In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NOEL JESSE PLATA & RONALD TRI TRAN,

Defendants and Appellants.

CAPITAL CASE

Case No. S165998

Orange County Superior Court Case No. 01HF0193
The Honorable William J. Froeberg, Judge

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CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

On August 24, 2007, the Orange County District Attorney filed an amended information against Ronald Tran and Noel Plata, charging one count of murder in violation of Penal Code[1] section 187, subdivision (a) (count 1). (3 CT 758–761).[2] The information alleged special circumstances that the murder was committed while the defendants were engaged in robbery and burglary (§ 190.2, subds. (a)(17)(A) & (a)(17)(G)), the murder involved the infliction of torture (the binding of wrists and ankles and slashing of throat) (§190.2, subd. (a)(18)), and Plata had previously been convicted of murder in the first degree (§ 190.2, subd. (a)(2)). (3 CT 759.)

The information also included an enhancement allegation that the murder was committed for the benefit of, at the direction of, and in association with "VFL" – Viets for Life, a criminal street gang. (§ 186.22, subd. (b)(1).) (3 CT 759.) The information further alleged that Plata had a prior juvenile adjudication for a serious and violent felony (§§ 667, subds.

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

[2] The original information, filed on December 6, 2001, included three additional counts charging street terrorism (§ 186.22, subd (a)), first degree burglary of an inhabited dwelling (§§ 459, 460, subd. (a)), and first degree robbery in an inhabited dwelling (§§ 211, 212.5, subd. (a), 213, subd. (a)(1)), as well as an additional enhancement allegation that Plata personally used a dangerous and deadly weapon in the commission of the offense (§ 12022, subd. (b)(1)). (1 CT 185–188.) The prosecutor amended the information to delete the street terrorism, burglary, and robbery counts due to concern regarding the applicable statute of limitations. (2 RT 273.) Trial of this case was delayed due to, among other things, a series of unforeseen events including Tran's lead attorney being appointed as a superior court judge, the death of Plata's *Keenan* counsel, the suicide of Plata's investigator, and Plata's lead attorney's accidental fall, which resulted in a broken hip and required surgery. (2 CT 436; 1 RT 157–158, 160–161.)

(d) & (e)(1), 1170.12, subds. (b) & (c)(1)) and that Tran had suffered a prior prison term (§ 667.5, subd. (b)) and had been convicted of a prior serious and violent felony (§§ 667, subds. (a)(1), (d), & (e)(1), 1170.12, subds. (b) & (c)(1)). (3 CT 760.)

On August 24, 2007, Tran and Plata entered pleas of "not guilty" and denied all special circumstance and enhancement allegations. (3 CT 788–791; 2 RT 274.)

Tran and Plata were tried together after the trial court denied a motion for severance brought by Tran. (3 CT 741, 743; 2 RT 270.) Jury selection began on September 24, 2007. (3 CT 808; 2 RT 302.) The jury was sworn on October 10, 2007. (3 CT 875, 879; 4 RT 717–718.) Jury deliberations began on October 22, 2007. (4 CT 955, 957; 8 RT 1755.)

On October 23, 2007, the jury returned a verdict, finding Plata and Tran guilty of first degree murder and finding to be true the robbery, burglary, and torture special circumstances as well as the gang enhancement. (4 CT 1150–1177; 9 RT 1756–1760.)

Tran and Plata waived their rights to a jury trial regarding their prior convictions. (8 RT 1634–1638.) In a hearing outside the presence of the jury, Tran admitted that he was previously convicted of burglary (§§ 459, 460, subd. (a)). (8 RT 1635.) Plata admitted a prior conviction of first degree murder and a juvenile adjudication for robbery (§§ 211, 212.5, subd. (b)). (8 RT 1637–1638.) Accordingly, the court found to be true the prior conviction allegations against Tran and Plata as well as the special circumstance allegation (§ 290.2, subd. (a)(2)) against Plata. (8 RT 1635, 1637, 1639.)

The penalty phase began on October 24, 2007. (4 CT 1193; 9 RT 1768.) On October 25, 2007, the court excused Juror 1 upon agreement of the parties after the juror expressed that she did not think she could be fair to the defendants anymore. (9 RT 1876–1879.) Juror 1 was replaced by an

alternate juror. (9 RT 1881.) Penalty phase deliberations began on November 1, 2007. (5 CT 1247, 1248.) On November 5, 2007, the jury determined that the appropriate penalty for both Tran and Plata is death. (5 CT 1382–1385; 12 RT 2478–2479.)

On August 15, 2008, the trial court considered and denied Tran and Plata's motions for a new penalty phase trial or to reduce the punishment to life without parole. (12 RT 2564.) On that same day, the trial court considered and denied automatic motions to modify the verdict pursuant to section 190.4, subdivision (e). (12 RT 2564–2571.) Both Tran and Plata were sentenced to death. (12 RT 2579.)[3]

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Overview

In November 1995, Tran, a member of the VFL gang, asked his girlfriend, Tu Anh Joann Nguyen ("Joann"),[4] whether she knew anyone with money or jewelry. Joann identified Linda Park, who had been her friend in high school, and, at Tran's request, showed him where she lived. On November 9, 1995, shortly before 7:00 p.m., Joann met up with Tran and Plata, a fellow gang member of Tran's, and switched cars with Tran because Tran believed his old car would be too suspicious in Linda's neighborhood.

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[3] The enhancement was stricken for sentencing purposes. (12 RT 2580.)

[4] Because there are multiple individuals associated with this case with the surname "Nguyen," respondent refers to these individuals by their first names. Similarly, the victim and members of her family who share the surname "Park" will be referenced herein by their first names.

Later that evening, around 8:05 p.m., Sun Park, Linda's father, came home from work. He noticed that the front door was unlocked and entered the house. He discovered Linda, his youngest daughter, dead on the living room floor. She was lying face down on the living room floor with her hands and feet tied behind her back with nylon twine. A gray electrical cord with a thermostat device on it was wrapped around her neck and attached to the nylon twine. Linda died from asphyxiation due to ligature strangulation. She also suffered two non-fatal slash wounds to her neck.

Missing from the house was $700 in cash that Sun kept in a brown jacket in his bedroom closet and some of Linda's mother's jewelry. Sun's jacket was on the floor of the closet and two jewelry boxes and an empty tray from one of the jewelry boxes were found on a coffee table in the living room. Otherwise, the house was in almost immaculate condition.

The police investigation of Linda's murder reached a turning point in 1999, when Qui Ly, a convicted felon who hoped to reach a deal regarding his prison sentence, came forward with information regarding statements made to him by Tran and Plata about the murder of a young girl in Irvine. Ly was "taken out of circulation" for 20 months and was then placed in a cell first with Tran and then with Plata. Ly's conversations with Tran and Plata were secretly recorded. Both Plata and Tran made incriminating statements about their involvement in Linda's murder.

Joann's eventual cooperation with law enforcement also provided significant evidence against Tran and Plata. Initially, Joann lied to the police and denied knowledge of Linda's murder. In 1999, Joann admitted that Tran had told her about his role in the murder but denied any involvement herself. Finally, in 2001, after receiving immunity, Joann came clean about the part she played in the crime.

DNA analysis of a portion of the twine that was used to tie Linda's wrists and ankles showed a mixture of DNA that was consistent with Tran being a contributor.

No defense evidence was presented during the guilt phase.

B. Linda's Murder and the Robbery of the Park Home

In November 1995, Sun Park lived with his wife, Dong, and his daughters Janie and Linda at 26 Blazing Star in Irvine. (5 RT 854.) Janie was four years older than Linda, who had turned eighteen the prior month. (5 RT 855.) Sun owned an upholstery business and worked long hours, usually from 6:00 or 7:00 a.m. to around 8:00 p.m. (5 RT 856.) Dong worked at a postal office and her working hours were from 4:00 or 4:30 p.m. to about 10:00 p.m. (5 RT 857.) Normally, Linda would prepare dinner for Sun. (5 RT 857.) On November 9, 1995, Sun talked to Linda on the telephone around 5:00 p.m. to tell her what time he would be home for dinner. (5 RT 861.)

Between 6:00 and 7:00 p.m., Danny Son was talking on the phone with Linda. (5 RT 901.) Linda and Danny were both students attending Irvine Valley College ("IVC") and had met through his best friend. (5 RT 899–900.) Linda had just agreed to record a greeting on his pager when someone came to the door of Linda's house. (5 RT 900–901.) Linda told Danny to just wait and she put the phone down. (5 RT 901.) Danny heard Linda talking to somebody in the background. (5 RT 901.) He heard her say, "What's wrong? What's your problem? You need help?" (5 RT 902.) Danny could not hear who Linda was talking to, but he thought she might be talking to her sister. (5 RT 902.) He decided to hang up and tried calling her 30 minutes later, but just got the answering machine. (5 RT 903.)

Sun arrived home around 8:05 p.m. (5 RT 862.) When Sun put his key in the front door lock, he discovered that the door was already

unlocked. (5 RT 863.) He went inside the house and saw Linda face down on the living room floor with her hands and feet tied behind her. (5 RT 863.) He tried to roll her on her back but was unable to do so because of the way she was tied. (5 RT 865). He also tried to untie her but was unsuccessful because the rope was tied very tightly. (5 RT 865.)

Sun then ran to the kitchen to call 911 but could not locate the handset. (5 RT 866.) He ran up to his bedroom, where there was a phone, but he was in shock and ended up running outside to the house of his neighbor, Marilyn Fox. (5 RT 868.) Fox called 911, and the police arrived a few minutes later. (5 RT 868, 878.)

Rolf Parkes, a police officer with the City of Irvine, arrived at the Park home at 8:13 p.m. (5 RT 879.) He and another officer entered the house and immediately saw Linda lying face down on the living room carpet. (5 RT 880). Her ankles and wrists were tied up with a nylon type cord, and a gray electrical cord was wrapped around her neck and connected to the nylon cord. (5 RT 880.) Parkes checked her vital signs—his examination was negative. (5 RT 881.) Linda's body was cool but was not extremely cold and was not stiff. (5 RT 882.) Paramedics arrived and confirmed that Linda was dead. (5 RT 883.)

David Stoermen, a crime scene investigator, documented the scene of the crime. (5 RT 969.) He took photographs of the residence as well as Linda's body. (5 RT 969, 973.) When Linda was turned over, he took a photograph of Linda's face and throat. (5 RT 973; People's Ex. 7.) The photograph documented that there was a straight horizontal line of blood above Linda's mouth area on the right side of her face and there was a laceration on her throat. (People's Ex. 7.)

Kenny Wong, a forensic scientist with the Orange County crime lab who was also documenting the scene, observed that there was a wet stain in Linda's crotch area, presumably urine. (7 RT 1339.)

C. Linda's Autopsy

An autopsy revealed that the cause of Linda's death was asphyxiation due to ligature strangulation. (7 RT 1329.) The electrical cord was wrapped twice around Linda's neck. (7 RT 1309.) There were indentations on her neck as well as abrasions and contusions. (7 RT 1311.) These wounds were antemortem wounds. (7 RT 1312.)

Linda had hemorrhaging, which would have taken place antemortem, in various areas of her upper body and head. (7 RT 1314, 1320, 1321.) There were petechial hemorrhages on Linda's gums and thymus gland, a hemorrhage on the front of Linda's tongue (consistent with her biting her tongue), and extensive hemorrhaging at the base of the tongue and epiglottis area due to the ligature. (7 RT 1316, 1329.) Linda had scleral hemorrhages in her eyes, caused by increased pressure rupturing the blood vessels. (7 RT 1321.) Hemorrhaging above and behind each of Linda's earlobes, inside the scalp but outside the skull, indicated some soft blunt-force injury to the sides of her head. (7 RT 1328.)

According to the testifying pathologist, Dr. Richard Fukumoto, the injuries on the sides of Linda's head would be consistent with Linda struggling and moving her head while someone was strangling her from behind. (7 RT 1328.) There were petechial hemorrhages in Linda's shoulder area, leading Dr. Fukumoto to conclude that there had been some kind of compressional injury to Linda's chest from the back at the same time that she was being strangled. (7 RT 1319–1320). Linda's lungs showed edema and hemorrhaging, indicating that Linda went into heart failure. (7 RT 1328.)

Linda had a bruise on her left cheek area below her eye. (7 RT 1309.) Hemorrhaging below the skin's surface indicated that Linda sustained this injury before she died. (7 RT 1312.) The bruise was caused by a blunt

force instrument injury. (7 RT 1313.) A fist, palm of the hand, or back of the hand could cause this type of injury. (7 RT 1313.)

In addition to the indentations on Linda's neck, there were two overlapping slash wounds going from the right to the left. (7 RT 1316–1317.) The cuts were made antemortem and would have been caused by some kind of sharp instrument such as a knife or the edge of scissors. (7 RT 1317.) No major blood vessel, artery, or vein was incised. (7 RT 1318.) The wounds were not deep enough to cause immediate death, but without medical treatment, a person suffering from this type of injury could eventually die from loss of blood. (7 RT 1318.)

Linda had binding marks on her wrists and feet that occurred prior to her death. (7 RT 1323.) There were abrasions to her wrist areas, indicating that Linda was trying to pull her arms apart and get loose from the binding. (7 RT 1324.)

The blunt force trauma to Linda's face, the tying up of Linda, and the two cuts to her throat occurred prior to her strangulation. (7 RT 1329–1330.) Linda would have been conscious at the beginning process of the strangulation. (7 RT 1330.) There is pain associated with the process of strangulation. (7 RT 1302.) Pain or stress can result in someone urinating on themselves. (7 RT 1306.)

D. Crime Scene and Forensic Evidence

Sun normally kept cash in a brown jacket that was kept in a closet in the master bedroom. (5 RT 857–858.) Janie and Linda knew where the cash was kept, and Sun would allow them to get cash from his jacket when they needed it. (5 RT 859.) On November 9, 1995, he had about $700-$800 in the jacket. (5 RT 859.)

Dong kept her jewelry inside the drawer of her makeup table in the master bedroom. (5 RT 860.) On November 9, 1995, her jewelry boxes,

which contained her jewelry, were in the drawer where she always kept them. (5 RT 978.)

When Sun ran up to the master bedroom after finding Linda, he noticed his brown jacket on the floor of the closet. (5 RT 867.) Later, Officer Parkes retrieved the jacket and confirmed with Sun that this was the jacket that contained $700 in cash. (5 RT 888.) There was no cash in the jacket. (5 RT 889.)

In the living room, where Linda was found, there were two jewelry boxes on top of a coffee table—a turquoise box with a felt material applied to it and a smaller maroon wood jewelry box. (5 RT 884.) An empty tray that looked like it had been inside the turquoise box was also on the coffee table. (5 RT 884–885.) There was another table in the living room on top of which were various small plants, including a potted cactus that was lying on its side. (5 RT 885.)

The rest of the house was very orderly and in almost immaculate condition. (5 RT 886.) There was no evidence of ransacking in the master bedroom or anywhere else. (5 RT 886, 987.) There was no evidence of forced entry either. (5 RT 972.) The family's dog, a Doberman Pincher named "Sammy," was in the backyard where he was normally kept. (5 RT 856, 889.)

The electrical cord around Linda's neck had a thermostat device on it. (5 RT 980.) The cord had been cut off on one end with scissors or a knife. (5 RT 980.) The police found and collected an empty heating pad box from the TV room. (5 RT 981–982; People's Ex. 30.)[5] The back of the box showed a picture of the heating pad and attached electrical cord. (5 RT 982.) The picture of the electrical cord was similar to the cord that was found around Linda's neck. (5 RT 982.) The box gave the dimensions of

[5] Sun testified that his wife used the heating pad. (5 RT 869.)

the heating pad as 14 inches by 27 inches. (5 RT 982.) No heating pad was ever found in the house or garage. (5 RT 982–983.)

The twine that was used to bind Linda's wrists and ankles was not found at the Park residence. (5 RT 983.) There was no duct tape in the house either. (5 RT 872.) There were two telephones in the house—one in the master bedroom and one in the kitchen. (5 RT 984.) The one in the kitchen was missing the cordless handset, which was not found in the residence. (5 RT 985.) Also missing from the house were a pair of scissors and Linda's pager. (5 RT 872–873.)

Various areas in the house, such as door jambs and tables, were dusted for fingerprints. (5 RT 989.) However, no prints were recovered. (5 RT 989.) The jewelry boxes were flocked, and no fingerprints were recovered from them. (5 RT 980.)

In 2000, Mary Hong, a forensic scientist with the Orange County Sheriff's Department, performed DNA analysis of several items of evidence in this case. (7 RT 1359.) She performed an analysis of a sexual assault kit that was taken from Linda and did not find the presence of semen or foreign DNA. (7 RT 1360.) She also tested the electrical cord from Linda's neck and did not find any DNA relating to Tran or Plata. (7 RT 1368–1369.) A portion of the twine that was used to tie Linda's wrists and ankles showed a mixture of DNA from at least three people that was consistent with Linda and Tran being contributors. (7 RT 1370–1372.) Using a Vietnamese database, approximately one in 3,800 individuals would not be eliminated as a contributor of the DNA. (7 RT 1372.) Converting the ratio to a percentage, 99.97368 percent of the Vietnamese population would be eliminated. (7 RT 1373–1374.)

E. Incriminating Statements Made by Tran and Plata to Friends

In 1996, Jin Ae Kang contacted the Irvine Police Department and told them that she had information about a murder that happened in Irvine. (5 RT 950.) Within the few months after November 1995, her boyfriend at the time, Tien Tran, told her that his friend Ron Tran had told him that he was involved in murdering a girl in Irvine. (5 RT 950.) Tien told Kang that Tran had told him that the girl recognized Tran and was bound and that a bit of cash and a few gold items were taken from the girl's house. (5 RT 950–951.)[6] Kang vaguely recalled Tien saying that four of five guys were involved. (5 RT 953.)

In 1995, Linda Le was good friends with Plata, who had dated her sister Samantha. (6 RT 1174.) She also knew Tran by the nickname "Scrappy." (6 RT 1174.) In January 2000, Le was interviewed by Investigator Jim Fisher with the Garden Grove Police Department and Probation Officer Timothy Todd. (6 RT 1180.) The interview was videotaped. (6 RT 1181.) Le told Fisher and Todd that she was at the apartment where Plata lived when she heard a conversation between Plata and her boyfriend, Terry Tackett, about Plata cleaning a knife. (6 RT 1183–1184.) Tackett shouted across the room and asked Plata if he cleaned the knife. (6 RT 1184.) Le said that Tackett and Plata were talking about

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[6] Tien told the police that he did not know anything about Tran's involvement in Linda's murder. (5 RT 932.) Tien even threatened an officer who was asking questions about Tran, and Tien subsequently pled guilty to obstructing a police officer. (5 RT 934, 942–943.) At trial, prior to testifying, Tien told the prosecutor and an investigator that he did not remember Tran saying anything about being involved in a murder. (5 RT 929.) However, when Tien took the stand, he testified that he vaguely recalled Tran telling him that he was involved in murdering a young girl in Irvine. (5 RT 928.) Tien confirmed that he told his girlfriend, Kang, what Tran had told him. (5 RT 928.) Tien had cigarette burns on his body that he made himself but denied affiliation with VFL. (5 RT 951.)

"the incident." (6 RT 1183.) During the preliminary hearing, Le testified that this conversation took place on the evening of Linda's murder, and the location of the discussion was an apartment rented by Tom Nguyen. (6 RT 1220–1221, 1229.)

Le told Fisher and Todd that a few days after the knife cleaning conversation, Plata was sad, drinking and doing drugs, and told her that he had had robbed a house and the girl was home. (6 RT 1190, 1194.) Plata said, "I had no idea she was going to be home. Then we go there, and she was home, and I had to do what I had to do." (6 RT 1190.) Plata blurted out that he didn't mean to hurt the girl and he "knocked her out" by accident. (6 RT 1194.)[7]

F. Plata and Tran's Recorded Conversations with Qui Ly, a Confidential Informant

Qui Ly was a member of the V gang and had a lot of respect within the gang. (6 RT 1278.) The V and VFL are allies. (6 RT 1278.) Ly first met Plata in February 1996 after Plata was released from state prison. (6 RT 1277.) He was friendly with Plata and had a conversation with him at a Vietnamese restaurant during which Plata told him about the murder of a young girl in Irvine. (6 RT 1281.) The topic of Linda's murder came up

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[7] At trial, for the most part, Le denied any recollection of her prior statements to Fisher and Todd or her preliminary hearing testimony. (6 RT 1172–1197.) She testified that she remembered seeing Plata cleaning a knife that was 6 to 8 inches long but did not remember when that occurred. (6 RT 1187, 1215.) She recalled that the night she saw Plata clean the knife, they went to the movies at Plata's suggestion. (6 RT 1230–1231.) She denied ever having a conversation with Plata where Plata talked about his involvement in the murder of a girl in Irvine. (6 RT 1187.) Dina Mauger, an investigator for the District Attorney's Office, testified that she was present at the preliminary hearing when Le testified. (7 RT 1392.) A fire alarm went off while Le was on the stand, and everyone had to exit the courtroom and go to the patio area in front of the courthouse. (7 RT 1393.) Le stood close to Mauger the whole time and asked her if she had a gun with her because she was afraid for her safety. (7 RT 1393.)

again later when Ly and Plata were in custody at the same time and were placed in a holding cell together. (7 RT 1443.)

Ly also hung around Tran, who he knew as "Scrappy," and sometimes hung out with both Plata and Tran. (6 RT 1284.) Ly violated his parole in October 1997 and was arrested and sent first to Anaheim City Jail and then to Chino, where he was housed in the West Yard. (6 RT 1283.) Tran was also at the Anaheim Jail on a parole violation and they were sent to Chino together. (6 RT 1285.) Eventually, Tran and Ly became "bunkies" in the West Yard. (6 RT 1285.) While they were housed together (from October 20, 1997 until November 21, 1997), Tran told Ly about the murder of a young girl in Irvine. (6 RT 1286.)

After Ly was released for his parole violation, he was arrested against in April 1998 for residential burglary. (7 RT 1408.) He was convicted in 1999 and faced a potential sentence of 31 years to life in prison as a result of his prior strikes. (7 RT 1409.) Ly decided to provide information to law enforcement about criminal activities throughout Southern California in the hopes of getting some consideration with respect to his sentence. (7 RT 1409.)

Ronald Seman, an investigator on the District Attorney's Office regional gang enforcement team was assigned to investigate the Linda Park case. (6 RT 1242.) In October 1999, he interviewed Ly, who told him about the statements Tran and Plata made to him about the murder. (6 RT 1243, 1247; 7 RT 1409–1410.)[8]

[8] Ly told the police that Plata told him that he was the one who killed the girl and that he had to do it. (7 RT 1445, 1454.) However, at trial, Ly testified that Plata never said that he was the one who strangled or killed Linda and that Ly assumed it was Plata who killed her. (7 RT 1444, 1450–1451.)

Based on the information provided by Ly, Seman came up with a plan to get information from Tran and Plata. (6 RT 1246.) Seman arranged to have Ly "taken out of circulation" for 20 months and then, on February 28, 2001, had Ly transferred to Santa Ana Jail, where he was placed into a cell first with Tran and then with Plata. (6 RT 1246–1248.) Microphones were hidden behind a toilet paper holder in the cell and the conversations were recorded. (6 RT 1247.)

Segments of the recorded conversations were played for the jury. In one segment, the following exchange took place between Ly and Tran:

> **Ly**: They got you for this murder, you think they got you good?
>
> **Tran**: I don't know dog. You know I don't even know what they got on me. You know if Noel's talking you know, I'm screwed, that's all I got to say. That's the only way.
>
> **Ly**: But who killed her, you or him?
>
> **Tran**: * * * [Non verbal response]
>
> **Ly**: Man, you idiot.
>
> **Tran**: Yeah, I know, I know man. Now I gotta live with it.

(People's Ex. 88; 1 SCT 69.) Ly testified that from time to time, Tran would point to a speaker/intercom that was in the cell and change his tone of voice. (7 RT 1424.) When asked who killed Linda, Tran pointed to himself and nodded his head. (7 RT 1425.) Tran's nonverbal response prompted Ly to say, "Man, you idiot." (7 RT 1425.)

When Ly asked Tran if he thought Plata had talked, Tran said, "I don't know." (1 SCT 72.) Ly then said, "Man. What the fuck, fuck, you take her out for, you idiot?" (1 SCT 73.) Tran responded, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (1 SCT 73.)

Ly asked Tran if the crime was worth it. (1 SCT 80.) Tran replied that it was not worth it although it was supposed to be worth "about ten."

(1 SCT 81.) When Ly laughed in response, Tran stated, "Hey dog, I was . . . dude, ten was attractive to a nineteen year old dog. A nineteen year guy driving . . . a 1979 beat up car." (1 SCT 81.) Tran refused to say how much he actually got. (1 SCT 82.)

Tran expressed that he accepted his fate. He said that no matter what, "Co chai co chieu [Vietnamese for "you play, you pay and accept"]. That's the way America is dog. I got to accept it. Can't live in denial dog." (1 SCT 84.) Tran said that he accepted it way back when it happened four of five years ago, and also said that right after the crime, he knew he "would get busted for this and I'll be the biggest fucking idiot in the world." (1 SCT 86, 89.)

At some point, Tran mused about whether "they found some crazy new DNA linking or something crazy to where even if you touch something, I don't know, fuck technology." (1 SCT 86.) When Ly asked Tran if he had any of the girl's property at his house, Tran laughed and said, "Dude, come on now, it's all good, it's all good." (1 SCT 91.)

Ly and Tran also talked about Tran's ex-girlfriend, Joann, who had visited him in Chino. (1 SCT 75.) Ly said he thought she was Tran's "real girlfriend." (1 SCT 76.) Tran said he thought so too but they broke up because he was in jail and she could not wait for him. (1 SCT 76.)

Ly asked Plata whether there was any evidence left behind. (1 SCT 95.) Plata said "Hell no." (1 SCT 95.) Plata also explained that a witness had reported seeing a blue car and confirmed that a red car was used. (1 SCT 95–96.) Plata told Ly that he was supposed to get "Hai Xap [$2,000 in Vietnamese street slang]" out of the crime. (1 SCT 98.) Plata described how "she looked through the door" and stood and watched them. (1 SCT 102.) Plata also mentioned, "That fool slipped by a cactus." (1 SCT 112.) Ly asked Plata if Sam (Samantha Le) knew what happened and Plata said, "sort of." (1 SCT 102; 7 RT 1435.) When Ly asked if Joann was there,

Plata said no but that she was her "esse." (1 SCT 104.) "Esse" refers to a friend. (7 RT 1435.) Ly asked Plata about other people who knew about the crime and who Plata was worried about. (1 SCT 110.) Plata responded, "Just his girl, Joann." (1 SCT 110.)

At trial, Ly testified that during the recorded conversation with Plata, Plata told him that he was there in Irvine at the house and was involved in the murder but did not strangle the victim. (7 RT 1437.) Plata said that if Terry (Tackett) was still alive, he would think that Terry was talking to the police. (7 RT 1438.) Plata said that there was nothing he could do in connection with the murder and that he was "pissed off" and had to go back inside the house to take something off. (7 RT 1438.)[9]

Ly did not receive any promises up front regarding what consideration he would receive for his cooperation. (7 RT 1410.) Ly remained in custody until April 2007, when the People requested that he be released on his own recognizance. (7 RT 1410, 1412.) As a result of his cooperation with law enforcement over the preceding nine years, Ly expected that he would be sentenced to 13 ½ years in prison, with credit for time served, resulting in no additional time in custody. (7 RT 1413–1414.)

G. Testimony of Accomplice Joann Nguyen

Joann was Tran's girlfriend in 1995. (5 RT 999.) Shortly after Linda's murder, she was interviewed by Investigator Peter Linton from the Irvine Police Department. (5 RT 1048.) Tran told Joann not to say anything about what happened to Linda, so Joann lied to the police. (5 RT 1048–1049.)

In 1999, Joann was interviewed by Seman and other investigators at the Irvine Police Department. At some point during the interview, she

[9] By agreement between Plata's attorney and the prosecutor, the prosecutor elicited the testimony described in this paragraph by way of leading questions instead of playing the tape recording. (6 RT 1259–1260.)

asked to speak with a Catholic priest. (5 RT 1049–1050.) A priest was brought in, and after the priest left, Joann told the investigators what Tran had told her about his involvement in the murder of Linda. (5 RT 1050.) However, Joann continued to lie about her own involvement in the crime because she did not want to incriminate herself. (5 RT 1050.)

In 2001, Joann testified at the preliminary hearing after she was offered immunity by the District Attorney's Office. (5 RT 1052.) She understood that in return for her testimony, she would not be prosecuted for her involvement in the crime. (5 RT 1053.)[10]

At trial, Joann testified that she was friends with Linda in high school. (5 RT 993.) They met in sophomore year, and Joann would go over to Linda's house about twice a month. (5 RT 994.) They both ended up attending IVC and grew apart. (5 RT 997.)

Joann met Tran, who went by the name "Scrappy," when she was 16 or 17. (5 RT 997.) She also knew Plata through Tran. (5 RT 998.) She was dating Tran in 1995 and continued dating him until 1997. (5 RT 999, 1002.) Tran told her that he was a member of VFL. (5 RT 1010.) Tran attended IVC for a couple of weeks in the fall of 1995 and then dropped out. (5 RT 1009.) At some point, Joann showed Linda a photo of Tran and told her he was her boyfriend. (5 RT 1011.)

A few days before November 9, 1995, Tran asked Joann if she knew anyone with money or jewelry. (5 RT 1013.) Joann named Linda Park. (5 RT 1013.) Tran said that he was going to rob her and asked Joann to show him where Linda lived. (5 RT 1014.) Joann and Tran drove to Linda's house and Joann pointed out the house to Tran. (5 RT 1015.) Tran asked if the Parks had any dogs, and Joann told him about Sammy. (5 RT 1015.)

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[10] The People agreed that Joann would have transactional immunity if she testified fully and truthfully regarding her knowledge of the facts out of which the charges in this case arose. (People's Ex. 42.)

Linda never told Joann where her father kept cash or where her mother kept her jewelry. (5 RT 996.)

Tran made arrangements with Joann to switch cars on November 9 because his old white hatchback would look too suspicious in the Park's neighborhood. (5 RT 1016, 1017.) Tran and Plata met Joann in the parking lot of IVC a little bit before 7:00 p.m. (5 RT 1018.) Joann gave Tran the keys to her newer red Honda Prelude, and he and Plata drove off, leaving Tran's car in the parking lot. (5 RT 1010, 1018–1019.) Joann went to her biology class and then, after class, returned to the parking lot to switch the cars back. (5 RT 1020.)

Between 9:30 and 10:00 p.m., Tran and Plata returned with Joann's car. (5 RT 1021.) Tran and Plata got out of her car and she saw one of them moving a blanket from her car to Tran's car. (5 RT 1022.) The blanket measured about a foot by a foot and a half. (5 RT 1022.) Tran appeared anxious and hyper. (5 RT 1023.) Plata also seemed anxious and hyper but a little less than Tran. (5 RT 1023.)

Tran told Joann that they robbed Linda and killed her. (5 RT 1044–1045.)[11] Tran said that Linda was on the phone. (5 RT 1045.) At the time Tran made these statements to Joann, Plata was about six feet away from Tran and ten feet away from Joann. (5 RT 1044.) Plata did not say anything. (5 RT 1045.) Before Plata and Tran left, they talked about going and seeing a movie. (5 RT 1046.)

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[11] At the preliminary hearing, Joann similarly testified that "[Tran] told me that they knocked on her door. She was on the phone with somebody, and they kind of pushed their way in." (6 RT 1124.) At the preliminary hearing and at trial, Joann said that she could not recall the exact words Tran used and could not say whether Tran said "we" or "I" when describing what had happened. (5 RT 1062, 6 RT 1123–1124, 1132–1134.)

A couple of days later, Tran told Joann that Linda was killed because Tran did not want her to identify him. (5 RT 1047.) Tran said that money and jewelry were taken during the robbery. (5 RT 1046.)

After Linda's murder, Tran got a new tattoo on the side of his neck. (5 RT 1047.) Tran told Joann that the tattoo said "forgive me" in Korean. (5 RT 1048.)

H. Gang Evidence

At trial, Mark Nye, a police sergeant with the Westminster Police Department, testified as the prosecution's gang expert. (7 RT 1460.) Nye had twelve years of experience working in the area of Vietnamese street gangs. (7 RT 1460.) Nye's job at the Westminster Police Department entailed continuous contact with Vietnamese gang members. (7 RT 1464.) He talked to gang members in the course of investigating crimes as well as just to gather intelligence. (7 RT 1465.) He talked to gang members about their lifestyles, expectations that gang members have within their culture, and other gang concepts. (7 RT 1465–1466.)

Nye published a paper regarding the evolution of Vietnamese street gangs in America as well as a paper about home invasion robberies by Asian gangs. (7 RT 1462.) In researching the home invasion study, Nye interviewed gang members convicted of home invasion robberies and asked them about their motivation behind the crime, their gang membership, how the crimes were committed, and what was done with the proceeds. (7 RT 1463.)

1. Gang culture

Nye testified that Vietnamese gangs are not turf oriented because gang members generally do not live in the same geographic area. (7 RT 1472.) Asian gangs are focused on economic gain. (7 RT 1482.)

One can be an original member of the gang or one can get "jumped" into a gang by withstanding a beating, or get "crimed" into a gang by committing a crime for the gang. (7 RT 1473–1474.) Asian gangs also burn people into the gang by taking a hot cigarette tip and burning the prospective member's skin. (7 RT 1474.) If a member disrespects the gang, the member can be "jumped out," an extremely violent event. (7 RT 1474.) A gang member assigned the task of jumping out another gang member would have a fairly high stature within the gang. (7 RT 1475.)

Having a tattoo for a particular gang is one way of showing allegiance, but gang members do not necessarily have to have gang tattoos. (7 RT 1475.) Asian non-turf oriented gangs will often write the name of their gangs on personal items, such as books, or in their homes. (7 RT 1476.) If the name of a rival gang is crossed out, that is a showing of disrespect and essentially means that you would kill any members of that gang. (7 RT 1476.)

Respect is very important within the gang culture, and gang members want to earn respect for themselves as well as for their gang. (7 RT 1477.) The more violence gang members commit and the more frequently they commit the violence, the more respect they have within the gang subculture and within the community. (7 RT 1477.) Bragging about violent crimes that have been committed is one way a gang member can enhance his reputation within his own gang and within the gang community. (7 RT 1483.) Tattoos are one of the methods of bragging about the commission of crimes. (7 RT 1483.)

When gang members commit crimes, everyone has a role and everyone is expected to stick to that role. (7 RT 1479.) A "backup" is a person who helps commit a crime and helps protect a fellow gang member. (7 RT 1478.) Within the gang culture, it is an absolute expectation that a gang member is going to back up his fellow gang member during the

commission of a crime. (7 RT 1478.) Girlfriends of gang members may be used to assist in the commission of crimes and achieve the objective of the gang. (7 RT 1484.)

Gang crash pads are places where gang members go to seek refuge. (7 RT 1481.) The crash pad can be a hotel, motel, apartment, or a house. (7 RT 1481.) Sometimes weapons, stash, or loot from burglaries are stored at the crash pad. (7 RT 1481.) Generally, a non-gang member will rent the place. (7 RT 1481.) Sometimes the lease agreement is in one person's name and then later, the name on the agreement is changed to someone else. (7 RT 1482.)

2. The VFL gang

Nye testified that the VFL gang was formed in the early '90's. (7 RT 1485.) The gang started out committing petty crimes but then became street soldiers for the "V" gang, a violent gang that specialized in home invasion robberies. (7 RT 1486–1487.) Eventually, VFL members graduated into residential burglaries, home invasion robberies, auto thefts, weapon sales, possession of weapons, narcotics, extortions of businesses throughout the Gardena and Hawthorne area, and murders and attempted murders of rival gang members. (7 RT 1487.)

In December 1992, there was a confrontation between the VFL and the Oriental Playboys, which resulted in one dead on either side. (8 RT 1525.) The gang member from VFL who was killed was named Tam. (8 RT 1525.) The rivalry continued with paybacks against each other. (8 RT 1526.) The TRG (Tiny Rascals Gang) was enemies of both the Oriental Playboys and VFL. (8 RT 1526.)

Not all members of the VFL are Vietnamese. (8 RT 1527.) Anthony Johnson, aka "White Boy," is Caucasian and a member of VFL. (8 RT 1527–1528.) Terry Tackett was also a member of VFL. (8 RT 1529.)

Tackett was killed at the Westminster Family Billiards, where a lot of Vietnamese gangs congregate. (8 RT 1529.)

Nye was of the opinion that VFL was a criminal street gang in November 1995. (8 RT 1534.) VFL had 20 to 30 members at that time. (8 RT 1535.) The primary activities of the gang were home invasion robbery, residential burglary, murder, and attempted murder. (8 RT 1535.) An active member of the gang would know about crimes committed by other gang members. (8 RT 1535.) A gang member who committed a robbery or burglary would share the proceeds with other members of the gang and would talk about how the robbery or burglary went down. (8 RT 1535.) Sometimes, bragging rights are also involved. (8 RT 1535.) In reaching his opinion, Nye relied on his training and experience as well as documents and reports relating to convictions and crimes committed by members of VFL. (8 RT 1529, 1534–1535.)

3. Tran and Plata's membership in VFL

Nye was of the opinion that Tran and Plata were members and active participants in VFL in November of 1995. (8 RT 1548, 1555.) Nye reviewed records and documents relating to Tran and Plata and talked to other law enforcement officers about them. (8 RT 1537.)

In 1993, Plata was involved in criminal activity with Anthony Johnson. (8 RT 1538.) Initially, Plata denied that Johnson was involved but subsequently provided information to the police regarding Johnson's involvement in the gang. (8 RT 1538.) Plata told the police that Johnson was a member of VFL and that he was just an associate, not having been jumped in yet. (8 RT 1538.)

In 1993, Hong Lay, aka "Old Man," one of the leaders of the VFL, wrote Plata a letter in which he said, "Tell Se [Hoang] that I want him to go play with you and you could become close to him so you two could be good homeboys, okay?" (8 RT 1527, 1539.) The letter continued, "Oh,

yeah, do me a favor, please. Jump Homeless out of VFL because he want to jump out long time ago, but we did not have time, so that way I want you and some of the guy to go with you and jump him out." (8 RT 1539.) Lay directed Plata to talk to Phi Nguyen because he knew where Homeless lived. (8 RT 1540.) Lay ended the letter, "Take care, my homeboy. Smile now, cry later. Your homeboy, Old Man." (8 RT 1540.) Nye believed that Plata had a high status in the gang because jumping someone out of the gang was a big responsibility. (8 RT 1541.)

A letter from Plata to Tam, the VFL member who was killed in December 1992, was found in Plata's residence in 1996. (8 RT 1543; People's Ex. 105.) The letter was dated December 18, 1993 at 5:15 p.m., the one-year anniversary of Tam's death. (8 RT 1545.) In the letter, Plata said that he wished Tam didn't die because he didn't deserve to die and because Tam was his "homie." (8 RT 1543.) Plata also expressed fear that Anthony was trying to get him "jumped out" for "ratting on him." (8 RT 1544.) Plata said that he "would die for VFL and just about everyone in it" and asked Tam to help him because he was afraid that if he got jumped out he would kill himself. (8 RT 1544.)

A field identification card showed that Plata and Tackett were contacted by Westminster police on July 7, 1996. During that contact, Plata admitted his membership in VFL. (8 RT 1546.) Nye also read a report where Plata admitted under oath that he was a member of VFL. (8 RT 1576.)

On July 17, 1996, Plata's sister told the police that Plata was a member of VFL and that she knew that from hanging around Plata and other members of VFL. (8 RT 1546.) Samantha Le also told the police that Plata always talked to her about being a member of VFL and the crimes he committed with the VFL. (8 RT 1546–1547.) Laura Nguyen

similarly told police that Plata had told her that he was a member of VFL. (8 RT 1547.) [12]

Tran had various tattoos on his body. He had a tattoo of a map of Vietnam on his right arm, consistent with other VFL members, as well as the words "In loving memory of Viet." (8 RT 1548; People's Ex. 44.) Viet was a VFL member who was found dead in a vehicle in Costa Mesa. (8 RT 148.) Tran's left arm was tattooed with the years that Tran was incarcerated. (8 RT 1549; People's Ex. 106.) On Tran's back there were tattoos of his nickname, "Scrappy," as well as a "V" surrounded by rays. (8 RT 1550; People's Ex. 47.) Tran's clavicle area was tattooed with a Vietnamese saying that translates to "no good deed has been returned to my father and mother by me," and in the gang culture, means "I kinda disrespected my mom and dad." (8 RT 1551; People's Ex. 107.) On the side of Tran's neck was a tattoo in Korean characters, which translated into English as "forgive." (8 RT 1552; People's Exs. 41, 108.)

Knowing that Linda was Korean-American, it was Nye's opinion that if it was known within Tran's gang or the gang subculture that a Korean female was murdered, Tran was taking credit for that crime by getting the tattoo. (8 RT 1553.) The tattoo may show remorse, but at the same time Tran was taking credit for what he did. (8 RT 1553.) Showing remorse would be a sign of weakness within the gang and Nye questioned why Tran would want to advertise weakness to other gang members. (8 RT 1553.) Nye's opinion was reinforced by the fact that during a taped conversation between Plata and another individual who was trusted within the gang, Plata said that the tattoo actually meant, "blow me" or "suck me." (8 RT 1554.)

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[12] At trial, Linda Le testified that her boyfriend, Tackett, was a member of VFL as were Plata and Tran. (5 RT 1176, 1177.) Joann testified that Tran told her that he was a member of VFL. (5 RT 1010.)

Probation Officer Timothy Todd also testified that when he first saw photos of the tattoo on Tran's neck, he felt that it was an attempt by Tran to project his pride at something that had occurred. (6 RT 1156–1157.) Todd explained the role of bragging in gang culture and how tattoos are a way that gang members can brag about something they have done. (6 RT 1155.) In forming his opinion about Tran's tattoo, he considered that Plata told Qui Ly that that the tattoo on the side of Plata's neck stood for something to the effect of "suck me" or "blow me." (6 RT 1558.) Todd conceded that it was possible that Tran got the tattoo out of remorse, but it was Todd's interpretation that if there was remorse it was superficial, and the act was about bragging about the exploits of the gang. (6 RT 1162.)

On March 11, 1993, police officers contacted Tran, who was with Se Hoang. (8 RT 1554.) Tran initially gave a false name but subsequently admitted his name and that he was a member of VFL. (8 RT 1554.) In forming his opinion about Tran's gang membership, Nye considered this incident as well as eight to ten other contacts between law enforcement and Tran. (8 RT 1554.) Nye also took into consideration that Tran had a book in his house that contained handwriting referring to VFL and VFL's rivalry with TRG. (8 RT 1555.)[13]

[13] In March 2001, the police obtained search warrants for Tran's parents' home in Santa Ana and the Fountain Valley home of Kathy Nguyen, Tran's then girlfriend and mother of his son. (6 RT 1250–1251.) In Tran's parents' home, police recovered a science book that contained handwriting that said things like "VFL, gangsters, '93," "Big Bad VFL Gang, '93," "VFL," "Fuck TRG," and "Scrappy." (6 RT 1253.) Sometimes the letters "TRG" were crossed out. (6 RT 1253.) The police also found a letter to Tran signed, "Your homie, Noel." (6 RT 1255.) At Kathy's home, police found three-inch plaster letters that spelled "VFL" on the bedroom wall. (6 RT 1252.)

4. Gang purpose of the crimes in this case

The prosecutor posed a hypothetical tracking the facts of this case. (8 RT 1556.) In the hypothetical, there are two active members in a gang, which has as one of its primary activities home invasion burglaries and robberies. (8 RT 1556.) The two gang members enter a home where they think there will be cash and jewelry, find an innocent victim in the house, torture and tie up the victim to get her to tell them the location of valuables in the house, kill her, and take whatever cash and property they can locate. (8 RT 1556.) Nye opined that both individuals would be expected to back each other up during the commission of the crime. (8 RT 1556.) Nye also opined that the crimes of robbery, burglary, and murder, would have been done for the benefit of, at the direction of, and in association with that criminal street gang. (8 RT 1557.)

Nye explained that the gang supports itself from proceeds from criminal activity. (8 RT 1557.) Proceeds from crimes committed by gang members are shared with the people who are involved in the crime as well as with others back at the crash pad. (8 RT 1558.) In addition, the crime would enhance the reputation of the gang and the reputation of the individual members of the gang. (8 RT 1558.)

II. PENALTY PHASE

A. Prosecution's Case in Aggravation

1. Tran's prior criminal acts involving force or violence (factor (b))

On June 24, 1992, Mr. Schonder, who lived in Mission Viejo, reported that jewelry, camera equipment, a telephone, and a video camera were missing from his home. (9 RT 1863.) Three latent prints recovered from the Schonder residence were identified as belonging to Tran. (9 RT

1868.) Tran admitted an allegation in a juvenile petition that he committed this residential burglary. (9 RT 882.)[14]

On June 26, 1992, CHP Officer Scord was driving by a gas station in the Laguna Hills area when an off-duty CHP officer flagged him down to tell him that a car accident had just taken place and that the people in one of the cars ran to the trash and dropped a metal box in there. (9 RT 1843.) Officer Scord detained David Du and Tran. (9 RT 1843.) The metal box was recovered and found to contain paperwork belonging to David Nesthus. (9 RT 1854.)

Tran and Du were taken to the Orange County Sheriff's Station. (9 RT 1841–1842.) There, Deputy Lumm interviewed Tran and Du. (9 RT 1845.) Tran told Deputy Lumm that while he was at a video store in Lake Forest, he met up with an individual named Huynh. (9 RT 1846.) Huynh suggested that they go pick up Du. (9 RT 1846.) Tran needed $300 to repay his parents for a big telephone bill, and one of them brought up the idea of committing a burglary. (9 RT 1846.) Tran decided to go along with the burglary since he needed the money. (9 RT 1846.)

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[14] No evidence was presented that this burglary involved the use or attempted use of force or violence or the express or implied threat to use force or violence. Therefore, it appears that this burglary does not qualify as factor (b) evidence. However, Tran did not object to the introduction of this evidence below, nor did he raise this issue on appeal. Therefore, Tran has forfeited any challenge to the admissibility of this evidence under factor (b). (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Moreover, the admission of the evidence was harmless. The facts presented about the burglary were sparse, and given the circumstances of the crimes in this case and the evidence of Tran's other criminal conduct, the admission of evidence regarding the Schonder burglary was harmless by any standard. (See *People v. Williams* (2006) 40 Cal.4th 287, 316 [explaining that erroneous admission of evidence of a burglary under factor (b) was harmless in light of the other aggravating evidence against the defendant and because it appeared that the burglary did not involve violence].)

The three of them picked out a house at random, and Tran rang the doorbell about 50 times. (9 RT 1847.) Nobody answered the door, so he went to the back of the house to try to gain entry. (9 RT 1847–1848.) Eventually, he got into the house through a bedroom window and opened the door for his friends. (9 RT 1848.) Tran was not sure whether the residents of the house were on vacation and he started to get nervous when 4:00 p.m. approached. (9 RT 1848.) Tran was worried that the homeowners might be coming home. (9 RT 1848.) Tran took a TV, camcorder, and about 150 quarters from a jug full of coins. (9 RT 1848–1849.) Tran and his cohorts also stole some guns that were in the house as well as a Nintendo video game and some fake jewelry. (9 RT 1849.) Tran admitted an allegation in a juvenile petition that he committed this June 25 residential burglary. (9 RT 1881–1882.)

Jacqueline Nesthus testified that her family was on vacation in Hawaii when her house was burglarized. (9 RT 1857.) When her family returned from their vacation, she found a butcher knife lying in the master bedroom closet. (9 RT 1860.) The knife had been removed from a butcher block knife holder in the kitchen downstairs. (9 RT 1860.) It frightened her and her husband to find the knife there, and they called the police to tell them about it. (9 RT 1860.)

In April 1994, Detective Michael Reynolds with the Huntington Beach Police Department arrested Plata in connection with an auto theft investigation and searched his residence. (9 RT 1884.) Reynolds found a note about an illegal transaction with the name "Scrappy" on it. (9 RT 1884.) He learned that "Scrappy" was Tran and made efforts to find Tran. (9 RT 1885.)

On April 20, 1994, Detective Reynolds drove by one of the houses where Tran was known to associate with Linda Vu, a Vietnamese gang member, and saw Tran standing in the driveway near a car which,

according to the license plate, was a stolen vehicle. (9 RT 1886.) Tran and Vu got into the car and drove away, and Detective Reynolds and his partner followed in their unmarked cars and requested the assistance of black-and-white units to stop the car. (9 RT 1889.) Black-and-white units arrived, and, after Tran ignored instructions to stop, a car chase ensued. (9 RT 1890–1892.) At one point, Tran was driving the wrong way against traffic, causing more than one car to take evasive action. (9 RT 1892.) Detective Reynolds observed Tran driving erratically and at a high rate of speed and saw Tran run a red light. (9 RT 1893.)

During the pursuit, Tran drove into a Target parking lot. (9 RT 1900.) The parking lot had a lot of pedestrians at that time of day. (9 RT 1901.) Officer Manh Ingwerson observed Tran going at least 45 to 50 miles per hour and saw pedestrians having to run out of the way. (9 RT 1901.) From the parking lot, Tran drove into a residential area. (9 RT 1902.) Tran was driving at least 90 miles per hour. (9 RT 1902.) Eventually, the black-and-white units surrounded Tran's vehicle and Tran was taken into custody. (9 RT 1894.)

The exterior door locks on both sides of Tran's vehicle had been removed. (9 RT 1895–1896.) The ignition housing had also been removed. (9 RT 1896.) The ignition was configured so that a screwdriver could be used to start the car and turn it off. (9 RT 1896.) A screwdriver was located in the center console along with Tran's wallet. (9 RT 1896.) There were a number of items in the trunk, including stereos, a Smith Corona word processor, and amplifiers. (9 RT 1896, 1897.)

The day before, April 19, 1994, Darin Urabe returned to his home in Huntington Beach for lunch and discovered that his home had been burglarized. (9 RT 1904.) The house had been ransacked and a Smith Corona word processor, gateway computer, and a camcorder were missing.

(9 RT 1905.) The garage door was open and there was a baby seat and spare tire that did not belong to the Urabes in the garage. (9 RT 1904.)

2. Tran's prior felony convictions (factor (c))

In connection with the burglary of the Urabe residence and the police pursuit the following day, Tran was convicted of the felonies of residential burglary (§ 459) and evading a police officer (Veh. Code, §§ 10851, 2800.2). (People's Ex. 114.)

3. Plata's prior criminal acts involving force of violence (factor (b))

On March 27, 1993, Officer Timothy Thompson received a description and license plate number of a suspect who had snatched the purse of out of the hands of a 53-year-old woman. (9 RT 1906–1907.) Officer Thompson went to the address associated with the license plate and arrested Plata when he drove by. (9 RT 1907.)

Plata, who was 17 at the time, initially lied to the police but then admitted that he, his friend Anthony, and two others had gone to the church where the robbery had taken place and decided to commit a robbery. (9 RT 1908–1911.) Anthony snatched the purse out of the hand of the victim who chased Anthony, and Plata drove everyone away. (9 RT 1912.) Plata gave a description of Anthony, subsequently determined to be Anthony Johnson, and where he lived. (9 RT 1912.) Plata told Officer Thompson that Anthony was a member of VFL and that he was an associate but had not been jumped in yet. (9 RT 1911.)

On July 7, 1996, around midnight, Yvonne Ha (15 years old), Michelle Douglas, Bao Nguyen (17 years old), Giao[15] Nguyen (19 years old), and Trung Nguyen were in a car in a restaurant parking lot. (9 RT 1807–1808, 1800–1801.) Four cars came into the parking lot and Ha's

[15] Throughout the record, Giao is alternatively spelled as "Jiao."

group decided to drive away. (9 RT 1809.) The four cars followed and at some point blocked the car Ha's group was in. (9 RT 1809.) Ha told police that a Mexican man approached the car and asked them where they were from and said, "I know you claim, do you claim OCB?" (9 RT 1818.) Ha and the others in the car denied claiming anywhere and said they were not gang members. (9 RT 1818.) The man then said, "You better claim now or I'm going to shoot." (9 RT 1818.) Again, she and the others denied claiming any gang and the man immediately began shooting into their car. (9 RT 1818.)

Ha, who was in the front passenger seat, was shot in the leg. (9 RT 1811.) Giao was found slumped over with his head in the lap of his brother, Bao, in the back seat. (9 RT 1799.) Bao said that they were hit up by the VFL. (9 RT 1800.) Bao had a gunshot wound to his hip, and Giao had a gunshot wound to his neck that went straight through. (9 RT 1800.) Giao died. (9 RT 1802.) At least four .45 caliber shell casings were found at the scene, and the vehicle had bullet holes in various locations. (9 RT 1803.)[16]

In April 1999, Plata pled guilty to the murder of Giao as well as the attempted murder of Bao and Ha. (People's Ex. 112.) He admitted that he was a member of VFL and carried out the shootings with the specific intent to benefit VFL by achieving retaliation and by enhancing the reputation of VFL. (1 SCT 226.)

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[16] On June 17, 1996, Marie Lacson, who lived in Garden Grove, called the police to report a burglary at her residence. (9 RT 1838.) A .45 Colt handgun and some jewelry, including a St. Thomas University class ring, were taken from her home. (9 RT 1839.) On July 17, 1996, the handgun and jewelry were recovered by the Garden Grove Police Department during the execution of a search warrant at an apartment where Plata was staying. (9 RT 1827–1828.) The gun was fully loaded. (9 RT 1831–1832.) Plata told the police that he reloaded the gun after the shooting. (9 RT 1832.)

4. Plata's prior felony conviction (factor (c))

On July 8, 1995, Plata was convicted of the unlawful taking of a vehicle (Veh. Code § 10851). (People's Ex. 113.)

5. Victim impact testimony

Linda's father, Sun, testified that Linda was a bright child who loved her parents. (9 RT 1778.) Because Sun was the only one in his family to have daughters, Linda received a lot of adoration and love from her relatives. (9 RT 1778.) Linda loved dancing and playing dress-up. (9 RT 1782.)

When Linda got older, she had a lot of friends. (9 RT 1778.) She was a faithful churchgoer and tried her best at everything she did. (9 RT 1778.) She was a very organized person and would plan her outfits for the coming week in advance. (9 RT 1778–1779.) She loved movies, meeting her friends, and birthday parties. (9 RT 1779.) She also loved going shopping with her mother. (9 RT 1781.) She was very ticklish. (9 RT 1779.)

Linda's mother, Dong, became pregnant with Linda at a time when the family did not have enough resources to have another child. (9 RT 1785.) Dong secretly went off her birth control because she was getting older and really wanted to have another baby. (9 RT 1785.)

When Dong found out that Linda had been murdered, she passed out, and since then, she has a tendency to faint. (9 RT 1784.) Dong goes to Linda's grave every Saturday and cleans the area. (9 RT 1785.) After Linda died, Dong would cry in Linda's room every day. (9 RT 1785.) Sometimes Sun would find her laughing out loud, crying, and acting like a crazy person. (9 RT 1786.) Sun thought to himself that maybe he could ease her pain by killing her. (9 RT 1786.) Once he went into her room to kill her with a knife, but his brother stopped him. (9 RT 786.)

At one point, Sun believed that the family could not go on living without Linda and thought that maybe it would be better if they all died together. (9 RT 1786.) So Sun poured gasoline all over the house to set it on fire. (9 RT 1786.) But his older daughter, Janie, found out and got help from their neighbors, Mr. and Mrs. Fox. (9 RT 1786.)

After Linda's murder, Sun became addicted to alcohol because the pain was too great to bear. (9 RT 1786.) However, he came to the realization that he had another daughter he had to take care of and that he needed to focus on her. (9 RT 1786–1787.) He overcame alcohol and tobacco through his religious faith. (9 RT 1787.)

Right after Linda was murdered, Sun wrote on Linda's bedroom walls, "Linda, I love you. Linda, I miss you. Linda, I am so sorry." (9 RT 1790.) Otherwise, Linda's room was kept in the same condition as it was when she was alive. (9 RT 1789.)

Marilyn Fox testified that she lived next door to the Park family for 15–16 years. (9 RT 1792.) She described the family as a loving, caring family, who were avid churchgoers and a big part of the Korean community in Irvine. (9 RT 1793.) She recalled the events of November 9, 1995, describing how Sun had come over to her house screaming that Linda was dead and how, after returning to the house, Sun cradled Linda's head in his lap, saying that Linda was dead and someone had murdered her. (9 RT 1793–1794.) Fox remembered Linda as a quiet, beautiful girl who was always respectful. (9 RT 1794.) For months after Linda's death, Sun could not go straight to his house after work and would first stop at her house and sit and talk for an hour before he could gather the strength to go home. (9 RT 1795.)

Janie testified that Linda, who was four years younger than her, was like her shadow and always followed her around. (9 RT 1913–1914.) Janie was supposed to watch her and take care of her, and they were always

together. (9 RT 1914.) Her last memory of Linda was a phone conversation on the day of the murder during which Linda asked Janie if she could come home early so she could go with her friend to the library. (9 RT 1914.)

Janie described Linda as very popular and very friendly. (9 RT 1915.) Janie also recalled Linda as being meticulously organized and neat. (9 RT 1916.) Linda would write herself little post-it notes to remind herself to do things. (9 RT 1916.)

According to Janie, Linda was incredibly close to her parents. (9 RT 1916.) Linda was spoiled because she was the baby and was daddy's little girl. (9 RT 1916.) It was devastating for Janie to see how Linda's murder affected her mother. (9 RT 1920.) Her mother was in a daze and suppressed so much inside that Janie was waiting for her to explode like a time bomb. (9 RT 1920.) Her mother has spells where she just collapses, and she faints anytime she sees a police officer come close. (9 RT 1920.) Her father became very self-destructive. (9 RT 1922.) He went through a period where he blamed himself and was drinking all the time. (9 RT 1922.) When he went into the bathroom, he would scream and bang the walls. (9 RT 1923.)

Sun shielded Janie from the details of how he found Linda. (9 RT 1923.) Janie sees her father suffer every day and knows that he cannot sleep because he is thinking about how Linda died. (9 RT 1923.) Linda's death has devastated her father and he will never be the same. (9 RT 1923.)

On the one-year anniversary of Linda's murder, there was a memorial service attended by extended family, people from the church, and friends. (9 RT 1924.)

B. Tran's Case in Mitigation

1. Cultural expert

Jeanne Nidorf, a cultural expert and cultural consultant with a background in psychology and public health, was asked to present psycho social material about Tran and his life from the time he was a young child to the present. (10 RT 2026, 2033.)

Nidorf testified that Tran was born in a refugee camp in Porchaffe,[17] Arkansas in 1975. (10 RT 2035.) Tran's family then moved to Missouri for a short time before they moved to Fountain Valley, California. (10 RT 2035.) Tran's father is Catholic, and Tran and his older brother, Hung, were raised in the Catholic church. (10 RT 2035.)

Tran's parents were hard-working people—his mother worked as an electronic assembler and his father was a machinist. (10 RT 2036–2037.) Tran's parents valued education and made a lot of sacrifices for the children. (10 RT 2037.) The relationship between Tran's mother and father was confrontational. (10 RT 2037.) Nidorf characterized Tran's mother, Cam, as "a sort of verbally abusive, somewhat cruel, sometimes bizarre, self-centered, histrionic woman." (10 RT 2037.) Nidorf provided the example of an incident where Tran, who was in jail, called Hung's cell phone so he could speak with his father who was dying in the hospital and Cam would not let Tran speak to his father. (10 RT 2038.)

Upon interviewing Cam, Nidorf found her to be an unusually self-absorbed person with somewhat unusual ideas about things. (10 RT 2039.) Cam talked about herself for most of the interview, avoided talking about Tran, and said that she very angry about the way her husband had raised the children. (10 RT 2042.) At one point, Cam told her husband that the

[17] It appears that the refugee camp was actually in Fort Chaffee. (10 RT 1961.)

children were his and she did not want much to do with them. (10 RT 2042.)

Tran told Nidorf that when he was an active little boy, his mother would discipline him by making him kneel for long periods of time and hitting him with a stick. (10 RT 2043.) Tran recalled a couple of frightening and humiliating incidents. (10 RT 2043.) Once when he was about five, Cam held him above a tub filled with very hot water and said, "I'll drop you in if you don't behave." (10 RT 2043.) Sometimes Cam would make him take off all his clothes and sit or kneel outside in the presence of his girl cousins. (10 RT 2043.) This was very embarrassing for him. (10 RT 2043.) Nidorf explained that in Vietnamese culture, shame is a way of controlling children. (10 RT 2044.) Tran's Catholic father also made him feel guilty about a lot of things. (10 RT 2044.)

Cam often made comparisons between Hung and Tran because Tran could not measure up academically. (10 RT 2045.) Tran was a very sweet, social, outgoing child, whereas Hung was quiet, studious, and introverted. (10 RT 2045.) Cam would also compare Hung to other children who, in her opinion, had achieved more. (10 RT 2045.) Tran described his family life as "gloomy." (10 RT 2045.) Tran was distant from his parents and brother, and there were no hugs or intimacy. (10 RT 2045.) Tran was needy for attention, including negative attention. (10 RT 2045.) He also talked badly about himself in a self-deprecating way. (10 RT 2047.) For example, he said that he skipped a grade in elementary school because the school did not know what to do with him, whereas relatives said that he was promoted because he was a very smart child and needed to be challenged. (10 RT 2047.)

After Tran's first run-in with the law for stealing rims, his parents sent him to a Catholic private school in Missouri. (10 RT 2049.) When he graduated in 1992 and returned to California, he found out that he had

developed a reputation as a cool guy. (10 RT 2049.) Two friends approached him to commit a residential burglary and he did it. (10 RT 2050.) The following day he committed a second burglary and was apprehended and sent to Juvenile Hall. (10 RT 2050.) There, he was segregated with Vietnamese boys for the first time and was introduced to the VFL street gang. (10 RT 2050.) While he was on house arrest, VFL gang members came to his house and befriended him. (10 RT 2051.)

The gang was attractive to Tran because it got him out from under family pressures and conflicts and gave him a Vietnamese identity. (10 RT 2051.) In addition, Tran always wanted to be liked and to be in the "in crowd." (10 RT 2051.) Moreover, being in a gang comes with the benefits of girls, parties, and access to drugs. (10 RT 2052.) The gang became like a family of loyal brothers to Tran. (10 RT 2051.)

As soon as Tran was off house arrest, Tran committed another residential burglary to prove himself to the gang. (10 RT 2052.) In the gang, Tran was known as a "stoner" because of his use of marijuana on an almost daily basis. (10 RT 2052–2053.) When he turned 18, Tran violated probation, went to county jail for four months, committed another residential burglary that involved a high speed chase, and was sent to prison for two years. (10 RT 2053.) Tran did not learn from experience, meaning that he was invested in criminal conduct. (10 RT 2054.)

In 1995, Tran began to date Joann. (10 RT 2055.) This was Tran's first serious relationship and he really fell in love with her. (10 RT 2055.) He began IVC in the summer but dropped out in the fall because he got overwhelmed. (10 RT 2055.) He started trying to improve but he was still hanging out with Plata and his gang friends and using marijuana. (10 RT 2055.)

Shortly after Linda's murder, Tran was picked up and sent back to prison for parole violations. (10 RT 2055.) In 1996, upon his release, Tran

decided it was time to grow up and get out of the gang. (10 RT 2056.) He attended a "Life Spring" seminar, and became more respectful to his parents. (10 RT 2057.) However, the change was short lived because Tran became depressed after hearing that Plata had been arrested. (10 RT 2060.) Tran went back to his old ways, using methamphetamine, hanging out with gang members, and violating parole. (10 RT 2060.) He went back to prison for parole violations. (10 RT 1060.)

In 1998 or 1999, Tran met Kathy and they had a son together. (10 RT 2061.) After his son, Eric, was born, he took care of Eric during the day and attended NA meetings. (10 RT 2061–2062.) Tran was no longer involved in criminal conduct, other than the use of drugs, and was gainfully employed. (10 RT 2061.) He was trying to pull himself together and was working hard to extricate himself from the kind of lifestyle he had before. (10 RT 2061–2062.) However, Tran was apprehended in 2001. (10 RT 2062.) Nidorf reviewed Tran's jail records and noted that since he had been in custody, he had not initiated any violence. (10 RT 2063.) Nidorf asked Tran why got the tattoo on his neck, and he said that he did not know. (10 RT 2064–2065.)

Nidorf opined that Tran's criminal conduct seemed to be mostly tied to the late adolescent developmental stage, when Tran was rebelling and experimenting and fell into a negative peer group. (10 RT 2069.) After Linda's murder, Tran did not commit another burglary and relied on substance abuse to anesthetize himself and mitigate his depression and shame and guilt. (10 RT 2069.) Subsequently, Tran turned very strongly to his Catholic faith. (10 RT 2069.)

2. Testimony of family and friends

Hung, Tran's brother, testified that he and Ron were latchkey kids because their parents worked so much. (10 RT 1964.) As they grew older, they interacted less because their interests were different. (10 RT 1965.)

Hung was into school and homework and Tran was more social and into sports. (10 RT 1965, 1967.) When Tran was in prison, he wrote Hung and said that he felt inferior because of the way their mother compared them. (10 RT 1974.)

In 1996, Hung gifted Tran with the "Life Spring" seminar, a motivational seminar. (10 RT 1977–1979.) Tran attended the seminar and came back energized and revitalized. (10 RT 1979.) However, Tran got depressed a month or so later when he heard some news about his friend Plata. (10 RT 1980.) After the birth of Tran's son in October of 1999, Tran became very responsible and was home most of the time taking care of his son. (10 RT 1981.)

Members of Tran's extended family, including cousins, uncles, and an aunt, testified for Tran. They testified about how friendly, kind, and helpful Tran was. (10 RT 1947, 1956, 2004, 2006, 2080–2081, 2013, 2112–2113, 2118–2119.) Tawni Tran, Tran's cousin, remarked on how she was surprised to see Tran at an annual prayer gathering for her grandmother in 2001 and how mature and different Tran seemed. (10 RT 2110.) A few relatives commented on Cam's shortcomings as a mother. (10 RT 1941, 2019, 2078–2079.)

The parties stipulated that if recalled, Jin Ae Kang would testify that in 1996, her then boyfriend Tien Tran told her that after Linda's murder, Tran told Tien that he was very remorseful, was taking all kinds of drugs, had lost a lot of weight, was experiencing nightmares, and wanted to kill himself because he could not handle it. (Def. Ex. I.)

Le Hang Tran, a member of the Catholic Detention Ministry, contacted Tran's attorney about testifying for Tran after seeing an article about him in the paper. (11 RT 2272, 2276–2277.) She first met Tran in a bible study at the Intake Release Center in 2001–2002. (11 RT 2274.) She saw Tran in bible study around 10 or 15 times. (11 RT 2281.) She and

Tran wrote letters to each other. (11 RT 2278–2279.) Tran never asked for money or anything like that. (11 RT 2280.) She and four other volunteers from the ministry, who were sitting in the audience, wanted to show support for Tran. (11 RT 2278.) One of the volunteers was currently serving Tran at Theo Lacy and had been visiting him twice a month for the past year or so. (11 RT 2282.)

C. Plata's Case in Mitigation

Plata's mother, Sylvia Plata-Beeson, and his younger sister, Lisa, testified about Plata's family life growing up. Plata and Lisa's biological father was around for a couple of years after Plata was born but then he left because he was married to another woman and had another family. (11 RT 2254.) Sylvia met her current husband, John Beeson, shortly afterwards, and they married in 1984. (11 RT 2255.)

Plata was an average student and seemed like a happy child growing up. (11 RT 2259.) He was quiet and bashful. (11 RT 2261.) Things changed after Sylvia's father was murdered in Chicago in 1990. (11 RT 2260.) Plata was 15 or 16 at that time. (11 RT 2260.) When Sylvia received the news, she flew out to Chicago, and a couple of days later, Plata was arrested for shoplifting at Target. (11 RT 2261.)

Sylvia became very depressed after her father's murder and would sleep and cry all the time. (11 RT 2172, 2260.) She also became very involved in the trial, often flying back to Chicago, and started to pull away from the family. (11 RT 2169.) Her depression lasted for years. (11 RT 2172.) During that time, she did not notice anything about what was happening with her children and has little memory of what went on in her house. (11 RT 2260.)

Plata's step-father took care of Plata and Lisa, but he was structured and strict. (11 RT 2173.) Plata did not have an emotional relationship with

his step-father. (11 RT 2173.) Plata was very quiet and distant from the family; his bedroom door was always closed. (11 RT 2177.)

Lisa fell into drugs and lived on the street for some time when she was around 14. (11 RT 2177.) Lisa's fiancé and father of her children was murdered the day after Christmas in 1995 in a gang-related incident. (11 RT 2179.)

Sylvia observed that Plata had grown up a lot in recent years and was more open. (11 RT 2264.) Because of Plata, she went back to church. (11 RT 2268.) Plata knows a lot about the bible and includes scripture verses when he sends her letters. (11 RT 2269.) Plata has a relationship with Lisa's children though letters and visitations. (11 RT 2179.) Lisa's oldest daughter really respects Plata and seeks out his advice. (11 RT 2267–2268.) Plata is protective of Lisa and her children and sometimes criticizes Lisa about the way she is raising her children. (11 RT 2181.)

Friends of Plata described Plata as quiet, shy, easygoing, and polite. (11 RT 2141, 2151, 2162.) Over the years, Plata wrote cards and letters to his friends and the daughters of one of his friends. (11 RT 2145–2147, 2154–2156.)

Fred M. Van Ry, was an elder in the congregation of Jehovah's Witnesses in Irvine and was a volunteer chaplain at the Orange County Jail. (11 RT 2184.) Ry contacted Plata after Plata reached out to the church, and for three years Plata participated in a weekly bible study with other interested inmates. (11 RT 2185.) Plata was very studious and well-prepared and helped other inmates with their studies. (11 RT 2187.) Every month or couple of months, Plata would write a short note expressing appreciation to Ry and would enclose a sheet of stamps as a contribution. (11 RT 2188.) Nobody else had ever done that. (11 RT 2188.)

James Esten, a correctional consultant, testified regarding the typical living conditions of a prisoner in a level four maximum security institution.

(11 RT 2205–2206.) Esten explained that there was no chance that Plata would ever be housed in a facility below level four. (11 RT 2203.) Plata remained discipline-free for the two and a half years he was incarcerated at Tehachapi and had not engaged in violence during the seven years he was in the Orange County Jail. (11 RT 2210, 2213.)

ARGUMENT

I. TRAN'S RIGHTS WERE NOT VIOLATED BY THE PARTIES STIPULATING TO 20 PROSPECTIVE JURORS BEING EXCUSED FOR CAUSE BASED ON THEIR RESPONSES TO JUROR QUESTIONNAIRES

Tran contends that the trial court improperly removed prospective jurors from the jury pool by allowing the parties to stipulate to the removal of the jurors for cause based on their answers on a written questionnaire. (Tran AOB 76–104 [Arg. I].) According to Tran, this process violated jury selection procedures set forth in Code of Civil Procedure sections 222 and 223. However, Tran's attorney, as well as Plata's, acquiesced in the removal of the jurors upon stipulation. Therefore, Tran is barred from raising any objections to this procedure on appeal.

Prior to voir dire, 150 time-qualified jurors were asked to complete a 17-page questionnaire that was prepared by counsel and approved by the court. (2 RT 297–298, 319–320.) After reviewing the questionnaires, defense counsel and the prosecutor agreed to excuse for cause Jurors 132, 145, 162, 124, 125, 118, 207, 240, 165, 181, 247, 122, 237, 184, 191, 201, 232, 252, 196, and 120. (2 RT 332–333.) The prosecutor stated, "The People stipulate that, by agreement of all parties, we can excuse those jurors without bringing them to court and talking to them." (2 RT 333.) Counsel for Tran and Plata agreed. (2 RT 333.) Based on the stipulation, the court ordered the clerk to notify the jurors that they had been excused. (2 RT 333.)

Tran complains that the dismissal of the prospective jurors pursuant to stipulation and prior to any questioning by the court violated Code of Civil Procedure section 222, which provides for the random selection and seating of prospective jurors, as well as Code of Civil Procedure section 223, which states that the court shall conduct an initial examination of prospective jurors before any questioning by counsel. Tran argues that the procedures set forth in sections 222 and 223 cannot be waived because they serve a public purpose—i.e., the random selection of jurors and the equal opportunity for qualified persons to be considered for service. (See Code Civ. Proc., § 191.) Tran's argument is based on Civil Code section 3513, which provides: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

According to Tran, prior cases have not addressed whether section 3513 bars a defendant from waiving the procedures required by either section 222 or 223. (Tran AOB 80.) Tran is wrong. In *People v. Visciotti* (1992) 2 Cal.4th 1 (*Visciotti*), the defendant waived his right to random selection of the initial group of jurors who were seated for voir dire, and each attorney submitted a list of 20 prospective jurors, from which the first 12 jurors who appeared on both lists were seated. (*Ibid.*) The statutory procedure was followed thereafter. (*Ibid*.) On appeal, this court considered the "firm" public policy of random selection but still held that the defendant was barred from challenging the procedure on appeal due to his failure to object to it:

> While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. (Cal. Const., art. VI, § 13; *People v. Edwards* (1991)

> 54 Cal.3d 787, 813 [1 Cal.Rptr.2d 696, 819 P.2d 436].) *The failure to object will therefore continue to constitute a waiver of a claim of error on appeal*.

(*Id.* at pp. 37–38, italics added.)

Although *Visciotti* did not specifically mention section 3513, it is clear that the court followed the rule enunciated in section 3513 to reach the conclusion that parties may not waive *compliance* with the statutory procedures designed to further the policy of random selection. However, *Visciotti* drew a distinction between waiver of *compliance* with the law and waiver of *a claim of error on appeal*, which may occur if the defendant acquiesced in the challenged jury selection procedures. (*Visciotti*, *supra*, 2 Cal.4th at p. 38.) (*Ibid*.) In making this distinction, *Visciotti* cited to Cal. Const., art VI, § 13, which explains that no judgment shall be set aside for any procedural error unless the error resulted in a "miscarriage of justice." (*Ibid*.)

Relying on *Visciotti*, this court has repeatedly held that defendants who stipulate to the removal of prospective jurors based solely on their answers to questionnaires are barred from complaining about the process on appeal. (*People v. Booker* (2011) 51 Cal.4th 141, 161 ["As defendant agreed to and participated in the process whereby some prospective jurors were excused through stipulations, he has forfeited his right to complain about this procedure"]; *People v. Benavides* (2005) 35 Cal.4th 69, 87–88 [defendant waived claim of error based on stipulated removal of eight prospective jurors based on their responses to questionnaires alone]; *People v. Ervin* (2000) 22 Cal.4th 48, 73 [holding that defendant was barred from raising on appeal violation of statutory procedures, including Code Civ. Proc., § 223, where defense counsel and prosecutor agreed to screen out more than 600 prospective jurors based on questionnaire responses].)

Tran agreed to and took part in the process whereby prospective jurors were dismissed based upon stipulation of the parties without questioning by the court. Therefore, Tran is barred from complaining about the process now.

II. THE "SUBSTANTIAL IMPAIRMENT" STANDARD IS NOT INCONSISTENT WITH THE STATE AND FEDERAL CONSTITUTIONS

Tran contends that the "substantial impairment" standard, presumably applied by the trial court in discharging jurors for cause based on their views on capital punishment, is inconsistent with the state and federal constitutions. (Tran AOB 105–122 [Arg. II].) According to Tran, the "substantial impairment" standard is fundamentally inconsistent with the historical role of juries and the intent of the Framers who drafted the Sixth Amendment. (Tran AOB 115–122.)

The trial court discharged Jurors 234, 112, 214, and 158 for cause based on their views on the death penalty. (3 RT 535; 4 RT 715.) The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Tran argues that the "substantial impairment" standard violates the Sixth Amendment as well as the state constitution.

However, the determination of whether the "substantial impairment" standard is constitutional rests with this court and the United States Supreme Court, not Tran. Both of these courts continue to recognize that "under the applicable state and federal constitutional provisions, prospective jurors may be excused for cause if their views would prevent or substantially impair the performance of their duties." (*People v. Gonzalez*

(2012) 54 Cal.4th 1234, 1284–1285, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 424; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 9.)

Tran urges this court to revisit the issue of the constitutionality of the substantial impairment test based on a series of decisions issued over the last 15 years in which the Supreme Court has reexamined its Sixth Amendment jurisprudence in light of the historical role of juries and the intent of the Framers. However, these cases have nothing to do with the discharge of jurors for cause. (See *Jones v. United States* (1999) 526 U.S. 227, 252 [factual finding that increased sentence on a carjacking charge was an element that had to be submitted to jury]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt]; *Ring v. Arizona* (2002) 536 U.S. 584, 608 [right to jury determination of aggravating circumstance necessary for the imposition of death penalty]; *Crawford v. Washington* (2004) 541 U.S. 36, 68 [confrontation clause bars testimonial evidence absent unavailability of the declarant with prior opportunity for cross examination].)

Even if this court were to consider the Framers' intent, as represented by Tran, there is no basis for finding the "substantial impairment" standard unconstitutional. Citing to writings by the Founding Fathers and other historical documents, Tran contends that the Framers viewed the jury as the "conscience of the community" and believed that the jury was free to use its verdict to reject laws that it deemed unjust. (Tran AOB 115–120.) Thus, Tran argues, the "substantial impairment" standard "contradicts the intent and understanding of the Framers of the Sixth Amendment and erodes the

Sixth Amendment's guarantee of an impartial jury where it is needed most." (Tran AOB 120.)[18]

But recognition of the role of jury nullification in checking unjust laws is not the same thing as guaranteeing the right to jury nullification. Although juries certainly have the ability to disregard or nullify the law, this ability "does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions." (*People v. Williams* (2001) 25 Cal.4th 441, 449 (*Williams*).) "It is well established that jurors have the *power* to nullify . . . . [h]owever, juries do not have a *right* to nullify, and the courts have no corresponding duty to ensure that juries are able to exercise this power . . . ." (*United States v. Kleinman* (9th Cir. 2017) 880 F.3d 1020, 1031, original italics.)

Federal and state cases have consistently held that it is the right of the court to instruct the jury on the law and the duty of the jurors to follow the court's instructions. (*Williams*, *supra*, 25 Cal.4th at pp. 449–461 [summarizing cases].) Furthermore, "[N]o published authority has restricted a trial court's authority to discharge a juror when the record demonstrates that the juror is unable or unwilling to follow the court's instructions." (*Id.* at p. 461.)

The "substantial impairment" standard does not violate the state or federal constitution. Therefore, reversal of the penalty judgment is not warranted based on the excusal of prospective jurors for cause based on their death penalty views.

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[18] Tran fails to appreciate that his position would preclude the dismissal for cause of jurors who choose to disregard instructions because of their beliefs *in favor* of the imposition of the death penalty.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING TRAN'S SEVERANCE MOTION; THE ADMISSION OF PLATA'S RECORDED STATEMENTS IMPLICATING TRAN DID NOT VIOLATE *ARANDA*/*BRUTON*; THE COURT DID NOT ERRONEOUSLY PRECLUDE THE JURY FROM CONSIDERING ALLEGED STATEMENTS BY PLATA THAT HE WAS THE ACTUAL KILLER

Tran argues that the trial court erroneously denied his motion to sever his case from Plata's, allowing the jury to consider recorded statements by Plata that he did not kill Linda and that there was "nothing he could do," while precluding the jury from considering non-recorded statements by Plata that Plata killed Linda. (Tran AOB 130 [Arg. III].) According to Tran, the admission of Plata's recorded statements implicating Tran in Linda's killing violated the *Aranda/Bruton*[19] rule, and such error could not be cured by the court's jury instruction limiting the consideration of statements made by a defendant against that defendant only. (Tran AOB 132–146.) Tran also argues that the court's limiting instruction effectively precluded the jury from considering alleged statements by Plata that Plata killed Linda, which Tran claims were admissible as declarations against interest (Evid. Code, § 1230). Tran claims that these errors rendered his trial fundamentally unfair and warrant reversal of the guilt verdict, special circumstance findings, and death judgment. (Tran AOB 170–171.)

As discussed below, the trial court properly exercised its discretion to deny the motion for severance. The court's limiting instruction directed the jury to consider Plata's statements against Plata only, and it should be presumed that the jury followed this instruction. Plata's statements allegedly implicating Tran were not testimonial, and, therefore, the *Aranda*/*Bruton* doctrine does not apply and Tran's rights under the

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[19] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

confrontation clause were not violated. As for Plata's alleged statements that he was the one who killed Linda, Tran never sought admission of these statements as declarations against interest and accordingly did not request a jury instruction that such statements should be considered for their truth as to Tran. Therefore, Tran has forfeited his claim. Even if there was any error regarding the evidentiary treatment of Plata's statements, such error was harmless under any standard.

A. Proceedings Relating to Tran's Motion for Severance

Prior to trial, Tran filed a motion to sever his case from Plata's. (2 CT 432–444.) In the motion, Tran argued that while Plata might not object to the admission of Plata's recorded statements to Ly because some of the statements placed responsibility for the actual killing on Tran, Plata's statements ran afoul of *Aranda/Bruton* and would deny Tran a fair trial at the guilt and penalty phases. (2 CT 437–441.)

In response, the prosecutor filed excerpts of the recorded statements of Tran and Plata that he sought to introduce. (2 CT 474–479.) Proposed redactions to the statements were indicated by strikethroughs. (2 CT 474, 486.) The proposed redactions included elimination of references to Tran's nickname, Scrappy, and references to more than one person being involved in the crime. (2 CT 474–484.) Excerpt No. 4 of Plata's statements contained the following proposed redactions:

> **CI**: Wow, was it worth it?
>
> **NP**: No.
>
> **CI**: ~~Man, why did you guys whack her?~~
>
> **NP**: ~~I don't know man. There's nothing I could do~~ * * *. If Terry was alive I'd say he was telling them.

(2 CT 477.)

Plata filed a response in which he argued that the redacted portion of Excerpt No. 4 as well as additional excerpts from his conversation with Ly

were admissible in the prosecution's case-in-chief under Evidence Code section 326. (3 CT 723–729.) In these additional excerpts, Plata told Ly: "Home boy can't stop, she looked through the door"; ". . . he didn't have to . . . I told him just to leave her and just go . . ."; "I was in the car . . . to take off . . . and I was mad"; and "I didn't strangle her, I was just there." (3 CT 724–725.) Plata argued that these excerpts were admissible to avoid a misleading impression regarding Plata's participation in Linda's killing. (3 CT 726–727.)

At a hearing on the motion to sever, Tran's attorney expressed concern that the additional statements Plata wanted to come in would allow the jury to ascribe moral blame during the penalty phase. (2 RT 236–238.) The trial court found that the prosecutor's excerpts, as redacted, passed muster under *Aranda/Bruton*. (2 RT 239.) However, the court also ruled that under Evidence Code section 356, the redacted portion of Excerpt No. 4 would be admissible as would Plata's statement that "Home boy can't stop" because Excerpt No. 10 would not be complete without it. (2 RT 242, 251–253.)[20] To avoid violating *Aranda/Bruton*, the court excluded Excerpts Nos. 4 and 10 in their entirety. (2 RT 254–255.) The court denied the motion to sever. (2 RT 270.)

During trial, prior to Ly taking the stand, Plata's attorney informed the court that the prosecutor intended to go into some areas on direct with Ly that would touch upon *Aranda/Bruton* issues. (6 RT 1259.) Plata's attorney explained that the prosecutor and Plata's counsel were in agreement as to what would or would not be objected to, but that Tran's lawyers were not included in that agreement. (6 RT 1259.) The prosecutor confirmed that he planned to ask Ly something to the effect of: "Did Mr.

[20] Excerpt No. 10 included the partial statement by Plata, "She looked through the door." (2 CT 483.) However, the full statement was "Home boy can't stop, she looked through the door." (3 CT 724.)

Plata tell you that he had nothing to do with the strangulation of Linda Park?" and "Did he tell you that he had nothing to do or that he could do when it comes to the murder of Linda Park?" (6 RT 1261.) The prosecutor argued that this testimony would not run afoul of *Aranda/Bruton* given Tran's admission to Ly that he was the one who committed the murder and the anticipated limiting instruction that Plata's statements could not be considered against Tran. (6 RT 1261.)

Tran's attorney objected, arguing that the clear inference of Plata's statements was that Tran was out of control or Plata was coerced by Tran. (6 RT 1262.) Tran's attorney reiterated his concerns regarding the jury assigning moral responsibility at the penalty phase. (6 RT 1264–1265, 1267.)

The court ruled that the testimony at issue would not violate *Aranda/Bruton* and that it would be allowed with a limiting instruction. (6 RT 1274–1275.) Tran's attorney made an oral motion for mistrial, which was denied. (6 RT 1275.)

During the guilt phase, the jury was instructed as follows: "You have heard evidence that each of the two defendants made statements out of court and before the trial. You may consider that evidence only against the defendant making the statements and not against the other defendant." (4 CT 1085.) This instruction was not requested or given during the penalty phase. (5 CT 1331–1381.)[21]

B. Law Governing Severance

Section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials."

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[21] In the penalty phase, the jury was instructed to "disregard all of the instructions [the court] gave [the jury] earlier." (5 CT 1332.)

Through this statute, the Legislature has established a strong preference for joint trials. (*People v. Souza* (2012) 54 Cal.4th 90, 109.) Joint trials are favored because they promote economy and efficiency and also serve the interests of justice by "avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40, quoting *Zafiro v. United States* (1993) 506 U.S. 534, 539.) When defendants are charged with having committed "common crimes involving common events and victims," the court is presented with a "classic case" for a joint trial. (*People v. Keenan* (1988) 46 Cal.3d 478, 499–500.)

The "guiding principles a trial court should follow" when exercising discretion in ruling on a severance motion are that "[t]he court should separate the trial of codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1079, internal quotation marks and citations omitted.) Severance may also be proper when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States*, *supra*, 506 U.S. at p. 539.)

On appeal, the denial of a severance motion is reviewed for abuse of discretion based on the facts as they appeared at the time of the court's ruling. (*People v. Lewis* (2008) 43 Cal.4th 415, 453.) If the reviewing court determines that the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial. (*Ibid*.) If the trial court's ruling on the motion to sever was proper when made, reversal is required only upon a showing that joinder resulted in "gross unfairness"

amounting to a denial of due process. (*Ibid.*, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

C. The Admission of Plata's Recorded Statements to Ly Did Not Violate the *Aranda/Bruton* Rule, and It Is Presumed that the Jury Followed the Trial Court's Limiting Instruction

Tran argues that the admission of Plata's recorded statements[22] that he did not kill Linda, there was "nothing he could do" in connection with the murder, and that he was "pissed off," implicated Tran and violated the *Aranda/Bruton* doctrine. (Tran AOB 132–146.) Tran further argues that because the admission of Plata's statements violated *Aranda/Bruton*, the court's limiting instruction did not prevent the jury from considering Plata's statements against Tran, and the admission of the evidence violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Tran AOB 140–141.)

Generally, courts presume that juries will follow instructions limiting consideration of evidence for certain purposes or against certain parties. (*Richardson v. Marsh* (1987) 481 U.S. 200, 206 (*Richardson*) ["Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant"]; *People v. Winbush* (2017) 2 Cal.5th 402, 457 [presuming jury followed instruction to consider evidence against one of the defendants only].) However, in *Bruton*, the United States Supreme Court recognized a "narrow exception" to this rule, holding that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is admitted at their joint trial, even if the jury is instructed to consider the

[22] Although the statements were recorded, the taped statements were not played for the jury. Instead, the prosecutor elicited testimony from Ly regarding the statements by Plata. (7 RT 1437–1438.)

confession against the codefendant only. (*Richardson*, *supra*, 481 U.S. at p. 207.) In *Aranda*, decided several years before *Bruton*, this court held that it is prejudicial and unfair to a defendant to allow the admission of the extrajudicial statement of a codefendant that implicates the defendant, even if the trial court instructs the jury that the statement is not to be considered against the defendant. (*Aranda*, *supra*, 63 Cal.2d at pp. 529–531.)

Tran contends that the admission of Plata's statements violated *Aranda/Bruton*. However, the *Aranda/Bruton* doctrine does not apply to Plata's recorded statements because more recent developments in Sixth Amendment jurisprudence limit the reach of *Aranda/Bruton* to testimonial statements only, and Plata's recorded statements do not qualify as testimonial.

In *Crawford v. Washington*, *supra*, 541 U.S. 36 (*Crawford*), the United States Supreme Court "announced a new standard for determining when the confrontation clause of the Sixth Amendment prohibits the use of hearsay evidence." (*People v. Cage* (2007) 40 Cal.4th 965, 975.) Previously, the confrontation clause barred the admission of hearsay statements where the declarant was not available for cross-examination unless the statement bore adequate "indicia of reliability"—i.e., the evidence fell within a "firmly rooted hearsay exception" or the evidence otherwise had "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) *Crawford* overturned the *Roberts* rule, holding that the admission of *testimonial* hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify, and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. (*Crawford*, *supra*, 541 U.S. at pp. 61–62.) *Crawford* explained, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers'

design to afford the States flexibility in their development of hearsay law." (*Id.* at p. 68.)

After *Crawford*, the United States Supreme Court clarified that testimonial statements "mark out not merely [the clause's] 'core,' but its perimeter." (*Davis v. Washington* (2006) 547 U.S. 813, 824.) "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Id.* at p. 821.)

Crawford and its progeny limit the *Aranda/Bruton* rule to testimonial statements. In *People v. Cortez* (2016) 63 Cal.4th 101, 129, the defendant relied on *Bruton* in arguing that the admission of out-of-court statements of his codefendant violated his Sixth Amendment right to confront and cross-examine witnesses. This court distinguished *Bruton* on the ground that *Bruton* involved a nontestifying codefendant's hearsay statement that did not qualify for admission under any recognized exception to the hearsay rule, but also pointed out that under *Davis*, the confrontation clause applies only to testimonial hearsay statements. (*Ibid*.) Because the out-of-court statements at issue in *Cortez* were clearly nontestimonial, the court concluded that "binding high court precedent requires us to hold that the Sixth Amendment is inapplicable and that defendant's confrontation clause claim therefore fails." (*Ibid*.)

Numerous federal circuit courts have also held that *Crawford* limits the reach of *Bruton* because *Bruton* is grounded in the confrontation clause. (*United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 ["It is . . . necessary to view *Bruton* through the lens of *Crawford* and *Davis*"]; *United States v. Berrios* (3d Cir. 2012) 676 F.3d 118, 128 ["[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements"]; *United States v. Dargan* (4th Cir. 2013) 738 F.3d

643, 651 ["*Bruton* is simply irrelevant in the context of nontestimonial statements"]; *United States v. Vasquez* (5th Cir. 2014) 766 F.3d 373, 378–379 [holding that the defendant's *Bruton* challenge had to be rejected because *Bruton* is no longer applicable to nontestimonial statements]; *United States v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 ["Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements"]; *United States v. Dale* (8th Cir. 2010) 614 F.3d 942, 958 ["Reading *Bruton* in light of *Crawford*, we concluded that a *Bruton* violation must be predicated on a testimonial out-of-court statement implicating a co-defendant"]; *United States v. Clark* (10th Cir. 2013) 717 F.3d 790, 815 ["Like our sister circuits, we have recognized the need to interpret *Bruton* 'consistent[ly] with the present state of Sixth Amendment law'"].)

Aranda, like *Bruton*, must also be interpreted in light of *Crawford* and *Davis*. In *Aranda*, the court explained that the rules it adopted were to be regarded "not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098." (*Aranda*, *supra*, 63 Cal.2d at p. 531.) However, in 1982, voters enacted the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), which limited the power of the courts to create nonstatutory exclusionary rules. (*In re Lance W.* (1985) 37 Cal.3d 873, 888.) Accordingly, to the extent *Aranda* imposes broader restrictions than those imposed under *Bruton*, it was abrogated by the "truth-in-evidence" provision. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1407.) Thus, *Aranda* no longer has any application to nontestimonial statements. (*People v. Washington* (2017) 15 Cal.App.5th 19, 27–28*; People v. Gallardo* (2017) 18 Cal.App.5th 51, 68–69; *People v. Arceo* (2011) 195 Cal.App.4th 556, 575.)

Plata's recorded statements were nontestimonial and are therefore not governed by the *Aranda/Bruton* doctrine. Statements are testimonial when the statements were obtained for the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822.) In determining the "primary purpose," courts objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the participants. (*Michigan v. Bryant* (2011) 562 U.S. 344, 360.) The inquiry is a combined one "that accounts for both the declarant and the interrogator." (*Id.* at p. 367.) In other words, "the statement must have been given and taken primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*People v. Cage*, *supra*, 40 Cal.4th at p. 984.)

As recognized by the United States Supreme Court, "statements made unwittingly to a Government informant" are "nontestimonial." (*Davis*, *supra*, 547 U.S. at p. 825.) This is because a declarant who was secretly recorded clearly did not anticipate his statements being used in a criminal proceeding. (*United States v. Johnson*, *supra*, 581 F.3d at p. 325; *People v. Gallardo*, *supra*, 18 Cal.App.5th at pp. 67–68 [holding that secretly recorded statements were nontestimonial because "there is no evidence indicating Angel knew he was speaking to police informants or otherwise anticipated his statements would 'be used prosecutorially'"].)

There is no evidence that Plata knew he was being recorded or believed that his statements would be used in criminal proceedings. Therefore, his statements do not qualify as testimonial and do not fall within the *Aranda/Bruton* rule.

Absent an *Aranda/Bruton* violation, the general rule that juries will follow a limiting instruction applies. In *People v. Washington*, *supra*, 15 Cal.App.5th at pages 26–29, the court affirmed the defendant's murder conviction where there was no *Aranda/Bruton* violation and the jury was

specifically instructed not to consider secretly recorded conversations of codefendants against the defendant. (See also *United States v. Dale*, *supra*, 614 F.3d at pp. 958–59 [holding that the trial court did not abuse its discretion in denying appellants' motion to sever where there was no *Bruton* violation because defendants' statements to cooperating witness were not testimonial and the jury was given a limiting instruction].)

Tran contends that arguments made by the prosecutor contradicted the limiting instruction and might have confused the jury as to whether Plata's statements could be considered against Tran. Specifically, Tran points to the prosecutor's reference during closing argument to Plata's statement to Ly regarding Tran's tattoo meaning "blow me" or "suck me." The prosecutor argued:

> No evidence of bragging or lack of remorse. That's what Mr. Pohlson said.
>
> Really? Really?
>
> [¶] . . . [¶]
>
> How about the opinion of Todd and Nye. This is evidence, both of them, experienced in this field, told you that that's evidence of bragging.
>
> Well, how about "blow me and suck me?" It's on tape. It's on tape. This is on tape.
>
> How does that factor into the opinion of Nye and Todd, "Blow me and suck me." Telling people that's what it means.

(8 RT 1734–1735.)

The prosecutor did not, as Tran claims, effectively urge the jury to ignore the limiting instruction. The prosecutor did not argue that Plata's statement about the tattoo could be considered directly against Tran, but, rather, talked about Plata's statement solely in the context of Nye's and

Todd's opinions.[23] Even assuming Plata's statement regarding Tran's tattoo constituted inadmissible hearsay, the prosecutor's fleeting reference to the statement in connection with the opinions of Nye and Todd would not cause a reasonable juror to conclude that despite the court's limiting instruction, he or she could consider all of Plata's recorded statements against Tran. Furthermore, the court instructed the jury: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (4 CT 1064.)

Tran has not overcome the presumption that the jury understood and followed the trial court's instruction limiting the consideration of a defendant's statement against that defendant only. (*People v. Winbush*, *supra*, 2 Cal.5th at p. 457.) Therefore, the admission of Plata's recorded statements did not result in the violation of Tran's constitutional rights.

D. The Trial Court Did Not Erroneously Preclude the Jury from Considering Alleged Statements by Plata that He Was the Actual Killer

When cross-examining Ly, Tran's attorney asked him about his statements to Officer Linton in 1999 that Plata told him more than once that he had killed "the Korean girl" and that he "had to do it." (7 RT 1444–

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[23] Prior to *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), California courts held that out-of-court statements admitted as "basis evidence"—evidence upon which an expert formed his or her opinion—do not constitute hearsay because such statements are not offered for the truth of the matter, but to allow the jury to evaluate the expert's opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618–619.) In *Sanchez*, however, the court held that an expert cannot relate case-specific out-of-court statements as true unless the statements are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) In addition to arguing that Plata's statement regarding Tran's tattoo was inadmissible hearsay, appellants argue that Nye related case-specific out-of-court statements regarding the predicate offenses and Plata's status within the gang. Those arguments are addressed in Arguments VI.E and VII.B.3 below.

1446, 1452–1454.) Tran argues that Plata's inculpatory statements were admissible in his case as declarations against interest (Evid. Code, § 1230) and that the court's limiting instruction erroneously precluded the jury from relying on this evidence in determining Tran's role in the killing. (Tran AOB 147–155.) Tran contends that the trial court violated his due process rights by precluding him from relying on this important defense evidence. (Tran AOB 147–155.) But Tran never sought to have Plata's alleged inculpatory statements admitted as declarations against interest.

The proponent of hearsay "has to alert the court to the exception relied upon and has the burden of laying the proper foundation." (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.) In *Livaditis*, the defendant raised an argument for the first time on appeal that certain evidence was admissible under the state-of-mind exception to the hearsay rule. (*Id.* at p. 778.) At trial, the defendant never suggested the hearsay statements were admissible under some exception and did not establish that the evidence qualified for admission under the state-of-mind exception. (*Id.* at p. 779.) Accordingly, this court found that the issue was not properly before it. (*Id.* at p. 780; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1177–1179 [holding that defendant failed to preserve for appeal claim that testimony regarding contents of letters was admissible because the defendant did not make an offer of proof as to the substance of the anticipated testimony, cite a hearsay exception, or argue a nonhearsay purpose].)

Based on prior discussions between counsel and the court, Tran knew that the jury would be instructed to consider a defendant's statement against that defendant only based on the hearsay nature of the evidence as to the non-declarant defendant. However, Tran never suggested to the court that Plata's alleged admission that he was the killer qualified as a declaration

against interest, as opposed to impeachment evidence against Ly,[24] and did not attempt to lay the proper foundation for such a hearsay exception.

Indeed, it is unclear what Plata actually said to Ly about his role in the murder. Although Ly admitted that he previously told the police that Plata said that he killed Linda and "had to do it," Ly also repeatedly testified that he just *assumed* that Plata was the actual killer based on what Plata said about his involvement in the crime. (7 RT 1445, 1450–1451, 1453.) Ly testified that Plata never said that he was the one who strangled Linda or killed her. (7 RT 1450–1451.) Ly just assumed that Plata killed Linda because he said he was involved in the crime and was there. (7 RT 1451.)

Because Tran did not seek a ruling that Plata's statements were admissible as declarations against interest, Tran has forfeited his claim. The limiting instruction did not violate Tran's due process rights because Tran did not establish that Plata's statements fell within a hearsay exception, and, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.)

E. Any Error Was Harmless

Even assuming there was any error with respect to how the court handled Plata's recorded and/or non-recorded statements, such error was harmless under any standard. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [requiring reversal for state law error where "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; *Chapman v. California* (1967) 386 U.S. 18, 24 [requiring that the beneficiary of a constitutional error "prove beyond a

[24] Whether Plata actually ever said that he was the one who killed Linda, Ly's prior claim that Plata had told him so could bear upon the believability of Ly's subsequent claim that Tran nonverbally identified himself as the actual killer.

reasonable doubt that the error complained of did not contribute to the verdict obtained"]; *People v. Brown* (1988) 46 Cal.3d 432, 448 [standard for state law error at the penalty phase is whether it is "reasonably possible" that a given error or combination of errors affected a verdict].)

No matter what statements Plata made about his role in the murder, Tran's own actions and recorded statements firmly established that Tran was the killer. When Ly asked Tran who killed Linda, Tran pointed to himself and nodded his head. (7 RT 1425.) Tran argues that this nonverbal act was not recorded or corroborated by other evidence. (Tran AOB 169.) However, Tran ignores the statements made by Ly and himself immediately afterwards. After the nonverbal response, Ly said, "Man, you idiot," and Tran replied, "Yeah, I know, I know man. Now I gotta live with it." (1 SCT 69.) Ly and Tran's subsequent statements only make sense if Tran did in fact indicate that he was the killer.

Furthermore, when Ly asked Tran, "Man. what the fuck, fuck, you take her out for, you idiot?," Tran responded, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (1 SCT 73.) Tran did not deny that he was the one who "took her out" or suggest that Plata was the actual killer.

Moreover, with respect to the guilt phase, the claimed errors clearly had no effect on Tran's conviction for first degree murder because the jury must have found at minimum that Tran was guilty of felony murder. Although the jury's verdict did not indicate whether Tran was convicted under the malice aforethought theory and/or the felony-murder theory, the jury found true the special circumstance of murder in commission of the crime of robbery or burglary, meaning that the jury found that Tran had committed felony murder. (See *People v. Kelly* (2007) 42 Cal.4th 763, 789 [explaining that the jury's true findings regarding the rape-murder and robbery-murder special circumstances showed that the jury found that the

defendant killed the victim "in the perpetration of, or attempt to perpetrate . . . rape . . . [and] robbery," which makes the killing first degree murder].)

Tran argues that his identity as the actual killer was critical to the state's case against him for felony murder and the special circumstance of murder in the commission of a felony because the prosecutor argued that (1) the felony-murder instruction for the actual perpetrator (CALCRIM 540A) applied to Tran, whereas the felony-murder instruction for the coparticipant (CALCRIM 540B) applied to Plata, and (2) the special circumstances instruction regarding the intent requirement for an accomplice (CALCRIM 703) applied to Plata. (Tran AOB 165, 168.) However, the instructions themselves did not specify who was the actual perpetrator and who was the coparticipant. The jury was not bound to apply only CALCRIM 540A to Tran and was free to find that Plata, not Tran, was the actual killer.

With respect to the penalty phase, Tran relies on *People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*), in arguing that the penalty verdict must be reversed because the jury was precluded from considering the evidence that Plata allegedly admitted to being the actual killer. However, *Grimes* involved much different circumstances than this case. In *Grimes*, the defense conceded that defendant Grimes was guilty of burglary, robbery, and murder, but contended that Grimes, who was not the actual killer of the elderly victim, had no intent to kill and was not recklessly indifferent to life. (*Id.* at p. 707.) At trial, the jury heard Grimes's tape-recorded interview in which he admitted to detectives that he was involved in the burglary and robbery but denied any involvement in the murder, claiming that another participant in the crime, Morris, killed the victim while Grimes was in the back of the house. (*Id.* at p. 705.) The jury also heard the testimony of a prisoner, Howe, who had been housed with Grimes in jail. (*Id*. at p. 707.) Howe testified that Grimes told him that he had ordered

Morris and Wilson, the other participant in the crime, to tie up and kill the victim and that Grimes said either that he had enjoyed watching the victim be killed or that he enjoyed the fact that she died. (*Ibid*.)

On appeal, Grimes argued that the trial court erroneously excluded statements made by Morris that Grimes did not take part in the killing and looked surprised after Morris killed the victim. (*Id*. at p. 710.) This court held that Morris's statements were admissible as declarations against interest and that the erroneous exclusion of the evidence required reversal of the death verdict. (*Id*. at pp. 710–723.) This court explained that the excluded statements would have given the defense a substantial basis for countering the prosecutor's argument that Howe's testimony was worthy of belief and that Grimes "stood by" while the victim was brutally strangled and stabbed to death. (*Id*. at pp. 722–723.)

In contrast to *Grimes*, where the most damning evidence was uncorroborated testimony by a prisoner who had reached a deal with the prosecution, here, the jury heard recorded statements by Tran in which he incriminated himself as being the killer. Furthermore, there are no definitive statements by Plata that he was the one who strangled Linda—it is actually unclear whether Plata ever told Ly that he was the killer. Moreover, the penalty phase instructions directed the jury to "disregard all of the instructions I gave you earlier" and did not include the instruction that a defendant's out-of-court statement can be used only against that defendant. (5 CT 1332.) Therefore, the jury was not actually precluded from considering Plata's nonrecorded statements in Tran's penalty phase case.

Pointing to the absence of a limiting instruction in the penalty phase instructions, Tran next argues that he was prejudiced during the penalty phase because the jury was permitted to consider Plata's recorded statements against him on the critical issues of Tran's role in the murder

and whether he exhibited remorse. But Tran did not request a penalty phase instruction limiting the admissibility of out-of-court statements by defendants.[25] Evidence Code section 355 states: "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Italics added.) "Absent a request, a trial court generally has no duty to instruct as to the limited purpose for which evidence has been admitted." (*People v. Cowan* (2010) 50 Cal.4th 401, 479.) This is true in the penalty phase of a capital case as well as in the guilt phase. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 590 [holding that trial court was not required to sua sponte give instructions limiting the purpose for which the jury could consider evidence that prior death verdict had been rendered against the defendant].) Because Tran did not request that the limiting instruction be included in the penalty phase of the trial, Tran cannot now complain of the potential consequences of what he describes as an "instructional gap." (Tran AOB 163.)

At any rate, even assuming the jury considered Plata's recorded statements against Tran during the penalty phase, there is no reasonable possibility that the jury would have rendered a different verdict had they not done so. As previously discussed, Tran's own incriminating statements eliminated any doubt as to who the actual killer was. As for Plata's statement regarding the meaning of Tran's tattoo, there was plenty of other evidence regarding Tran's lack of remorse. Although Nye and Todd

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[25] During a discussion regarding Plata's statements that he did not kill Linda and there was nothing he could do about it, the prosecutor stated that he had no objection to the limiting instruction being given in the penalty phase: "[A]nd I have no problem telling them that . . . whatever limiting instruction you were given in the guilt phase does apply in the penalty phase." (6 RT 1266.) However, Tran did not request that the instruction be given.

considered Plata's statement in forming their opinions regarding the meaning of Tran's tattoo, they also relied on their own knowledge of gang culture, including bragging through tattoos and maintaining a reputation by not appearing weak. (6 RT 1155, 1162; 8 RT 1553–1554.)

In addition, during his conversations with Ly, Tran expressed that the crime was not "worth it," although it was supposed to be worth "about ten," and that he felt like "the biggest fucking idiot in the world" for getting "busted for this." (1 SCT 81, 89.) When asked if he had any of Linda's property at his house, Tran actually laughed. (1 SCT 91.) When asked why he killed Linda, Tran just responded, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (1 SCT 73.) Tran never suggested that he was sorry for taking Linda's life as opposed to being sorry for getting caught.

Any error as to the court's handling of Plata's recorded statements and/or non-recorded statements was harmless, whether considered in connection with the guilt verdict or the death verdict.

F. The Court Did Not Abuse Its Discretion in Denying the Motion for Severance, and Reversal Is Not Warranted

This case concerns codefendants charged with common crimes involving common events and victims, and was therefore a "classic case" for a joint trial. (*Keenan*, *supra*, 46 Cal.3d at pp. 499–500.) Plata's nontestimonial statements did not implicate the *Aranda/Bruton* rule, and the joint trial did not prevent the jury from making a reliable judgment about guilt or innocence. Therefore, the trial court did not abuse its discretion in denying Tran's motion for severance. (See *People v. Coffman and Marlow*, *supra*, (2004) 34 Cal.4th 1 at p. 43 [explaining that introduction of defendants' extrajudicial statements implicating each other in the offenses did not dictate severance where Sixth Amendment confrontation rights were not implicated].) Even if the trial court abused its discretion in

denying severance, as discussed above, Tran cannot demonstrate that he was prejudiced. Accordingly, reversal of the guilt verdict, special circumstance findings, and death judgment is not warranted.

IV. THE TRIAL COURT DID NOT VIOLATE TRAN'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO PROOF BEYOND A REASONABLE DOUBT BY INSTRUCTING THE JURY WITH CALCRIM NOS. 335, 336, AND 358

Tran contends that the trial court's instructions regarding accomplice testimony (CALCRIM No. 335), in-custody informant testimony (CALCRIM No. 336), and evidence of a defendant's statement (CALCRIM No. 358) imposed a fundamentally unfair barrier to the jury's consideration of defense evidence favorable to Tran. (Tran AOB 172–192 [Arg. IV].) Specifically, Tran argues that the instructions erroneously directed the jury not to consider Joann's testimony regarding Tran's tattoo meaning "forgive me" unless her testimony was supported by other evidence, and to consider "with caution" Plata's alleged statements to Ly that he killed Linda and Ly's testimony regarding the same. Tran is mistaken. The instruction regarding accomplice testimony applied to incriminating testimony only, and Plata's alleged statements that he was the actual killer could not be considered for their truth as to Tran because Tran never sought to have the statements admitted under an exception to the hearsay rule.

The court's instruction regarding accomplice testimony (CALCRIM No. 335) properly stated, "Any testimony or statement of an accomplice that tends to *incriminate* the defendant should be viewed with caution." (4 CT 1092, italics added.)[26] (See *People v. Guinan* (1998) 18 Cal.4th 558,

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[26] The instruction provided in full:

If the crime of murder was committed, then Joann Nguyen was an accomplice to that crime.

569 [holding that "the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant"].) Similarly, the instruction required supporting evidence in order for the jury to "use the testimony or statement of an accomplice *to convict* a defendant or *to find an allegation or a special circumstance to be true*." (4 CT 1091, italics added.) Accordingly, the instruction did not restrict the jury's consideration of accomplice testimony that was favorable to the defendant.

At any rate, Tran overstates the importance of Joann's testimony regarding Tran's tattoo. The relevant testimony is set forth below:

You may not convict the defendant of Murder or find any of the special circumstances or enhancements to be true based on the testimony or statement of an accomplice alone. You may use the testimony or statement of an accomplice to convict a defendant or to find an allegation or a special circumstance to be true only if:

1. The accomplice's testimony or statement is supported by other evidence that you believe;

2. That supporting evidence is independent of the accomplice's testimony or statement; AND

3. That supporting evidence tends to connect the defendant to the commission of the crime.

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime or that an enhancement or a special circumstance is true, and it does not need to support every fact about which Joann Nguyen testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

Any testimony or statement of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony or statement the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

(4 CT 1091–1092.)

Prosecutor: Do you recognize this as the tattoo written on Mr. Tran that he had on the side of his neck subsequent to the murder of Linda Park?

Joann: Yes.

Prosecutor: Did you ask him about this tattoo?

Joann: Yes.

Prosecutor: And what did Mr. Tran tell you that this tattoo says?

Joann: Forgive me.

Prosecutor: Did he tell you what language it says in it?

Joann: Korean.

(5 RT 1047, 1048.) There is no dispute that the literal translation of the tattoo is "forgive" – the parties stipulated to that fact. (8 RT 1552–1553.) The question was what Tran intended to convey to his fellow gang members and others through the tattoo. Joann's testimony confirms that the literal meaning of the tattoo is "forgive" or "forgive me" but does not elucidate whether the tattoo was a genuine expression of remorse by Tran.

The trial court's instructions regarding in-custody informant testimony (CALCRIM No. 336) and evidence of a defendant's statements (CALCRIM No. 358) did not distinguish between statements that are favorable to the defense and those that are not as the model instructions do today.[27] However, any error in these instructions did not prejudice Tran

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[27] The instructions provided:

IN-CUSTODY INFORMANT

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of,

because the alleged statements by Plata that he was the killer were not admissible for their truth as to Tran.

As discussed in Argument III.D above, Tran never sought to have Plata's alleged statements that he was the killer admitted as declarations against interest. Therefore, as to Tran, the jury could not consider Plata's alleged statements for their truth, and any shortcomings in the jury instructions had no bearing on his case. Furthermore, for the reasons discussed in Argument III.E above, any error in preventing or impeding the consideration of Plata's non-recorded statements was harmless with respect to the guilt verdict as well as the death verdict.

In arguing that the jury instructions violated his right to present a defense or to proof beyond a reasonable doubt, Tran relies upon *Cool v.*

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or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

An in-custody informant is someone, other than an accomplice, whose testimony is based on statements the defendant allegedly made while both the defendant and the informant were held within a correctional institution.

Qui Ly is an in-custody informant.

(4 CT 1093.)

EVIDENCE OF DEFENDANT'S STATEMENTS

You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements.

You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.

(4 CT 1097.)

United States (1970) 409 U.S. 100, 102. However, *Cool* is wholly distinguishable. In *Cool*, the trial court instructed the jury that it could give accomplice testimony the same effect as it would to an ordinary witness's testimony if the jury was convinced that the accomplice testimony was true *beyond a reasonable doubt*. The court held that by predicating the consideration of exculpatory evidence upon a finding of truth beyond a reasonable doubt, the instruction substantially reduced the Government's burden of proof. (*Id.* at p. 104.)

Here, in contrast, the trial court did not erect any "artificial barriers" to the consideration of relevant defense testimony, and there is no basis for reversal of the guilt verdict, special circumstance findings, or judgment of death.

V. THERE WAS SUFFICIENT EVIDENCE THAT TRAN INTENDED TO INFLICT EXTREME PHYSICAL PAIN FOR PURPOSES OF REVENGE, EXTORTION, PERSUASION, OR OTHER SADISTIC REASON

Tran argues that there was insufficient evidence that he intended to cause cruel or extreme pain and suffering and that the jury's torture-murder special circumstance finding must therefore be vacated. (Tran AOB 193–201 [Arg. V].) However, there was substantial evidence from which the jury could find beyond a reasonable doubt that Tran harbored the requisite torturous intent.

The inquiry for sufficiency of the evidence is the same for special-circumstance allegations as it is for substantive offenses, i.e., "when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Clark* (2016) 63 Cal.4th 522, 610; *People v. Johnson* (2015) 60 Cal.4th 966, 988 [same].) The reviewing court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from

the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Farnam* (2002) 28 Cal.4th 107, 143.)

The amended information alleged the special circumstance that Linda's murder involved the infliction of torture, specifically, the binding of her wrists and slashing of her throat. (§ 190.2, subd. (a)(18).) The evidence presented at trial supported a finding that Tran intended to cause extreme pain and suffering for purposes of extortion or a sadistic reason.

"To prove a torture-murder special circumstance, the prosecution must show that defendant intended to kill and had a torturous intent, i.e., an intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose." (*People v. Streeter* (2012) 54 Cal.4th 205, 237.) The intent to torture is a state of mind, and, unless it is established by the defendant's own statements or a witness's description of a defendant's behavior in committing the offenses, must be proved by the circumstances surrounding the commission of the offense, including the nature and severity of the victim's wounds. *(People v. Mungia* (2008) 44 Cal.4th 1101, 1137.)

The jury could reasonably infer from the evidence presented at trial that Tran and Plata tied Linda up and slashed her throat to make her tell them where the cash and jewelry were hidden in her house. Joann testified that Linda never told her where the cash and jewelry were kept. (5 RT 996.) Therefore, Joann could not have told Tran. Yet Tran and Plata located the cash in Sun's jacket and the jewelry boxes inside the drawer of Dong's makeup table without ransacking the house. (5 RT 886, 987.) The reasonable inference from the evidence is that Linda was forced to tell Tran and Plata where the valuables were hidden.

Alternatively, there was substantial evidence that Linda was tortured for sadistic purposes. Evidence of intentionally inflicted nonlethal wounds on the victim may demonstrate sadistic intent to cause the victim to suffer pain in addition to the pain of death. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1188 (*Hajek*).) In *Hajek*, the victim suffered a number of nonlethal wounds—including a blunt force trauma to her chin, a stab wound to her shoulder, and five shallow puncture wounds to her chest—before she was strangled and her throat was slashed. (*Id.* at p. 1188.) The court concluded, "These wounds evidenced deliberate and gratuitous violence beyond that which was necessary to kill the victim, and the jury could reasonably infer from the circumstances that the wounds were inflicted to cause her severe pain while she was bound, gagged, and utterly helpless." (*Ibid*.; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 141 [explaining that nonfatal knife wounds, including a number of fairly superficial cuts, were "consistent only with an intent to inflict extreme pain, and provide substantial evidence supporting the determination that this element of the special circumstance was proved"].)

Evidence of binding by itself is insufficient to establish an intent to torture. (*Hajek*, *supra*, 58 Cal.4th at p. 1188.) But it is "appropriate to consider whether the victim was bound and gagged, or was isolated from others, thus rendering the victim unable to resist a defendant's acts of violence." (*Ibid*.)

Linda sustained significant but nonlethal wounds to her throat. (7 RT 1318.) She was also bound, with her arms and legs behind her back. (5 RT 880.) A straight, horizontal line of blood near Linda's mouth suggests that duct tape was placed over her mouth to keep her quiet. (People's Ex. 7.) Based on the depth of the overlapping wounds on Linda's neck, the injuries were not inflicted in an attempt to kill Linda; a completely different method—strangulation—was used to actually kill her. Therefore, the

slashes to Linda's throat were consistent with an intent to deliberately cause her unnecessary pain and suffering.

Furthermore, the painful method that was used to kill Linda is consistent with a sadistic intent. A victim experiences pain during the process of strangulation. (7 RT 1302.) In *Hajek*, the court noted that the manner in which the victim was killed—strangulation—furnished additional evidence of defendants' torturous intent. (*Hajek*, *supra*, 58 Cal.4th at p. 1189.) As explained by the court, combined with the other circumstances present in the case, the evidence of the manner of the victim's death was "consistent with an intent to inflict extreme pain or suffering." (*Ibid*.)

In sum, the evidence that appellants hog-tied Linda to prevent her from escaping and slashed her throat twice before strangling her to death is substantial evidence from which the jury could find that appellants intended to torture her, and there is no basis for vacating the torture-murder special circumstance finding.

VI. THE JURY'S FINDINGS ON THE SPECIAL CIRCUMSTANCES AS TO PLATA WERE SUPPORTED BY SUFFICIENT EVIDENCE; THE PROSECUTOR DID NOT RELY ON HEARSAY TO ESTABLISH THE MENS REA ELEMENT OF THE SPECIAL CIRCUMSTANCES

Plata alleges that there was insufficient evidence in support of the jury's special circumstance findings. (Plata AOB 72–95 [Arg. II].) Specifically, Plata argues that there was insufficient evidence that: (1) he had an intent to kill for purposes of the torture-murder and prior-murder special circumstances; (2) he was a major participant with a reckless indifference to human life as required for the robbery-murder and burglary-murder special circumstances; and (3) he had an intent to torture. There was substantial evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Plata had an intent to kill, was a major

participant in the crime, was recklessly indifferent to human life, and had an intent to torture.

Plata also argues that all four special circumstance findings and the death judgment must be reversed because the gang expert allegedly relied on two case-specific out-of-court statements when testifying about Plata's status within the gang. (Plata AOB 96–101 [Arg. III].) According to Plata, the prosecutor relied upon these hearsay statements to establish the mens rea element of the special circumstances. However, Plata has not established that Nye related case-specific hearsay statements. Moreover, any error in admitting the alleged hearsay statements was harmless.

A. Statutory Provisions Regarding Aider and Abettors

Section 190.2 provides, in relevant part:

> (c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.
>
> (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

Under subsections (c) and (d), "a murderer who was not the actual killer and who lacked the intent to kill, but acted 'with reckless indifference to human life and as a major participant,' can be subject to a punishment of either death or life imprisonment without the possibility of parole only

when the prosecution alleges, as a special circumstance, that the murder occurred in the commission of certain felonies specified in section 190.2's subdivision (a)(17)." (*People v. Nunez* (2013) 57 Cal. 4th 1, 45.)

B. There Was Sufficient Evidence that Plata Had the Intent to Kill Linda

Plata claims that there was insufficient evidence that he had the intent to kill Linda and that, therefore, the jury's torture-murder (subdivision (a)(18)) and prior-murder (subdivision (a)(2)) special circumstance findings must be reversed. However, there was substantial evidence supporting a finding that Plata intended to kill Linda after Linda recognized Tran.

Linda Le made prior statements that on the night of the murder, she heard a conversation between Plata and her boyfriend, Terry Tackett, about Plata cleaning a knife. (6 RT 1183–1184, 1220–1221, 1229–1230.) At trial, Le testified that she saw Plata cleaning a 6-to-8-inch-long knife and that they went to the movies at Plata's suggestion later that evening. (6 RT 1187, 1230–1231.) During his recorded conversations with Qui Ly, Plata mentioned that if Tackett was still alive, he would think that Tackett was talking to the police. (7 RT 1438.) Based on this evidence, the jury could reasonably infer that Plata was the one who slashed Linda's throat with his knife.

Le also told law enforcement officers that Plata told her, "I had no idea she was going to be home. Then we get there, and she was home, and I had to do what I had to do." (6 RT 1190.) Plata also blurted out that he didn't mean to hurt the girl and that he "knocked her out" by accident. (6 RT 1194.) Before she died, Linda sustained a bruise on her left cheek area below her left eye. (7 RT 1309, 1312.) The bruise was caused by a blunt force instrument, such as a fist, palm of the hand, or back of the hand. (7 RT 1313.)

Plata's statement to Le that he "had to do what [he] had to do," and his similar statement to Qui Ly that there was "nothing he could do" (7 RT 1438) could reasonably be interpreted as meaning that once Tran recognized Linda, only one outcome was possible—Linda's death. As argued by the prosecutor, "Remember Plata telling Qui Ly there was nothing he could do because the minute she recognized Tran, they were not going to let her live. They were not going to let her live." (8 RT 1686.) Plata would have known that if Linda survived she would be able to identify Tran, and Plata's role in the crime would be discovered soon thereafter. The jury could have reasonably concluded that by the time Plata hit Linda and slashed her throat, both he and Tran had determined that Linda had to die.

The gang evidence provides additional support regarding Plata's intent to kill. (See *People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055 [viewing evidence in the context of testimony by gang expert regarding Asian gang practices and the ongoing rivalry between two gangs, the jury could have inferred that defendant knew of the killer's intent to kill, shared that intent, and aided him by spotting potential targets].) Nye explained that residential burglaries and home invasion robberies were primary activities of the VFL. (8 RT 1535.) He also explained that when gang members commit a crime together, it is an absolute expectation that a gang member is going to back up his fellow gang member during the commission of the crime. (7 RT 1478.) Nye was of the opinion that Plata had a high status in the gang because one of the leaders of the gang asked Plata to jump someone out of the gang. (8 RT 1541.) In a letter, Plata expressed his strong allegiance to the gang, stating that he "would die for VFL and just about everyone in it." (8 RT 1544.)

Once Linda recognized Tran, Plata would have realized that if he and Tran continued with their plan to rob Linda's residence, Linda's death

would be necessary to protect his fellow gang member as well as himself. Despite having a high status in the gang, Plata did not abort the plan or give orders to Tran to not hurt Linda. Instead, Plata forged ahead with the robbery. Because Plata helped carry the plan forward and actively participated in hurting Linda, it can reasonably be inferred that Plata knew and intended that Linda would be killed either at his hands or at Tran's.

There was substantial evidence that, when viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find beyond a reasonable doubt that Plata had the intent to kill Linda. (*Clark*, *supra*, 63 Cal.4th at p. 610.) Therefore, the torture-murder and prior-murder special circumstance findings should not be reversed.

C. There Was Sufficient Evidence that Plata Was a Major Participant with a Reckless Indifference to Human Life

The robbery-murder and burglary-murder special circumstances apply to a defendant who was not the actual killer if the defendant was a "major participant" in the crime and acted with "reckless indifference to human life." (§ 190.2, subd. (d).) Plata argues that there was insufficient evidence that he was a major participant or that he acted with reckless indifference to human life. To the contrary, there was sufficient evidence of both.

With respect to a defendant's participation in a crime, the "ultimate question" is "whether the defendant's participation 'in criminal activities known to carry a grave risk of death' . . . was sufficiently significant to be considered 'major.'" (*People v. Banks* (2015) 61 Cal.4th 788, 803 (*Banks*), quoting *Tison v. Arizona* (1987) 481 U.S. 137, 152, 157.) Factors that may be considered include the following: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other

participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Ibid*.)

In *Banks*, the defendant Lovie Troy Matthews was a getaway driver for an armed robbery of a marijuana dispensary. (*Banks*, *supra*, 61 Cal.4th at pp. 804–805.) During the robbery, which resulted in a security guard being shot to death, Matthews was sitting in his car three blocks away and waiting. (*Ibid*.) There was no evidence that Matthews was involved in planning the robbery, that his confederates had previously committed or attempted to commit murder, or that he had any immediate role in instigating the shooting or could have prevented it. (*Id*. at p. 805.) The court concluded that Matthews was no more than a getaway driver and was ineligible for the death penalty. (*Ibid*.)

Plata attempts to compare this case to *Banks*. However, here, there is evidence that Plata was in Linda's house and helped carry out the crime. Plata told Ly how "[t]hat fool slipped by a cactus." (1 SCT 112.) One of the few things that was disturbed in the Park residence was a potted cactus that was lying on its side. (5 RT 885.) Moreover, as discussed above, there was evidence that Plata hit Linda in the face and, after she was bound, slashed her throat twice with a knife. As argued by the prosecutor, the jury could also reasonably infer that Plata helped Tran tie Linda up because her wrists and her ankles were bound by a single piece of twine and it would be difficult for a person acting alone to accomplish this feat. (8 RT 1686.)

In addition, the jury could reasonably conclude that Plata was present when Linda was actually killed. It defies common sense that Plata, Tran's "backup," who participated in striking Linda and slashing her throat, would suddenly absent himself when Linda was killed.

Despite Plata's status in the gang, Plata did not stop the plan from going forward after Linda recognized Tran and did not stop Linda from being killed. Furthermore, there is evidence that after the murder, Plata helped cover up the crime. Plata told Ly that he was "pissed" and had to go back inside the house to take something off. (7 RT 1438.) As argued by the prosecutor, the evidence suggests that what Plata had to take off was duct tape that was covering Linda's mouth and potentially had fingerprints on it. (8 RT 1676–1677.)

Plata's role in the crime was not akin to that of a mere getaway driver. Plata was present as the robbery was taking place and facilitated the crime by helping to subdue Linda. Plata's prominent role in the crime qualified him as a major participant.

The evidence also supports the finding that Plata acted with reckless indifference to human life. The requirement of major participation and reckless indifference "significantly overlap . . . for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life." (*Tison*, *supra*, 481 U.S. at p. 153.) Reckless indifference encompasses "a willingness to kill (or assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, *supra*, 63 Cal.4th at p. 617.) Reckless indifference encompasses a subjective element—the defendant's conscious disregard of risks known to him or her—as well as an objective standard, "namely what 'a law-abiding person would observe in the actor's situation.'" (*Ibid*.)

Factors that may be considered in determining the existence of reckless indifference to human life include knowledge of weapons and use and number of weapons, physical presence at the crime and opportunities to restrain the crime and/or aid the victim, duration of the felony, defendant's knowledge of his cohort's likelihood of killing, and efforts by the defendant

to minimize the risks of violence during the felony. (*Clark*, *supra*, 63 Cal.4th at pp. 618–623.) No single one of these factors is necessary, nor is any one of them necessarily sufficient. (*Id.* at p. 618.)

In this case, reckless indifference is established by the substantial role Plata played in the events leading up to the murder. As explained by this court:

> Proximity to the murder and the events leading up to it may be particularly significant where, as in *Tison*, the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force. In such cases, "the defendant's presence allows him to observe his cohorts so that it is fair to conclude that he shared in their actions and mental state . . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders." (McCord, *State Death Sentencing for Felony Murder Accomplices under the* Emnund *and* Tison *Standards* (2000) 32 Ariz. St. L.J. 843, 873.)

(*Clark, supra*, 63 Cal.4th at p. 619.) Linda's death was a culmination of events starting with Linda recognizing Tran at the front door. Once Linda recognized Tran, the potential for deadly violence increased significantly. Tran and Plata could have abandoned their plan to rob the Park residence. Instead, both of them entered the home. After Plata hit Linda in the face, Tran (and perhaps Plata as well) tied Linda up, Plata slashed her throat, and Tran and/or Plata took the cash and jewelry, there was no question that Linda would not be allowed to live. Plata did not act as a restraining influence on Tran, but, rather, helped move events along to their inevitable and deathly conclusion.

Because there was sufficient evidence that Plata was a major participant and was recklessly indifferent to human life, the robbery-murder and burglary-murder special circumstance findings should be upheld.

D. There Was Sufficient Evidence that Plata Had the Intent to Torture

Plata argues that there is insufficient evidence in the record that he had an intent to torture or that he actively participated in torturing Linda. As detailed in Argument VI.B above, there was substantial evidence of Plata's participation in the torture, specifically, the slashing of Linda's throat with a knife. For the reasons discussed in Argument V above, there was also substantial evidence that Plata intended to cause extreme pain and suffering for purposes of extortion or a sadistic reason.

E. The Trial Court Did Not Admit Case-specific Hearsay Regarding Plata's Status within the Gang; Any Error in Admitting Hearsay Statements Was Harmless

Plata points to two statements that he claims were related to the jury by Nye and constitute inadmissible hearsay. Plata argues that he was prejudiced by the introduction of these hearsay statements because the prosecutor relied on them to establish the mens rea element of the four special circumstances. (Plata AOB 99–100.)

The first statement was made by Hong Lay, aka "Old Man," one of the leaders of the VFL, who wrote to Plata and said, "Oh, yeah, do me a favor, please. Jump Homeless out of VFL because he want to jump out long time ago, but we did not have time, so that way I want you and some of the guy to go with you and jump him out." (8 RT 1539.) Old Man directed Plata to talk to Phi Nguyen because he knew where Homeless lived. (8 RT 1540.) Nye testified that he believed that Plata had a high status in the gang because jumping someone out of the gang was a big responsibility. (8 RT 1541.)

The second statement was allegedly made by unnamed Garden Grove police department investigators. When asked whether he knew in 1995 what Plata's level was in the gang, Nye responded, "I had heard about Mr.

Plata from Garden Grove police department investigators prior to his arrest in this case and heard that he had a noteworthy reputation within the gang, that he was somebody to keep an eye on." (8 RT 1562.)

In *Sanchez*, this court clarified, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) "Case-specific facts" are those "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.)

Hong Lay's request to Plata to "jump Homeless" out of the gang was not hearsay. An out-of-court statement is hearsay only when it is "offered to prove the truth of the matter stated." (Evid. Code § 1200.) "Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated." (*People v. Jurado* (2006) 38 Cal.4th 72, 117; see also *People v. Reyes* (1976) 62 Cal.App.3d 53, 67 ["A declarant's words of direction or authorization do not constitute hearsay since they are not offered to prove the truth of any matter asserted by such words"].)

Whether Homeless actually wanted to be jumped out of VFL and whether Plata actually carried out Old Man's request is irrelevant. What matters is that Old Man, a shot caller in the gang, asked Plata to jump a gang member out. The fact that Old Man made the request to Plata showed that Old Man trusted Plata and held him in some regard.

As for Nye's testimony that he had "heard that [Plata] had a noteworthy reputation with the gang, that he was somebody to keep an eye on," it is unclear whether Garden Grove officers said words to that effect or whether Nye was actually conveying the opinion he formed based on various statements by the officers. Because Plata did not make a hearsay objection at the time, there is insufficient information to conclude that Nye

in fact conveyed hearsay statements. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585 [explaining that since no contemporaneous objections were lodged, the record was undeveloped, and the court could not simply assume that certain out-of-court statements conveyed by the gang expert were testimonial hearsay].)

Even assuming Nye conveyed case-specific hearsay, the error was harmless. There is no evidence whatsoever that the hearsay was testimonial, therefore, the error was one of statutory state law and the *Watson* standard applies. (*Sanchez*, *supra*, 63 Cal.4th at p. 698; *Watson*, *supra*, 46 Cal.2d at p. 836.) Plata's status within the gang was just one of many facts that bore upon whether he had the intent to kill and/or was a "major participant with a reckless indifference to human life." As discussed in Arguments VI.B. and VI.C. above, whatever Plata's status in the gang was, he played a substantial role in Linda's murder, including going forward with the planned robbery despite Linda's recognition of Tran, entering the house, hitting Linda in the face, and slashing her throat. Therefore, it is not reasonably probable that Plata would have obtained a more favorable result absent the alleged admission of hearsay statements regarding his gang status.

F. The Reversal of any Special Circumstance Does Not Warrant Reversal of the Death Judgment

Even if this court were to find that there was insufficient evidence to support any one of the special circumstance findings, the death judgment should be upheld. "[I]nvalidation of a special circumstance finding will not render the penalty unconstitutional if one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1354, citing *Brown v. Sanders* (2006) 546 U.S. 212, 220.) Here, the jury could properly consider the facts it found in connection with the torture-murder and

felony-murder special circumstances as circumstances of the crime (§ 190.3, subd. (a)). In addition, the jury could consider Plata's prior conviction for first-degree murder as part of Plata's criminal history (§ 190.3, subds. (b), (c)). Accordingly, even if this court were to reverse any of the special circumstance findings, the penalty verdict should still be affirmed. (See, e.g., *Mungia*, *supra*, 44 Cal.4th at p. 1139 [finding that reversal of torture-murder special circumstance did not require reversal of the judgment of death because the jury properly considered two other valid special circumstance findings (murder in the commission of a burglary and robbery), all of the facts and circumstances underlying the murder, and defendant's lengthy criminal record].)

VII. THE GANG ENHANCEMENT FINDING SHOULD NOT BE REVERSED BECAUSE A PATTERN OF CRIMINAL GANG ACTIVITY WAS PROVEN, AND THERE WAS SUFFICIENT EVIDENCE THAT THE CRIMES WERE COMMITTED IN ASSOCIATION WITH AND FOR THE BENEFIT OF THE VFL

Tran argues that the gang enhancement finding (§ 186.22, subd. (b)) should be reversed because the predicate offenses upon which the prosecution relied to establish a "pattern of criminal gang activity" were invalid. (Tran AOB 202–224 [Arg. VI].) Specifically, Tran claims that the prosecution failed to establish the necessary predicate offenses because (1) the trial court instructed the jury that proof of a "conviction" of two or more qualifying crimes was sufficient to establish a "pattern of criminal activity" even though the statute in effect in 1995 did not include the word "conviction"; (2) the trial court allowed the jury to rely on Se Hoang's conspiracy to commit murder conviction even though conspiracy to commit murder was not an enumerated offense in 1995; and (3) the court's instructions permitted the jury to rely on case-specific, testimonial hearsay to find that Hoang and Johnson were members of the VFL gang. (Tran AOB 207.) Even if there was any instructional error, such error was

harmless because there was a surplus of admissible evidence that VFL members committed crimes that fell within the enumerated offenses and qualified to establish a pattern of criminal gang activity.

Tran and Plata also argue that there was insufficient evidence that the crimes in this case were "committed for the benefit of, at the direction of, or in association with a criminal street gang." (Tran AOB 225 [Arg. VII]; Plata AOB 41–71 [Arg. I].) To the contrary, there was substantial evidence that the crimes in this case were committed both "in association with" and "for the benefit of" the VFL. Therefore, reversal of the gang enhancement finding is not warranted.

A. Gang Enhancement Elements

To prove a gang enhancement allegation the prosecutor must establish that (1) the underlying felony was committed for the benefit of, at the direction of, or in association with a criminal street gang, and (2) the crimes were committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*).)

For a group to fall with the statutory definition of a "criminal street gang," the following requirements must be met: "(1) the group must be an ongoing association of three or more persons sharing a common name or common identifying sign or symbol; (2) one of the group's primary activities must be the commission of one of the specified predicate offenses [set forth in subdivision (e)]; and (3) the group's members must 'engage in or have engaged in a pattern of criminal gang activity.'" (*People v. Loeun* (1997) 17 Cal.4th 1, 8; § 186.22, subd. (f).)

The commission of one or more of the statutorily enumerated crimes must be one of the gang's "chief" or "principal" undertakings to qualify as "primary activities." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) The "occasional commission of those crimes" by the

group's members does not qualify as primary activities. (*Ibid.*) Evidence of both past offenses and the currently charged offenses may be considered in making the primary activities determination. (*Ibid*.)

A "pattern of criminal gang activity" is currently defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [offenses set forth in subdivision (e)], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).) The enumerated offenses include robbery, homicide, and burglary. (§ 186.22, subd. (e)(2), (3) & (11).)

B. Substantial Evidence of Valid Predicate Offenses Supported a Finding of a Pattern of Criminal Activity

1. Nye's testimony regarding predicate offenses

In forming his opinion about the VFL's status as a criminal street gang and its primary activities, Nye reviewed documents relating to crimes committed by Se Hoang, Phi Nguyen, and Anthony Johnson. (8 RT 1529–1535.)

Nye reviewed records showing that Se Hoang pled guilty to a first-degree residential burglary committed in 1992, and also pled guilty to a 1993 conspiracy to commit murder. (8 RT 1530–1531; People's Exs. 100, 101.) According to a document reviewed by Nye, Hoang admitted that at the time of both of these crimes, he was a member of VFL. (8 RT 1531.)

Nye also reviewed the records of Phi Nguyen, who pled guilty to a 1994 attempted residential burglary and admitted that he actively participated with the VFL street gang. (8 RT 1532; People's Ex. 102.) Phi also pled guilty to a 1994 residential robbery and admitted that he used a deadly weapon in the commission of the offense, and pled guilty to a

separate 1994 residential burglary. (8 RT 1533; People's Ex. 103.) Based on Phi's background and his record, Nye concluded that Phi was a member of VFL at the time of the crimes. (8 RT 1533.)

Additionally, Nye considered the records of Anthony Johnson. (8 RT 1533; People's Ex. 104.) Nye was involved in investigating an attempted murder that Johnson was involved in and interviewed him in connection with the case. (8 RT 1533–1534.) Johnson pled guilty to committing attempted murder in 1995 and admitted that he committed the attempted murder for the benefit of VFL, a criminal street gang. (8 RT 1534.)

2. Any ex post facto violation was harmless

Tran argues that the jury instructions violated ex post facto principles by allowing the jury (1) to rely on convictions alone to establish a pattern of criminal activity, and (2) to consider conspiracy to commit an enumerated offense as a qualifying offense.

It is true that in 1995, section 186.22 did not refer to convictions or conspiracies to commit enumerated offenses. The statute in effect at that time defined a "pattern of criminal gang activity" as "the commission, attempted commission, or solicitation of two or more of the following offenses . . . ."

Both the federal and state constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) The ex post facto clauses are aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. (*People v. Grant* (1999) 20 Cal.4th 150, 158; *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504.)

Even assuming the court's instructions violated ex post facto principles, the error was harmless. Relying on *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1204, Tran argues that to establish harmless error, the People must show, beyond a reasonable doubt, that the jury based its

verdict on a legally valid theory supporting the pattern of criminal gang activity. However, *Chun* is inapposite. *Chun* concerned a situation where the jury was presented with alternate theories of guilt, one of which was inadequate. (*Id.* at pp. 1202–1205.) This case, in contrast, concerns an instructional error as to an element of a sentencing enhancement.

Instructional error on an element of the gang enhancement is reviewed under the harmless error standard of *Chapman* if the gang enhancement increases the sentence for the underlying crime beyond its statutory maximum. (*Sengpadychith*, *supra*, 26 Cal. 4th at p. 327; see also *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401 [following *Sengpadychith* and applying *Chapman* because the gang enhancement increased the penalty for the attempted murder].) If, on the other hand, the gang enhancement does not increase the penalty beyond the prescribed statutory maximum—e.g., if the defendant was sentenced to an indeterminate term of imprisonment for life—the error does not violate the federal constitution and is reviewed under the *Watson* harmless error standard. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 327.)

Under either standard, any error in this case was harmless.[28] The same documents that established *convictions* of the predicate crimes also established *commission* of the crimes. Certified court documents, which were admitted into evidence, established that Se Hoang, Phi Nguyen, and Anthony Johnson pled guilty to the crimes in question. (People's Exs. 100, 101, 102, 103, 104.)

Even if conspiracy to commit murder does not qualify for purposes of establishing a pattern of criminal gang activity, all of the other offenses committed by Hoang (1992 first-degree residential burglary), Phi Nguyen

[28] In this case, the *Watson* standard is actually the appropriate standard of review because the gang enhancement did not increase the statutorily prescribed maximum penalty for first degree murder.

(1994 attempted residential burglary, 1994 residential robbery, 1994 residential burglary), and Johnson (1995 attempted murder) support such a finding. Furthermore, as recognized by Tran (Tran AOB 223), the charged offense in this case may be considered in determining a pattern of criminal gang activity. (*People v. Bragg*, *supra*, 161 Cal.App.4th at p. 1401.)

3. Tran has not established that Nye related testimonial, case-specific hearsay statements; any hearsay or confrontation clause violation was harmless

Tran argues that the court's instructions allowed the jury to consider testimonial hearsay statements regarding the gang membership of Johnson and Hoang. But the record does not reflect that Nye relied on hearsay statements to form his opinion regarding Johnson's gang membership. As for Hoang's gang membership, the hearsay statement related by Nye was not case-specific, and, at any rate, any error was harmless.

In *Sanchez*, decided years after the trial of this case, this court held, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) If the expert relates testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability; and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing. (*Id.* at p. 686.)

Tran claims that Nye relied on testimonial hearsay—namely statements by Plata to police—in concluding that Johnson was a VFL member. However, the record does not support this conclusion. When discussing Johnson's gang membership, Nye did not refer to Plata's 1993 statements to police that Johnson was a member of VFL. (8 RT 1527–1529.) Nye only referred to Plata's statements to the police when he was discussing Plata's gang membership. (8 RT 1538.)

Nye reviewed records regarding Johnson, and also *personally* assisted in investigating the 1995 attempted murder and interviewed Johnson in connection with the case. (8 RT 1533.) Johnson ended up pleading guilty to the attempted murder and admitted on the guilty plea form that he committed the crime "on behalf of and for the benefit of a criminal street gang 'VFL' (Viets for Life) knowing such gang regularly engaged in criminal activity." (People's Ex. 104.) Therefore, it appears that Nye's testimony regarding Johnson's gang membership was based on his own personal knowledge and certified court records.

When testifying about Hoang's gang membership, Nye said that he reviewed a document indicating that when contacted by police at the time of the residential burglary and the conspiracy to commit murder, Hoang admitted that he was a member of VFL. (8 RT 1531.)[29] Although Nye conveyed hearsay, it was not "case-specific" hearsay. As explained by *Sanchez*, "case-specific facts" are those "relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) In contrast, an expert may properly provide background testimony about "general gang behavior" or descriptions of the gang's conduct and territory. (*Id*. at p. 698.)

Facts regarding other predicate crimes, including the gang membership of the individuals who perpetrated them, are not "case – specific" because they are independent of the facts of the particular crime

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[29] Although Nye did not say that his opinion regarding Hoang's gang membership was based on the letter from Hong Lay, aka Old Man, to Plata, the letter tends to show that Hoang was in fact a member of the VFL. Lay, a leader of the VFL, told Plata, "Tell Se that I want him to go play with you and you could become close to him so you two could be good homeboys, okay?" (8 RT 1527, 1539.) Nye testified that "Se" referred to Se Hoang. (8 RT 1539.) The clear import of Lay's direction to Plata was that Se Hoang was a trusted member of the gang and could help Plata's development within the gang.

being tried. Instead, such facts constitute general background testimony about general gang behavior or descriptions of the gang's conduct. (*People v. Mraz* (2016) 6 Cal.App.5th 1162, 1175, review granted on unrelated issue 3/22/17, S239442 [holding that gang expert was permitted to testify to non-case specific general background information about gang, including its pattern of criminal activity, even if it was based on hearsay sources]; but see *People v. Huynh* (2018) 19 Cal.App.5th 680 [holding that testimony establishing a predicate offender's gang affiliation at the time of the offense is case-specific because the facts are beyond the scope of a gang expert's general knowledge]; *People v. Lara* (2017) 9 Cal.App.5th 296, 337 [improperly admitted testimonial hearsay regarding predicate offense required reversal]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588–589 [out-of-court statements regarding gang memberships of predicate crime perpetrators are case-specific hearsay under *Sanchez*].)

Even assuming Nye improperly related case-specific testimonial hearsay regarding Hoang's gang membership, the error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) The other predicate offenses committed by Johnson and Phi Nguyen in addition to the charged offense in this case were more than sufficient to establish a pattern of criminal gang activity.

C. There was Sufficient Evidence that the Crimes Were Committed in Association with and for the Benefit of the VFL

1. Nye's opinion regarding gang purpose

Based on a hypothetical tracking the facts of this case—i.e., two active members in a gang (which has as one of its primary activities home invasion burglaries and robberies) rob a home and torture and kill an innocent victim in the home—Nye opined that the crimes of robbery, burglary, and murder would have been done for the benefit of, at the

direction of, and in association with that criminal street gang. (8 RT 1556–1557.) Nye explained that both individuals would be expected to back each other up during the commission of the crime. (8 RT 1556.) He also explained that proceeds from crimes committed by gang members support the gang: the proceeds are shared with the people who are involved in the crime as well as with others back at the crash pad. (8 RT 1558.) In addition, the crime enhances the reputation of the gang as well as the reputation of the individual gang members who committed the crime. (8 RT 1558.)

2. There was substantial evidence that the crimes were committed in association with the VFL

Viewing the evidence in the light most favorable to the judgment, Plata and Tran assisted each other as gang members to commit crimes that were the primary activities of the VFL. Therefore, there was substantial evidence that the crimes in this case were committed "in association with" the VFL.

The standard of review for sufficiency of the evidence to prove gang enhancements is the same as that for substantive crimes. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) The entire record is reviewed "in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.) The reviewing court presumes every fact in support of the judgment the jury could have reasonably deduced from the evidence, and reversal is not warranted simply because the circumstances might also be reasonably reconciled with a contrary finding. (*Ibid*.)

In *Albillar*, this court held that there was sufficient evidence that the defendants committed a gang rape "in association with" the Southside

Chiques. The gang expert explained that gang members commit crimes together to earn respect within the gang, to increase their success of completing the crime, to train younger members of the gang, to elevate their status by having other gang members witness the crime and relay what happened to other gang members, and to intimidate others. (*Albillar*, *supra*, 51 Cal.4th at p. 61.) The evidence showed that the defendants "not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together." (*Id*. at pp. 61–62.) In other words, "The record supported a finding that defendants relied on their common gang membership and the apparatus of the gang in committing the sex offenses against [the victim]." (*Id.* at p. 60.)

Similarly, in *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332, the court concluded that the record supported a finding that the crime was committed "in association with" a gang where two members of the King Kobras committed a robbery, one of the gang's primary activities. The gang expert testified that this evidence showed that the defendant committed the robbery in association with the gang. (*Ibid*.; see also *People v. Morales* (2003) 112 Cal.App.4th 1176 [explaining that absent evidence that several gang members were on a "frolic and detour unrelated to the gang," the jury could "reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"].)

Here, Plata and Tran, both active members of the VFL, committed robbery, burglary, and murder—primary activities of the VFL. As already discussed, there was evidence that Plata and Tran assisted each other in carrying out the crimes. Therefore, as in *Albillar*, the record supports a

finding that Plata and Tran relied on their common gang membership and the apparatus of the gang in committing the crimes in this case.

Plata attempts to discredit Nye's opinion regarding the gang purpose of the crimes by challenging his testimony that residential burglaries and home invasion robberies were primary activities of the VFL. First, Plata argues that Nye's own description of the VFL's history disproved that home invasion robberies or residential robberies were primary activities of the VFL. According to Plata, Nye testified that VFL members only graduated to committing residential burglaries and home invasion robberies after *joining* the V. (Plata AOB 56.) Plata misinterprets Nye's testimony.

In describing the origins of the VFL, Nye explained that in the beginning, the gang, which was called the "Mercedes Boys," committed petty crimes. (7 RT 1485.) However, two of the Mercedes Boys had a brother who was in the V, a more notorious gang that specialized in home invasion robberies. (7 RT 1486.) The V indoctrinated the Mercedes Boys regarding how to be gang members and how to commit crimes, and when the Mercedes Boys got older, they adopted the name VFL out of respect for the V. (7 RT 1486.) The VFL eventually got together with the Hawthorne V and became the "foot soldier" for the more notorious Asian street gang. (7 RT 1457.) As explained by Nye, when the "VFL members got a little bit older, they began to graduate into residential burglaries, home invasion robberies, auto thefts, weapon sales, possession of weapons, narcotics, and extortions of businesses throughout the Gardena and Hawthorne area, as well as murders and attempted murders of rival gang members." (7 RT 1457.)

According to Nye's testimony, the VFL, with the help of the V and in concert with the Hawthorne V, moved on from petty crimes to committing more serious and violent crimes. Nye did not, as Plata claims, testify that VFL members only committed more serious crimes after joining the V.

Next, Plata argues that only one of the specific prior crimes upon which Nye relied was a residential robbery, and it was not established the crime was perpetrated by a VFL member. Phi Nguyen pled guilty to a 1994 attempted residential burglary[30] and a 1994 residential robbery. (People's Ex. 102, 103.)[31] In connection with the attempted residential burglary, Phi admitted active gang participation: "I actively participated with the VFL criminal street gang knowing its members actively participate in criminal gang activity." (People's Ex. 102; 1 SCT 150.) Plata correctly points out that active participation in a criminal street gang does not necessarily prove gang membership. (See § 186.22, subd. (i).) However, Nye testified that he reached the conclusion that Phi Nguyen *was a member of VFL* at the time he committed both of these crimes based on Phi's background and record. (8 RT 1533.)[32]

Finally, Plata contends that the record suggests that Nye lacked the professional experience or personal knowledge to opine about the primary activities of the VFL in 1995. Plata asserts that Nye was not working in gang-related law enforcement on the local scene during the critical time period leading up to November 1995. (Plata AOB 58.) However, Plata's argument is based on speculation and is not supported by the record.

Nye testified that he started at the Westminster police department in 1988, and about two years later was assigned to the Little Saigon substation, where he served as a liaison with the Vietnamese community.

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[30] In his argument, Plata refers to the 1994 attempted residential burglary as a "residential robbery." (Plata AOB 56–57.)

[31] Although Nye did not mention it in his testimony, the certified court records show that Phi also pled guilty to a 1994 residential burglary (committed November 7, 1994). (People's Ex. 103.)

[32] Tran raises a hearsay and confrontation clause argument regarding Nye's testimony as to the gang membership of Hoang and Johnson but does not do so as to Nye's testimony regarding Phi Nguyen's gang membership. (Tran AOB 217–221.)

(7 RT 1461.) Sometime thereafter, he was assigned to the FBI's Anti-Terrorist Unit and worked with the FBI's Asian Organized Crime Task Force within the state of California. (7 RT 1461.) He was with the FBI for about a year and a half. (7 RT 1461.) A few years later, he was assigned as the primary Asian gang investigator for the City of Westminster. (7 RT 1461.) He was assigned to the Target Gang Unit for five and a half years and then became Sergeant in charge of the Tri-Agency Unit. (7 RT 1461–1462.) He had been Sergeant for about three and a half years by the time of trial. (7 RT 1462.)

It is unclear from Nye's testimony exactly when he was where. However, it is clear that in 1995, Nye participated in investigating an attempted murder by Anthony Johnson and personally interviewed him. (8 RT 1533–1534.) Therefore, Nye certainly was involved in local gang law enforcement in 1995, and Plata's challenge to Nye's professional and personal knowledge is unfounded.

3. There was substantial evidence that the crimes were committed for the benefit of the VFL

Not only was there sufficient evidence that the crimes in this case were committed in association with the VFL, there was also sufficient evidence that the crimes were committed for the benefit of the VFL. In response to the hypothetical mirroring the facts of this case, Nye testified that the crimes would have been done for the benefit of the criminal street gang because the gang supports itself from proceeds from criminal activity of its members, and the crimes would enhance the reputation of the gang as well as the reputation of the individual members of the gang. (8 RT 1557–1558.)

According to this court, "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the

benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar*, *supra*, 51 Cal.4th at p. 63; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1048.) In *Albillar*, the expert testified that when three gang members rape a victim, the crime elevates the individual status of the gang members and also benefits and strengthens the gang. (*Ibid*.) Based on the testimony of the expert, the court determined that the record supported a finding that the crimes were committed to benefit the Southside Chiques gang. (*Id*. at pp. 63–64.)

Nye's testimony is similar to that of the expert in *Albillar*. Nye's opinion that the crimes would enhance the reputation of the individual gang members as well as the reputation of the gang itself is sufficient to raise the inference that the crimes were committed to benefit the VFL.

Plata relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, 661 (*Ochoa*) for the proposition that a gang expert's testimony alone is insufficient to find an offense gang-related, and that some substantive factual evidentiary basis must support the expert's opinion. The validity of this proposition is called into doubt by *Albillar*. However, even if other evidence is necessary in order to establish that a crime was committed for the benefit of a gang, that evidence exists in this case.

Plata contends that there is no evidence that Plata or Tran "bragged" about the crimes within or outside of the gang. However, according to prior statements by Linda Le, on the night of the murder, Plata was cleaning a knife and talking about the incident with Terry Tackett, a fellow gang member. (6 RT 1183–1184.) In addition, Tran had the Korean characters tattooed on his neck. Plata argues that Probation Officer Todd, who was not designated as an expert, was not qualified to give an opinion regarding the meaning of Tran's tattoo. (Plata AOB 61.) Even if this is so, Nye also testified that it was his opinion that Tran was taking credit for the crimes by getting the tattoo. (8 RT 1553.) According to Nye, even though

the tattoo could show remorse, Tran was simultaneously taking credit for what he did. (8 RT 1553.)

Thus, unlike *Ochoa* and the other cases upon which Plata relies, there was additional evidence supporting Nye's opinion that the crimes were committed for the benefit of the VFL. (Compare with *Ochoa*, *supra*, 179 Cal.App.4th at pp. 662–663 [expert testified that car theft was a signature crime of the street gang but defendant acted alone and there was no evidence that he bragged about the crime or had permission to commit the crime by the gang, or displayed his gang membership]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 849–854 [expert testified that crime was gang-related because defendant and his codefendant were members of same gang and they were stopped in a stolen vehicle in gang territory, but expert did not testify that possession of stolen vehicles was a primary activity of the gang, and there was no evidence that the crimes were committed on behalf of the gang as opposed to on behalf of themselves]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [expert's testimony that juvenile possessed knife with intent to benefit gang was insufficient to establish gang enhancement allegation where the juvenile was not in gang territory, was not with gang members, and was not shown to have a reason to expect to use the knife in a gang-related offense].)

There was sufficient evidence that Plata and Tran committed the crimes in association with and for the benefit of the VFL. Therefore, the jury's finding on the gang enhancement should be upheld.

VIII. THE ADMISSION OF VICTIM IMPACT TESTIMONY DID NOT VIOLATE FEDERAL OR STATE LAW

Tran contends that the trial court's admission of powerful victim impact testimony violated federal and state law. (Tran AOB 226–251 [Arg. VIII].) However, the victim impact evidence admitted in this case—the testimony of Linda's father, sister, and neighbor—was typical of the sort of

victim impact evidence that is permissible under state and federal law. The jury instructions gave proper guidance regarding consideration of the victim impact evidence, and the trial court was under no duty to sua sponte provide further instructions on the point. To the extent any error was committed in admitting the victim impact evidence, such error was harmless.

The admission of victim-impact evidence in a capital trial is not barred by the Eighth or Fourteenth Amendments. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) "Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Romero and Self* (2015) 62 Cal.4th 1, 45.) Similarly, victim impact evidence is precluded under the federal constitution only "if it is so unduly prejudicial as to render the trial fundamentally unfair." (*People v. Trinh* (2014) 59 Cal.4th 216, 245.)

Prior to the commencement of the penalty phase of the trial, Tran's attorney objected to the use of victim impact evidence, arguing that the evidence violated the Eighth and Fourteenth Amendments because it would focus the jury's decision on revenge and an emotional reaction to who the victim is. (9 RT 1765.) The court asked the prosecutor what evidence he intended to present. (9 RT 1765.) The prosecutor explained that he intended to call Linda's family members as well as Marilyn Fox, the neighbor, and was going to show the jury some photographs of Linda and about four or five minutes of video. (9 RT 1766.) The court overruled Tran's objection. (9 RT 1767.)

Sun Park, Janie Park, and Marilyn Fox testified during the penalty phase. The day after Sun testified, Juror 1 informed the court that she was having some emotional problems with the penalty phase. (9 RT 1875.)

During a hearing outside of the presence of the jury, Juror 1 said that she was up all night, and explained, "Yesterday was life changing for me." (9 RT 1875.) When asked by the court if she could continue on, she responded: "I don't believe, in fairness to them, I can. And I've got to be very fair. I have a son their age. I have a daughter that was not too long ago the age of the victim. I thought, based on those things, I would be the most fair person there was. And I was the hardest one to convince of anything the other day. And then yesterday . . . I just don't think I can be fair. I believe in the law, and I believe in being fair, and I believe that I have to be courageous enough to say I don't think I have an open mind anymore. And I was devastated by yesterday." (9 RT 1876.)

The trial court agreed that the other day was "very emotional" and noted, "I have never seen an interpreter cry during testimony before." (9 RT 1877.) However, the court explained that the trial was going to move on to other witnesses and asked Juror 1 whether she was mentally and physically able to continue. (9 RT 1877.) Juror 1 responded, "I don't know. If either one of the defendants were my son, I would not want me here." (9 RT 1877.)

Counsel for Plata and Tran requested that Juror 1 be excused in light of the fact that Janie still had to take the stand. (9 RT 1878.) The prosecutor had no objection, and the court dismissed Juror 1. (9 RT 1878–1879.)

During closing argument, the prosecutor argued, "Thirty seconds before you sign the verdict forms. Close your eyes for just 30 seconds and try to imagine the hurt and the agony and the despair and the self-doubt and the loss of love that [Sun] experiences every day. . . . I want another 30 seconds when you go back there for Mrs. [Janie] Park. Close your eyes and for just 30 seconds try to think and imagine the horror and the terror and the sense of loss that they caused her, and then put a weight on it. Then put a

weight on it." (12 RT 2391, 2393.) The prosecutor compared the impact of Sun and Janie's testimony to a tidal wave: "It felt like a tidal wave, all that, the enormous emotions of loss and love and hurt and sense of loss. . . . Now, compare that to what they live with every day. This tidal wave becomes a drop in the ocean of what they go through. All caused by two men sitting in this courtroom, Scrappy and Noel Plata. Put a value on that." (12 RT 2395.)

A. The Legislative History of Section 190.3 Does Not Limit the Admission of Victim Impact Evidence

Although Tran recognizes that this court has repeatedly held that victim impact evidence is admissible as "circumstances of the crime," Tran argues that this court has not taken into consideration principles of statutory construction that allegedly compel the conclusion that "circumstances of the crime" do not include victim impact evidence absent an affirmative showing that the defendant intended to cause the specific harm referenced in that evidence. (Tran AOB 243.) According to Tran, the "circumstances of the crime" language in the current statute, enacted by voter initiative in 1978, was taken from identical language in the 1977 statute, which in turn had its genesis in section 190.1 of the 1958 death penalty statute.[33] (Tran AOB 237–238.) Relying primarily on *People v. Love* (1960) 53 Cal.2d 843 (*Love*), Tran posits that victim impact evidence was inadmissible under the 1958 law unless the harm in question was intentionally inflicted. Tran then argues that under well-accepted principles of statutory construction, the electorate is deemed to have intended "circumstances of the crime" as used in section 190.3 to have the same meaning as it had in the pre-1978 statutes.

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[33] The 1958 statute provided that in determining the penalty, the jury could consider, among other things, "the circumstances surrounding the crime." (Former Penal Code § 190.1, added by Stats. 1957, ch. 1968, p. 3509, § 2.)

Tran's argument is foreclosed by *People v. Seumanu* (2015) 61 Cal.4th 1293 (*Seumanu*). In *Seumanu*, the defendant relied on *Love* in an effort to "distinguish a long line of precedent" establishing that factor (a) of section 190.3 allows evidence of the specific harm caused by the defendant, including the impact on the victim's family. (*Id*. at p. 1366.) Like Tran, the defendant in *Seumanu* contended that none of this court's decisions had considered the actual meaning of the statutory phrase "circumstances of the crime" as informed by the court's interpretation of the same phrase in *Love*. (*Ibid*.)

This court examined *Love* in *Seumanu* and concluded that even assuming *Love* concerned victim impact evidence, it did not purport to interpret the meaning of "the circumstances surrounding the crime" to reach its decision. (*Seuman*, *supra*, 61 Cal.4th at p. 1367.) In *Love*, the court reversed a death verdict where, during the penalty phase, the jury saw a photo of the dead victim with a pained look on her face and heard a recording of the victim groaning as she died. (*Love*, *supra*, 53 Cal.2d at pp. 854–855.) The evidence was deemed to be unduly inflammatory because the victim's pain had been more than adequately described by the doctor. (*Id*. at pp. 856–857.)

Love did not "purport to give the phrase 'the circumstances surrounding the crime' a narrow interpretation so as to preclude evidence of the crime's impact on surviving family and friends." (*Seumanu*, *supra*, 61 Cal.4th at p. 1368.) Therefore, "[e]ven assuming for argument that *Love* has not been overtaken by subsequent judicial decisions concerning the admissibility of victim impact evidence in capital trials, it has no bearing on the meaning of section 190.3, factor (a) as presently written." (*Ibid.)*[34]

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[34] Tran also relies on *People v. Floyd* (1970) 1 Cal.3d 694, which cited *Love* in discussing the propriety of argument by the prosecutor about

B. The Trial Court Had No Duty to Give Any Further Instruction Regarding the Consideration of Victim Impact Evidence

Tran argues that the trial court was under a duty to sua sponte give a jury instruction limiting the jury's consideration of victim impact evidence to "a rational inquiry into the culpability of the defendant, not an emotional response to the evidence." (Tran AOB 246–247.) This court has repeatedly rejected this same argument.

First of all, Tran never requested a clarifying instruction regarding the jury's consideration of victim impact evidence. Therefore, Tran has forfeited his claim. (*People v. Simon* (2016) 1 Cal.5th 98, 143 ["Failure to request a clarifying jury instruction pertaining to victim impact evidence results in forfeiture"].)

Furthermore, time and again, this court has rejected Tran's proposed instruction. "Indeed, we have repeatedly held that the trial court's use of jury instructions CALJIC Nos. 8.84.1 and 8.85 is sufficient to address a defendant's concerns about the proper use of victim impact evidence, and is consistent with his or her federal and state constitutional rights to due process, a fair trial, and a reliable penalty determination. (*People v. Simon*, *supra*, 1 Cal.5th at p. 143 [listing California Supreme Court cases].)

In *People v. Zamudio* (2008) 43 Cal.4th 327, 369, the court determined that CALJIC No. 8.85, which directs the jury to consider factors that include the circumstances of the crime of which the defendant was convicted, adequately instructed the jury how to consider victim impact evidence. In addition, the court explained that the defendant's proposed instruction that victim impact evidence "must be limited to a rational

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the imposition of the death penalty for purposes of vengeance or retribution. *Floyd* is inapposite and does not interpret the meaning of the statutory language in question.

inquiry into the culpability of the defendant, not an emotional response to the evidence," would not have provided the jurors with information they did not otherwise learn from CALJIC No. 8.84.1. (*Ibid*.) CALJIC No. 8.84.1 provides in pertinent part, "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." The court also pointed out that the proposed instruction was incorrect in suggesting that a juror's "emotional response" to the evidence may play no part in the decision to vote for the death penalty because the jurors in fact may, in considering the impact of a defendant's crimes, "exercise sympathy for the defendant's murder victims and . . . their bereaved family members." (*Id.*, quoting *People v. Pollock* (2004) 32 Cal.4th 1153, 1195.)

In this case, the jury was instructed: "Do not allow bias, prejudice, or public opinion to influence your opinion in any way." (5 CT 1334.) The jury was also instructed that it must "consider, weigh, and be guided by" factors, including "[t]he circumstances of the First Degree Murder that each defendant was convicted of in this case . . . ." (5 CT 1339.) Accordingly, the jury was properly instructed regarding the use of victim impact evidence, and no further instruction was required or appropriate.[35]

C. The Victim Impact Evidence Was Typical and Permissible

Tran argues that reversal of the death verdict is required because the victim impact evidence in this case was "devastating" and prevented a fair

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[35] Tran also argues that defense counsel was ineffective for failing to request Tran's proposed instruction limiting the use of victim impact evidence. (Tran AOB 247–248.) However, because Tran's proposed instruction was unnecessary and also misleading, defense counsel did not act unreasonably in failing to request the instruction. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687–691.)

trial. However, the evidence was no different than the victim impact evidence that is typically allowed.

Sun and Janie described Linda's personality and character traits and testified how her death had devastating effects on the family. Sun described how he became an alcoholic and at one point contemplated killing the family so that they could die together. (9 RT 1786.) According to Janie, for a period of time, Sun blamed himself for what happened to Linda. (9 RT 1922.) Janie explained that she sees her father suffer every day and knows that he cannot sleep because he is thinking about how Linda died. (9 RT 1923.)

Sun and Janie also testified about how Linda's mother, Dong, was overcome with grief. According to Sun, Dong cried in Linda's room every day after her death, and sometimes Sun would find Dong laughing and crying and acting like a crazy person. (9 RT 1786.) For a time, Sun thought that he could ease Dong's pain by killing her. (9 RT 1786.) Both Sun and Janie testified that Linda's mother now has a tendency to faint and collapse. (9 RT 1784; 1920.)

Marilyn Fox described the events of November 9, 1995, and how Sun reacted to finding Linda on the floor. (9 RT 1793–1794.) Fox testified that for months after Linda's death, Sun could not go straight to his house after work, but instead would first stop at her house and sit and talk for an hour before he could gather the strength to go home. (9 RT 1795.)

During the testimony of Sun and Janie, the prosecutor introduced into evidence family photographs of Linda at various times of her life and a few personal items belonging to Linda, including a high school diploma, certificate of outstanding work, 1994 yearbook, and her address book. (People's Exs. 109, 117, 118.) The prosecutor also played video clips of Linda's high school graduation, Linda's 14th birthday party, and a one-year

anniversary memorial service attended by members of the community. (People's Exs. 119, 120, 121.)

Tran focuses on the effect of Linda's father's testimony. He points out that Sun's testimony caused the interpreter to cry and had a clear emotional impact on Juror 1. As the judge recognized, it "was a very emotional day I think for just about everybody who listened to that." (9 RT 1877.) But Sun's testimony was typical of the victim impact evidence that this court has routinely allowed.

"[T]he devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056–1057.) Accordingly, in *People v. Burney* (2009) 47 Cal.4th 203, 258, the court held permissible testimony by the victim's family members regarding "the deleterious impact of the victim's murder on themselves and others, how much they missed the victim, and the victim's sweet and peaceful nature."

Victim impact testimony is not limited to expressions of grief, but, rather "encompasses the spectrum of human responses, including anger and aggressiveness [citation], fear [citation], and an inability to work [citation]." (*People v. Ervine* (2009) 47 Cal.4th 745, 793.) In *People v. Panah* (2005) 35 Cal.4th 395, 495–496 (*Panah*), the court rejected the defendant's challenges to testimony that the victim's 16-year-old brother faltered in school and began to use drugs following his sister's death and testimony that the victim's 18-year old brother considered suicide. In *People v. Scott* (2011) 52 Cal.4th 452, 467, 494 (*Scott*), the court found "typical" victim impact testimony regarding, among other things, how the victim's parents became severely depressed and required psychiatric care and how finding their daughter stabbed to death on the floor haunted them. (See also *People v. Russell* (2010) 50 Cal.4th 1228, 1265 [holding

admissible victim impact testimony regarding son's destructive behavior following father's death and mother's heart attack suffered weeks after her son was killed].)

Sun's testimony regarding the effects of Linda's murder on himself and his wife was akin to the victim impact evidence in *Panah* and *Scott*. Neither the content of Sun's testimony nor the manner in which it was presented was "so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case," or "so unduly prejudicial as to render the trial fundamentally unfair." (*People v. Romero and Self*, *supra*, 62 Cal.4th at p. 45; *People v. Trinh*, *supra*, 59 Cal.4th at p. 245.) Sun's testimony was no doubt moving, but that was inevitable given that Tran and Plata killed his youngest daughter and left her on the living room floor, hog-tied and with her throat slashed, to be found by her unsuspecting father upon returning home from work.

Tran argues that the prosecutor took "full advantage" of the impact of the victim impact testimony during his closing argument, comparing the evidence to a "tidal wave." (Tran AOB 235, 250.) To the extent Tran is arguing that the prosecutor's remarks were improper, he has forfeited his claim by failing to object to the remarks at the time they were made. (*People v. Huggins* (2006) 38 Cal.4th 175, 251–252.) In any event, the prosecutor's remarks were not so inflammatory as to "divert[ ] the jury's attention away from its proper role." (*People v. Haskett* (1982) 30 Cal.3d 841, 863.)

During closing argument, a prosecutor may rely upon the impact of victim's death on his or her family. (*People v. Dykes* (2009) 46 Cal.4th 731, 787 (*Dykes*).) A prosecutor may also ask the jurors to put themselves in the shoes of the victim's family "to help the jurors consider how the murder affected the victim's relatives." (*People v. Jackson* (2009) 45 Cal.4th 662, 692.) In *Jackson*, for instance, the prosecutor asked the jurors

to think how they would feel if someone they loved dearly died "in a gutter" like the victim did, "choking on his own blood." (*Id*. at p. 691; see also *People v. Ghent* (1987) 43 Cal.3d 739, 772 [prosecutor asked jurors "to think about how you would feel if [the victim] were your baby, your daughter, your wife, your sister"]; *Dykes*, *supra*, 46 Cal.4th at pp. 786–787 [finding no prosecutorial misconduct where defendant claimed the prosecutor "urged the jurors to identify with the victims and the emotional pain of their loss"].) Although the prosecutor's closing argument certainly had emotional impact, it was permissible. As this court has acknowledged, "[E]motion need not be eliminated from the penalty determination." (*Dykes*, *supra*, 46 Cal.4th at p. 787.)

D. Any Error in Admitting the Victim Impact Evidence Was Harmless

Even assuming that there was any error in admitting the victim impact evidence, such error was harmless because there is no reasonable possibility that the evidence affected the penalty verdict. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 447–448.) Only two family members and a friend/neighbor gave victim impact testimony, and the testimony was brief. Sun's testimony covers 16 reporter's transcript pages, Fox's spans 6 pages, and Janie's takes up 13 pages.

Even if the victim-impact evidence had been excluded, the outcome would have remained the same. Given the nature of the crime—an unprovoked torture and killing of an 18-year-old girl—and Tran's criminal history, there is no reasonable possibility that the victim impact evidence affected the penalty phase verdict. (See *People v. Abel* (2012) 53 Cal.4th 891, 939 ["Further, in light of the nature of the crime and the other aggravating factors, including defendant's criminal history, there is no reasonable possibility [mother's statement that the murder caused the death of her other son] affected the penalty verdict"]; *People v. Parker* (2017) 2

Cal.5th 1184, 1229 ["In light of the brutal and unprovoked nature of the murders and defendant's numerous other acts of violence, there is no reasonable possibility the broken heart testimony affected the penalty phase verdict"].)

IX. THE ADMISSION OF EVIDENCE OF TRAN'S JUVENILE OFFENSES DID NOT VIOLATE THE EIGHTH AMENDMENT

Tran relies on three Supreme Court cases—*Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), and *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*)—to argue that the Eighth Amendment precludes the consideration of juvenile offenses in penalty phase aggravation. (Tran AOB 252–266 [Arg. IX].) However, these cases do not support Tran's argument. [36]

In *Roper*, the Supreme Court held that the Eighth Amendment barred execution of a defendant who was under 18 when he committed the capital crime. (*Roper v. Simmons, supra*, 543 U.S. at pp. 555–556, 578.) *Graham* held that the Eighth Amendment prohibits a sentence of life without parole (LWOP) for a juvenile offender's non-homicide crime. (*Graham v. Florida, supra*, 560 U.S. at pp. 52–53, 82.) Finally, *Miller* held that the Eighth Amendment precludes a mandatory LWOP sentence for a defendant convicted of a murder committed before he turned 18. (*Miller v. Alabama, supra*, 567 U.S. at p. 465.)

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[36] Tran devotes much of his argument to discussing how the consideration of juvenile adjudications under factor (c) (§ 190.3, subd. (c)) violates the Eighth Amendment because juveniles are less likely to consider consequences and be deterred by convictions. (Tran AOB 260–263.) However, the evidence of Tran's juvenile offenses was introduced under factor (b), not factor (c). (12 RT 2397–2400; 5 CT 1344–1346.) Indeed, juvenile adjudications are not prior felony convictions within the meaning of factor (c). (*People v. Lewis*, *supra*, 43 Cal.4th at p. 530; *People v. Burton* (1989) 48 Cal.3d 843, 861.)

Roper, *Graham*, and *Miller* were concerned with the *penalty* imposed on an offender for a *juvenile* crime. This case, however, involves the penalty for a murder Tran committed as an *adult*. Enhancing an adult defendant's sentence based on his juvenile crimes is not an additional penalty for his juvenile crimes, it is a stiffened penalty for his adult crime. (*People v. Pride* (1992) 3 Cal.4th 195, 257.)

This court has long held that evidence of violent juvenile conduct is admissible under factor (b).[37] (*People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Visciotti* (1992) 2 Cal.4th 1, 72; *People v. Lucky* (1988) 45 Cal.3d 259, 295.) This court has also "repeatedly held that the admission of such evidence passes constitutional muster." (*People v. Lee* (2011) 51 Cal.4th 620, 649.) Finally, this court has specifically rejected the argument that *Roper's* Eighth Amendment analysis precludes the prosecution's reliance on juvenile conduct under factor (b). (*People v. Bramit* (2009) 46 Cal.4th 1221, 1239 (*Bramit*).)

In *Bramit*, the court explained that the defendant's reliance on *Roper* was "badly misplaced" because *Roper* "says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile." (*Bramit*, *supra*, 46 Cal.4th at p. 1239.) "An Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment." (*Ibid*.) Tran's challenge is to the *admissibility of evidence*, not the imposition of punishment. (*Ibid*.; *People v. Bivert* (2011) 52 Cal.4th 96, 123 [rejecting defendant's argument that *Roper* prohibited use

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[37] As discussed, *supra*, at page 56, f.n. 14, it appears that the 1992 burglary of the Schonder residence does not qualify as factor (b) evidence. However, Tran forfeited any challenge to the admission of this evidence under factor (b) by failing to raise an objection during trial. Furthermore, as discussed below, Tran suffered no prejudice from the admission of the evidence.

in aggravation of three prior murders defendant committed as a juvenile]; *People v. Lee*, *supra*, 51 Cal.4th at pp. 648–649 [holding that *Roper* does not compel exclusion of juvenile criminal activity]; *People v. Taylor* (2010) 48 Cal.4th 574, 653–654 [same].)

Graham and *Miller*, like *Roper*, concern the imposition of punishment on juveniles and do not discuss whether evidence of violent juvenile offenses should be admissible as aggravation evidence in an adult defendant's capital case. Therefore, *Graham* and *Miller* do not call into question this court's decisions regarding the constitutionality of the consideration of violent juvenile conduct under factor (b).

Even assuming the evidence of Tran's juvenile offenses was improperly admitted, the error was harmless. When evidence has been improperly admitted in aggravation, "the error may be harmless when the evidence is trivial in comparison with the other properly admitted evidence in aggravation." (*People v. Williams* (2010) 49 Cal.4th 405, 461.) The question is whether, in light of the properly admitted evidence of Tran's criminal history and the circumstances of the crimes in this case, there is a reasonable possibility that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Burton* (1989) 48 Cal.3d 843, 864.)

In addition to Tran's juvenile offenses, evidence was presented that in 1994, Tran drove recklessly while trying to evade police and was convicted of residential burglary and evading a peace officer. (9 RT 1889–1893, 1900–1902; People's Ex. 114.) Considering Tran's other criminal conduct and the circumstances of this case, which involved torture of a young girl, there is no reasonable possibility the jury's penalty verdict was affected by the admission of the evidence of the burglaries Tran committed as a juvenile.

X. TRAN'S RIGHT TO A RELIABLE PENALTY PHASE WAS NOT VIOLATED BY THE PROSECUTION'S RELIANCE ON TRAN'S JUVENILE CRIMINAL CONDUCT

Tran argues that his Eighth Amendment rights were also violated because the prosecution's reliance on juvenile adjudications, which were obtained without providing Tran a right to a jury trial, undercut the need for heightened reliability in capital cases. (Tran AOB 267–273 [Arg. X].) Tran's argument is premised on the use of Tran's juvenile adjudications as "convictions" under factor (c). (Tran AOB 267.) However, the prosecutor presented the evidence of Tran's juvenile offenses under factor (b), not factor (c). (12 RT 2397–2400; 5 CT 1344–1346.) Thus, the prosecutor was relying on evidence that Tran engaged in criminal conduct involving force or violence, not the adjudications themselves.

Under factor (b), "other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted," as long as the penalty instructions "make clear that an individual juror may consider other violent crimes in aggravation only if he or she is satisfied beyond a reasonable doubt that the defendant committed them." (*People v. Lewis and Oliver*, *supra*, 39 Cal. 4th at p. 1052.) The admission of evidence of juvenile conduct under factor (b) does not violate a defendant's Eighth Amendment right to a reliable penalty determination. (*People v. Lee*, *supra*, 51 Cal.4th at pp. 648–649; Cf. *People v. Anderson* (2001) 25 Cal.4th 543, 584 [explaining that this court has repeatedly rejected claims that factor (b) violates the right to a reliable penalty determination by allowing evidence of criminal conduct for which the defendant was never charged or convicted].)

In this court's opinion, "the Eighth Amendment's aim of ensuring the reliability of penalty determinations is furthered, not frustrated, by the

admission of [the defendant's] prior violent criminal activity." (*People v. Williams* (1997) 16 Cal.4th 153, 233, internal quotation marks and citation omitted.) Therefore, the prosecution's reliance on evidence of Tran's juvenile criminal conduct did not run afoul of the Eighth Amendment's requirement of reliability in capital cases.

XI. THE TRIAL COURT PROPERLY DENIED TRAN'S REQUEST TO ALLOCUTE BEFORE THE PENALTY JURY

Tran argues that the trial court deprived him of his due process rights by denying his request to make a statement before the penalty jury without being subject to cross-examination. (Tran AOB 274–281 [Arg. XI].) However, it is clearly established that there is no right to allocution at the penalty phase of a capital trial in this state.

Prior to the close of his penalty phase case, Tran filed a motion for penalty-phase allocution. (5 CT 1210–1212.) Tran represented that he wished to make a personal statement, immune from cross-examination, expressing his remorse for the death of Linda. (5 CT 1210.)

At a hearing on Tran's motion, the prosecutor argued that allowing Tran to allocute regarding remorse would be insulting to the Park family in light of evidence (recorded statements of Plata to Qui Ly) that was not presented to the jury suggesting that Tran sexually assaulted Linda after she was dead. (10 RT 2123–2124.) Citing to California Supreme Court cases, the trial court explained that allocution is unnecessary to a fair trial and is contrary to the statutes' purpose of providing the sentencer with all relevant information bearing on the appropriate penalty. (10 RT 2125.) Therefore, the trial court denied Tran's motion. (10 RT 2126.)

Tran had no right to allocution at the penalty phase. "[W]e have repeatedly held there is no right of allocution at the penalty phase of a capital trial." (*People v. Romero* (2008) 44 Cal.4th 386, 426, quoting *People v. Lucero* (2000) 23 Cal.4th 692, 717; accord, *People v. Tully*

(2012) 54 Cal.4th 952, 1057–1058; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1182–1183; *People v. Clark* (1993) 5 Cal.4th 950, 1036 (*Clark*).) Because capital defendants have the opportunity to present evidence as well as take the stand and address the sentencer, the denial of a request for allocution does not violate any of the defendant's rights under the federal constitution. (*People v. Tully*, *supra*, 54 Cal.4th at pp. 1057–1058.)

Tran urges the Court to reexamine its settled authority in light of *Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523, in which the Ninth circuit held that allocution is guaranteed by the due process clause when a noncapital defendant makes a request that he be permitted to speak to the trial court before sentencing. However, this court has already determined that *Boardman* has no bearing on allocution in the penalty phase of a capital case. As explained in *Clark*, in the noncapital context, a defendant does not generally have an opportunity to testify as to what penalty he feels is appropriate, whereas in the penalty phase of a capital trial, the defendant is allowed to present evidence as well as take the stand and address the sentencer. (*Clark*, *supra*, 5 Cal.4th at p. 1037, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 889.) Therefore, there is no constitutional right to address the sentencer without being subject to cross-examination in capital cases. (*Ibid*.)[38]

The trial court properly denied Tran's motion for allocution, and Tran's due process rights were not violated.

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[38] In *United States v. Chong* (D.Haw. 1999) 104 F.Supp.2d 1232, 1233, cited by Tran, the district court concluded that there was no basis for distinguishing *Boardman* from the case before it, which involved a defendant who asserted the right to allocute before the sentencing jury in a federal capital case. The reasoning of *Chong* is contrary to that of this court.

XII. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR NEW TRIAL BECAUSE THERE WAS NO PREJUDICIAL JUROR MISCONDUCT

Appellants contend that (1) the trial court erred in denying their motions for new trial because prejudicial jury misconduct occurred when jurors received extraneous information regarding the death penalty; (2) the trial court failed to conduct a sufficient inquiry into the jury's receipt of the extrinsic information; and (3) the trial court erroneously failed to disclose to counsel and inquire into writings by the foreperson, Juror 7, that allegedly revealed that Juror 7 was actually biased. (Tran AOB 282–317 [Arg. XII]; Plata AOB 102–164 [Arg. IV].) Appellants argue that the penalty verdict must be reversed, or, in the alternative, that the matter should be remanded so that the trial court can conduct further inquiry.

Even if there was technical jury misconduct due to the receipt of extraneous information regarding the death penalty, there was no substantial likelihood of bias. A preliminary inquiry conducted by the trial court was sufficient to determine that there was no prejudicial juror misconduct, eliminating the need for an evidentiary hearing. The undisclosed portion of Juror 7's writings, which consisted entirely of Juror 7's mental processes, was inadmissible under Evidence Code section 1150 and did not trigger a duty of the court to inquire into whether Juror 7 was actually biased.

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*).) "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid*.) However, "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular

case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296, original italics.)

A substantial likelihood of bias can appear in two different ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not inherently prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was actually biased against the defendant. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) "[B]efore a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial*." (*Id*. at p. 654, original italics.)

When analyzing a juror misconduct claim, a reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact, if supported by substantial evidence. (*Nesler, supra*, 16 Cal.4th at p. 582.) But whether prejudice arose from juror misconduct is a mixed question of law and fact that is reviewed independently. (*Ibid*.) "Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias." (*People v. Ramos* (2004) 34 Cal.4th 494, 519.)

A. Proceedings Relating to Potential Juror Misconduct

1. Discovery of note and questioning of Juror 7

When cleaning up the jury room after the verdicts had been read, the court clerk found in a file folder containing the jury instructions a three-page typewritten document titled "Life or Death?" (12 RT 2486). It was determined by the court that the foreperson, Juror 7, wrote it. (12 RT

2486.) The court brought counsel in for a hearing, explaining that the court had reviewed the document and was of the opinion that it was nothing more than the juror putting down his thoughts—"a thought-process thing." (12 RT 2486.) However, "out of an abundance of caution" (12 RT 2487), the court thought perhaps one paragraph should be inquired into and gave the attorneys a copy of that paragraph, which read:

> I cannot allow the fact that the American Bar Association has recently resumed its campaign for a national moratorium on the death penalty to influence my judgment in this case. Likewise, I cannot consider the fact that the U.S. Supreme Court has agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment as I judge this case.

(2 SCT 389.) The court concluded that the proper thing to do was to bring in Juror 7 and inquire into how he prepared the document, why he prepared it, whether it was shared with other jurors, and if he wanted it disclosed to counsel. (12 RT 2489.)

Juror 7 was brought into the court and sworn in. (12 RT 2494.) He admitted that he was the author of the document, which he described as a written summary of his personal private deliberations in the case. (12 RT 2494.) He explained: "When I'm considering issues that are very complex and also very important, I find that if I can express them clearly in writing, it enforces clarity of thought as well." (12 RT 2495.) He brought the document on the last day of deliberations so he could refer to it privately. (12 RT 2495). He did not show it to any of the other jurors, nor did he read any of it to his fellow jurors. (12 RT 2495.) He had taken it out to look at it before the final vote and realized he had left the document behind when he reached his car after the trial was over. (12 RT 2495.) He had no intention that the document be seen by anyone else—he intended it as an entry in his personal journal. (12 RT 2495.) Given the option by the court

to keep the document private or share it with the attorneys, Juror 7 said he preferred that it remain private. (12 RT 2496.)

When asked by the court how he obtained the information discussed in the paragraph, Juror 7 explained that during the trial, the Supreme Court's action (reviewing a case concerning execution by lethal injection) was the lead story in the Los Angeles Times and was the top story on all of the television news broadcasts as well as all over the internet. (12 RT 2497.) It was something he simply happened to see—he was not seeking it out. (12 RT 2497.) One of the reasons he wrote about the news item was because he felt it was his obligation as a foreperson to make sure that if somebody else mentioned it, everyone was reminded that they could not allow that in any way to influence their deliberations. (12 RT 2497.) Another juror brought up the news item and he reminded the jurors that they could not allow "either of those facts" to affect their judgment in the case. (12 RT 2498.) Nothing more was ever said about the news item. (12 RT 2498.)

Juror 7 could not say with certainty which juror brought up the news item. (12 RT 2500.) He recalled that the juror had seen the item in the newspaper and thought the juror was male. (12 RT 2501.)

The court told Juror 7: "I have reviewed the document and your responses, and it confirms my opinion that this is a recitation of your thought process. From what I've heard so far, I don't see anything that was improper, so rest easy. At this point there doesn't appear to be anything, to me, anyway, that is untoward at all." (12 RT 2505.) The court marked the document as Court Exhibit 17 and filed it under seal. (12 RT 2505.)

2. Motion for access to juror identification information

Tran filed a motion for access to juror identification information under Code of Civil Procedure section 237. (5 CT 1402–1425.) In the

motion, Tran argued that he had established a prima facie case for the disclosure of the juror information because, based on Juror 7's testimony and the paragraph he wrote, a reasonable conclusion could be drawn that the jury discussed an improper factor. (5 CT 1408.) The prosecutor filed a response in which the People agreed that it would be of benefit and in the interest of justice to get information from the remaining male jurors about what was said regarding the ABA stance on the death penalty and the United States Supreme Court case. (5 CT 1428–1432.)

At a hearing regarding the motion, which Plata orally joined, the court explained that it did not "see enough to order jurors in," but would order the procedure set forth in section 237 to take place. (12 RT 2510, 2516.) The court set a hearing on the motion for March 14, 2008, and sent the jurors a notice of the hearing. (5 CT 1433–1434.) The notice informed the jurors that they could (1) personally appear at the hearing to protest the disclosure of juror information; (2) call the Clerk or write to the Clerk to protest the disclosure of such information; or (3) notify the court by telephone, personal appearance or in writing of any desire not to be contacted by the attorney for the defendant. (5 CT 1434.) In addition, the notice explained that jurors who appeared at the hearing would be asked to discuss whether their decision in the penalty phase of the trial was affected by discussions of matters that were not presented by way of evidence or the law upon which the jury was instructed. (5 CT 1434.)

At the hearing, the Clerk furnished counsel with a list of the jurors and their responses to the notice. (12 CT 2521.) With the exception of Juror 3, who did not indicate her preference regarding the disclosure of her information, none of the jurors wished to have their information disclosed. (2 SCT 395; 12 RT 2521.) Several jurors appeared at the hearing and were examined one by one in camera. (12 RT 2521.)

Juror 2 said he believed that the issue of a moratorium on lethal injection was brought up but was not used as any part of the decision making. (12 RT 2526.) He could not recall who brought the issue up and did not recall any written material being referred to. (12 RT 2526.) He did not remember seeing any papers anyone might have brought in referencing other materials. (12 RT 2526). As he recalled, the topic was brought up as an aside, and the head juror said, "We are not supposed to consider that," and the matter was dropped. (12 RT 2527.) The discussion was probably no more than 15 seconds. (12 RT 2527.)

Juror 3 did not recall anyone saying something about a moratorium on lethal injections or anyone saying they were not supposed to discuss that. (12 RT 2532–2533.) She thought she might have heard something about a moratorium on the death penalty but did not know if it was during that time frame; she believed it probably was not because she did not watch a lot of television or read newspapers at that time. (12 RT 2533.) She could not think of any information provided to the jurors that was not evidence at the trial. (12 RT 2533.) She did not remember a discussion of the ABA's stance on the death penalty or the Supreme Court taking up a case on lethal injection. (12 RT 2534.) Although she did not mind if the attorneys had her personal identifying information, she did not want the information to go any further than the attorneys. (12 RT 2534.)

Juror 7, who returned for this hearing, said that he tried to remember who brought up the moratorium but could not do so. (12 RT 2535.) He just recalled that when the topic came up, he immediately said, "We cannot allow that—any of that to influence our thinking." (12 RT 2535.) He thought it happened on the first day of deliberations. (12 RT 2535.) He did not remember any other discussion of the issue. (12 RT 2535.) He also confirmed that he did not show his notes to anybody else. (12 RT 2535.)

Juror 9 did not recall anyone saying anything about a moratorium on lethal injections or the ABA's stance on the death penalty. (12 RT 2536–2537.) He recalled hearing something about the suspension of executions, not necessarily lethal injection, but did not recall if it was during, before, or after the trial. (12 RT 2537.) He did not notice anyone bringing in paperwork that was not part of the evidence into deliberations. (12 RT 2537.)

Tran's attorney argued that a prima facie showing under section 237 had been made and that the court should release the information of the remaining jurors, or at least the male jurors, so that defense counsel could determine if those jurors had additional information. (12 RT 2538, 2544.) Plata joined in Tran's request. (12 RT 2539.) The prosecutor argued that no prima facie case had been established and asked the court to deny the defense request. (12 RT 2540.)

The court denied the request for further investigation of juror information, explaining, "I can see nothing that's been presented to this court to lead this court to believe that there was anything improper rising to the level of juror misconduct. In fact, it sounds like things were handled appropriately." (12 RT 2545.) The court further explained that there was no legitimate purpose in proceeding further: "I would have to disbelieve what these jurors have already told this court in the hope that throwing the line in the water would somehow grab some fish, and that is not the purpose of this proceeding." (12 RT 2545.)

Plata's attorney requested that the foreperson's notes be disclosed to the defense. (12 RT 2546). The court denied the request on the ground that "it was completely his thought process." (12 RT 2546.)

Tran challenged the court's ruling on the motion for access to juror information in petitions filed with the Court of Appeal and the California

Supreme Court. (12 RT 2563–2564.) Relief was denied at both levels. (12 RT 2563–2564.)

3. Motions for new trial

Tran filed a motion for a new trial in which he argued that jurors committed misconduct by considering information outside the record. (5 CT 1485–1490.) Plata also argued juror misconduct in a motion for a new penalty phase trial. (6 CT 1496.)

At the hearing on the motions for new trial, the court stated for the record that there was no juror misconduct. (12 RT 2562.) The court explained, "When I first was presented with the notes from this juror, my initial reaction was: This is nothing. The further we went into it, I was convinced this is nothing. This is merely a note to oneself as to the thought process of a juror in making a determination." (12 RT 2563.) The court denied the motions for new trial. (12 RT 2564.)

B. Even Assuming There Was Juror Misconduct as a Result of the Receipt of Extraneous Information, There Was No Substantial Likelihood of Bias

According to the testimony of Juror 7 and the other jurors, at least two jurors, Juror 7 and an unidentified male juror, received extraneous information regarding the ABA's call for a national moratorium on executions and the United States Supreme Court's decision to review the legality of execution by lethal injection. Although the extraneous information did not pertain to this case or the parties in this case in particular, this court has warned against the reading of "'any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty . . . .'" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108, quoting *People v. McCoy* (1886) 71 Cal. 395, 397; *People v. Pinholster* (1992) 1 Cal.4th 865, 924–925 [applying presumption where prospective jurors may have read article about another

capital defendant who said that he would not get executed because his case would be reversed on automatic appeal].) Furthermore, "[a]lthough inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*Nesler*, *supra*, 16 Cal.4th at p. 579; see also *People v. Stanley* (2006) 39 Cal.4th 913, 950 ["Juror C.'s reading of the newspaper article, and 'his inadvertent receipt of information outside the court proceedings,' was misconduct giving rise to a rebuttable presumption of prejudice"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1331 ["Even if inadvertent, it is misconduct for a sitting juror to read a newspaper article relating to the trial"].)

Accordingly, even though there is no evidence that the jurors intentionally sought out news items having a connection to the subject matter of this case, the technical definition of juror misconduct has arguably been met, resulting in a presumption of prejudice. (*Nesler*, *supra*, 16 Cal.4th at p. 578.) Any presumption of prejudice is rebutted, however, because there is no substantial likelihood that any of the jurors were actually biased against appellants.

1. The extraneous material was not inherently prejudicial

The extraneous material in this case was not so prejudicial in and of itself that it was inherently and substantially likely to have influenced a juror. A finding of inherently likely bias is required when, but only when, the extraneous information is so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.) Appellants argue that the news items were inherently prejudicial because they suggested that

even if the jury returned a death verdict, the sentence might never be carried out, thus diminishing the jurors' sense of responsibility regarding a vote for death. Not so. If anything, the news items were more helpful than harmful to appellants.

Tran attached to his motion for access to juror information an ABC news article dated October 28, 2007, about the ABA's call for a stay on executions. (5 CT 1412–1413.) The article explained that the ABA desired a halt to executions until improvements could be made to the capital justice system. (5 CT 1412.) A report by the ABA found that there were serious flaws in the death penalty systems of the eight states studied, including underfunded and underresourced capital defense systems, unreliable evidence, and racial disparity. (5 CT 1412.) The article mentioned that since the Supreme Court ruled that states could reinstate the death penalty, over 100 prisoners had been released from death sentences based on faulty convictions. (5 CT 1413.) The article also referred to the Supreme Court's agreement to hear a case brought by two Kentucky inmates who contended that lethal injection violated the Eighth Amendment's ban on cruel and unusual punishment. (5 CT 1413.) According to the article, pending the Supreme Court's decision in that case, most states had frozen any scheduled executions. (5 CT 1413.)

The prosecutor attached to his response to the motion for access to juror information an article from the Los Angeles Times dated October 31, 2007. (5 CT 1431–1432.) The article discussed legal challenges to California's efforts to revise its lethal injection guidelines and build a new death chamber. As explained by the article, California's death penalty was already on a de facto moratorium for the past 20 months because of a constitutional challenge to lethal injection: "Critics across the country have objected that lethal injection amounts to cruel and unusual punishment, contending that the three-drug cocktail that is used includes a paralyzing

chemical that masks extreme pain. The U.S. Supreme Court is considering a challenge to lethal injection in a Kentucky case." (5 CT 1431.)

Although it is unclear what precise articles were viewed by Juror 7 and the other juror, the gist of the news items was that the Supreme Court was reviewing a challenge to whether lethal injection constituted cruel and unusual punishment, scheduled executions in states (including California) utilizing lethal injection were stayed pending the Supreme Court decision, and the ABA had concerns regarding the fairness and accuracy of the states' death penalty systems and advocated a halt to executions until further study and reform could be implemented. The fact that the Supreme Court was reviewing the constitutionality of *one particular execution protocol* and that a bar organization *sought* a moratorium on executions pending further investigation and reform would not cause a juror to conclude that the ultimate responsibility for a death judgment rested elsewhere.

Moreover, the asserted grounds for the constitutional challenge to lethal injection and the ABA's call for a moratorium on executions would make a juror less, not more, inclined to impose a death sentence. If jurors thought that lethal injection might be cruel and unusual punishment or that the death penalty system was somehow flawed, they might be hesitant to sentence a defendant to death.

Caldwell v. Mississippi (1985) 472 U.S. 320 (*Caldwell*), upon which both Tran and Plata rely, is inapposite. In *Caldwell*, the prosecutor told the jury that their decision regarding a death verdict was not the final decision, and that their decision was automatically reviewable by the Mississippi Supreme Court. (*Id*. at pp. 325–326.) The prosecutor's argument was inaccurate because it "was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform."

(*Id*. at p. 336.) The Court held that the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death and concluded that it could not say that this effort had no effect on the sentencing decision. (*Id*. at p. 341.)

Here, in contrast, there were no "state-induced" suggestions regarding the sentencing responsibility of the jury. (*Caldwell*, *supra*, 472 U.S. at p. 330.) Nor is there any evidence that the news items "affirmatively misled" the jurors regarding their role in the sentencing process. (See *Romano v. Oklahoma* (1994) 512 U.S. 1, 10 [explaining that *Caldwell* did not control because the admission of evidence regarding the defendant's prior death sentence did not "affirmatively mislead" the jury regarding its role in the sentencing process so as to diminish its sense of responsibility]; *People v. Ledesma* (2006) 39 Cal.4th 641, 733 ["*Caldwell* simply requires that the jury not be mis[led] into believing that the responsibility for the sentencing decision lies elsewhere"].)

Viewing the extraneous material in this case objectively, it was not so prejudicial in and of itself that it was "inherently and substantially likely to have influenced a juror." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.)

2. It was not substantially likely that any juror was actually biased against appellants

Even if the extraneous information was not so prejudicial as to cause inherent bias, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. (*In re Carpenter, supra*, 9 Cal.4th at p. 654.) The surrounding circumstances include "the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Ibid*.)

Actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 581.) "'Actual bias' in this context is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.'" (*Ibid*., quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

There is no substantial likelihood that any of the jurors in this case were actually biased against appellants based on the news stories. There is no evidence that the jurors were intentionally seeking out information regarding the death penalty, and the reference to the current events during deliberations was very brief. According to Juror 2, the discussion was probably no more than 15 seconds. (12 RT 2527.) Juror 3 and Juror 9's inability to recall any discussion regarding the moratorium is consistent with a fleeting reference to the topic because such a brief aside could easily be ignored or forgotten. (12 RT 2532–2533, 2536–2537.)

Most importantly, according to Jurors 7 and 2, as the foreperson, Juror 7 correctly reminded the jurors that they could not consider the extraneous information.[39] The trial court found Jurors 7 and 2 credible, noting that "it sounds like things were handled appropriately." (12 RT 2545.) The trial court's credibility determination was supported by substantial evidence and must not be disturbed. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1423.)

This court has explained that "[w]here a mistake by one or more jurors during deliberations is promptly followed by a reminder from a fellow juror to disregard [the prohibited considerations]," and "the

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[39] The trial court had previously instructed the jurors that they must use only the evidence that was presented in the courtroom and that they must disregard anything they saw or heard when the court was not in session. (5 CT 1353–1354.)

discussion of the forbidden topic thereafter ceases, without any objective evidence that the reminder of the court's instructions was ineffective—the reminder tends strongly to rebut the presumption" of prejudice. (*People v. Lavender* (2014) 60 Cal.4th 679, 691 (*Lavender*).) Thus, in *People v. Loker* (2008) 44 Cal.4th 691, 748, several jurors stated that during penalty deliberations, there was some discussion about the defendant's failure to testify. However, because the comments on the subject were brief and the foreperson promptly reminded the jurors that the defendant had a right not to testify and that his assertion of that right could not be held against him, "the purpose of the rule against commenting on defendant's failure to testify was served, and the presumption of prejudice [was] rebutted." (*Id*. at p. 749; see also *People v. Avila* (2009) 46 Cal.4th 680, 727 [presumption of prejudice rebutted where comment regarding defendant's failure to testify was not of any length or significance, the offending juror was immediately reminded that he could not consider this factor, and the discussion ceased].)

Here, there is no objective evidence establishing a basis to question the effectiveness of Juror 7's reminder to the other jurors to not consider extraneous information. (*Lavender*, *supra*, 60 Cal.4th at p. 687.) Therefore, Juror 7's reminder to the jury to follow the court's instruction is "strong evidence that prejudice does not exist." (*Ibid*.)

In addition, looking at the strength of the evidence against appellants, the presumption of prejudice is rebutted because the evidence supporting the death verdict was overwhelming. (*People v. Ramos, supra*, 34 Cal.4th at p. 521.) The jury had already found appellants guilty of the murder and torture of Linda, and there was extensive proof of prior violent conduct by both appellants. In addition, the jury heard that Plata had previously been convicted of first-degree murder.

In sum, under all of the circumstances, there simply is no evidence that appellants were prejudiced from jury exposure to outside information regarding the ABA's campaign for a moratorium on executions and/or the Supreme Court's decision to review the constitutionality of execution by lethal injection. Therefore, the trial court properly denied appellants' motions for new trial.

C. The Trial Court Conducted a Sufficient Inquiry Regarding the Jury's Receipt of Extraneous Information Regarding the Death Penalty

Appellants contend that the trial court failed to conduct an adequate inquiry into the jurors' receipt of extraneous information about the death penalty. (Tran AOB 309–312; Plata AOB 136–144.) According to appellants, by questioning only four of the jurors, the court did not have sufficient information to determine whether prejudicial misconduct occurred. But the court's preliminary inquiry in connection with Tran's motion for access to juror information showed that any receipt of extraneous information by Juror 7 or the other male juror was not prejudicial because Juror 7 immediately admonished the jurors that they could not consider such information, and the topic was not discussed again. The court did not abuse its discretion in determining that an evidentiary hearing was not warranted.

"[I]f during a trial, the court becomes aware of possible juror misconduct, it must 'make whatever inquiry is reasonably necessary to determine if the juror should be discharged . . . . [Citation.]'" *(People v. Hedgecock* (1990) 51 Cal.3d 395, 417 (*Hedgecock*).) In contrast, after trial, "when a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations . . . . [T]he defendant is not entitled to such a hearing as a matter of right." (*Id*. at p. 415.) "The hearing

should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Id*. at p. 419.)

Upon discovering Juror 7's note, the trial court deemed it appropriate to call Juror 7 in to ask about the paragraph referring to the news stories.[40] (12 RT 2487.) Upon hearing Juror 7's testimony, the court concluded that the note was nothing more than a recitation of Juror's 7's thought process and observed, "At this point there doesn't appear to be anything, to me, anyway, that is untoward at all." (12 RT 2505.)

After Tran filed his motion for access to juror identification information, the court stated that it did not believe that there was a basis for ordering all the jurors in (i.e., holding an evidentiary hearing), but agreed to hold a hearing on Tran's motion under the procedures set forth in Code of Civil Procedure section 237. Section 237 provides, in relevant part: "The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying

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[40] The minute order regarding the hearing stated, "The Court, having received information of potential juror misconduct, orders all counsel, the defendants and the foreperson from the penalty phase of the trial to appear on January 4, 2008, at 9:00 a.m. in Department C40 of this court to determine if the foreperson considered outside information during the deliberation process." (5 CT 1390.) Plata argues that the minute order signaled to the foreperson what specific actions by him would constitute such misconduct and thereby inhibited candid responses during the inquiry. (Plata AOB 139.) But there is no evidence that Juror 7 ever saw the minute order. Furthermore, it is entirely speculative to conclude that Juror 7 would lie under oath to avoid a finding that misconduct occurred.

information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure."

To establish good cause for the release of a juror's identifying information, the moving party must show that there is a reasonable belief that jury misconduct occurred and that further investigation is necessary to provide the court with adequate information to rule on a new trial motion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) "'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information.'" (*Id.* at p. 990, quoting *People v. Rhodes* (1989) 212 Cal.App.3d 541, superseded by statute on other grounds as noted in *People v. Wilson* (1996) 43 Cal.App.4th 839, 852.)

As discussed above, at the section 237 hearing, the court questioned Jurors 2, 3, and 9, and heard from Juror 7 again.[41] Based upon the accounts of these jurors, the court properly concluded that there was no indication that prejudicial juror misconduct had occurred and denied appellants' request for the release of the information of the remaining jurors. (12 RT 2545.) Plata argues that the trial court erroneously conflated the issue of

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[41] Plata argues that the method used by the court to notify the jurors of the hearing essentially intimidated them and deterred them from attending the hearing. Plata's argument is unfounded. The notice neutrally stated that jurors who appeared would be asked to discuss with the court whether their decision in the penalty phase was affected by discussions of matters that were not presented by way of evidence or the law upon which the jury was instructed. (5 RT 1434.) By no means did the notice suggest that "attendees would be interrogated" on the matter. (Plata AOB 140.) There was no accusation of wrongdoing or threat of adverse consequences.

prejudice with the question of whether misconduct occurred in the first instance. (Plata AOB 144.) Even though the trial court stated that there was nothing improper "rising to the level of juror misconduct," it is clear that the trial court meant that there was no prejudicial misconduct. The court's lack of precision when discussing the legal concepts of juror misconduct and prejudice does not affect the court's ultimate findings and conclusion regarding the absence of prejudicial misconduct.

Because the trial court determined that appellants had not met their burden for the release of juror information—i.e., had not shown that further investigation regarding potential juror misconduct was necessary to provide the court with adequate information to rule on a new trial motion—the court necessarily also found that appellants had not demonstrated "a strong possibility that prejudicial misconduct [had] occurred." (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Therefore, the court properly declined to hold an evidentiary hearing.

Plata contends that "a court cannot fulfill its duty to inquire if it refuses to query at least all of those who were or may have been privy to the potential misconduct." (Plata AOB 141.) However, the cases upon which Plata relies involved the questioning of all jurors after potential misconduct was revealed *during* trial, not afterwards, when there is no right to an evidentiary hearing. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 337 [prior to commencement of penalty phase, all jurors questioned about news article about the defendant]; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1331–1332 [prior to commencement of penalty phase, all jurors questioned about whether they saw news coverage regarding a codefendant's death verdict]; *Pinholster*, *supra*, 1 Cal.4th at p. 928 [before closing argument during the guilty phase, the court and counsel questioned the jurors about whether they had read an article lionizing the prosecutor]; *People v. Thomas* (1975) 47 Cal.App.3d 178, 180 [at the beginning of trial,

all jurors were questioned regarding whether they had seen an article about the case].)

Plata argues that further inquiry was necessary in this case because the preliminary inquiry showed that there was another juror, never identified to the court, who had brought up the moratorium during deliberations and was never questioned. (Plata AOB 141.) According to Plata, the court should have inquired into the specifics of how that juror received the information and what was said when the matter came up in the jury room during deliberations. (Plata AOB 137.) However, based on the accounts of Juror 7 and Juror 2, it does not matter how the other juror received the information or exactly what was said when the topic was raised. The salient facts are that the topic was brought up, the jurors were promptly told that they could not take it into consideration, and there was no more discussion on the matter.

Plata also contends that the court had a duty to inquire whether any other jurors had been exposed to news coverage about the Supreme Court case or proposed moratorium. (Plata AOB 137.) But even if other jurors had been exposed to the news items, the presumption of prejudice would be rebutted because the information was not inherently prejudicial and the foreperson reminded the jurors of their duty to consider only the evidence presented at trial. In addition, the court instructed the jury, "In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out." (5 CT 1371.) It is presumed that jurors understand and follow the court's jury instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.)

Finally, Plata argues that further inquiry was necessary because the fact that Jurors 3 and 9 did not recall any discussion about a moratorium on lethal injections or the ABA's stance on the death penalty suggests that the deliberations might have occurred without all jurors present. (Plata AOB

124, f.n. 28, 141.) Nothing in the record supports Plata's speculation regarding deliberation taking place without all of the jurors present. Neither Juror 7 nor Juror 2 said anything that would lead to the conclusion that not all of the jurors were there when the events in question took place. Moreover, as previously discussed, the fact that Jurors 3 and 9 did not recall any discussion of the topic is *consistent* with a very brief exchange that was not significant in the scheme of the entire deliberations. (See *People v. Avila*, *supra*, 46 Cal.4th at p. 727 ["Here, at the guilt phase, the circumstance that only two jurors recalled that any juror had commented on defendant's failure to testify indicates that the discussion was not of any length or significance"].)

Appellants did not demonstrate a strong possibility that prejudicial misconduct had occurred. Therefore, the trial court did not abuse its discretion in concluding that any further inquiry would be a fishing expedition and declining to hold an evidentiary hearing. The court properly denied the motions for new trial based upon its preliminary inquiry.

D. The Undisclosed Portion of the Foreperson's Notes Was Inadmissible to Impeach the Verdict and Did Not Give Rise to a Duty by the Court to Reveal the Contents to Appellants or Conduct a Further Inquiry

Appellants argue that the undisclosed portion of Juror 7's notes revealed that Juror 7 was biased and that, therefore, the trial court erred in not revealing the contents of the entire document to counsel and not conducting a further inquiry. (Tran AOB 313–317; Plata AOB 145–161.) However, the court correctly refused to disclose the remainder of the notes to counsel because the notes consisted entirely of Juror 7's mental processes and were inadmissible to impeach the verdict. Appellants were not entitled to discovery of the notes, and there was no basis for a further inquiry into possible juror misconduct.

1. The undisclosed portion of Juror 7's notes

In his notes, consisting of three typewritten pages, Juror 7 expressed his thoughts about his duties as a juror, the mitigating and aggravating factors in this case, and why he felt that a death sentence was the appropriate verdict. (2 SCT 391–393.)[42]

In support of their argument that Juror 7 was actually biased, appellants point to the following portions of the notes, which were not disclosed to counsel:

> The defendants in this case do not fit my definition of "penitent." I think their remorse may be genuine, but the fact that they did not voluntarily submit themselves to the law and confess their crimes taints their remorse, and disqualifies them as truly penitent in my view. They may be sorry for killing Linda Park, but they are also sorry they were caught and convicted.
>
> [¶] . . . [¶]
>
> Any uncertainty about which of the defendants actually strangled the victim might, at first glance, be a mitigating factor for the other defendant. The evidence as to which of the two did the strangling is not absolutely conclusive. Nevertheless, under the law both defendants have been found guilty of this crime; not partly guilty, but completely guilty. There is no gradation of guilt here; there can be no comparative judgment on that basis alone.
>
> [¶] . . . [¶]
>
> The crime required sustained murderous intent. If either of them feels remorse, it may be genuine, but it is not pure and it is too little too late. Remorse merely signifies that your moral compass is working. Remorse is but the first step in true penitence. I am sure they are both sorry the police caught up with them; if they were truly penitent they would have turned themselves in, confessed, and attempted to make some kind of

[42] In an order filed on September 13, 2017, this court unsealed the document and made it part of the public record.

> effort at restitution. I doubt they would have done so by now if the police had caught them. Mr. Ciulla stated in court that mercy was something freely given, without price. I believe otherwise; the price of mercy is genuine penitence, which consists of remorse, confession, forsaking and restitution. Would the defendants still be free men today, keeping their secrets, if the police had not detected them?

(2 SCT 392–393.)

2. The document was inadmissible under Evidence Code section 1150, and appellants were not entitled to discovery of it

The trial court properly refused to disclose the remainder of Juror 7's notes to counsel because the notes reflected Juror 7's deliberative process and were therefore inadmissible under Evidence Code section 1150. Additionally, because the notes could not be used to impeach the validity of the death verdict, they were not reasonably likely to assist the defense and were not discoverable.

Evidence Code section 1150, subdivision (a) provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

This statute distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) "The only improper influences that may be proved under section 1150 to impeach a verdict,

therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." (*Id*. at p. 350.)

In other words, "'[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror "felt" or how he understood the trial court's instructions is not competent.'" (*People v. Morris* (1991) 53 Cal.3d 152, 231, quoting *People v. Sutter* (1982) 134 Cal.App.3d 806, 819.) Not all thoughts "by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a unanimous verdict; a jury verdict is not so fragile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219.)

Although a trial court may consider "statements made . . . within or without the jury room" (Evid. Code, § 1150), the statements "must be admitted with caution" because "[s]tatements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors—e.g., what the juror making the statement meant and what the juror hearing it understood." (*People v. Stankewitz* (1985) 40 Cal.3d 391, 398.) However, "no such misuse is threatened when . . . the very making of the statement sought to be admitted would itself constitute misconduct. Such an act is as much an objective fact as a juror's reading of a novel during the taking of testimony [citation], or a juror's consultation with an outside attorney for advice on the law applicable to the case [citation]." (*Ibid*.) "But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of these processes is barred by Evidence Code section 1150." (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.)

Juror 7's notes were not "statements" within the meaning of section 1150 because they were not made to anyone else. As explained by Juror 7, he did not share the document with his fellow jurors and did not intend for it to be seen by anyone else. (12 RT 2495.) The document was "a written

summary of [Juror 7's] personal private deliberations in the case" and he wrote it because "when I'm considering issues that are very complex and also very important, I find that if I can express them clearly in writing, it enforces clarity of thought as well." (12 RT 2495.)

It is clear from Juror 7's description of how and why the document was created as well as the content of the document itself, that Juror 7's notes were a verbal reflection of his mental processes. The entire document consists of Juror 7's personal deliberations in the case. Unlike the cases cited by appellants, there are no portions of Juror 7's notes that constitute proof of overt acts, such as improper statements or conduct during deliberations. (Compare with *People v. Danks* (2004) 32 Cal.4th 269, 302–310 [portions of juror declarations related solely to the mental processes of the declarant jurors but other portions were admissible evidence regarding conversations jurors had with nonjurors]; *People v. Steele* (2002) 27 Cal.4th 1230, 1265 [portions of declarations discussing effect of military experience and medical experience on deliberations were inadmissible under section 1150, but portions of declarations involving statements made or conduct occurring in the jury room were evidence of objectively ascertainable overt acts]; *People v. Hensley* (2014) 59 Cal.4th 788, 820–825 [excluding portions of juror's statements regarding how his conversations with his pastor affected his deliberative process but admitting other portions of juror's statements describing what was said].) Accordingly, Juror 7's notes were inadmissible in their entirety under section 1150.

Plata argues that the notes should have been disclosed because they were proof that Juror 7 may have provided false information during voir dire when he agreed to follow the law, to not use Plata's failure to testify against him, and to assess each defendant's culpability individually. (Plata AOB 155–159.) But there is no legal authority permitting a defendant to

skirt section 1150 by arguing that evidence of a juror's mental process constitutes proof that the juror committed misconduct by answering voir dire questions untruthfully. If this were the rule, a defendant could always avoid section 1150 by arguing that flaws or errors in a juror's thought process proves that the juror lied when he said he could follow the law or agreed to follow certain instructions.[43]

Moreover, there is nothing in Juror 7's notes that indicates that he gave untruthful answers to the voir dire questions. In his notes, Juror 7 questioned the sincerity of appellants' remorse, pointing to the fact that they had not turned themselves in, confessed, or attempted to make restitution. Appellants argue that these statements by Juror 7 show that he ignored the court's instruction regarding the right of defendants not to testify. However, it appears that Juror 7 was referring to appellants' *pre-trial* conduct. He never said anything about appellants' failure to take the stand or take responsibility in court.

Plata also argues that Juror 7's notes show that he was not willing to make an individualized determination regarding whether Plata should be sentenced to death. Plata relies on the following language in the document:

> Any uncertainty about which of the defendants actually strangled the victim might, at first glance, be a mitigating factor for the other defendant. The evidence as to which of the two did the strangling is not absolutely conclusive. Nevertheless, under the law both defendants have been found guilty of this crime; not partly guilty, but completely guilty. There is no gradation of guilt here; there can be no comparative judgment on that basis alone.

(2 SCT 392.) In this passage, Juror 7 expresses that in his view of the evidence, there was an insufficient basis to conclude that one defendant was

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[43] *People v. Castaldia* (1959) 51 Cal.2d 569, 572, cited by Plata, is inapposite because the case did not did not concern section 1150, which became operative January 1, 1967. (Stats. 1956, c. 299, § 2.)

more culpable than the other. He does not reject the legal guidance that the culpability of each defendant should be assessed independently. Similarly, the fact that Juror 7 used the word "they" when talking about appellants' lack of true penitence means that Juror 7 believed that both appellants were more sorry for being caught than for what they did, but sheds no light on Juror 7's understanding of or willingness to follow the instruction that the penalty determination should be made as to each defendant.

Appellants conveniently ignore other portions of the document that reveal that Juror 7 was thoughtful, conscientious, and fair-minded. His notes show that he was very attuned to his duty to follow the law and not inject personal bias into deliberations. In the second paragraph of the document, Juror 7 said, "I must follow the law and the judge's instructions as they are given to me." (2 SCT 391.) Similarly, he wrote, "My duty is to be impartial and dispassionate," and "[N]o juror should project his or her personal religious values and moral code onto this case." (2 CT 392.) Juror 7 explained, "I have realized that I can live with either verdict in the penalty phase. If the verdict is death, it will have been reached under the applicable laws and will be fully justified by the crimes of which the defendants have been lawfully convicted." (2 CT 392.)

Plata argues that he had a right to the discovery of Juror 7's notes because a defendant is entitled to discovery of unprivileged information that might lead to the discovery of evidence reasonably likely to assist in the preparation of his defense. (Plata AOB 152.) Even assuming a general right to post-trial discovery of information that will assist in a defendant's defense, the trial court did not err in denying Plata's request to disclose the full document because discovery of the notes would not lead to admissible evidence establishing juror misconduct.

E. Reversal of the Penalty Verdict is Not Warranted

The trial court's preliminary inquiry into the receipt of extraneous material by the jurors established that it was not substantially likely that any juror who was exposed to news regarding the ABA's call for a moratorium on executions or the Supreme Court's review of the constitutionality of lethal injection was actually biased. Because appellants had not demonstrated a strong possibility that prejudicial misconduct had occurred, an evidentiary hearing was not warranted, and the court properly denied the motions for new trial. The court did not err in refusing to reveal the contents of the undisclosed portion of Juror 7's notes to counsel and not inquiring into whether Juror 7 was biased. The notes consisted entirely of Juror 7's deliberative process and were inadmissible under Evidence Code section 1150. Moreover, the notes did not suggest any actual bias on the part of Juror 7. Therefore, appellants' constitutional rights to a fair and impartial jury and to due process were not violated, and there is no basis for reversing the penalty verdict or remanding the case for further inquiry.

XIII. CALIFORNIA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL

Appellants challenge the constitutionality of California's death penalty statute on various grounds. (Tran AOB 318–321 [Arg. XIII]; Plata AOB 175–190 [Arg. VI].) Appellants present no new arguments or persuasive reasons to revisit these issues.[44] Therefore, respondent urges the

[44] Appellants summarily present their claims in abbreviated fashion under the procedure set forth in *People v. Schmeck* (2005) 37 Cal.4th 240. Under *Schmeck*, a defendant may present and preserve for review "routine or generic claims" repeatedly rejected by this court by doing no more than (i) identifying the claim in the context of the facts, (ii) noting that this court previously has rejected the same or a similar claim in a prior decision, and (iii) asking the court to reconsider that decision. (*Id.* at p. 304.) Likewise, rather than burden this court with arguments that have repeatedly been

court to reaffirm its prior holdings finding California's death penalty statute, relevant instructions, and sentencing scheme constitutional.

A. Section 190.2 Is Not Impermissibly Broad

Appellants contend that California's capital punishment scheme fails to provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Tran AOB 320; Plata AOB 175.) There is no reason to revisit this court's prior decisions, which hold that "'[s]ection 190.2 adequately narrows the class of murder for which the death penalty may be imposed [citation], and is not overbroad, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits imposition of the death penalty for an unintentional felony murder [citation].'" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 489, quoting *People v. Harris* (2005) 37 Cal.4th 310, 365; see also *People v. Montes* (2014) 58 Cal.4th 809, 898–899; *People v. Jackson* (2014) 58 Cal.4th 724, 773; *People v. Jones* (2012) 54 Cal.4th 1, 85; *People v. Thomas* (2011) 51 Cal.4th 449, 506.)

B. The Application of Section 190.3, Factor (a), Does Not Result in the Arbitrary and Capricious Imposition of the Death Penalty

Appellants argue that factor (a) of Penal Code section 190.3 is unconstitutional because it allows the jury to weigh in aggravation almost every conceivable circumstance of the crime, thereby permitting arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (Tran AOB 320; Plata AOB 176–177.) This court has

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presented in past cases, respondent will simply cite to recent cases which have rejected the claims and arguments raised by appellants.

repeatedly rejected this claim. (See *People v. Johnson* (2016) 62 Cal.4th 600, 655; *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490; *People v. Linton* (2013) 56 Cal.4th 1146, 1215; *People v. Foster* (2010) 50 Cal.4th 1301, 1362–1364; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Jennings* (2010) 50 Cal.4th 616, 688–689.) Factor (a) allows each case to be judged on its facts and each defendant to be judged on the particulars of his offense. (*People v. Brown* (2004) 33 Cal.4th 382, 401.) "Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*Ibid*.; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 ["The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence"].)

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

Appellants contend that California's death penalty statute and jury instructions fail to set forth the appropriate burden of proof in a number of ways. This court has rejected all of appellants' contentions in prior decisions and should do so here as well.

1. The Constitution does not require an instruction that the jury must decide beyond a reasonable doubt that aggravating factors outweigh mitigating factors and death is the appropriate sentence

Appellants argue that their constitutional rights were violated by the trial court's failure to instruct the jury that it had to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (Tran AOB 320–321; Plata AOB 177–178.) This court has held otherwise in numerous decisions.

(See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235; *People v. Johnson, supra,* 62 Cal.4th at pp. 655–656; *People v. Sattiewhite, supra,* 59 Cal.4th at pp. 489–490.)

Appellants contend that this court's prior decisions should be revisited in light of *Hurst v. Florida* (2016) 577 U.S.__ [136 S.Ct. 616] (*Hurst*), a United States Supreme Court decision invalidating Florida's capital sentencing scheme. (Tran AOB 321; Plata AOB 163–174 [Arg. V].) This court has already determined that *Hurst* does not alter its prior rulings regarding the constitutionality of California's death penalty statute. (*People v. Henriquez* (2017) 4 Cal.5th 1, 45; *People v. Jones* (2017) 3 Cal.5th 583, 619; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.) As explained by the court, the "California sentencing scheme is materially different from that in Florida." (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16; see also *People v. Jackson* (2016) 1 Cal.5th 269, 374 [explaining how California's sentencing scheme differs from Florida's].)[45] Moreover, *Hurst* does not address the standard of proof required for determining whether aggravating factors outweigh mitigating factors.

The Sixth Amendment does not require that the jury determine beyond a reasonable doubt that the aggravating factors outweigh those in mitigation because "[d]etermining the balance of evidence of aggravation and mitigation and the appropriate penalty do not entail the finding of facts but rather, 'a single fundamentally normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman* (2014) 60 Cal.4th 1, 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595.) "[S]entencing is an inherently moral and normative function, and not a

[45] Under Florida's capital sentencing scheme, the trial court had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. (*Hurst*, *supra*, 136 S.Ct. at pp. 621–622.)

factual one amenable to burden of proof calculations." (*People v. Winbush*, *supra*, 2 Cal.5th at p. 489.)

The United States Supreme Court acknowledged the moral and normative nature of the weighing determination in *Kansas v. Carr* (2016) 577 U.S. __ [136 S.Ct. 633, 642] (*Carr*). In *Carr*, the Court expressed doubt that it was even possible to apply a standard of proof to the mitigating-factor determination or the weighing determination:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.

(*Ibid*.) [46]

Hurst has no effect on this court's repeated rulings that the federal constitution does not require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the factors in mitigation.

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[46] In addition to *Hurst*, Plata relies on a few state supreme court decisions holding that the weighing determination is a finding of fact that falls within the *Apprendi/Ring* rule. (Plata AOB 173–174.) However, these cases are contrary to *Carr*. In addition, the sentencing schemes at issue in those cases were much different than California's. (*Rauf v. State* (Del. 2016) 145 A.3d 430, 457 [under Delaware law, jury's choice between a life and death sentence was completely advisory, and the judge could impose a sentence of death as long as the jury had unanimously found the existence of a single aggravating factor]; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 261–262 [under Missouri statute, if jurors could not agree on punishment, a judge could impose the death penalty]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 259–262 [under Colorado law, capital sentencing determinations were made by a three-judge panel after the jury's verdicts on first degree murder].)

2. The Constitution does not require an instruction regarding a burden of proof or the lack of a burden of proof

Appellants also argue that they were constitutionally entitled to a jury instruction setting forth the state's burden of proof or clarifying that there was no burden of proof. (Tran AOB 319; Plata AOB 178–179.) Time and again this court has held that the Constitution does not require any burden of proof, nor does it require trial courts to instruct juries that there is no burden of proof. (*People v. Romero and Self*, *supra*, 62 Cal.4th at p. 57; *People v. Dement* (2011) 53 Cal.4th 1, 55; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Bennett* (2009) 45 Cal.4th 577, 632.) Appellants do not present any new arguments warranting reconsideration of the issue.

3. The Constitution does not require that a death verdict be premised on unanimous jury findings

Relying on *Ring v. Arizona*, *supra*, 536 U.S. 584, appellants contend that that their death sentences violate the Sixth, Eighth, and Fourteenth Amendments because they were not premised on unanimous jury findings regarding the aggravating factors, including prior unadjudicated criminal activity under section 190.3, factor (b). (Tran AOB 319; Plata AOB 179–181.) This court has held that neither the state nor federal constitutions require the jury to "make *unanimous* findings concerning the particular aggravating circumstances." (*Linton*, *supra*, 56 Cal.4th at p. 1215, original italics; see also *People v. Burney*, *supra*, 47 Cal.4th 203 at p. 268 [lack of unanimity as to aggravating factors does not violate equal protection principles]; *People v. Valencia* (2008) 43 Cal.4th 268, 311 [jury unanimity not required as to specific aggravating circumstances or unadjudicated criminal activity under factor (b)]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243 [failure to instruct jury that it must agree unanimously

that defendant committed unadjudicated crimes did not violate Sixth, Eighth, or Fourteenth Amendments].)

Nothing in *Ring* or its progeny has any bearing on this court's decisions on this issue. (*People v. Romero and Self*, *supra*, 62 Cal.4th at pp. 56–57; *People v. Ward* (2005) 36 Cal.4th 186, 221–222.) Therefore, appellants' invitation to the court to reconsider its prior decisions should be declined.

4. The instructions were not impermissibly vague and ambiguous

Plata argues that the penalty determination turned on an impermissibly vague and ambiguous standard—i.e., whether the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that a death sentence was warranted. (Plata AOB 181–182.) According to Plata, the phrase "so substantial" does not sufficiently limit the sentencer's discretion so as to avoid the risk of arbitrary and capricious sentencing. This court has consistently held that the "so substantial" language is not inadequate or misleading. (*People v. Salazar* (2016) 63 Cal.4th 214, 256; *People v. Romero and Self*, *supra*, 62 Cal.4th at p. 56; *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1357; *People v. Williams* (2015) 61 Cal.4th 1244, 1287–1288; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1091–1092; *People v. Johnson* (2015) 61 Cal.4th 734, 786.) Plata presents no new argument warranting reconsideration of the matter.

5. Due process does not require that the instructions inform the jurors that if they determine the evidence in mitigation outweighs that in aggravation, they are required to return a sentence of life without the possibility of parole

Plata argues that due process required that the trial court instruct the jurors that if they determined that the mitigating circumstances outweighed the aggravating circumstances, they were required to return a sentence of

life without the possibility of parole. (Plata AOB 182–183.) Such an instruction would only serve to clarify the instructions already given, and thus, Plata was required to request it. His failure to do so forfeits the claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Moreover, this claim was rejected in *People v. Capistrano* (2014) 59 Cal.4th 830, 882, *People v. Hajek and Vo*, *supra*, 58 Cal.4th at page 1247, *People v. Suff* (2014) 58 Cal.4th 1013, 1078, and *People v. Rogers* (2013) 57 Cal.4th 296, 349–350, and should be rejected here as well.

6. The trial court was not required to instruct the jury regarding the standard of proof for mitigating factors or the lack of a unanimity requirement as to the mitigating factors

Appellants contend that the jury instructions were constitutionally flawed because they failed to inform the jury regarding the standard of proof as to the mitigating circumstances, leaving the jury with the impression that the defendants bore some particular burden in proving facts in mitigation. (Tran AOB 319; Plata AOB 183–184.) Plata also contends that the instructions were unconstitutional because they did not tell the jury that unanimity was not required for the consideration of mitigating circumstances. (Plata AOB 184.) These same arguments were rejected in *Salazar*, *supra*, 63 Cal.4th at page 256, *People v. Adams* (2014) 60 Cal.4th 541, 580, and *People v. Riggs* (2008) 44 Cal.4th 248, 328, and should be rejected here as well.

7. The Constitution does not require instructions on the presumption of life

Appellants also contend that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence, violated their Eighth and Fourteenth Amendment rights. (Tran AOB 319; Plata AOB 185–186.) This court has repeatedly held otherwise. (*People v. Salazar*, *supra*, 63 Cal.4th at p. 256; *People v.*

Scott (2015) 61 Cal.4th 363, 407; *People v. Boyce* (2014) 59 Cal.4th 672, 724.)

D. The Jury Need Not Make Written Findings

Plata contends that the trial court's failure to require written or other specific findings by the jury deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments, as well as his right to meaningful appellate review. (Plata AOB 186.) Contrary to Plata's assertion, "The lack of a requirement that the jury make a written statement of its findings and its reasons for the death verdict does not deprive a capital defendant of the rights to due process, equal protection, and meaningful appellate review that derive from the Fifth, Eighth, and Fourteenth Amendments." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 662; see also *People v. Nelson* (2011) 51 Cal.4th 198, 225 ["Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation"]; *People v. Thompson* (2010) 49 Cal.4th 79, 134 [Supreme Court decisions interpreting Sixth Amendment's jury trial guarantee did not alter this court's conclusions regarding the constitutionality of not requiring written findings]; *People v. Gamache* (2010) 48 Cal.4th 347, 406.)

E. The Instructions on Mitigating and Aggravating Factors Did Not Violate the Constitution

1. The use of restrictive adjectives does not act as a barrier to the consideration of mitigating evidence

Appellants argue that potential mitigating factors were unconstitutionally limited by the adjectives "extreme" and "substantial." (Tran AOB 319; Plata AOB 186–187.) As explained by this court, potentially mitigating factors are not unconstitutionally limited by the adjectives "extreme" and "substantial," because section 190.3, factor (k), as expanded in *People v. Easley* (1983) 34 Cal.3d 858, allows consideration of

‘“‘any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime’ and any other ‘aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.’”’ (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305; see also *People v. Sanchez*, *supra*, 63 Cal.4th at pp. 487–488; *People v. Rountree* (2013) 56 Cal.4th 823, 863; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

2. Deletion of inapplicable sentencing factors was not required

Appellants also argue that the failure to delete inapplicable sentencing factors from the jury instructions likely confused the jury and prevented it from making a reliable determination of the appropriate penalty. (Tran AOB 319; Plata AOB 187.) This claim has been oft rejected, and appellants offer no reason for reconsideration of this issue. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1036; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1248; *People v. Cook* (2007) 40 Cal.4th 1334, 1366.)

3. The court was not required to instruct that certain mitigating factors were relevant solely as possible mitigators

Appellants contend that several of the factors set forth in CALCRIM No. 763—factors (d), (e), (f), (g), (h), and (j)—were relevant solely as possible mitigators, and that the court was required to instruct the jury accordingly. (Tran AOB 319; Plata AOB 187.) The court should reject this claim for the same reasons it has done so in the past. (See *People v. Casares* (2018) 62 Cal.4th 808, 854; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [“The aggravating or mitigating nature of the factors is self-evident within the context of each case”]*; People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.)

4. Factor (i), which allowed the jury to consider the defendant's age at the time of the capital crime, was not impermissibly vague

Tran argues that factor (i) of CALCRIM No. 763, which allowed the jury to consider his age at the time of Linda's murder, was impermissibly vague in violation of the Eighth Amendment. (Tran AOB 318.) This court and the United States Supreme Court have previously rejected this argument. (*People v. Rices* (2017) 4 Cal.5th 49, 94; *People v. Ray* (1996) 13 Cal.4th 313, 358; *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977.) Tran raises no new argument warranting reconsideration of the issue.

F. The Jury's Consideration of Unadjudicated Criminal Activity Did Not Violate the Constitution

Tran contends that allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed unadjudicated crimes under section 190.3, factor (b), violates the defendant's constitutional rights to an unbiased decision maker. (Tran AOB 319.) However, as explained by this court, Tran's concern regarding the ability of the jury to be fair and unbiased "is overshadowed by the state's legitimate interest in prosecuting capital cases before a single jury, and in allowing that jury to weigh and consider the defendant's prior criminal conduct in determining penalty, so long as reasonable steps are taken to assure the defendant a fair and impartial penalty trial." (*People v. Medina* (1990) 51 Cal.3d 870, 907; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.)

G. Intercase Proportionality Review is not Required by the Constitution

Appellants claim California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review to guarantee against arbitrary imposition of the death penalty. (Tran

AOB 320; Plata AOB 188.) Intercase, or comparative, proportionality review is not required by the federal Constitution, and this court has consistently declined to engage in it. (*People v. Winbush, supra*, 2 Cal.5th at p. 490; *Pulley v. Harris* (1984) 465 U.S. 37, 43–54.)

H. California's Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Plata argues that California's death penalty scheme violates the equal protection clause by providing fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. (Plata AOB 188.) This court has repeatedly rejected this claim, finding that capital defendants and noncapital defendants are not similarly situated and, accordingly, may be treated differently without violating either equal protection guarantees or the Eighth Amendment. (*People v. Lucas* (2014) 60 Cal.4th 153, 333; *People v. Linton*, *supra*, 56 Cal.4th at p. 1216; *People v. Debose* (2014) 59 Cal.4th 177, 214; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Johnson*, *supra*, 3 Cal.4th at pp. 1242–1243.)

I. California's Capital Sentencing Scheme Does Not Fall Short of International Norms

Appellants contend that California employs the death penalty as a regular form of punishment, which violates constitutional provisions and falls short of international norms and evolving standards of decency. (Tran AOB 321; Plata AOB 189–190.) This court has consistently determined that the death penalty does not violate the Eighth Amendment, international law, or "evolving standards of decency." (See *People v. Johnson, supra,* 62 Cal.4th at p. 657; *People v.* Howard (2010) 51 Cal.4th 15, 39; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Jennings, supra,* 50 Cal.4th at p. 689.) Plata urges the court to reconsider its previous decisions in light of *Roper*, *supra*, 543 U.S.

at page 554, in which the United States Supreme Court cited evolving international standards as "respected and significant" support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as *juveniles*. (Plata AOB 190.) However, *Roper* has not persuaded this court to revisit its determination that California's death penalty scheme, as it pertains to defendants who committed capital crimes as adults, does not violate international law and norms. (*People v. Hung Than Mai* (2013) 57 Cal.4th 986, 1058; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1112.)

XIV. THERE WAS NO CUMULATIVE ERROR

Appellants argue that cumulative prejudice from errors in the guilt phase and penalty phase requires reversal of the guilt verdict, the special circumstance findings, and the death verdict. (Tran AOB 322–324 [Arg. XIV] Plata AOB 191–194 [Arg. VII].) According to Tran, the court's various evidentiary and instructional errors "skewed" the jury's ability to determine who the actual killer was. (Tran AOB 323–324.) Tran also points to the court's alleged errors in allowing victim impact evidence and refusing to grant a mistrial for jury misconduct. (Tran AOB 324.) Plata claims that the introduction of hearsay, the lack of sufficient evidence in support of the gang enhancement, and juror misconduct combined to deprive him of his right to a fair and impartial jury, due process, and a reliable penalty verdict. (Plata AOB 192–193.)

This court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844–848; *People v. Holt* (1984) 37 Cal.3d 436, 458–459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

On the other hand, if the reviewing court rejects all of a defendant's claims of error, it should also reject the contention of cumulative error. (*People v. Anderson, supra*, 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Similarly, where "nearly all of [a] defendant's assignments of error" are rejected, this court has declined to reverse based on cumulative error. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 837 [finding no cumulative error where effect of few demonstrated was harmless]; *People v. Cooper* (1991) 53 Cal.3d 771, 839 [rejecting cumulative error argument where there was "little error to accumulate"].) These same principles apply to claims seeking to overturn a death judgment by combining alleged guilt and penalty phase errors. (See *People v. Williams*, *supra*, 61 Cal.4th at p. 1291; *People v. Bonilla* (2007) 41 Cal.4th 313, 360.)

As discussed above, there were no errors to accumulate. Therefore, appellants' claims of cumulative error must be rejected. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606; *People v. Bolin*, *supra*, 18 Cal.4th at p. 335.) Appellants were entitled to a fair trial – not a perfect trial – and a fair trial is exactly what they received. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1057.) The judgment should be affirmed in its entirety.

CONCLUSION

For all of the reasons stated above, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: April 19, 2018

Respectfully submitted,

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SD2008700742

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 46,667 words.

Dated: April 19, 2018

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/S/- Christine Y. Friedman
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Plata &Tran**
No.: **S165998**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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Honorable William R. Froeberg
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Department C40
Santa Ana, CA 92701

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 April 19, 2018, at San Diego, California.

L. Farias	*/S/-L. Farias*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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4/19/2018

Date

/s/Christine Friedman

Signature

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