In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FRANK CHRISTOPHER GONZALEZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S163643

Los Angeles County Superior Court Case No. NA71779
The Honorable Joan Camparet-Cassani, Judge

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TABLE OF CONTENTS

Page

Statement of the Case....1

Statement of Facts....2

I. The guilt phase....2

A. The prosecution evidence....2

1. Appellant murders Los Angeles County Sheriff's Deputy Maria Rosa during an attempted robbery....2

2. Appellant admits to his girlfriend and sister that he murdered Deputy Rosa....5

3. The investigation of the murder....6

4. The undercover operation....7

5. Rowan and Celina concoct an alibi for appellant and lie to the police....11

6. The DNA Evidence....13

B. The defense evidence....13

II. The penalty phase....13

A. The prosecution evidence....13

1. Appellant's criminal activity....13

a. The February 1994 robbery of La Concha Restaurant in Long Beach....13

b. The February 1994 parking lot robbery in Long Beach....14

c. The February 17, 1994 robbery of Patrick Park and Ed Duncan at a Long Beach ATM....14

d. The February 24, 1994 robbery of Kang and Sam An's liquor store in Long Beach....14

e. The February 24, 1994 robbery of a Baskin Robbins in Long Beach....15

TABLE OF CONTENTS
(continued)

Page

f. Appellant admits to the string of robberies in Long Beach 15

g. The February 5, 2006 shooting at Chris' Burger in Downey 16

h. The February 23, 2006 shooting on Locust Street in Long Beach 18

i. The March 1, 2006 alley shooting near Cedar Avenue in Long Beach 19

j. The March 8, 2006 carjacking in Long Beach 19

k. The July 25, 2007 razor incident with a fellow inmate 20

l. The August 28, 2007 attack on Los Angeles County Sheriff's Deputy Gregory Campbell 20

m. The September 21, 2007 incident with Los Angeles County Sheriff's Deputy Adrian Ruiz 21

n. Appellant's membership in the gang Barrio Pobre 21

2. Victim impact evidence 22

B. The defense evidence 24

Argument 27

I. Sufficient evidence supported appellant's conviction for the attempted second degree robbery of Maria Rosa 27

A. The relevant trial court proceedings 27

B. The prosecution presented sufficient independent evidence of the corpus delicti 28

TABLE OF CONTENTS
(continued)

Page

II. The corpus delicti rule was inapplicable to the underlying attempted robbery with respect to appellant's conviction for murder under the felony-murder doctrine 30

III. Appellant did not have a right to counsel when law enforcement elicited incriminating statements from him 32

A. The relevant trial court proceedings 33

B. Appellant's right to counsel was not triggered before he was formally charged 33

IV. The trial court did not abuse its discretion when it denied appellant's motion to continue the trial 36

A. The relevant trial court proceedings 36

B. The trial court weighed the appropriate factors and did not act arbitrarily 36

V. The admission of Julie Watkins' testimony regarding the DNA analysis did not violate the confrontation clause 42

VI. The trial court did not err when it denied appellant's motion to suppress because even if the wiretap application did not strictly comply with precise procedures, suppression was unwarranted under the circumstances 54

A. The relevant trial court proceedings 54

B. The wiretap application complied with the relevant statutory requirements, and appellant's mechanical interpretation of wiretap law is untenable and unsupported by binding authority 55

VII. The trial court did not improperly coerce testimony from Rowan and Celina, who were both evasive and uncooperative witnesses 60

A. The relevant trial court proceedings 60

TABLE OF CONTENTS
(continued)

Page

B. The trial court acted within its discretion when it permitted the prosecution to ask Rowan and Celina leading questions and reminded both witnesses of the obligation to testify truthfully.....62

VIII. The trial court did not abuse its discretion when it restricted appellant's cross-examination of Rowan and Celina.....66

A. The relevant trial court proceedings.....67

B. Appellant's counsel engaged in impermissibly argumentative cross-examination and, regardless, was permitted to elicit the sought after testimony.....68

IX. Videotape clip #16 regarding a carjacking was admissible as an adoptive admission relevant to appellant's guilt for the attempted robbery and murder of Deputy Rosa, as well as for the non-hearsay purpose of providing context to the recorded discussions.....71

A. The relevant trial court proceedings.....72

B. The evidence was relevant because it tended to prove that appellant was responsible for the murder of Deputy Rosa.....73

C. Clip #16 contained an admissible adoptive admission and, regardless, was admissible for the non-hearsay purpose of providing context for appellant's admissions during the undercover operation.....75

X. The trial court's admission of the officers' testimony regarding the video recordings of the undercover operation did not violate the "secondary evidence rule".....77

XI. The prosecution presented sufficient evidence of the uncharged carjacking and armed robberies under the corpus delicti rule for the jury to consider appellant's admissions in video clip #1 and clip #3 under section 190.3, subdivision (b), during the penalty phase.....81

TABLE OF CONTENTS
(continued)

Page

XII. The trial court did not abuse its discretion by admitting a videotape as victim impact evidence at the penalty phase 84

XIII. California's death penalty statute, as interpreted by this court and applied at appellant's trial, does not violate the federal constitution 88

XIV. No cumulative prejudice exists in this case 90

Conclusion 91

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey
(2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] 89

Blakely v. Washington
(2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] 89

Bullcoming v. New Mexico
(2011) __U.S.__ [131 S.Ct. 2705, 180 L.Ed.2d 610] 45, 46

Chapman v. California
(1967) 386 U.S. 18 [17 L.Ed.2d 705] 53, 59, 66, 76

Coolidge v. New Hampshire
(1971) 403 U.S. 443 [91 S.Ct. 2022, 29 L.Ed.2d 564] 59

Crawford v. Washington
(2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] 42, 43, 44

Cunningham v. California
(2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] 89

Davis v. Alaska
(1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347] 68

Davis v. Washington
(2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] 43, 44, 47

Delaware v. Fensterer
(1985) 474 U.S. 15 [106 S.Ct. 292, 88 L.Ed.2d 15] 69

Delaware v. Van Arsdall
(1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674] 68

Delaware v. Van Arsdall
(1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674] 53, 68, 69

Faretta v. California
(1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] 40

Ferrel v. Superior Court
(1978) 20 Cal.3d 888 40

In re Ryan N.
(2001) 92 Cal.App.4th 1359 ..... 68, 69

Kirby v. Illinois
(1972) 406 U.S. 682 [92 S.Ct. 1877, 32 L.Ed.2d 411] 33

Massiah v. United States
(1964) 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246] 34

Melendez-Diaz v. Massachusetts
(2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314] 44, 45, 46

Michigan v. Bryant
(2011) 562 U.S.__ [131 S.Ct. 1143, 179 L.Ed.2d 93] 46, 47

Nunes v. Superior Court
(1980) 100 Cal.App.3d 915 59

Owens v. Superior Court
(1980) 28 Cal.3d 238 39

Payne v. Tennessee
(1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] 84

People v. Allen
(1986) 42 Cal.3d 1222 65

People v. Alvarez
(2002) 27 Cal.4th 1161 ..... passim

People v. Amaya
(1952) 40 Cal.2d 70 31

People v. Armendariz
(1984) 37 Cal.3d 573 76

People v. Babbitt
(1988) 45 Cal.3d 660 69

People v. Barba
(2013) 215 Cal.App.4th 712 ..... 50, 52, 53

People v. Beames
(2007) 40 Cal.4th 907 37

People v. Beeler
(1995) 9 Cal.4th 953 38

People v. Belmontes
(1988) 45 Cal.3d 744 68

People v. Bliss
(1919) 41 Cal.App. 65 63

People v. Bolinski
(1968) 260 Cal.App.2d 705 32

People v. Booker
(2011) 51 Cal.4th 141 85

People v. Box
(2000) 23 Cal.4th 1153 91

People v. Boyd
(1985) 38 Cal.3d 762 83

People v. Boysen
(2007) 152 Cal.App.4th 1409 34

People v. Bradford
(1997) 15 Cal.4th 1229 35

People v. Bramit
(2009) 46 Cal.4th 1221 85

People v. Brown
(2003) 31 Cal.4th 518 75

People v. Brown
(2004) 33 Cal.4th 382 ..... 87, 88

People v. Bryant
(1984) 157 Cal.App.3d 582 64

People v. Cantrell
(1973) 8 Cal.3d 672 31

People v. Carpenter
(1997) 15 Cal.4th 312 82

People v. Chatman
(2006) 38 Cal.4th 344 70

People v. Chun
(2009) 45 Cal.4th 1172 32

People v. Clair
(1992) 2 Cal.4th 629 83

People v. Cook
(2006) 39 Cal.4th 566 90

People v. Cooper
(1960) 53 Cal.2d 755 31

People v. Courts
(1985) 37 Cal.3d 784 37

People v. Crittenden
(1994) 9 Cal.4th 83 ..... 55, 65

People v. Cunningham
(2001) 25 Cal.4th 926 91

People v. Daly
(1992) 8 Cal.App.4th 47 32

People v. Doolin
(2009) 45 Cal.4th 390 ..... 37, 38

People v. Dungo
(2012) 55 Cal.4th 608 ..... 48, 49, 50

People v. Dykes
(2009) 46 Cal.4th 731 ..... 84, 88

People v. Flannel
(1979) 25 Cal.3d 668 31

People v. Froehlig
(1991) 1 Cal.App.4th 260 37

People v. Frye
(1998) 18 Cal.4th 894 69

People v. Fudge
(1994) 7 Cal.4th 1075 69

People v. Garceau
(1993) 6 Cal.4th 140 73

People v. Garcia
(2011) 52 Cal.4th 706 84

People v. Garrison
(1989) 47 Cal.3d 746 65

People v. Gatlin
(1989) 209 Cal.App.3d 31 38

People v. Geier
(2007) 41 Cal.4th 555 ..... 42, 43, 44, 45

People v. Grey
(1972) 23 Cal.App.3d 456 63

People v. Grossman
(1971) 19 Cal.App.3d 8 59

People v. Hajek
(2014) 58 Cal.4th 1144 82

People v. Hansen
(1994) 9 Cal.4th 300 32

People v. Hill
(1998) 17 Cal.4th 800 91

People v. Holmes
(2012) 212 Cal.App.4th 431 ..... 50, 51, 53

People v. Holt
(1997) 15 Cal.4th 619 30

People v. Howard
(2010) 51 Cal.4th 15 82

People v. Huggins
(2006) 38 Cal.4th 175 87

People v. Huynh
(2012) 212 Cal.App.4th 285 ..... 50, 51

People v. Jackson
(2005) 129 Cal.App.4th 129 ..... 58, 59, 76

People v. Jackson
(2009) 45 Cal.4th 662 36

People v. Jenkins
(2000) 22 Cal.4th 900 ..... 37, 39

People v. Jones
(1993) 5 Cal.4th 1142 57

People v. Jones
(1998) 17 Cal.4th 279 ..... 28, 29

People v. Jones
(2011) 51 Cal.4th 346 ..... 88, 89

People v. Kelly
(2007) 42 Cal.4th 763 ..... 85, 86, 87, 88

People v. Lewis and Oliver
(2006) 39 Cal.4th 970 84

People v. Livingston
(2012) 53 Cal.4th 1145 71

People v. Lopez
(2012) 55 Cal.4th 569 ..... passim

People v. Manriquez
(2005) 37 Cal.4th 547 90

People v. Martinez
(1994) 26 Cal.App.4th 1098 31

People v. McDowell
(2012) 54 Cal.4th 395 89

People v. McKinnon
(2011) 52 Cal.4th 610 89

People v. Medina
(1974) 41 Cal.App.3d 438 ..... 64, 65

People v. Meza
(1984) 162 Cal.App.3d 25 58

People v. Miller
(1951) 37 Cal.2d 801, argued 31, 32

People v. Moore
(1973) 31 Cal.App.3d 919 59

People v. Moran
(1974) 39 Cal.App.3d 398 77

People v. Morrison
(2004) 34 Cal.4th 698 90

People v. Nelson
(2008) 43 Cal.4th 1242 ..... 34, 35

People v. Panah
(2005) 35 Cal.4th 395 ..... 77, 78

People v. Patterson
(1989) 49 Cal.3d 615 32

People v. Peck
(1974) 38 Cal.App.3d 993 59

People v. Price
(1991) 1 Cal.4th 324 90

People v. Prieto
(2003) 30 Cal.4th 226 90

People v. Prince
(2007) 40 Cal.4th 1179 85

People v. Rains
(1999) 75 Cal.App.4th 1165 70

People v. Reeder
(1978) 82 Cal.App.3d 543 69

People v. Reyes
(2009) 172 Cal.App.4th 671 56

People v. Riel
(2000) 22 Cal.4th 1153 75

People v. Roberts
(2010) 184 Cal.App.4th 1149 56

People v. Russell
(2010) 50 Cal.4th 1228 84

People v. Rutterschmidt
(2012) 55 Cal.4th 650 ..... 48, 49

People v. Sanchez
(1982) 131 Cal.App.3d 323 59

People v. Scofield
(1983) 149 Cal.App.3d 368 31

People v. Scott
(1969) 274 Cal.App.2d 905 31

People v. Scott
(2011) 52 Cal.4th 452 89

People v. Snow
(2003) 30 Cal.4th 43 ..... 37, 69

People v. Spain
(1984) 154 Cal.App.3d 845 ..... 62, 63

People v. Steppe
(2013) 213 Cal.App.4th 1116 ..... 50, 51, 52, 53

People v. Streeter
(2012) 54 Cal.4th 205 89

People v. Strozier
(1993) 20 Cal.App.4th 55 37

People v. Sturm
(2006) 37 Cal.4th 1218 64

People v. Superior Court (Jones)
(1998) 18 Cal.4th 667 64

People v. Turner
(1994) 8 Cal.4th 137 76

People v. Valencia
(2008) 43 Cal.4th 268 29

People v. Viray
(2005) 134 Cal.App.4th 1186 34

People v. Watson
(1956) 46 Cal.2d 818 ..... 81, 70

People v. Weaver
(2001) 26 Cal.4th 876 31

People v. Wetmore
(1978) 22 Cal.3d 318 31

People v. Williams
(1997) 16 Cal.4th 635 62

People v. Zamudio
(2008) 43 Cal.4th 327 ..... 85, 87

People v. Zapien
(1993) 4 Cal.4th 929 41

People v. Zepeda
(2001) 87 Cal.App.4th 1183 ..... 55, 58

Rhinehart v. Municipal Court
(1984) 35 Cal.3d 772 40

Ring v. Arizona
(2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] 89

Ungar v. Sarafite
(1964) 376 U.S. 575 [84 S.Ct. 841, 11 L.Ed.2d 921] 41

United States v. Donovan
(1977) 429 U.S. 413 [97 S.Ct. 658, 50 L.Ed.2d 652] 58

United States v. Giordano
(1974) 416 U.S. 505 [94 S.Ct. 1820, 40 L.Ed.2d 341] 57

United States v. Guthrie
(9th Cir. 1991) 931 F.2d 564 69

United States v. Juan
(9th Cir. 2013) 704 F.3d 1137 65

United States v. Perez-Valencia
(9th Cir. 2013) 727 F.3d 852 .....55, 57

Webb v. Texas
(1972) 409 U.S. 95 [93 S.Ct. 351, 34 L.Ed.2d 330] 64

Williams v. Illinois
(2012) __U.S.__ [132 S.Ct. 2221, 183 L.Ed.2d 89] .....passim

STATUTES

18 U.S.C. § 2516(2) 56

Code of Civ. Proc. § 475.....58

Evid. Code
§ 210.....73, 74
§ 250.....77
§ 351.....73
§ 352.....72, 74
§ 720.....79
§ 764.....62
§ 767.....62
§ 1221.....75
§§ 1520 through 1523 .....77, 78

Pen. Code
§ 187 1
§ 190.2 ..... 1, 88
§ 190.3 ..... 81, 84, 88, 82
§ 211 ..... 1, 29
§ 212.5 29
§ 629.50 ..... 55, 56, 57
§ 629.72 58
§ 664 1
§ 667.5 1
§ 686 40
§ 995 27
§ 1050 ..... 37, 39
§ 1203 1
§ 1382 40
§ 1538.5 58
§ 12022 1
§ 12022.53 1

CONSTITUTIONAL PROVISIONS

Cal. Const., Art. I, § 15 40

U.S. Const.
Amend. V 75
Amend. VI ..... passim
Amend. VIII 87

COURT RULES

Cal. Rules of Ct., rule 4.113 37

OTHER AUTHORITIES

CALJIC No. 2.72 30

Senate Committee on Crim. Proc., Report on Assembly Bill Number 1016 (1995–1996 Regular Session) as amended April 3, 199 58

STATEMENT OF THE CASE

In a two-count information, the Los Angeles County District Attorney charged appellant[1] in count 1 with murder, in violation of Penal Code[2] section 187, subdivision (a), and in count 2 with attempted second degree robbery, in violation of sections 664 and 211. The information alleged firearm enhancements under sections 12022, subdivision (a)(1), and 12022.53, subdivisions (b) through (d), as well as prior conviction and prior prison term enhancements under sections 1203, subdivision (e)(4), and 667.5, subdivision (b), as to both counts. As to count 1, the information further alleged the special circumstance that appellant committed the murder while engaged in the commission of an attempted robbery, within the meaning of section 190.2, subdivision (a)(17). (2CT 311-315.) Appellant pled not guilty and denied all of the special allegations. (2CT 318.)

Following a jury trial, on April 22, 2008, a jury found appellant guilty as charged, and found all of the special allegations and the special circumstance to be true. (4CT 945-947, 953-954.)

The penalty phase commenced on April 24, 2008. (4CT 955.) Following a jury trial, on May 8, 2008, the jury fixed appellant's penalty at death. (4CT 1015, 1017.)

On May 12, 2008, appellant waived a motion for new trial. (41CT 10728.) The court subsequently denied the automatic motion for modification of sentence and imposed a judgment of death. (41CT 10728-10730, 10757-10760.)

This automatic appeal followed.

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[1] Appellant's co-defendant, Justin Flint, was charged identically, but is not a party to this appeal.

[2] Unless indicated otherwise, all further statutory references are to the Penal Code.

STATEMENT OF FACTS

I. THE GUILT PHASE

A. The Prosecution Evidence

1. Appellant murders Los Angeles County Sheriff's Deputy Maria Rosa during an attempted robbery

On March 28, 2006, at 5 a.m., Genaro Huizar went to church after leaving his work and then drove to his home on Eucalyptus Avenue in Long Beach. Upon arriving at his home, he walked to its front door. Just before he reached the door, he heard a noise, turned around, and saw two men riding by on bicycles. One of the men, later identified as appellant, was riding a smaller BMX-type bicycle, and the other, later identified as Flint, was riding a larger 10-speed-type. The man on the larger bicycle was taller, thinner, and lighter-skinned than the man on the smaller bicycle. (9RT 1829-1831.) Huizar entered his home. Moments later, he heard the sound of three to five gunshots, which he believed sounded as if they came from a small-caliber firearm. (9RT 1832.)

Around the same time, Jose Burgos was assisting his friend, Donato Velasco, to deliver newspapers in the early morning. (9RT 1813, 1821.) While making deliveries on Eucalyptus Avenue, Burgos told Velasco that he thought he saw a mannequin on the ground. As he and Velasco drove closer to it, Burgos realized what he saw was not a mannequin. It was a woman, later identified as Los Angeles County Sheriff's Deputy Maria Rosa, lying motionless. Burgos and Velasco parked the car they were in and exited. (9RT 1814-1815, 1822-1823.) They tried to perform CPR on Deputy Rosa after observing that she had no pulse and was not breathing. Burgos called 911. (9RT 1815.)

James Knapp left his home nearby on Eucalyptus Avenue. As he drove up the street, he saw the headlights of Burgos' automobile and

Burgos speaking on a cell phone while seated in the street. Knapp believed Burgos might be delivering newspapers, but he looked to his left and saw Deputy Rosa's body on the sidewalk. (9RT 1785-1787.) Knapp made a U-turn in his car, parked, exited, and spoke with Burgos. Burgos told Knapp that Deputy Rosa was dead. Knapp proceeded over to her, where Velasco was standing, and tried to find her pulse. He could not find it. (9RT 1786, 1815.) Burgos was having language difficulties with a 911 operator,[3] so Knapp took the phone and spoke with the operator. The operator asked Knapp to perform CPR on Deputy Rosa, and he did. (9RT 1786-1787, 1815, 1824.) Burgos knocked on the door of the home in front of which he found Deputy Rosa's body, but no one came to the door, so he returned to Deputy Rosa to assist Knapp. (9RT 1815.)

Los Angeles County Sheriff's Detective Jenny Martin was Deputy Rosa's girlfriend. (9RT 1793.) Deputy Rosa lived with her and her nephew Edgar. On the date of the attempted robbery and murder, Edgar woke Detective Martin up by banging on her bedroom door. When Detective Martin woke up, she expected Deputy Rosa to have already left for work in Downtown Los Angeles. (9RT 1795.) In response to Edgar's banging on the door, Detective Martin inquired, "What?" Edgar replied, "Do you know why Ceci's on the floor outside?" (9RT 1796.) Detective Martin sprang out of bed, ran to the front door, and stepped out of the house to find Deputy Rosa on the ground. (9RT 1797.) By that time, Edgar was kneeling next to Knapp, who was performing CPR. (9RT 1787-1788, 1799.) Burgos was speaking on a cell phone, and Edgar was yelling to

[3] The 911 call was played for the jury. (9RT 1790.)

Knapp, "Don't stop!" Detective Martin ran back inside her home and called 911.[4] (9RT 1799.)

Long Beach Police Department Officer Robert Davenport received a call regarding the incident at 6 a.m. and responded to the location. When he arrived, paramedics were already working on Deputy Rosa. (9RT 1867-1868.) Officer Davenport saw a gunshot wound to Deputy Rosa's lower portion of her torso. (9RT 1869.) He also noticed a red BMX-type bicycle nearby, and cordoned it off to make sure no one touched it. (9RT 1871-1873.) Officer Davenport looked inside the still-open trunk of Deputy Rosa's automobile and saw her belongings, including a gun, boots, purse, papers, and gun holster. Deputy Rosa's purse was partially open. (9RT 1873, 1880-1881.)

Long Beach Police Department Detective Patrick O'Dowd arrived at the scene with Detectives Slash and Evens at 7:20 a.m. (9RT 1887-1888.) Detective O'Dowd's partner, Long Beach Police Department Detective Bryan McMahon, was already there. Detective O'Dowd learned that paramedics had transported Deputy Rosa and that she was pronounced dead. (9RT 1889; 11RT 2298-2299.) He inspected the trunk of Deputy Rosa's automobile with the assistance of Detective McMahon. (9RT 1891, 1893.) Detective McMahon removed Deputy Rosa's gun from the trunk, and he and Detective O'Dowd determined the gun was jammed due to someone having tried to get a round in the chamber by using the gun's slide. (10RT 1059, 2101-2102; 11RT 2305.) Los Angeles County Sheriff's Department Firearms Identification Expert Edmund Anderson concurred that the gun malfunctioned, jammed, and had failed to fire. (11RT 2344, 2346.)

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[4] This 911 call was played for the jury too. (9RT 1800.)

On March 29, 2006, Los Angeles County Medical Examiner Paul Gliniecki conducted the autopsy on Deputy Rosa. (9RT 1841, 1843.) Dr. Gliniecki identified two gunshot wounds on Deputy Rosa. The wounds were to the back, upper-right portion of her shoulder and left side of her abdomen. (9RT 1843.) Dr. Gliniecki recovered expended bullets from both wounds, and concluded that Deputy Rosa died due to internal bleeding that the gunshots caused. (9RT 1844-1845.) Dr. Gliniecki gave the bullets to Los Angeles County Sheriff's Deputy Phillip Guzman. (11RT 2337-2338.) Firearms Identification Expert Anderson analyzed the bullets and concluded that they were .22-long-rifle-caliber cartridges that could be fired from a handgun. (11RT 2344.)

2. Appellant admits to his girlfriend and sister that he murdered Deputy Rosa

Jessica Rowan was appellant's girlfriend of 12 years and had two children with him. (10RT 1929.) Between 8 and 9 a.m., on the morning of the attempted robbery and murder, appellant's sister, Celina Gonzalez, drove appellant to Jessica Rowan's home, which was unusual to Rowan because he always rode his bicycle to her home. (10RT 1938.)

Within the next couple of days, appellant and Rowan were in bed when appellant told her that he had "done something" in Long Beach and needed to leave the area. (10RT 1931.) He explained that he and a friend were trying to rob a woman because they needed money for drugs. He had demanded her money and grabbed her purse, but a struggle ensued. Appellant claimed that the woman pulled out a gun, which discharged during the struggle. The woman was shot, and a badge in her hand flew into her open automobile trunk. Appellant told Rowan that he ran from the scene. (10RT 1933-1936.)

A day or two after the murder, appellant and Rowan went to Celina's home in Downey. Appellant was nervous and hyper. He said that he

thought he had shot a police officer, and Celina laughed. Appellant went outside and grabbed a newspaper. (10RT 1939, 2021, 2028-2029.) He returned inside, threw the newspaper down in front of Rowan and Celina, and said, "I told you I did something in Long Beach." (10RT 1940, 2022.) Rowan and Celina looked at the newspaper and saw Deputy Rosa's photo along with an article about the murder. (10RT 1842, 2022.) Appellant repeatedly said, "This is her," and explained that the murder was the result of a robbery gone wrong. (10RT 2022-2023.) He admitted that he targeted Deputy Rosa, when he rode up on his bicycle and saw her exiting her home, because he needed money for drugs. (10RT 2035-2036.)

A few days later, Rowan spoke with appellant by phone. Appellant told her that he needed to borrow her car because he wanted to use it to get rid of something. She allowed him to use it, and after he dropped her off at Celina's home, he said he was going to the beach and left with a friend named "Bear." (10RT 1942-1943.) About four hours later, appellant returned. At a later date, he told Rowan that he sanded and sawed the gun he used to murder Deputy Rosa into pieces before he threw it in the ocean. (10RT 1943-1944.)

3. The investigation of the murder

On March 28, 2006, Long Beach Police Department Detective David Rios inquired of businesses near the scene of the shooting to determine if they had any surveillance video that might help identify the suspects. (9RT 1855-1856.) A Bank of America nearby had cameras, so Detective Rios contacted a bank employee to secure copies of any recordings. (9RT 1856.) Detective Rios and his partner, Detective Matsubara, then reviewed the video captured between 4 and 7 a.m., on the date of the murder. (9RT 1858.) From the video, Detective Rios obtained some still images, which he turned over to investigating officers. Included in these images were

ones depicting two men on bicycles between 5:25 and 5:30 a.m. (9RT 1862-1865.)

Using the photos Detective Rios obtained, Detective O'Dowd created a flier offering a reward for information about the suspects on the bicycles. (10RT 2070-2071.) Based on the totality of the police investigation up to this point, Detective O'Dowd was able to focus on appellant and Flint as suspects. He also helped create an undercover sting operation by which appellant and Flint would be transported with undercover officers, posing as inmates, to Los Angeles County Jail on a bus, equipped with concealed recording devices, and then placed in similarly-equipped recording cells. (10RT 2081-2082.)

Los Angeles County Sheriff's Detective Mark Lillienfeld coordinated the undercover operation. (11RT 2163-2165.) Detective Lillienfeld made arrangements to have five undercover officers in Wasco State Prison where appellant was in custody and five additional undercover officers at Northern Kern State Prison where Flint was housed. (11RT 2165.)

On August 28, 2006, Detective O'Dowd conducted a lineup for Huizar. The purpose of the lineup was not only to see if Huizar could identify a suspect, but also to spark a conversation between appellant and Flint. During the lineup, appellant was in position number two, and Flint was in number five. (10RT 2083, 2086.) Huizar identified Flint and stated he looked like the suspect on the smaller bicycle. Huizar was not certain, however, because the man appeared to have lost weight. (9RT 1836-1837.)

4. The undercover operation

On August 16, 2006, the undercover operation went forward as planned. (11RT 2169.) To begin the operation, correctional officers placed appellant in a holding area at Wasco State Prison with several undercover officers, including Long Beach Police Department Detective Gregory Roberts and Los Angeles County Sheriff's Detectives Leopoldo Noyola,

Javier Clift, and Miguel Beltran. (11RT 2174, 2176-2177, 2189, 2240-2241, 2273.) Appellant and the undercover officers were next placed on the bus to be transported. (11RT 2175-2177.) He was handcuffed to Detective Noyola. (11RT 2169, 2273-2274.)

According to Detective Noyola, as the bus pulled up to Northern Kern State Prison, appellant tried to see the inmates about to board it. When he saw Flint, he was "excited in a bad way." (11RT 2275.) Flint was handcuffed to Los Angeles County Sheriff's Deputy Manuel Vina. (11RT 2169, 2262.) Once Flint was on the bus, Detective Roberts overheard appellant speaking with him. The two tried to figure out why they had been placed on the same bus for transport to Los Angeles County Jail, including possible crimes. Appellant thought the transport might relate to a carjacking. (11RT 2182-2183, 2276.) But the two discussed that their transport might relate to "the bicycle shit." (11RT 2276.)

After arriving at Los Angeles County Jail, appellant, Flint, and the undercover officers were placed in holding cells. Detective Roberts shared a cell with appellant and three undercover officers, including Detectives Clift, Noyola, and Beltran. (11RT 2177, 2180, 2191.) Appellant continued to speculate that his transport might relate to a carjacking. (11RT 2183-2184.) He also referred to Flint, whom he called his "homeboy," and to possible "pressure points" Flint might have if "squeeze[d]" by law enforcement, in other words whether law enforcement could get Flint to talk about the crimes. (11RT 2183, 2184.)

While in the holding cell, Detective Clift brought up "C.S.I." to appellant because in his experience many criminals watched television programs pertaining to criminal investigations and investigative techniques and spoke about such techniques with other criminals. (11RT 2192-2193.) Detective Clift used gang slang and terminology when speaking with appellant. He suggested that appellant must have left some evidence at the

crime scene. Appellant replied, "No, I cleaned and wiped and everything. It's just going to be he say she say." (11RT 2193-2194.) Detective Clift interpreted "he say she say" to mean that appellant believed his crime had no witnesses who could testify against him. (11RT 2198.) Appellant also discussed the wristband he was wearing. The color of the wristband indicated the crime he was being charged with, and appellant inquired about it to the undercover officers. He was interested in why its color did not indicate he was being charged with murder. (11RT 2198.)

Detective Clift spoke with appellant about "strategizing." (11RT 2201.) He wanted to encourage appellant to discuss the details of the crime and any evidence. (11RT 2201.) Detective Clift mentioned to appellant that he and Flint needed to make certain they had consistent alibis. (11RT 2202.) Detective Clift explained that the police might offer them plea deals to try to get them to implicate each other in the crime. (11RT 2203.) He inquired whether any gun appellant used had been found. Appellant replied, "It's swimmin." (11RT 2204.) Detective Clift then pretended that he was apprehended due to DNA evidence. (11RT 2205.) Appellant stated, "Well, I shot him the heat," which Detective Clift understood to mean that appellant gave the gun to Flint after the crime. (11RT 2206.) Appellant further stated that he got rid of the gun which was "a plus," meaning no evidence existed of the crime. (11RT 2207.) Detective Clift asked if appellant might have left footprints at the crime scene. Appellant told the detective that he was on cement the entire time. (11RT 2208.) But he also mentioned to Detective Beltran that he left a bicycle at the crime scene. (11RT 2248-2249.) Detective Beltran discussed the notion that appellant might have left evidence like fingerprints on the grips of the bicycle. (11RT 2251.) Appellant talked about creating an alibi to try to convince the authorities that the bicycle did not belong to him. In addition,

he commented that he did not leave any shell casings at the scene. (11RT 2280.)

Appellant later opined that he must not be in custody for the carjacking because he "cleaned" the car he took. (11RT 2209.) But he believed that if the police knew he had murdered an officer, "Hooda would have whipped my ass." (11RT 2210.) Detective Clift knew that "hooda" was slang for police. (11RT 2210.) Appellant made reference to his being "cappa," which Detective Clift understood to mean that he had committed an extremely dangerous crime that exposed him to capital punishment. (11RT 2213-2214.) Appellant was excited to receive "special privileges" from other inmates at the Los Angeles County Jail commissary due to his stature in prison as a cop killer. (11RT 2224-2225, 2237-2238.) Appellant confirmed to Detectives Beltran and Noyola that he killed a female officer. (11RT 2242-2245, 2284.) He claimed that Deputy Rosa showed her badge before he "unload[ed] on her." (11RT 2288.) He also commented that he might disfigure his face so that no one could identify him from a lineup. (11RT 2220.)

Eventually, Detective Roberts was removed from the holding cell and taken for processing before returning, so that the undercover operation would look realistic. (11RT 2184-2185.) Detectives Clift and Beltran were removed too. (11RT 2287.)

Later in the undercover operation, Flint and Deputy Vina were brought into the holding cell with appellant. (11RT 2253.) By this point, Flint and appellant had been processed and informed of the charges against them, including murder. (11RT 2255-2256.) Deputy Vina asked appellant what was the worst punishment Flint could receive. Appellant responded, "life." (11RT 2268.) Appellant and Flint tried to determine if someone had snitched on them. They were determined to kill any witnesses who might try to testify against them in court. (11RT 2279.) Additionally, Flint

referred to Deputy Rosa "as just a bitch, and had she given up her wallet she wouldn't have been killed, just robbed." (11RT 2279.) In response, appellant acted as if he was not worried and stated, "Well, I bet they don't have anything about his case." (11RT 2279-2280.) In general, appellant wanted "to keep Justin Flint limited in his statements." (11RT 2289.) He told Flint to "shut up" and stop talking about the murder. (11RT 2290.) Appellant strategized with Flint how to behave during the investigation. (11RT 2292-2293.)

5. Rowan and Celina concoct an alibi for appellant and lie to the police

After appellant was taken into custody, Celina showed Rowan articles and photos regarding the murder on the internet. (10RT 1969, 1997.) One photo showed appellant and Flint on bicycles. Rowan was concerned that someone would identify appellant from the photo, which she mentioned to Celina. (10RT 1997-1998.) But she was encouraged by the fact that the photo showed appellant wearing a hat, which concealed the tattoo on his head. (10RT 2002.)

Rowan and Celina then began working on an alibi for appellant. (10RT 1969, 2024.) Rowan and appellant had a longstanding plan in place that if he was ever investigated by the police for an offense, Rowan was to provide him with an alibi by saying he was home with her. Following the plan, Rowan attempted to make certain that she and Celina were consistent in their stories about appellant's whereabouts at the time of the murder. Rowan told Celina to tell the police that they were all at a barbeque. The two did not know that their phones were the subject of wiretaps at the time. (10RT 1947-1948, 2024-2025.)

On September 10, 2006, Detectives McMahon and O'Dowd interviewed Rowan. Rowan lied to the detectives. She stated that she was constantly with appellant from March 24 through April 2, 2006, so he could

not have committed the murder. She also provided them with the false alibi regarding the barbeque and added that appellant was in bed with her at the time of the murder. (10RT 1945-1946.) During the interview, Detective O'Dowd appeared to take a phone call, which Rowan later learned was a ruse. Rowan overheard Detective O'Dowd say something about divers searching in the ocean. After the call, Detective O'Dowd told his partner that "it" was "in pieces." (10RT 1949-1950.) The detectives interviewed Celina as well, and she also lied. (10RT 2025.)

After being interviewed, Rowan visited appellant in custody. She showed appellant a note in which she explained the alibi she concocted and conveyed to Celina. In the note, Rowan also mentioned the divers searching for a gun that she overheard Detective O'Dowd discuss. (10RT 1951.) After reviewing the note, appellant responded, "Fuck." (10RT 1951-1952.) Appellant told Rowan he committed the crime with the "white boy" from whom he bought a computer, and Rowan knew he was referring to Flint. (10RT 1955.)

Also while appellant was in custody, he directed Rowan to speak with his friend "Psycho." Appellant wanted her to tell Psycho to deal with any potential snitches. (10RT 1956-1957, 1964.) Rowan understood appellant to mean that Psycho should kill any snitch. (10RT 1964.) Rowan complied and, as directed, told Psycho, "If anything happens you know what to do." (10RT 1958.) Psycho replied, "Okay," and instructed Rowan not to talk about anything related to the shooting over the phone. (10RT 1965.)

On September 27, 2006, the police arrested Rowan. (10RT 1952.) Rowan eventually pled guilty to conspiracy to obstruct justice in connection with the false alibi. (10RT 1932.) She accepted the plea agreement against the advice of counsel, because she wanted to be released so she could go home to her children and avoid a prison sentence. (10RT 1974.) Rowan,

however, clarified that she was never promised leniency in exchange for her entering into the plea and testifying against appellant. (10RT 1989.)

The same day, the police arrested Celina. She similarly pled guilty to conspiracy to obstruct justice. (10RT 2024.)

6. The DNA Evidence

Los Angeles County Sheriff's Crime Lab Senior Criminalist Julie Watkins received the red BMX-type bicycle for DNA testing. (10RT 2114-2115.) Watkins obtained samples from several portions of the bicycle, including the handlebars, and performed a DNA analysis on them. (10RT 2116-2118.) The samples Watkins used were contaminated, so new samples were necessary. Watkins, however, was unavailable to obtain the new samples. Her colleague, Kari Yoshida, obtained them and conducted the analysis. (10RT 2119-2120, 2125.) The two then coauthored a report. Watkins and Yoshida each reached the conclusion that appellant's DNA was present on the bicycle's right handlebar grip based on appellant's DNA reference sample. (10RT 2143, 2146-2147; 11RT 2304.)

B. The Defense Evidence

Appellant presented no affirmative evidence in his own behalf.

II. THE PENALTY PHASE

A. The Prosecution Evidence

1. Appellant's criminal activity

a. The February 1994 robbery of La Concha Restaurant in Long Beach

In February 1994, Sylvia Guzman and her boyfriend, Hector Benavides, were having dinner at La Concha Restaurant in Long Beach. At 10 p.m., a man armed with a sawed-off shotgun pointed the gun at Manuel Gonzales, a restaurant employee, pushed him, and demanded money from the register. Guzman heard some noise, looked to her right, and saw

Gonzales on the floor while someone was standing at the open cash register and removing money from it. She also saw a young Hispanic male pointing a gun at Benavides. (13RT 2565-2566, 2620-2621, 2622, 2647.) Benavides told the armed man that he was getting his wallet. He gave it to the armed man, but asked the man to take the money from it and leave the wallet. (13RT 2567, 2623, 2649.)

b. The February 1994 parking lot robbery in Long Beach

Also in February 1994, Eloy Barajas took a break from work with some other people in a parking lot in Long Beach. Three men approached. One had a shotgun, and the other two had handguns. The man with the shotgun demanded money and took Barajas' wallet out of his pocket. The assailants took money from Barajas' companions too. (13RT 2572-2574, 2672-2676.) Barajas later identified appellant from a six-pack photo lineup. (13RT 2661-2662.)

c. The February 17, 1994 robbery of Patrick Park and Ed Duncan at a Long Beach ATM

Patrick Park and Ed Duncan drove to an ATM in Long Beach. As Park waited in the car, Duncan used the ATM. Three armed men, two with revolvers and one with a sawed-off shotgun, ordered Park to get out of the car. (13RT 2634-2636.) Duncan retrieved money from the ATM, and the men took it and ran. The men also took the stereo from the car. (13RT 2636-2637.)

d. The February 24, 1994 robbery of Kang and Sam An's liquor store in Long Beach

Kang and Sam An owned a liquor store in Long Beach. (13RT 2578, 2585.) On February 24, 1994, at 8:45 p.m., three men entered the store. Kang was behind the counter and saw that one man was concealing a sawed-off shotgun. The man pointed the shotgun at Kang and demanded

money. Kang bent down and tried to run to the back of the store. The man with the shotgun followed Kang, and Sam threw a wine bottle at him. (13RT 2579-2581, 2586-2587.) The men ran from the store, and Kang and Sam followed them. The man with the shotgun said, "Don't follow me," and then fired the shotgun. (13RT 2581-2582, 2587-2588.) Kang and Sam hid and were not shot. (13RT 2582.) When they returned to the store, Sam saw that money was missing from the register. (13RT 2588.) Kang and Sam subsequently provided a description of the suspects to the police and identified appellant from a six-pack photo lineup. (13RT 2657; 14RT 2801-2802.)

e. The February 24, 1994 robbery of a Baskin Robbins in Long Beach

On February 24, 1994, Richard Lillis and Maria Carmin Sima were working at a Baskin Robbins in Long Beach when three armed men, one with a shotgun, entered and demanded money. (13RT 2624-2626, 2640-2641.) The men threatened to shoot them, so Sima opened the cash register. (13RT 2626-2627, 2641-2642.) The men took money from the register, as well as additional money in a bag in the store. (13RT 2627, 2642.) Sima later identified appellant as one of the assailants, including by six-pack photo lineup. (13RT 2644, 2656.)

f. Appellant admits to the string of robberies in Long Beach

Long Beach Police Department Officers Thomas Brown and Darren Davenport investigated the string of robberies in 1994. (13RT 2652, 2663-2664.) They took appellant into custody on February 25, 2994, and appellant admitted to committing the robberies. He further admitted that when he committed the robberies he typically used a shotgun. (13RT 2665-2666.) A search of his residence resulted in the recovery of shotgun shells consistent with the gun appellant described. (13RT 2667.)

Long Beach Police Department Detective Anthony Lembi interviewed appellant about the robberies. (14RT 2681-2682.) Appellant admitted robbing two doughnut shops and said he used a plastic gun during one of the robberies. (14RT 2683-2684, 2689.) Appellant also admitted to the robbery at the ATM and claimed he had used a plastic gun then too. (14RT 2685.) With respect to the La Concha Restaurant, Baskin Robbins, and liquor store robberies, appellant admitted he had used a shotgun. (14RT 2686-2688.) Appellant denied intentionally firing the shotgun after the liquor store robbery and claimed it accidentally fired. (14RT 2687.) Appellant additionally informed Detective Lembi that he was a member of the Barrio Pobre street gang. (14RT 2689.)

Appellant also admitted during the 2006 undercover operation that he had committed armed robberies since he was a juvenile. (15RT 2941.)

g. The February 5, 2006 shooting at Chris' Burger in Downey[5]

On February 5, 2006, appellant showed up at Rowan's job. He wanted money from her and was angry because she refused to give him any. (14RT 2734.) Appellant demanded that Rowan leave with him in his car to go to Celina's home. She complied because she was scared appellant might have a gun, and once there, appellant hit her multiple times until Celina told him to stop. Appellant also ordered her to call her boyfriend, Jose Magallanes, from a nearby payphone, so she could convince him to pick her up because appellant wanted to beat him up. (14RT 2735-2736, 2756, 2819.) He and Magallanes had an altercation a month earlier when appellant crawled through Rowan's bedroom window and attacked Magallanes. (14RT 2752-2753.) Rowan made the call and told Magallanes

[5] Surveillance video capturing the incident was played for the jury. (14RT 2707.) From the video, Rowan identified appellant as a man wearing a hooded sweatshirt. (14RT 2738.)

to pick her up near Chris' Burger because she needed to go to the hospital due to being beaten. (14RT 2736-2737.) Magallanes received the call and drove his Toyota to the area of Chris' Burger to pick Rowan up as she requested. (14RT 2713-2714.)

Rowan and appellant then met Celina and others at Chris' Burger. (14RT 2737, 2819-2820.) When Rowan saw Magallanes drive by, appellant went outside to the street. (14RT 2737, 2741-2742.) Rowan then heard the sound of two gunshots. At the time, appellant was in the middle of the street. (14RT 2742.) After the gunshots, appellant ran to Celina's nearby apartment. (1RT 2744.) Celina saw appellant with a gun and also heard the shots before appellant ran. (14RT 2821-2825.)

According to Magallanes, as he approached the area, a man on foot and wearing shorts and a tank top began shooting at him. Two bullets struck Magallanes, but he continued driving and went to a doctor in Glendale for treatment. (14RT 2714-2716, 2719.) Magallanes, who was in prison at the time of trial, further described the shooter as a Caucasian male with blonde hair, but admitted that he was aware a snitch would be beat up or killed. (14RT 2713, 2721, 2724.)

Christa Lumpkin was seated outside Chris' Burger. As she waited for her mother to pick her up, Lumpkin saw a young man, wearing blue jeans and a light-gray hooded sweatshirt, walk past her. (14RT 2704.) The man pulled out a gun and began shooting at a blue or teal-colored car. Lumpkin believed the shooter fired seven shots before running into an apartment complex. She stayed near some shell casings expelled from the gun so she could show them to the police. (14RT 2705-2706, 2711.) Downey Police Officer Joe Bustos later collected eight casings. (14RT 2807-2808.)

Earl Strode and his wife drove past Chris' Burger and saw the shooter running out of the driveway while firing six or seven rounds from a semiautomatic handgun. (14RT 2696-2697.) According to Strode, the

shooter was 5'8" to 5'9" in height with short hair, and wearing blue jeans and a light-gray hooded sweatshirt. (14RT 2698.) Strode also believed that the shooter was firing at a blue Honda or Toyota traveling eastbound on Telegraph Road. (14RT 2697.) Following the shooting, Strode saw the shooter run into an apartment building. (14RT 2698.)

Later, appellant told Celina that he shot at Magallanes' car. He added, "I think I got him." (14RT 2831.) According to Celina, appellant stated that he hid the gun he used in the garage at her apartment complex. (14RT 2831.)

h. The February 23, 2006 shooting on Locust Street in Long Beach

On February 23, 2006, Darnell Connors, Tyjuan Fuller, and some of their friends were standing on a porch outside a home on Locust Street in Long Beach, when someone came around the corner yelling "BP," for Barrio Pobre, and began shooting a gun he pulled from his waist. According to Connors, the shooter was a short Hispanic male and fired six shots. (14RT 2841, 2842, 2852-2853.)

Long Beach Police Department Officer Jose Rios responded to the scene with Officers Carlos Nava and Densdale. At the scene, he found seven .38 super caliber bullet casings.[6] (14RT 2856-2857, 2874.)

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[6] Long Beach Police Department Criminalist Troy Ward reviewed a total of 18 shell casings from shootings in Downey and Long Beach. (13RT 2607-2608.) From his analysis, Ward concluded that the casings were all .38-super auto ammunition manufactured by Winchester for use in a semiautomatic handgun. He further concluded that they had all been fired by the same gun. (13RT 2614-2616.)

i. The March 1, 2006 alley shooting near Cedar Avenue in Long Beach

On March 1, 2006, Julie Buenrostro was living with her husband, children and cousin, Julio Cesar Chavez, in an apartment building on Cedar Avenue in Long Beach. Buenrostro's children saw Chavez get shot in an alley behind the complex. Buenrostro ran outside and held Chavez until the paramedics arrived. (14RT 2870-2872.)

Long Beach Police Department Officer Eduardo Urquiza responded to the scene of the alley shooting to find Chavez shot and lying on the ground. (14RT 2862-2863.) Officer Urquiza recovered three bullet casings and a bullet fragment. (14RT 2866.)

Norma Olivares, who managed an apartment building by the alley in which the shooting occurred, turned over surveillance video from the date and time of the incident to Officer Nava.[7] (14RT 2810-2811, 2815, 2875-2876.) The video showed two individuals ride by the alley on bicycles before one appeared to open fire. (14RT 2864-2865.)

j. The March 8, 2006 carjacking in Long Beach

On March 8, 2006, Shawn Ouaounian was called outside of a home where he was visiting some people. As he went outside, appellant demanded the keys to his mother's Lexus, which he had driven to the home.[8] (14RT 2765-2769.) Appellant showed Ouaounian a gun when he made the demand. (14RT 2769.) Ouaounian turned over the keys to appellant, and appellant ordered him to get in the front passenger seat and put his head between his legs. (14RT 2769-2770.) Appellant then drove

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[7] The video was played for the jury. (14RT 2812.)

[8] In a video clip from the undercover operation, appellant claimed that the carjacking was of a Mercedes. (15RT 2949.)

Ouaounian around for about 20 minutes before stopping in an alley. He ordered Ouaounian to get out of the car, remove stuff from inside, and take the rims off the car. (14RT 2770.) Another armed man was in the alley at this point. Ouaounian intentionally broke the locks on the rims while pretending to try to remove the rims. (14RT 2771-2772.) Appellant unsuccessfully attempted to get the rims off the car. (14RT 2772.)

The following day, Ouaounian spoke with the police about the incident. From a six-pack photo lineup, Ouaounian selected appellant. (14RT 2774-2776, 2781, 2783-2784.)

Appellant admitted to the carjacking to Rowan. (14RT 2753-2755.) Celina was aware of it too, particularly in light of the fact that she saw appellant with Ouaounian in the car while Ouaounian had his head between his legs, and appellant left the car in front of her apartment complex. (14RT 2832, 2834.)

k. The July 25, 2007 razor incident with a fellow inmate

On July 25, 2007, Los Angeles County Sheriff's Deputy Raul Guerrero was transporting inmates from their cells to the showers. While he transported an inmate named Derrick Parra, he walked by appellant's cell. Appellant reached out and tried to cut Parra with an altered razor. (14RT 2887-2888.) Before Deputy Guerrero could get to appellant, appellant flushed the razor down his cell's toilet. (14RT 2889.)

l. The August 28, 2007 attack on Los Angeles County Sheriff's Deputy Gregory Campbell

During the early morning of August 28, 2007, Los Angeles County Sheriff's Deputy Gregory Campbell was preparing inmates from the Los Angeles County Men's Central Jail for court. (14RT 2879.) Deputy Campbell noticed that one inmate had not exited his cell and that he erroneously opened the wrong cell, which housed appellant. (14RT 2880-

2881.) Appellant said, "Tell the homies I'm going to do this," and then charged and struck Deputy Campbell. A fight ensued, and deputies had to pepper spray appellant to restrain him. (14RT 2881-2882, 2886-2887.)

m. The September 21, 2007 incident with Los Angeles County Sheriff's Deputy Adrian Ruiz

On September 21, 2007, Los Angeles County Sheriff's Deputy Adrian Cruz was present while appellant was yelling out to a new inmate. Deputy Ruiz reprimanded the new inmate, who was also yelling. The new inmate continued to speak with appellant. He called Deputy Ruiz an "asshole" and suggested someone "gas" the deputy. (14RT 2892-2895, 2909.) Appellant tried to coordinate with another inmate, who had gassed other deputies, and then said to the new inmate, "I would love to do it, that would put another notch on my belt . . . ." (14RT 2910-2911.)

n. Appellant's membership in the gang Barrio Pobre

According to Long Beach Police Department Detective Hector Gutierrez, appellant was a member of the gang Barrio Pobre and went by the moniker, "Grumpy." (14RT 2925-2926.) Appellant had many gang-related tattoos, including a "13" on his head and the Disney character Grumpy holding smoking guns. (14RT 2926.) Detective Gutierrez explained that Barrio Pobre's members were notorious for committing crimes against law enforcement. (14RT 2920.) To kill someone in law enforcement would raise a member to a high status within the gang. (14RT 2925.)

2. Victim impact evidence[9]

Sandra Sanchez was Deputy Rosa's older sister. Deputy Rosa was born in 1975 in Mexico. (15RT 3004.) The two were very close, and Sanchez took care of Deputy Rosa as a child. (15RT 3005.) Sanchez was separated from Deputy Rosa when Sanchez immigrated to the United States. (15RT 3006.) Deputy Rosa was 10 years old at the time. Eventually, Deputy Rosa was reunited with Sanchez in Long Beach when her mother fell ill to cancer. (15RT 3006-3007.) Deputy Rosa's mother passed away when Deputy Rosa was just 12 years old. Sanchez enrolled her in school, and she had to learn English. (15RT 3007.) Deputy Rosa's father died just two years later. (15RT 3009.)

Deputy Rosa got her first job when she was just 13 years old. She used her earnings to pay for her father's funeral. (15RT 3009-3010.) She also graduated from high school and then studied to be a dental assistant while working other jobs. Later, she became a dental assistant. (15RT 3011.) She also helped care for Sanchez's children and spoke with Sanchez about having children of her own. (15RT 3014, 3016.)

In an autobiography Deputy Rosa wrote, she called Sandra the most influential person in her life. (15RT 3025.) She further described Sandra as a mother to her. (15RT 3026.) Deputy Rosa also discussed her own future in the autobiography, including how she wanted to pursue higher education and have a family. (15RT 3027-2028.)

Detective Martin was Deputy Rosa's girlfriend. (15RT 2976.) When the two met, Deputy Rosa was not yet in law enforcement. (15RT 2976-2977.) They became very close quickly and discussed a future together,

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[9] A victim impact video was played for the jury over appellant's objection. (People's Exh. 85; 15RT 3030.)

including children. (15RT 2977-2978.) In the course of their relationship, Detective Martin learned much about Deputy Rosa's upbringing, including the passing of her mother, her immigrating from Mexico, and her learning English. (15RT 2978-2979.) While the two were together, Deputy Rosa decided to become a sheriff's deputy. She fought through injuries in the academy and graduated. (15RT 2979-2981.) Deputy Rosa loved her job and made a difference in the course of performing it. (15RT 2982.) And she also continued her schooling with the goal of graduating from college. (15RT 2983.) Detective Martin described Deputy Rosa's murder as killing a piece of her soul. (15RT 2984.)

Los Angeles County Sheriff's Deputy Rebecca Vaughn met Deputy Rosa at work, and the two became best friends. (15RT 2952.) Deputy Vaughn described Deputy Rosa as a proud and driven deputy and the type of friend who would put aside anything in her own life to be there for a friend. (15RT 2953-2954.) Deputy Vaughn kept a photo of Deputy Rosa with her while on duty. (15RT 2954.)

Letty Pimentel was also a friend of Deputy Rosa and her girlfriend, Detective Martin. (15RT 2955-2956.) Deputy Rosa spent a lot of time with Pimentel's family because she grew up without a father and her mother died when she was young. (15RT 2956.) She even served as a mediator of disputes in the Pimentel family and helped keep the family together. (15RT 2957.) Deputy Rosa helped Pimentel through a difficult break-up with an infectious love for life and passion for dancing. (15RT 2958.) According to Pimentel, her murder prevented Deputy Rosa from fulfilling her dream of being a patrol officer and furthering her education. (15RT 2959.)

Los Angeles County Sheriff's Deputy Marlena Martinez was once Deputy Rosa's co-worker. (15RT 2962.) Deputy Martinez respected Deputy Rosa's loyalty. (15RT 2963.) Their relationship became closer

after Deputy Martinez suffered an injury that kept her out of work for five years. Deputy Rosa was an understanding and compassionate friend throughout that time. (15RT 2963-2964.) She was always there for Deputy Martinez and even for strangers who needed a helping hand. (15RT 2965.)

Los Angeles County Sheriff's Department Custody Assistant Marnie Saldecke worked with Deputy Rosa as well. (15RT 2966-2967.) Saldecke was very impressed with Deputy Rosa's thirst for knowledge and inquisitive nature. (15RT 2969.) Saldecke knew she could rely on Deputy Rosa. (15RT 2972.) Thanks to Deputy Rosa's attitude and job performance, she was selected for a variety of assignments. (15RT 2969-2970.) She was liked by all of her co-workers, and her loss was devastating to all of them. (15RT 2974-2975.)

B. The Defense Evidence

Lillian Gonzalez was appellant's aunt. (13RT 2590.) Her brother Frank fathered appellant, and was in prison for murder and robbery. Her other brothers Carlos, Benjamin, and Phillip had also served time in prison, and Phillip died there. (13RT 2592-2593; 15RT 3035-3036.) Carlos served nearly eight years as an accessory to the murder that Frank committed. (15RT 3036.) Frank and Carlos were gang members. (13RT 2596; 15RT 3039.) In fact, Carlos believed most of the family was in gangs. (15RT 3039.) Another brother, Orlando, was a fireman. (15RT 3038.)

Appellant's mother, Susan Felix, gave birth to him in 1980, when she was 22 years old. (15RT 3084.) She never married appellant's father, who had lived a life of crime since he was a teenager and had a substance abuse problem. (15RT 3085, 3133, 3134.) But appellant's father Frank loved appellant and tried to be part of his life until Frank's incarceration in 1983. (15RT 3086, 3132.) Felix described appellant as an active child who received good grades in school. (15RT 3089-3091.)

Felix became a heroin addict. She lived with the man who introduced her to heroin, and he kept the family from seeing her. (13RT 2597-2598; 15RT 3040, 3050, 3061, 3086-3087.) Carlos, however, would visit when appellant was still a baby and lived with Felix for about a year after he was released from prison. (13RT 2596, 2599; 15RT 3041.) At that time, appellant was already in juvenile custody since he was 13 years old and a gang member. (15RT 3042-3043, 3068, 3095.) Carlos and Felix unsuccessfully attempted to stop appellant from joining a gang that was active in the neighborhood. (15RT 3043, 15RT 3066, 3094.) And appellant told Carlos that he hoped to be incarcerated so he could be with his father Frank. (15RT 3049.)

Lillian believed appellant was a "good" boy from the age of one to six. (13RT 2595.) But she had not seen him in 20 years and did not know the names of any of his children. (13RT 2603.)

Katherine Monforte was appellant's aunt. She was involved in appellant's life since he was a baby. (15RT 3055-3056.) Monforte knew appellant's father Frank quite well and described him as a man who partied a lot and ran around with many women. He tried to be a good father, but had his own problem with drugs. (15RT 3058-3059.) It was his drug habit that led to his life of crime. (15RT 3059.) Monforte tried to help with his children, including appellant, particularly in light of appellant's mother's own drug issues. (15RT 3061-3062.) The children even lived with her for a period of time. (15RT 3062-3063.) During that time, appellant was a "great kid" who played sports and was improving in terms of his grades in school. (15RT 3064.) But appellant's mother wanted the children to move back in with her, and they did. (15RT 3065.) Monforte did not see appellant much after he was put into juvenile custody and eventually released. (15RT 3074.)

Consuelo Gonzalez was appellant's sister, but she did not know him when she was growing up. In fact, the first time she ever saw him was in court on the day she testified. (15RT 3079.) Consuelo and appellant were raised in different homes. (15RT 3080.) Consuelo hoped appellant's life would be spared so that the two could establish a relationship. (15RT 3082.)

Rowan was appellant's girlfriend and the mother of his children. She met appellant while both were in juvenile custody. The two continued to see each other after they were released. (15RT 3112-3113.) On the first day they saw each other after their release, appellant put a gun in Rowan's purse without telling her so she could hold it for him. (15RT 3123.)

Rowan described appellant as a good father. (15RT 3114.) But he had a drug problem and physically abused Rowan when he was under the influence. (15RT 3114, 3116.) Appellant even kicked her in the stomach while she was pregnant. (15RT 3124.) Rowan, nevertheless, gave appellant money to support his drug use. (15RT 3121.) Appellant, however, blamed her for Deputy Rosa's murder because she did not give him money on that occasion, which led him to try to rob Deputy Rosa. (15RT 3121.) Robbing women was something he told Rowan he did regularly to support his drug habit. (15RT 3122.)

Rowan denied referring to her children as Satan and saying that she wanted to stab them with a fork, when she spoke with appellant while he was in custody for Deputy Rosa's murder. (15RT 3126.) She also did not recall calling them cowards. (15RT 3129.) Appellant never once asked Rowan to stop speaking about the children in that manner. (15RT 3130.)

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTED APPELLANT'S CONVICTION FOR THE ATTEMPTED SECOND DEGREE ROBBERY OF MARIA ROSA

In his first argument on appeal, appellant contends that the prosecution presented insufficient evidence from which the jury could convict him of the attempted second degree robbery of Deputy Rosa. Specifically, he alleges that absent his own extrajudicial statements, the evidence was insufficient to prove the corpus delicti of the crime. (AOB 40-50.) Appellant, however, is incorrect because the prosecution met its burden of presenting independent evidence of the corpus delicti.

A. The Relevant Trial Court Proceedings

On October 2, 2007, appellant moved to set aside the attempted robbery charge under section 995. In the motion, he claimed that the prosecution failed to meet its burden of presenting independent evidence of the corpus delicti. (2CT 371-376; 1RT 82.)

On January 18, 2008, the court denied appellant's motion. (2RT 296.) In doing so, the court rejected appellant's argument that no circumstantial evidence supported the attempted robbery charge. The court found that the evidence, including Huizar's and Velasco's testimony, showed two males riding bikes in the area before the incident and running from the scene after it. The court additionally found that Detective McMahon's testimony that Deputy Rosa's car trunk lid was open with items, including her wallet, gym bag, and gun, strewn about permitted a reasonable inference that Deputy Rosa was on her way to work and was disturbed as she opened her car trunk. The open trunk and empty purse indicated that she was attacked, and a struggle, consistent with an attempted robbery ensued. Furthermore, the

fact her clothing was undisturbed showed that the attack was not sexually-related. This evidence was supportive of the charge. (2RT 293-296.)

B. The Prosecution Presented Sufficient Independent Evidence of the Corpus Delicti

Appellant's claim that the prosecution presented insufficient evidence of the corpus delicti of the attempted robbery charged in count 2 is without merit. In a criminal trial, the prosecution must prove the corpus delicti of the crime without relying exclusively upon the defendant's extrajudicial statements, confessions, or admissions. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) The main purpose of the rule is to prevent a person from being falsely convicted of "a crime that never happened" based on his testimony alone. (*Id.* at p. 1169.) It "requires corroboration of the defendant's extrajudicial utterances insofar as they indicate a crime was committed, and forces the People to supply, as part of their burden of proof in every criminal prosecution, some evidence of the corpus delicti aside from, or in addition to, such statements." (*Id.* at p. 1178.) The corpus delicti may be proven by circumstantial evidence and need not amount to proof beyond a reasonable doubt. (*Id.* at p. 1171.)

The requisite amount of independent evidence of the corpus delicti is not great. (*Alvarez*, *supra*, 27 Cal.4th at p. 1181; see also *People v. Jones* (1998) 17 Cal.4th 279, 301-302 [finding sufficient independent evidence to permit inference of forced oral copulation to permit the defendant's admission of the same, where deceased victim was found with no underwear or shoes, and had semen in various other orifices, despite the lack of semen in the victim's mouth].) "The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues." (*Alvarez*, *supra*, 27 Cal.4th at p. 1181; see also *Jones*,

supra, 17 Cal.4th at pp. 301-302.) To satisfy the corpus delicti rule, the independent evidence need only permit a reasonable jury to infer reasonably that the alleged crime did happen. (*People v. Valencia* (2008) 43 Cal.4th 268, 297; *Jones*, *supra*, 17 Cal.4th at pp. 301-304.) Once the evidence satisfies the rule, jurors may consider the defendant's statements for their full value in arriving at their verdict. (*Alvarez*, *supra*, 27 Cal.4th at p. 1171.)

On review, an appellate court grants deference to a trial court's determination that the corpus delicti for the crimes alleged in the charging document was established. An appellate court draws every legitimate inference in favor of the judgment and cannot substitute its own judgment as to the credibility or weight of the evidence for that of the trier of fact. (*Jones*, *supra*, 17 Cal.4th at p. 301.)

Here, sufficient independent evidence of the corpus delicti existed to support the elements of the attempted robbery. Section 211 defines robbery as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§§ 211; 212.5, subd. (c).)

As the trial court aptly found, Huizar testified that two men on bikes, one of which was connected to appellant via DNA evidence, rode around Eucalyptus Avenue just before the shooting. (2RT 293; 9RT 1830.) Surveillance footage corroborated Huizar's testimony. (9RT 1861, 1863-1866.) The evidence further showed that Deputy Rosa opened her car trunk before the crimes and that, after the shooting, several items were strewn about inside the trunk, including her purse, which was partially open. (9RT 1873, 1881, 1893; 10RT 2055.) And the evidence showed that two men ran from the area after the crimes. (2RT 293.) From this evidence, the jury could reasonably infer that appellant and Flint surprised Deputy Rosa while she was at her trunk, and then appellant struggled with her over her

belongings. Given that there was no evidence of any sexual motive, it was also reasonable to infer that the presence of items in her trunk, including the open purse, coupled with the use of a gun, evidenced that the struggle resulted due to an attempt to take her belongings forcefully. As this Court made clear in *Alvarez*, *supra*, 27 Cal.4th at page 1181, even if this evidence was only a slight showing to permit the reasonable inferences above, it nevertheless sufficed to permit the jury to consider appellant's extrajudicial statements as well.

In addition, the jury was properly instructed, using CALJIC 2.72, that it could not convict appellant of a charge based on his out-of-court statements alone, but that it needed other evidence to show the charged crime was committed. (4CT 891.) The jury apparently weighed the evidence set forth above and found that there was sufficient independent evidence of the attempted robbery to infer reasonably that it occurred. (*People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions"].) This Court, therefore, should reject appellant's argument because the prosecution presented sufficient independent evidence of the corpus delicti of attempted robbery.

II. THE CORPUS DELICTI RULE WAS INAPPLICABLE TO THE UNDERLYING ATTEMPTED ROBBERY WITH RESPECT TO APPELLANT'S CONVICTION FOR MURDER UNDER THE FELONY-MURDER DOCTRINE

In his second argument on appeal, appellant contends that the prosecution presented insufficient evidence to support his conviction for murder under the felony-murder doctrine. Specifically, he alleged that because insufficient evidence supported his conviction for attempted robbery, it necessarily follows that insufficient evidence supported his conviction for first degree felony-murder. (AOB 50-53.) Appellant, however, fails to recognize that under the felony-murder doctrine, the prosecution was only required to establish the corpus delicti of the crime of

murder by independent evidence to permit the use of his extrajudicial statements.

Appellant does not dispute that the prosecution proceeded against him under a theory of first degree felony-murder, yet he fails to acknowledge that as a result it was only required to establish the corpus delicti of the murder by independent evidence before using his extrajudicial statements to prove both the murder and the attempted robbery. Like appellant does here, the defendant in *People v. Miller* (1951) 37 Cal.2d 801, argued that the prosecution was bound to establish by independent evidence the corpus delicti of the crime of attempted robbery, as well as the corpus delicti of murder before it could use his extrajudicial statements concerning the planning and execution of the attempted robbery to prove the degree of the murder. (*Miller*, *supra*, 37 Cal.2d at p. 806.) This Court, however, rejected the argument, and held that where a defendant was convicted on a felony murder theory,

> [t]he corpus delicti of the crime of murder having been established by independent evidence, both reason and authority indicate that the circumstances surrounding the commission of the crime can be shown by the extrajudicial statements of the accused, and that such evidence of the surrounding circumstances may be used to establish the degree of the crime committed.

(*Miller*, *supra*, 37 Cal.2d at p. 806.) The law this Court pronounced in *Miller* still governs. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 929-930; *People v. Cantrell* (1973) 8 Cal.3d 672, 680-681, overruled on other points in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, and *People v. Wetmore* (1978) 22 Cal.3d 318, 324, fn. 5; *People v. Cooper* (1960) 53 Cal.2d 755, 765; *People v. Amaya* (1952) 40 Cal.2d 70, 80; *People v. Martinez* (1994) 26 Cal.App.4th 1098, 1104; *People v. Scofield* (1983) 149 Cal.App.3d 368, 371-372; *People v. Scott* (1969) 274

Cal.App.2d 905, 907-908; *People v. Bolinski* (1968) 260 Cal.App.2d 705, 715.)

Appellant, nevertheless, contends that the prosecution was required to establish independently the corpus delicti not only for the charged crime of murder, but also for the crime of attempted robbery as the basis for felony-murder, despite *Miller*'s holding to the contrary. Yet *Miller* is consistent with the corpus delicti rule, because that rule does not require that the necessary mental state for the charged crime be shown by independent evidence. (*Alvarez*, *supra*, 27 Cal.4th at p. 1183; *People v. Daly* (1992) 8 Cal.App.4th 47, 59.) The role of the felony-murder rule is to provide a substitute for malice, i.e., the mental state required for murder. (*People v. Hansen* (1994) 9 Cal.4th 300, 320, disapproved on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1199; see also *People v. Patterson* (1989) 49 Cal.3d 615, 626.) Accordingly, the corpus delicti rule makes no demand that there be independent evidence establishing the crime of attempted robbery, i.e., the predicate crime that is the substitute for proof of appellant's mental state, in this matter. This Court, thus, should reject appellant's argument.

In any event, as demonstrated in Argument I, *ante*, there was sufficient evidence of the corpus delicti of the underlying attempted robbery. And there is no dispute about the sufficiency of evidence of the corpus delicti of the murder because Deputy Rosa was shot to death.

III. APPELLANT DID NOT HAVE A RIGHT TO COUNSEL WHEN LAW ENFORCEMENT ELICITED INCRIMINATING STATEMENTS FROM HIM

In his third argument on appeal, appellant contends that law enforcement obtained statements from him regarding the shooting of Deputy Rosa, in violation of his right to counsel and due process under the Sixth and Fourteenth Amendments of the federal Constitution. He alleges

that his right to counsel attached prior to the commencement of formal proceedings against him because the prosecution intentionally delayed in charging him to avoid the requirements of the Sixth and Fourteenth Amendments. (AOB 54-64.) He is incorrect because the prosecution had no duty to file charges as soon as probable cause existed and before it was satisfied that it would be able to establish his guilt beyond a reasonable. Thus, contrary to appellant's contention, the delay in charging him did not cause the attachment of his right to counsel.

A. The Relevant Trial Court Proceedings

On February 8, 2008, appellant moved to suppress the statements he made in the presence of undercover officers on the ground that law enforcement obtained the statements in violation of his right to counsel. (3CT 702-710.) The People opposed the motion. (3CT 714-718.)

On March 6, 2008, the court denied the motion. In doing so, the court noted that the United States Supreme Court had never given credence to the view that a defendant's right to counsel might attach before he was formally charged. The court addressed additional precedent on the issue and explained that the prosecution was permitted to charge appellant when it believed it had sufficient evidence to do so. As such, the court found that appellant's right to counsel had not attached when undercover law enforcement officers obtained the statements at issue. (2RT 336.)

B. Appellant's Right to Counsel Was Not Triggered before He Was Formally Charged

Contrary to appellant's claim, law enforcement did not violate his constitutional rights via the undercover operation that recorded his incriminating statements. A defendant's Sixth Amendment right to have counsel present during police questioning attaches upon the commencement of formal judicial proceedings on the charges. (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-690 [92 S.Ct. 1877, 32 L.Ed.2d 411].) The prosecution

cannot constitutionally use a defendant's own incriminating statements that an undercover law enforcement agent deliberately elicits after the commencement of formal judicial proceedings. (*Massiah v. United States* (1964) 377 U.S. 201, 207 [84 S.Ct. 1199, 12 L.Ed.2d 246].) In California, formal judicial proceedings commence upon the filing of the complaint. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1198-1199.) Here, the Los Angeles County District Attorney's Office filed the felony complaint in this case on September 27, 2006. (1CT 1.) Appellant made the incriminating statements during the undercover operation on August 16, 2006. (11RT 2169.) As such, *Massiah* does not apply.

Appellant's claim that prosecutorial delay in charging him somehow triggered his right to counsel or violated his due process rights is of no avail. Although it is true that "'[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions'" (*People v. Boysen* (2007) 152 Cal.App.4th 1409, 1419-1420), the only alleged prejudice from the delay was that law enforcement was able to bolster its investigation by tricking appellant into incriminating himself. (AOB 63-64.) But no court should "second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment . . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256.)

From the record before this Court, appellant has failed to establish as a matter of law that there was substantial evidence to require the filing of an information before the time of the undercover operation, or that the

prosecution improperly delayed the filing of charges without justification. Due process "'protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.'" (*Nelson*, *supra*, 43 Cal.4th at p. 1250.) It does not, as appellant urges, protect against minimal delays in the filing of charges necessitated by the need to investigate thoroughly suspected crimes. Here, the undercover operation was imperative, particularly in light of the absence of eyewitness identification and the murder weapon, the fact that Rowan and Celina had not yet been interviewed by the police (10RT 1945-1946), and the contamination of the initial DNA sample, which would obviously assist appellant in his defense (10RT 2119-2120). Aside from the prosecution's obtaining additional incriminating evidence, appellant cannot show the minimal delay in filing charges weakened his defense or resulted in any other prejudice. The prosecution, thus, merely gathered sufficient evidence to permit the charges and conviction.

Furthermore, any purported error in eliciting the incriminating statements was harmless beyond a reasonable doubt given the other overwhelming evidence in support of the convictions. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1313.) Not only did DNA evidence tie appellant to the crime, but also his own girlfriend Rowan and sister Celina testified that he admitted to the charged offenses. (10RT 1933-1936, 1940, 2022-2023, 2035-2036.) He also admitted to Rowan how he discarded the gun he used. (10RT 1943-1944.) And he instructed her how to assist him by providing the police with a false alibi and helping dissuade witnesses from testifying. (10RT 1947, 1956-1958, 1964-1965.) Similar admissions came before the jury via appellant's own mouth as a result of the recorded undercover operation. (11RT 2163-2290.) In light of the above, appellant

is not entitled to relief from this Court on his challenge to the admission of his incriminating statements during the undercover operation.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE THE TRIAL

In his fourth argument on appeal, appellant contends that the trial court's denial of his motion to continue the trial to June 16, 2008, violated his right to counsel, due process, and a fair trial. (AOB 64-77.) The trial court, however, acted well within its discretion when it denied the motion because appellant failed to establish that the continuance had any utility in contrast to the negative impact it would have had on the administration of justice.

A. The Relevant Trial Court Proceedings

On February 8, 2008, appellant's counsel moved to continue the trial to June 16, 2008, on the ground that she required additional time to investigate and prepare for trial. (3CT 711-713.) The court explained to appellant that his counsel desired the continuance to best defend him. Appellant, however, refused to waive time. (2RT 321-322.) The court then noted that appellant appeared to be intelligent and aware of the nature of the proceedings. He was permitted to waive his rights and even waive the presentation of mitigating evidence during the penalty phase. As such, the court simply could not find good cause to continue the matter for an additional five months over appellant's refusal to waive time, and it denied the motion on February 13, 2008. (4CT 769; 2RT 322-324.)

B. The Trial Court Weighed the Appropriate Factors and Did Not Act Arbitrarily

Contrary to appellant's claim, he is not entitled to relief from this Court on his claim that the trial court erroneously denied his request to continue the trial to June 16, 2008. The grant or denial of a motion to continue trial rests within the broad discretion of the trial court. (*People v.*

Jackson (2009) 45 Cal.4th 662, 678; *People v. Strozier* (1993) 20 Cal.App.4th 55, 60.) An abuse of discretion occurs only when the court acts arbitrarily, capriciously, or outside the bounds of reason. (*People v. Doolin* (2009) 45 Cal.4th 390, 450; *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) "In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, '"particularly in the reasons presented to the trial judge at the time the request [was] denied."' [Citations.]" (*People v. Courts* (1985) 37 Cal.3d 784, 791.) It is the defendant's burden to establish the existence of an abuse of discretion. (*Strozier*, *supra*, 20 Cal.App.4th at p. 60.) "[A]n order denying a continuance is seldom successfully attacked. [Citation.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

Continuances in criminal cases may only be granted on an affirmative showing of good cause. (§ 1050, subd. (e).) "Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice require a continuance." (Cal. Rules of Court, rule 4.113.) Although a trial court should not exercise its discretion to deny a continuance that would unfairly deprive a defendant of a reasonable opportunity to prepare a defense (*People v. Snow* (2003) 30 Cal.4th 43, 70), it is nonetheless not required to indulge every eve-of-trial defense request for additional time where diligence and good cause are not clearly demonstrated. (*Courts*, *supra*, 37 Cal.3d at pp. 791-792.) In ruling on a continuance motion, "[t]he court considers '"not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion."'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Here, the trial court appropriately evaluated the usefulness of a continuance in light of the arguments presented by defense counsel. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1003.) "[T]o demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time." (*Ibid.*) Appellant failed to make this showing.

In counsel's declaration in support of the continuance request, she first stated that she "presented DNA documents to an expert for review however as of this date have not received any feedback." (3SCT 16.) Counsel, however, made no effort even to estimate when and if she could obtain any material evidence related to the purported expert. Furthermore, in counsel's previous request for a continuance, filed October 16, 2007, seeking a February 4, 2008 trial date, counsel initially raised the issue of the DNA expert. (4SCT 3.) Despite the passing of four months since raising the issue, the continuance request at issue on appeal evidenced absolutely no progress with respect to the expert and, instead, spoke in vague generalities. Counsel additionally provided no explanation as to how a DNA expert would provide material exculpatory evidence. A continuance may be granted to investigate exculpatory evidence, but the speculative nature of what is to be gained justifies its denial. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 40-42.) Counsel's speculation was particularly important given the overwhelming evidence linking appellant to the charged offenses, including his own recorded admissions. (*Doolin, supra*, 45 Cal.4th at p. 451 [motion for continuance properly denied where "[r]etesting DNA would not have been beneficial to defendant . . . in light of the extensive evidence linking him to each crime"].)

Second, counsel claimed she needed the continuance for the purpose of retaining a psychiatrist and psychologist to assist with the penalty phase.

(3SCT 17.) Counsel never mentioned the necessity of these witnesses in her previous continuance request. (4SCT 1-3.) More importantly, counsel in no way explained how the services of either mental health professional would provide any evidence material to the penalty phase. Counsel also failed to set forth any time frame for retaining the psychiatrist or psychologist and any diligent attempts to retain same before the continuance request.

Third, counsel stated in her declaration that she required a continuance because, "she believed that there remain other penalty phase witnesses that must be located and interviewed." (3SCT 17.) When a continuance is sought to secure the attendance of a witness, the defendant must establish "that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*Owens v. Superior Court* (1980) 28 Cal.3d 238, 250-251; see also § 1050.) Obviously, counsel's vague assertion about witnesses met none of these requirements. (*Jenkins*, *supra*, 22 Cal.4th at p. 1038 ["to the extent defendant contends a continuance should have been granted to permit his penalty phase consultant to undertake an open-ended investigation of his character and background, the court was within its discretion in refusing to grant a continuance, because defendant had not demonstrated that a continuance would be useful in producing specific relevant mitigating evidence within a reasonable time"].)

The court was not only aware of the above deficiencies in appellant's request, but also weighed them against the nearly five months counsel sought by the continuance, as well as appellant's objection to counsel's request, refusal to waive time, and threat to represent himself if the court granted the request. (2RT 320.) With respect to counsel's seeking a nearly

five-month continuance based on vague and bald assertions, the amount of time was unreasonable when weighed against appellant's right to a speedy trial, which he did not want to waive. A defendant's right to a speedy trial is a fundamental right guaranteed by the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The Legislature has also provided for '"a speedy and public" trial as one of the fundamental rights preserved to a defendant in a criminal action. (§ 686, subd. 1.)' [Citation.] To implement an accused's constitutional right to a speedy trial, the Legislature enacted section 1382. [Citation.]" (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776.)

The continuance request was equally unreasonable when weighed against the risk that appellant would seek to represent himself. Appellant faced the death penalty if convicted. The seriousness of the penalty amplified a court's general preference that a defendant not represent himself given that a defendant may conduct his own defense to his own detriment. (*Faretta v. California* (1975) 422 U.S. 806, 834-835 [95 S.Ct. 2525, 45 L.Ed.2d 562]; *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891.) The risk that appellant represent himself and end up completely undermining his own defense and the efficient administration of justice far outweighed his counsel's purported need for unidentified evidence and witnesses.

Appellant claims that the trial court erroneously relied only on his objection to the continuance request when it denied the request, yet his claim is not supported by the record. (AOB 69-73.) The court acknowledged appellant's counsel's declaration under seal submitted in support of the continuance request. (2RT 320.) The fact that the discussion on the record specifically referenced appellant's objection to the request was not indicative of what the court considered in denying the request. It was, instead, indicative of appellant's counsel's electing to discuss that

issue with the court. (2RT 320.) It was further indicative of counsel's express request that the court not discuss any of the issues contained in the declaration in open court before the prosecution. (2RT 321.) Thus, the mere failure by the court and the parties to discuss the specifics of defense counsel's motion on the record does not support appellant's claim of error.

Even if this Court finds that the above factors did not weigh in favor of denying a continuance, appellant cannot show that he suffered any prejudice due to the denial. (See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 972-973 [finding no prejudice from denial of a continuance where there was no reasonable basis to conclude from the defendant's showing that the trial court's ruling led to a less favorable result for the defendant].) Given that the DNA evidence was completely unnecessary to convict appellant, no review by the defense's purported expert would have led to a more favorable result. A DNA expert could not have offered any evidence to undermine appellant's own confessions to the charged offenses. And it would be impossible for appellant to show he was prejudiced in the penalty phase due to the denial of the continuance because, as stated above, counsel's declaration did not identify the substance and materiality of any evidence allegedly still being sought. Counsel also was able to present an ample amount of evidence during the penalty phase. Appellant, thus, has not shown any abuse of discretion by the trial court or any resulting prejudice, and the court's ruling does not support a claim of error under the federal Constitution either. (See *Ungar v. Sarafite* (1964) 376 U.S. 575, 591 [84 S.Ct. 841, 11 L.Ed.2d 921].) This Court, therefore, should reject appellant's claim that the denial of his continuance constituted reversible error.

V. THE ADMISSION OF JULIE WATKINS' TESTIMONY REGARDING THE DNA ANALYSIS DID NOT VIOLATE THE CONFRONTATION CLAUSE

In his fifth argument on appeal, appellant contends that the admission of Julie Watkins' testimony regarding the DNA analysis, in lieu of Kari Yoshida's testifying, violated the confrontation clause. (AOB 77-83.) This argument is without merit. As shown by this Court's recent confrontation clause precedent, as well as the California Court of Appeal's application of same, Watkins' independent conclusions, arising from her and Yoshida's data, did not violate the confrontation clause. Moreover, even if her testimony was admitted in error, the error was harmless beyond a reasonable doubt given the overwhelming evidence supporting appellant's conviction.

The confrontation clause of the Sixth Amendment of the United States Constitution provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" (*Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed.2d 177].) The confrontation clause has traditionally barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.) "Under *Crawford*, the crucial determination about whether the admission of an out-of-court statement violates the confrontation clause is whether the out-of-court statement is testimonial or nontestimonial." (*People v. Geier* (2007) 41 Cal.4th 555, 597.)

Crawford did not specify what constitutes a testimonial statement for purposes of the confrontation clause. *Crawford*, however, offered examples of,

> [v]arious formulations of this core class of "testimonial" statements, i.e., "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [citation]; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," [citation]; [and] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" [citation].

(*Crawford, supra*, 541 U.S. at pp. 51-52.) Subsequently, the United States Supreme Court explained in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] that,

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis, supra*, 547 U.S. at p. 822.)

After the decision in *Davis*, this Court was asked to determine the admissibility of a report detailing DNA testing when the evidence was admitted by means of the testimony of a lab director who cosigned the analyst's report. (*Geier, supra*, 41 Cal.4th 555.) In *Geier*, the defendant was convicted of rape and murder based in part on DNA evidence. (*Id.* at pp. 562, 564-565, 593-596.) The laboratory analyst from Cellmark who performed the DNA testing did not testify at trial. A laboratory director who cosigned the report testified instead. (*Id.* at pp. 593-594 & fn. 11, 596.) The laboratory director testified that, based on the test results and in

her expert opinion, the DNA extracted from the vaginal swabs matched the victim and the defendant. (*Ibid.*)

Through analysis of the case law after *Crawford*, this Court recognized in *Geier* the difficulty of the threshold determination of whether evidence is testimonial or nontestimonial. (*Geier*, *supra*, 41 Cal.4th at pp. 597-605.) This Court stated it had not found any analysis of the applicability of *Crawford* and *Davis* to the type of scientific evidence at issue in *Geier* to be entirely persuasive. (*Id.* at p. 605.) Based on its own interpretation of *Crawford* and *Davis*, this Court ultimately concluded in *Geier* that the laboratory reports and notes were nontestimonial and therefore not inadmissible under *Crawford* and *Davis*. (*Id.* at pp. 605-607.)

Two years later, the United States Supreme Court issued its 5 to 4 decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], where the trial court had "admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." (*Id.* at p. 307.) There, the United States Supreme Court was asked to determine "whether those affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Ibid.*) The United States Supreme Court concluded that, because "[t]he 'certificates' are functionally identical to live, in-court testimony" and were made to provide prima facie evidence of the composition, quality, and weight of the analyzed substance, under *Crawford* they were "testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Id.* at pp. 309, 310-311.) The "testimonial" documents were therefore not admissible, because the analysts were not subject to cross-examination and the petitioner had no prior opportunity to cross-examine. (*Id.* at p. 311.)

Melendez-Diaz undermined many of the reasons given by this Court in *Geier* for reaching its conclusion. For example, *Geier* stated that the lab reports were not testimonial because they constituted "a contemporaneous recordation of observable events rather than the documentation of past events," in which the analyst had "recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Geier*, *supra*, 41 Cal.4th at pp. 605-606.) *Melendez-Diaz* discounted the value of the near-contemporaneous nature of the events reported. (*Melendez-Diaz*, *supra*, 557 U.S. at pp. 315-316.) *Geier* also determined that the reports were not testimonial because the analyst conducted the tests and made her report contemporaneously, "as part of her job, not in order to incriminate defendant." (*Geier*, 41 Cal.4th at p. 607.) The notes and report were "not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results." (*Ibid.*) *Melendez-Diaz* stated that scientific data are not neutral when they are produced against a defendant, and statements in business records prepared by those whose business activity "is the production of evidence for use at trial" may only be admitted into evidence if subject to the requirements of the confrontation clause. (*Melendez-Diaz*, 557 U.S. at pp. 321-322.)

Next, in *Bullcoming v. New Mexico* (2011) __U.S.__ [131 S.Ct. 2705, 180 L.Ed.2d 610], the defendant's blood sample was sent to a state lab for testing after he was arrested for drunk driving. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2709.) The analyst recorded the results on a state form and signed the form, which included a "'certificate of analyst.'" (*Id.* at pp. 2709, 2710.) A reviewer certified that the analyst was qualified and that established procedures had been followed. (*Id.* at p. 2711.) At the defendant's trial, the analyst who tested his blood sample did not testify because he had been placed on disciplinary leave. (*Id.* at pp. 2711-2712.)

The prosecution called another analyst who was familiar with the lab's testing procedures but had not signed the certification, nor had he participated in, observed, or reviewed the analysis of the defendant's sample. (*Id.* at pp. 2710, 2712, 2713.)

The plurality opinion in *Bullcoming* explained that the surrogate analyst was an inadequate substitute for the analyst who performed the test. Surrogate testimony by someone who qualified as an expert regarding the machine used and the lab's procedures could not convey what the actual analyst knew or observed and would not expose "any lapses or lies" by the certifying analyst. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2715.) The United States Supreme Court stated that, if the Sixth Amendment is violated, "no substitute procedure can cure the violation." (*Id.* at p. 2716.)

Bullcoming reiterated the principle stated in *Melendez-Diaz* that a document created solely for an evidentiary purpose in aid of a police investigation is testimonial. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717.) Also, even though the analyst's certificate was not signed under oath, as occurred in *Melendez-Diaz*, the two documents were similar in all material respects. (*Bullcoming*, 131 S.Ct. at p. 2717.)

In *Michigan v. Bryant* (2011) 562 U.S.__ [131 S.Ct. 1143, 179 L.Ed.2d 93], the United States Supreme Court considered whether admission of a mortally wounded victim's statements to police officers violated the confrontation clause. (*Id.* at p. 1150.) Police officers asked the victim what had happened and who had shot him. The victim identified the defendant and said the shooting had occurred about 25 minutes earlier. (*Ibid.*) The United States Supreme Court held that the primary purpose of the interrogation was to enable law enforcement to meet an ongoing emergency. (*Id.* at pp. 1150, 1164.) In its description of "'ongoing emergency,'" the United States Supreme Court identified several factors that informed the determination of the primary purpose of the questioning,

such as the formality of the encounter, and the statements and actions of both the declarant and the interrogator. (*Id.* at pp. 1160-1161.) Quoting from *Davis*, *supra*, 547 U.S. at page 822, the United States Supreme Court noted, "[W]e cannot say that a person in [the victim's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'" (*Bryant*, *supra*, 131 S.Ct. at p. 1165.) Under all of the circumstances of the encounter, the United States Supreme Court concluded the victim's identification of the defendant was not testimonial hearsay. (*Id.* at pp. 1166-1167.)

In *Williams v. Illinois* (2012) __U.S.__ [132 S.Ct. 2221, 183 L.Ed.2d 89], the statements at issue were those of a prosecution expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police laboratory using a sample of the petitioner's blood. (*Id.* at p. 2227.) A plurality of four justices held in part that, "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." (*Id.* at p. 2228.) The plurality offered a second basis for its decision, stating that, even if the report in question had been admitted into evidence, it was not testimonial in that it was not sought for the purpose of obtaining evidence to be used against the petitioner, who was not a suspect at the time. (*Id.* at pp. 2228, 2243.) The plurality observed that "[t]he abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id.* at p. 2242.)

Justice Thomas joined the four justices of the plurality solely in the judgment. Justice Thomas concluded that the disclosure of Cellmark's out-of-court statements by means of the expert's testimony did not violate the Confrontation Clause for the sole reason that the expert's testimony "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." (*Williams*, *supra*, 132 S.Ct. at p. 2255 (conc. opn. of Thomas, J.).)

The remaining four justices joined in a vehement dissent authored by Justice Kagan in which the conclusion that the expert's testimony about the out-of-court statements was not offered for its truth was found to have no merit and was labeled a "prosecutorial dodge." (*Williams*, *supra*, 132 S.Ct. at pp. 2265, 2268 (dis. opn. of Kagan, J.).) Because Justice Thomas also believed that "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose," the dissent asserted that "Five justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication." (*Id.* at p. 2257 (conc. opn. of Thomas, J.), 2265 (dis. opn. of Kagan, J.).)

People v. Lopez (2012) 55 Cal.4th 569 is one of three major cases from this Court addressing confrontation clause issues after the *Williams* decision. The others are *People v. Dungo* (2012) 55 Cal.4th 608 and *People v. Rutterschmidt* (2012) 55 Cal.4th 650. All three cases, like *Williams*, were concerned with confrontation clause issues engendered by the results of technical reports whose contents were testified to by someone other than the person who conducted the analysis. (See *Rutterschmidt*, *supra*, 55 Cal.4th at p. 659 [laboratory reports on testing of murder victim's blood samples]; *Dungo*, *supra*, 55 Cal.4th at p. 612 [autopsy report]; *Lopez*, *supra*, 55 Cal.4th at p. 573 [laboratory report on blood-alcohol level].)

In *Lopez*, this Court found no confrontation clause violation because the critical portions of the report on the defendant's blood-alcohol level

"were not made with the requisite degree of formality or solemnity to be considered testimonial." (*Lopez*, *supra*, 55 Cal.4th at pp. 582, 584.) In *Dungo*, there was no confrontation clause violation because "criminal investigation was not the primary purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Dungo*, *supra*, 55 Cal.4th at p. 621.) In *Rutterschmidt*, this Court set forth the confrontation clause arguments by the Attorney General and defendant but concluded only that any error in allowing the laboratory director to testify to the results of two reports by analysts who did not testify was harmless beyond a reasonable doubt, because the evidence of guilt was overwhelming. (*Rutterschmidt*, *supra*, 55 Cal.4th at pp. 652, 659-661.)

Lopez summed up *Williams* by stating,

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

(*Lopez*, *supra*, 55 Cal.4th at pp. 581-582.)

Justice Liu stated in his dissent to *Lopez* that the nine separate opinions offered by this Court in *Lopez*, *Dungo*, and *Rutterschmidt* reflected "the muddled state of current doctrine concerning the Sixth Amendment right of criminal defendants to confront the state's witnesses against them." (*Lopez*, supra, 55 Cal.4th at p. 590 (dis. opn. of Liu, J.).) Justice Liu stated that *Williams* produced no authoritative guidance beyond

the result reached on its facts. (*Id.* at p. 590.) The majority in *Dungo* noted that the complexities of the case were not easy to resolve in light of the widely divergent views of the justices in *Williams*. (*Dungo*, *supra*, 55 Cal.4th at p. 618.) Justice Chin, concurring in *Dungo*, stated that the split among the justices in *Williams* made it "difficult to determine what to make of that decision." (*Id.* at p. 628 (conc. opn. of Chin, J.).) He concluded that it was necessary to decide whether there was a confrontation clause violation under Justice Thomas's opinion and whether there was a confrontation clause violation under the plurality's opinion. If there was not, then the result would command the support of a majority of justices in the *Williams* decision. (*Id.* at p. 629 (conc. opn. of Chin. J.); see also *People v. Barba* (2013) 215 Cal.App.4th 712, 733-734 [concluding that Justice Chin's opinion, even if not binding precedent, was persuasive authority and a reliable indicator of how the majority would hold].)

Several districts of the California Courts of Appeal have published decisions applying the line of authority developed by the United States Supreme Court and this Court. These decisions include *People v. Huynh* (2012) 212 Cal.App.4th 285, *People v. Holmes* (2012) 212 Cal.App.4th 431, *People v. Steppe* (2013) 213 Cal.App.4th 1116, and *Barba*, *supra*, 215 Cal.App.4th 712.

In *Huynh*, the defendant contended his Sixth Amendment rights were violated when a nurse testified about a victim's sexual assault examination conducted by another nurse. (*Huynh*, *supra*, 212 Cal.App.4th at p. 315.) At issue were two photographs taken during the examination of the victim, which were used by the testifying nurse to state her independent opinion. (*Id.* at p. 320.) The court held that the photographs lacked the formality and solemnity required to be testimonial. (*Ibid.*) In addition, the photographs did not have a primary purpose that pertained in some way to a criminal prosecution, because it was not known at the time of the

examination if the drugged victim had been sexually assaulted, and the photographs were not taken for the primary purpose of accusing a targeted individual. (*Id.* at p. 321.) Therefore, the witness's testimony, which stated objective facts she gleaned from the photographs, did not give the defendant the right to confront and cross-examine the examining nurse. (*Id.* at pp. 320, 321.)

In *Holmes*, *supra*, 212 Cal.App.4th 431, the reviewing court determined that the confrontation clause did not bar testimony by,

> [t]hree supervising criminalists . . . [who] offered opinions at trial, over defense objection, based on DNA tests that they did not personally perform. They referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory reports that were prepared by nontestifying analysts. None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during the testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts.

(*Id.* at p. 434.) The *Holmes* court reasoned that these documents were not testimonial because, "[t]he forensic data and reports in this case lack 'formality.' They are unsworn, uncertified records of objective fact. Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial." (*Id.* at p. 438.) *Holmes* concluded, "It is now settled in California that a statement is not testimonial unless both criteria [i.e., formality and primary purpose] are met. In *Lopez*, the court concluded that lack of formality alone rendered the blood-alcohol report nontestimonial regardless of its primary purpose. [Citation.]" (*Id.* at p. 438.)

In *Steppe*, *supra*, 213 Cal.App.4th 1116, the appellate court upheld admission of a laboratory technical reviewer's independent opinion that the defendant's DNA profile matched DNA that was retrieved from certain evidence. The testifying witness reviewed the raw data, interpreted it,

concluded the victim's DNA was on defendant's clothing, and offered a random match probability opinion. (*Id.* at pp. 1120-1121.) *Steppe* held:

> Both *Williams* and *Lopez* persuade us that the trial court's overruling of defendant's objection was not error. There are two aspects of the technical reviewer's testimony that defendant's objection could be viewed as encompassing, i.e., her reference to the raw data and her reference to the conclusion reached by the clothing/door analyst, which was the same as the conclusion she reached. As to the first, *Lopez* specifically held that a machine printout is not subject to confrontation analysis. Here, it was never established how the raw data was generated, or by whom. Defendant cites no authority that testimony concerning raw data, by an expert subject to cross-examination, violates the confrontation clause.

(*Id.* at p. 1126.) "As to the second aspect, the technical reviewer's reference during her testimony to the conclusion reached by the clothing/door analyst, we note, . . . as a general matter, as both *Williams* and *Lopez* concluded, such lab reports, containing these conclusions, lack the degree of formality and solemnity to be considered testimonial for purposes of the confrontation clause." (*Id.* at pp. 1126-1127.)

In *Barba*, *supra*, 215 Cal.App.4th 712, a Cellmark laboratory director, who had not personally done the DNA testing, testified about the results. Her duties included "performing technical reviews of case folders created by the lab's test analysts, independently drawing conclusions from the test results based on her own expertise and training, and either cosigning the reports or testifying about them in court." (*Id.* at p. 718.) *Barba* found no confrontation clause error, stating, "We believe that a majority of [the United States Supreme Court] would approve of an affirmance here for two reasons. Justice Thomas would approve because DNA reports lack the solemnity and formality required to be deemed testimonial. The plurality would approve because, at least as we read the opinion, DNA test reports are not testimonial in part due to practical considerations, and in part

because their primary purpose is not to accuse a targeted individual." (*Id.* at p. 742.) The court added, "As for the practical considerations that motivated the plurality in *Williams*, we agree that it makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Ibid.*)

This Court should uphold the admission of Watkins' testimony based on the application of its own reasoning in *Holmes*, *Barba*, and *Steppe*. Watkins directly participated in the DNA collection and analysis, reached her own independent conclusion based on the data, co-authored the DNA report, and was subject to cross-examination. (10RT 2121-2122, 2134.) Additionally, the fact that she testified permitted an extensive investigation into and introduction of evidence of the contamination of the first DNA sample, arguably the only DNA-related evidence that could have possibly assisted appellant's defense. (10RT 2119.) Further, as noted in *Barba*, DNA test reports lacked the solemnity and formality required to be deemed testimonial.

Furthermore, even if this Court found that Watkins' testimony violated the confrontation clause, the error in admitting it was harmless. A violation of the confrontation clause is harmless if this Court finds "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674], quoting *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710].) Here, the alleged error was harmless beyond a reasonable doubt based on the other overwhelming evidence, independent of the DNA evidence, that supported the verdicts. Specifically, appellant's own girlfriend Rowan and sister Celina testified that appellant admitted to the charged offenses. (10RT 1933-1936, 1940,

2022-2023, 2035-2036.) He also told Rowan how he discarded the gun he used. (10RT 1943-1944.) And he instructed her how to assist him by providing the police with a false alibi and helping dissuade witnesses from testifying. (10RT 1947, 1956-1958, 1964-1965.) Similar admissions came before the jury via appellant's own mouth as a result of the recorded undercover operation. (11RT 2163-2290.) This evidence was far stronger than the DNA evidence and more than sufficient to convict appellant. He, therefore, suffered no harm due to the admission of Watkins' testimony, and this Court should reject his claim of a confrontation clause violation.

VI. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS BECAUSE EVEN IF THE WIRETAP APPLICATION DID NOT STRICTLY COMPLY WITH PRECISE PROCEDURES, SUPPRESSION WAS UNWARRANTED UNDER THE CIRCUMSTANCES

In his sixth argument on appeal, appellant contends that the trial court erred when it denied his motion to suppress evidence obtained pursuant to a wiretap order. Appellant claims that the prosecution illegally obtained the wiretap order because it failed to establish that the District Attorney was absent or the nature of the party's authority making the application for the order. (AOB 83-89.) Appellant's argument, however, relies on a hypertechnical reading of the statutes regarding wiretaps and ignores the fact that the United States Supreme Court has never held that each and every failure to abide by the precise statutory requirements necessitates suppression. Moreover, the express and implicit findings of the trial court demonstrated that the application met the statutory requirements.

A. The Relevant Trial Court Proceedings

On October 2, 2007, appellant moved to suppress the wiretap evidence. (1RT 85.) The People opposed the motion. (3CT 686-694.)

On January 18, 2008, the court denied the motion. (3CT 696.) In denying the motion, the court rejected appellant's argument that the

prosecution was required to prove District Attorney Steve Cooley was absent and the reason why he was absent with supporting documentation in connection with the wiretap application. The court explained that it did not believe the Legislature intended to require such burdensome and unnecessary proof. In addition, the court agreed with the prosecution that under the relevant statute, "absent" meant unavailable to complete the task and, thus, Chief Deputy District Attorney John Spillane's statement in the application that he was designated to act in District Attorney Cooley's absence was sufficient. (2RT 258-259, 263-265.)

B. The Wiretap Application Complied with the Relevant Statutory Requirements, and Appellant's Mechanical Interpretation of Wiretap Law Is Untenable and Unsupported by Binding Authority

As a preliminary matter, the primary basis of appellant's claim that the trial court erred when it denied his motion to suppress the wiretap evidence is the Ninth Circuit Court of Appeals' holding in *United States v. Perez-Valencia* (9th Cir. 2013) 727 F.3d 852, that remand was required to determine whether the assistant district attorney who applied for the wiretap order was designated to act for all purposes as the district attorney in the absence of "the principle prosecuting attorney," under section 629.50. (*Id.* at pp. 855-856.) This Court is obviously aware that it is not bound by decisions of the lower federal courts, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Assuming this Court, nevertheless, entertains appellant's argument, he has failed to show he is entitled to relief for two reasons. First, appellant has not demonstrated that the wiretap application did not comply with the relevant statutory requirements. A trial court's determination that the documentation supporting the wiretap authorization application satisfies these requirements is entitled to substantial deference and is reviewed for abuse of discretion. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1204.)

The reviewing court defers to the trial court's express and implied factual findings that are supported by substantial evidence. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1171; *People v. Reyes* (2009) 172 Cal.App.4th 671, 683.) As detailed below, substantial evidence supported the trial court's findings.

Wiretaps issued by state courts are regulated by 18 U.S.C. § 2516(2):

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge . . . may apply to such judge for . . . an order authorizing, or approving the interception of wire, oral, or electronic communications . . . .

(18 U.S.C. § 2516(2).) Section 629.50 is the California statute that authorizes wiretap applications within the State. At the county level, the statute states that "a district attorney, or the person designated to act as district attorney in the district attorney's absence," may apply to a superior court "for an order authorizing the interception of a wire or electronic communication." (§ 629.50, subd. (a).) As such, compliance with 18 U.S.C. § 2516(2) necessarily requires an analysis of the applicable state wiretap statute, section 629.50. That statute in turn plainly authorizes "the person designated to act as district attorney in the district attorney's absence" to apply for such an order.

District Attorney Cooley properly delegated his responsibility under the wiretap statute, which only requires that "the person designated to act as district attorney in the district attorney's absence" make the application "in writing upon [his] personal oath or affirmation." (§629.50, subd. (a).) As noted in the order authorizing the wiretap, the wiretap application identified Chief Deputy Spillane as designated to act as *district attorney* in District Attorney Cooley's absence, and Chief Deputy Spillane subsequently applied to the trial court for the wiretap authorization. (3CT 694.) No

additional documentation confirming District Attorney Cooley's absence or enumerating each of Chief Deputy Spillane's responsibilities as the acting district attorney was required or contemplated by statute. The statute could have, but did not, require District Attorney Cooley or his designate to provide documentation or elaboration. In the absence of such statutory provision, this Court should presume the Legislature did not intend to require such proof. "'If the language [of a statute] is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . .' [Citation.]" (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.)

In light of the above, the wiretap application complied with the statutory requirements. Appellant's argument that further proof as to the nature of District Attorney Cooley's absence and as to the exact nature of Chief Deputy Spillane's authority was required is not supported by the statute. His reliance on *Perez-Valencia*, does not establish otherwise because in *United States v. Giordano* (1974) 416 U.S. 505 [94 S.Ct. 1820, 40 L.Ed.2d 341], the United States Supreme Court found that the federal wiretap statute was not properly complied with because it was not executed by the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to authorize an application to a federal judge for a wiretap order, but instead the Attorney General's Executive Assistant who was not properly designated to authorize and review such applications for wiretaps. The facts of *Giordano* are materially distinguishable from the case at hand where District Attorney Cooley officially designated a particular Deputy District Attorney, Chief Deputy Spillane, to act in his absence, and that is precisely who authorized this wiretap application. As set forth above, the wiretap application described that Chief Deputy Spillane "is the person designated to act as district attorney in the district attorney's absence", under Section 629.50. In that

capacity, Chief Deputy Spillane applied to the trial court requesting authorization to intercept communication. (3CT 694.)

Moreover, even if this Court found that the application contained insufficient proof of District Attorney Cooley's absence and designation of authority, not every failure to comply fully with the wiretap requirements would render the wiretap unlawful thereby requiring suppression of its fruits. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 151-152.) California's wiretap laws are not more restrictive than federal law, by which the United States Supreme Court has repeatedly observed "'not every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications "unlawful."' [Citation.]" (*United States v. Donovan* (1977) 429 U.S. 413, 433 [97 S.Ct. 658, 50 L.Ed.2d 652]; see also *Zepeda*, *supra*, 87 Cal.App.4th at p. 1196, quoting Senate Committee on Criminal Procedure, Report on Assembly Bill Number 1016 (1995–1996 Regular Session) as amended April 3, 1995 [the Legislature's express intent is that California's law "conform to the federal law"].)

In addition, the last sentence of section 629.72 states, "The motion [to suppress] shall be made, determined, and be subject to review in accordance with the procedures set forth in section 1538.5." Cases involving challenges to traditional searches under section 1538.5 have long applied a "harmless error" test when considering whether to suppress evidence because of minor violations of statutory procedures. (See, e.g., *People v. Meza* (1984) 162 Cal.App.3d 25, 36-37; see also Code of Civ. Proc., § 475 ["The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties"].) Although these cases recognize "[c]ompliance with the prerequisites of the statute must be adhered to in

order to insure adequate judicial supervision and control to preserve the constitutional guarantees [citation]" they agree "[t]echnical defects in the procedure . . . do not invalidate the search [citation]." (*People v. Sanchez* (1982) 131 Cal.App.3d 323, 329.) Even violations of core requirements of the search procedure such as the warrant's failure to describe the place to be searched with particularity may not result in suppression of the evidence seized in the search if the People can demonstrate the warrant served the purpose of the requirement: to prevent a general rummaging around in a person's belongings (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 467 [91 S.Ct. 2022, 29 L.Ed.2d 564]). Numerous cases have held, for example, an ambiguity in the warrant's description of the place to be searched is not fatal if the officer conducting the search can resolve the uncertainty by referring to the affidavits supporting the warrant. (See, e.g., *Nunes v. Superior Court* (1980) 100 Cal.App.3d 915, 933-935; *People v. Peck* (1974) 38 Cal.App.3d 993, 1000-1001; *People v. Moore* (1973) 31 Cal.App.3d 919, 927; *People v. Grossman* (1971) 19 Cal.App.3d 8, 12-13.)

Here, appellant has failed to show how the absence of more detailed proof of District Attorney Cooley's absence and designation of authority to Chief Deputy Spillane thwarted the purpose of the wiretap laws and harmed him. Under the circumstances, this Court should reject his argument that the trial court should have suppressed the evidence the prosecution obtained from the wiretaps.

Finally, even if the evidence obtained from the wiretaps was admitted in error, such error was harmless beyond a reasonable doubt in light of the other overwhelming independent evidence of guilt. (*Chapman, supra*, 386 U.S. at p. 24; *Jackson, supra*, 129 Cal.App.4th at p. 165.) In addition to DNA evidence linking appellant to the bike left at the crime scene, appellant's own girlfriend Rowan and sister Celina testified that he admitted to the charged offenses. (10RT 1933-1936, 1940, 2022-2023,

2035-2036.) He also told Rowan how he discarded the gun he used. (10RT 1943-1944.) And he instructed her how to assist him by providing the police with a false alibi and helping dissuade witnesses from testifying. (10RT 1947, 1956-1958, 1964-1965.) Similar admissions came before the jury via appellant's own mouth as a result of the recorded undercover operation. (11RT 2163-2290.) This evidence, without even considering that obtained from the wiretap, was more than sufficient to convict appellant. This Court, therefore, should reject appellant's claim of error regarding the wiretaps.

VII. THE TRIAL COURT DID NOT IMPROPERLY COERCE TESTIMONY FROM ROWAN AND CELINA, WHO WERE BOTH EVASIVE AND UNCOOPERATIVE WITNESSES

In his seventh argument, appellant contends that the trial court erred by participating in the coercion of Rowan and Celina, who were critical witnesses at trial. Appellant claims that the court permitted the prosecution to use blatantly suggestive leading questions and to threaten the witnesses. He adds that the court judged the credibility of the witnesses and sided with the prosecution when it warned the witnesses about the consequences of lying. (AOB 89-134.) His claim, however, is without merit because the methods employed by the prosecution and court were permissible given Rowan's and Celina's deliberately evasive and uncooperative behavior while testifying.

A. The Relevant Trial Court Proceedings

During Rowan's testimony, the court spoke with the prosecution, defense counsel, and Rowan's counsel outside the presence of the jury. The court expressed its concern with Rowan's cooperation on the stand because despite her plea deal, which required her to tell the truth, Rowan consistently testified that she had difficulty remembering the facts. The court informed her counsel that if her behavior continued, counsel would

have to discuss with her the requirement that she tell the truth. The prosecution asked that the court direct counsel to do so immediately, and defense counsel objected. (10RT 1959-1960.) The court told defense counsel that Rowan was being a difficult witness, and after sending the jury out of the courtroom, the court directed Rowan's counsel to speak with her about being truthful and volunteering responses rather than requiring prodding by the prosecution. Rowan's counsel complied with the court's request and advised Rowan of her obligation to testify truthfully and voluntarily. (10RT 1961.)

During Celina's testimony, the court stopped the proceedings when Celina asked the prosecution a question. The court permitted Celina's counsel to speak with her about appropriate behavior while on the stand and then admonished Celina about asking questions. (10RT 2030.) Following the admonition, the court noted that Rowan and Celina were not being forthcoming while testifying. (10RT 2031.) Defense counsel suggested that such statements by the court were tantamount to intimidating Rowan and Celina by conveying that they better do what the prosecution asks of them. The court disagreed and stated that it was simply reminding the witnesses of their obligation to tell the truth. The court then noted that like Rowan, Celina would initially testify that she did not remember something, but then change her testimony when prodded by the prosecution. Just as Rowan did, Celina was not volunteering information. (10RT 2032.) Celina's counsel responded that Celina was trying to remember, but she was nervous and much time had passed since the murder. (10RT 2034.) The court reiterated that the prosecution's reminding Rowan and Celina that they were under oath was not a form of inappropriate intimidation and, instead, was the result of both witnesses being difficult and uncooperative. (10RT 2034.) Celina's testimony resumed, but her uncooperative behavior

continued, and her counsel requested a moment to speak with her. (10RT 2038.)

Following the discussion, Celina resumed her testimony and stated that she was concerned about the sentence she might receive and hoped her testimony would help her receive a lenient sentence. Celina was concerned that the prosecution might argue for a harsher sentence for her, but testified that she did not feel compelled to testify dishonestly to curry the prosecution's favor. (10RT 2043-2044.)

B. The Trial Court Acted within Its Discretion When It Permitted the Prosecution to Ask Rowan and Celina Leading Questions and Reminded Both Witnesses of the Obligation to Testify Truthfully

Although appellant characterizes the court's permitting the prosecution to ask leading questions of Rowan and Celina and reminding both of the obligation to testify truthfully as coercing testimony favorable to the prosecution, the trial court did not err. Evidence Code section 764 states, "A 'leading question' is a question that suggests to the witness the answer that the examining party desires." Evidence Code section 767, subdivision (a)(1), states, "(a) Except under special circumstances where the interests of justice otherwise require: [¶] (1) A leading question may not be asked of a witness on direct or redirect examination." Trial courts have broad discretion to decide when such special circumstances are present. (*People v. Williams* (1997) 16 Cal.4th 635, 672.)

For example, "A leading question is permissible on direct examination when it serves 'to stimulate or revive [the witness's] recollection.'" (*Williams*, *supra*, 16 Cal.4th at p. 672.) Another "long established" special circumstance is "when the prosecution is faced with a hostile witness." (*People v. Spain* (1984) 154 Cal.App.3d 845, 853.) Witnesses may be shown to be hostile, for example, because of their relationship with the defendant (*id.* at p. 852 [the defendant's mother]), or

because their demeanor on the stand indicates they are "inclined to favor the defense as much as possible" (*People v. Grey* (1972) 23 Cal.App.3d 456, 464), or "inclined to tell as little as [they] actually kn[o]w of the matter as possible" (*People v. Bliss* (1919) 41 Cal.App. 65, 71). "[A]ssessment of the circumstances revealing the witness' hostility is uniquely within the realm of the trial court," and therefore "the use of leading questions on direct examination is committed to the sound discretion of the trial court." (*Spain*, *supra*, 154 Cal.App.3d at p. 853.)

Here, the trial court acted within its discretion when it permitted the prosecution to ask Rowan and Celina leading questions because both claimed a lack of memory and were hostile. The hostility of both witnesses was obvious given that Rowan was appellant's girlfriend and the mother of his children (10RT 1929) and Gonzalez was his sister (10RT 2019). Their bias in favor of appellant was evidenced by the fact that they previously lied to the police and concocted a false alibi for him. (10RT 1932, 1947-1948, 2024-2025.) Rowan also passed appellant a note while he was in custody in a surreptitious effort to keep him apprised of the status of the police investigation. (10RT 1951.)

Rowan's and Celina's hostility was equally evidenced by their deliberately evasive purported lack of memory. A review of their testimony shows that the two failed to give complete and truthful answers to the prosecution's initial questions and, instead, required a subsequent course of multiple leading questions to elicit the sought after information. (10RT 1932-1934, 1943, 1958, 2023-2025, 2028-2029.) The court even highlighted this behavior outside the presence of the jury. (10RT 1960-1961, 2031-2034.) Because of Rowan's demeanor on the stand, the court stated, "I'm getting the feeling that [Rowan's] memory is going downhill, and to me that reflects lack of cooperation pursuant to her bargain that she's entered into." (10RT 1959.) During Celina's testimony, the court

reiterated its concern for the two witnesses' lack of cooperation. (10RT 2031.) This Court has recognized the deference owed to a trial court's determination on the question of a whether a witness' purported lack of memory was a deliberate evasion. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 690, fn. 2.) In light of the above, this Court should find that Rowan's and Celina's behavior compelled the leading questions to stimulate their memories and elicit complete and truthful answers.

Appellant's contention that the prosecution and court impermissibly threatened and coerced Rowan and Celina by reminding them to tell the truth and cautioning them about the consequences of committing perjury is equally without merit. (AOB 91-92.) The court and prosecution were permitted to remind them that they were under oath and that perjury was a crime for which they could be punished. (See *Webb v. Texas* (1972) 409 U.S. 95, 95-96 [93 S.Ct. 351, 34 L.Ed.2d 330]; *People v. Bryant* (1984) 157 Cal.App.3d 582, 589-590.) Both witnesses entered into plea agreements by which they were required to testify truthfully. (10RT 1932, 2024.) Neither was promised a more lenient sentence in exchange for any particular testimony. (10RT 1989, 2043-2044.) Had they been promised leniency, they would not have so willingly testified evasively. Furthermore, the court did not engage in any of the types of gratuitous criticism, snide comments, and sarcasm regarding witnesses either in front of or in the absence of the jury that this Court has held inappropriate. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1240.) Thus, the prosecution and court did not engage in any misconduct by reminding Rowan and Celina of the requirement that they testify truthfully or they could be subject to penalty for committing perjury. As such, the trial court acted well within its discretion in the management of Rowan and Celina as witnesses in furtherance of the interests of justice.

Appellant, nevertheless, relies on *People v. Medina* (1974) 41 Cal.App.3d 438, in support of his claim that the court and prosecution

committed reversible misconduct. (AOB 123-124.) There, the court found constitutionally impermissible an immunity agreement by which the witness was required not to change materially or substantially his testimony from previous police interviews. (*Medina*, *supra*, 41 Cal.App.3d at p. 450.) No such agreement was present here and, thus, the facts of *Medina* are materially distinguishable. As this Court has recognized, "unless the bargain is expressly contingent on the witness sticking to a particular version," constitutional principles are not violated. (*People v. Garrison* (1989) 47 Cal.3d 746, 771.) Rowan and Celina were not subject to any such express contingency and, instead, were simply required to testify truthfully, as are all witnesses. This Court has held that, "it is clear that an agreement requiring only that the witness testify fully and truthfully is valid." (*People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252, fn. omitted.) As such, *Medina* fails to support appellant's argument that the prosecution's and court's conduct compelled Rowan and Celina to do anything more than testify truthfully.

Appellant also relies on *United States v. Juan* (9th Cir. 2013) 704 F.3d 1137 (AOB 119-122.) Again, this Court is not bound by decisions of the lower federal courts, even on federal questions. (*Crittenden*, *supra*, 9 Cal.4th at p. 120, fn. 3.) Regardless, the holding of *Juan* in no way furthers appellant's argument because the United States Court of Appeals for the Ninth Circuit only held there that a prosecutor could impermissibly interfere with the testimony of his own witness if he communicates to the witness a threat over and above what the record indicates is necessary. (*Juan*, *supra*, 704 F.3d at p. 1142.) It made no finding regarding the permissibility of the prosecutor's conduct and, more importantly, it acknowledged that warning a witness about the possibility and consequences of perjury may be warranted. (*Ibid.*) As detailed above, the

circumstances of Rowan's and Celina's testimony warranted the conduct of the prosecution.

Finally, even if the trial court and the prosecution erred regarding the examination of Rowan and Celina, such error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Had Rowan and Celina provided testimony favorable to appellant, the prosecution would have introduced compelling evidence from law enforcement officers who interviewed them and overheard the wiretapped calls to impeach them. (10RT 1945-1950, 2025.) Moreover, the prosecution presented substantial evidence of guilt, aside from the testimony of these two hostile witnesses. (See Statement of Facts, *ante*.) Under no circumstances would the absence of the purported error have assisted appellant. For the above reasons, this Court should not find that the prosecution and the trial court engaged in any reversible misconduct during the direct examinations of Rowan and Celina.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RESTRICTED APPELLANT'S CROSS-EXAMINATION OF ROWAN AND CELINA

In his eighth argument, appellant contends that the trial court improperly restricted his counsel's cross-examination of Rowan and Gonzalez. (AOB 135-146.) The trial court, however, did not abuse its discretion when it restricted the cross-examination because counsel engaged in argumentative questioning in an effort to argue to the jury that Rowan and Celina were crafting their testimony in the interest of pleasing the prosecution rather than being truthful. Moreover, appellant was not harmed by the restriction because counsel was still permitted to question both witnesses as to whether their testimony was affected by the potential sentence they might receive in connection with their plea agreements.

A. The Relevant Trial Court Proceedings

During the cross-examination of Rowan, defense counsel inquired whether Rowan was now claiming that she was telling the truth to please the prosecution. (10RT 1970-1971.) The prosecution objected that the line of questioning was argumentative, and the court agreed. The court sustained the objection and found that defense counsel was implying by the questioning that the prosecution wanted Rowan to make up a story to further its case. (10RT 1970-1971.) Defense counsel then clarified he was trying to ask the witness whether her testimony was tainted by the fact that she could get a three-year sentence if the prosecution was not in agreement with her testimony. In turn, the court agreed that defense counsel could ask Rowan whether her testimony was tainted by her belief that she would receive three years in prison as a result of her violating the terms of her plea agreement, if the prosecution did not believe she testified honestly. (10RT 1971-1972.) Defense counsel complied with the court's ruling, and resumed cross-examination of Rowan. Rowan then stated that she was testifying in a way she believed would keep her from receiving a three-year prison sentence. She further stated that she was concerned her testimony might affect her sentence. (10RT 1972.)

Defense counsel asked similar questions of Celina on cross-examination. From the questioning, counsel elicited testimony from her that she was testifying in a manner that she believed would prevent her from receiving a three-year prison sentence. Celina added that she was concerned that her testimony could affect a potential sentence and that she entered into the plea agreement because she wanted to go home to her children rather than go to prison. (10RT 1972, 1974.)

B. Appellant's Counsel Engaged in Impermissibly Argumentative Cross-Examination and, Regardless, Was Permitted to Elicit the Sought after Testimony

Appellant's claim that the trial court's restriction of his counsel's argumentative cross-examination of Rowan and Celina infringed on his constitutional rights is without merit because he was still permitted to explore whether the witnesses were biased by their plea agreements. The confrontation clause of the Sixth Amendment guarantees a criminal defendant the right to confront and cross-examine the witnesses against him. A violation of the confrontation clause occurs where a defendant shows he was "prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness." (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385, citing *Delaware v. Van Arsdall, supra*, 475 U.S. at 679-680] and *Davis v. Alaska* (1974) 415 U.S. 308, 318 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

The trial court, however, retains broad discretion to limit cross-examination on issues of a witness's credibility. (*Davis*, *supra*, 415 U.S. at pp. 315-316.) A limitation on cross-examination does not violate the confrontation clause "'unless the prohibited cross-examination might reasonably have produced "'a significantly different impression of [the witness's] credibility. . . .' " (*People v. Belmontes* (1988) 45 Cal.3d 744, 780, quoting *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) "As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues." (*In re Ryan*

N., *supra*, 92 Cal.App.4th at p. 1386; see also *Van Arsdall*, *supra*, 475 U.S. at p. 679 [court must consider the relevance and probative value of the proposed cross-examination]; *United States v. Guthrie* (9th Cir. 1991) 931 F.2d 564, 568-569 [no violation where defense is permitted to impeach the witness by other lines of questioning that afford "'sufficient information to appraise the biases and motivations of the witness'"].) As the United States Supreme Court has observed, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [106 S.Ct. 292, 88 L.Ed.2d 15] (per curiam).)

Similarly, a defendant's constitutional right to present a defense is not unlimited. The due process right to present a defense requires that a defendant be able "'to present all relevant evidence of significant probative value to his defense.'" (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; see also *Snow*, *supra*, 30 Cal.4th at p. 90; *People v. Frye* (1998) 18 Cal.4th 894, 945.)

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. "Evidentiary rulings will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice." (*In re Ryan N.*, *supra*, 92 Cal.App.4th at p. 1385, and cases cited therein.) A reviewing court should declare a miscarriage of justice only if, after an examination of the entire cause, including the evidence, that court is of the opinion that it is reasonably probable that a result more favorable

to the appellant would have been reached in the absence of the error. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170, citing *Watson, supra,* 46 Cal.2d at p. 836.)

Here, the trial court acted well within its discretion and did not infringe on appellant's constitutional rights when it restricted his counsel's cross-examination of Rowan and Celina. As detailed above, counsel was not permitted to ask specifically if Rowan and Celina were testifying in a manner to please the prosecution. (10RT 1970-1971.) Restricting this particular phrasing was within the court's discretion because the question was argumentative.

"An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) "An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*Ibid.*) Counsel's questioning was argumentative because it did not seek to elicit testimony that would explain a potential bias Rowan and Celina had so that the jury could weigh their credibility. It, instead, sought to argue the conclusion that the two witnesses were crafting their testimony in a way to curry the favor of the prosecution in connection with their plea agreements.

More importantly, appellant's counsel was not restricted from inquiring about the witnesses' potential bias. The court permitted defense counsel to ask Rowan whether her testimony was tainted by the fact that she would receive three years in prison as a result of her violating the terms of her plea agreement, if the prosecution did not believe she testified honestly. (10RT 1971-1972.) Rowan then stated that she was testifying in a way she believed would keep her from receiving a three-year prison

sentence. She further stated that she was concerned her testimony might affect her sentence. (10RT 1972.) Appellant's counsel elicited similar testimony from Celina, who admitted she was concerned about the sentence she might receive, believed the prosecution might be present at her sentencing, and wanted to provide testimony that would help her at her sentencing. (10RT 2043-2044.) From this testimony, it is apparent that the court's narrow restriction of defense counsel's cross-examination in no way infringed on appellant's right to confront Rowan and Celina and present a defense that their testimony was biased and compromised. The restriction actually ensured that both witnesses provided the jury with specific facts from which it could infer that they were biased. In any event, the fact that counsel was still able to elicit the sought after testimony from Rowan and Gonzalez so that counsel could argue to the jury that both were biased and lacked credibility unquestionably demonstrates that any error in restricting the cross-examination was harmless. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1159.) Appellant, therefore, is not entitled to relief on this claim.

IX. VIDEOTAPE CLIP #16 REGARDING A CARJACKING WAS ADMISSIBLE AS AN ADOPTIVE ADMISSION RELEVANT TO APPELLANT'S GUILT FOR THE ATTEMPTED ROBBERY AND MURDER OF DEPUTY ROSA, AS WELL AS FOR THE NON-HEARSAY PURPOSE OF PROVIDING CONTEXT TO THE RECORDED DISCUSSIONS

In his ninth argument, appellant contends that the trial court erred by permitting the jury to consider videotaped clips that were both irrelevant and highly prejudicial. (AOB 146-152.) Specifically, he challenges the admission of Clip #16 because it referred to a carjacking that appellant previously committed, which was not relevant in the guilt phase of the trial. (AOB 148-152.) This evidence, however, was highly relevant to provide context to appellant's taking responsibility during the undercover operation

for the murder of Deputy Rosa. Additionally, Evidence Code section 352 did not require the exclusion of the evidence because its probative value was not substantially outweighed by the danger of undue prejudice due to its admission.

A. The Relevant Trial Court Proceedings

During a pretrial hearing, appellant objected to the admission of the clip at issue during which he spoke with Detective Clift about a carjacking he committed. He claimed that the clip contained inadmissible evidence of other crimes that was not relevant to the guilt phase. (9RT 1724.) The court disagreed. It explained that the evidence showed that appellant was aware that he could be facing a much more serious penalty for the attempted robbery and murder of Deputy Rosa and, therefore, hoped he was in custody, instead, for the carjacking. The court further explained that it could instruct the jury to consider the evidence of other crimes only as to appellant's state of mind and knowledge about the attempted robbery and murder of Deputy Rosa. Appellant responded that it believed the court's ruling would only be appropriate if the clip actually mentioned the attempted robbery and murder, which it did not. (9RT 1725.) The prosecution, however, emphasized that the clip had to be viewed in the context of all the other clips, including the one in which Detective Clift mentioned a "big jale," slang for criminal job, to refer to the attempted robbery and murder. The court agreed that the context of the clip was implicit, and that appellant's response in which he mentioned the carjacking to Detective Clift constituted an adoptive admission. As such, the court found the clip "highly relevant" to appellant's state of mind or consciousness of guilt. (9RT 1726.)

B. The Evidence Was Relevant Because It Tended to Prove that Appellant Was Responsible for the Murder of Deputy Rosa

Appellant's initial challenge that the clip contained irrelevant evidence (AOB 149-150) is without merit because the clip tended to show that he was responsible for the attempted robbery and murder of Deputy Rosa. Evidence possessing any tendency in reason to prove or disprove any disputed material fact is relevant and may be admissible at trial. (Evid. Code, §§ 210, 351; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177.) A trial court enjoys broad discretion in determining the relevance of evidence. (*Garceau, supra*, 6 Cal.4th at p. 177.) Here, the trial court did not abuse such discretion.

Clip #16 was necessary for the jury to put in context the entirety of appellant's conversation with Detective Clift during the undercover operation. When viewed in context, appellant's statement obviously showed that he was hopeful he was in custody and would be sentenced for a carjacking rather than the attempted robbery and murder of Deputy Rosa. As Detective Clift testified, he was discussing with appellant why appellant might be in custody, as well as investigative techniques, in an effort to elicit incriminating statements about the murder and any potential evidence tying appellant to same. (11RT 2191, 2193.) Detective Clift was not yet certain whether appellant knew that he was going to be charged with Deputy Rosa's murder. (11RT 2200.) The conversation continued such that it was clear that Detective Clift and appellant were discussing Deputy Rosa's murder. (11RT 2207.) Appellant referred to the crime being "cappa" or one subject to capital punishment. (11RT 2213.) Further discussion continued about why appellant might be in custody (11RT 2215), and then appellant made the statement now at issue on appeal (11RT 2218).

Thus, in context, appellant's statement that he would gladly accept a sentence of 20 years or less in prison showed his guilty state of mind regarding the murder of Deputy Rosa, which he admitted would expose him to capital punishment. Under the circumstances where the initial DNA sample was contaminated, no eyewitnesses could identify appellant, no murder weapon was recovered, and two key witnesses were biased, evasive and uncooperative (Rowan and Celina), evidence as powerful as appellant's guilty state of mind was highly relevant and probative to the ultimate issue of whether appellant murdered Deputy Rosa. The trial court, therefore, acted well within its discretion when it found that the evidence was relevant under Evidence Code section 210.

In addition, Evidence Code section 352 did not compel the exclusion of the evidence. Under Evidence Code section 352, the trial 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." (Evid. Code, § 352.) Here, Clip #16 did not in any way mention violence as appellant suggests. (AOB 148.) Rather, appellant minimized his conduct in the clip by characterizing it as taking someone "for a little ride." (Exh. H at p. 301; AOB 148.) And even if the clip had mentioned a greater degree of violence, such violence would hardly inflame the emotions of the jury when compared to the cold-blooded murder of a female officer. Further, the prosecution did not make any effort to prove the carjacking or introduce evidence regarding any details of the offense. Equally important is the fact that the clip was brief and did not unduly consume time during the trial. The trial court, therefore, did not err when it admitted the clip.

C. Clip #16 Contained an Admissible Adoptive Admission and, Regardless, Was Admissible for the Non-Hearsay Purpose of Providing Context for Appellant's Admissions during the Undercover Operation

Appellant's contention that even if Clip #16 was relevant, the trial court still erred by admitting it because it was not an adoptive admission (AOB 150-151) is equally without merit. Under Evidence Code section 1221, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Under this provision, this Court has made clear that "'[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) An appellate court reviews the admission of evidence as an adoptive admission for an abuse of discretion and will not reverse unless the trial court exercised its discretion in an "'arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Here, the trial court acted well within its discretion when it found that appellant's statement about his willingness to serve time on an offense other than Deputy Rosa's murder constituted an adoptive admission. As set forth above, Detective Clift was discussing the murder of Deputy Rosa, and referred to it as the "big jale." (9RT 1726; 11RT 2207.) His statements were plainly accusatory in that they suggested to appellant that he was in

custody because he must be responsible for Deputy Rosa's murder. Appellant had the opportunity to deny his involvement in the murder. But rather than doing so, he adopted Detective Clift's belief that he was the murderer by stating that he hoped he was in custody for something else. As such, appellant has not only failed to show that the evidence was irrelevant, but also that it was not an adoptive admission.

Even if this Court finds that Clip #16 did not contain an adoptive admission, the evidence was still admissible. Evidence of an out-of-court statement is also admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay purpose is relevant to an issue in dispute. (*People v. Turner* (1994) 8 Cal.4th 137, 189; *People v. Armendariz* (1984) 37 Cal.3d 573, 585.) For example, as was the case here, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements. (*Turner*, *supra*, 8 Cal.4th at pp. 189-190.) Given the admissions by appellant on many of the clips the prosecution properly played for the jury, Clip #16 was also admissible to provide context for these admissions as argued above regarding the clip's relevance. The trial court, therefore, did not abuse its discretion by admitting Clip #16.

Finally, any alleged error in admitting the clip was harmless beyond a reasonable doubt in light of the overwhelming evidence against appellant. (*Chapman*, *supra*, 386 U.S. at p. 24; *Jackson*, *supra*, 129 Cal.App.4th at p. 165.) In addition to DNA evidence linking appellant to the bike left at the crime scene, appellant's own girlfriend Rowan and sister Celina testified that he admitted to the charged offenses. (10RT 1933-1936, 1940, 2022-2023, 2035-2036.) He also told Rowan how he discarded the gun he used. (10RT 1943-1944.) And he instructed her how to assist him by providing the police with a false alibi and helping dissuade witnesses from testifying. (10RT 1947, 1956-1958, 1964-1965.) Similar admissions came before the

jury via appellant's own mouth as a result of the recorded undercover operation. (11RT 2163-2290.) Based on this overwhelming evidence, appellant cannot show that he would have received a more favorable verdict had the trial court excluded the challenged clip. This Court, therefore, should reject appellant's claim of error.

X. THE TRIAL COURT'S ADMISSION OF THE OFFICERS' TESTIMONY REGARDING THE VIDEO RECORDINGS OF THE UNDERCOVER OPERATION DID NOT VIOLATE THE "SECONDARY EVIDENCE RULE"

In his tenth argument, appellant contends that the trial court erred by permitting oral testimony from the officers involved in the undercover operation regarding the contents of video recordings of the operation. Appellant asserts that the admission of the testimony violated the secondary evidence rule codified in Evidence Code sections 1520 through 1523. (AOB 153-157.) Because the court admitted and played for the jury the actual video recordings and the officers' testimony was not admitted to convey the contents of the recordings, the testimony did not violate the secondary evidence rule. The officers were permitted not only to lay a foundation for the recordings, but also to provide their expert opinion as to subjects discussed during the recordings that were beyond the scope of a layperson's experience. In any event, the admission of the officers' testimony in no way prejudiced appellant.

The secondary evidence rule is contained in Evidence Code section 1523, subdivision (a), which states: "Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." "Writing" is defined in Evidence Code section 250. For purposes of the secondary evidence rule, a videotape is a writing. (*People v. Panah* (2005) 35 Cal.4th 395, 475, citing *People v. Moran* (1974) 39 Cal.App.3d 398, 407-408.) The purpose of the secondary evidence rule is to "minimize the possibilities of misinterpretation of writings by requiring the production of

the original writings themselves, if available." (*Panah, supra*, 35 Cal.4th at p. 475.)

Here, the admission of testimony by Detectives Roberts, Clift, Beltran, Avina, and Noyola did not violate Evidence Code section 1523 because it was not offered "to prove the content of a writing." (Evid. Code, § 1523, subd. (a).) The prosecution introduced and the court admitted into evidence the video recordings of the undercover operation themselves. It is difficult to ascertain how the admission of the challenged testimony violated Evidence Code section 1523 when the actual video recordings were admitted into evidence.

Contrary to appellant's claim, the detectives' testimony was not admitted to prove the contents of the videotape and usurp the jury's ability to view the recordings for itself. Beginning with Detective Roberts' testimony, he testified in conjunction with Clip #1 to lay a foundation and authenticate that the recording, in fact, depicted the undercover officers placed in a holding cell at Los Angeles County Jail. (11RT 2179.) He further testified to lay a foundation as to the context of the conversation that ensued, including that the unspecified "he" appellant referred to was Flint, a conclusion based on his personal knowledge. (11RT 2181, 2183.) The same was true of Clip #2. (11RT 2183-2184.) Detective Roberts was also able to explain why he was removed and returned from the holding cell. (11RT 2185.)

Detective Clift similarly laid the foundation that he was present in Clip #3 and speaking with appellant. (11RT 2191.) He subsequently provided expert testimony regarding why he mentioned C.S.I. to appellant. Specifically, he explained that in his experience, inmates were aware of investigative techniques. As such, he hoped to induce appellant to discuss any evidence possibly left at the scene that might be subject to investigative techniques. (11RT 2192-2193.) Given that Detective Clift had 27 years

experience as a deputy sheriff, and appellant did not object to his qualification as an expert, he was sufficiently qualified to explain the very purpose for his conversation on the tape. (See Evid. Code, § 720, subd. (a).) His testimony was necessary in that the jury could not have deduced that C.S.I. was a topic people in custody discussed. The jury was equally ill-equipped to deduce the strategy of an undercover officer in attempting to induce an inmate to speak about a crime. The jury was further ill-equipped to know, without Detective Clift's explanation, that "jale" was a term used by inmates and gang members to refer to a criminal job. (11RT 2193-2194.) And the remainder of Detective Clift's testimony was to provide context to the conversations. (11RT 2195-2198.)

Detective Clift also offered admissible expert testimony regarding wristbands that inmates wore during Clip #4. Beyond common experience was the different color wristbands and what each color represented. In light of Detective Clift's experience, he was able to shed light on the correspondence between the colors and the charged offense. (11RT 2198-2199.) This experience further allowed him to explain to the jury that "cuete" was gang member and criminal slang for a gun, and in Clip #10 that a "G ride" referred to a stolen car. (11RT 2203, 2208.) With respect to Clip #10, Detective Clift's expertise also allowed him to explain that law enforcement often relied on surveillance cameras on public transportation during investigations. (11RT 2209.) In the same clip, Detective Clift utilized his expertise to explain that "hooda" was slang for a police officer, and "cappa" was slang for a crime that exposed someone to capital punishment. (11RT 2210, 2213.) Clip #12 presented the same opportunity for expert testimony in connection with Detective Clift's explanation that the term "palabra" referred to snitching (11RT 2214), and Clip #16 allowed him to explain that a "clucker" was a street term for a drug addict (11RT 2216).

As to Clip #5, Detective Clift provided context as to what it meant to strategize between co-defendants, thus, laying a foundation for the conversation on the clip. (11RT 2201.) Detective Clift's testimony was essential to lay a foundation in a similar manner with respect to Clip #6 regarding what it meant to throw "something on [Flint's] plate." (11RT 2203.) His later testimony as to a beanie in Clip #7 was necessary to put in context the character he was playing as an undercover officer and the purpose of the character. (11RT 2205.) Such foundational testimony continued in Clip #9 to explain the meaning of the term "tonto" and the phrase "shot him the heat" (11RT 2206), in Clip #16 to explain the significance of "7, 10, 15, and 20" as potential prison terms (11RT 2218), in Clip #18 to explain that "cutting that baby up" referred to discarding the murder weapon (11RT 2219), and in Clip #27 to explain that the "store" referred to the commissary at Los Angeles County Jail (11RT 2224). The above examples unquestionably show how Detective Clift was able to provide expert and foundational context for the jury.

Detective Beltran provided admissible testimony too. His qualifications as an expert were unchallenged and more than sufficient given that he worked for the Los Angeles County Sheriff's Department for 13 years, including in Men's Central Jail and a gang unit. (11RT 2240.) He used this expertise to explain such phrases as "straight muerte" in Clip #28, which he testified was street slang for murder, and "heina hooda" in the same clip, which meant a female officer. (11RT 2243-2244.) Detective Beltran testified as well as to foundational facts regarding the context of conversations with appellant in clips Clip #34 and Clip #35. (11RT 2249.)

Appellant complains about Detective Noyola's testimony in conjunction with Clips #46, #47, and #52 as well, but his testimony was also admissible. (AOB 157.) As to Clips #46 and #47, Detective Noyola provided foundational testimony as to the purpose of the conversation he

was having with appellant. (11RT 2278-2279.) Turning to Clip #52, all Detective Noyola did was identify himself in the video clip to lay a foundation. (11RT 2294.)

The above summary of the detectives' testimony shows that each detective involved in the undercover operation was permitted to provide admissible testimony as to foundational facts regarding the video clips and to provide expert testimony. Such testimony covered terms and matters well beyond the jurors' lay experience and certainly aided them to understand the content of the video clips.

What is more, the admission of the detectives' testimony did not prejudice appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Even without the detectives testimony, the jury still would have heard appellant's admissions that he committed the murder of Deputy Rosa, a subject none of the detectives described. (11RT 2242-2245, 2284.) This evidence, coupled with Rowan's and Celina's testimony and the DNA evidence, overwhelmingly supported appellant's convictions. The exclusion of the detectives' testimony, therefore, would not have produced a more favorable result. For all of the above reasons, appellant is not entitled to relief on his evidentiary challenge to the testimony.

XI. THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE OF THE UNCHARGED CARJACKING AND ARMED ROBBERIES UNDER THE CORPUS DELICTI RULE FOR THE JURY TO CONSIDER APPELLANT'S ADMISSIONS IN VIDEO CLIP #1 AND CLIP #3 UNDER SECTION 190.3, SUBDIVISION (B), DURING THE PENALTY PHASE

In his eleventh argument on appeal, appellant claims that the trial court erred by allowing the jury to consider appellant's statements, contained in video clips, as evidence of criminal activity under section 190.3, subdivision (b), in the absence of independent evidence of the corpus delicti of the crimes. Specifically, appellant challenges video Clip #1

regarding a carjacking of a Mercedes and Clip #3 regarding armed robberies. (AOB 158-161.) His argument is without merit because the prosecution presented ample independent evidence to prove the corpus delicti of both crimes.

To the extent appellant is challenging the admissibility of the video clips under the corpus delicti rule rather than the sufficiency of the evidence, he has forfeited this claim by failing object on this basis in the trial court. (See *People v. Hajek* (2014) 58 Cal.4th 1144, 1213-1214 [failure to assert specific ground of objection to admissibility of evidence constitutes forfeiture].) Regardless, the corpus delicti rule pertains to the sufficiency of the evidence required to convict a defendant as opposed to the admissibility of the evidence used to do so. This distinction is proven by the well-established rule that a defendant's inculpatory out-of-court statements may be relied upon to establish his or her identity as the perpetrator of a crime. (*People v. Howard* (2010) 51 Cal.4th 15, 36-37.) The corpus delicti rule's principal purpose is "to ensure that a defendant is not convicted of a crime that never occurred" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394), and the rule's purpose is achieved by establishing that the prosecution cannot rely exclusively on extrajudicial statements, confessions, and admissions of a defendant to prove the corpus delicti of a crime (*Alvarez, supra*, 27 Cal.4th at pp. 1168-1169). Here, the prosecution did not violate the rule.

In considering a capital defendant's punishment, the jury is permitted to consider 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." (§ 190.3, subdivision (b).) The requisite "criminal activity" must violate a penal statute and "the use or attempted use of force or violence or the express or implied threat to use

force or violence" must be directed at a person. (*People v. Clair* (1992) 2 Cal.4th 629, 672; *People v. Boyd* (1985) 38 Cal.3d 762, 772, 776.)

Although in Clip #1 appellant admits to a carjacking and identifies a Mercedes (13RT 2502), the prosecution made clear in its opening statement during the penalty phase that it would be providing evidence of the March 8, 2006 carjacking of Ouanounian. (13RT 1558.) The fact that Ouanounian testified the car was actually a Lexus (14RT 2765) does not undermine the proof of the carjacking. Prosecutions often involve differing identifications of the make and model of a vehicle at issue. Such inconsistencies are for the jury to resolve. What is imperative is that the prosecution presented evidence independent from appellant's admission in Clip #1 that he committed the carjacking it set out to prove. And the prosecution did just that via the testimony of Ouaounian, the victim of the offense, and Detective Johnson, who testified that Ouaounian identified appellant as the carjacker from a photo six-pack. (14RT 2769-2773, 2783-2784.) Equally imperative is that in the video clip, appellant discussed how the victim was brought to a home and set up for the carjacking. (15RT 2949.) This description of the carjacking was consistent with Ouaounian's account. (14RT 2766-2768.)

Appellant's challenge to Clip #3 is even more futile. The prosecution explained in his penalty phase opening argument that he would prove a string of armed robberies appellant committed. (13RT 2558.) Although appellant's admission on Clip #3 did not specify the dates and locations of the armed robberies, the prosecution's additional evidence, including the testimony of the victims of the robberies and appellant's other admissions to law enforcement, provided all of the remaining details necessary to prove the offenses. (13RT 2566-2567, 2573-2574, 2579, 2586, 2621-2622, 2626-2627, 2636, 2640-2641, 2648, 2656, 2662, 2665-2666, 2675; 14RT 2683-2689.)

In light of the above, the jury was presented with substantial, if not overwhelming, evidence of the corpus delicti of the carjacking and armed robberies that the prosecution introduced under section 190.3, subdivision (b), to allow the jury's consideration of appellant's admissions and to prove the crimes.

XII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING A VIDEOTAPE AS VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE

In his twelfth argument on appeal, appellant claims that the trial court erred by admitting a videotape containing victim impact evidence. He asserts that the contents of the videotape ran afoul of the restrictions this Court has put on such types of evidence to create an emotional impact. (AOB 162-171.) He is incorrect because the trial court acted within its sound discretion when it admitted the videotape.

Victim impact evidence, including photographic images of the victim while she was alive, may be introduced at penalty phase proceedings under the federal Constitution (*Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]) and under our state law (*People v. Russell* (2010) 50 Cal.4th 1228, 1264-1265; *People v. Dykes* (2009) 46 Cal.4th 731, 781). "[T]he state has a legitimate interest in '"counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to [her] family."'" (*People v. Garcia* (2011) 52 Cal.4th 706, 751, quoting *Payne*, *supra*, at . 825; accord, *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056.) "Unless it invites a purely irrational response, evidence of the effect of a capital murder on the loved ones of the victim is relevant and admissible under section 190.3, factor (a), as a circumstance of the crime. [Citation.] The federal Constitution bars

victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. [Citations.]" (*People v. Booker* (2011) 51 Cal.4th 141, 190; *People v. Zamudio* (2008) 43 Cal.4th 327, 364.)

The prosecution may use videotapes for victim impact purposes in capital penalty trials. This Court has said, however, that trial courts must take care in admitting such evidence, because "the medium itself may assist in creating an [undue] emotional impact upon the jury." (*People v. Prince* (2007) 40 Cal.4th 1179, 1289.) Under this case-by-case approach, this Court has had little difficulty upholding videotaped tributes to murder victims. (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1240-1241 [depicting victim's humble upbringing in Mexico].) Some took more time to play than the present one. (See, e.g., *Zamudio*, *supra*, 43 Cal.4th at pp. 363-368 [14-minute videotape spanning lives of elderly married couple from childhood to gravesite]; *People v. Kelly* (2007) 42 Cal.4th 763, 794-799 [20-minute videotape showing female victim from infancy through age 19, when she died].)

Kelly, *supra*, 42 Cal.4th 763, is highly relevant here. There, the defendant was convicted of robbing, raping, and murdering a 19-year-old woman, Sara, who was a Native American and who had been adopted as an infant into a Caucasian home. At the penalty phase, Sara's mother described Sara's life and the pain her death had caused family and friends. Over the defendant's objection, the prosecution also played a 20-minute videotape that Sara's mother had prepared. It consisted of video clips and still photographs spanning Sara's life, with the voice of her mother calmly narrating events in the background. The music of Enya played through most of the video, but the volume was soft and the lyrics were faint. On screen, Sara was seen singing with a school group, including the song, "You Light Up My Life." Other images showed her swimming, horseback riding, and interacting with family and friends. Near the end of the

videotape, Sara's mother stated that she did not dwell on the "terrible crime." (*Id.* at p. 797.) The video ended with a view of Sara's gravestone, followed by a clip of people riding horseback in Alberta, Canada—the "kind of heaven" in which Sara was said to belong. (*Ibid.*)

Rejecting the defendant's contrary claims, this Court held in *Kelly* that because the presentation was relevant and not unduly emotional, it was permissible. (*Kelly*, *supra*, 42 Cal.4th at p. 797.) This Court noted that even though the mother's testimony and the videotape covered similar ground, they supplemented, rather than duplicated, one another. The reason was that the videotape "humanized" Sara in a way that live testimony could not do. (*Ibid.*) "In particular, the videotape helped the jury to see that defendant took away the victim's ability to enjoy her favorite activities, to contribute to the unique framework of her family . . . and to fulfill the promise to society that someone with such a stable and loving background can bring." (*Ibid.*)

At most, only two questionable elements emerged—the background music by Enya and the horseback-riding scene from Canada. This Court made clear that such sentimentality is not impermissible as long as it helps show "what [the murder victim] was like." (*Kelly*, *supra*, 42 Cal.4th at p. 798.) This Court also acknowledged that the challenged features seemed to play a mostly "theatric" role in Sara's case because they imparted little "additional relevant material." (*Ibid.*) However, there was no reason to decide whether the trial court abused its discretion in admitting the videotape with these features intact, because any such error was harmless beyond a reasonable doubt. In making this point, this Court relied on the routine use of music and special effects in videotapes, the factual nature of Sara's videotape overall, and the aggravating nature of the penalty evidence as a whole. (*Id.* at p. 799.)

No different result is warranted here. After reviewing the videotape, this Court should agree with the trial court, which conducted its own careful analysis, that there is nothing objectionable about the manner in which the videotape was edited and prepared. As the trial court noted, the videotape was less than half as long as the one this Court permitted in *Kelly*. (14RT 2794.) Furthermore, unlike in *Kelly* where the music, containing lyrics, was easily heard, the music here was soft and without lyrics. It also was not particularly dramatic. (14RT 2793-2794.) Also distinguishable from *Kelly* is the fact that there was no video of any gravestone or burial spot. (14RT 2792-2793.) In fact, the trial court did not even notice that the videotape was recorded at a cemetery until defense counsel mentioned the location. (14RT 2789.) And contrary to appellant's claim, this Court has made clear that voiceover by family members and photographs depicting the life of Deputy Rosa are not objectionable. (*Kelly*, *supra*, 42 Cal.4th p. 797.) As the trial court aptly noted, the videotape did not contain any inflammatory rhetoric, sobbing, crying, and otherwise overly emotional behavior. (14RT 2794.)

Like the evidence admitted in *People v. Huggins* (2006) 38 Cal.4th 175, the testimony provided via the videotape, "though emotional at times, fell far short of anything that might implicate the Eighth Amendment." (*Id.* at p. 239; accord, *Zamudio*, *supra*, 43 Cal.4th at pp. 364-368.) As such, the videotape contained factual and relevant images and commentary by those who knew Deputy Rosa. The videotape served simply to "humanize[ ]" Deputy Rosa, "as victim impact evidence is designed to do." (*Kelly*, *supra*, 42 Cal.4th at p. 797; see also *People v. Brown* (2004) 33 Cal.4th 382, 397-398 [upholding admission of victim impact testimony that "concerned either the immediate effects of the murder," the "residual and lasting impact" that the victim's family continued to experience, and testimony that served "to explain why [the family members] continued to be affected

by his loss and to show the 'victim's "uniqueness as an individual human being"'"].) Rejecting appellant's challenge to the admission of this evidence would be consistent with this Court's prior decisions. The challenged evidence simply reflected "manifestations of the psychological impact experienced by the victims" and "understandable human reactions" to the nature and circumstances of Deputy Rosa's murder. (*Brown*, *supra*, 33 Cal.4th at p. 398.)

In addition, any error in admitting the videotape was clearly harmless. For the reasons set forth in *Kelly*, *supra*, 42 Cal.4th 763, and described above, there was "no reasonable possibility these portions of the videotape affected the penalty determination." (*Id.* at p. 799.) The aggravating nature of the penalty evidence overall was overwhelming, including detailed evidence from appellant's victims of violent crimes that he committed even while in custody. Under the circumstances, the admission of the videotape as victim impact evidence did not constitute reversible error.

XIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

In his thirteenth argument on appeal, appellant contends that California's death penalty scheme, as interpreted by this Court, violates the federal Constitution. (AOB 171-184.) First, he asserts that section 190.2 is impermissibly broad. (AOB 173-174.) The list of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad. (*People v. Dykes* (2009) 46 Cal.4th 731, 813.)

Second, appellant claims that section 190.3, subdivision (a), as applied, allows arbitrary and capricious imposition of death. (AOB 173-175.) This Court has already rejected this claim. (*People v. Jones* (2011) 51 Cal.4th 346, 380-381, and cases cited therein.)

Third, appellant argues that the death penalty scheme fails to contain necessary safeguards. (AOB 176-177.) Among these safeguards, he asserts that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 178-179, 182-184.) This Court has rejected this claim as well. (*Jones*, *supra*, 51 Cal.4th at pp. 380-381, and cases cited therein.) Contrary to appellant's claim (AOB 179-181), nothing in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], affects that conclusion. (*People v. McDowell* (2012) 54 Cal.4th 395, 443.)

Appellant additionally complains that the jury should be required to make written findings or achieve unanimity as to aggravating circumstances.[10] (AOB 177, 184-185.) This Court has rejected this argument. (*People v. Streeter* (2012) 54 Cal.4th 205, 268; *People v. McKinnon* (2011) 52 Cal.4th 610, 693; *People v. Scott* (2011) 52 Cal.4th 452, 496.)

Another safeguard appellant argues is necessary is that some burden of proof is required or the jury should have been instructed that there was no burden of proof. (AOB 177.) This Court has rejected this argument too. (*Jones*, *supra*, 51 Cal.4th at pp. 380-381.)

Appellant suggests that the failure to conduct inter-case proportionality review shows that the death penalty scheme lacks a required

[10] Appellant advances this argument in Argument XIV of the Opening Brief as well. (AOB 184-185.)

safeguard.[11] (AOB 177, 186-187.) But this Court has already determined that this claim lacks merit. (*People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Fourth, appellant contends that the trial court's failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, even-handed administration of the death penalty scheme.[12] (AOB 188.) This Court has rejected this argument. (*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

Fifth, appellant argues that the California capital sentencing scheme violates the equal protection clause.[13] (AOB 188.) This Court has held that this claim is without merit. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Sixth, appellant asserts that California's use of the death penalty as a regular form of punishment falls short of international norms.[14] (AOB 189-191.) This Court has held that this claim too lacks merit. (*People v. Cook* (2006) 39 Cal.4th 566, 620.)

XIV. NO CUMULATIVE PREJUDICE EXISTS IN THIS CASE

In his fourteenth and final argument on appeal, appellant argues that he suffered cumulative prejudicial error. (AOB 192.) But where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) The essential question is whether the

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[11] Appellant advances this argument in Argument XV of the Opening Brief as well. (AOB 186-187.)

[12] Appellant advances this argument in Argument XVI of the Opening Brief.

[13] Appellant advances this argument in Argument XVII of the Opening Brief.

[14] Appellant advances this Argument in Argument XVIII of the Opening Brief.

defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1219.) For the reasons explained, there was no error in this case, and even if there was error it was harmless. The several alleged errors, or small groups of related errors, that appellant points to are all discrete and unrelated, and therefore have no accumulating effect. Thus, even considered in the aggregate, the alleged errors could not have affected the outcome of trial. There was no miscarriage of justice, and reversal is not required on this ground.

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court affirm the judgment.

Dated: August 26, 2014

Respectfully submitted,

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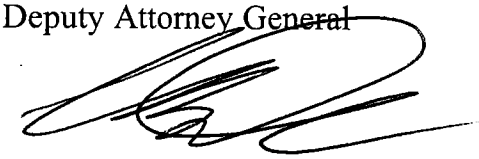

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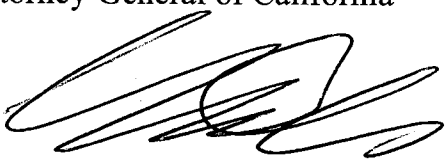
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 27,253 words.

Dated: August 26, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Frank Christopher Gonzalez**

No.: **S163643**

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 August 27, 2014, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On August 27, 2014 I caused eight (8) copies of the **Respondent's Brief** in this case to be delivered t the California Supreme Court at 350 McAllister Street, First Floor, San Francisco,CA 94102-4797 by United States Postal Service.

On August 27, 2014, I caused one electronic copy of the **Respondent's Brief** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

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 August 27, 2014, at Los Angeles, California.

Lily Hood
Declarant

Lily Hood
Signature

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