328.) A trial court has considerable discretion in determining the relevance of evidence. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

The prior uncharged conduct evidence in this case was relevant to prove several facts under Evidence Code section 1101, subdivision (b). The evidence, and particularly his eagerness to shoot a firearm, was relevant to prove appellant's state of mind at the time he committed the charged offenses. (*People v. Rogers* (2013) 57 Cal.4th 296, 330 [uncharged offense evidence admissible to prove premeditation and deliberation].) Evidence of appellant's prior gang-related offenses were relevant to prove appellant's gang-related motive and intent in committing the charged crimes, which included establishing that appellant was aware of a pattern of criminal activity committed by gang members to support the gang allegations. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212 [prior gang-related shooting relevant to prove charged crime was gang-related].) Notably, appellant's prior conduct against Mohammed and Gonzalez was very similar to appellant's encounter with McIntire and Bianchi, in that both conflicts began by passing motorists exchanging dirty looks at each other. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [to prove intent, uncharged misconduct must be "sufficiently similar" to support inference that defendant probably harbored the same intent in each instance].)

Contrary to appellant's assertions, the evidence was indeed used to prove predicate acts of the Merced Gangster Crips and to support Sergeant Trinidad's expert opinions that the crimes were gang-related. (8 RT 1584-1585 [defense counsel's comments regarding evidence supporting predicate acts]; 9 RT 1836-1837 [gang expert testimony].) The uncharged offense evidence was also relevant to show that appellant was aware he possessed a firearm and that he was aware of the ability to cause harm with that firearm

in relation to the firearm possession and assault with a semiautomatic firearm offenses. Appellant's claim that the evidence was "entirely irrelevant" (AOB 172) is wrong.

2. The admission of the evidence did not violate Evidence Code section 352

Evidence Code section 352 provides,

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Thus, even if the evidence of appellant's prior uncharged offenses was material, the trial court had broad discretion under Evidence Code section 352 to exclude the evidence if it determined the probative value of the evidence was substantially outweighed by its possible prejudicial effects. (*People v. Merriman, supra*, 60 Cal.4th at p. 74.) An appellate court reviews a trial court's decision to admit evidence for abuse of discretion. (*Ibid.*) A trial court's ruling will not be disturbed and reversal not required unless it is shown that "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Ibid.*, quoting *People v. Brown* (2003) 31 Cal.4th 518, 534, internal citations omitted.)

As respondent has explained, the evidence of appellant's prior uncharged offenses was relevant for a variety of reasons. Even though the prosecution presented other evidence in support of its case, it was not limited to presenting such evidence to the exclusion of material other crimes evidence. (*People v. Rogers, supra*, 57 Cal.4th at p. 331; *People v. Tran* (2011) 51 Cal.4th 1040, 1048-1049.) It is true that several predicate acts committed by others were used to establish the gang's pattern of criminal activity (9 RT 1837-1847), but appellant's prior uncharged

offenses carried significant probative value because those acts were committed by appellant. Those acts uniquely showed that appellant was an active participant in the criminal street gang, that he knew gang members engaged in a pattern of criminal gang activity, and that he committed the current crimes with gang-related intent, all elements of the gang enhancements or special circumstance (48 CT 13826, 13835, 13837). (*Tran,* at pp. 1048, 1050.) The probative value of the evidence of the prior conduct against Mohammed and Gonzalez was not substantially outweighed by any prejudice because the circumstances surrounding that encounter were very similar to appellant's encounter with McIntire and Bianchi. (See *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

Both instances of uncharged conduct supported Sergeant Trinidad's opinion that appellant's gang monikers of Bullet and Trigger meant that guns were his "tools of the trade" and that he was quick to pull the trigger (9 RT 1831-1832), which was particularly significant in the face of Dr. Lopez's claim that the monikers could have been given for any number of innocent reasons (10 RT 1974-1977). The evidence was also probative because it rebutted appellant's defense that he did not premeditate the killing of Officer Gray and supported the prosecutor's theory that appellant's premeditation found its genesis in and was accelerated at the time of the crime by the violent gang lifestyle he led.

The fact that the prior uncharged conduct occurred three or four years before the charged offenses and six or seven years prior to trial does not lessen the probative value of the evidence. In *Ewoldt*, the court determined that the probative value of evidence of uncharged misconduct that occurred 12 years prior to trial was not significantly lessened by the passage of "only a few years." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) And in *Zepeda*, the court of appeal reached the same conclusion regarding a prior

incident that occurred about five years before the charged crime. (*People v. Zepeda, supra*, 87 Cal.App.4th at p. 1212.)

The probative value of the prior incident evidence was not substantially outweighed by a substantial danger of prejudicial effects. In the context of Evidence Code section 352, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320.) The prior uncharged conduct was not unduly inflammatory compared to the incredibly violent and gruesome crimes charged in this case. (*People v. Tran, supra,* 51 Cal.4th at pp. 1047, 1050.) In the uncharged conduct, appellant fired shots at rival gang members but hit no one and threatened two random motorists on the street. In the charged conduct, however, he shot and killed a police officer at close range and successfully shot another motorist. A wealth of gang-related evidence was already introduced at trial, so the gang elements of the prior uncharged conduct would not have been prejudicial. (*Id.* at p. 1048.) Likewise, the fact that appellant possessed a firearm during the prior uncharged misconduct would not have been prejudicial in light of the charged shootings and his subsequent possession of a different firearm.

The uncharged conduct evidence was unlikely to improperly inflame the passions of the jury or evoke an emotional bias that was not already naturally evoked by the hideous, cold-blooded killing of Officer Gray. The jury was unlikely to confuse the prior incidents with the shootings in this case or be misled by the evidence, particularly in the case of the Bradley shooting that already resulted in a conviction. (*People v. Balcom, supra*, 7 Cal.4th at p. 427.) Further, presenting the evidence of the prior uncharged offenses did not result in an undue consumption of time.

Appellant's offer to stipulate to several facts does not alter the probative value of the prior uncharged conduct evidence or render it unduly prejudicial. (*People v. Carter, supra*, 36 Cal.4th at pp. 1169-1170.) The prosecutor was not legally obligated to accept appellant's proffered stipulations. (*People v. Rogers, supra*, 57 Cal.4th at pp. 329-330.) "A trial court cannot compel a prosecutor to accept a stipulation that would deprive the state's case of its evidentiary persuasiveness or forcefulness." (*Ibid.*; see *Old Chief v. United States* (1997) 519 U.S. 172, 186-187 [117 S.Ct. 644].)

The trial court also gave appropriate limiting instructions pursuant to CALJIC Nos. 2.50 and 17.24.3. (48 CT 13800, 13839.) Thus, the jury would not have considered the prior uncharged conduct evidence for an improper purpose such as character evidence or propensity evidence. (*People v. Tran, supra*, 51 Cal.4th at p. 1050.) The jury is presumed to have followed the court's instructions. (*People v. Lewis, supra,* 43 Cal.4th at p. 461.) Based on the instructions, the jury would not have spent any time attempting to determine whether the prior uncharged conduct actually constituted a criminal offense, as appellant suggests (AOB 171-172). This is especially true concerning the Bradley shooting, for which appellant had already suffered a conviction.

Because the gang evidence was highly relevant and probative, the probative value was not substantially outweighed by the danger of prejudicial effects. Because the trial court gave limiting instructions designed to lessen the risk of undue prejudice, the admission of the prior uncharged conduct was not an abuse of discretion. (See *People v. Montes* (2014) 58 Cal.4th 809, 860 [admission of gang affiliation evidence in non-gang case].)

Therefore, the admission of the prior uncharged conduct evidence was proper under state law and was not an abuse of discretion. Because there

was no violation of state law, appellant's federal constitutional rights were not violated.[30] (*People v. Rogers, supra*, 57 Cal.4th at p. 332 [because evidence was properly admitted under Evidence Code sections 1101(b) and 352, federal constitutional rights were not violated]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1284 ["the routine application of state evidentiary law does not implicate a defendant's constitutional rights"].)

3. The record as a whole shows that the trial court was aware of and engaged in the appropriate balancing process under Evidence Code section 352

Appellant argues that there was an abuse of discretion because the trial court did not expressly engage in an Evidence Code section 352 weighing analysis on the record. (AOB 172.) "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2010) 48 Cal.4th 574, 650, quoting *People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) The record here shows that the trial court was aware of and engaged in the appropriate balancing process under Evidence Code section 352.

One of appellant's motions in limine (#5) moved to exclude specific evidence on Evidence Code section 352 grounds. (44 CT 12609-12624.)

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[30] As a general rule, courts will consider, on the merits, a constitutional claim which "merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [claim that admission of evidence violated Sixth, Eighth and Fourteenth Amendments, when trial objections based on Evidence Code sections 1101(a) and 352].

Although the prior uncharged conduct at issue here was not specifically identified in the motion in limine, appellant purported to move to exclude, in addition to the evidence specifically identified, "such other matters as defendant specifically identifies and expressly objects to during the course of the proceedings herein." (44 CT 12610.) Another defense motion in limine regarding gang evidence (#15) also raised an Evidence Code section 352 challenge to the evidence of appellant's prior convictions. (44 CT 12774-12775.) Further briefing repeated appellant's Evidence Code section 352 challenge to the gang evidence generally in light of appellant's proposed admissions. (45 CT 12909-12911, 12922-12925.)

During the hearing on the motions in limine, appellant argued that much of the prosecution's evidence was barred under Evidence Code section 352 because he was willing to stipulate to various facts. (2 RT 383-388.) The trial court reserved its ruling and agreed to research the issue. (2 RT 388-389, 403.) The trial court also expressly stated that it would consider appellant's argument regarding "such prejudicial matters as Defendant specifically identifies" in motion in limine #5. (2 RT 391.)

Prior to opening statement, the court addressed the admissibility of the prior uncharged conduct evidence. (5 RT 899-904.) The prosecution stated its intention to offer the evidence as predicate acts in support of the gang acts. (5 RT 899.) Appellant argued that the evidence was more prejudicial than probative in light of his offers to stipulate to certain facts. (5 RT 900-902-903.) After reviewing its research (5 RT 902), the court declared that the prosecution could present the evidence because it had a right to present its case and could not be forced to accept appellant's stipulations. (5 RT 904.)

During an April 20, 2007, conference on the jury instructions, the parties discussed the giving of CALJIC No. 2.50 as though it covered the prior uncharged conduct evidence at issue here. (8 RT 1584-1586.) In a

May 1, 2007, jury instruction conference, the prosecutor explained that some of the evidence that was initially admitted for gang purposes also served to prove at trial various Evidence Code section 1101, subdivision (b) purposes, including "knowledge, motive, perhaps even premeditation." (10 RT 2168.) Appellant's counsel agreed that the instruction covered all the permitted purposes for the evidence. (10 RT 2168.)

Based on the record as a whole, it is clear the trial court was aware of appellant's Evidence Code section 352 challenge to the evidence of his prior uncharged conduct and its corresponding responsibilities. The court's ruling immediately followed an objection on grounds that the evidence was more prejudicial than probative. (5 RT 900.) The fact that a hearing is held at which the parties argue Evidence Code section 352 factors prior to the trial court's ruling normally demonstrates that the court was aware of, and performed its balancing function under Evidence Code section 352, even if the trial court did not make an express statement on the record. (See *People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v. Hill, supra*, 17 Cal.4th at p. 828, fn. 1.) Although the court did not expressly engage in a thorough Evidence Code section 352 analysis, it is apparent that the court conducted research on the issue (2 RT 388-389, 403; 5 RT 902-903). After the court's ruling, appellant's counsel stated that he would continue to object as the trial proceeded, but the record does not show any additional objections to the evidence on Evidence Code section 352 grounds. Appellant's counsel understood that the prior uncharged offense evidence was admitted for Evidence Code section 1101, subdivision (b) purposes as well as predicate act evidence. (8 RT 1584-1586.) When the prosecutor later referenced those purposes while discussing the relevant jury instruction, appellant's counsel did not object as though this theory of admission was being raised for the first time. Instead, counsel acquiesced that the evidence could be considered by the

jury for those purposes. (10 RT 2168.) The record as a whole shows that the trial court was aware of and engaged in the appropriate balancing process under Evidence Code section 352.[31]

C. Harmless Error

Even if the trial court abused its discretion in admitting the evidence of appellant's prior uncharged conduct, any error was harmless under any standard. For the reasons presented above, the jury would not have considered the evidence for propensity evidence or evidence of bad character. The jury was specifically instructed not to consider the evidence for such purposes. (48 CT 13800, 13839.) The jury is presumed to have followed the court's instructions. (*People v. Lewis, supra*, 43 Cal.4th at p. 461.) None of the attorneys urged the jury to consider the evidence for improper purposes either. Moreover, any prejudicial effect of this evidence was negligible because the prior uncharged conduct evidence was far less serious than the charged offenses and were not likely to inflame the jury.

And even without the prior uncharged offense evidence, the evidence against appellant was overwhelming. The prosecution presented abundant evidence concerning the pattern of criminal gang activity of the Merced Gangster Crips, the gang lifestyle, and appellant's participation in the gang to support gang expert opinion that the crimes were committed with gang-related intent. (9 RT 1818 – 10 RT 1936.)

The prosecution also presented overwhelming evidence that appellant premeditated the murder of Officer Gray. Prior to being contacted by Officer Gray, appellant called his gang associates to come get him. (6 RT 1244-1248.) He knew that the only way he could avoid being caught with

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[31] And even assuming the trial court did not evaluate the evidence under Evidence Code section 352, had it done so it would have admitted the evidence for the reasons explained above. (See *People v. Padilla, supra*, 11 Cal.4th at p. 925.)

the firearm from the Easter Sunday shooting was to kill Officer Gray, an intent that was also revealed by the lack of any attempt to hide the gun. Appellant waited until the most opportune moment to distance himself enough from Officer Gray and then shot him twice in deliberate succession, hitting him in the critical area of the chest above his ballistics vest. The evidence also showed that appellant had previously threatened to "do something" to Officer Gray after a long history of perceived harassment (7 RT 1442), and Peterson's later statement that she "didn't think he would do it" (7 RT 1349-1350) indicated that she had been aware of appellant's intent to kill Officer Gray. Gang expert testimony also explained that appellant was mentally prepared for the shooting based on his gang monikers (9 RT 1830-1832), and that killing Officer Gray would enhance his gang's power and reputation (9 RT 1819, 1850; 10 RT 1930-1933).

The evidence was also overwhelming as to the shooting of McIntire and Bianchi. McIntire and Bianchi both affirmatively identified appellant at trial as the shooter in the Easter Sunday incident. (9 RT 1645-1646, 1680, 1711-1712.) They also both identified Peterson's car as the vehicle driven by appellant. (9 RT 1650-1651, 1661-1662, 1668-1669, 1685-1686, 1702.) Any prior difficulties in identifying appellant or hesitancies in identifying him with 100% certainty were undoubtedly disregarded by the jury because of other corroborating evidence. The testimonies of McIntire and Bianchi were corroborated by Peterson's testimony, which placed appellant in her car in the same area at the same time as the shooting. (6 RT 1259-1262; 9 RT 1729-1732.) Law enforcement investigation suggested that the shooter was Hispanic and possibly related to the Merced Gangster Crips (5 RT 1016-1017), both of which accurately described appellant. And the evidence also showed that the firearm used in the shooting was the same firearm that appellant used to kill Officer Gray. (9 RT 1796-1797.)

For these reasons, any error in admitting the evidence of prior uncharged conduct was harmless.

XII. THERE WAS NO CUMULATIVE PREJUDICE FROM GUILT PHASE ERRORS WARRANTING REVERSAL

Appellant contends that the cumulative effect of the alleged errors in the guilt phase warrants reversal of his convictions. (AOB 178-183.) This claim is without merit.

In a close case, the cumulative effect of multiple errors may constitute reversible error. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Hill, supra,* 17 Cal.4th at p. 844.) The "litmus test" is whether a defendant received due process and a fair trial. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 319.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 521-522.) Whether considered individually or for their cumulative effect, there is no "reasonably probability" that any alleged errors affected the outcome of either phase of the trial or that the jury would have reached a different result absent the errors. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117; see *People v. Watson* (2008) 43 Cal.4th 652, 704 [rejecting cumulative error]; *People v. Carter, supra*, 36 Cal.4th at pp. 1212-1213.) Appellant cannot show that reversal is warranted even if multiple errors were committed.

First, as demonstrated above, this was not a close case. There was overwhelming evidence that appellant committed the shooting against McIntire and Bianchi, that he committed premeditated first degree murder against Officer Gray, and that both crimes were gang-related. Because the case was not close, it was not reasonably probable that appellant would have obtained a more favorable result even if the trial had been flawless. (See *People v. Bunyard*, *supra*, 45 Cal.4th at pp. 1236-1237.)

Second, to the extent that there were any errors in this case, they were not substantial. As discussed in Argument V, *ante*, any error in instructing the jury on an invalid theory as to the section 190.2, subdivision (a)(5) special circumstance was harmless because the evidence was overwhelming as to the special circumstance and it is impossible, based on the evidence, that the jury found the special circumstance to be true without finding the facts necessary to support the valid theory. As discussed in Argument VIII, *ante*, the instructional error for failing to define assault for the jury as to counts V and VI was clearly harmless because the jury did in fact find every fact necessary to establish the omitted elements of assault beyond a reasonable doubt. As discussed in Argument IX, *ante*, the prosecutorial error caused by a fleeting reference to the existence of the uncalled repetitive witnesses was harmless in light of the overwhelming evidence, the court's instructions, and defense counsel's arguments. Any possible errors would not have aggregated to result in cumulative error. (See *People v. Bunyard*, *supra* 45 Cal.3d at p. 1236 [because errors at trial were not substantial, the cumulative impact of those errors did not prejudice the defendant].)

Third, because the errors were separate and distinct from one another, their cumulative effect would not have resulted in an unfair trial. (See *People v. Loy* (2011) 52 Cal.4th 46, 77 [no cumulative prejudice when two evidentiary errors found by reviewing court were "directed primarily at different trial issues"]; *People v. Moore, supra,* 51 Cal.4th at pp. 417-418 [no cumulative prejudice from three errors found or assumed by reviewing court because they "related to distinct procedural or evidentiary issues not closely related to one another"].)

In sum, there were only three insubstantial errors in this case that were clearly harmless and were not closely related. Even if other errors occurred, they were not substantial and thus could not have combined to

render appellant's trial fundamentally unfair. Accordingly, even if there were multiple errors at trial, there would be no cumulative prejudice to warrant reversal. Accordingly, appellant's claim of cumulative error must be rejected.

XIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EVIDENCE OF APPELLANT'S PRIOR JUVENILE ADJUDICATIONS AS FACTOR (B) EVIDENCE PURSUANT TO SECTION 190.3

Appellant contends that the trial court erroneously admitted evidence during the penalty phase that he sustained juvenile adjudications and had been declared a ward of the juvenile court at ages 15 and 16. He argues that the jury's consideration of the evidence violated the Eighth and Fourteenth Amendments and requires reversal of the death judgment. (AOB 184-201.) Respondent submits that the evidence was properly admitted and that appellant constitutional rights were not violated.

A. Relevant Background

Prior to the penalty phase, appellant filed a motion to exclude evidence of his juvenile adjudications under section 190.3, factor (c). (48 CT 13683-13687.) He also filed a motion to exclude documents regarding his juvenile record for assaultive conduct under section 190.3, factor (b). (48 CT 13688-13697.)

After the prosecution expressed its intent to introduce evidence related to appellant's juvenile adjudications, appellant requested an Evidence Code section 402 hearing. (11 RT 2456-2460.) The prosecution later clarified that it planned on introducing the juvenile adjudication evidence in two ways: (1) having the supervising probation officer testify as to appellant's status as a ward for certain felony adjudications for crimes of violence or threatened violence; and (2) introducing a certified copy of appellant's criminal history as an official record pursuant to *People v. Dunlap* (1993)

18 Cal.App.4th 1468 to show the facts of those juvenile adjudications. (12 RT 2541.) The court and the parties agreed that the trial court would rule on the issue based on the documents and arguments presented, without live witness testimony. (11 RT 2463-2464.) The parties argued the issue and the court conducted additional research. (12 RT 2487-2492, 2540-2543.)

The trial court agreed that the juvenile adjudication evidence was not admissible under section 190.3, factor (c), but held the evidence was admissible under section 190.3, factor (b), and Evidence Code section 452.5. (12 RT 2530, 2543.)

During the penalty phase of the trial, Jeff Kettering, assistant chief probation officer of the Merced County Probation Department, testified that appellant had been supervised by the Merced County Probation Department and had been under the jurisdiction of the courts as a juvenile. (12 RT 2579-2581.) He had reviewed the probation department's file on appellant, and he testified that appellant was made a ward of the court when he suffered felony adjudications for making criminal threats and brandishing a deadly weapon on August 19, 1998. (12 RT 2580-2582.) He was also adjudicated a ward of the court for two felony counts of threatening a school official on January 25, 1999. (12 RT 2582.) A redacted certified copy of appellant's criminal history showing the juvenile adjudications was admitted into evidence. (48 CT 13728-13732 [People's Exhibit 97].)

B. Analysis

Juvenile adjudications are not criminal convictions, and thus are not admissible under section 190.3, factor (c),[32] as prior felony convictions. (*People v. Hayes* (1990) 52 Cal.3d 577, 633.) However, juvenile adjudications are admissible under factor (b), if they show "the presence or

[32] All further unspecified references to a "factor," such as factor (a), (b), or (c), are to those subdivisions of section 190.3.

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." (*People v. Combs* (2004) 34 Cal.4th 821, 859-860; *People v. Burton* (1989) 48 Cal.3d 843, 861-862; see *People v. Ray* (1996) 13 Cal.4th 313, 349 [reliance solely on judgment of conviction to show criminal activity]; *id.* at pp. 367-369 (conc. opn. of George, C.J.) [prosecution may establish the presence of criminal activity under factor (b) with the record of a conviction].) The violent juvenile misconduct must be a crime if committed as an adult in order to be admissible under factor (b), as evidence in aggravation. (*People v. Bivert* (2011) 52 Cal.4th 96, 114; *People v. Lee* (2011) 51 Cal.4th 620, 649; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239; *People v. Lewis* (2001) 26 Cal.4th 334, 378-379.) Factor (b) applies to all criminal activity, whether committed by a juvenile or an adult, and the prosecution may prove the commission of such misconduct "by any competent means" (*People v. Ray, supra,* 13 Cal.4th at p. 350), including the fact of a juvenile adjudication. (*People v. Combs, supra*, 34 Cal.4th at pp. 859-860 [docket sheet]; *People v. Burton, supra*, 48 Cal.3d at pp. 861-862 [records of juvenile adjudication to prove attempted robbery].)

In *Combs*, the prosecution sought to prove a robbery under factor (b) by relying solely on a docket sheet reflecting the juvenile adjudication the defendant suffered for that conduct. (*People v. Combs, supra*, 34 Cal.4th at p. 860.) This Court approved the admission of the docket sheet to prove the conduct, explaining that it had repeatedly held "the fact of an adjudication or conviction is admissible to establish 'criminal activity' under [factor (b)]." (*Ibid.*, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1222-1223, *People v. Jackson* (1996) 13 Cal.4th 1164, 1234, and *People v. Ray, supra*, 13 Cal.4th at pp. 367-369 & fn. 2 (conc. opn. of George, C.J.).)

This case is similar to *Combs*. The prosecutor relied on the facts of appellant's violent juvenile adjudications, through testimony and a certified copy of appellant's criminal history, to prove "the 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" under factor (b). The facts of appellant's juvenile adjudications were admissible to prove the relevant conduct under factor (b). Additional facts regarding the underlying conduct were not required here. As Chief Justice George stated in his concurring opinion in *Ray*, which was joined by four other justices:

> I believe it would be absurd to interpret the 1977 statute as *precluding* the prosecution from relying upon a prior conviction of a crime involving the use or threat of force or violence to prove the presence of other violent criminal activity within the meaning of [factor (b)], and instead as *requiring* the prosecution to try anew every prior violent crime offered in aggravation under factor (b), even when the defendant already had been convicted of the crime.

(*People v. Ray, supra*, 13 Cal.4th at p. 367, italics in original.)

Appellant relies heavily on *People v. Taylor, supra,* 48 Cal.4th 574 in support of his claim that juvenile adjudications are not admissible under factor (b). (AOB 186-187.) His reliance on *Taylor* is misplaced.

In *Taylor*, the prosecution introduced evidence of unadjudicated criminal activity under factor (b), including testimony regarding an incident in which the defendant committed a sexual assault when he was 12 or 13 years old. (*People v. Taylor, supra*, 48 Cal.4th at pp. 651-652.) The defendant claimed that section 190.3 is internally inconsistent because the fact of a juvenile adjudication is inadmissible under factor (c), but juvenile criminal activity involving force or violence is admissible under factor (b). (*Id.* at pp. 652-653.) He argued that because a juvenile court adjudication affords more procedural safeguards than the factor (b) admission process, it

was "inherently illogical" to allow the prosecutor to present the underlying facts of the criminal activity without also presenting the fact of the activity's adjudication. (*Id.* at p. 653.)

Taylor rejected the claim of internal inconsistency. (*People v. Taylor, supra*, 48 Cal.4th at p. 653.) It reasoned that juvenile adjudications are inadmissible as evidence under factor (c) because they are not "prior felony convictions" within the meaning of that factor, but evidence of violent conduct is permitted because it "enables the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed." (*Ibid.*) Indeed, the two statutory factors serve different purposes. (*People v. Scott* (1997) 15 Cal.4th 1188, 1222; *People v. Melton* (1988) 44 Cal.3d 713, 764.) Factor (b) "allows in *all* evidence of violent criminality to show defendant's propensity for violence," whereas factor (c) "allows in 'prior' nonviolent felony 'convictions' to show that the capital offense was the *culmination of habitual criminality*" and that the defendant was "undeterred by the community's previous *criminal sanctions*." (*People v. Melton, supra*, 44 Cal.3d at p. 764, italics in original.)

Although the language of the opinion generally refers to juvenile adjudications being inadmissible as evidence in aggravation, *Taylor* did not hold that the fact of a juvenile adjudication stemming from violent criminal activity is inadmissible under section 190.3, factor (b). The juvenile conduct admitted under that factor apparently did not result in a juvenile adjudication, and neither party attempted to admit any fact of a juvenile adjudication, so the court could not have so held. In rejecting the defendant's claim, *Taylor* stated:

> Thus, although the fact of the juvenile adjudication is inadmissible, the conduct underlying the adjudication is relevant to the jury's penalty determination and admissible as violent criminal activity under factor (b). ([*People v. Lucky* (1988) 45

Cal.3d 259, 295-296, fn. 24] ["It is not the adjudication, but the conduct itself, which is relevant."].)

(*People v. Taylor, supra*, 48 Cal.4th at p. 653.)

It is the violent juvenile conduct, not the adjudication, that is the focus of factor (b), but the fact of a juvenile adjudication is relevant to prove, and is the "competent means" to prove, that the violent conduct occurred. Indeed, in *Lucky*, on which *Taylor* relied, juvenile court records that showed the defendant's admission to a violation of grand theft were used to prove violent conduct under factor (b). (*People v. Lucky* (1988) 45 Cal.3d 259, 294.) The fact of a juvenile adjudication is admissible to establish criminal activity under factor (b), and appellant offers no compelling reason for this court to abandon *Combs*, *Taylor*, and *Lucky*.

The admission of the juvenile adjudication evidence did not impermissibly lower the burden of proof for factor (b) evidence. The standard of proof beyond a reasonable doubt applies to juvenile adjudications. (Welf. & Inst. Code, § 701; see *In re Winship* (1970) 397 U.S. 358, 368 [90 S.Ct. 1068]; *In re Eddie M.* (2003) 31 Cal.4th 480, 501.) Before a juror can consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052; *People v. Griffin* (2004) 33 Cal.4th 536, 585.) The penalty phase jury instructions must make clear that an individual juror may consider other violent criminal activity in aggravation only if the juror is satisfied beyond a reasonable doubt that defendant committed that criminal activity. (*People v. Lewis & Oliver, supra*, 39 Cal.4th at p. 1052.)

Appellant's jury was instructed that it must find appellant committed the criminal activity underlying the juvenile adjudications beyond a reasonable doubt before any juror could consider it as an aggravated circumstance. (13 RT 2857-2858.) No additional evidence was necessary

to satisfy the requisite burden of proof, and each juror was able to evaluate the evidence and determine whether the underlying facts had been proven. There was no impermissible lowering of the burden of proof here.

Because there was no state law error or impermissible lowering of the burden of proof, appellant's claim that his constitutional rights to a jury trial, due process, and a fair and reliable penalty determination fails as well. (AOB 189-190.) This Court's prior decisions holding that violent juvenile conduct may be admitted as evidence of criminal activity under factor (b) should not be disturbed.

Appellant further argues that evolving standards in Eighth Amendment jurisprudence, as set forth in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183], *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011], and *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455], render unconstitutional the jury's consideration of appellant's prior juvenile record under the Eighth and Fourteenth Amendments. (AOB 190-197.) This Court has repeatedly rejected similar claims based on *Roper* alone. (*People v. Bramit, supra,* 46 Cal.4th at p. 1239.) *Graham* and *Miller* add nothing to the conversation. None of the cases say anything "about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile." (*People v. Lee, supra*, 51 Cal.4th at p. 649; *People v. Taylor, supra*, 48 Cal.4th at pp. 653-654; *People v. Bramit, supra*, 46 Cal.4th at p. 1239.)

C. Harmless Error

Even assuming that the juvenile adjudication evidence was inadmissible, any error was harmless beyond a reasonable doubt. "'State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard

of [*Chapman v. California, supra,* 386 U.S. at p. 24]. [Citations.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 218-219, fn. 15, italics in original.)

In addition to the crimes appellant committed against McIntire and Bianchi in this case, the prosecution presented evidence of two other instances of appellant's violent criminal activity during the penalty phase pursuant to factor (b). (See 13 RT 2857.) In one instance, appellant shot at rival gang members. (6 RT 1140, 1264-1266; 9 RT 1629-1634, 1832.) In the other, he pointed a gun at two individuals who gave him dirty looks and warned them not to report the incident to the police. (7 RT 1425-1429.) The juvenile conduct underlying the adjudications for making criminal threats, brandishing a deadly weapon, and threatening school employees was not nearly as violent as appellant's adult criminal activity.

The prosecution also introduced evidence of appellant's felony convictions pursuant to factor (c). Appellant was convicted of being a felon in possession of a firearm (§ 12021, subd. (e)) (46 CT 13307, 13311; 9 RT 1836), and possession of cocaine base for sale (Health and Saf. Code, § 11351.5) (46 CT 13307, 13311; 9 RT 1836). (See 13 RT 2856.) When also considering appellant's current non-capital offenses, it is clear that the capital offense was the culmination of appellant's habitual criminality.

The prosecutor mentioned the juvenile adjudications only fleetingly in his argument to the jury. In his discussion of appellant's age, the prosecutor briefly referred to the "several felonies involving acts of violence or threatened violence before he even turned 18." (13 RT 2880.) In a discussion of the criminal activity admitted pursuant to factor (b), the prosecutor told the jury it could consider the juvenile adjudications and briefly reminded the jury what the adjudications were for. (13 RT 2888-2889.) He methodically discussed all of the relevant section 190.3 factors, but he gave the most attention to factor (a), concerning the circumstances of

the horrific crime against Officer Gray, the existence of the special circumstances, the victim impact evidence presented, and appellant's attitude towards the victim. (13 RT 2889-2894.)

The evidence of the juvenile adjudications paled in comparison to the "'[m]uch more direct and graphic evidence of [appellant's] violent conduct [that] was before the jury.' [Citation.]" (*People v. Lewis, supra*, 43 Cal.4th at p. 528.) The jury was permitted to consider the circumstances of the current crimes (factors (a) and (b)) in determining penalty. Appellant brutally shot and killed a law enforcement official at close range after deliberation and premeditation. For no apparent reason, he also shot at McIntire and Bianchi, hitting McIntire. Appellant's hateful attitude toward Officer Gray was readily apparent. In addition to his claims of harassment, he claimed Officer Gray was a "bad cop" (7 RT 1475), exclaimed that he hated Officer Gray and "Fuck Officer Gray" (7 RT 1493), and referred to him as "some pig" who "got killed" (12 RT 2568). "The cold-blooded, cruel, and senseless murder[]" of Officer Gray "sealed [appellant's] fate." (*People v. McKinnon, supra*, 52 Cal.4th at p. 684.)

To rebut the overwhelming aggravating evidence, appellant offered weak mitigating evidence. Appellant's character witnesses included his mother, sister, and niece. Each explained that appellant was like a father figure to his siblings and relatives. (13 RT 2797, 2802, 2820, 2835.) His mother explained that he had always been protective of her and only exhibited violence to protect her. (13 RT 2830-2832.) The character evidence was not persuasive, particularly in light of the fact that when he murdered Officer Gray, appellant shot in the direction of his own girlfriend and daughter.

The evidence of appellant's mental health issues was not persuasive either. A psychiatrist testified that appellant suffered from post traumatic stress disorder (13 RT 2734-2755) and impulse control disorder not

otherwise specified (13 RT 2734, 2749-2751). But the diagnoses were far-fetched and based largely on appellant's own self-serving statements. (See 13 RT 2883-2885.) For instance, Dr. Howsepian's opinions were based on the assumption that appellant had been doing well on parole and would have been discharged soon, without considering that appellant repeatedly violated the conditions of his parole and that he committed the current crimes while on parole. (13 RT 2763-2765.) Dr. Howsepian also relied on appellant's lies about the shooting of Officer Gray, including appellant's claim that he was not even in possession of a gun at the time. (13 RT 2769-2770, 2779.) The weight of Dr. Howsepian's expert opinions was dramatically diminished when he claimed that they were not affected by a reliance on false information and lies. (13 RT 2771, 2779-2780, 2785.) It was further diminished when he continued to stand by his conclusions despite his own admission that they were based on incomplete, false data. (13 RT 2785-2786.)

Under these circumstances, there is no reasonable doubt that appellant would have received the same penalty verdict even if the jury not heard or considered the allegedly inadmissible juvenile adjudication evidence. The jury found beyond a reasonable doubt appellant committed the premeditated and deliberate gang-related murder of Officer Gray while Gray was engaged in the course of performance of his duties and for the purpose of avoiding or preventing a lawful arrest. The jury also found him guilty of two counts each of being a felon in possession of a firearm, shooting at an occupied vehicle, and assault with a semiautomatic firearm, all of which were gang-related. The jury heard about appellant's callous attitude toward the murder and his extravagant attempts to evade capture. The jury also heard evidence of two other instances of violent criminal activity, both involving the use of a firearm, as well as two prior convictions, one of which involved a firearm.

It is extremely unlikely that the jurors had been ambivalent about the death penalty but were won over to that decision by relying on the juvenile adjudications for making criminal threats, brandishing a weapon, and threatening school employees. "'[I]t would require capricious speculation for [this Court] to conclude' that any error in admitting ... [evidence] under factor (b) 'affected the penalty verdict.' ([*People v. Belmontes* (1988) 45 Cal.3d 744, 809,] [erroneous admission of factor (b) evidence was harmless given that '[t]he properly admitted aggravating evidence,' i.e., 'the circumstances of the crime,' was 'overwhelming']; see *People v. Silva* (1988) 45 Cal.3d 604, 636 [ ] [finding harmless error because erroneously admitted factor (b) evidence was '"trivial when compared to [defendant's] crimes and the other proper evidence adduced at the penalty phase"'].)" (*People v. Valdez* (2012) 55 Cal.4th 82, 172.) As a result, any error in regards to the challenged juvenile adjudication evidence was harmless beyond a reasonable doubt and this Court should uphold the judgment of death.

XIV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EVIDENCE OF APPELLANT'S STATEMENT THAT HE WAS BEING HOUSED UNFAIRLY IN THE COUNTY JAIL "JUST BECAUSE SOME PIG GOT KILLED"

Next, appellant contends that the trial court erroneously admitted evidence during the penalty phase that he complained he was being housed unfairly in the county jail "just because some pig got killed." He argues that the admission of the statement was irrelevant to any statutory sentencing factor and that its probative value was substantially outweighed by the prejudicial nature of the evidence, thus violating state law and, consequently, his federal constitutional rights to due process and a fair penalty trial. (AOB 202-217.) Respondent submits that the evidence was properly admitted and that appellant constitutional rights were not violated. In any event, any error was harmless beyond a reasonable doubt.

A. Relevant Background

Prior to trial, appellant filed a motion to exclude evidence that he exhibited a lack of remorse after committing the crimes. (44 CT 12702-12704, 12708-12711.) Appellant clarified that the motion only applied to the guilt phase of the trial. (2 RT 396.)

Prior to the penalty phase, the prosecution announced its intent to introduce evidence regarding an incident in the Merced County Jail in which appellant flooded his cell because he was upset about not getting some yard time. (11 RT 2457; 12 RT 2485-2486.) According to the prosecutor, appellant made the comment during the incident, "All this because some fucking pig got killed." (11 RT 2457; 12 RT 2486.) The prosecution intended to offer the evidence as evidence of a lack of remorse pursuant to factor (a). (12 RT 2484, 2537-2538.) Appellant's counsel argued that the evidence, in particular a video of the incident, was more prejudicial than probative because it was not apparent on the video that the statement was actually made. (11 RT 2457; 12 RT 2484.) He also argued that there was no evidence to support the prosecution's assertion and requested an Evidence Code section 402 hearing. (11 RT 2457; 12 RT 2484-2486.) After appellant's counsel had further opportunity to review the video and reports and discuss the incident with the jailer, it appeared that he withdrew the more prejudicial than probative objection and related request for an Evidence Code section 402 hearing. (12 RT 2536.) He instead argued that the prosecution was not permitted to present any evidence of a lack of remorse except in rebuttal to defense evidence that appellant was remorseful, citing his prior motion regarding lack of remorse evidence. (12 RT 2484, 2536-2537.) Because the defense did not intend to present any evidence of remorse, appellant argued, the prosecution's evidence was irrelevant and inadmissible. (12 RT 2484, 2536-2537.)

The trial court ruled that evidence of remorse at the scene of the crime was admissible but postcrime evidence of lack of remorse was not admissible unless presented in rebuttal. (12 RT 2538.) The trial court further ruled that the evidence proffered by the prosecution was admissible under factor (a) as evidence of appellant's attitude towards the victim. (12 RT 2538-2539.)

During the penalty phase of the trial, Sergeant Barbara Carbonaro of the Merced County Sheriff's Department testified that on April 18, 2006, appellant was in custody in the Ad-Seg unit of the Merced County Jail. (12 RT 2566-2567, 2570.) Appellant was angry that he could not be rehoused with the jail's general population so he flooded his jail cell by bailing water out of the toilet. (12 RT 2567.) During the incident, he complained that it was unfair that he could not be housed with the general population. (12 RT 2568.) Sergeant Carbonaro described his statement: "Everybody else gets a chance and that just because some pig got killed he was there." (12 RT 2568.)

In closing argument, the prosecutor referred to appellant's statement as evidence of his attitude toward the victim during his discussion of factor (a). (13 RT 2893.) He argued:

> You should also consider in this category, ladies and gentlemen, the defendant's attitude towards his victim Stephan Gray. "Fuck Officer Gray" he told LaDonna after murdering him. Can you imagine that? "Fuck Officer Gray." I apologize.
>
> And even more shocking, ladies and gentlemen, is two years after he's murdered Stephan, two years after he's had an opportunity to dwell and reflect on what he's wrought, he tells Sergeant Carbonaro during a fit of anger because he isn't getting his way in the jail, he wants to go to the main block, bear that in mind, "All this because some pig got killed." That is a loathsome statement of utter contempt for Stephan, for his family, his friends and law enforcement, people sworn to protect all of us, including him. If that doesn't tell you who he is,

> nothing does. Factor (a), ladies and gentlemen, cannot be characterized as anything but a factor in aggravation.

(13 RT 2893-2894.) In response to appellant's counsel's argument that appellant would have the rest of his life to sit in prison and reflect on what he had done (13 RT 2924-2925), the prosecutor briefly referred to those statements again in his rebuttal argument to argue that appellant was emotionless and would not be "eaten up in his prison life about what he did." (13 RT 2935-2936.)

B. Factor (a)

A prosecutor is not permitted to introduce aggravating evidence in its case-in-chief that is irrelevant to the factors specifically listed in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-780.) Evidence that reflects directly on the defendant's state of mind at the time of the capital murder is relevant to the circumstances of the crime under factor (a). (*People v. Nelson, supra,* 51 Cal.4th at p. 224.) The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.)

Evidence of overt remorselessness, or a murderer's attitude towards his actions and the victims, at the time of the crime is admissible under factor (a). (*People v. Gonzalez, supra*, 51 Cal.3d at pp. 1231-1232; *People v. Cain* (1995) 10 Cal.4th 1, 77.) Postcrime evidence of remorselessness, however, does not fit within any statutory sentencing factor and is inadmissible as aggravating evidence. (*People v. Nelson, supra*, 51 Cal.4th at p. 224; *People v. Gonzalez, supra*, 51 Cal.4th at p. 1232.)

In *People v. Ramos* (1997) 15 Cal.4th 1133, the prosecution presented evidence of statements made by the defendant while in a holding cell at the county courthouse. (*Id.* at p. 1163.) The defendant admitted to shooting the victims and claimed to enjoy hearing them beg for their lives. (*Ibid.*)

The Court held the evidence was admissible under factor (a), as evidence reflecting directly on the defendant's state of mind contemporaneous with the murder. (*Id.* at p. 1164.)

Similarly, in *People v. Payton* (1992) 3 Cal.4th 1050, the defendant claimed testimony of a jailhouse informant regarding his statements about stabbing and raping women, and about all women being potential victims, was improperly admitted. (*Id.* at p. 1063.) In the context of an Evidence Code section 352 analysis, the Court explained, "Evidence of statements from defendant's own mouth demonstrating his attitude toward his victims was highly probative." (*Ibid.*)

As in *Ramos* and *Payton*, the trial court admitted evidence of appellant's in-custody statement concerning his attitude toward the victim. Appellant's reference to Officer Gray as a "pig" showed his extreme level of disrespect and disdain for the officer. In light of appellant's prior history with Officer Gray and his perceived harassment of appellant, as well as appellant's statements made during his attempt to evade law enforcement similarly showing his hatred of Officer Gray (7 RT 1475, 1493), the "pig" statement reflected directly on appellant's attitude toward Officer Gray at the time of the murder. It was not an attitude that was formed after the crime. Therefore, the trial court did not err when it found the statement admissible under factor (a). Because the evidence was properly admitted under state law, appellant's constitutional claims must fail as well.

C. Evidence Code Section 352

Appellant additionally argues that the trial court abused its discretion under Evidence Code section 352 because it failed to engage in an Evidence Code section 352 analysis. (AOB 207-208.) Because appellant either impliedly withdrew his Evidence Code section 352 objection or failed to request an express ruling on the objection, appellant's Evidence Code section 352 claim on appeal has been forfeited. In any event, the trial

court implicitly rejected the Evidence Code section 352 claim and did not abuse its discretion.

Appellant originally argued that the evidence the prosecution wanted to introduce, particularly the video of the incident, was more prejudicial than probative because it was not apparent from the video that the "pig" statement was actually made. (11 RT 2457; 12 RT 2484.)) After requesting a hearing under Evidence code section 402 to determine what the evidence showed, appellant's counsel reviewed the video and reports of the incident and discussed the incident with Sergeant Carbonaro, which appeared to assuage his concerns regarding the making of the statement. (12 RT 2536; see 11 RT 2457; 12 RT 2484-2486.) When the trial court asked to hear Evidence Code section 402 testimony from Sergeant Carbonaro about the incident, appellant's counsel explained:

> I had an opportunity to go over the DVD and the reports last night and talk to Sergeant Carbonaro. Our position is it's not admissible anyway.

(12 RT 2536.) Appellant then relied solely on the report and argument that the evidence was inadmissible as evidence of remorselessness. (12 RT 2536-2537.) For that reason, the trial court had no reason to hear any Evidence Code section 402 testimony.

Appellant implicitly withdrew his Evidence Code section 352 objection. (*People v. Valdez* (2004) 32 Cal.4th 73, 132 [defendant implicitly withdrew objection when, before court ruled, prosecutor stated he would not use evidence in complained-about fashion].) And even if appellant did not withdraw his Evidence Code section 352 objection, he still failed to request that the court make an express ruling on the objection. (*People v. Morris* (1991) 53 Cal.3d 152, 195.) Therefore, appellant has forfeited the claim on appeal. (*Id.* at pp. 131-132.) Nevertheless, assuming that appellant's Evidence Code section 352 objection was not forfeited, the

trial court implicitly found the evidence more probative than prejudicial when it determined that it could be admitted under factor (a). (See *People v. Lewis, supra*, 6 Cal.4th at p. 1285.) The trial court did not abuse its discretion.

D. Harmless Error

Even assuming that the evidence of appellant's "pig" statement should have been excluded, any error was harmless beyond a reasonable doubt. "'State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of [*Chapman v. California, supra,* 386 U.S. at p. 24]. [Citations.]' [Citations.]" (*People v. Nelson, supra,* 51 Cal.4th at pp. 218-219, fn. 15, italics in original.)

Appellant suggests that in order to prove any error was harmless, respondent must prove that the verdict actually rendered was surely unattributable to the error, citing *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279. (AOB 213-214, 217.) That is the incorrect standard to apply here. As respondent has previously explained, the *Chapman* harmless error analysis depends on proof beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, not simply on proof that the jury actually rested its verdict on a proper ground. (*People v. Cross, supra*, 45 Cal.4th at pp. 69-71 (conc. opn. of Baxter, J.).) Such a showing may be made if, based on overwhelming evidence, the jury would have reached the same verdict absent the error. (*Id.* at p. 72; *People v. Nelson, supra*, 51 Cal.4th at p. 224 ["In light of this evidence, it strains credulity to suggest that the jury was improperly influenced by" the admission of the challenged evidence].)

There was no reasonable possibility that any error in admitting the "pig" statement affected the death verdict. First of all, the evidence of appellant's statement that "some pig got killed" was essentially cumulative of other evidence establishing his animosity toward Officer Gray in particular, and toward police officers in general. During the guilt phase, evidence was introduced that appellant called Officer Gray a "bad cop" who had harassed him and others (6 RT 1236, 1242; 7 RT 1475). Appellant had said, "I hate Officer Gray. I hate Officer Gray. Fuck Officer Gray" (7 RT 1493) after he killed the officer. It was already apparent from the evidence that appellant hated and disrespected Officer Gray. His hatred and disrespect were never more apparent than when he shot and killed Officer Gray in the lawful performance of his duties as a peace officer. The jury would have come to the same conclusions about appellant with or without the "pig" statement being admitted.

Second, the prosecution presented overwhelming aggravating evidence in support of the death verdict. The circumstances of appellant's killing of Officer Gray presented aggravating evidence alone. Appellant premeditated and deliberated the killing. He shot Officer Gray twice from close range before the officer even had a chance to unsecure his firearm from its holster. Appellant then engaged in extravagant attempts to evade capture by law enforcement, causing a statewide manhunt joined by numerous law enforcement agencies. The jury found beyond a reasonable doubt that appellant committed first degree murder against a peace officer and found two special circumstances to be true.

In addition to the circumstances of the crime, three other factors supported a death verdict. Although appellant's age, 21, could have been viewed as a factor in mitigation, it was an aggravating factor because he had been an active participant and gang member in one of the most violent gangs in Merced since he was 16 years old and had committed many

felonies involving acts of violence, and he had threatened violence during that time. His unsuccessful performance while on parole showed that he would not be rehabilitated and that he had intentionally chosen to lead a life of violent crime. (See 13 RT 2879-2882.)

The prosecution presented evidence of several instances of appellant's violent criminal activity pursuant to factor (b). (See 13 RT 2857, 2886-2889.) The most significant act of his violent criminal activity was the shooting of Bianchi and McIntire, for which the jury found appellant guilty of being a felon in possession of a firearm, shooting at an occupied vehicle, and assault with a semiautomatic firearm with various gang and firearm enhancements during the guilt phase. In that senseless shooting, appellant shot at two innocent citizens simply because one of them raised his hands in response to appellant and his passengers doing the same thing. In another incident, appellant shot at rival gang members. (6 RT 1140, 1264-1266; 9 RT 1629-1634, 1832.) In a third incident strikingly similar to the Bianchi-McIntire shooting, appellant pointed a gun at two individuals who gave him dirty looks and warned them not to report the incident to the police. (7 RT 1425-1429.) Four juvenile adjudications for making criminal threats, brandishing a deadly weapon, and threatening school employees merely added to appellant's impressive resume of violent criminal activity for such a young individual. (12 RT 2579-2582.)

The prosecution also introduced evidence of appellant's felony convictions pursuant to factor (c). Appellant was convicted of being a felon in possession of a firearm (§ 12021, subd. (e)) (46 CT 13307, 13311; 9 RT 1836), and possession of cocaine base for sale (Health and Saf. Code, § 11351.5) (46 CT 13307, 13311; 9 RT 1836). (See 13 RT 2856, 2886.) When also considering the current non-capital offenses, it is clear that the capital offense was the culmination of appellant's habitual criminality.

To rebut the overwhelming aggravating evidence, appellant offered weak mitigating evidence. Appellant's character witnesses included his mother, sister, and niece. Each explained that appellant was like a father figure to his siblings and relatives. (13 RT 2797, 2802, 2820, 2835.) His mother explained that he had always been protective of her and only exhibited violence to protect her. (13 RT 2830-2832.) The character evidence was not persuasive, particularly in light of the fact that during the current crime, appellant shot in the direction of his own girlfriend and daughter.

The evidence of appellant's mental health issues was not persuasive either. A psychiatrist testified that appellant suffered from post traumatic stress disorder (13 RT 2734-2755) and impulse control disorder not otherwise specified (13 RT 2734, 2749-2751), but the diagnoses were far-fetched and based largely on appellant's own self-serving statements. (See 13 RT 2883-2885.) For instance, Dr. Howsepian's opinions were based on the assumption that appellant had been doing well on parole and would have been discharged soon, without considering that appellant repeatedly violated the conditions of his parole and that he committed the current crimes while on parole. (13 RT 2763-2765.) Dr. Howsepian also relied on appellant's lies about the shooting of Officer Gray, including that he was not even in possession of a gun at the time. (13 RT 2769-2770, 2779.) The weight of his expert opinions was dramatically diminished when he claimed that they were not affected by a reliance on false information and lies. (13 RT 2771, 2779-2780, 2785.) It was further diminished when he continued to stand by his conclusions despite his own admission that they were based on incomplete, false data. (13 RT 2785-2786.)

Based on this record, including the circumstances of appellant's senseless murder of Officer Gray, coupled with appellant's lifelong pursuit of criminal activity involving the use or threatened use of force or violence,

admission of appellant's statement that "some pig got killed" would not have affected the jury's penalty determination and thus was harmless beyond a reasonable doubt.

Appellant argues that the prosecutor's reliance on the "pig" statement strongly indicates that he was prejudiced by its admission. (AOB 210-214.) The prosecutor referred to the statement just once during his first closing argument in a discussion of factor (a), and once more during his rebuttal argument to specifically rebut appellant's counsel's argument that appellant would have the rest of his life to sit in prison and reflect on what he had done. The prosecutor did not focus or dwell on the statement. Rather, the prosecutor methodically discussed all of the relevant section 190.3 factors. The "pig" statement was just one small piece of the puzzle of evidence presented by the prosecutor in support of a death verdict.

Appellant also argues that the jury's requested readback of Sergeant Carbonaro's testimony regarding the "pig" statement and other defense evidence in mitigation indicated any error was not harmless beyond a reasonable doubt. (AOB 214-215.) The jury made several requests during deliberations including for readback of testimony from both prosecution and defense witnesses (48 CT 13746, 13755, 13763), to view the videotaped law enforcement interview of appellant (48 CT 13756) and photographs of Officer Gray's body after the murder (48 CT 13764), questions about the instructions (48 CT 13746), and other administrative requests (48 CT 13755). Despite the many jury requests, nothing in the record suggests there was any dissension, deadlock, or hold out among the jurors during the penalty phase deliberations. The requests reflect the jury's care in considering all relevant evidence presented in both the guilt phase and penalty phase of the trial during deliberations after a two-week delay between the guilt phase and penalty phase, not a jury emphasis on certain evidence.

For the reasons already stated, there was no reasonable possibility that any error affected the verdict and any error was harmless beyond a reasonable doubt. Thus, the death judgment should be affirmed.

XV. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY REGARDING THE FLOODING INCIDENT

Appellants contends that the trial court prejudicially erred when it permitted the prosecution to introduce testimony during the penalty phase that appellant flooded his cell while in pretrial confinement. (AOB 218-224.) He claims that the evidence was improperly admitted as an aggravating factor under factor (b), in violation of his state and federal constitutional rights to due process and a fair and reliable penalty determination. His claim fails for several reasons.

First, the evidence concerning the flooding incident was not admitted under factor (b). The trial court never addressed the admissibility of the flooding incident apart from the admissibility of the "pig" statement that occurred during the incident, and it was never asked to do so by the defense. The "pig" statement and the circumstances surrounding it were admitted by the trial court under factor (a), as evidence of appellant's attitude toward the victim.[33] (12 RT 2538-2539.) The jury was never informed, by either the parties or the court, that it could consider the flooding incident as evidence of violent criminal activity under factor (b). (13 RT 2857, 2887-2889.) To the extent appellant believes the flooding incident evidence was admitted under factor (b), he is mistaken.

[33] It is worth noting that the facts regarding appellant's extraction from his cell after the flooding were first elicited by appellant's counsel on cross-examination (12 RT 271-2572), not by the prosecutor.

Second, the evidence was properly admitted as context for the "pig" statement under factor (a).[34] That appellant was angry about the circumstances of his confinement, that he acted on his anger by flooding his cell, and the jailer's response to the situation were necessary facts to provide context to appellant's "pig" statement. Sergeant Carbonaro explained that his statement, "Everybody else gets a chance and that just because some pig got killed he was there," was the reason appellant gave for his conduct. (12 RT 2567-2568.) The jury would not have been able to properly evaluate appellant's statement without placing it in the proper context.

Third, any error in admitting the circumstances surrounding the "pig" statement was harmless. The evidence of the flooding incident apart from the "pig" statement would not have been used by the jury as aggravating evidence on its own, and neither party nor the court indicated otherwise to the jury. The evidence was merely context for the "pig" statement and was only useful for that purpose. Appellant could not possibly have been prejudiced by the admission of context evidence. Additionally, any error was harmless beyond a reasonable doubt in light of the prosecutor's evidence in aggravation for the reasons set forth in the preceding argument.

XVI. THE JURY PROPERLY RELIED ON THE SPECIAL CIRCUMSTANCE THAT APPELLANT MURDERED OFFICER GRAY FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST IN REACHING ITS DEATH VERDICT

Appellant contends that the death judgment must be reversed because the jury's reliance on an invalid sentencing factor—the special circumstance allegation that he committed murder for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to

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[34] The "pig" statement was properly admitted under section 190.3, factor (a), for the reasons expressed the previous argument.

perfect, an escape from lawful custody—rendered the sentence unconstitutional. (AOB 225-229.) The jury properly relied on the special circumstance in reaching its death verdict. In any event, there was no constitutional violation.

As respondent explained in Argument V, *ante*, the jury necessarily made the findings required to support the section 190.2, subdivision (a)(5) special circumstance on the valid theory that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Therefore, it properly relied on its true finding for the special circumstance in reaching its death verdict.

Even if the special circumstance could be considered an invalid sentencing factor, the jury's consideration of it did not give rise to a constitutional violation. An invalidated sentencing factor will not render the sentence unconstitutional if one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. (*Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884]; see *People v. Debose* (2014) 59 Cal.4th 177, 196.)

Here, the aggravating facts and circumstances underlying the special circumstance at issue were also available for the jury's consideration as "the circumstances of the crime of which the defendant was convicted in the present proceeding" under factor (a). The purpose for Officer Gray's murder—the subject of the special circumstance—was a circumstance of the crime and therefore properly considered as evidence in aggravation under that factor. The same facts and circumstances also would have been properly considered in support of the prosecution's theory of murder as well as the other special circumstance allegation found true by the jury that appellant intentionally killed a peace officer who was engaged in the course of performance of his duties (§ 190.2, subdivision (a)(7)). Therefore, there

was no constitutional violation and reversal of the death verdict is not required.[35]

In *Brown,* the United States Supreme Court came to the same conclusion. Two of the four special circumstances found true by the jury and considered by the jury as sentencing factors had been declared invalid by this Court.[36] (*Brown v. Sanders, supra*, 546 U.S. at pp. 214-215, 223.) The high court held that all the facts and circumstances supporting the two invalidated special circumstances were also open to the jury's proper consideration as circumstances of the crime under factor (a). (*Id.* at pp. 222-224.)

Similarly, this Court has repeatedly held that reversal of the death penalty is not required when the facts and circumstances admitted to establish an invalidated special circumstance are also properly considered as circumstances of the crime under factor (a). In *People v. Debose, supra,* 59 Cal.4th 177, an arson-murder special circumstance was invalidated as a sentencing factor because there was insufficient evidence to support it. (*Id.* at p. 195.) *Debose* held there was no constitutional error because all the facts and circumstances admissible to establish the arson-murder special circumstance "'were also properly adduced as aggravating facts bearing

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[35] Appellant argues that the jury considered an "erroneous fact that appellant was in lawful custody at the time of the killing." (AOB 228.) The jury did not make an express finding that appellant was in lawful custody at the time of the killing. Nor did the prosecutor ask it to consider any such fact. In any event, the facts and circumstances of the crime were properly considered in support of the prosecution's theory of murder, the other special circumstance allegations, and as "circumstances of the crime" under factor (a).

[36] The invalidated special circumstances were the burglary-murder special circumstance (§ 190.2, subd. (a)(17)(G)) and the "especially heinous, atrocious, or cruel" special circumstance (§ 190.2, subd. (a)(14)). (*Brown v. Sanders, supra*, 546 U.S. at p. 223.)

upon the "circumstances of the crime" sentencing factor.'" (*Id.* at p. 196, quoting *Brown v. Sanders, supra*, 546 U.S. at p. 224.) *Debose* also rejected the notion of a likelihood that the jury's consideration of the mere existence of the special circumstance "'tipped the balance toward death.'" (*Debose*, at p. 196, quoting *People v. Mungia* (2008) 44 Cal.4th 1101, 1139.) This Court has made similar holdings recently in *People v. Carrasco* (2014) 59 Cal.4th 924, 970, where the same evidence supported theories of murder and other special circumstance allegations, and *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1186-1187, where the evidence of an invalid special circumstance was also considered as "circumstances of the crime." In *People v. Maciel* (2013) 57 Cal.4th 482, 521, the same evidence used to support a multiple murder special circumstance would also have been admissible under the prosecutor's alternate theory and would not have changed the facts available to the jury in making its penalty determination. Finally, in *People v. Castaneda* (2011) 51 Cal.4th 1292, 1354, this Court vacated a kidnapping special circumstance, but nevertheless upheld the death judgment because the jury was authorized to consider the same evidence under factor (a). This Court should reach the same result in this case.

XVII. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON LINGERING DOUBT

Appellant contends that the trial court violated his state and federal constitutional rights to present a defense, to due process, to a fair trial, to a trial by jury, and to a reliable determination of penalty when it refused to give a requested instruction on the concept of lingering doubt. (AOB 230-236.) The trial court properly refused to give the jury a lingering doubt instruction.

A. Relevant Background

Appellant filed a motion in limine prior to the penalty phase requesting the standard CALJIC No. 8.85 jury instruction be modified to include an instruction on the concept of lingering doubt. (48 CT 13649-13652.) The trial court initially informed appellant that it would not instruct on lingering doubt, although it would permit him to argue lingering doubt to the jury. (12 RT 2509-2511.) The trial court agreed to review appellant's motion and supporting authorities again. (12 RT 2510-2511.) The next day, after reviewing the relevant case law, the trial court ruled that it would not instruct the jury on lingering doubt. (12 RT 2531.)

The court instructed the jury with CALJIC No. 8.85, which provided that the jury shall consider "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." (13 RT 2848; 48 CT 13864-13865.) During closing argument, appellant's counsel argued that the jury should consider any lingering doubt as a mitigating factor. (13 RT 2922-2923.)

B. Analysis

There is no state or federal constitutional right to a lingering doubt instruction at the penalty phase of a capital case, even if such an instruction is requested by the defendant. This Court has repeatedly rejected claims that the trial court must instruct the jury on lingering doubt. (*People v. Boyce* (2014) 59 Cal.4th 672, 708-709; *People v. Jackson* (2014) 58 Cal.4th 724, 769-770; *People v. Edwards* (2013) 57 Cal.4th 658, 765; *People v. Thomas* (2012) 53 Cal.4th 771, 826; *People v. Hartsch* (2010) 49 Cal.4th 472, 512-513; *People v. Rogers* (2009) 46 Cal.4th 1136, 1176; *People v.*

Lewis (2009) 46 Cal.4th 1255, 1314.) The standard CALJIC No. 8.85 instruction, which tells the jury that it shall consider "the circumstances of the crime" and "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," sufficiently encompasses the concept of lingering doubt. (*People v. Boyce*, at pp. 708-709; *People v. Rogers,* at p. 1176.) Moreover, counsel argued in closing that a juror with lingering doubt as to appellant's guilt should consider that doubt in mitigation. (*People v. Boyce*, at p. 709.)

Appellant relies on footnote 20 in *People v. Cox* (1991) 53 Cal.3d 618, 678, for the proposition that a lingering doubt instruction may be warranted by the evidence in any particular case. (AOB 232.) This argument has also been rejected, as this Court has since concluded that a lingering doubt instruction is unnecessary when the jury is properly instructed, as it was here, regarding the aggravating and mitigating factors described in factors (a) and (k). (*People v. Thomas, supra*, 53 Cal.4th at pp. 826-827; *People v. Hartsch, supra*, 49 Cal.4th at pp. 512-513.) There is no reason this Court should reconsider its precedent on this issue.

Because no lingering doubt instruction is required, defense counsel argued the issue to the jury, and the jury was properly instructed regarding the aggravating and mitigating factors, the court did not err in refusing to instruct the jury on lingering doubt.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant raises an array of familiar arguments challenging the constitutionality of California's death-penalty statute and the jury instructions implementing it. (AOB 237-252.) As appellant acknowledges,

all of these claims have been rejected by this Court in prior cases. Appellant presents no compelling reason for this Court to reconsider any of its previous holdings. In asking this Court to reconsider those decisions, appellant states that he wishes to preserve them for federal habeas review. (AOB 233.) In light of those circumstances, respondent will address appellant's claims only briefly.

A. Factor (a) Appropriately Allows the Jury to Consider Circumstances of the Crime

Appellant contends that factor (a), which allows jurors to consider the circumstances of the crime in determining penalty, permits them "to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death" and that it therefore violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 237-239.)

This Court has repeatedly rejected this claim finding that "factor (a) is not impermissibly overbroad facially or as applied." (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein.) Factor (a) correctly allows the jury to consider the "circumstances of the crime." (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson, supra,* 51 Cal.4th at p. 225; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

B. California's Death Penalty Scheme and Corresponding Instructions Set Forth the Appropriate Burden of Proof

Appellant contends California's death penalty scheme and accompanying penalty-phase instructions fail to set forth the appropriate burden of proof. (AOB 239-248.) Appellant argues that: (1) the jury was not instructed that it had to find that the aggravating factors outweighed any

mitigating factors beyond a reasonable doubt (AOB 239-241); (2) the jury was not instructed that the prosecution had the burden of persuasion regarding any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, or, in the alternative, that neither party had the burden of proof (AOB 242-243); (3) the jury was not instructed that it had to unanimously find aggravating factors true beyond a reasonable doubt (AOB 243-245); (4) the instructions were impermissibly broad or vague in directing jurors to determine whether the aggravating factors were "so substantial" in comparison to the mitigating factors (AOB 245-246); (5) the jury was not instructed that the central determination is whether death is the appropriate punishment (AOB 246-247); and (6) the jury was not instructed regarding the presumption of life (AOB 247-248).

1. Aggravating factors outweigh mitigating factors

This Court has found that "the greater weight of aggravating circumstances relative to mitigating circumstances ... are not subject to a burden-of-proof qualification. [Citations.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 487-488, and cases cited therein.) This Court has further found that "'[n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[ ].' [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Lee, supra,* 51 Cal.4th at pp. 651-652.)

2. Burden of proof or no burden of proof

This Court has found that "[t]he death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a

reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 469; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1298; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Lomax* (2010) 49 Cal.4th 530, 594-595.) The death penalty law and instructions are also not defective "for failing to inform the jury that there was no burden of proof." (*People v. Gonzales, supra,* at p. 1298; *People v. Lomax, supra*, at p. 595.)

3. Unanimity of aggravating factors

This Court has found that section 190.3 is not unconstitutional "for failing to require unanimity as to the applicable aggravating factors. [Citation.]" (*People v. Elliot, supra,* 37 Cal.4th at pp. 487-488.) This Court has further held that "'[n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[ ].' [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Lee, supra,* 51 Cal.4th at pp. 651-652.)

4. "So substantial" standard

This Court has found that "[t]he instructions were not impermissibly broad or vague in directing jurors to determine whether the aggravating factors were 'so substantial in comparison with the mitigating factors that it warrants death instead of life without parole.' [Citation.]" (*People v. Valdez, supra,* 55 Cal.4th at p. 180, citing *People v. Carter* (2003) 30

Cal.4th 1166, 1226; *People v. Gonzales, supra,* 54 Cal.4th at pp. 1298-1299; *People v. Lomax, supra,* 49 Cal.4th at p. 595.)

5. Central determination whether death is the appropriate penalty

This Court has found that "CALJIC No. 8.88 does not improperly fail to inform the jury that the central determination is whether death is the 'appropriate punishment.' The instruction properly explains to the jury that it may return a death verdict if the aggravating evidence 'warrants' death. [Citations.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Gonzales, supra,* 54 Cal.4th at p. 1299; *People v. Mendoza* (2007) 42 Cal.4th 686, 707.)

6. Presumption of life

This Court has found that "[t]he court was not required to instruct on a 'presumption of life.' [Citations]" (*People v. Gonzales, supra,* 54 Cal.4th at p. 1299; *People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Lomax, supra,* 49 Cal.4th at pp. 594-595.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

C. The Jury Instructions Regarding Mitigating and Aggravating Factors Were Constitutional

Appellant contends the penalty phase jury instructions regarding mitigating and aggravating factors violated his constitutional rights. (AOB 248.) He argues that the trial court failed to delete inapplicable sentencing factors.

This Court has found that "[t]he trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. [Citation.]" (*People v. McDowell, supra,* 54 Cal.4th at p. 444; *People v. Stitely* (2005) 35 Cal.4th 514, 574.) "[T]he full list of factors may be put before the jury

as a framework for the penalty determination. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 624.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

D. The United States Constitution Does Not Require Inter-case Proportionality Review of Death Sentences

Appellant contends that California's death penalty scheme violates the United States Constitution because it does not require "inter-case proportionality review" of sentences. (AOB 248-249.)

This Court has repeatedly rejected the claim that the United States Constitution requires inter-case proportionality review of death sentences. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

E. California's Death Penalty Law Does Not Deny Capital Defendants Equal Protection under the Law

Appellant contends that California's death penalty scheme violates the Equal Protection Clause because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. Appellant claims that unlike noncapital cases, the death penalty scheme is unconstitutional because there is no standard of proof in the penalty phase, no requirement of juror unanimity on the aggravating factors, and no requirement that the jury justify the death sentence with written findings. (AOB 249-250.)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated. [Citations.]" (*People v. Lee, supra,* 51 Cal.4th at p. 653.) In other words,

> "The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]" [Citation.]

(*People v. Thomas, supra,* 51 Cal.4th at p. 507.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

F. Application of the Death Penalty Does Not Violate International Norms

Appellant claims his sentence violates international law. (AOB 250-252.) This Court has repeatedly held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 539; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Boyer* (2006) 38 Cal.4th 412, 489-490.) Because appellant has failed to show that either state or federal law was violated, this Court need not consider his claim of international law violations. (*People v. Hoyos, supra* 41 Cal.4th at p. 925; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

Moreover, appellant fails to demonstrate standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments, not individuals. (See *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.) Appellant does not have standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Under general principles of

international law, individuals have no standing to challenge violation of international treaties in absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

International law does not compel the elimination of capital punishment in California. (*People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities did not compel elimination of the death penalty and do not have any effect upon domestic law unless they are either self-executing or implemented by Congress. (*Ghent*, at p. 779; *Hillhouse*, at p. 511.)

In sum, appellant has failed to state a cause of action under international law for the simple reason that his claims of constitutional violations asserted throughout the appeal are without merit. Further, this Court is not a substitute for international tribunals and, in any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal and state statutory or judicial law. Finally, this Court's earlier decisions preclude relief.

G. There Was No Cumulative Error Regarding California's Capital Sentencing Scheme

Appellant further contends that the cumulative impact of the alleged deficiencies in California's capital sentencing scheme render California's death penalty law unconstitutional. (AOB 252.)

As respondent has explained, all of appellant's challenges to California's death penalty law lack merit. His claims are no more compelling when they are considered together. (*People v. Williams* (2013) 58 Cal.4th 197, 296; *People v. Garcia* (2011) 52 Cal.4th 706, 765.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

XIX. THERE WAS NO CUMULATIVE PREJUDICE FROM GUILT PHASE AND PENALTY PHASE ERRORS WARRANTING REVERSAL

Finally, appellant contends that the cumulative effect of the alleged errors in the guilt phase and penalty phase warrants reversal of his convictions. (AOB 253-258.) This claim is without merit. As respondent explained in Argument XII, *ante*, there was no cumulative prejudice arising from any errors at the guilt phase. Similarly, either there were no errors during the penalty phase or any errors were harmless, such that there was no cumulative prejudice from any errors at the penalty phase. Appellant's claims are no more compelling or prejudicial when considered together. (*People v. Garcia, supra*, 52 Cal.4th at p. 765.) Therefore, appellant's claim of cumulative prejudice must fail.

CONCLUSION

Accordingly, respondent respectfully asks this Court to affirm appellant's judgment of conviction and the penalty of death.

Dated: September 24, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 43,079 words.

Dated: September 24, 2015

KAMALA D. HARRIS
Attorney General of California

DARREN K. INDERMILL
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rivera**
No.: **S153881**

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 September 25, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Stephen M. Lathrop
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Certified Appellate Law Specialist
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Board of Legal Specialization
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(Representing Appellant
Cuitlahuac Rivera)

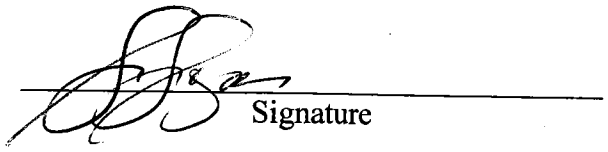
Colusa County Superior Court
Clerk of the Superior Court
532 Oak Street
Colusa, CA 95932

Honorable Larry Morse II
Merced County District Attorney
550 West Main Street
Merced, CA 95340

Supreme Court California S.F.
San Francisco Branch
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 25, 2015, at Sacramento, California.

L. Lozano
Declarant


Signature

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