# In the Supreme Court of the State of California

| | |
|---|---|
| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>**v.**<br>**JAMES MICHAEL FAYED,**<br>Defendant and Appellant. | **CAPITAL CASE**<br>Case No. S198132 |



Los Angeles County Superior Court
Case No. BA346352
The Honorable Kathleen Kennedy, Judge

## RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
IDAN IVRI
Deputy Attorney General
State Bar No. 260354
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 620-6097
Fax: (213) 897-2263
E-mail: Idan.Ivri@doj.ca.gov
E-mail: DocketingLAAWT@doj.ca.gov
*Attorneys for Respondent*

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF CONTENTS
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**



///

///

///

///

///

///

///

///

///

## TABLE OF AUTHORITIES
## (continued)

Page

STATUTES

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
(continued)

## TABLE OF AUTHORITIES
## (continued)

**Page**

## STATEMENT OF THE CASE

An information filed February 29, 2010, charged appellant with one count of first degree murder (Pen. Code, §187, subd. (a)[1]; count 1) and one count of conspiracy to commit murder (§ 182, subd. (a)(1); count 2). As to count 1, the information alleged two special circumstances, namely, that appellant committed the murder for financial gain and that he killed the victim by lying in wait. (§ 190.2, subds (a)(1), (a)(15).) (8 CT 1790-1793.)

Appellant pled not guilty to both counts and denied all special allegations. (8 CT 1794-1795.) A jury was impaneled to hear the case. (13 CT 3476-3477.) At the conclusion of the guilt phase of trial, the jury found appellant guilty as charged. (14 CT 3616-3633.) At the conclusion of the penalty phase of trial, the same jury fixed the penalty as death. (14 CT 3634-3635, 3698, 3704-3706.) The trial court denied appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e). (30 CT 8263-8265.) Accordingly, the court sentenced appellant to death as to count 1. The court further sentenced appellant to a term of 25 years to life in prison as to count 2, but stayed that sentence pursuant to section 654. Finally, the court ordered appellant to pay $10,000 in restitution pursuant to section 1202.4, subdivision (b). (30 CT 8266-8272.)

This appeal is automatic. (§ 1239.)

///

///

///

///

///

///

---

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

## STATEMENT OF FACTS

### A. Guilt Phase: The People's Case-in-Chief

#### 1. Appellant's Marriage To Pam, the Operation of Their Company "Goldfinger," Their Divorce Proceedings, and the Federal Investigation Into Financial Misconduct at Goldfinger

The victim Pamela Fayed had a daughter named Desiree. (6 RT 1029.) Desiree[2] first met appellant around 1997, when appellant and Pam became romantically involved. Desiree was six years old at that time. Desiree and appellant bonded. Appellant and Pam got married soon thereafter, when Desiree was seven or eight years old. (6 RT 1031-1032.) Appellant and Pam then had a biological child of their own, Jeanette. (6 RT 1032-1033.) The four of them lived in a simple apartment at first, and they were not well-off financially. (6 RT 1034.) Eventually, appellant and Pam started a business together named Goldfinger,[3] and the family became more wealthy. (6 RT 1035.) Fundamentally, Goldfinger was a website where customers could maintain an account funded with commodities such as gold and silver, and trade on those commodities. (6 RT 1043.) At first, the business was so small that the family operated it out of their condominium. Appellant was the president and Pam was an equal partner who assisted him. (6 RT 1044-1046.) Pam worked at Goldfinger two to three days per week. She was invested in the company's well-being, but appellant ran its daily operations. (6 RT 1095.)

Marty McCoy met Pam in 2000, when he sold her and appellant life insurance. He became close friends with Pam thereafter, and she did some

---

[2] Respondent refers to individuals in this case by their first names when their surnames are shared by other individuals.

[3] The company's name was Goldfinger, but its public internet address for customers was "E-Bullion." (6 RT 1092.)

paperwork in his office. (9 RT 1766.) Around that time, McCoy became aware that Pam and appellant were having marital problems. In fact, appellant frequently accused McCoy of having an affair with Pam, even though they were just friends. (9 RT 1766-1767.) Pam stopped working for McCoy once Goldfinger became more successful and demanded more of her time. (9 RT 1767.)

Delilah Urrea lived in the same condominium complex as appellant and Pam did in the summer of 1999, shortly after Jeanette was born. (6 RT 1085-1086.) Urrea was a close friend of Pam's. (6 RT 1088.) In 2004, appellant hired Urrea as a customer service representative for Goldfinger, answering phones. (6 RT 1089-1091.) Urrea became familiar with the workings of the business, including the manner in which customers could purchase gold, silver, and "e-currency," which was pegged to the dollar, via the website. (6 RT 1091-1092.) To Urrea's knowledge, Goldfinger's profits came from a two or three percent fee levied on the price of the commodity the customer wished to purchase. (6 RT 1092.) Later, the fee on funding the accounts was dropped and replaced by a fee on withdrawals. (6 RT 1093.) The company handled transactions totaling $3 million to $5 million per month at the time that Urrea was employed there. (6 RT 1094.)

After Goldfinger had been operational for about a year, it expanded to the point where appellant and Pam had to obtain dedicated office space and hire employees. (6 RT 1046-1047.) Thanks to Goldfinger's success, the family became more wealthy and was able to move into a bigger house, own more cars, and live more comfortably. (6 RT 1047-1048.) The family purchased one home in 2003 or 2004 on Baja Vista Way in Camarillo and also bought a ranch in Moorpark consisting of several buildings surrounded by several hundred acres of land, which they used as a weekend getaway. (6 RT 1048-1049.) Appellant and Pam hired a man named Joey Moya to stay at the ranch full time and take care of the property. (6 RT 1052, 1097.)

Moya lived in a secondary structure, not the main house, on the ranch property. (6 RT 1054.) Moya was also effectively appellant's assistant, a person who ran errands for him and took care of his requests. Appellant and Moya kept in regular contact. (6 RT 1053-1054.) Moya's other responsibility was working as the warehouse manager at Goldfinger, meaning he was in charge of managing the area containing the safes which stored the company's gold and other supplies. (6 RT 1096-1097.) Moya's contact information was provided to other members of Goldfinger's staff. (6 RT 1098.)

In December 2007, Miguel Sanchez was also hired to work at the ranch, doing remodeling work and taking care of the horses. (9 RT 1607-1608.) Unlike Moya, Sanchez did not actually reside at the ranch. (9 RT 1610.) Eventually, Sanchez took over many of Moya's manual labor duties at the ranch. Even after that, however, Moya continued to live there. (9 RT 1611.) There were two gates that led to the ranch which were secured by padlocks. During the day, Sanchez was responsible for opening them, and, at night, Moya would do so. (9 RT 1612-1613.)

Desiree began working part-time for Goldfinger in late 2005 or early 2006. (6 RT 1055, 1082.) In fall of 2007, however, divorce proceedings began between appellant and Pam. Appellant and Pam were "distant" toward one another. (6 RT 1056-1057.) Appellant stopped coming regularly to work after the divorce proceedings began. (6 RT 1128.) Appellant also had health problems in the year and a half leading up to this point that caused him pain and led him to take pain medication. The medication caused him to act "out of it" and appear drunk. Desiree began to have trouble communicating with appellant because he stayed in his room like a hermit. (6 RT 1071-1073.) Pam showed Desiree an email in

which appellant accused Pam of having an affair with Desiree's biological father.[4] (6 RT 1060-1061.) Around this time, appellant also mentioned to Urrea that he believed Pam had embezzled $250,000 from the company. However, Urrea knew that Pam did not have access to the accounts that would be necessary to embezzle money from the company. (6 RT 1126-1127, 1140-1141.)

Appellant put his sister Mary Mercedes and a manager named Scott Layton in charge of personnel matters at Goldfinger after the divorce proceedings began, and Urrea reported to them on those issues. (6 RT 1133-1134.) In October 2007, Desiree was fired by Layton. Desiree and Pam were excluded from the business and banned from its premises from that time onward. Appellant did not give any explanation for this. (6 RT 1056-1058, 1062, 1100-1103.) Pam only came to the Goldfinger offices on one occasion after she was banned, and that visit was in connection with the divorce proceedings and audit of the company. The audit involved an accounting of the contents of Goldfinger's gold safes for purposes of the divorce proceedings. (6 RT 1103, 1110-1111.) Desiree and appellant also stopped communicating. In the fall of 2007, appellant moved out of the Camarillo residence and began living exclusively at the ranch. (6 RT 1058-1059.)

In September and October of 2007, Pam spoke almost daily to an old friend of hers named Carol Neve. (7 RT 1313.) They discussed both personal and business-related topics. (7 RT 1314.) Neve, like Pam, was involved in a business that handled online trading. (7 RT 1370.) One topic that came up in their conversations was a "money transfer license" for

---

[4] On the weekend of September 18, 2007, Pam and Desiree spent a weekend together in Newport Beach during which time they spent time with Desiree's biological father William. (6 RT 1070.)

businesses such as theirs. (7 RT 1370.) Neve told Pam that Neve's business had recently faced legal issues for operating without those licenses, and that Pam's business was similarly at risk. Neve advised Pam to obtain money transmitter licenses, and Pam told Neve that she would do so. (7 RT 1371-1373.)

In early 2008, Mercedes moved to the ranch with appellant. (9 RT 1637.) Sanchez began doing errands for Mercedes after she moved in. (9 RT 1637-1638.) To Desiree's knowledge, appellant, Moya, and Mercedes were the only people living at the ranch at that time. (6 RT 1060, 1068.) Desiree was not in contact with Mercedes and did not see her in person.[5] (6 RT 1067-1068.) Neither Desiree nor Pam had any contact with Moya, nor did they have access to the ranch after the fall of 2007. (6 RT 1062-1063.) Jeanette, however did visit appellant at the ranch approximately once per week after the divorce proceedings began. (6 RT 1068.)

Pam hired attorney Gregory Wallace Herring to represent her in the divorce. (6 RT 1147.) Part of Herring's job was to ascertain the value of Goldfinger's assets.[6] (6 RT 1151-1153.) However, Herring could not do that part of his job because appellant and his attorneys were preventing him from thoroughly investigating the company. (6 RT 1154.) Appellant was the one who initially filed for divorce, and the proceedings were contentious from the beginning. (6 RT 1156-1157.) One of the few points

---

[5] Urrea, however, did meet Mercedes several times when Mercedes came to the Goldfinger office to do paperwork. (6 RT 1131-1132.)

[6] Herring learned about Goldfinger's business as part of his duties representing Pam in the divorce. (6 RT 1148.) In Herring's understanding, Goldfinger's business was to allow customers to buy precious metals without actually physically possessing them, and then enable customers to trade on those assets. Goldfinger made money by charging fees on the trades and accounts. (6 RT 1149-1150.) The value of gold on the market was rising rapidly during the time that Herring began representing Pam. (6 RT 1150.)

on which Pam and appellant agreed was that appellant would own and run Goldfinger, but Pam would receive payments and remain informed as to business operations. (6 RT 1159-1160, 1186-1187.) Despite this ostensible agreement, however, Herring believed that Pam was in fact being kept unaware of how Goldfinger was actually operating or how much money was passing through it. (6 RT 1160-1161.) Moreover, appellant accused Pam of embezzling $800,000 from Goldfinger in divorce court declarations, which she denied. (6 RT 1161-1162.) Pam maintained that she spent the money in order to secure licenses that Goldfinger needed to legally do business. (6 RT 1162.) However, it was appellant's and Goldfinger's position that Goldinger did not need these licenses. (7 RT 1261.)

In December 2007, Herring tried to informally request the financial information he needed from appellant's attorneys without resorting to formal discovery. (6 RT 1165-1167.) Appellant's attorney promised to provide the relevant information, but he did not follow through. Then, appellant fired that attorney and hired someone new. The new attorney also promised to provide the information, but he too reneged. (6 RT 1167-1169.) In March 2008, Herring began issuing formal requests for the information he needed. Appellant and his attorneys again agreed, but when they provided the documents, they were heavily redacted and essentially useless. (6 RT 1169-1170.) Herring then filed a motion for sanctions against appellant for noncompliance with the divorce as well as various other motions to compel appellant to turn over the information so Goldfinger's assets could be divided and the divorce could proceed. (6 RT 1171-1172.)

In early 2008, Mark Aveis, a federal prosecutor, was investigating Goldfinger for possible violations of a federal law forbidding unlicensed transmissions of money. Organizations that engaged in unlicensed money

transfers, known as Hawalas, existed in order to avoid reporting the origins and destination of money. (7 RT 1208-1214.) Operators of Ponzi schemes and other fraudulent enterprises used Hawalas to secretly withdraw money from accounts set up for their victims without the victims knowing about it. (7 RT 1212-1213.) The federal investigation of Goldfinger started because federal authorities had discovered that money from several Ponzi schemes was flowing through Goldfinger. (7 RT 1218-1219.)

In January 2008,[7] Aveis determined that it would be appropriate to indict appellant and Goldfinger for violating laws relating to the unlicensed transmission of money. (7 RT 1226-1227.) Pam was not named in the indictment. (7 RT 1221.) Aveis hoped that the indictment would lead to more incriminating evidence against the Ponzi schemes which were funneling money through Goldfinger. (7 RT 1219-1220.) Specifically, Aveis hoped that appellant would ultimately cooperate with the authorities and allow an undercover federal agent to work at Goldfinger to track the questionable funds. (7 RT 1221.) Initially, however, the indictment was sealed, meaning neither Goldfinger nor the general public knew of it. In the end, Pam was killed before appellant or Goldfinger were ever made aware of the indictment, and therefore the plan to request appellant's cooperation in the federal undercover operation never materialized. (7 RT 1224-1225, 1244-1245.)

By January 2008, Aveis was also aware that appellant and Pam were involved in a divorce. (7 RT 1228.) On May 22, 2008, Aveis issued a subpoena to a forensic accounting firm named Pyne Waltrip that had analyzed Goldfinger's assets for purposes of the divorce. Aveis wanted access to their divorce investigation to assist him in his criminal

---

[7] The indictment was actually filed on or about February 26, 2008. (2 CT 337.)

investigation. (7 RT 1230.) At some point, appellant, Pam, and others at Goldfinger became aware of the subpoena to Pyne Waltrip and, thus, the existence of a federal probe into Goldfinger. At that point, Aveis began receiving phone calls from the parties' attorneys.[8] (7 RT 1245-1248.) Aveis also received a phone call from an attorney named John Crouchley claiming to represent Pyne Waltrip regarding privileges that might apply to the accounting investigation. (7 RT 1231-1232, 1247-1248.) Though the indictment remained sealed, Aveis obtained records about Goldfinger's gross revenues for 2003 ($9.3 million), 2004 ($14.8 million), 2005 ($27.7 million), 2006 ($73.2 million), and 2007 ($160 million). (7 RT 1222-1223, 1227.)

Meanwhile, in the divorce case, appellant and his attorneys did provide some records that Herring requested, including an accounting of assets in certain Goldfinger safes. (6 RT 1188.) Herring hired forensic accountant Paul White to assist in the ongoing accounting, who informed Herring that appellant was using Goldfinger as his personal "piggy bank" in the amount of approximately $125,000 per month, via so-called loans appellant was making to himself. (6 RT 1172-1173.) Meanwhile, the amount that Pam would receive from the business, which the parties had agreed would be $8,000 per month, was unilaterally cut by appellant to approximately $4,000. (6 RT 1173-1174.) This reduction took place despite the fact that Goldfinger had claimed in financial filings that it was worth approximately $1 billion. (6 RT 1174-1175.) Accordingly, Herring

---

[8] Herring became aware that Goldfinger, appellant, and Pam were under investigation for improper practices relating to licensing and taxes. Herring was instructed not to do anything in the divorce proceedings that might imperil Pam's criminal defense, to the extent one would be required, and that he should keep Pam's criminal defense attorney (discussed in detail below) apprised of his actions. (6 RT 1163-1164.)

was concerned that appellant would or could sell the company's assets and abscond with the money without divided it fairly with Pam. (6 RT 1175-1176.) Herring convinced the divorce court to appoint a receiver, Lindsay Nielsen, who was put in nominal control of Goldfinger's assets to prevent them from being moved. (6 RT 1176-1178.) In May 2008, Herring also became aware of the federal subpoena for Goldfinger's records. (6 RT 1164-1165.)

Eventually, Herring moved in the divorce court for Pam to be compensated in the amount of approximately $1 million, including both prospective support in the amount of $66,000 per month as well as retroactive spousal and child support and sanctions on appellant for obstructing the divorce. Herring also asked the court to join Goldfinger itself in the divorce case so that Herring would no longer have to deal with appellant to make Pam's claims against the assets of the company. (6 RT 1178-1180, 1189.) Appellant's attorneys responded that appellant had retained his own accountants who could prove that he made much less in profits than Herring believed. (6 RT 1189-1190.) In response, the divorce court set a "big, giant hearing" for July 29 to address all of Herring's arguments. Appellant had hired attorneys of the "highest caliber" to defend himself from these claims, but Herring and his associates were tenacious. (6 RT 1182-1183.) The divorce litigation had reached a "fever pitch" in the week or two before the key hearing. (6 RT 1183.)

In the meantime, attorneys representing both appellant and Pam had contacted Aveis regarding the criminal investigation. (7 RT 1225-1226.) Pam had retained attorney David Willingham as her criminal defense counsel. Willingham contacted Aveis on Pam's behalf in late June 2008. (7 RT 1269, 1228, 1300, 1232-1233.) Willingham was a white-collar criminal defense attorney who had previously worked in the same office as Aveis as an Assistant United States Attorney. (7 RT 1267-1268.) Herring

told Willingham about the federal subpoena served on Pyne Waltrip. (7 RT 1301.) Willingham then advised Pam that the subpoena could mean that she, appellant, and Goldfinger were all under federal investigation. However, Willingham was not aware of the sealed indictment at that time, nor did Pam mention to him that she knew of any indictment. (7 RT 1249, 1279-1280, 1301, 1303.)

In early June 2008, Pam and Willingham discussed the possibility that she could be a witness for the government in the federal prosecution of Goldfinger and appellant. (7 RT 1278.) Willingham told Pam that she had three options. First, she could opt not to cooperate and present a joint defense with appellant in the event of any prosecution against them both. Second, she could approach Aveis and, to the extent she was being viewed more as a witness than a defendant, she could agree to cooperate with the prosecution. Third, she could do nothing and/or assert privilege over the documents that Aveis was attempting to subpoena from Pyne Waltrip. (7 RT 1281.) Pam chose to have Willingham call Aveis, determine what her status was in the investigation, and possibly position herself as a witness for the prosecution. (7 RT 1281-1282.)

Willingham then contacted Aveis and inquired about the federal investigation and the extent to which Pam was a suspect. Aveis said that he could not discuss the details. (7 RT 1283.) Willingham told Aveis that Pam wanted to speak with him regarding the investigation and that it was Willingham's view that Pam should be treated as a witness. Aveis said, "Great," and made plans for him and a Federal Bureau of Investigation investigator to speak to Pam. (7 RT 1234-1235, 1251, 1283.) There was no firm "contract" for Pam to testify for the prosecution, but Willingham understood that there would be further discussions to that effect. (7 RT 1284-1285.) It was both Willingham's and Pam's hope that she would not be prosecuted. (7 RT 1268-1287.) However, while Aveis recalled that

Willingham explicitly said, "My client, Pam Fayed, wants to come in," Willingham's recollection was that he did not firmly commit Pam to cooperate with federal authorities, and would not have done so unless Aveis agreed that Pam would not be viewed as a target of the investigation. (7 RT 1290-1293, 1298-1299.) However, Willingham testified that Aveis would not divulge who was being viewed as a target of the investigation in their phone call. (7 RT 1293-1294.)

While Aveis was reviewing his files in preparation to meet with Pam, he realized that Willingham had a conflict of interest that barred him from representing Pam due to his prior actions as a federal prosecutor. Aveis informed Willingham of the conflict and Willingham agreed to withdraw. (7 RT 1251-1253, 1285, 1296-1297.) For that reason, Pam retained a different attorney, Jean Nelson, in June 2008. (7 RT 1376.) Willingham and Pam brought Nelson up to speed regarding the federal investigation of Goldfinger and Pam's possible involvement. (7 RT 1376-1377.) In mid-July, Nelson contacted Aveis on Pam's behalf. (7 RT 1253-1254, 1285-1286, 1298.) Nelson told Aveis that she would need more time to prepare her representation of Pam, and Aveis told her to take whatever time she needed. Aveis never personally spoke to Pam and reached no formal agreement with Nelson for Pam to cooperate with the authorities. (7 RT 1254-1255, 7 RT 1258-1259, 1278.) However, as Willingham had previously done, Nelson discussed with Pam the basic options of how to proceed, which included doing nothing, approaching the government to ascertain her status in the investigation, and fully cooperating. (7 RT 1387-1388.)

At approximately this time in the summer of 2008, several events occurred that would become relevant to the murder investigation. Appellant's ranch assistant Joey Moya had a niece, Melissa, who had a child with a man named Gabriel Marquez. (9 RT 1798.) On May 29,

Marquez's cellular phone contacted Moya's phone several times in the afternoon and evening. (9 RT 1784.) There were additional contacts between these two phones on June 1, June 4, June 5, June 7, June 14, June 15, and June 16. (9 RT 1785.) Furthermore, on June 21, Oxnard Police Department Officer Tenille Chacon detained Marquez and a younger man, Steven Simmons, in a residential area of Oxnard on suspicion of graffiti. The area was frequented by the local Lomo gang. Officer Chacon was given information by other officers indicating that both Marquez and Simmons were members of that gang. (9 RT 1706, 1709-1710.) Marquez had a tattoo of a skull on the right side of his neck. (9 RT 1710.) Then, on July 4, Pam's friend Marty McCoy and Pam went to a party together at the home of a woman named Maralice Courdner. (9 RT 1767-1768.) The party began at approximately noon, and Pam and McCoy left it at approximately 9:00 p.m. that night, when she drove him back to his vehicle, which was parked at Pam's house. (9 RT 1769-1770.) Finally, at some point during Urrea's employment with Goldfinger, Moya had told her that appellant needed to rent a car for his nephew Robert Tokarcik to use. Urrea had arranged for the rental of a red Suzuki SUV for that purpose. (6 RT 1112-1113, 1116.) From July 3 to July 19, Tokarcik used the SUV, at which point he purchased his own car and used it instead. (9 RT 1798.) Several days after July 19, Urrea saw Moya driving the SUV. (6 RT 1114-1115, 1119.)

Approximately one week before the pivotal divorce hearing on July 29, appellant's litigation team went silent without any explanation. They missed a major filing deadline with the court, which Herring found extremely unusual given the expertise of the attorneys appellant had hired. Herring was particularly concerned about this situation because he felt confident that various issues in the litigation would be resolved in Pam's favor as a result of that hearing. (6 RT 1183-1184, 1193-1195.) Herring

called appellant's lead attorney, John Foley, but could not get a clear answer as to what was going on. (6 RT 1192.) On July 25, Herring received a letter from Foley stating that appellant had decided to liquidate Goldfinger and its assets. Herring believed this was yet another ploy to hide appellant's assets from Pam. However, in Herring's opinion, this alone would not have stopped the July 29 hearing from proceeding. (6 RT 1196-1198, 1202.)

On July 27, Moya's cellular phone transmitted two text messages to appellant's Blackberry at 12:56 a.m., as well as additional messages at 3:51, 4:00, 4:01, 4:03, and 4:04 a.m.[9] (9 RT 1740-1741.)

**2. Pam's Murder**

On July 28, at 9:51 a.m., Moya's cellular phone was located in Oxnard.[10] (9 RT 1727-1728.) In the meantime that day, appellant and his criminal defense attorneys Gary Linceberg and John Rubiner met with Pam and her criminal defense attorney, Nelson, in Century City. (7 RT 1257, 1378-1379.) At approximately noon that day, Simmons' cellular phone was located in Century City. (9 RT 1789-1790.) Two calls, at 12:03 and 12:04 p.m., respectively, were made between Simmons' phone and Marquez's phone. (9 RT 1792.) At 2:58 p.m., Moya's phone received a call from appellant's flip-phone. By then, Moya's phone was located in West Los Angeles. Three minutes later, Moya's phone called appellant's flip-phone back. (9 RT 1728-1729.) Appellant's flip-phone was located in

---

[9] Generally, AT&T records indicated that Moya's phone and appellant's phones communicated often, and at various times of day and night. (9 RT 1762.)

[10] The evidence that a cellular phone was located in a particular neighborhood was based on testimony by cellular phone company witnesses that the phone in question electronically communicated with a cellular phone site (colloquially, a "cell tower") located in that area and operated by that phone's service provider.

Century City during these calls. (9 RT 1744-1745.) At 3:53 p.m., Moya's phone, which was by then located in Century City, called its own voicemail. (9 RT 1729-1731.) At 5:39 p.m., Moya's phone transmitted a text message to appellant's Blackberry and received a text message from the Blackberry at 5:40 p.m. Moya's phone then transmitted two more messages at 5:47 and 5:51 p.m., respectively, to the Blackberry. (9 RT 1741, 1744.) Simmons' phone was in Century City at 3:07, 5:30, and 5:42 p.m. that day. (9 RT 1791-1792.) At 6:00 p.m., Moya's phone, which was still in Century City, received an incoming call from Mercedes' phone (9 RT 1731-1732), which was in Moorpark (9 RT 1748). (9 RT 1731-1732.)

The meeting between appellant's and Pam's attorneys ended at 6:00 or 6:30 p.m. (7 RT 1379.) After the meeting, Nelson left to find her car in the parking structure. It took her several minutes to do so, and during the time that she was standing at street level, she heard a high-pitched sound similar to screaming. The sound continued for about one minute. Nelson looked across the street and saw a woman pointing at a parking structure emphatically. (7 RT 1381-1383.) Nelson then found the elevator she needed and entered it. A bystander told her not to do so because a person had been stabbed somewhere in the structure, but Nelson "didn't quite process what the person said." (7 RT 1383.) Nelson then got in her car and left the area. (7 RT 1384.) One of appellant's attorneys called Nelson's cellular phone while she was driving and informed her that a woman in her forties fitting Nelson's description had just been stabbed. Nelson obviously was safe, but she suspected that Pam might have been the victim. (7 RT 1384-1385.)

Matthew Grode was an attorney who worked in an office building in Century City. (8 RT 1406.) He was in his office at approximately 6:30 p.m. on July 28. It was quiet because most of the other employees had gone home. (8 RT 1413.) Then, Grode heard loud, piercing screams in a

woman's voice coming from outside his window. He looked out the window to the parking structure that was across the street. (8 RT 1414-1415.) From his 12th floor vantage point, he saw a woman leaning over a handrail on the third floor of that parking structure with her hands outstretched in front of her, screaming "help" repeatedly. There was another person behind her. (8 RT 1416-1418, 1421, 1425.) Grode could hear the woman's screams clearly despite the distance between her and the glass window. (8 RT 1425-1426.) Grode saw people on the street below looking up at the woman, but the person behind her had pulled her back from the railing, so she was not in the bystanders' line of sight. The person behind the woman was attacking her with numerous downward punching motions from behind while she was flailing and screaming. The other person was also pulling the woman back away from the railing. (8 RT 1418-1419, 1423-1424.) Grode saw blood spattered "everywhere on the railing" but he did not actually see a knife. (8 RT 1419-1420.) Eventually, the woman was pulled back into the darkness of the garage where Grode could not see her. However, Grode and a secretary (who also witnessed the scene from the same window) noticed blood on the ground where the woman had been. (8 RT 1423-1424.) The screaming stopped after the woman was pulled away. (8 RT 1426.) Shortly thereafter, Grode saw paramedics arrive at the structure and wheel a covered body out of the area on a stretcher. (8 RT 1427.)

At 5:30 p.m. that same day, Edwin Rivera was in his car on the third floor of the parking structure in question. He had a habit of waiting in his car and listening to the radio after leaving work in order to avoid rush hour. (8 RT 1510-1511.) When Rivera exited the stairwell on the third floor of the structure, he noticed an SUV that he had never seen before parked in the best spot on that floor, near the exits. Somebody was sitting in the driver's seat wearing a black sweater, which Rivera found unusual because it was

almost 90 degrees that day. (8 RT 1511-1513.) Rivera walked to his car, entered it, and rested for a time. Approximately 45 minutes later, at 6:30 p.m., Rivera was preparing to start his commute when he heard screaming. (8 RT 1515-1516.) Rivera exited his car and yelled "What the 'F' is going on?" The screaming briefly stopped, but then Rivera noticed more screaming from a woman across the street who was pointing directly where Rivera was standing. This made Rivera think that something had happened very close to him. (8 RT 1516-1517.) Then, Rivera saw a man jump out from between two parked SUVs, heading for toward another SUV that was waiting for him. The man was wearing a black hooded sweatshirt and jeans, and he was tall and skinny. (8 RT 1520-1521.) The third SUV was the same red vehicle that Rivera had first seen when he arrived at the third floor of the structure at 5:30 p.m. The red SUV was moving when the man in the sweatshirt hopped in. The vehicle then drove away heading the wrong direction down a one-way lane. (8 RT 1517-1519, 1521, 1528.) Rivera assumed there had been a robbery. (8 RT 1520-1521.) Rivera chased the SUV a brief distance and yelled to another bystander to note its license plate number. (8 RT 1521.)

Rivera then walked to the area where the man had run from. (8 RT 1521-1522.) He saw Pam covered in blood in a crouching position. She stood up and walked toward him with her arms outstretched. Rivera turned around and told other bystanders to call an ambulance and the police. He then attempted to console Pam by telling her that she would be alright and that he would help her. (8 RT 1522-1523.) Pam sat down or collapsed and said to Rivera, "Please help me. Don't let me die." (8 RT 1523.) Rivera got very close to Pam and noticed she was having difficulty breathing. Because Pam was covered in blood, the only cut Rivera was able to clearly distinguish was the one to her left eye area. (8 RT 1524.) Rivera turned around again to demand that the other bystanders hurry to get help, and

when he faced Pam again, she was lying flat on her back. Pam was having difficulty breathing and making gurgling noises. Rivera saw her take one final breath. (8 RT 1524-1525.) At that point, Rivera finally noticed Pam's throat, which had been completely cut away. Rivera "lost it" at the sight of that injury and began screaming for help. Other bystanders then began to assist him with Pam. When paramedics arrived, Rivera asked them if Pam was going to survive. A paramedic informed him that Pam had no pulse. (8 RT 1525-1526.)

At 7:19 p.m. that day, Simmons' phone was in the proximity of 1470 East 4th Street and 1701 East Cesar E. Chavez Avenue in Boyle Heights. (9 RT 1792.) Moya's phone sent text messages to appellant's flip phone at 8:43, 9:05, 9:09, and 9:12 p.m. that night, and at 1:35 a.m. to appellant's Blackberry.[11] (9 RT 1741-1742.) That same night, Mercedes' phone called Moya's phone at 10:25 p.m. (9 RT 1748-1749.) However, during the week of July 21 to July 28, there had been no text messages from Mercedes' phone to Moya's phone and only one push-to-talk communication with a zero-minute duration. (9 RT 1747, 1749-1750.) On July 30, AT&T records indicated that Moya's cellular phone was reported lost or stolen. (9 RT 1717.)

Dr. Stephen Scholtz was the forensic pathologist who performed the autopsy on Pam. (8 RT 1533.) Pam's injuries included a knife wound to the right side of her lower neck which was approximately three inches long and one inch deep. This wound severed an artery and would have led to fatal blood loss. It was consistent with an assailant drawing a knife across Pam's throat from behind her. (8 RT 1538-1543.) Pam had another knife

---

[11] The parties stipulated to the content of several emails retrieved from appellant's Blackberry, introduced to the jury as People's Exhibits 134 and 135. No testimony was taken as to those emails. (9 RT 1796-1797.)

wound to her jaw which was not fatal, but which was also consistent with being attacked from behind. (8 RT 1543-1546.) Pam also suffered a third knife wound to the area of her right jaw which cut to the bone and was rapidly life-threatening. This wound was consistent with an assailant attempting to cut Pam's throat, and Pam lowering her head and jaw to protect herself. (8 RT 1549-1550.) Pam had a non-fatal knife injury to her left eye, the bridge of her nose, and he surrounding area. (8 RT 1550-1552.) In addition, Pam had shallow, non-fatal knife wounds to the skin on the back of her neck. (8 RT 1552-1553.) Pam had a non-fatal knife wound to the chest at the upper part of her breastbone. (8 RT 1554-1556.) Pam also suffered from defensive wounds to her right wrist, left forearm, and left hand. One of these defensive injuries was an incision so deep that the knife actually pierced her through her arm completely and caused an exit wound on the opposite side. (8 RT 1556-1562.) Based on these injuries, Dr. Scholtz opined that Pam put up a fight during the course of her death, and that the cause of death was sharp force injury. (8 RT 1565-1566.) The fatal cut to Pam's neck would have caused unconsciousness and death within several minutes. Until that time, she would likely have been awake and able to feel pain. (8 RT 1566-1567.)

### 3. The Investigation Into Pam's Murder

At 10:00 or 11:00 a.m. on July 28, Sanchez saw a limousine pick appellant up at the ranch to take him to the legal appointment in Century City. (9 RT 1641-1642.) Later that day, Sanchez was at a restaurant in Oxnard when he saw reports of the murder on television. At 11:00 p.m. that night, he received a call from Mercedes telling him to return to the ranch and open the gates. Sanchez was upset because Moya was typically responsible for the gates at night. (9 RT 1616-1617.) Sanchez drove to the ranch and waited at the gate for approximately one hour. (9 RT 1618.) Eventually, a group of lawyers arrived and he showed them through to the

house, where appellant and Mercedes were waiting. Sanchez then waited approximately four hours for the group to leave again. (9 RT 1618-1620.) In the meantime, he looked for Moya. Though Moya's truck was at the ranch, Moya was not answering the door of his residence or his cellular phone. (9 RT 1620-1621, 1643.)

On the morning of July 29, as Herring was preparing to go to the divorce hearing, a receptionist called him and informed him that Pam had been killed. Generally, once one spouse has died, there is no further obligation for other spouse to pay support in a divorce. (6 RT 1184.) Aveis was also informed on the morning of July 29 that Pam had been killed. Of course, Pam's death obviated any potential meeting with prosecutors in the federal case. (7 RT 1236-1237.) Desiree was informed of Pam's death by police shortly after midnight on July 29. Desiree had last seen Pam at noon the previous day. (6 RT 1064.)

Los Angeles Police Department Detective Eric Spear was assigned to investigate Pam's murder. (8 RT 1435-1436.) He was informed enroute to the scene that the victim had already died. (8 RT 1436.) The crime scene was secured when Detective Spear arrived, meaning there were no unauthorized people walking through it or approaching witnesses. (8 RT 1437-1438.) The crime scene was on the third floor of a parking structure adjacent to the Watt Tower in Century City. (8 RT 1439-1443.) There was a trail of blood from the railing of the parking structure on that level, leading to a pool of blood at the rear of a parked Yukon and another SUV. There was also miscellaneous bloody clothing scattered near the two vehicles. (8 RT 1443-1446, 1458-1459.) The vehicles were parked approximately 15 feet from the railing. (8 RT 1446.) Given Detective Spear's experience with crime scenes, he knew that the amount of blood in this case indicated a violent stabbing had occurred. (8 RT 1447.)

Detective Spear found a purse at the crime scene that contained money and other valuables, leading him to conclude that the murder was not part of a robbery. (8 RT 1451, 1455-1457.) Detective Spear noticed that the parking structure had video surveillance cameras on the first floor, though not on the floor with the crime scene. (8 RT 1463-1464.) Video recovered from the camera depicted Pam leaving the first floor of the structure at 3:32 p.m. and entering the Watt Tower. (8 RT 1466.) At 3:48 p.m., the video depicted a red SUV entering the structure and ascending from the first to the second floor. (8 RT 1466-1467.) The video then depicted Pam leaving the Watt Tower and re-entering the parking structure at 6:33 p.m. (8 RT 1467.) The next scene in the video depicted a number of people running in different directions in the Watt Tower courtyard indicating concern and looking in the direction of the parking structure. (8 RT 1471.) Another angle depicted the red SUV at an exit reserved for parking customers with keycards. The video depicted the individuals in the SUV attempting to activate the exit gate but failing to do so, putting the car in reverse, and then heading to another exit. (8 RT 1472.) A camera at another gate showed the individuals paying a fee at a public exit and driving out of the structure onto Century Park East. (8 RT 1472-1473.) Another camera angle depicted appellant walking through the courtyard between the Watt Tower and the parking structure. From that angle, bystanders could be seen looking up at the commotion as appellant was walking away in the opposite direction. (8 RT 1473-1474.)

Detective Spear identified the SUV as a suspect vehicle and obtained an image of its license plate number, 6CLW535, from one of the parking lot cameras. (8 RT 1479-1480.) The number matched that of a rental from Avis Rent-a-Car. The vehicle had been rented from the company's Camarillo location on June 3 by a corporate client, Goldfinger, which had a standing account with Avis. (9 RT 1690-1691, 1693-1694.) Appellant's

name was on the Goldfinger account because his American Express credit card was the payment method. (9 RT 1699.) The person who actually made the phone call to rent the SUV was a woman,[12] and the person who picked it up was a heavily tattooed man. (9 RT 1694-1695.) The SUV had been rented throughout June and then on July 3, the rental contract was renewed. (9 RT 1695-1697.) Appellant's credit card was charged for both months' rental fees for this vehicle. (9 RT 1700.) Detective Spear contacted Avis employee Alex Samayoa on July 29 about the SUV, stating that it was needed in a murder investigation. (9 RT 1697-1698.) Samayoa informed the him that the vehicle was still out but that it was due to be returned on August 3. (9 RT 1698.)

Detective Spear then went back to the parking structure and, by calculating from the video the amount of time that the suspects' SUV was in the structure, he deduced which ticket stub had been used by the suspects and obtained it. (8 RT 1481-1482.) A fingerprint found on the ticket matched Simmons. (9 RT 1797.)

Detective Spear then prepared a search warrant for appellant's Moorpark ranch residence based on the fact that the suspects' car had been rented in his name. (8 RT 1483.) Detective Spear searched the ranch on July 29, the day after Pam's murder. (8 RT 1483-1484.) Detective Spear did not find the SUV. However, he did find two safes, one in appellant's residential building and one in Moya's building. (8 RT 1486.) Detective Spear was not allowed access to the safes at that time. (8 RT 1487.)

One or two days after the murder, Moya asked Sanchez if he could help him return the red Suzuki SUV that had originally been obtained for Tokarcik to use, since Moya would need a ride back to the ranch

---

[12] Urrea testified that she made the call to Avis. (6 RT 1112-1113, 1116.)

afterwards. The SUV had been at the ranch for several months by that point. Tokarcik was its principal user, but other people, including Moya and Sanchez, had driven it as well. On the day they returned to the rental dealership, Sanchez drove in a van while Moya drove the SUV. (9 RT 1622-1625, 1640.) On the way, Sanchez filled up the van with gas while Moya took the SUV to a car wash. They did errands together in the van while the SUV was cleaned. They only discussed Pam's murder in passing and did not exchange substantive views on it. (9 RT 1626-1628.) The SUV spent two hours at the car wash. Sanchez and Moya then drove to the Avis rental dealership in Camarillo. The office was closed, so Moya dropped off the SUV's keys in a box and left it in the lot. (9 RT 1629-1630.) When Avis manager Samayoa returned to work, he was surprised to see that the SUV had been returned because he assumed (based on his discussions with police) that it had been used as a getaway vehicle and was lost for good. Samayoa was also struck by how clean and meticulously detailed the SUV was, which was extremely unusual compared to the average condition in which rental cars were returned. He immediately called the police, who came and towed it away. (9 RT 1701-1702.)

On July 30, Detective Spear was informed by Avis that the suspects' SUV had been returned sometime late the previous night, before Avis employees had arrived at work. (8 RT 1488.) Detective Spear told the employees not to touch the vehicle and ordered a Los Angeles Police Department tow truck to retrieve it. When the SUV was at the tow yard, Detective Spear examined it and determined that it had been recently cleaned and detailed. The carpets were steam cleaned and the interior surfaces were treated with sealant. (8 RT 1489.) Nevertheless, Detective Spear had the vehicle examined by a criminalist to determine if there was any remaining physical evidence of the crime, such as saliva or blood. (8 RT 1489-1490.) Despite the cleaning, the SUV did indeed have red

splotches on parts of its leather and carpet interior, as well as on a seat latch. (8 RT 1490-1491, 1494.) A subsequent DNA analysis of the red substance indicated that it was Pam's blood. (8 RT 1492; 9 RT 1797.)

The next day, July 31, Detective Spear had obtained another warrant to access the safes at the ranch, which he did on August 1. (8 RT 1487-1488, 1495-1496.) Detective Spear also found 62 pounds of gold in bar and coin form in the safe in Moya's residence on the ranch. (8 RT 1501-1502.) Detective Spear also found a wall calendar in the kitchen of appellant's residence which indicated that an Avis car rental was due to be returned by August 3. (8 RT 1499.) In appellant's bedroom drawer, Detective Spear recovered $24,980 in cash as well as a ziplock baggie containing another $36,000 in cash. He also recovered an American Express business credit card in appellant's name. (8 RT 1500-1501.)

The federal indictment against appellant was unsealed on August 1. FBI Special Agent Mark Newhouse arrested appellant on that day in connection with the federal charges, not Pam's murder. (7 RT 1237-1238, 1259-1260; 8 RT 1568-1569.) Appellant was taken to the Ventura County Main Jail for temporary holding. (8 RT 1569.) Agent Newhouse then executed another search warrant at a storage unit that had been rented by Pam on North Aviador Street in the City of Camarillo. (8 RT 1570.) There, Agent Newhouse found four boxes of documents, including printouts of various emails in a folder labeled "Jim's last emails to me." (8 RT 1571-1572.) On August 3, appellant was subsequently taken from the county jail and booked at the Men's Detention Center in Los Angeles. (8 RT 1573.)

Aveis issued a subpoena for recordings of all calls appellant made from federal custody. (7 RT 1238-1239.) It was determined that appellant made one such call to Mercedes, which was recorded. In it, appellant explained that he owed favors to other inmates and needed Mercedes to

maintain $2,000 in his account at all times. (13 CT 3484-3485.) He then stated that "[t]here's been a lot of problems that are never ever going to happen ever again." (13 CT 3486.) He told Mercedes to "just think about how . . . great everything is going to be . . . once this is all over with," and that "we're never . . . going to have all this, any problems anymore." (13 CT 3486-3487.)

FBI Special Agent Steven Eidson had specialized training in accounting and the valuation of assets recovered during investigations such as cash, credit cards, jewelry, and other items. (9 RT 1584-1585.) Agent Eidson was directed to value the assets of Goldfinger in connection with the federal investigation into the company. (9 RT 1585.) He also assisted in the execution of search warrants at Pam's home, appellant's ranch, and the business headquarters of Goldfinger, and attempted to ascertain the value of the precious metal assets in those places. (9 RT 1587-1588.) For the precious metals that were not in the form of currency, Agent Eidson calculated value based on weight. For the precious metals delineated as currency, he used their face value. (9 RT 1590-1591.) The aggregate value of all these assets was approximately $6.3 million. (9 RT 1604-1605.)

On August 26, 2008, LAPD Detective Salaam Abdul was assigned to investigate Pam's murder. At the time, appellant was in federal custody, but the three others under investigation for Pam's murder (Moya, Marquez, and Simmons) had not yet been arrested. (9 RT 1803.) Detective Abdul reviewed the cellular phone records indicating calls between Moya's phone and appellant's flip-phone on the afternoon of Pam's murder. In particular, he focused on the fact that at 3:53 and 6:00 p.m. on July 28, Moya's phone was within approximately 300 feet of the scene of Pam's murder. Detective Abdul also concluded given the cellular phone data that appellant and Moya likely spoke shortly before Pam's murder. (9 RT 1807-1808.) On September 11, Moya was arrested. (9 RT 1808-1809.) However,

Detective Abdul believed that the actual stabber was still at large. (9 RT 1810.) Detective Abdul knew from cellular records that appellant's flip-phone had sent Moya's phone various text messages, but these were no longer in appellant's phone's memory when Detective Abdul searched it. Indeed, all outgoing text messages had been deleted form appellant's phone, and Moya's phone was never recovered. (9 RT 1817-1818.)

Detective Abdul used the fingerprint obtained from the parking structure ticket to narrow the search for Simmons. (9 RT 1811.) Using Officer Chacon's field identification cards, Detective Abdul was able to link Simmons to Marquez and began to investigate him as well. (9 RT 1811-1812.) Detective Abdul determined that Simmons and Marquez were in the same gang, that Simmons was Marquez's "little homie," and that Marquez had a child with Moya's neice. (9 RT 1812, 1814.) Detective Abdul then obtained cellular phone records indicating that both Simmons and Marquez's phones were just feet from the scene of the crime on the day of the murder. Moreover, records showed that Marquez's phone was in that location at almost the exact same time that Pam died, 5:59 p.m. (9 RT 1813-1815.) Detective Abdul was able to plot Marquez's movements on July 28 from Oxnard to Century City and back. (9 RT 1815.)

On September 9, Detective Abdul received word from federal authorities that Shawn Smith, a man in custody[13] who was sharing a cell with appellant, wanted to speak to police. (9 RT 1819-1820; 10 RT 1843.) Smith met Detective Abdul and gave him information about appellant which Detective Abdul believed merited additional investigation. Smith

---

[13] Smith had prior convictions for conspiracy to distribute cocaine, possession and sale of a controlled substance, and vehicular hit and run, and also was awaiting sentencing (at the time he was in custody with appellant) for a conviction of possession with intent to sell cocaine. (10 RT 1668-1872.)

was then provided with a "wire," a recording device to wear when he was placed back in the cell with appellant. (10 RT 1843-1844, 1846.) Smith was instructed to avoid the appearance of attempting to elicit information from appellant, but rather to make general conversation and see if appellant would repeat the statements that he had made to Smith previously. (10 RT 1845.) Detective Abdul did not counsel Smith on what to say to appellant. (10 RT 1874.) The wire was then fitted inside the zipper on the crotch area of Smith's pants at 8:56 a.m. on September 10, and was retrieved from him at 3:20 p.m. that day. (10 RT 1845-1847, 1867-1868.) The surreptitiously recorded conversation was played for the jury.

In September 2008, shortly after appellant made the incriminating statements to Smith, the federal indictment against appellant was dismissed. (7 RT 1263.) Aveis did not want to interfere with the state's murder investigation by pursuing the federal money transfer licensing charges. (7 RT 1264-1265.)

#### 4. The Surreptitiously Recorded Statement

During the conversation between Smith and appellant, Smith began by disparaging Moya's poor planning and tactics in killing Pam, as compared to what a true professional killer would do. (3 CT 479, 481-483.) Smith asked appellant if he had paid Moya "a shit pile" of money to kill Pam, and appellant said, "Yeah." (3 CT 483.) Smith told appellant that Moya needed to die before the police were to find him and interrogate him about appellant. (3 CT 555-557.) Smith suggested that he could get in contact (via jail visitation) with a professional contract killer named "Tony" who would murder Moya and one other accomplice ("the culprits, driver and hitter") and burn their bodies.[14] He asked appellant to draw him a map

[14] Tony, of course, did not actually exist.

to the property where the targets would be. (3 CT 480-481, 485-487, 489, 529.) In exchange for Smith's assistance, appellant promised to hire him and pay him once they were both out of prison. (3 CT 483-484.) Smith made it appear to appellant that they would smuggle the information Tony would need to kill Moya on a small piece of paper in a medicine bottle. (3 CT 502-506, 509-518.) Appellant admitted he had paid Moya "Too much, 25," and promised to pay Tony the same for each of his killings. (3 CT 520-521.) Appellant then told Smith that "Joey drove," and that he was a "Fuckin' idiot." (3 CT 527.) At one point, after a guard walked by their cell, appellant said to Smith, "We're planning a fuckin' multiple homicide bitch. Leave us alone." (3 RT 560.)

Smith then asked appellant, "Your sister doesn't know anything about this, does she?" Appellant replied, "No, fuck no. Huh-uh." Smith asked appellant, "Why'd you get yourself in this fuckin' jam?" (3 CT 562.) Appellant said that Moya hated Pam even before the murder plot. (3 CT 563.) Appellant then further explained,

Appellant: [Moya was the] [o]nly guy I got out there. I didn't - - I haven't been in here. I hadn't met you . . . I didn't have my hands on people like - - you know . . . I always wanted them, but I couldn't . . .

. . .

I was waiting and waiting and waiting and waiting to figure something out. I wanted - - I mean, I just wanted to do it myself, but I knew I'd never fuckin' be able to get away with it. Never. You know what I mean.

Smith: Back hoe. Bury that cunt.

Appellant: Well, no way man . . . there's no way I would've been able to cover that. And you see how they're all over everything.

| | |
|---|---|
| Smith: | Well, look at what the fuck he did to you. He took the family - - |
| Appellant: | Yeah. |
| Smith: | - - wagon down - - |
| Appellant: | Yeah. |
| Smith: | - - in front of a lit fuckin' - - fuckin' intersection - |
| Appellant: | I - - |
| Smith: | - - with a camera. |
| Appellant: | It was - - yeah. |

(3 CT 564-565.)

Appellant then agreed with Smith that Moya had to be killed because "I don't want to be worrying about this every fuckin' minute of the day when I'm out there." (3 CT 567.) Appellant added, "I don't want to be thinking is this going to be the fuckin' year that . . . they make the connection?" Appellant told Smith that "there's no limitations on this bro. This is going to follow me as long as I'm alive." (3 CT 567-568.) Smith then reminded appellant that the hitman Tony would need to interrogate Moya because appellant could not provide the location or identity of the other person Moya involved in Pam's killing. (3 CT 573.) Smith said to appellant, "I can't believe that you would allow fuckin' this many people to be in on a murder." Appellant responded, "I didn't till I found out later." (3 CT 574.) Appellant said, "This is another way he fucked up. But I also have the insulation, cause [*sic*] I don't know them, and they don't know me. I never met them. I never seen them. I wouldn't recognize them." (*Id.*)

Later in the conversation, Smith told appellant, "You'd have been better off paying the bitch her money . . . I'm beginning to think it would've been cheaper to keep her." (3 CT 577.) Appellant said, "No,

cause [*sic*] she would - - no, no, no, she wouldn't be - - listen to reason dude. She wouldn't listen." (*Id.*) Appellant then told Smith that he also forged Pam's will. (3 CT 577-578.)

Smith then pushed for more specifics about Pam's killing:

| | |
|---|---|
| Smith: | Yeah, but see what you get for hiring Mexicans - - |
| Appellant: | I don't - - |
| Smith: | - - to do your job? |
| Appellant: | I didn't hire him. |
| Smith: | Yeah, you did. |
| Appellant: | Yeah. |
| Smith: | Tell me what you want. |
| Appellant: | He really fucked shit up. He sure did. |
| Smith: | Was there any malice aforethought to that, or did he just go? |
| Appellant: | It sure wasn't the way that I would've wanted things taken care. You know what I mean? |
| Smith: | Didn't you tell him how? Did he go rogue on you? |
| Appellant: | Yeah, yeah, after missing the target four times. |
| Smith: | Whoa. |
| Appellant: | You know how many clean situations I had set up for him, and they didn't follow through? |
| Smith: | They just didn't do it? |
| Appellant: | Yeah. |

Smith: Why? Chicken?

Appellant: I guess or too fucked up or something. Who knows?

Smith: How long did this go on for?

Appellant: It was about four - -

Smith: Months?

Appellant: Yeah, months, months.

Smith: No shit?

Appellant: Yeah. There was four different other occasions where I had it so it was perfectly clean.

Smith: Such as? No cameras?

Appellant: Yeah, such as walking out of a July 4th party down in Malibu at a friend's house with 100 other people.

Smith: They fuckin' could've just fuckin' don it then or - -

Appellant: Yeah, it was a rural area. I even had the time, dates, everything, location. All he had to do was sit there, wait for her to get in the car, and jack it. And everybody at the party would've said, oh, yeah, she went home. Maybe she was a little tipsy blah-blah-blah. You know what I mean? There were four different other occasions that I physically made sure that it was pre-checked and cleared with, you know - - and there's no - - no cameras, none. But they pick the day before my fuckin' court hearing at the busiest place in LA.

Smith: Under a camera - -

Appellant: Yeah.

| | |
|---|---|
| Smith: | - - with a light in your ride. |
| Appellant: | Instead - - instead of - - yeah, in my ride. |
| Smith: | Excuse me. |
| Appellant: | Can you believe that shit? |
| Smith: | Yeah, you're killing me. |
| Appellant: | When I had it set up so nobody could see. It was a rural area. It was Malibu. It's in the fuckin' canyon. |
| Smith: | I'm sorry. |
| Appellant: | But they do this. |
| Smith: | You're killing me. |
| Appellant: | That's - - the other time I had when she was over at the ranch. |
| Smith: | All by herself? |
| Appellant: | Yeah. |
| Smith: | And he was there with her? |
| Appellant: | Yeah, all they had to do was go. |
| | . . . |
| | You know what I told him when this shit went down? I said, "Fuck you. Go get my fuckin' money back." |
| Smith: | Yeah, no shit. |
| Appellant: | I said, "Fuck no. This is the fourth fuckin' time." I said, "You're not gonna go do this." I said, "Get my fuckin' money back." |

Smith: Fuck, he had $25,000 of yours for how fuckin' long?

. . .

[F]or - - for, like, three months.

(3 CT 582-584.)

Smith then told appellant," You should have known better. He's gonna use the family ride." (3 CT 587.) Appellant replied,

> Oh, god. Let me tell you I'm not shitting, dude. It wasn't the way - - that's not the way I do things. Okay? The way I even - - the way I expect things to be done. You know what I mean? Not after having all this - - not after - - you know, I'm a detail person. Man, I'm detail oriented. I don't get into all this fucking cowboy shit. If I'm anything, I'm professional at what I do, or I try to be.

(3 CT 587.)

Smith then pushed for more specifics,

Smith: Well, you're smart not to fuckin' whack your old lady, because you need to have somebody else work for you, but you need to be able to hire the right people."

Appellant: Yes.

Smith: And some Mexican that works on your fuckin' ranch who's got a whole bunch of tattoos on him is not the right guy to hire. Tony doesn't have any tattoos. He's clean. He wears a suit.

Appellant: No, I understand. I told you if I'd only had those people in my corner years ago, we could've all been filthy fuckin' rich, I mean stinky rich not just rich.

Smith: How do you figure that? What do you mean?

| | |
|---|---|
| Appellant: | Because you know how much I - - you know what I could've done for those guys, man, with the platform that I had? |
| Smith: | I don't want to hear about it. It makes me ill. |

(3 CT 588.)

Smith then told appellant that Tony would have to torture Moya until he revealed the identity of the other conspirator in Pam's murder. (3 CT 590.) Appellant said, "I think [Moya's] the driver." (3 CT 590-591.) Smith asked, "And his partner did the stabbing?" Appellant replied, "Probably . . . Or maybe he was the driver and the kid and his dad did the murder. I don't know. But there can't be anymore than that." (3 CT 591.) Smith said, "You know, this is going to be ridiculous if we start burying 30 bodies." Appellant said, "No, that's - - that's gotta be it." (*Id.*) Appellant then volunteered additional information:

| | |
|---|---|
| Appellant: | I said, "They are fuckin' trash. They fucked up four times. There ain't gonna be a fifth." And all of a sudden all this shit comes down. |
| Smith: | They fuckin' got real busy. Well, they already spent your money. |
| Appellant: | Yeah. |
| Smith: | So they fuckin' got sloppy. |
| Appellant: | I was gonna go take care of them personally - - |
| Smith: | I hear that. |
| Appellant: | - - so I can get my money back. |

| | |
|---|---|
| Smith: | Shoot them. You are gonna take care of them personally, bro. Believe me. You just took care of them personally. You have no idea. I guarantee it. They will pay for what they've done. |
| Appellant: | Motherfuckers. Stupid fuckers. |
| Smith: | Yeah, stupid fuckers. |
| Appellant: | I can't - - I can't sit around here for the rest of my life and worry about whether one of them is gonna fuckin' finally decide to fess up. You know what I mean? |

(3 CT 592.)

Appellant told Smith that he had told Moya to "forget it" shortly before Pam's murder because they had missed so many prior opportunities to kill her, and that he wanted his money back because he would take his chances in divorce court. For that reason, appellant said he was taken by surprise when Pam was killed. (3 CT 599-600, 634.) Appellant also explained the origins of his problems with Pam, saying that she had started to "believe her own lies" about how Goldfinger was engaged in misconduct. (3 CT 602.) Smith then asked appellant directly about the crime:

| | |
|---|---|
| Smith: | Let me just ask you a stupid question. |
| Appellant: | But all you gotta do is scratch the surface. |
| Smith: | If you have it to do over again, would you do it? |
| Appellant: | This way? |
| Smith: | Well, no, not this way but, you know, dump the fuckin' cunt. |
| Appellant: | Uh-huh. |

| | |
|---|---|
| Smith: | Affirmative, huh? |
| Appellant: | Uh-huh. |
| Smith: | Well, fuck it. Then you did the right thing, bro. |
| Appellant: | Absolutely. She was destroying my daughter. She never took care of her. She was poisoning me. Okay? Yeah. |

(3 CT 611-612.)

Five weeks after Smith cooperated in taping appellant's statements, Smith was released on unsecured bond and was later released early from custody. (10 RT 1873.) Whatever the reasons Smith was released, however, Detective Abdul stated that they "had nothing to do with the state crime that [appellant] was charged with." (*Ibid.*) Notwithstanding the recorded discussion between Smith and appellant, no map or writing was recovered from their cell afterwards. (10 RT 1876.)

**B. Guilt Phase: The Defense Case-in-Chief**

Patricia Taboga was appellant's sister. (10 RT 1885-1886.) From 10 years to several years prior to appellant's arrest, appellant was living in California and Taboga was in Pennsylvania. They did not communicate often, typically only on holidays. (10 RT 1889-1892.) However, after appellant married Pam, Taboga became friendly with her. (10 RT 1893-1894.) Taboga and her husband visited appellant and Pam at the Moorpark ranch in October 2006. (10 RT 1894-1895, 1899-1900.) Taboga had a wonderful time during her visit. (10 RT 1896.) After the trip, Taboga more often spoke to Pam on the phone than she did to appellant. Pam and Taboga spoke weekly or every other week. (10 RT 1898-1899.)

Taboga also spoke to her sister Mary Mercedes on the phone on various occasions during 2007, and did so somewhat more frequently than she spoke to Pam or appellant. (10 RT 1903.) Taboga knew that Mercedes

was no longer living with her husband, that her children were grown, and that Mercedes was living with and working for appellant in Southern California. (10 RT 1927-1928.) In May 2008, Taboga received an "extremely unusual" phone call from Mercedes regarding Pam. Mercedes asked Taboga whether Taboga's husband Kurt would murder Pam in exchange for $200,000. (10 RT 1903-1904.) Taboga was shocked and told Mercedes that her husband was a police officer. (10 RT 1904.) Mercedes said "the money was running out and Pam had to go." (10 RT 1905.) Taboga told Mercedes that she was out of her mind for asking such a thing and that Mercedes had "gone way over the top" by getting involved in Pam's and appellant's divorce and business. (10 RT 1905.) Mercedes responded that the divorce and attorneys' fees involved in the dispute between Pam and appellant were costing the business too much money and something had to be done. (10 RT 1906.) Taboga ended the call by telling Mercedes to leave California and "get out" of the situation between appellant and Pam. (10 RT 1907.) However, Taboga never subsequently warned Pam that Mercedes was considering a plot to murder her. (10 RT 1932-1933.) Some time later, Mercedes told Taboga that she had lost her senses momentarily, and asked Taboga not to tell Kurt or appellant about her earlier request. (10 RT 1908.)

Mercedes was the person who first told Taboga about Pam's murder. (10 RT 1908.) Mercedes did not say whether she had anything to do with Pam's death. (10 RT 1909.) Taboga had several phone conversations with Mercedes after Pam's death, including on August 19, September 1, and September 3, 2008. However, Taboga could not remember when, if ever, she confronted Mercedes about the fact that Mercedes previously had a plan to kill Pam, that Pam had in fact been murdered, and whether Mercedes had anything to do with it. (10 RT 1935-1938.) Taboga also did not volunteer any information about Mercedes' possible involvement in Pam's death

when appellant was arrested. (10 RT 1939.) She also did not raise such concerns when Mercedes began taking care of Jeanette after appellant was taken into custody. (10 RT 1945.) Mercedes told Taboga to contact her, rather than appellant's attorneys, if Taboga had any issues with the case. (10 RT 1948-1949.)

In December 2009, Mercedes again asked Taboga not to mention anything about the fact that she had sought to arrange for Pam's murder. (10 RT 1910.) Taboga asked Mercedes if appellant knew about her phone call attempting to solicit Kurt to murder Pam. Mercedes said no. (10 RT 1946.) Mercedes visited Taboga in Wyoming at around that same time. During the visit, they had a dispute and stopped talking to each other. (10 RT 1911-1912.) By the time of trial, Taboga was no longer aware of Mercedes' whereabouts. (10 RT 1929.)

When Taboga learned that appellant was being prosecuted for arranging Pam's murder, Taboga contacted appellant's counsel, saying that she had some information to share (i.e., Mercedes plan to kill Pam) but not specifying what it was. Counsel responded that the defense's point of contact with appellant's family was Mercedes, and Taboga should speak to her. (10 RT 1910-1912.) Taboga did not attempt to contact counsel again until about one month before trial. (10 RT 1911, 1941-1943.) At that time, Taboga got a call from one of defense counsel's employees, Holly Jackson, who interviewed her in preparation for this case. (10 RT 1912-1913.) Jackson told Taboga that she was a "mitigation specialist" whose job it was to assist the defense in the penalty phase of the trial, assuming appellant was convicted and would be facing the death penalty. (10 RT 1920.) Jackson informed Taboga about the "very incriminating" recording that Smith made. (10 RT 1922.) Taboga then provided Jackson with a letter that was intended for appellant which explained Mercedes' plan to kill Pam. (10 RT 1913.) Defense counsel read the letter and contacted Taboga

about it approximately six weeks before trial. Taboga then agreed to become a witness for the defense. (10 RT 1915-1916, 1949.) Counsel told Taboga he would relay the information (presumably about Mercedes' plan) in the letter to the authorities, but nobody ever contacted Taboga about it again until trial. (10 RT 1949.)

### C. Guilt Phase: The People's Rebuttal Case

On March 30, 2011, Detective Abul, Deputy District Attorney Alan Jackson (one of the trial prosecutors in the instant case), and Mercedes had a conference call. (10 RT 2041-2042.) In it, Mercedes denied that she asked Taboga to arrange for Pam's murder. (10 RT 1995.) Moreover, in the five phone conversations between Taboga and Mercedes that were recorded by police in August and September 2008, neither of them made any reference to Mercedes having ever solicited Pam's murder. (10 RT 2044-2046.)

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

Dawn Opoulos was Pam's sister. (12 RT 2460.) Pam was the youngest of four siblings. Her parents were deceased by the time of trial. (12 RT 2461-2462.) Opoulos and Pam had a close relationship when Pam's daughter Desiree was a young girl, and they visited each other. (12 RT 2475.) However, they became distant in the subsequent years. Opoulos attempted to reconcile with Pam after their father's death in 2004, but did not complete that process. Opoulos deeply regretted not having done so before Pam was murdered. (12 RT 2476-2477.) Pam's friend Carol Neve was the one who informed Opoulos that Pam had died. The news felt surreal. Opoulos was able to find out from Internet research that Pam had died of a brutal stabbing. She had trouble sleeping and saw a doctor for that issue. (12 RT 2477-2479.) At the time of trial, Opoulos remained distraught and emotional regarding Pam's death, which put a strain on her

family. (12 RT 2480-2481.) Opoulos also was angry and sad that Pam's children would have to grow up without Pam. (12 RT 2481.) Opoulos found the testimony of Edwin Rivera about Pam's final moments particularly distressing, and she cried every night since hearing that evidence. (12 RT 2483.)

Christina Holland met Pam when Pam's daughter Jeanette and Holland's son Cayden were in first grade together. (12 RT 2488.) They became close friends. (12 RT 2489.) Pam offered to help Holland obtain treatment when Holland was diagnosed with leukemia and even requested a test to determine whether she could be Holland's bone marrow donor. (12 RT 2490.) Holland knew Pam to be a good, devoted mother. (*Id.*) Pam often bought expensive gifts for Jeanette as well as Holland's two sons. (12 RT 2492-2494.) Jeanette and one of Holland's sons had the same rare skin condition, and Pam promised to take Holland to consult medical experts who could help the children. (12 RT 2494-2495.) The last time Holland saw Pam was the week before her death, when she and Holland were planning a trip to Big Bear. (12 RT 2496.) In order to hear Pam's voice after her death, Holland sometimes replayed a voicemail Pam had once left for her. (12 RT 2497.) Holland remained close to Jeanette because she loved her and that is what Pam would have wanted. (12 RT 2499.) Pam was miserable and sad during the last six months of her life. (12 RT 2496-2497.) Holland missed her terribly and was distraught that she could not help Pam when she needed it. (12 RT 2498, 2500.)

Scott Goudie was Pam's brother. (12 RT 2503.) He thought about Pam every day since her murder. (12 RT 2505.) Pam was a good aunt to Scott's oldest son. (12 RT 2510.) Pam was also a loving and protective mother to Desiree. (12 RT 2511.) The last time Scott saw Pam alive was in early March 2008, when they went to the beach with Pam's daughters. (12 RT 2512.) Scott heard from Dawn that Pam had been killed. He could

not believe it was true at first. (12 RT 2514.) Scott felt terrible and guilty because Pam had come to him for help before she died, and he had simply told her to be careful. (12 RT 2515-2516.) Scott still felt guilty at the time of trial. (12 RT 2516.) Scott was taken with thoughts of revenge. (12 RT 2516.) Pam's funeral was difficult to arrange due to the media attention surrounding her death. It was also difficult for the mortician to repair the physical damage to Pam's body such that they could have an open casket and Pam's daughters could see her one last time. (12 RT 2517-2518.) In the end, the open casket was possible for only a brief time, since the repairs to Pam's body would not last long. Pam had a scarf around her neck to hide the injuries. (12 RT 2518-2519.) Scott saw Jeanette, then age eight, put a stuffed animal in Pam's casket, which was very hard to watch. (12 RT 2519.)

Scott began caring for Jeanette after Pam's death and appellant's arrest, and planned to raise her as his own daughter. He was happy to have her, but found that taking care of a young child placed a burden on his family. Scott's biological children were grown and he and his wife had been looking forward to the next stage of their lives before they took responsibility for Jeanette. (12 RT 2520.) The trial had a scarring effect on Scott, and he would never be able to forget the things he saw. (12 RT 2522.) He also thought about Pam's death every day, every time he drove into a parking structure, and every time Jeanette mentioned appellant. (12 RT 2523-2524.) Scott regretted losing the chance the say goodbye to Pam. (12 RT 2525.)

Shelbi Hamilton was a friend of Pam's. (12 RT 2527-2528.) Hamilton knew Pam to be a wonderful mother who cared for and comforted Jeanette. (12 RT 2529.) Pam helped Jeanette through her problems fitting in with other children at school, and helped increase Jeanette's confidence. (12 RT 2529-2531.) Pam was an attentive mother who was deeply

involved in Jeanette's schoolwork and extracurricular activities. (12 RT 2531-2532.) Pam was generous with her time and money. (12 RT 2533.) Hamilton herself had a difficult time asking for help and making friends, but Pam knew how to help her when Hamilton needed it, especially during Hamilton's divorce. (12 RT 2534.) Pam taught Hamilton the value of caring for a friend in need. (12 RT 2536.) For that reason, Pam's death brought an emptiness to Hamilton's life. Hamilton went through a phase during which she could not stop crying about the murder. (12 RT 2537.) Since Pam's death, Hamilton had not made new friends or gone on a date. She shut off her emotions because she felt that she could not trust anyone. (12 RT 2538-2539.) Hamilton also struggled with paranoia due to the murder, and became overly sensitive about her children's safety. (12 RT 2540.)

Greta Vaught was Pam's sister. (12 RT 2546.) Vaught found Pam to be very extroverted, which was a quality Vaught admired. (12 RT 2549.) After Vaught and Pam's mother died in 1992, they saw each other approximately once each year. (12 RT 2551.) Pam was an affectionate aunt to Vaught's two daughters. (12 RT 2551.) Listening to the evidence at trial was difficult for Vaught because she did not want to think of Pam dying violently. (12 RT 2552.) Viewing Pam at her funeral, with the scarf covering her neck, was very difficult. (12 RT 2554.) Pam's death increased the level of fear in Vaught's everyday life. (12 RT 2555.) Vaught regretted not telling Pam how much she appreciated her before she died. (12 RT 2555-2556.)

Renee Goudie was Pam's sister-in-law, who was married to Pam's brother Scott. (13 RT 2586-2587.) Pam was a wonderful aunt to Renee's children and was a loving and caring mother to her own children as well. (13 RT 2588-2589.) Pam had a great sense of humor and was always available to help her family when they needed it. (13 RT 2590-2591.) For

example, when Scott's mother had cancer, Pam took care of her. (13 RT 2592.) Renee and Scott took legal custody of Jeanette after Pam was murdered and appellant was arrested. (13 RT 2593.) The day Scott told Renee that Pam had been killed was one of the worst days in Renee's life. She screamed in disbelief when she heard the news. (13 RT 2593-2594.) The trial was heart-wrenching for Renee to attend. (13 RT 2595-2596.) Renee found it difficult to be strong for her husband, her children, and Jeanette while managing her own grief and emotions at the same time. (13 RT 2596.)

Desiree testified that Pam was a single mother when Desiree was five and six years old, between the time that Pam left Desiree's father but before she met appellant. (13 RT 2599.) Desiree hated being away from Pam when she was a little girl. They were "best friends." (13 RT 2600.) Pam was attentive to special occasions such as holidays and Desiree's birthdays. (13 RT 2600-2601.) Not having Pam in her life made Desiree feel empty and lonely. (13 RT 2602.) Since Pam's death, Desiree had trouble feeling excited about life and lost her sense of direction, and she believed that this feeling would persist for some time. (13 RT 2602.) Pam had been very attentive to Desiree and active in her life. (13 RT 2604.) Pam allowed Desiree a great deal of freedom, but would discipline her when necessary. (13 RT 2606.) Pam had a loud, infectious laugh that Desiree missed greatly. (13 RT 2606-2607.) Pam was generous and often gave financial help to those in need. (13 RT 2607-2609.) Pam and Desiree became closer as Desiree entered her later teenage years. Pam was interested in Desiree's life and style and friends. (13 RT 2609-2610.) By the time Desiree was 18, she considered Pam as much a friend as her mother. (13 RT 2610-2611.) Desiree had plans to go into business with Pam, potentially opening a clothing boutique. Those plans obviously all disappeared when Pam died. (13 RT 2613.) Desiree also found it difficult to comfort Jeanette while

Desiree was feeling her own grief about Pam's death. (13 RT 2611-2612.) Desiree recalled that Pam and Jeanette were very close and did everything together. (13 RT 2612.)

Desiree was informed of Pam's death while she was at the movies. The police then met Desiree at a friend's house. Desiree was in shock when she heard the news. (13 RT 2614-2615.) She called appellant, but he never called back. (13 RT 2616.) Desiree was set to begin college several weeks after Pam was killed, with appellant in custody and Jeanette having been taken away to live elsewhere. It was a very difficult situation for Desiree. (13 RT 2616-2616.) At the funeral, Pam's body did not look familiar because she was caked in makeup and her neck was covered in a scarf. That bothered Jeanette. (13 RT 2618-2619.) Desiree also became distraught when she learned during appellant's trial that Pam was conscious and begging in her final moments of life. (13 RT 2620-2621.)

Desiree read aloud a letter from Pam to Desiree and Jeanette which was written on July 7, 2006, as part of Pam's will:

> Oh, my dear sweet baby girls. Please hear me and know that I am with you. You are the fruit of my labor in this life, and I am so proud of you both. Listen for my voice to guide you. I want so much to hold you in my arms and kiss your sweet faces for all eternity. Please keep my family together. When [*sic*] gentle love and understanding. You are all that exists for me now. Never abandon. Family is truly the only thing that is important. Protect each other at all costs. Love you with all my being. Momma.

(13 RT 2622-2623.)

When Desiree was a small child, appellant was nice to her and acted like a father figure. (13 RT 2624-2625.) However, Desiree recalled that appellant and Pam had many fights in which they would threaten each other with a divorce. (13 RT 2626-2627.) Desiree could go to appellant as a teenager during the times that she was not getting along with Pam. (13 RT

2628.) However, when Desiree was approximately 16, during the last several years of appellant's and Pam's marriage, appellant spend a great deal of time in his bedroom in a stupor due to his use of prescription drugs such as morphine. (13 RT 2629-2630.) Appellant appeared unhappy and depressed around that time. (13 RT 2633.) Appellant loved Jeanette but did not appear willing to help Pam take care of her. Appellant would accuse Pam of being a bad mother when she left Jeanette in his care. (13 RT 2635.) Then, when Desiree was 18, she met her biological father, and appellant began accusing Pam of having an affair with him. Appellant moved out of the house shortly thereafter. (13 RT 2632-2633.)

**E. Penalty Phase: The Defense Case-in-Chief**

James Sadler was appellant's friend in high school. (13 RT 2643-2644.) Appellant was not socially adept at dealing with large crowds, but was a good friend to people he knew well. (13 RT 2651-2652.) Appellant would avoid interpersonal conflict and tended to hold his emotions inside rather than expressing them. (13 RT 2652-2653.) By the time of trial, Sadler had not had contact with appellant in approximately 20 years. (13 RT 2655.) Sadler did not know whether appellant's character changed over the 20 years since they lost regular contact. Sadler never met Pam or appellant's children and had never been to either of appellant's homes. (13 RT 2658-2660.)

James Tyler knew appellant from the time that he worked at the El Toro United States Marine Corps Air Station in the 1990s. (13 RT 2664.) Tyler was a highly decorated Marine Corps Vietnam veteran and, later, a police officer and plumber. (13 RT 2664-2665.) Tyler found appellant to be a quiet, non-aggressive, mellow, and intelligent person. (13 RT 2668, 2672.) Once, appellant helped solve a theft at the base. (13 RT 2668-2669.) Tyler lost contact with appellant in approximately 1997 and had no

knowledge of any changes to appellant's character in the years since then. (13 RT 2671-2672, 2674-2675.)

Melanie Jackman was one of appellant's best friends. (13 RT 2678.) She met appellant in high school and knew him to be a kind and gentle person. (13 RT 2679.) Jackman, her husband Jerry, and appellant enjoyed riding motorcycles together. (13 RT 2682.) Jerry built a motorcycle for appellant but was unable to deliver it because appellant had been arrested by that time. (13 RT 2685.) Jackman knew appellant to be a quiet person who did not like to be the center of attention. (13 RT 2691.) She believed appellant was a stable, good person. (13 RT 2693-2694.) After appellant and Pam got married, appellant no longer saw Jackman in person, though they continued to talk over the phone. (13 RT 2694.) Jackman did not recall appellant ever saying anything negative about Pam. (13 RT 2695.) However, during the divorce, appellant sent Jackman emails accusing Pam of being a "sociopathic-lying-money-grubbing whore," a "Super-Bitch," and regretting that he "let [Pam] get away with this shit for years." (13 RT 2705-2706.) On one occasion, after appellant moved out of the house he had lived in with Pam, he spoke to Jackman on the phone. He sounded groggy and depressed, and had slurred speech. (13 RT 2699.) Jackman believed appellant might be suicidal at that time. (13 RT 2700.) Jackman had not actually seen appellant in person, however, for 16 years prior to trial. (13 RT 2703.)

## ARGUMENT

### I. APPELLANT'S SURREPTITIOUSLY RECORDED STATEMENTS WERE ADMISSIBLE

Appellant argues that the admission of Smith's surreptitiously recorded statement was improper for a host of reasons. He claims its admission violated his Sixth Amendment right to counsel (AOB 67-78), his Fifth Amendment right to counsel and his privilege against self-

incrimination (78-82), his Fourth Amendment right to be free from unreasonable seizure (AOB 82-86), his rights under the Confrontation Clause (AOB 88-93), as well as his due process rights and the protections of Evidence Code sections 352 and 1101 (AOB 93-109). All of these arguments fail.

**A. Procedural History**

Appellant was indicted on federal charges on February 26, 2008, five months before Pam's murder. Initially, the indictment was sealed. (2 CT 237.) On August 1, several days after Pam's murder, the indictment was unsealed and appellant was arrested pursuant to it. (7 RT 1237-1238, 1259-1260; 8 RT 1568-1569.) On August 4, appellant was arraigned before a federal magistrate. The prosecutor set forth various facts in support of detaining appellant without bail. These facts were in regards to Pam's murder, not the federal charges, and were presented via an FBI agent affiant who outlined the LAPD's evidence against appellant. For example, he noted that Pam was murdered as she was leaving a legal meeting with appellant, that the murder suspects' rental car was paid for by appellant's credit card, that appellant had previously threatened Pam's life in the context of their divorce proceedings, and that millions of dollars in gold and various firearms had been found during a search of appellant's ranch. (2 CT 338-340, 350.) The prosecutor then argued that appellant ought to remain in detention because he had a motive to kill Pam, due at least in part to the ongoing FBI investigation into Goldfinger. (2 CT 368-369.) Defense counsel countered that because Pam was killed before appellant knew about the existence of the sealed federal indictment, her murder could not have been related to the federal charges. Thus, defense counsel concluded, Pam's murder should not be considered in any decisions made in the federal case, such as whether appellant should remain in custody or be allowed bail. (2 CT 376.)

Because the charged offense was not enumerated under the federal bail statutes as one in which defendants may be denied bail on the basis of public safety, the court narrowed its bail ruling to the question of whether appellant was a flight risk. (2 CT 379.) Defense counsel argued that if the government believed appellant was a flight risk, he would have been arrested shortly after he was indicted in February, and that appellant would not flee if freed on bail because he had extensive business, family, and medical ties to the local area. (2 CT 378, 380-384.) The prosecutor argued that bail should be denied based on the fact that appellant was the prime suspect in Pam's murder, regardless of the federal money transfer allegations. (2 CT 387-388.) The prosecutor argued that the court's analysis of whether bail should be granted must include the risk that appellant would flee in advance of the forthcoming state murder charges. (2 CT 388-389.)

The court recognized that appellant was the prime suspect in Pam's murder, and that this fact carried weight in the bail analysis, but concluded that it was not enough to deny bail given the restrictions the court could place on his movements. (2 CT 390A.) The court then set bail at $500,000 and mandated house arrest, but stayed its ruling pending appeal by the People. (2 CT 392-393, 398.)

On August 6, a United States federal district court judge heard the People's appeal. (2 CT 405.) In its preliminary statements, the district court disagreed with the magistrate's decision to permit bail, noting that there did appear to be a strong link between the murder and the federal case given the acrimonious relationship between appellant and Pam and the possibility that she would have cooperated with federal prosecutors. (2 CT 409.) The People relied on much the same evidence provided by the FBI agent affiant in the prior hearing, who was cross-examined again by defense counsel. (2 CT 425-428.) Given all this evidence, the prosecutor

stated that there was no safeguard that could ensure appellant's safe release on bail. (2 CT 429.) Defense counsel's position was that the prosecution was trying to improperly "bootstrap" evidence of Pam's murder to the analysis of whether bail should be permitted in the federal case, and that there was no evidence that Pam was actually cooperating with the government before she was killed. (2 CT 407-408, 411.) However, defense counsel conceded that the government was permitted to rely on hearsay, namely the testimony of the FBI affiant, in its presentation of facts in opposition to granting bail. (2 CT 415.)

The court gave little credence to defense counsel's argument that federal authorities should have arrested appellant soon after the indictment was filed if they believed him to be a flight risk, noting that Pam's murder was the event that rightly spurred the government to take action. (2 CT 417.) The court also emphasized that appellant was a flight risk because he was found to be in possession of millions of dollars in gold and currency when he was arrested, and therefore it was reasonable to believe that he had additional assets that had not been confiscated. (2 CT 420.) Accordingly, the court denied bail because appellant was too great a flight risk given the pending murder investigation. (2 CT 432.)

On September 10, approximately one month later, appellant made incriminating statements to his cellmate Shawn Smith while in federal custody. (10 RT 1845-1847, 1867-1868.) Formal state murder charges were brought against appellant on September 15, 2008. (1 CT 10-16.) The federal government dismissed its charges against appellant shortly thereafter. (7 RT 1263-1265.)

The defense moved on numerous occasions to exclude the statements recorded by Smith. On January 29, 2009, the defense moved to suppress the evidence pursuant to section 1538.5. (2 CT 273-309.) The People opposed the motion. (3 CT 450-463.) During oral arguments, the defense

stated that appellant's arrest on federal charges (rather than for the murder) and his detention in the jail where Smith spoke to him were both part of a "sham prosecution" designed to circumvent appellant's Sixth Amendment right to counsel in the forthcoming murder case. (1 CT 76.) Defense counsel argued that the federal judge who denied appellant bond shortly after his arrest on federal charges openly stated that the true reason appellant was in custody was that he was suspected of murder, even though murder charges had not yet been filed at that time. (1 CT 77-78.) Counsel stated that the "sham played itself out" (i.e., appellant made the incriminating statements) before the defense could appeal the denial of bond to the Ninth Circuit, thereby implying that the People had some overarching plan to keep appellant in federal custody on financial charges for the express purpose of using an informant to circumvent his asserted right to remain silent regarding Pam's murder. (1 CT 78.) Defense counsel noted that shortly after appellant made the statements, federal authorities dropped their charges against him and the state began its murder prosecution. (1 CT 79.) Finally, though the issue was not discussed during oral arguments, the defense motion also claimed that the statement was taken in violation of appellant's Fifth Amendment rights because he had invoked his *Miranda*[15] rights after being arrested. (2 CT 301-303; 4 CT 952.)

The prosecutor responded that Smith was not "placed" in a cell with appellant as an informant. Rather, appellant freely admitted incriminating details about Pam's murder to Smith, who then approached law enforcement and asked for a recording device in the event he could induce

---

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

appellant to *repeat what he had already admitted.* (1 CT 80-81.) The prosecutor also argued that the federal charges were not intertwined with the murder investigation, and that the Sixth Amendment right to remain silent is offense-specific. Therefore, appellant's invocation of his right to remain silent after his arrest on the federal charges did not prohibit the police use of an informant as to the murder, on which formal adversarial procedures had not yet begun. (1 CT 81-82.) Moreover, the sealed federal indictment preceded Pam's murder by many months, making it impossible for the authorities to pre-plan a "sham" federal prosecution to obtain evidence in the murder investigation. (1 CT 82.)

Defense counsel responded that when appellant made the incriminating statements, he was in custody "because of the murder case," and his invocation of his Fifth Amendment right to remain silent at that time barred the authorities from agreeing to Smith's offer to obtain information. (1 CT 86-87.)

The court denied the defense motion to suppress. (1 CT 89.) The court stated that the Fifth Amendment case law relied upon by the defense was concerned with coercive police interrogations, not voluntary admissions. (1 CT 88.) The court held that the federal judge who denied appellant bond was reasonable in believing that appellant was a flight risk (as it pertained to *either* the federal charges or the murder investigation) because it was openly known that he was a suspect in Pam's death. (1 CT 89.) In any event, the court stated, a state trial court was not a suitable venue to appeal a federal court's order denying bond. Because appellant was in lawful custody when he made his admissions, and those admissions were not coerced under police pressure, there was no basis to suppress them. (*Ibid.*)

On April 18, 2011, the defense again moved to exclude the recorded admissions. (11 CT 2727-2776.) The People opposed that motion. (13 CT 3234-3251.) Defense counsel reiterated his prior arguments and also added a new argument, namely, that even if appellant's statements about Pam were played for the jury, at least the discussion of appellant's plan to kill Moya and his associates should be redacted. (3 RT 301.) Defense counsel argued that Smith first raised that issue and "forced" it on appellant, and it would be unfair to appellant for the jury to consider. (3 RT 302.) The prosecutor responded by pointing out portions of the transcript where appellant himself said that Moya had to be killed because of the uncertainty about whether Moya would be arrested and turned against him. (3 RT 302-303.) The court again denied the defense motion to exclude the evidence and also denied the request for redactions, because though appellant's statements were certainly prejudicial to his case, they were also highly probative of his guilt. (13 CT 3382-3383; 3 RT 303.)

The defense again reiterated various objections to this evidence shortly before it was introduced (10 RT 1838-1839) and in appellant's motion for a new trial (14 CT 3738-3785). One new theory raised shortly before the statement was played for the jury and then again in the motion for a new trial was that Smith's statements in the recording were hearsay and/or violated appellant's Confrontation Clause rights. (14 CT 3451-3755; 10 RT 1839.) The trial court held that Smith's statements were not being offered for the truth of the matters asserted, which addressed both of these concerns. (10 RT 1840.)

As summarized in the Statement of Facts above, the jury heard the entirety of the surreptitiously recorded conversation between Smith and appellant.

### B. Applicable Law on the Motion to Suppress

On review of a denial of a motion to suppress, the appellate court views the record in the light most favorable to the trial court's ruling and defers to the trial court's express and implied factual findings as long as they are supported by substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.) Regarding appellant's later motions to exclude the recording, it should be noted that, in general, all relevant evidence is admissible. (Evid. Code, § 351.) Trial courts have broad discretion to admit evidence, and a court only abuses that discretion if it acts in an arbitrary, capricious or patently absurd manner that results in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343.)

### C. The Admission of the Recorded Statement Did Not Violate Appellant's Sixth Amendment Right To Counsel

Appellant's argues that admission of the recorded statement violated his right to counsel under the Sixth Amendment. (AOB 67-78.) This argument is meritless. Appellant's Sixth Amendment right to counsel did not attach as to the uncharged murder investigation before he made the incriminating statements to Smith.

#### 1. Applicable Law

Under both the California Constitution and the Sixth Amendment to the federal Constitution, defendants have the right to counsel in criminal proceedings brought against them. (U.S. Const., 6th Amend.; Cal. Const. Art. I § 15; *Gideon v. Wainwright* (1963) 472 U.S. 335, 342-343 [83 S.Ct. 792, 9 L.Ed.2d 799].) The Sixth Amendment right to counsel bars the government from using an undercover informant, in the absence of a defendant's attorney, who leads the defendant to unwittingly make

incriminating statements. (*Massiah v. United States* (1964) 377 U.S. 201, 204-205 [84 S.Ct. 1199, 12 L.Ed.2d 246]; *People v. Frye* (1998) 18 Cal.4th 894, 991-992, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) However, the Sixth Amendment right to counsel, and its attendant protections, do not attach until adversarial judicial proceedings are initiated against a defendant, which in California occurs by way of a formal complaint or criminal information. (*Rothgery v. Gillespie County, Texas* (2008) 554 U.S. 191, 194 [128 S.Ct. 2578, 171 L.Ed.2d 366]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1194-1195.)[16] The mere fact that a defendant has been arrested and is incarcerated does not trigger Sixth Amendment protections. (*United States v. Gouveia* (1984) 467 U.S. 180, 187-194 [104 S.Ct. 2292, 81 L.Ed.2d 146].)[17]

Furthermore, the right to counsel is offense-specific. (*People v. Carter* (2003) 30 Cal.4th 1166, 1210.) In other words, the fact that the right to counsel has attached as to one offense (i.e., an offense for which the defendant has been formally charged) does not bar the government from attempting to elicit incriminating statements from the defendant, outside the presence of counsel, regarding a different, uncharged offense. (*Moran v. Burbine* (1986) 475 U.S. 412, 431 [106 S.Ct. 1135, 89 L.Ed.2d 410].) Such a situation may occur if a suspect is arrested and indicted for one crime but questioned about another offense which is still in the investigatory stages.

---

[16] *Miranda* added a Fifth Amendment aspect to this same analysis, holding that a defendant must be advised of his right to remain silent rather than be interrogated even before adversarial proceedings commence and he is advised of his Sixth Amendment right to counsel. (*Miranda*, *supra*, 384 U.S. at p. 465.)

[17] However, there are certain exceptions to this rule, one of which is that a defendant has the right to counsel during a pre-indictment custodial interrogation. (*Escobedo v. State of Illinois* (1964) 378 U.S. 478, 485 [84 S.Ct. 1758, 12 L.Ed.2d 977]; *People v. Dorado* (1965) 62 Cal.2d 338, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478.).

Such tactics are permissible. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175-176 [111 S.Ct. 2204, 115 L.Ed.2d 158]; *People v. Wader* (1993) 5 Cal.4th 610, 654.)

There are several narrow exceptions to the offense-specific nature of the Sixth Amendment right to counsel. For example, the Ninth Circuit has held that where a charged offense is "inextricably intertwined" with an uncharged offense, the right to counsel attaches to the latter as soon as it attaches to the former. This Court has cited (without explicitly affirming) that authority. (See *Wader, supra,* 5 Cal.4th at p. 657, fn. 7, citing *United States v. Hines* (9th Cir. 1992) 963 F.2d 255, 257-258.) However, the United States Supreme Court has since set forth a more stringent rule, holding that the Sixth Amendment does not attach if one offense "requires proof of a fact which the other does not," even if they share many facts in common. (*Texas v. Cobb* (2001) 532 U.S. 162, 172-173 [121 S.Ct. 1335, 149 L.Ed.2d 321]; *People v. Slayton* (2001) 26 Cal.4th 1076, 1082-1083 [adopting *Cobb*]; see also *Hendricks v. Vasquez* (9th Cir. 1992) 974 F.2d 1099, 1104-1105 [though charge of interstate flight to avoid prosecution was related to charge of murder, the offenses were not linked for Sixth Amendment purposes].)[18] Moreover, several federal appellate courts have set forth an exception to this rule, holding that even if the two offenses are factually identical, Sixth Amendment protections do not apply to the uncharged offense if it is brought by a different sovereign (e.g., one by a state government and one by the federal government). This is known as the dual sovereignty principle. (*United States v. Alvarado* (4th Cir. 2006) 440

---

[18] In the event a defendant confesses to an uncharged crime while he is incarcerated for a charged offense, a reviewing court may also consider, as one of various factors, whether there was inappropriate delay in bringing formal charges on the uncharged crime in order to secure the admission. (*People v. Williams* (1977) 68 Cal.App.3d 36, 44.)

F.3d 191, 198 [dual sovereignty principle prevents right to counsel from attaching to as-yet uncharged offenses brought by a different sovereign than has brought the instant charged offense, even if the two offenses are substantively identical]; *United States v. Coker* (1st Cir. 2005) 433 F.3d 39, 44-45 [same]; *United States v. Avants* (5th Cir. 2002) 278 F.3d 510, 517-518 [same]; but see *United States v. Mills* (2nd Cir. 2005) 412 F.3d 325, 330 [dual sovereignty principle does not apply in Sixth Amendment context].) However, there does not appear to be any California authority on the application of the dual sovereignty principle in the Sixth Amendment context.

Defendants benefit from one additional safeguard in this area. Federal courts have barred either federal or state authorities from disingenuously bringing charges against a defendant simply to help the other sovereign circumvent a defendant's right to counsel. (*Hendricks*, *supra*, 974 F.2d at p. 1104.) In other words, one sovereign may not act as a pawn merely to elicit incriminating information from a defendant for use in the other sovereign's as-yet uncharged future case. The test is whether "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." (*Coker*, *supra*, 433 F.3d at p. 45, quoting *United States v. Guzman* (1st Cir. 1996) 85 F.3d 823, 827.) However, cooperation between different agencies is generally encouraged, so this exception is also highly circumscribed and defendants seeking to prove improper state action face a high bar. (*Guzman*, *supra*, 85 F.3d at p. 827 ["We emphasize that the *Bartkus* exception is narrow."].)[19] In essence, the exception applies only

---

[19] This sham prosecution rule arose from the double jeopardy context, and is just as difficult to meet in those cases as it is in the Sixth Amendment context. (*United States v. Figueroa-Soto* (9th Cir. 1991) (continued...)

when one sovereign's prosecution is a "sham." (*Id.* at p. 45, citing *Bartkus v. Illinois* (1959) 359 U.S. 121 [79 S.Ct. 676, 3 L.Ed.2d 684].) Neither evidence-sharing between state and federal officials nor cooperation in the design of trial tactics will render either of the prosecutions a sham—even if the supposed sham prosecution results in an acquittal. (*Bartkus*, *supra*, 359 U.S. at pp. 123-124.)

Most of the jurisprudence relating to sham prosecutions and improper collusion between state and federal authorities is based on the bar against double jeopardy, not the right to counsel, because the seminal holdings from *Bartkus* concerned the former. Indeed, it does not appear that any California court or the United States Supreme Court has considered, let alone adopted, the *Coker* court's application of the "sham" exception in the Sixth Amendment context. However, in the double jeopardy context, at least one California court has held that "[a]lthough the "sham separate sovereign" exception has been recognized by some courts . . . it is quite restricted." (*People v. Westbrook* (1996) 43 Cal.App.4th 220, 224-225 (even where state and federal authorities participated on the same investigative task force, and a state official received a federal designation for purposes of the case, such cooperation was appropriate and did not constitute a sham prosecution), citing *Figueroa-Soto*, 938 F.2d at pp. 1018-1019.)

Even if a defendant meets all the above criteria to bring a Sixth Amendment claim for inappropriate use of an informant, he must still show

---

(...continued)
938 F.2d 1015, 1019 (holding no sham prosecution and no double jeopardy violation despite designation of state prosecutor as a special assistant to federal prosecution and cooperation in trial tactics between the two sovereigns, and stating that "it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government").)

"that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks," namely, "that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." (*People v. Hartsch* (2010) 49 Cal.4th 472, 490-491.) A trial court's ruling on a motion to suppress informant testimony allegedly obtained in contravention of a defendant's Sixth Amendment rights is a factual determination which is entitled to deferential review. The evidence on this issue is limited to that which was available to the trial court at the time that it considered the motion. (*Id.* at p. 491.)

### 2. Appellant Was Not Deprived of His Sixth Amendment Right To Counsel

Here, pursuant to the Sixth Amendment, it was appropriate for officers to use Smith as an undercover informant regarding Pam's murder. On September 10, when appellant made the incriminating statements, he had only been indicted on the federal money transfer charge but had not yet been charged with Pam's murder. (10 RT 1845-1847, 1867-1868 [Smith sent to appellant's cell wearing a wire on September 10]; 1 CT 10-16 [September 15, 2008, criminal complaint for murder].) Generally, Sixth Amendment protections do not attach until formal charges are brought, which in California occurs via a felony complaint or information. (*Rothgery*, *supra*, 554 U.S. at p. 194; *Viray*, *supra*, 134 Cal.App.4th at pp. 1194-1195.) Sixth Amendment protections are offense-specific. (*Carter*, *supra*, 30 Cal.4th at p. 1210.) Thus, the authorities were permitted to use an informant to elicit incriminating information from appellant that might be useful in the uncharged murder investigation. (*Moran*, *supra*, 475 U.S.

at p .431; *McNeil*, *supra*, 501 U.S. at pp. 175-176; *Wader*, *supra*, 5 Cal.4th at p. 654.)

*Cobb* held that there is an exception to the above rule when the charged and uncharged offenses share all the same elements, but here that was not the case. (*Cobb*, *supra*, 532 U.S. at pp. 172-173.) A state murder charge obviously shares none of the same elements as a federal money licensing violation. The mere fact that there was a tragic background story connecting the two offenses in this instance does not mean that Sixth Amendment protections had attached to the murder investigation. (*Slayton*, *supra*, 26 Cal.4th at pp. 1082-1083 (even if two offenses are "closely related" or "inextricably intertwined," Sixth Amendment protections apply only to the charged offense).) Appellant argues that the shared backstory linking Pam's death to the federal investigation of Goldfinger was sufficient to persuade a federal judge to deny bail. (AOB 72-74.) Though true, this has no bearing on the Sixth Amendment question. As explained in the Fourth Amendment discussion below, a federal court in a bail hearing may rely on information, including hearsay, "which would not be considered as evidence under traditional trial standards." (*United States v. Fortna* (5th Cir. 1985) 769 F.2d 243, 250; *United States v. Winsor* (9th Cir. 1986) 785 F.2d 755, 756.) Thus, the incriminating links between the federal investigation into Goldfinger and Pam's murder were relevant in the decision to deny him bail. On the other hand, these links fell far short of meeting the *Cobb* standard for the application of Sixth Amendment protections to the uncharged offense.

Appellant also maintains that Sixth Amendment protections had attached to the uncharged murder investigation because he was put in an "adversarial position to the government," whose activity had "surpass[ed] merely gathering information," and he relies on *Moran* and *Kirby* for support. (AOB 71.) Those cases, however, held the exact opposite. In

*Moran*, the United States Supreme Court specifically reiterated the rule that the Sixth Amendment attaches only to formally charged offenses, including when a defendant makes incriminating statements regarding an uncharged offense which are surreptitiously recorded:

> [L]ooking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. [In *Maine v. Moulton* (1985) 474 U.S. 159 [106 S.Ct. 477, 88 L.Ed.2d 481]], we considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. Concerning the former, the Court reaffirmed that after the first charging proceeding the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel . . . *The Court made clear, however, that the evidence concerning the crime for which the defendant had not been indicted—evidence obtained in precisely the same manner from the identical suspect—would be admissible at a trial limited to those charges.*

(*Moran*, *supra*, 475 U.S. at p. 431, emphasis added.)

This opinion was consistent with the High Court's prior ruling in *Kirby*:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' *to which alone the explicit guarantees of the Sixth Amendment are applicable.*

(*Kirby v. Illinois* (1972) 406 U.S. 682, 689-690 [92 S.Ct. 682, 32 L.Ed.2d 411], emphasis added.)

Appellant also is unpersuasive in his argument that the "sham" prosecution exception to the offense-specific nature of the Sixth Amendment applies here. (AOB 74-76.) Under a sham prosecution theory, Sixth Amendment protections would have attached to the murder investigation if state officers had "thoroughly dominat[ed]" the federal prosecution such that the latter retained "little or no volition . . . ." (*Coker*, *supra*, 433 F.3d at p. 45.) Here, that simply did not happen. The federal indictment was filed five months before the murder (2 CT 337), and the investigation that occurred prior to Pam's death was extensive. For example, Aveis had reason to believe that Goldfinger was laundering money for Ponzi schemes (7 RT 1218-1219) and went to great lengths to obtain financial records about Goldfinger from 2003 to 2007 (7 RT 1222-1223, 1227), including serving a subpoena on the Pyne Waltrip accounting firm (7 RT 1230). Indeed, the day Pam was murdered, she was on her way back from a meeting with appellant and their respective criminal defense attorneys addressing the impending federal case. There is no evidence that the state manipulated this process, nor would it have had any reason to do so at that time.

Appellant does not challenge the fact that the federal prosecution began legitimately in the above fashion, but he implies that it *became* a sham only after Pam's death because it served as a basis to detain him without bail in federal custody, which set the stage for him to sabotage his own defense by making incriminating statements to Smith. (AOB 75-76.) However, appellant cites no authority for this novel concept that prosecutions may become shams for Sixth Amendment purposes even though they began appropriately. Such an expansion of the sham prosecution doctrine contradicts holdings which have described it as

"narrow" and "quite restricted." (*Guzman*, *supra*, 85 F.3d at p. 827; *Westbrook*, *supra*, 43 Cal.App.4th at pp. 224-225.)[20] In any event, the mere fact that the federal prosecutor in the bail hearing relied on facts from the state murder investigation did not turn the federal prosecution into a sham. As discussed above, evidence-sharing between state and federal officials is appropriate (*Bartkus*, *supra*, 359 U.S. at pp. 123-124), and hearsay, such as the FBI agent's testimony about the LAPD's murder investigation, is admissible in federal bail hearings (*Winsor*, *supra*, 785 F.2d at p. 756).

Furthermore, appellant's reliance on the sham prosecution doctrine fails because the *Coker/Bartkus* analysis is limited to cases in which two sovereigns prosecute a defendant for the same criminal act. The *Bartkus* rule originated in the doctrine of Double Jeopardy and was designed to prevent one sovereign from retrying a defendant for the *same offense* for which he had already been acquitted in the other sovereign's court. (*Bartkus*, *supra*, 359 U.S. at pp. 122-123.) Similarly, in *Coker*, which expanded the *Bartkus* doctrine to the Sixth Amendment context, federal agents interrogated a defendant regarding the *same crime* about which local police had already questioned him. (*Coker*, *supra*, 433 F.3d at p. 41.) The policy underlying the *Bartkus/Coker* rule is designed in this way to prevent two sovereigns from serially investigating a single defendant for the same criminal acts, which would put him in an unconstitutionally weak procedural position. For example, the quintessential *Bartkus/Coker* defendant would be forced to undergo interrogation and/or reveal his trial strategy to one sovereign in the first prosecution and then face a second

---

[20] Appellant's position is particularly problematic because even the *existing* authority regarding sham prosecutions in the Sixth Amendment context, such as *Coker*, is not binding on this Court, let alone appellant's creative extrapolation to include prosecutions that transform into shams long after they begin.

sovereign which, having been thoroughly briefed, had already prepared for all his defenses to that offense (or to the second sovereign's substantively equivalent crime). Here, on the other hand, the federal charges merely gave the authorities the power to prosecute appellant on a relatively minor white-collar offense, having nothing to do with murder, and hold him before trial. Relatively little was at stake for appellant in the federal case beyond the inconvenience of being detained without bail. The fact that he happened to sabotage his state murder defense while in federal custody does not implicate the protections from improper dual prosecution envisioned by *Coker*, let alone *Bartkus*.

Finally, even if this Court were to conduct a *Massiah* analysis, it should be noted that, under the first prong of that test, there is little evidence here that Smith acted as an informant with the "expectation of some resulting benefit or advantage . . ." (*Hartsch*, *supra*, 49 Cal.4th a pp. 490-491.) In fact, Detective Abdul testified that Smith's eventual release from custody "had nothing to do with the state crime that [appellant] was charged with." (10 RT 1873.)

In sum, the trial court's denial of the defense motion to suppress appellant's statement should stand because the court's findings were supported by substantial evidence. (*Jenkins*, *supra*, 22 Cal.4th at p. 969.) Similarly, the court's denial of the defense motion in limine to exclude the same evidence was not an abuse of discretion. (*Jordan*, *supra*, 42 Cal.3d at p. 316.)

### D. The Admission of the Recorded Statement Did Not Violate Appellant's Fifth Amendment Right To Counsel or His Other *Miranda* Rights

Appellant argues that his Fifth Amendment *Miranda* rights, including the right to counsel (AOB 78-82), were violated by the authorities' use of Smith as an undercover informant. This position is meritless.

### 1. Applicable Law

Defendants have a right to counsel under the Fifth Amendment to the federal Constitution. (U.S. Const., 5th Amend.; *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378].) Under *Miranda*, this right was expanded such that defendants must be advised as a prerequisite to any police interrogation that they have a right to remain silent, that any statements they make may be used as evidence against them, that they have a right to the presence of an attorney, and that an attorney will be appointed if they cannot afford to retain one. If the individual requests an attorney, the interrogation must cease until an attorney is provided, with whom the individual has had an opportunity to confer. (*Miranda*, *supra*, 384 U.S. at p. 473.) Unlike the Sixth Amendment right to counsel, these *Miranda* protections are not offense-specific. Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, officers may not seek the suspect's permission to discuss that crime or others unless counsel is present. (*People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1448.)

However, custodial interrogation under *Miranda* specifically means questioning initiated by law enforcement officers which compels a defendant under pressure to speak when he would not otherwise do so. In other words, *Miranda* is concerned with *compulsion* in a police-dominated atmosphere. Thus, *Miranda* protections do not apply "when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate," such as an undercover agent. (*Illinois v. Perkins* (1990) 496 U.S. 292, 297 [110 S.Ct. 2394, 110 L.Ed.2d 243]; *People v. Tate* (2010) 49 Cal.4th 635, 685-686.) Thus, even when a defendant has explicitly invoked his right to counsel under *Miranda*, statements he makes while "voluntarily speak[ing] alone to a friend" may be used against him because the defendant had "no reason to assume, during the private

conversation, that he or she is subject to the coercive influences of *police* questioning." (*Tate*, *supra*, 49 Cal.4th at p. 686, emphasis original.)[21]

### 2. Appellant Was Not Deprived of His *Miranda* Rights

Both the United States Supreme Court and this Court have emphasized that the Fifth Amendment, as interpreted by *Miranda*, is specifically designed to prevent police from coercing a confession by force or intimidation. *Miranda* did not intend to protect defendants from being duped into voluntarily making incriminating statements to undercover jailhouse informants. (*Perkins*, *supra*, 496 U.S. at p. 297; *Tate*, *supra*, 49 Cal.4th at pp. 685-686.) Here, Smith never threatened or intimidated appellant into admitting his involvement in Pam's murder. To the contrary, Smith pretended to be appellant's ally and friend, which led appellant to freely volunteer all the incriminating information. Appellant's Opening Brief fails to acknowledge this distinction and does not even attempt to distinguish *Perkins* or *Tate* in this context. As such, the trial court's decision to deny the suppression motion was supported by substantial evidence (*Jenkins*, *supra*, 22 Cal.4th at p. 969), and its denial of his motion in limine was not an abuse of discretion (*Jordan*, *supra*, 42 Cal.3d at p. 316).

///

///

---

[21] The use of an undercover informant, of course, is inappropriate when the informant himself uses coercive tactics, such as the threat of violence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 288 [111 S.Ct. 1246, 113 L.Ed.2d 302] [police use of informant violated defendant's due process rights by eliciting confession via threat of violence to defendant].)

### E. The Federal Court's Denial of Bail Did Not Constitute an Unlawful Detention Under the Fourth Amendment; Alternatively, the Statement Was Admissible Even if Appellant Was Unlawfully Detained

Appellant argues that he was unlawfully kept in custody instead of being released on bail after his arrest on the federal licensing charge, and therefore that his statements to Smith, which he made during that detention, should have been suppressed pursuant to the Fourth Amendment. (AOB 82-86) This argument fails.

#### 1. Applicable Law

Generally, evidence seized by the authorities as a result of an unlawful search or seizure, including a detention, should be suppressed under the Fourth Amendment to the federal Constitution. (U.S. Const., 4th Amend.; *Wong Sun v. United States* (1963) 371 U.S. 471, 485 [83 S.Ct. 407, 9 L.Ed.2d 441].) On the other hand, lawfully incarcerated prisoners have no reasonable expectation of privacy pursuant to the Fourth Amendment in their jail cells, including from surreptitious recordings. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194, citing *Lanza v. State of New York* (1962) 370 U.S. 139, 143-144 [82 S.Ct. 1218, 8 L.Ed.2d 384]; *Hudson v. Palmer* (1984) 468 U.S. 517, 526 [104 S.Ct. 3194, 82 L.Ed.2d 393].)

The Bail Reform Act governs bail in federal criminal prosecutions. (18 U.S.C. § 3142.) That statute sets forth various criteria that federal judicial officers should consider when granting or denying pretrial release. (18 U.S.C. § 3142, subds. (a)-(c).) Procedurally, the statute requires that on either the prosecutor's or the court's own motion to deny bail based on a "serious risk that [the defendant] will flee," the court must "hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of

such person as required and the safety of any other person and the community . . . ." (18 U.S.C. § 3142, subd. (f)(2)(A).) If, after conducting such a hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial." (18 U.S.C. § 3142(e)(1).)

Under California law, defendants are generally entitled to release on bail, subject to certain exceptions. (Cal. Const. Art I, § 12.) The court considers the seriousness of the offense charged, the defendant's criminal record, and the probability the defendant will appear for hearings or trial. (*In re Weiner* (1995) 32 Cal.App.4th 441, 444.)

It is not at all clear under either state or federal law whether the denial of bail alone may constitute an unlawful detention for the purposes of the Fourth Amendment, such that evidence subsequently obtained from the defendant during pretrial detention may be suppressed as a result. Indeed, as the Second Circuit observed in *United States v. Abuhamra* (2d Cir. 2004) 389 F.3d 309, the United States Supreme Court and the federal appellate courts have reached different conclusions about whether the circumstances of a defendant's pre-trial detention implicate his Fourth Amendment rights at all. (*Abuhamra, supra*, 389 F.3d at p. 319, fn. 6, citing *Albright v. Oliver* (1994) 510 U.S. 266, 273-275 [114 S.Ct. 807, 127 L.Ed.2d 114 [declining to decide whether the Fourth Amendment guarantees the right to be free of prosecution without probable cause]; *Torres v. McLaughlin* (3d Cir. 1998) 163 F.3d 169, 174 ["[T]here may be some circumstances during pre-trial detention that implicate Fourth Amendment rights; however, we refer to the Fourth Amendment as applying to those actions which occur between arrest and pre-trial detention."]; *Riley v. Dorton* (4th Cir. 1997) 115 F.3d 1159, 1163 [Fourth Amendment does not apply to post-arrest conditions of

custody]; but see *Torres v. City of Madera* (9th Cir. 2008) 524 F.3d 1053, 1056 & fn. 3 [Ninth Circuit employs a "continuing seizure" rule which defines seizure as continuing throughout the time the arrestee is in the custody of the arresting officers, but recognizes that "[t]he circuits are split on this issue"].) There does not appear to be any California authority governing whether unlawful procedures leading to a defendant's pretrial confinement could amount to a Fourth Amendment violation justifying suppression of evidence.

In any event, even if a defendant's detention were deemed a Fourth Amendment violation, evidence arising from it would not need to be suppressed in all cases. A reviewing court must decide whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. (*People v. Brendlin* (2008) 45 Cal.4th 262, 269.) Three factors are used to determine whether the taint of the illegal detention has been attenuated: (1) the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purposefulness of the official misconduct. (*Ibid.*)

The appellate court exercises its independent judgment in determining the constitutionality of an underlying search or seizure. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

**2. The Denial of Bail Did Not Violate Appellant's Fourth Amendment Rights; Alternatively, His Statement To Smith Was Admissible Even Assuming a Fourth Amendment Violation Occurred**

First, the federal district court did not err when it denied appellant bail, and his resulting detention was lawful. As required, the federal court

held a hearing pursuant to 18 U.S.C. § 3142, subdivision (f)(2)(A), to determine whether there were any conditions of release that could reasonably assure appellant's future appearance, or whether he was too great a flight risk. In support of the latter position, the prosecutor presented the testimony of an FBI agent who was familiar with the LAPD's investigation into Pam's murder. The prosecutor then argued that a preponderance of the evidence militated against granting bail due to the seriousness of that investigation.[22] (2 CT 425-429.) As defense counsel rightly conceded (2 CT 415), the hearsay evidence provided by the FBI agent was admissible at the bail hearing. (*Fortna*, *supra*, 769 F.2d at p. 250; *Winsor*, *supra*, 785 F.2d at p. 756.) The prosecutor's position was directly responsive to the inquiry mandated by 18 U.S.C. § 3142, subdivision (e)(1), namely, whether any safeguard could reasonably ensure that appellant would not flee if he were released on bail. After defense counsel's rebuttal, the court sided with the People and concluded that appellant was indeed too great a flight risk for release on bail because he was a wealthy man facing a serious state murder investigation. (2 CT 420, 432.)

Appellant mischaracterizes the court's findings when he claims that it denied bail because "[a]ppellant posed a danger to the community." (AOB 84-85 & fn. 31.) The court made clear that its primary (if not only) reason for denying bail was that appellant was a flight risk because he was the prime suspect in a murder investigation and had recently been found in

---

[22] Contrary to appellant's argument (AOB 85, fn. 31), the applicable standard for such a showing by the People was a mere preponderance of the evidence. (*United States v. Ali* (D.D.C. 2011) 793 F.Supp.2d 386, 387 [when analyzing under 18 U.S.C. § 3142, subdivision (e)(1), whether no conditions of release will reasonable ensure that defendant does not flee, the "government must demonstrate that the defendant is a flight risk . . . by a preponderance of the evidence"].)

possession of millions of dollars in gold. As the court wryly observed, appellant "has assets at his disposal, which means he can probably, oh, at least make it as far as Glendale." (2 CT 420.) The court then inquired whether defense counsel had any evidence that all of appellant's assets had been confiscated, to which counsel replied that he did not know. (2 CT 421.) Accordingly, the court held that "the risk is too grave, and *I think the possibility of flight is too grave*." (2 CT 432, emphasis added.) However, appellant ignores these statements and instead argues (without citation) that the court wrongly classified him as a danger to the community. Appellant likely focuses on the "danger to the community" rationale because denial of bail on that basis is more highly circumscribed; it is typically limited to a list of enumerated offenses in 18 U.S.C. § 3142, subdivisions (f)(1) and (f)(2)(B). But this entire line of argument is a red herring. Under 18 U.S.C. § 3142, subdivisions (f)(2)(A) and (e)(1), a defendant may be denied bail solely on the basis that he is flight risk, regardless of whether he is a danger to the community or whether the alleged crime is an enumerated offense. That is what occurred in the instant case.

In any event, even if the federal district court made some error in interpreting 18 U.S.C. § 3142 when it denied appellant bail, appellant cites no authority that the denial of bail under state or federal law amounts to an unlawful detention pursuant to the Fourth Amendment. Under federal law at least, the Fourth Amendment generally applies "to those actions which occur *between* arrest and pre-trial detention." (*Torres*, *supra*, 163 F.3d at p. 174, emphasis added.) This seems to exclude pre-trial detention itself, such as detentions that occur after a bail hearing. Moreover, appellant argues that his Fourth Amendment rights were violated not only because he was unlawfully detained, but because the true reason for the detention was to facilitate the state's uncharged murder prosecution or investigation. (AOB 86.) However, the United States Supreme Court has declined to decide

whether the Fourth Amendment guarantees a defendant the right to freedom from *prosecution* on the basis that the government lacks probable cause. (*Albright, supra*, 510 U.S. at pp. 273-275.) Therefore, even if appellant's speculations about the federal authorities' motives were true, they are unlikely to support a Fourth Amendment claim. At best, appellant might be able to allege a federal statutory error in the interpretation of the rules for granting bail, which would not justify suppression of any evidence resulting from that error in his murder trial.[23]

Next, even if the denial of bail were considered a Fourth Amendment violation, appellant's statements to Smith would not necessarily need to be suppressed. The question in that instance would be whether the chain of causation linking the Fourth Amendment violation (i.e., hypothetically, the denial of bail) and the collection of the evidence itself had been broken. If the link between the two is attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality, then the evidence would not be suppressed. (*Brendlin, supra*, 45 Cal.4th at p. 269.) Relevant factors in this analysis include the amount of time that passed between the two events, the presence of intervening circumstances, and the flagrancy of the original misconduct. (*Ibid.*) Here, all three factors would militate against suppression. First, approximately one month passed between the bail hearing on August 6 and the day appellant made the statements on September 10, during which time he was represented by competent,

---

[23] Appellant's reliance on *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56 [111 S.Ct. 1661, 114 L.Ed.2d 49], is misplaced. That case does bar authorities from detaining a suspect while gathering evidence sufficient to justify the detention (*id.* at p. 56), but here the detention was justified on the basis that appellant was a flight risk under 18 U.S.C. § 3142, subdivision (e)(1). The government did not need any additional evidence to keep appellant in pre-trial detention.

privately retained counsel who either advised him or should have advised him of the danger of making incriminating statements to anybody. Second, there was an intervening circumstance between the bail hearing and the statements, namely, appellant's unforced choice to seek advice from Smith, his fellow inmate, and his eager acceptance of Smith's bizarre offer to have Moya killed. Third, even if the district court's denial of bail was erroneous for some technical reason, it certainly was not flagrant. The court logically weighed the factors for and against bail, as described above, and stated that, notwithstanding the magistrate's prior decision to grant bail, "reasonable bench officers can differ" on such factual questions. (2 CT 409.) Such reasoned analysis cannot be described as flagrant misconduct. As such, suppression of the statement would have been unwarranted even if the denial of bail were construed to be a Fourth Amendment violation.

In sum, this Court should conclude that there was no Fourth Amendment violation (*Glazer*, *supra*, 11 Cal.4th at p. 362), or, alternatively, that any violation would not have supported suppression of the evidence in any event. As such, the trial court's decision to deny the suppression motion was supported by substantial evidence (*Jenkins*, *supra*, 22 Cal.4th at p. 969), and its denial of his motion in limine was not an abuse of discretion (*Jordan*, *supra*, 42 Cal.3d at p. 316).

### F. Appellant's Confrontation Clause Rights Were Not Violated Because Smith's Statements Were Nontestimonial

Appellant also argues that his rights under the Confrontation Clause were violated by the admission of Smith's statements in their recorded conversation (AOB 88-93), and that the trial court erred when it held that Smith's statements were non-hearsay (10 RT 1840). Appellant's argument is meritless.

### 1. Applicable Law

The Confrontation Clause ensures that defendants have the opportunity to confront witnesses who testify against them. (*Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354, 158 L.Ed.2d 177] ["The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."].) The *Crawford* court held that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Ibid.*) However, the question of whether a statement is "testimonial" is pivotal. This Court in *People v. Cage* (2007) 40 Cal.4th 965, recently summarized U.S. Supreme Court precedent and established a thorough framework to determine whether an out-of-court statement is testimonial:

> First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are *out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial*. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the *formality and solemnity characteristic of testimony*. Third, 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. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*Id.* at p. 984, emphasis added, footnotes omitted.)

The United States Supreme Court has specifically considered the effect of an interrogator's questions on a defendant's Confrontation Clause rights, holding that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate" because "[a]n interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter." (*Michigan v. Bryant* (2011) __ U.S. __, 131 S.Ct. 1143, 1160, fn. 11, 179 L.Ed.2d 93, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822, fn. 1 [126 S.Ct. 2266, 165 L.Ed.2d 224].) Statements not made for the truth of the matter asserted are, of course, nontestimonial. (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.) Indeed, no matter how much police have "prepped" a jailhouse informant in the hopes that he will extract incriminating information from an in-custody defendant, the informant's questions cannot amount to a Confrontation Clause violation because the informant's statements are simply not at issue. (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402, citing *Bryant, supra*, 131 S.Ct. at 1160, fn. 11.)

In any event, admission of statements in violation of the Confrontation Clause may be deemed harmless beyond a reasonable doubt. (*Crawford, supra,* 541 U.S. at p. 42, fn. 1 [Confrontation Clause violation subject to harmlessness review]; *Brenn, supra,* 152 Cal.App.4th at pp. 178-179 [where other evidence against appellant is overwhelming, erroneous admission of out-of-court statement is harmless].)

### 2. Appellant's Confrontation Clause Rights Were Not Violated

The Confrontation Clause does not bar admission of non-testimonial statements, such as statements which are not offered for their truth. (*Cage, supra*, 40 Cal.4th at p. 984.) In this case, Smith was an undercover informant whose conversational skills and feigned friendship induced appellant to make incriminating statements. Nothing Smith told appellant

was offered for the truth of the matter asserted. In fact, Smith's statements were intentionally quite far from the truth: One of the reasons that appellant incriminated himself was that Smith invented an imaginary hitman who could eliminate Moya and his accomplices (and would then conveniently die of natural causes). It was appellant's desire to find a quick and violent solution to his problems that led him to incriminate himself. The only declarant in this scenario was appellant himself. "[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate" because "[a]n interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter." (*Bryant, supra*, 131 S.Ct. at p. 1160, fn. 11, quoting *Davis, supra*, 547 U.S. at p. 822, fn. 1; *Arauz, supra*, 210 Cal.App.4th at p. 1402 ["statements unwittingly made to an informant are not 'testimonial' within the meaning of the confrontation clause"].) As such, Smith's statements were non-testimonial and their admission as part of the recorded conversation did not violate appellant's Confrontation Clause rights. (*Crawford, supra*, 541 U.S. at p. 59, fn. 9 [statements not made for truth of matter asserted are not testimonial under Confrontation Clause].)

Appellant argues that though the prosecutor claimed he was not seeking to admit Smith's statements for their truth, the prosecutor's arguments relied on certain aspects of Smith's statements being true. For example, appellant claims the prosecutor made various arguments designed to "bolster" or "vouch for" Smith's credibility, and to convince the jury that Smith did not threaten or intimidate appellant into making the incriminating statements. (AOB 90-93.) Appellant's arguments on this score fail, however, because he misrepresents the nature of non-hearsay evidence. Though the prosecutor here described Smith's state of mind and the circumstances of Smith's conversations with appellant, he never argued that the *substance* of Smith's assertions were true. A statement is not hearsay

merely because it is offered as circumstantial evidence of some fact at issue other than the truth or falsity of the statement itself. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187.) A non-hearsay statement may indeed be offered to prove the truth of *some relevant matter*, so long as it is not offered to prove the truth of any assertion it contains.[24]

For example, appellant correctly observes that the prosecutor argued that the jury should reject the defense characterization of Smith as a "bad guy" merely because he wanted to help the authorities. (11 RT 2316-2317.) The prosecutor also made references to the circumstances that led Smith and appellant to be housed together (11 RT 2224), and appellant's own statements about his previous admissions to Smith that had not been recorded (11 RT 2225, 2319, 2236). The prosecutor even argued that there was no evidence that Smith was "not being truthful," in the sense that the recording plainly proved there was no intimidation or coercion forcing appellant to confess. (11 RT 2317-2319.) All of these statements were non-hearsay. They were relevant to prove that appellant was not under duress, that his admissions should be taken at face value, and that Smith was simply a bystander who decided to work for the police and managed to dupe appellant. In fact, so there could be no confusion, the prosecutor explicitly told the jury that "I am not asking you to take Shawn Smith's word for anything," since appellant's own words were damning. (11 RT 2317-2318.) Accordingly, nothing in the recorded statement violated appellant's Confrontation Clause rights. Thus, the trial court's decision to

---

[24] A classic example of non-hearsay evidence offered to prove a fact other than its own assertion is a statement that sheds light on the mental state of the declarant. Though the statement in such a case is being offered to prove the truth or falsity of some relevant matter (i.e., the person's mental state), it is not hearsay because it is not offered to prove the truth of the assertion in the statement itself. (*Sandoval v. Southern Cal. Enterprises* (1950) 98 Cal.App.2d 240, 244.)

deny the suppression motion on that basis was supported by substantial evidence (*Jenkins*, *supra*, 22 Cal.4th at p. 969), and its denial of his motion in limine was not an abuse of discretion (*Jordan*, *supra*, 42 Cal.3d at p. 316).

### G. The Statement Was Admissible In Its Entirety Under Evidence Code Sections 352 and 1101

Appellant argues that admission of the recorded statement in its full, unredacted form violated his due process rights and the protections of Evidence Code sections 352 and 1101. (AOB 93-109.) These arguments, like all his prior attacks on admission of this evidence, also fail. The recorded statement was relevant and, indeed, highly probative of appellant's guilt in Pam's murder.

#### 1. Applicable Law

As noted above, all relevant evidence is admissible. (Evid. Code, § 351.) "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) A court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *People v. Hamilton* (2009) 45 Cal.4th 863, 929-930.) Nonetheless, the probative value of incriminating evidence will often outweigh its prejudicial effect. For example, a recorded jailhouse conversation between a defendant and his brother in which the defendant solicited the murder of a potential witness was admissible because it was highly probative of the defendant's guilt. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009.)

It is also well-established the authorities may use subterfuge to elicit incriminating remarks from a defendant, including using the defendant's

fellow inmate as an informant. "[I]n the often competitive enterprise of ferreting out crime" the police are permitted to use a subterfuge to obtain an inculpatory statement as long as the subterfuge is not likely "to produce an untrue statement." (*Arauz, supra*, 210 Cal.App.4th at p. 1399, quoting *Johnson v. United States* (1948) 333 U.S. 10, 14, [68 S.Ct. 367, 92 L.Ed. 436]; *People v. Connelly* (1925) 195 Cal. 584, 597; *People v. Felix* (1977) 72 Cal.App.3d 879.)

Next, Evidence Code section 1101, subdivision (a), generally prohibits the admission of a prior criminal act offered against a criminal defendant to prove his or her conduct on a specified occasion. However, subdivision (b) of the same section allows admission of such evidence for other purposes:

> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(Evid. Code, § 1101, subd. (b).)

The admissibility of uncharged conduct offered for one of the above purposes "depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) The degree of similarity between the prior act and the charged offense also affects the purpose for which the former is admissible under Evidence Code section 1101, subdivision (b). For example, if the prior act is admitted to prove intent in the charged offense, the uncharged misconduct must be sufficiently similar to support

the inference that the defendant "probably harbored" the same intent in each instance. (*People v. Soper* (2009) 45 Cal.4th 759, 776; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)[25] A greater degree of similarity is required if the prior act is admitted in order to prove the existence of a common design or plan, such that evidence of the uncharged misconduct must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. (*Soper, supra,* 45 Cal.4th at p. 776, fn.8; *Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) In sum, because all other crimes evidence in a sense may be viewed as "inherently prejudicial," uncharged offenses are admissible only if they have substantial probative value. (*People v. Rogers* (2013) 57 Cal.4th 296, 331.)

Evidence admitted under Evidence Code section 1101, subdivision (b), also must not contravene other evidentiary policies, such as Evidence Code section 352. (Evid. Code, § 352; *People v. Cole* (2004) 33 Cal.4th 1158, 1194; *Ewoldt, supra,* 7 Cal.4th at p. 404.) Trial court rulings pursuant to both Evidence Code sections 352 and 1101, subdivision (b), are reviewed for abuse of discretion. (*Cole, supra,* 33 Cal.4th at p. 1194.)

### 2. The Trial Court Did Not Abuse Its Discretion By Admitting Appellant's Admissions to Smith In Their Entirety

First, appellant claims that even if certain portions of the statement regarding Pam were properly admitted, Evidence Code sections 352 and

---

[25] The highest degree of similarity is required to prove identity, requiring common features so unusual and distinctive that they are like a signature, sufficiently distinctive so as to support the inference that the same person committed both acts. (*Soper, supra,* 45 Cal.4th at p. 776, fn.9; *Ewoldt, supra,* 7 Cal.4th at p. 403.)

1101 required redaction of his threats against Moya. (AOB 95-102.) This argument is highly unpersuasive. The People's case was that appellant perpetrated Pam's murder by hiring Moya and his henchmen (including the actual killer) as co-conspirators. Therefore, Moya and his men were also potential witnesses against appellant. In the recorded statement, appellant plans to murder these witnesses before the police find them. As a matter of common sense and long-established authority, a recorded conversation in which a defendant solicits the murder of a potential witness is highly probative of his guilt in the original crime, and is admissible under Evidence Code section 352. (*Edelbacher*, *supra*, 47 Cal.3d at p. 1009.)

Appellant concedes that his statements about hiring a hitman to kill Moya and the other co-conspirators was probative of his "consciousness of guilt," but claims this was inadmissible under Evidence Code section 352 because it was cumulative of his other, more direct admissions of his plan to kill Pam, and that Smith was the instigator of the plot against Moya. (AOB 97-98.) However, the evidence that appellant wanted to (or even that he was easily persuaded to) hire a hitman to kill Moya was relevant not only to prove his consciousness of guilt in Pam's death, but also that he had a common plan or modus operandi generally to kill people he believed were a threat to him. Evidence of uncharged acts is admissible to prove a common plan (between the charged crime and the uncharged act) where they share "a concurrence of common features [such] that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (Evid. Code, § 1101, subd. (b); *Soper, supra,* 45 Cal.4th at p. 776, fn.8; *Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) Here, the People's theory, supported by voluminous evidence, was that appellant hired Moya to kill Pam when she became a threat due to their bitter divorce and his belief that she was undermining Goldfinger. Then, when Moya became a threat by bungling Pam's murder, appellant solicited

*another* hitman to kill him. Undoubtedly, seeking to hire two hitmen in a matter of months is evidence of a common plan.[26] The fact that the conversation between appellant and Smith was quite lengthy (AOB 104) also does not make it prejudicial, as it demonstrated that appellant had ample opportunity to abandon the plot, but instead chose to follow through.

Appellant's attempt to blame the plan to kill Moya on Smith also fails. (AOB 98-102.) The fact that it may have taken Smith a bit of persuasion (and explanation of who his imaginary hitman was) to convince appellant to plan Moya's death does not negate the value of showing appellant's modus operandi. To the extent appellant hesitated at all, he was merely seeking Smith's assurances that the new hitman would be more competent and effective than Moya was. (See, e.g., 3 CT 507, 509-510, 515.)

Finally, appellant argues that his and Smith's discussions of "extraneous matters" should have been redacted under Evidence Code section 352. (AOB 105-108.) This argument is also meritless. It is true that Smith told appellant that he and/or his imaginary hitman knew about or perpetrated numerous grisly murders and tortures. (AOB 105-106.) However, this was probative of the fact that appellant maintained his plan to hire a hitman even after he learned how morally reprehensible that man or his associates might be. It was evidence that appellant could not be dissuaded from perpetrating his murderous plans. Also, appellant's discussions with Smith regarding forging wills, his ties to the National

---

[26] It is true that evidence admitted under Evidence Code section 1101, subdivision (b), must not contravene other evidentiary rules, such as section 352. (*Cole*, *supra*, 33 Cal.4th at p. 1194.) However, the mere fact that some of appellant's statements about soliciting a hitman to kill Moya also included references to killing Pam, and that this overlap may have been cumulative on that issue, is incidental. The value of demonstrating appellant's common plan of hiring hitmen to deal with his problems was far more probative than the prejudice caused by a few cumulative statements.

Security Agency, his sex life, and his insults directed at Pam were all admissible. (AOB 106-108.) These details lent credibility to appellant's admissions to Smith because they revealed the two men talking as friends and co-conspirators. Many of these statements also demonstrated appellant's animus toward Pam, which gave background into his desire to have her killed. Though these statements certainly did not put appellant in a favorable light, they were minimally prejudicial compared to the overwhelming admissible evidence that he actually hired a hitman to kill his wife. Thus, the probative value of these statements outweighed any minor prejudicial effect, and the court did not abuse its discretion in admitting them in spite of the defense motion in limine. (*Jordan*, *supra*, 42 Cal.3d at p. 316.)

**H. Any Error Was Harmless Beyond a Reasonable Doubt**

Even if this Court were to hold that the recorded statement, or any part thereof, was wrongly admitted, such error would not justify reversal under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal is required for state law error if there is a reasonable probability of a more favorable result but for the error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [reversal is required for federal constitutional error unless error was harmless beyond a reasonable doubt].) Undoubtedly, appellant's admissions in the recorded statement were hugely damaging to the defense. However, the People presented a vast amount of other evidence which was amply sufficient to convict appellant.

First, there was a great deal of evidence that appellant came to loathe Pam, which was relevant evidence of motive. Appellant and Pam had marital problems as early as 2000. (9 RT 1766-1767.) Though they did not have much money early in their marriage, their company, Goldfinger, generated enormous revenue in the years leading up to their divorce, reporting $160 million in 2007. (6 RT 1034; 7 RT 1222-1223, 1227.)

Eventually, appellant became convinced that Pam was embezzling hundreds of thousands of dollars from Goldfinger. (6 RT 1126-1127, 1140-1141.) Communication between appellant and Pam effectively ceased by the fall of 2007, when their divorce proceedings were underway, and appellant banned Pam from the Goldfinger offices. (6 RT 1056-1058, 1062, 1100-1103.) Appellant moved out of their home and into his ranch property, which he shared with Moya. (6 RT 1054, 1058-1059.) Meanwhile, Pam was informed by a friend that Goldfinger was operating without certain licenses which the federal government required, and Pam said she would obtain them. (7 RT 1371-1373.) However, it was appellant's and Goldfinger's position that Goldinger did not need these licenses. (7 RT 1261.)

There was also a powerful financial and legal incentive for appellant to kill Pam. During 2008, appellant and his attorneys began thwarting Pam's attorney from investigating Goldfinger for purposes of dividing its assets in the divorce. (6 RT 1154.) Appellant made the proceedings highly contentious. (6 RT 1156-1157.) Pam's attorney moved for sanctions and, shortly before Pam's death, believed he was close to obtaining a large, favorable ruling against appellant. (6 RT 1171-1172, 1183-1184, 1193-1195.) Pam's attorney had discovered that appellant was using Goldfinger as his personal "piggy bank." (6 RT 1172-1173.) At approximately the same time, there was an ongoing federal investigation of Goldfinger for secretly transferring money on behalf of certain Ponzi schemes. (7 RT 1218-1219.) Appellant and Pam both found out about the investigation when an accounting firm doing work relating to the divorce was subpoenaed by federal authorities investigating Goldfinger. (7 RT 1245-1248.) Shortly before Pam's death, her criminal defense attorneys advised her about the possibility of cooperating with federal authorities as a witness against appellant. (7 RT 1278, 1387-1388.) Pam asked at least one of her

attorneys to call the federal prosecutor and make inquiries to that effect. (7 RT 1281-1282.)

In the meantime, in the summer of 2008, Moya's phone was in contact with the phone belonging to Marquez, a gang member. (9 RT 1784-1785.) Simmons was Marquez's "little homie" in that gang. (9 RT 1706, 1709-1710.) Moya arranged for the rental of a red SUV under the Goldfinger corporate account which was paid for by appellant's credit card. (6 RT 1112-1113, 1116; 9 RT 1700.) After July 19, Moya was seen driving that vehicle. (6 RT 1114-1115, 1119.)

On the day and time of Pam's murder, Moya's and Simmons's phones were located in Century City, where appellant and Pam were having a meeting regarding the federal case. (7 RT 1257, 1378-1379; 9 RT 1791-1792, 1731-1732.) Appellant's phone and Moya's phone were in frequent contact during the entire day leading up to the murder, including mere minutes before Pam's death. (9 RT 1728-1729, 1741, 1744.) Immediately after Pam left the meeting with appellant, she was stabbed to death in the parking structure she had used. (8 RT 1414-1415, 1525-1526.) A red SUV was seen driving away from the scene by a witness and surveillance cameras. (8 RT 1517-1519, 1521, 1528.) Moya's phone and appellant's phone continued to be in contact on the evening after Pam's death. (9 RT 1741-1742.) After the murder, Marquez's phone returned from Century City back to Oxnard. (9 RT 1815.) That same night, Sanchez was asked to open the gate of appellant's ranch instead of Moya, who usually worked nights. (9 RT 1616-1617.) Moya was nowhere to be found. (9 RT 1620-1621, 1643.)

Surveillance footage revealed appellant calmly walking away from the courtyard near the scene of the crime while other bystanders panicked. (8 RT 1473-1474.) Footage also revealed the license plate number of the suspect SUV, which matched the one that Moya had rented in Goldfinger's

name. (9 RT 1690-1691, 1693-1694.) Sanchez testified that Moya had the SUV steam cleaned before he returned it to the rental agency. (9 RT 1626-1628.) Police obtained the SUV. Pam's blood was identified by DNA analysis in its interior. (8 RT 1489, 1492; 9 RT 1797.) Moreover, 62 pounds of gold were found in Moya's safe at the ranch. (8 RT 1501-1502.) Finally, Simmons's fingerprints were found on the parking ticket used by the SUV at the crime scene. (9 RT 1811.)

The defense case did not affirmatively rebut any of the substantive evidence above. Instead, it was focused on an uncorroborated and highly implausible story by appellant's sister Patricia Taboga that his other sister Mary Mercedes had once attempted to solicit Pam's murder. (10 RT 1903-1904.) However, Taboga could not explain why she had not confronted Mercedes about whether Mercedes had followed through on this plan after Pam actually was murdered. (10 RT 1935-1938.) Taboga also could not explain why she had not volunteered this information immediately after appellant was arrested and instead waited until shortly before trial to do so. (10 RT 1939.)

Given the mountain of evidence against appellant which was independent of his incriminating statements to Smith, exclusion of the recorded statement would not have created a reasonable probability of a more favorable result for appellant, and its admission, even if erroneous, was also harmless beyond a reasonable doubt. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

## II. THE TRIAL COURT CORRECTLY REMEDIED THE LIMITED JURY MISCONDUCT IN THIS CASE, AND NO REVERSIBLE ERROR OCCURRED

Appellant argues that certain jurors committed misconduct during trial, that the trial court failed to adequately investigate or remedy the misconduct when it occurred and later wrongly denied his motion for a new

trial, and that these errors warrant reversal. (AOB 109-129.) Appellant's arguments are meritless. The trial court correctly remedied the misconduct that occurred by dismissing one juror and one alternate juror, and properly held that all subsequent allegations of misconduct were baseless.

### A. Procedural History

During trial on Monday May 9, 2011, outside the presence of the jury, the court indicated that someone left a message on the court's answering machine stating that "certain jurors were discussing the case after the testimony on Friday." (9 RT 1577.) The caller identified himself[27] as a juror, and the court initially assumed that was true. (9 RT 1577-1579.) However, when a court staffer queried the jurors to determine who the caller was, each of them denied it. (9 RT 1579.) The court then considered the possibility that "somebody else made the call claiming to be a juror." The court requested suggestions from counsel on how to proceed. (9 RT 1579-1580.)

The prosecutor suggested that the court directly ask the jurors the same question that the staffer had asked and, assuming each juror again denied making the call, then the court could give a general admonishment not to discuss the evidence and move forward. (9 RT 1580.) Defense counsel, on the other hand, suggested that the court query each juror separately about the call and ask each of them whether he or she was aware of improper discussions between jurors about the case. Counsel was concerned that one of the jurors was a "whistleblower" who was uncomfortable airing his or her concerns in front of the other jurors. (*Ibid.*) The court opted to take the prosecutor's approach and query the panel as a whole about the voicemail, but stated that the complaining juror would not

---

[27] The court noted that the caller had a male voice. (9 RT 1579.)

be forced to air his substantive concerns in open court. (9 RT 1580-1581.) The court then called the jurors into the courtroom and informed them that the court received an unclear phone message from a person claiming to be a juror, and asked whether any of the jurors were the caller. (9 RT 1582.) All of the jurors and alternate jurors denied making the call. (*Ibid.*) The court then admonished the jurors not to discuss the case among themselves or form or express opinions about it prematurely. (*Ibid.*) The trial then proceeded.

On May 11, two days later, the court noted that on May 9, it had received a note from Juror No. 5. The note stated:

> On Friday, May 6, 2011, after the testimony of Edwin Rivera, we were released for an afternoon break. During that break, I observed and overheard Jurors 11, Alternate 1 and Alternate 4 discussing at length the actions of Mr. Rivera, his testimony and the case in general up to that point. I wasn't sure what to do, but after thinking of it all weekend, I decided to leave the court a message.

(9 RT 1652-1653.)

The voicemail message referenced in the note was the same one that the court had previously investigated on May 9. The court asked Juror No. 5 why he had not admitted to being the caller when all the jurors were asked. Juror No. 5 responded that "he felt embarrassed to have to raise his hand in front of everybody and decided to write the note instead and so he wrote this note and handed it to the bailiff on the way out of the courtroom." (9 RT 1653.)

The court called Juror No. 5 into the courtroom alone and stated, "I want to assure you that you've absolutely done the right thing" by calling this issue to the court's attention. (9 RT 1653-1654.) Juror No. 5 then elaborated on the incident he had observed. Juror No. 5 stated that shortly after Rivera's testimony, he overheard Juror No. 11, Alternate No. 1, and Alternate No. 4 in a hallway discussing Rivera's bravery, the graphic

photographs of the crime, and how cruel appellant must have been to take the actions leading to Pam's death. (9 RT 1654.) Juror No. 5 was concerned that a clique was forming among the jurors in which this small group was discussing the case. However, Juror No. 5 asserted that nothing he heard had affected his ability to be fair and impartial, and that he would refrain from arriving at any conclusions before the case was submitted. (9 RT 1655-1656.) Juror No. 5 stated that the only other juror who appeared to be within earshot of the conversation (besides himself) was Alternate No. 6. (9 RT 1656.) The court asked Juror No. 5 not to reveal his talk with the court to the other jurors. (*Ibid.*)

Alternate No. 6 was then called into the courtroom alone. (9 RT 1657.) The court queried whether he had overheard any conversation about the case between the jurors or alternates on May 6, and Alternate No. 6 replied that he had not. The court then asked him not to reveal his talk with the court to the other jurors. (*Ibid.*)

Juror No. 11 was then called into the courtroom alone. The court asked Juror No. 11 whether she had discussed the case with any of the alternates or other jurors, specifically after Rivera's testimony on May 6. Juror No. 11 replied that she had not. (9 RT 1658.) The court then asked her not to reveal her talk with the court to the other jurors. (*Ibid.*)

Alternate No. 1 was then called into the courtroom alone. The court asked Alternate No. 1 whether he had discussed the case with any of the alternates or other jurors, specifically after Rivera's testimony on May 6. Alternate No. 1 replied that he had not. (9 RT 1659.) The court then asked him not to reveal his talk with the court to the other jurors. (*Ibid.*)

Alternate No. 4 was then called into the courtroom alone. The court asked Alternate No. 4 whether he had discussed the case with any of the alternates or other jurors, specifically after Rivera's testimony on May 6. Alternate No. 4 replied that he had not. (9 RT 1659-1660.) The court then

asked him not to reveal his talk with the court to the other jurors. (9 RT 1660.)

The court then asked for suggestions from counsel on how to proceed. The prosecutor stated that the court should re-admonish all the jurors about the rule against discussing the case and then simply proceed with the trial. (9 RT 1660.) Defense counsel disagreed, arguing that the fairness of the trial was being jeopardized because either Juror No. 5 was lying or the three jurors/alternates whom he accused of misconduct were lying. Defense counsel suggested that Juror No. 5 was more credible because he had come forward initially. (9 RT 1660-1661.) Accordingly, defense counsel recommended dismissal of Juror No. 11 and Alternates No. 1 and 4. (9 RT 1662.) The court then heard additional arguments from both parties about the possibility that at least one of the jurors was lying and the potential prejudice that the alleged conversation between them about Rivera's testimony might have caused. (9 RT 1664-1665.)

Though the court tentatively held that there had not been a sufficient showing of misconduct to dismiss any juror, the prosecutor recommended that all of the remaining jurors be questioned individually regarding the alleged misconduct so that it would not appear that Jurors No. 5 and 11 and Alternates No. 1 and 4 were being singled out for such treatment. (9 RT 1665.) The court agreed to do so before moving on. (*Ibid.*)

During the course of these additional interviews, all but one of the jurors and alternates indicated that they had neither discussed the case with other jurors nor overheard others doing so, and that they could continue to serve objectively as jurors. (9 RT 1666 [Juror No. 1], 1667 [Juror No. 2], 1668 [Juror No. 3], 1669 [Juror No. 4], 1670 [Juror No. 6], 1671 [Juror No. 7], 1672 [Juror No. 8], 1673 [Juror No. 9], 1674 [Juror No. 10], 1675-1676 [Juror No. 12], 1676-1677 [Alternate No. 2], 1680-1681 [Alternate No. 5].) Alternate No. 3, however, reported that she was aware of some misconduct.

She indicated that one of the regular jurors, a young woman with short dark hair (later identified as Juror No. 11 at 9 RT 1681 and 10 RT 1832), told her that she had already decided that appellant was guilty and said that "once I make up mind, I don't change it." (9 RT 1678-1679.) Alternate No. 3 said that Alternate No. 1 was also present when Juror No. 11 made this statement, but that neither she (Alternate No. 3) nor Alternate No. 1 joined in her remarks. Alternate No. 3 said that she could continue to serve objectively despite the incident. (9 RT 1680.)

To sum up all the above, Juror No. 5 reported that he overheard Juror No. 11 make inappropriate comments to Alternates No. 1 and No. 4. Alternate No. 3, in contrast, reported that Juror No. 11 made the inappropriate comments directly to her and to Alternate No. 1. Finally, Juror No. 11 and Alternates No. 1 and No. 4 all denied either making or overhearing any inappropriate statements.

Following this questioning, the court indicated its intention to dismiss Juror No. 11. Both counsel agreed. (9 RT 1681-1682.) Defense counsel also requested the court dismiss Alternates No. 1 and No. 4. The court, however, was not persuaded that Alternate No. 4 had to be dismissed. Though Juror No. 5 reported that Alternates No. 1 and No. 4 were present when Juror No. 11 made the inappropriate statements, Alternate No. 3 reported that it was actually she and Alternate No. 1 who were present at that time. Alternate No. 3 never said that Alternate No. 4 was involved. Therefore, the court opined that Juror No. 5 had mistaken Alternate No. 3 for Alternate No. 4. (9 RT 1682.) However, the court agreed with defense counsel's concerns about Alternate No. 1 and called him or her back into court alone. Alternate No. 1 again denied overhearing any juror comment about the evidence or appellant's guilt or innocence. (9 RT 1684-1685.)

For the above reasons, the court held that Juror No. 11 and Alternate No. 1 should be dismissed and immediately excused them both. (9 RT

1685-1686.) The court instructed the remaining jurors not to speculate about why two jurors had been excused and reiterated "how very important it is for you to follow all of the court's instructions . . . particularly not forming or expressing any opinion about this case or discussing it among yourselves or with anyone." (9 RT 1687.)

The next day, May 12, defense counsel provided to the court a copy of an email that he had received earlier that morning via an online form on his firm's website from a sender named "anonymus@jamison.com." (10 RT 1825.) The email stated:

> Counsel, I notified judge however wanted to state you you [*sic*] and state, that I believe Mr. Fayed deserves fair trial. Please continue to express concern about jurors speaking opinion. Even after todays [*sic*] juror questions, many jurors continued to express opinion and statements among eachother [*sic*] including viewing websites about trial. Just please express the concern. Thank you.

(*Ibid.*)

The "name" field on the online form was simply filled in as "juror" and the return email address misspelled the word "anonymus." (10 RT 1829.) Defense counsel stated that the email was disturbing regardless of whether it was really sent from a juror or from a third party who was simply trying to be "mischievous." (10 RT 1826.) The court indicated that it would question Juror No. 5 about the email since he had previously reported jury misconduct. (10 RT 1826-1827.) However, the court expressed doubt that Juror No. 5 would resort to sending such an email, since he had already established direct contact with the court about juror misconduct on the prior occasion. (10 RT 1827.) The prosecutor also argued that the email "is clearly not from Juror No. 5" because Juror No. 5's prior note had been well-written, unlike this email, which was full of grammatical and spelling errors. (10 RT 1828.) The prosecutor argued against individually questioning Juror No. 5 again in order to avoid singling

him out from the other jurors or creating an environment of hostility around him for no reason. (10 RT 1830, 1835.) The prosecutor instead suggested asking all the jurors in open court whether they had sent counsel or the court an email, and, if so, that the juror should follow up with the bailiff. (*Ibid.*) Defense counsel expressed doubt that a third party would bother to interfere with the trial, implying that the email had in fact come from a juror. (10 RT 1831.) Defense counsel therefore requested a solo query of Juror No. 5 about the email as well as a question to the entire panel. (10 RT 1832-1833.) The court and counsel opined that perhaps the recently dismissed former Juror No. 11 had sent the email. (10 RT 1834-1835.)

The court subsequently decided not to individually question Juror No. 5 and, instead, to simply ask the entire panel about the email in open court. (10 RT 1836.) When the panel entered the courtroom, the court inquired whether any juror had sent an email to either attorney or the court. The jurors indicated that none of them had. The court then instructed them to contact the bailiff if they had any information that they were not comfortable sharing openly. (10 RT 1841.) None of the jurors contacted the bailiff and the trial proceeded. (10 RT 1853.)

That same day, the court stated that someone claiming to be a juror had left a voicemail on the court's phone to the effect that Jurors No. 6 and No. 9 were inappropriately discussing the case and/or looking up details about it on the Internet. (10 RT 1852-1853.) Based on the caller's female voice, the court opined that, if the message was in fact from a juror, it was likely to be either Juror No. 7 or Juror No. 10. (10 RT 1856.) The message stated,

> Hello, Judge Kennedy. I'm a juror in Department 109 in the case against Mr. Fayed. I just thought that I would go ahead and bring this to your attention.
>
> After, you know, the morning questioning about making sure that we aren't speaking or making any - - or expressing any

opinions, I thought that I would bring it to your attention that after court today, there's specific jurors, a few guys - - I believe this is Juror No. 6 and Juror No. 9 - - were talking about reading articles online and the things that they are investigating themselves and with regards to the case.

And I just want it to be known - - because I don't want this to be a factor in as being, you know, stated to other jurors and myself, and I do not want this to factor into the case or deliberation when it comes down to the point of if we have to deliberate.

I just want it to be known that even after, you know, the morning where we were all stating not to express or form an opinion, that it seemed to kind of perhaps make everyone - - not everyone, but make certain jurors decide to discuss it more.

I don't know if they are being cautious but it's definitely being discussed between people primarily after we were excused from the courtroom and are released the following day.

The discussion happened on the way to the parking garage. In regards to the opinions on that case, court case trials, and I just thought that I would let you know that it's very concerning to me if I'm going into deliberation with these people who have already made a verdict in their minds. I just thought I would let you know. Thank you.

(10 RT 1961-1963.)

The next morning, May 13, the court also received a written note from Juror No. 3 stating,

Your Honor, good morning and thank you for taking the time to read this note. In it I'm speaking only for myself, and I do not presume to speak for my fellow jurors.

I am somewhat concerned that the admonitions from the Court yesterday in talking amongst ourselves about the case, sending e-mails, et cetera, have created an air of suspicion and doubt among the jurors as we near deliberations. I'm not sure this is the best atmosphere to have.

Would it be possible to clear the air somehow questioning the jurors individually briefly, as I know time is precious, to ascertain if one of us did send an e-mail?

> Personally, I would feel more confident in my fellow jurors if I knew the truth regarding the e-mail or discussions about the case.
>
> I have neither seen nor heard any discussion of the details of the case during breaks, at lunch, or when walking to the parking garage.
>
> Again, thank you for your time and consideration. Juror No. 3.

(10 RT 1961.)

The court then spoke to Juror No. 3 individually and reassured him that the court shared his concerns. Juror No. 3 again stated that he had not heard any inappropriate discussions between jurors, nor was he aware of jurors sending emails to the attorneys or the court, or jurors researching the case online. (10 RT 1969-1970.)

The court then considered the question of the anonymous voicemail. Based on the caller's voice, the court individually queried Juror No. 10 about it, but she denied leaving any message. She also denied sending the anonymous email. She stated that she had not heard any jurors discussing the case or taking any other inappropriate actions, such as researching the case online, and confirmed that she could continue to serve as an unbiased juror. (10 RT 1964-1965.) Jurors No. 7, No. 11, No. 4, and Alternate No. 3 (the only other female jurors) were also individually questioned about the anonymous voicemail and all of them denied leaving the message. They also denied sending any email to counsel or participating in or overhearing any inappropriate discussion about this case. (10 RT 1967-1969, 1970-1971.)

The court then revisited the issue of the anonymous email (as Juror No. 3 had suggested) by questioning the male jurors individually about the email, any inappropriate discussions, and any improper use of the Internet to research the case. The court did not ask the men about the voicemail

since the caller was clearly female. All of the make jurors (including Jurors No. 6 and No. 9, who were accused of misconduct in the voicemail) denied any knowledge of inappropriate actions by jurors and stated that they were able to continue to serve in an unbiased fashion. (10 RT 1971-1984, 1990-1991.)

Following these extensive inquiries, the court summarized the situation and held that there was no basis to conclude that any further misconduct had occurred since the dismissal of the original Juror No. 11 and Alternate No. 1:

> All right. The state of the record is this: That every single juror and alternate juror has denied sending the e-mail to [defense counsel's] office, has denied leaving the voicemail on the court's telephone. Additionally, every single juror has indicated that they have not heard any of the jurors engaging in discussions about the case, forming or expressing opinions with regard to the case, and that includes those jurors that were not shy about letting us know of the problems that they became aware of, which led to earlier discussions that this court had.
>
> I don't think that there's sufficient evidence to demonstrate that any of these jurors now that are presently on the jury, or presently included among the alternates, has engaged in misconduct.
>
> The e-mail that was sent to [defense counsel's] office is anonymous, and it really didn't sound like any of those folks.
>
> The voicemail that was left on the court's voicemail, all of the female jurors denied having left that voicemail, and I have no way of knowing who it's from, but every single juror seems to be doing what they are required to be doing.

(10 RT 1984-1985.)

Defense counsel had no further objections or suggestions, and stated, "I'll submit, Your Honor." (10 RT 1985.) The prosecutor requested that the court make explicit findings that both the email and the voicemail were hoaxes and that neither of them was actually from a juror. The prosecutor

further requested that the court explicitly explain the situation to the jurors so that the issue would not be cloaked in secrecy. (10 RT 1984-1987.) Defense counsel objected to both those suggestions. (10 RT 1988.) The court opted not to make any findings regarding a hoax, but held that it would tell the jury about the anonymous voicemail and email, and explain that there was insufficient evidence that either of these communications had come from a juror. (10 RT 1988-1989.) Defense counsel objected to the court giving such an explanation. (10 RT 1989.)

The court subsequently informed the jury in open court that an anonymous voicemail had been left on the court's phone, that one of the attorneys had received an anonymous email about the case, and that both communications had alleged juror misconduct. The court informed the jury that its questioning of each of them had been an inquiry into those allegations. The court then informed the jury that "there's not sufficient evidence to give credence to [the allegations in the] anonymous voicemail or anonymous email" and stated that it was satisfied that all of the jurors were prepared to do their duty. (10 RT 1991-1992.)

On May 17, defense counsel received a letter which he copied and brought to court. The letter stated, "Dear Mr. Werksmen [*sic*], several jurors have received the letter and attached materials from the D.A. in your case. Does the court allow this? Is this right?" Attached to the letter was a copy of a campaign mailer from one of the two prosecutors in the case, Alan Jackson, who was running for the office of district attorney of Los Angeles County at the time. (11 RT 2375-2377.) Defense counsel requested that the prosecutor explain the mailer and that the court inquire whether any jurors had been influenced by it. (11 RT 2377.) The prosecutor stated that it was public knowledge that, in his personal capacity, he was running for district attorney, and that the mailer in question had been sent to constituents in February and never again

afterward. The prosecutor stated that no campaign mailers had been sent to anyone during the pendency of this case or in the months preceding it, and that he did not even know the jurors' names such that he could personally send them correspondence. (11 RT 2377-2378.) The prosecutor opined that this was yet another attempt by a third party to "torpedo these proceedings" and stated that it was not necessary to query the jurors about it. (11 RT 2378.) Defense counsel reiterated his request for an inquiry of the jurors about the mailer. (11 RT 2379-2380, 2384.)

The court agreed with the prosecutor that the level of apparent outside interference in the case was unprecedented, whether it was originating from appellant's supporters or one of Jackson's political opponents. (11 RT 2382.) The court considered requesting an investigation by law enforcement into the repeated instances of interference. (11 RT 2382-2383.) In any event, the court agreed with defense counsel's request to make a general inquiry to the jurors about the mailer. The court subsequently asked the jury panel whether any juror had received any correspondence from the attorneys or their offices during the trial. The jurors indicated that they had not. (11 RT 2386.) The court explained that it had received another tip that jurors were being inappropriately contacted, and asked them to be vigilant in case anybody tried to do so. (11 RT 2386-2387.)

After appellant was convicted, the defense moved for a new trial, claiming, inter alia, that jurors had committed misconduct. (14 CT 3778-3783.) Though counsel did not raise the issue in oral arguments on the motion, the court took exception to the defense's attempt to impugn members of the jury in its papers, stating,

> And I have never in all my years had a case like this where there were outside forces which somehow or another are associated with the defense. Not defense counsel, but somehow associated with the defense creating mischief and attacking . . . [the] heart

of our criminal justice system and trying to derail the jury in this case. And I notice there are a couple of jurors that are here today that were present during the trial. And I have nothing but the greatest respect for the jury in this case. They were under a tremendous amount of pressure in a case like this . . . The evidence and the facts in this case were gruesome and horrible . . . and in this case there was all this chicanery going on.

Now admittedly, there was misconduct that occurred between an alternate juror and one of the regular jurors early on. And the jury in this case self-reported. Somebody on the jury was aware that the alternate and one of the original jurors were talking about the case before the matter was submitted and forming or expressing opinions in contravention to the court's repeated instruction to the jury. And they let us know that. And I conducted a hearing, and I removed Juror Number Eleven and the alternate that were discussing the case.

And all of the jurors were questioned, and the remaining jurors all indicated that they were prepared to judge this case exclusively on the evidence that was presented in the trial and not from anything else.

And thereafter we got these anonymous emails and phone calls and letters that were claiming that jurors had committed additional misconduct; that jurors had gone on the Internet; that jurors had discussed the case; that the prosecutor had sent campaign materials to members of the jury.

We had an anonymous voicemail on the court's telephone one morning from one of the jurors, one of the female jurors claiming that certain jurors had been committing misconduct.

And with regard to each and every one of those claims of misconduct, the court conducted a hearing, and I examined all of the jurors and made inquiries. And all of the jurors denied sending the letters, sending the email or leaving the voicemail . . . And I believe those jurors.

I have nothing but the greatest respect for the jurors who participated in this trial, in their integrity.

And it was someone else that was creating the mischief, somebody associated with the defendant. If the defendant is

> willing to pay somebody $25,000 to kill his wife, then why wouldn't the defendant be willing to try to subvert the jury process in this case by having someone . . . send anonymous letters and emails and make anonymous phone calls to the court? I mean, that just is, I think, to be expected.
>
> We will never know exactly who was responsible. But as I said, I have the greatest faith in the integrity of this jury, and I don't find that this jury committed misconduct.
>
> The defense has not suggested any particular way in which misconduct occurred; only that they feel that I should grant a new trial or should have had a separate jury for the penalty phase because of these baseless allegations that were, you know, bombarded into the court repeatedly.
>
> And for all of the reasons that I stated here, and considering all of the arguments that the defense has offered in support of its motion for new trial, the motion for new trial is denied at this time.

(14 RT 2895-2897.)

Defense counsel asked the court to reconsider its conclusion that the interference with the jury originated with the defense, and opined that it may have been one of the prosecutor's political opponents. (14 RT 2899.) The court responded that, in its view, the person with the most to gain from the interference was appellant, and though there was no way to be certain, its suspicions fell squarely on him. (14 RT 2899-2900.)

**B. Applicable Law**

**1. Jury Misconduct**

An accused has a constitutional right to a fair trial by a panel of impartial, indifferent jurors. (*Irvin v. Dowd* (1961) 366 U.S. 717, 721-722 [81 S.Ct. 1639, 6 L.Ed.2d 751].) "A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'" (*People v.*

*Davis* (1995) 10 Cal.4th 463, 467, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 519.)

Depending on the circumstances, juror misconduct may amount to either structural error, which mandates reversal, or trial error, which can be harmless. (*People v. Gamache* (2010) 48 Cal.4th 347, 396-397.) "[S]tructural errors not susceptible to harmless error analysis are those that go to the very construction of the trial mechanism—a biased judge, total absence of counsel, the failure of a jury to reach any verdict on an essential element." Trial errors, on the other hand, occur when the overall structure of a trial is sound but the jury may have committed certain misconduct or considered improper evidence due to mistakes by the trial court or counsel. (*Ibid.*)

In the case of non-structural jury taint, "the focus is on whether there is any *overt* event or circumstance . . . which suggests a *likelihood* that one or more members of the jury were influenced by improper bias." (*In re Hamilton* (1999) 20 Cal. 4th 273, 294, emphasis original.) One form of jury misconduct in this category occurs when jurors converse among themselves or third parties about the case in order to form or express an opinion as to the defendant's innocence or guilt. (§ 1122; *In re Hitchings* (1993) 6 Cal.4th 97, 117-118.) The applicable law governing allegations of such misconduct was aptly summarized in *In re Lucas* (2004) 33 Cal.4th 682, where the court stated,

> To summarize, when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is

> substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.

(*Id.* at pp. 696-697, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 653; *Gamache*, *supra*, 48 Cal.4th at p. 397; *People v. Danks* (2003) 32 Cal.4th 269, 302-303; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.)

The *Lucas* court added,

> Juror misconduct generally raises a rebuttable presumption of prejudice, but '[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.'

(*Id.* at p. 696, quoting *Hamilton*, *supra*, 20 Cal.4th at p. 296.)

Notwithstanding all the above, when a sitting juror is *involuntarily* exposed to events outside the trial evidence, the resulting error does not constitute 'misconduct' in the pejorative sense at all, and only requires the sort of prejudice analysis applicable to ordinary trial error. (*People v. Harris* (2008) 43 Cal.4th 1269, 1303, citing *Hamilton*, *supra*, 20 Cal. 4th at pp. 294-295; *People v. Clair* (1992) 2 Cal.4th 629, 668 [with ordinary error, prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted].)

Finally, even if a trial court investigates and subsequently dismisses a juror for misconduct, that does not necessarily raise suspicions about the other jurors. When the investigation into the juror who is eventually dismissed provides no evidence to believe the other jurors committed misconduct, the court need not conduct further investigation. (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1385 [dismissal of juror during

deliberations did not compel court to investigate misconduct among other jurors, given the circumstances].)

**2. The Motion for a New Trial**

A defendant's motion for a new trial may be granted if the jury has engaged in misconduct which has prevented fair and due consideration of the case. (§ 1181, subd. 3.) When the defense makes such a motion, and has presented evidence demonstrating a "strong possibility" that prejudicial jury misconduct occurred, the court must "make whatever inquiry is reasonably necessary" to resolve the matter. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 417.) In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. First, the court must consider the admissibility of any evidence that the defense presents to prove the misconduct. If so, the court must then determine whether the facts establish misconduct. Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct. (*Hayes*, *supra*, 21 Cal.4th at p. 1256, citing *People v. Cox* (1991) 53 Cal.3d 618.) If the trial court finds misconduct occurred, the court must determine whether it was prejudicial. (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 704-705.)

On review of a denial of a defendant's motion for a new trial based on alleged jury misconduct, the appellate court also first determines whether any misconduct occurred, and then considers whether that conduct was prejudicial. (*People v. Collins* (2010) 49 Cal.4th 175, 242.) In determining misconduct, the appellate court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1194.) The trial court's decision will only be overturned for clear abuse of

discretion. (*Hayes*, *supra*, 21 Cal.4th at p. 1256; *Dorsey*, *supra*, 34 Cal.App.4th at p. 704.)

### C. The Court Conducted Proper Inquiries and Remedied the Jury Misconduct It Uncovered

#### 1. The Trial Court's Investigations Into the Alleged Misconduct During Trial Were Adequate; Alternatively, Any Error Was Harmless

Appellant does not allege that the jury misconduct amounted to structural error, but argues that it was sufficiently prejudicial to warrant reversal. However, contrary to appellant's claims that the trial court was "reluctant" to investigate this issue, the record reflects that the court conducted three full-panel jury inquiries and two rounds of individual interviews, and dismissed two jurors it found to have committed misconduct. There was no prejudice to the defense arising from the misconduct of the jurors who were excused, Juror No. 11 and Alternate No. 1, and the subsequent anonymous allegations of misconduct simply were not credible.

After the initial anonymous voicemail (which was later determined to have been made by Juror No. 5), the court conducted its first full-panel inquiry of the jury to determine who was the caller. (9 RT 1582.) After Juror No. 5 admitted to being the anonymous caller, the court conducted individual interviews regarding potential misconduct both with the jurors who Juror No. 5 claimed heard the inappropriate comments as well as with all the rest of the jurors. (9 RT 1657, 1658-1681.) At this point, misconduct was uncovered. As a result, Juror No. 11 and Alternate No. 1 were excused. (9 RT 1685-1686.) The presumption of prejudice arising from the misconduct of Juror No. 11 and Alternate No. 1 has been rebutted because all the remaining jurors then individually affirmed that they were not biased against the defense. (9 RT 1666 [Juror No. 1], 1667 [Juror No.

2], 1668 [Juror No. 3], 1669 [Juror No. 4], 1670 [Juror No. 6], 1671 [Juror No. 7], 1672 [Juror No. 8], 1673 [Juror No. 9], 1674 [Juror No. 10], 1675-1676 [Juror No. 12], 1676-1677 [Alternate No. 2], 1680 [Alternate No. 3] 1680-1681 [Alternate No. 5].) In fact, it was two jurors, Juror No. 5 and Alternate No. 3, who informed the court about the misconduct in the first place. Thus, there is "no reasonable probability of prejudice." (*Lucas*, *supra*, 33 Cal.4th at p. 696.)

After the anonymous email was sent to defense counsel, the court conducted yet another full-panel inquiry to determine the identity of the sender. (10 RT 1841.) Then, after the court received the anonymous voicemail accusing Jurors No. 6 and No. 9 of misconduct, the court conducted a second round of individual juror interviews regarding the voicemail (as to female jurors only), as well as the email and any inappropriate discussions or Internet research (as to both male and female jurors). (10 RT 1964-1991.) Finally, the court conducted a third full-panel inquiry after defense counsel received the letter about the prosecutor's political campaign mailer. (11 RT 2386.) These investigations constituted a "sufficient inquiry" to prove that the remaining jurors had not committed misconduct. (*Davis*, *supra*, 10 Cal.4th at p. 467.) The anonymous nature of these three communications, their dissimilarity with messages known to have come from actual jurors, and the lack of any independent verification of their claims all suggested that they came from third-party troublemakers.[28]

Nevertheless, appellant claims that the court "was hasty to disbelieve that the communications were coming from jurors, loath to question the

---

[28] Moreover, as to the allegations regarding the campaign mailer, it should be noted that involuntary exposure of jurors to extraneous material is generally not considered misconduct at all. (*Harris*, *supra*, 43 Cal.4th at p. 1303.)

jurors individually, and quick to believe that the jurors were not committing misconduct." (AOB 124.) In support of these allegations, appellant cites various colloquies between counsel and the court on this issue.[29] (AOB 124.) However, these citations simply highlight the court's (and the prosecutor's) reasoned and diligent investigations into Juror No. 5's concerns, which culminated in the appropriate dismissal of two jurors. For example, at 9 RT 1578, the court expressed its opinion that the initial caller (who was later identified as Juror No. 5) *actually was a juror*, namely, Juror No. 8. Therefore, appellant is wrong to assume that the court was reflexively inclined to blame a third party. Next, at 9 RT 1661-1665, the initial caller had been identified as Juror No. 5, and the court was considering whether to dismiss the jurors that he had implicated (Juror No. 11 and Alternate No. 1 and No. 4), or conduct additional inquiries. Again, this reflects the court's even-handed but serious treatment of the situation. Next, appellant's citations to 9 RT 1661 and 9 RT 1662:1-9 are inapposite because these sections are wholly composed of defense counsel's statements. At 9 RT 1663:18-19, the court tentatively concluded that Juror No. 5's accusations, without more, did not appear prejudicial to the defense because they merely concerned Edwin River's bravery. Nevertheless, at appellant's next citation, 9 RT 1665:16-24, the court agreed to conduct further investigations which subsequently led to the dismissal of Juror No. 11 and Alternate No. 1. None of these proceedings reflect hasty or improper handling of this issue by the court.

Appellant also claims that the court had a "disinclination to conduct full and complete investigations" into the allegations of misconduct, which was troubling because Juror No. 5 and Alternate No. 3 "lied when

---

[29] "9 RT 1578:3-21, 1660:27-28, 1661:1-28, 1662:1-9, 1663:18-19, 1664:4-9, 1665:16-24." (AOB 124.)

questioned as a group." (AOB 124.) Admittedly, Juror No. 5 was not truthful when the court first asked who left the initial voicemail, but he admitted the truth in a private note to the court shortly thereafter. (9 RT 1652-1653.) His honesty led to the first round of individual juror questioning which resulted in the dismissal of two jurors. There was nothing "troubling" about this outcome, as appellant suggests. Furthermore, contrary to appellant's claim, Alternate No. 3 never explicitly "lied" to the court. He was asked in the first full-panel inquiry only whether he left the initial voicemail, and he truthfully represented that he did not. (9 RT 1582.) Finally, appellant also claims that Juror No. 3's note to the court on May 13 should have prompted the court to conduct additional individual questioning of each juror. (AOB 124.) In fact, the court *did exactly that* after it received the note, conducting a second round of individual juror interviews. (10 RT 1964-1991.) Appellant's claim that the court "repeatedly refused to do so" (AOB 124-125) simply misstates the record.[30]

In any event, even if the court erred by failing to conduct additional investigation into any of the alleged misconduct, such error was harmless. First, any misconduct originating with Juror No. 11's discussion of the case

---

[30] Appellant further claims that, based on the same allegations jury misconduct, a new jury should have been impaneled for the penalty phase of his trial. (AOB 122.) The same jury must consider both phases unless good cause is shown for separate juries. (§ 190.4, subd. (c).) Good cause exists where it is a "demonstrable reality" that the jury is unable to perform its penalty phase function. (*Prince*, *supra*, 40 Cal.4th at p. 1281.) Denial of such a motion is reviewed for abuse of discretion. (*Ibid.*) For all the reasons discussed above, there was no demonstrable jury misconduct in the guilt phase after Juror No. 11 and Alternate No. 1 were excused. Thus, there was no good cause for the court to discharge the guilt phase jury, and its denial of the motion to do so was not an abuse of discretion. (12 RT 2405.)

was cured by excusing her and Alternate No. 1. Moreover, even if the claims of the anonymous tipsters (i.e., that jurors were discussing the case and researching it on the Internet) were credible, there was no evidence of what extraneous material the jurors actually saw or what they discussed. (*Lucas*, *supra*, 33 Cal.4th at pp. 696-697 [reversal may be justified if extraneous material was inherently and substantially likely to have influenced jurors].) For the same reason, it is also impossible to reasonably conclude that any juror was "actually biased against the defendant" when all them represented the exact opposite to the court in two rounds of individual interviews. (*Ibid.*) As such, reversal is unwarranted.

### 2. The Trial Court Properly Denied the Defense Motion for a New Trial Based on Juror Misconduct

The court's denial of the defense motion for a new trial was proper because the defense presented no new evidence of juror misconduct beyond that which the court had already considered and rejected during the trial. The court made all reasonably necessary inquiries and found that no misconduct had occurred which would justify a new trial. (*Hayes*, *supra*, 21 Cal.4th at pp. 1255-1256.)

After Juror No. 11 and Alternate No. 1 were excused, there were three subsequent allegations of juror misconduct; namely, an anonymous email, an anonymous voicemail, and an anonymous letter. Such anonymous hearsay falls far short of demonstrating a "strong possibility" that prejudicial misconduct had actually occurred. (*Hayes*, *supra*, 21 Cal.4th at pp. 1255-1256.) Normally, hearsay is not sufficient even to trigger a court's duty to conduct inquiries into allegations of jury misconduct, let alone grant a new trial. (*Id.* at p. 1256.) Here, moreover, the court had already conducted extensive inquiries and concluded that only Juror No. 11 and Alternate No. 1 had committed misconduct. In the court's denial of the

motion for a new trial, it clearly stated that the remaining jurors were credible and reasonably opined that the anonymous tips were likely perpetrated by a third party to derail the trial. (14 RT 2895-2897.) By repeatedly interviewing the jurors after each incident, the court ensured that this conclusion was supported by substantial evidence, which must not now be overturned. (*Linton*, *supra*, 56 Cal.4th at p. 1194.)

Appellant relies on *People v. Pierce* (1979) 24 Cal.3d 199, for the proposition that the burden was on the People to rebut the defense claims of jury misconduct in the motion for a new trial. (*Id.* at p. 207.) In *Pierce*, a juror who personally knew a police officer witness discussed the case with him in private while the trial was ongoing. (*Id.* at p. 205.) That juror subsequently was the foreman during deliberations. (*Ibid.*) After learning of the misconduct following the guilty verdict, the trial court applied an incorrect standard to weigh whether it was prejudicial. (*Id.* at pp. 207-208.) In other words, *Pierce* was concerned with the third step of the three-part inquiry described in *Hayes*, the determination of prejudice, because the misconduct had never been cured at trial. Here, in contrast, the only jury misconduct that actually occurred was that of Juror No. 11 and Alternate No. 1, who were dismissed long before deliberations. The court held that the anonymous communications (one email, one voicemail, and one letter) alleging jury misconduct after that point were not credible. Therefore, as to those allegations, the second prong of *Hayes* was not met, and the court did not abuse its discretion by denying the motion for a new trial. (*Hayes*, *supra*, 21 Cal.4th at p. 1256; *Dorsey*, *supra*, 34 Cal.App.4th at p. 704.) Accordingly, this claim fails.

## III. THERE WAS NO INSTRUCTIONAL ERROR

Appellant argues that the trial court committed a variety of instructional errors. (AOB 129-145.) All of his arguments in this regard are meritless.

### A. Applicable Law

The appellate court reviews *de novo* whether jury instructions correctly state the law. (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.) When an appellant claims instructions were conflicting or ambiguous, the reviewing court must determine whether the jury was reasonably likely to have construed them in a manner that violated the accused's rights. (*Ibid.*, citing *People v. Rogers* (2006) 39 Cal.4th 826, 873.) The errors should be viewed in the context of the entire record of trial, including other instructions and argument by counsel, because courts assume jurors are capable of understanding and correlating all of that information. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *Franco, supra,* 180 Cal.App.4th 713, 720, citing *People v. Stone* (2008) 160 Cal.App.4th 323, 331 and *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1089.) For instance, a correct instruction may clarify an erroneous instruction in the minds of jurors, thus negating the error. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110.)

A trial court is only obligated to instruct the jury sua sponte on the general principles of law governing the case, which are those principles connected with the evidence and which are necessary for the jury's understanding of the issues. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Counsel must affirmatively request an instruction on all other legal principles. For example, counsel may request that the court give pinpoint instructions, which relate facts to a particular legal issue in the case. (*Rogers*, *supra*, 39 Cal.4th at p. 878.) However, the court need not give an instruction pinpointing a defense theory of the case if it is not supported by substantial evidence, or is argumentative or duplicative of other instructions. (*People v. Harris* (2013) 57 Cal.4th 804, 853, quoting *People v. Hartsch* (2010) 49 Cal.4th 472, 500; *People v. Coffman* (2004) 34 Cal.4th 1, 99.)

A party forfeits any challenge to jury instructions that were correct in law and responsive to the evidence if he failed to object in the trial court. The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law or if the instructional error affected the defendant's substantial rights. (*Franco, supra,* 180 Cal.App.4th at p. 719.)

Instructional error justifies reversal only if the error was prejudicial under the applicable standard for determining harmless error. (*Franco, supra,* 180 Cal.App.4th 720.) The standard for reversal when instructional error deprives a defendant of his federal constitutional rights is harmlessness beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]); the standard for reversal for an instruction that violates or misstates California law is reasonable probability of a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836). (*People v. Mower* (2003) 28 Cal.4th 457, 484; *People v. Flood* (1998) 18 Cal.4th 470, 490, 502).

### B. There Was No Substantial Evidence To Support a Third-Party Culpability Instruction

#### 1. Procedural History

Defense counsel proposed a third-party culpability jury instruction which stated that "you have heard evidence that other persons, among them Mary Mercedes, committed the crimes charged," and that this evidence could, by itself, create reasonable doubt about appellant's guilt that would require his acquittal. (14 CT 3524.) Defense counsel stated that the defense theory underlying this instruction was that Mercedes hired Moya to kill Pam. (10 RT 2084-2085.)

However, the court stated that the defense's proposed instruction was misleading. The only evidence of Mercedes's involvement in Pam's murder was that Mercedes supposedly attempted to solicit Taboga's husband Kurt—not Moya—to kill Pam. (10 RT 2083.) Because it was

undisputed that Kurt rejected Mercedes's alleged offer to kill Pam, meaning her plan failed, Mercedes could at most be guilty of solicitation of murder rather than the murder itself. Even if Mercedes was guilty of this failed solicitation, it would not exculpate appellant from involvement in Pam's death, since the People's case was that he was pursuing a completely different track to kill Pam. Thus, Taboga's testimony provided no basis to give a third-party culpability instruction. (10 RT 2087.) In other words, the court stated that the jury "could believe that [Mercedes] did that [solicited Kurt] and still find the defendant guilty" by, for example, finding that appellant was the mastermind behind Mercedes's supposed plan, or that both appellant and Mercedes had separate, parallel schemes to kill Pam. (10 RT 2084-2086.) The court tentatively suggested a more neutral instruction that the weight and significance of Taboga's testimony about Mercedes's solicitation, as it related to the charges against appellant, were for the jury to decide. (10 RT 2090.)

The prosecutor interjected that Taboga's testimony was the primary piece of affirmative evidence for the defense, and the instruction requested by defense counsel was an improper attempt to highlight the significance of that evidence for the jury. (10 RT 2091-2092.) The only permissible parts of the proposed instruction, such as the standard for reasonable doubt and the prosecution's burden of proof, were already articulated in neutral fashion in other instructions. (10 RT 2092.) At that point, the court agreed with the prosecutor and withdrew its tentative suggestion for modifying the proposed instruction. (10 RT 2093.) The court stated that the defense was certainly permitted to argue that appellant should be acquitted because Mercedes was the person who solicited Moya to kill Pam, but held this was not the proper subject for a separate jury instruction as to Taboga's claims. (10 RT 2093.)

Defense counsel then suggested an alternate instruction reiterating for the jury Taboga's testimony about Mercedes's culpability, stating that the defense need not prove her guilt beyond a reasonable doubt, but that the jury was free to weigh the significance of that evidence as it saw fit. (10 RT 2094.) However, the prosecutor objected to that form of the instruction as well, since it would merely highlight a defense theory, and he reiterated that the substantive legal points (i.e., that the People bear the burden of proof) were already instructed elsewhere. (10 RT 2094-2095.) The court agreed with the prosecutor, noting that "there's no stock instruction on third-party culpability in either CALCRIM or CALJIC, so there's never been a feeling on the part of the people that draft these instructions that such an instruction is necessary" to highlight this particular type of defense argument. (10 RT 2095-2096.) The court then declined to give the proposed instruction in any form. (10 RT 2096.)

### 2. The Court Did Not Err By Omitting a Third-Party Culpability Instruction

Appellant claims that the record contained sufficient evidence to give the proposed third-party culpability instruction based solely on Taboga's testimony that Mercedes attempted to solicit Kurt to kill Pam. (AOB 132.) The proposed instruction was a pinpoint instruction which must be supported by substantial evidence. (*Coffman*, *supra*, 34 Cal.4th at p. 99.) Appellant repeatedly insists that the defense evidence supporting an instruction must be accepted as true (AOB 131), but this argument is a non-sequitur because Taboga's testimony, even if true, is simply tangential to the charge against appellant. The trial court was correct that this evidence, even if presumed true, would not create reasonable doubt as to appellant's guilt because it had nothing to do with the People's case that appellant

solicited Moya to arrange Pam's murder. There was no evidence—let alone substantial evidence—that Mercedes solicited *Moya*.[31]

Furthermore, the portions of the proposed instruction which stated that the defense does not bear the burden of proving the truth of Taboga's testimony, and that the People must prove appellant's guilt beyond a reasonable doubt, were also improper subjects of a pinpoint instruction. The jury was properly instructed as to the People's burden of proof, the presumption of innocence, and the standard of reasonable doubt. (14 CT 3550.) Where a court adequately instructs the jury regarding such principles, it is inappropriate to include another instruction highlighting them in the context of a particular defense theory. (*Harris*, *supra*, 57 Cal.4th at p. 853.)[32]

Finally, appellant puts undue focus on the court's statement that there is no model instruction in CALCRIM or CALJIC regarding third-party culpability. (AOB 134.) Though the court did briefly point out that fact (10 RT 2095-2096), this was not the primary justification for its refusal to give the proposed instruction. The court explained at length that the reason why the proposed instruction was inappropriate was that Taboga's

---

[31] On the day of Pam's murder, Mercedes's phone called Moya's phone just once at 10:25 p.m., and there had been no text messages between the two phones for the week prior to that. (9 RT 1747, 1748-1750.)

[32] In *Harris*, the court refused to give the defendant's proposed instruction that third-party culpability evidence "may, by itself, raise a reasonable doubt as to defendant's guilt," but did include a more general instruction about third-party culpability. (*Harris*, *supra*, 57 Cal.4th at p. 853.) An instruction on third-party culpability was appropriate in *Harris*, unlike the instant case, because in *Harris* (a murder prosecution) the defense theory was that the victim's boyfriend was the true killer, and a defense witness testified that he had seen the boyfriend driving the victim's car shortly after her death. (*Harris*, *supra*, 57 Cal.4th at pp. 818-819.) If true, that evidence would have contradicted the boyfriend's alibi. (*Id.* at p. 819.)

testimony about Mercedes had nothing to do with appellant's murder charge. (10 RT 2086.) The court then agreed with the prosecutor that all the other parts of the proposed instruction were duplicative. (10 RT 2093.)

### C. Appellant Forfeited the Argument That the Court Erred By Instructing the Jury With CALJIC No. 3.03; In Any Event, This Argument Is Meritless

Appellant claims that the court's use of the CALJIC model instructions rather than the CALCRIM model instructions was erroneous. Specifically, appellant claims that CALJIC No. 303 misstated the law regarding withdrawal of an aider and abettor from a crime.[33] (AOB 135-139.) Appellant forfeited this argument. (*Franco, supra,* 180 Cal.App.4th at p. 719.) In any event, it is meritless.

First, appellant forfeited a challenge to CALJIC No. 3.03 because defense counsel did not timely object. Appellant implies that this argument was preserved for appeal because the defense "argued that the CALCRIM jury instructions set forth the appropriate standards . . . ." (AOB 135-136 [citing 8 CT 1826].) This misstates the record. Appellant's citation refers to a footnote in the defense motion to set aside the information, filed long before trial, which set forth a CALCRIM instruction regarding withdrawal from a crime by an aider and abettor. (8 CT 1826.) The defense did not

---

[33] CALJIC No. 3.03, as given, stated,

Before the commission of the crimes charged in count one, an aider and abettor may withdraw from participation in that crime and thus avoid responsibility for that crime by doing two things: First, he must notify the other principals known to him of his intention to withdraw from the commission of that crime; second, he must do everything in his power to prevent its commission. The People have the burden of proving that the defendant was a principal in and had not effectively withdrawn from participation in that crime. If you have a reasonable doubt that he was a principal in and participated as a aider and abettor in a crime charged, you must find him not guilty of that crime.
(11 RT 2133-2134.)

argue that the corresponding CALJIC instruction on that issue misstated the law (which would have been radically premature in any event). Much later, when the question of jury instructions became pertinent, the court stated, "I do intend to use CALJIC rather than CALCRIM. I am not brave enough to use CALCRIM on a death penalty case." (8 RT 1575.) In response, defense counsel did not object, merely stating, "Your Honor, I will try to have some specials I will have ready for your review Monday. I am working on it." (*Ibid.*) Counsel also failed to object to the use of CALJIC instructions when the attorneys and the court were discussing instructions line-by-line (10 RT 2054-2100), including when the court specifically agreed to give the withdrawal instruction (over the People's objection) in the form of CALJIC No. 303 rather than the corresponding CALCRIM version (10 RT 2070) which he now claims was required (AOB 136-137). A defendant forfeits the opportunity to argue on appeal that CALJIC No. 3.03 incorrectly states the law regarding withdrawal unless he timely requested the trial court to alter that instruction. (*Richardson*, *supra*, 43 Cal.4th at pp. 1022-1023.)

In any event, even if this claim were not forfeited, it is meritless. CALJIC No. 3.03 sets forth the requirements for a defendant to demonstrate that he has withdrawn his participation in a crime as an aider and abettor. (CALJIC No. 3.03.) This Court explicitly ruled in 2008, approximately three years after the California Judicial Council adopted the CALCRIM model instructions, that CALJIC No. 3.03 still correctly states the law on this issue. (*Richardson*, *supra*, 43 Cal.4th at p. 1022 ["The instruction [CALJIC No. 3.03] is a correct statement of the law."].) It should also be noted generally that *none* of the CALJIC instructions became invalid or outdated by the adoption of the CALCRIM model instructions by the California Judicial Counsel. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465-466.) "CALJIC instructions that were legally

correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006." (*Id.* at p. 465.)

### D. Appellant Forfeited the Argument That the Court Erred By Using Both the CALCRIM and CALJIC Model Instructions; In Any Event, This Argument Is Meritless

Appellant claims that the court erred by using an instruction based on the CALCRIM model (CALCRIM No. 521) for one issue while using the CALJIC model instructions for all other purposes. (10 RT 2082-2083.) CALCRIM No. 521 is an instruction addressing multiple theories of guilt that could support a conviction. Defense counsel never objected to the use of this instruction in particular or to the practice of combining the CALCRIM and CALJIC instructions, thereby forfeiting the argument on appeal. (*Franco, supra,* 180 Cal.App.4th at p. 719.)

In any event, appellant's argument is meritless even if it were not forfeited. Appellant relies on the Guide for Using Judicial Council of California Criminal Jury Instructions for the proposition that the CALJIC and CALCRIM instructions should never be used together. (AOB 139.) However, while commentary by the Judicial Council can be instructive, it is not binding authority on California courts. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 304, fn.7.) Indeed, this Court recently considered a case in which a trial court combined the CALJIC and CALCRIM models in a single instruction. This Court acknowledged the Judicial Council's disapproval of such a practice but stated generally that "the trial court may modify any proposed instruction to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion." (*People v. Beltran* (2013) 56 Cal.4th 935, 943, fn. 6.) This Court then held that the resulting hybrid instruction did not misstate the law. (*Id.* at p. 954.)

Here, the trial court held that the CALCRIM No. 521 instruction was necessary because there was no appropriate equivalent (regarding differing theories of guilt) in CALJIC. (10 RT 2082-2083.) Given *Beltran*'s holding that combining the CALCRIM and CALJIC models *in a single instruction* is not necessarily improper, then neither is supplementing a selection of CALJIC instructions with one instruction from CALCRIM when the trial court finds it necessary or advisable to do so.

### E. Appellant Is Barred By the Doctrine of Invited Error From Arguing On Appeal That the Jury Was Inadequately Instructed Regarding Withdrawal From a Criminal Conspiracy; In Any Event, This Argument Is Meritless

Appellant argues that CALJIC No. 6.20, which the court used to instruct the jury regarding withdrawal from a criminal conspiracy, was an incorrect statement of the law. He claims that it is possible the jury believed the defense theory that he withdrew at some point from the conspiracy to kill Pam, and that CALJIC No. 6.20 wrongly omitted the requirement that jurors must unanimously agree that at least one "overt act" stemming from the conspiracy took place before the withdrawal. (AOB 140-142.) However, the defense explicitly requested CALJIC No. 6.20 as given, thereby waiving the argument that it was inadequate, pursuant to the doctrine of invited error. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 138 [doctrine of invited error bars a defendant from challenging a jury instruction given by the trial court when the defense itself requested the instruction based on conscious and deliberate tactical choice].)

During discussions regarding the proposed jury instructions, defense counsel stated, "Your Honor, it's not a coincidence that I'm actually going to request that the court consider my 6.20 to further buttress the court's

already included instruction about withdraw [*sic*] from a conspiracy."[34] (10 RT 2056.) The court postponed consideration of that issue at the time (10 RT 2057), but later agreed to give CALJIC No. 6.20 over the People's objection (10 RT 2071, 2100). Defense counsel's explanation that it was "no coincidence" that this instruction was needed to illustrate the issue of withdrawal clearly indicated a "conscious and deliberate tactical choice" on his part, and appellant is therefore barred from challenging that instruction on appeal. (*DeHoyos*, *supra*, 57 Cal.4th at p. 138.)

In any event, notwithstanding the waiver, appellant's argument is meritless. Appellant argues that jurors had to unanimously agree that at least one overt act[35] in furtherance of the conspiracy was committed before he withdrew. (AOB 141.) However, an overt act unanimity instruction is only appropriate when there is some dispute about whether the withdrawal

---

[34] CALJIC No. 6.20, as given, states:

A member of a conspiracy is liable for the acts and declarations of his co-conspirators until he effectively withdraws from the conspiracy or the conspiracy has terminated.

In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge.

If a member of a conspiracy has effectively withdrawn from the conspiracy heis not thereafter liable for any act of the co-conspirators committed after his withdrawal from the conspiracy, but he is not relieved of responsibility for the acts of his co-conspirators committed while he was a member.

The People have the burden of proving that the defendant was a member of and had not effectively withdrawn from the conspiracy at the time of the commission of the crime charged. If you have a reasonable doubt that he was a member of the conspiracy at that time, you must find him not guilty. (11 RT 2139-2140.)

[35] Commission of an overt act, beyond the conspiracy agreement itself, is one of the elements of count 2, criminal conspiracy. (§ 184.)

occurred before the first overt act. In other words, "*if evidence existed* that the defendant had withdrawn from the conspiracy, the court might have to require the jury to agree an overt act was committed before the withdrawal." (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2, emphasis added.) Here, however, there was no evidence or argument whatsoever that appellant withdrew before the first alleged overt act. The first overt act alleged as an element of count 2 was that appellant paid Moya $25,000 to kill Pam. (8 CT 1791.) The People's theory was that the payment occurred months before Pam's murder, and this was supported by the fact that appellant himself told Smith that Moya had botched four separate murder attempts after he had received the money. The defense did not dispute this theory, since its position was that appellant's first supposed attempted to withdraw from the conspiracy occurred *after* the failed attempts, when appellant wanted his money *back*. (11 RT 2288-2293.) In other words, the defense effectively conceded that appellant had already paid Moya, thereby committing the first overt act, before Pam died. An individual cannot escape liability for the crime of conspiracy by attempting to withdraw after at least one overt act has already been completed. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 702.) Thus, even if jurors believed the defense theory that appellant asked for his money back, and concluded that this constituted an attempt to call off the murder, this was an insufficient basis as a matter of law to establish legal withdrawal. In other words, there was no substantial evidence in support of the "unanimity" language that appellant claims was necessary. (*Harris*, *supra*, 57 Cal.4th at p. 853.)

### F. The Court Did Not Err By Refusing To Instruct the Jury With CALJIC No. 2.23

Appellant claims the court erred by refusing to instruct the jury using CALJIC No. 2.23. (AOB 142-144.) This claim is meritless.

CALJIC No. 2.23 states,

> The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness.

(CALJIC No. 2.23.)

As appellant concedes, this is a pinpoint instruction that need not be given sua sponte by the court. (AOB 142; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) Defense counsel argued that this instruction should be given with respect to Smith because he was a felon and a witness for the People. (10 RT 2068.) The prosecutor opposed giving the instruction on the basis that Smith was neither called to testify as a witness, nor were his recorded statements offered for their truth. (*Ibid.*) The court agreed with the prosecutor, holding that the defense could "still make your arguments" regarding Smith, but that the instruction was inappropriate because "he did not testify as a witness." (*Ibid.*)

Appellant argues that though Smith did not testify, he met the general definition of a witness under the Penal Code because he had "knowledge of the existence or nonexistence of facts relating to any crime" in that he overheard appellant's admissions regarding Pam's murder. (AOB 143; see, e.g., § 136, subd. (2)(i) [definition of witness].) However, the question of whether an individual such as Smith is a "witness" even without offering live testimony is tangential in this case. The important issue, as the prosecutor noted, is not whether the putative testimony was offered live in court, but rather that impeachment is only permissible of a declarant who has made statements admitted for their truth. For example, a witness's credibility may be impeached even if he does not give live testimony, but this is limited to situations where the effect of his out-of-court statements, if

believed, could lead to the defendant's exoneration. (See *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1452 [prosecution permitted to impeach defendant with prior crime evidence, even when defendant does not testify, if defendant's admissible hearsay statements were exculpatory].) Otherwise, there is nothing relevant to impeach.

As discussed at length in Argument I.F relating to the Confrontation Clause, Smith's statements in the recording were not admitted for their truth. Appellant, not Smith, was the declarant. "An interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter." (*Bryant, supra*, 131 S.Ct. at p. 1160, fn. 11, quoting *Davis, supra*, 547 U.S. at p. 822, fn. 1.) Contrary to appellant's claims, the People did not treat Smith as a declarant or "bolster his credibility at trial." (AOB 144.) Rather, Smith's statements were specifically offered as circumstantial evidence of some fact at issue *other than* the truth or falsity of the statement itself, namely, appellant's state of mind. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187.) Smith's statements (and the prosecutor's arguments describing Smith and the nature of his cooperation with the authorities) demonstrated that appellant was not under duress when they spoke, that appellant's admissions should be taken at face value, and that Smith was simply a bystander who managed to dupe him. In fact, so there could be no confusion, the prosecutor explicitly told the jury that "I am not asking you to take Shawn Smith's word for anything," since appellant's own words were damning. (11 RT 2317-2318.) As such, Smith was not a "witness" for the purposes of being impeached. Impeachment of Smith's credibility would have constituted an immaterial and collateral attack on the character of a person whose credibility was irrelevant. (*People v. Farnell* (1957) 156 Cal.App.2d 393, 401 [impeachment of witness is improper where it is immaterial and collateral to relevant

issues].) Therefore, the court was correct not to instruct the jury with CALJIC No. 2.23 to that effect.

### G. The Court Did Not Err By Instructing the Jury With CALJIC No. 2.06

Appellant argues that the court's use of CALJIC No. 2.06 was duplicative and prejudicial to his defense. (AOB 144-145.) This argument is contrary to specific recent rulings by this Court.

CALJIC No. 2.06, as given, stated,

> If you find that a defendant attempted to suppress evidence against himself in any manner, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(11 RT 2117 [CALJIC No. 2.06].)

Appellant argues this instruction was unnecessary and prejudicial to the defense because the court also instructed the jury with CALJIC No. 2.00 and No. 2.02. These instructions, as given, stated,

> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. It is not necessary that facts be proved by direct evidence. They may also be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(11 RT 2115-2116 [CALJIC No. 2.00].)

> The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only, number one, consistent with the theory that the defendant had the required specific intent; but two, cannot be reconciled with any other rational conclusion.

> Also, if the evidence as to any specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.
>
> If, on the other hand, one interpretation of the evidence as to specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(11 RT 2158-2159 [CALJIC No. 2.02].)

Appellant's argument fails because this Court has repeatedly rejected challenges to CALJIC No. 2.06 which were based on the notion that it is duplicative of other, more general instructions regarding circumstantial evidence. CALJIC No. 2.06 is appropriate where the facts suggest the defendant has engaged in evidence suppression, which may lead to an inference that he had consciousness of guilt. (*People v. Friend* (2009) 47 Cal.4th 1, 52-53; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1225.) Appellant committed a blatant act of attempted evidence suppression by planning to have Moya killed before he was arrested.

## IV. APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED EITHER BY THE WARRANTLESS SEIZURE OF EVIDENCE BY POLICE, OR BY THE METHODS USED TO OBTAIN THE SEARCH WARRANTS

Appellant argues that his Fourth Amendment rights were violated when police seized certain evidence without a warrant, and also when authorities obtained search warrants on allegedly improper bases. (AOB 146-180.) All of these arguments are meritless.

### A. Procedural History

Appellant was first arrested on July 29, 2008, and released that same day. His cellular phone was seized and police used it to obtain its own number. Police subsequently obtained a court order requiring appellant's

cellular provider to supply information relating to the number of the seized phone. (5 CT 1214-1215, 1222.) On August 1, after appellant was arrested on federal charges, police obtained a second court order for additional cellular records relating to the same number. (5 CT 1216-1217.) Appellant moved pursuant to section 1538.5 to suppress evidence obtained from his cellular phone. (4 CT 944-948.) The People opposed the motion (5 CT 1209-1237) on the basis that the phone was lawfully seized incident to appellant's arrest (5 CT 1214, 1218-1222), as well as on the basis of exigent circumstances, namely, that the phone could have been programmed to delete its data or the data could have been lost due to a malfunction (5 CT 1223-1226). The People's opposition also argued that the evidence stemming from the seizure of the cell phone (i.e., the cellular phone records) should not be suppressed because the only data actually taken from the phone itself was its number, which would have been inevitably discovered, and the additional evidence provided by the cellular provider was obtained from an independent source. (5 CT 1226-1237.)

At the hearing on the motion to suppress, the People called LAPD Detective Michael Pelletier. (2 RT 14.) Detective Pelletier was one of the officers who responded to the crime scene. (2 RT 15.) After spending some time there, he received notice that appellant was aware of Pam's death and had agreed to appear at the Camarillo station of the Ventura County Sheriff's Department out of concern for his daughters. (2 RT 18.) At approximately 4:30 a.m., Detective Pelletier arrested appellant at the police station in the presence of at least one of appellant's attorneys, who had come with him. (2 RT 18-19, 22.) The basis for the arrest was that police knew that appellant and Pam had been going through a divorce, and a suspect vehicle visible in a surveillance video leaving the crime scene had been rented in appellant's name. (2 RT 19.) In the meantime, Pam's cellular phone had been recovered from her purse at the crime scene. (2 RT

67.) The phone was given to Desiree, who later gave it to LAPD Detective Salaam Abdul after he took over investigative duties in the case on August 26. (2 RT 81-82.) One of the contacts stored in that phone was a number for appellant, 805-857-0120. (2 RT 82.)

Detective Pelletier further testified that on July 29, appellant was searched and a black Motorola Razr cellular phone was taken from his possession incident to the arrest. (2 RT 20-21.) Seizure of phones in the possession of arrestees is a common practice to prevent destruction of evidence and communication between the arrestee and third parties. (2 RT 21.) There are a variety of techniques to delete information on a cellular phone either remotely or manually, even if the phone itself is switched off. (2 RT 75-77.) Appellant was then taken to the West Los Angeles police station, and his attorneys followed. (2 RT 21-22.) Several officers attempted to speak with appellant. During that time, LAPD Detective Porche obtained the number associated with appellant's Motorola cellular phone from the phone itself. (2 RT 22, 53.) The detective did this in order to use the number in a search warrant affidavit for the substantive data associated with the phone. (2 RT 31-32.)

Detective Pelletier also testified that appellant was released from custody at approximately 5:30 or 6:00 a.m. the following morning. (2 RT 23.) The decision to release appellant was made because Detective Pelletier, in conjunction with Detectives Warren Porche and Eric Spear, determined that charges would not be filed against him at that time. (2 RT 28, 46, 57.) Appellant's phone was then briefly given to an FBI agent by the name of Depasquale, before being returned to Detective Porche. (2 RT 55, 63.) The phone was returned to appellant three days later, during execution of a search warrant at appellant's residence, at which time he was arrested by federal authorities. (2 RT 24-26, 54, 59.) Officers returned the phone because a wiretap had been approved on the line associated with it.

(2 RT 70.) Moreover, on August 1, FBI Special Agent Michael Easter executed a search warrant on Goldfinger offices, during which he recovered a phone directory. (2 RT 72-74.) During this search, Special Agent Eric Jensen also obtained two phone numbers from Goldfinger employees Scott Layton and Robert Brooks, 805-797-4583 and 805-797-0908. (2 RT 79-80.) Several weeks later, on August 22, another search warrant was executed at appellant's ranch house during which the same Motorola phone was once again taken as evidence, as was a Blackberry cellular phone. (2 RT 23-26.)

Detective Abdul testified that he interviewed appellant in custody on September 15, when he was arrested on murder charges and transferred from federal custody to the custody of the LAPD. (2 RT 82-83.) Appellant told Detective Abdul during a recorded interview that his Blackberry number was 805-797-4308. (2 RT 83.) On September 11, Detective Abdul also interviewed Moya, who confirmed that his phone number was 805-797-4586. (2 RT 83-84.) In any event, Detective Abdul was also aware that Moya was involved in Pam's murder independent of any evidence about Moya's cellular phone number, since he knew that Moya was in charge of renting cars for Goldfinger and had driven the vehicle suspected of being used in Pam's murder. (2 RT 88.)

Following the end of testimony on the motion to suppress, the prosecutor argued that the Motorola phone was lawfully seized on July 29 incident to appellant's arrest. (2 RT 91.) Alternatively, the prosecutor argued that the only evidence taken from the phone at that time was its number, which police would have found (and did find) in Pam's phone when it was recovered from the crime scene. (*Ibid.*) Moreover, police also obtained both the Motorola phone as well as appellant's Blackberry on August 22, when they were seized pursuant to a valid search warrant. (*Ibid.*) In addition, police obtained the number for appellant's Motorola

phone from Moya's phone, which was lawfully seized. (2 RT 92.) Also, police would have discovered the number of appellant's Motorola phone from the warrant for phone records of Goldfinger employees, including those who had called Layton and Brooks, and via the parallel investigation of Moya. (2 RT 92-93.)

Defense counsel responded that appellant's initial detention was invalid because there was no probable cause for an arrest, and therefore that the seizure of his phone could not have been incident to a lawful arrest. (2 RT 94.) Counsel claimed that appellant's detention was simply designed to elicit a confession, which is why appellant was released without being charged. (2 RT 95.) Counsel also attacked the theory that police would have obtained appellant's phone number notwithstanding the seizure. He emphasized that the warrant for cellular records to appellant's service provider was what led police to Moya, since it allowed them to pinpoint his physical position near the scene of the crime. (2 RT 96-97.)

The court ruled that appellant's initial detention was a de facto arrest. The court stated that the question of whether police had probable cause to make that arrest "is a real close question . . . ." (2 RT 98.) The court assumed for the sake of argument that the arrest was supported by probable cause, but stated that, even then, it was questionable whether the search incident to arrest justified obtaining the number from the phone (rather than simply depriving appellant of the chance to use the phone). (2 RT 99-100.) The court was not convinced of the exigent circumstances justification for seizing the phone, since there was no plausible way for appellant to disassociate the phone from its own number, and the police did not obtain any other data from it during the initial seizure. (2 RT 101.) Therefore, the court ruled that the search of the phone was unlawful, even if the arrest was lawful. (2 RT 102.) However, the court also held that police would have inevitably discovered appellant's Motorola phone number in a variety of

other ways, particularly from Pam's phone, since he was a suspect in her murder from the beginning of the investigation. Therefore, the court denied the motion to suppress under the inevitable discovery doctrine. (*Ibid.*)

**B. Applicable Law**

In general, the Fourth Amendment protection from unreasonable search and seizure is preserved by a requirement that searches be conducted pursuant to a warrant. (*People v. Allen* (2000) 78 Cal.App.4th 445, 448-449.) However, various exceptions to the warrant requirement exist, one of which is a search incident to a valid arrest. (*Chimel v. California* (1969) 395 U.S. 752, 762-763 [89 S.Ct. 2034, 23 L.Ed.2d 685].)

Evidence obtained in contravention of the Fourth Amendment should be suppressed as "fruit of the poisonous tree." (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 [83 S.Ct. 407, 9 L.Ed.2d 441].) However, evidence need not be suppressed even if the search was unlawful if the prosecution can establish by a preponderance of the evidence that the information would inevitably have been discovered by lawful means. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.)

On review of a motion to suppress evidence, appellate courts defer to the superior court's express and implied factual findings if they are supported by substantial evidence, but exercise independent judgment in determining the legality of a search on the facts so found. (*See, e.g., People v. Lomax* (2010) 49 Cal.4th 530, 563; *People v. Colbert* (2007) 157 Cal.App.4th 1068, 1072.) This includes cases when the People employ an inevitable discovery theory. (*Carpenter, supra*, 21 Cal.4th at p. 1040.)

**C. The Court Did Not Err By Denying the Motion To Suppress**

Appellant argues at length that his July 29 arrest, the pat-down search for the Motorola phone, and the search incident to arrest for data on the phone (namely, the phone's own number) were all unlawful and that the

information should have been suppressed. (AOB 148-159.) This argument, however, is meritless. In light of the trial court's persuasive reasoning under the inevitable discovery doctrine (and the deference due to its factual findings therein), respondent will address the preliminary issues only briefly.

First, respondent concurs with the trial court's holding (and the police officers' testimony, and appellant's position on appeal) that appellant's detention was a true arrest and not a mere temporary detention, given his transportation by officers between two police stations. (*In re Justin B.* (1999) 69 Cal.App.4th 879, 887 [when detention exceeds boundaries of mere investigative stop, it becomes de facto arrest requiring probable cause].) However, this warrantless arrest was lawful because it was supported by probable cause. (*People v. Thompson* (2006) 38 Cal.4th 811, 817.) Specifically, police knew that appellant was involved in a contentious divorce with Pam immediately before the murder, and that a car rented in his name (or under the name of the company he owned) was filmed fleeing the crime scene. (2 RT 19.) Appellant's argument that he did not match the description of the actual assailant (AOB 153) is irrelevant, since he was a suspect in a murder-for-hire plot. And though there was no evidence at the suppression haring about the exact dates when appellant rented the car, the fact that he was connected with a vehicle fleeing the scene of his estranged wife's murder was itself arguably enough to establish probable cause.

Next, to the extent that appellant was lawfully arrested for murder, the initial pat-down search for weapons that led the officers to find the phone was also reasonable. (*Terry v. Ohio* (1968) 392 U.S. 1, 30-31 [20 L.Ed.2d 889, 88 S.Ct. 1868]; *Chimel, supra*, 395 U.S. at p. 763 [police may search person and area within immediate control of arrestee for weapons or destructible evidence].) However, given the United States Supreme Court's

recent decision in *Riley v. California* (June 25, 2014, No. 13-132) __U.S.__ [2014 WL 2864483], it is unlikely that the search of the phone's contents was proper. The trial court's decision in this regard appears in accord with *Riley*. The trial court gave little credence to the notion that exigent circumstances justified the search and noted that there was no plausible way for appellant to have remotely deleted data on it while it was in the possession of officers. Therefore, the trial court held that the search was unlawful. (2 RT 101-102.) The United States Supreme Court expressed similar views in *Riley*. (See *Riley, supra*, 2014 WL 2864483 at *11-12, 19.)

Nevertheless, the trial court correctly concluded that even if the search of the phone was unlawful, the evidence should not be suppressed because police would have inevitably obtained the phone number. This decision was supported by a preponderance of the evidence. For example, the court correctly relied on the fact that the Motorola phone's number (the only data taken from it by police) was stored in Pam's phone. Pam's phone was recovered at the crime scene immediately after she was killed, and appellant's Motorola phone number was listed in it under his own name. (2 RT 82.) Given the divorce and the federal investigation of Goldfinger, appellant was a prime suspect in Pam's murder, meaning that his number would have been discovered and treated as evidence in any event. (2 RT 102.) In addition, police also obtained appellant's number from Moya's phone, which was validly seized, and from the call logs of other Goldfinger employees. (2 RT 92-93.) For those reasons, police would have been able to (and did in fact) obtain the number for the Motorola phone almost immediately after the crime. Appellant makes the conclusory argument that "the government did not show a 'reasonably strong probability' that the evidence would have been discovered anyway," but he does not actually dispute the fact that police had obtained the phone number from various

other sources. (AOB 161.) Thus, on the basis of the inevitable discovery doctrine, the court was correct in denying the motion to suppress. (*Carpenter*, *supra*, 21 Cal.4th at p. 1040.)

## V. APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ISSUANCE OF A SEARCH WARRANT BASED ON EVIDENCE STEMMING FROM A RECORDED PHONE CALL BETWEEN MOYA AND A DEFENSE INVESTIGATOR

Appellant argues that evidence obtained in the search of the ranch home should have been suppressed because the affidavit in support of the search warrant was based on an unlawful, surreptitious recording of a defense investigator's phone call with Moya. (AOB 163-171.) This argument is meritless.

### A. Procedural History

The defense moved before trial to traverse the search warrant that led to the search of appellant's ranch house on September 11, 2008, and suppress evidence obtained from that search pursuant to section 1538.5. (4 CT 856-865.) The motion was based on the argument that the affidavit supporting the warrant relied in part on an unlawful recording of an August 29, 2008, phone call between defense investigator Glen LaPalme and Moya. In the call, which was intercepted by police, LaPalme told Moya that police had taken possession of the SUV used in Pam's murder and would find "everybody's hair and skin" inside of it. Moya responded, "No, except for Pam's, it wouldn't be in there, it shouldn't be in there." (4 CT 858, 874.) This exchange (as well as a vast array of other evidence) was used to justify the search warrant for the ranch. (4 CT 868-874 [search warrant affidavit]; 877 [warrant return].)

In relevant part, the defense motion to traverse the warrant claimed the recording of the conversation between LaPalme and Moya was unlawful because LaPalme was an agent of defense counsel whose

communications were protected by the work product privilege. (4 CT 859-860.) The motion also argued that the affidavit was improper because it failed to point out to the authorizing magistrate that LaPalme was a defense investigator. (4 CT 861-862.) Finally, the motion claimed that the recording exceeded the scope of the wiretap which had authorized it, since the authorities intentionally recorded privileged communications. (4 CT 862-864.)

The People opposed the motion to traverse. (5 CT 1031-1064.) First, the opposition highlighted an August 22, 2008, report to the judge who issued the wiretap authorization which informed him that LaPalme was a defense investigator hired by appellant's trial counsel. In fact, police terminated listening to conversations between LaPalme and Mercedes until it was determined that appellant's defense counsel was not also representing Mercedes. (5 CT 1044-1046.) A September 4, 2008, wiretap report to the same judge covered LaPalme's discussions with Moya, including their talk about the SUV, and explicitly referred to LaPalme as "Mark Werksman's investigator." (5 CT 1046-1048.) Police justified listening to these conversations by stating that appellant's counsel did not represent Moya. (5 CT 1049.) Even so, the report stated that, in an abundance of caution, police had minimized or terminated listening to certain phone calls in which attorneys' phone numbers or voices were identified calling to the wiretapped phone numbers. (5 CT 1049.) Furthermore, the People opposed the motion to traverse on the basis that the work product privilege did not extend to conversations between a defense investigator and a witness during an ongoing criminal investigation. (5 CT 1053-1055.)

At oral arguments on the motion, defense counsel reiterated the argument that the judge who issued the search warrant was unaware that LaPalme was a defense investigator, and that the conversations between

LaPalme and Moya were privileged under the attorney work product doctrine. (2 RT 104-105.) The prosecutor responded that work product privilege is limited by statute in criminal cases to writings, and does not cover verbal communications. Furthermore, he added that the work product doctrine is not so expansive that it applies to conversations between an investigator retained by counsel for a person, like appellant, who had not yet been charged with a crime, and a witness in an ongoing investigation.[36] (2 RT 109.) Finally, the prosecutor argued that even if the conversations between LaPalme and Moya were unlawfully recorded, the search warrant was based on a large amount of information unrelated to those conversations. If this other information established probable cause in and of itself, then evidence obtained in the search should not be suppressed. (2 RT 112-113.)

The court held that the conversation did not fall under the work product doctrine and that there was no material omission in the affidavit because the judge issuing the wiretap authorization was aware of LaPalme's identity. In any event, the court also agreed with the prosecutor that even if the conversation between LaPalme and Moya were excluded from the search warrant affidavit, it would still contain "ample probable cause" supporting issuance of the warrant. (2 RT 114.)

///

///

///

///

///

---

[36] The prosecutor also noted unsettling sections in LaPalme's conversation with Moya in which LaPalme attempted to "steer" Moya's story, which the court found "disturbing." (2 RT 110-112, 114.)

## B. Applicable Law

### 1. Wiretap Rules

Law enforcement may intercept telephone communications upon judicial authorization that probable cause exists to do so. (See § 629.50.) Wiretapping generally is authorized only where normal investigative procedures have been tried and failed or reasonably appear unlikely to succeed. (§ 629.52, subd. (d).) Wiretap authorizations require the issuing court to specify the particular communications sought to be intercepted, and to minimize interception of other communications. (§ 629.52.) Indeed, wiretapping is subjected to a "much higher degree of scrutiny" by judicial officers than is a conventional search warrant. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1166.) A court reviewing the propriety of a wiretap scheme may look for guidance in the federal Omnibus Crime Control and Safe Streets Act of 1968, which establishes certain minimum standards in this area which state law must meet. (*Id.* at pp. 1166-1167, citing 18 U.S.C. §§ 2510-2520.)

### 2. Work Product in Criminal Proceedings

Section 1054.6 states that counsel in criminal proceedings are not "required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure." (§ 1054.6.) That statute defines work product as a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) This Court has recently held that this means only *writings* of an attorney that reflect his or her "impressions, conclusions, opinions, or legal research or theories," or attempts to elicit evidence of such writings, are protected by the work product privilege in criminal cases. (*People v. Scott* (2011) 52 Cal.4th 452, 489, citing *People v. Zamudio* (2008) 43 Cal.4th 327, 351-356.) Statements

about what evidence the defense possessed or how it treated that evidence are not protected as work product. (*Scott*, *supra*, 52 Cal.4th at p. 489.)

### 3. Motions to Traverse Search Warrants

The Fourth Amendment protection from unreasonable searches is generally preserved (subject to certain exceptions) by a requirement that searches be conducted pursuant to a warrant. (*People v. Allen* (2000) 78 Cal.App.4th 445, 448-449.) "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched." (§ 1525.) Probable cause exists when, "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].)

A motion to traverse a search warrant operates by attacking the veracity of the factual allegations in the affidavit supporting the warrant. (*People v. Hobbs* (1994) 7 Cal.4th 948, 957.) In order to prevail on such a motion, the defendant must first make a substantial preliminary showing that (1) the affidavit included a false statement made knowingly and intentionally, or with reckless disregard for the truth, and (2) that the allegedly false statement was necessary to the finding of probable cause because, if it were excised, the remaining allegations would be insufficient to support the warrant. (*People v. Thuss* (2003) 107 Cal.App.4th 221, 230; *People v. Luera* (2001) 86 Cal.App.4th 513, 524-525, citing *Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [98 S.Ct. 2674, 57 L.Ed.2d 667]; *Hobbs*, *supra*, 7 Cal.4th at p. 974.) If the defendant makes the necessary preliminary showing, the trial court must then conduct an evidentiary hearing (i.e., a *Franks* hearing) wherein the defendant must prove the same two elements by a preponderance of the evidence. (*Thuss*, *supra*, 107

Cal.App.4th at p. 230.) Only if a defendant meets that standard must the warrant be voided and any evidence seized pursuant to it be suppressed. (*Ibid.*)

When considering the second prong of the above test, the trial court should weigh "whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (*Thuss*, *supra*, 107 Cal.App.4th at p. 235, citing *People v. Kraft* (2000) 23 Cal.4th 978.) The warrant can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. (*Ibid*, citing *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 150.) This standard of review is deferential to the magistrate's determination. (*Ibid*, citing *People v. Hepner* (1994) 21 Cal.App.4th 761, 775.) An appellate court applies this same deferential standard of review when reviewing the trial court's ruling on the motion to suppress. (*People v. Campa* (1984) 36 Cal.3d 870, 878.)

### C. The Conversations Between LaPalme and Moya Were Not Privileged Under the Work Product Doctrine and Therefore Were Valid Evidence In Support of the Search Warrant Affidavit; In Any Event, the Affidavit Set Forth Probable Cause For the Search Warrant Even If Moya's Statements to LaPalme Were Excluded

Appellant's core argument that the conversation between LaPalme and Moya was privileged (AOB 166) is meritless. As *Scott* and *Zamudio* made clear, the only work product protection in criminal cases is for an attorney's writings that reveal his or her impressions, conclusions, opinions, or legal research or theories. (*Scott*, *supra*, 52 Cal.4th at p. 489, citing *Zamudio*, *supra*, 43 Cal.4th at pp. 351-356.) Appellant does not even

attempt to explain how oral statements between an investigator working for his attorney and a witness/suspect who did not share the same attorney could be characterized as such a "writing." Because the information was not privileged, there was no infirmity in the search warrant affidavit relying upon it. The court issuing the warrant was correct in holding that this information, in conjunction with the other evidentiary support in the affidavit, established probable cause for the warrant. (*Thuss*, *supra*, 107 Cal.App.4th at p. 235.) There is no basis to overturn that determination. Accordingly, the trial court did not err when it denied the motion to suppress. Appellant focuses on the fact that the judge authorizing the wiretap was not the same judge who authorized the search warrant, and on the trial court's brief mention that LaPalme should have spoken to Moya in person. (AOB 166.) However, because the underlying evidence was not privileged, these arguments are red herrings.

Next, appellant claims that the trial court should have granted the motion to suppress on the basis that the police inadequately minimized the scope of the wiretap. (AOB 167-168.) As appellant notes, the wiretap authorization did not permit the police to intercept communications not otherwise subject to interception. (AOB 168; 4 CT 889.) Indeed, the police did terminate interceptions when they came from a phone number associated with appellant's attorney, or when an attorney's voice was heard on the line, presumably to avoid any violations of the attorney-client privilege. (5 CT 1049.) For reasons explained above, however, the police had no duty to minimize interceptions of conversations between a defense investigator and a witness, to which neither the attorney-client privilege nor the work product doctrine apply.

In addition, appellant claims that his due process rights were violated by use of the wiretap to record LaPalme and Moya's conversation. (AOB 168-170.) In support of this claim, appellant cites several cases on the topic

of attorney-client privilege, namely *People v. Morrow* (1994) 30 Cal.App.4th 1252, 1261 [prosecutor "orchestrate[d] an eavesdropping upon a privilege attorney-client communication"], and *People v. Navarro* (2006) 138 Cal.App.4th 146 [setting forth standard for finding due process violation based on improper government use of privileged attorney-client information]. (AOB 169.) It is not clear whether appellant is actually arguing that the wiretap of Moya's phone somehow constituted a violation of some party's attorney-client privilege in addition to the work product doctrine. Even if appellant wished to take that position now, he cannot do so because he has waived it. During oral arguments on the motion to traverse, the prosecutor stated that the attorney-client privilege did not apply, and defense counsel conceded that "[t]his is work product. I know the prosecution's brief focuses mainly on the attorney/client privilege, but this is work product." (2 RT 106-107.) In any event, as the trial court correctly held, the attorney-client privilege does not apply. (2 RT 106.) Evidence Code section 954 states that the attorney-client privilege exists to allow a legal client (i.e., the holder of the privilege) to refuse to disclose confidential communications "between client and lawyer . . . ." (Evid. Code, § 954.) Here, Moya was not a client of appellant's attorneys, who were employing LaPalme, nor was LaPalme's conversation with Moya within the context of an attorney-client relationship.

Finally, appellant argues that reversal is warranted because the evidence obtained during the search of the ranch house, as authorized by the search warrant, was instrumental at trial. (AOB 170-171.) However, even assuming, arguendo, that the inclusion of the conversation between LaPalme and Moya in the search warrant affidavit was improper, the court still should have denied the motion to suppress due to other evidence set forth in the affidavit which established probable cause. For example, the affidavit contained evidence that appellant and Pam were "estranged," and

that the car filmed fleeing the crime scene was rented under the name "Fayed, James, Gold finger [*sic*] Inc." (4 CT 871.) Goldfinger employees had also informed police that appellant had recently given large amounts of money to Moya. (4 CT 871, 873) And Sanchez informed police about the suspicious gate opening on the night of the crime, when Moya, who was usually responsible for such work, suddenly could not be found. (4 CT 872.) Thus, the search warrant would have been authorized even if evidence of the conversation were excised. (*Thuss*, *supra*, 107 Cal.App.4th at p. 230.) In any event, even if the evidence should have been suppressed, the error was harmless beyond a reasonable doubt because there was a mountain of other evidence (not least of which were appellant's recorded admissions to Smith) which was damning to the defense. (*Chapman*, *supra*, 386 U.S. 24 [reversal not warranted for constitutional error if harmless beyond a reasonable doubt].)

## VI. APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE DENIAL OF THE MOTION TO QUASH THE JULY 31, 2008, SEARCH WARRANT

Appellant argues that the trial court erred by denying his motion to quash the July 31, 2008, search warrant because its supporting affidavit failed to set forth probable cause for a search. (AOB 171-180.) This argument is meritless.

### A. Procedural History

Shortly after Pam's murder, police obtained two warrants to search appellant's ranch house. Both the July 29 and July 31 search warrant affidavits described the circumstances of the crime, the premises of the ranch to be searched, and some of the evidence sought, including weapons, paperwork, and blood. (Compare 4 CT 918-922 with 4 CT 931-935.) However, the July 31 affidavit also contained an "Amendment" which stated that, according to Desiree, Pam's computers were at appellant's

ranch house. (4 CT 923.) The amendment also sought authorization to force open safes at the house. Specifically, the warrant requested authorization to collect "personal computers, laptop computers, hard drives, electronic equipment used to store files or written documentation, thumb drives, locked safes, secured lock boxes . . . financial records, soil samples from outside the residence . . .[and] saliva samples from [appellant] . . . ." (*Ibid.*)

Prior to trial, the defense moved to quash the search warrant issued on July 31, which led to the second search of the ranch house, and requested evidence of that search be suppressed pursuant to section 1538.5. (4 CT 901-915.) The motion argued that the July 31 warrant affidavit was based on the same information that had been previously used to authorize another search warrant on July 29, and that there was no new probable cause for a second search other than the "speculative" statements by Desiree relating to Pam's computers. (4 CT 910-914.) The motion further claimed that the July 31 warrant was overbroad. (4 CT 914-915.)

The People opposed the motion to quash (6 CT 1304-1334) on the basis that the second affidavit did contain new information from Desiree (6 CT 1317-1322), that certain areas of the ranch had been inaccessible during the first search and needed to be searched again (6 CT 1322-1327), and that the warrant was sufficiently narrowly tailored (6 CT 1327-1331).

During oral arguments on the motion, defense counsel reiterated his argument that the July 31 affidavit did not set forth probable cause for a second search. (2 RT 115.) The prosecutor responded that Desiree's statements about the computer records at the ranch were presumptively valid as the account of a citizen informant, and therefore established probable cause. (2 RT 117-118.) The prosecutor argued that searching the computers was necessary because officers were looking for evidence of a financial motive for Pam's murder, and the computers could have contained

important records to that effect. (2 RT 118.) Moreover, the prosecutor noted that the People had informed the judge who authorized the second warrant that certain items had already been found in the first search, and that police did not need to search those areas again. (2 RT 119.) Moreover, in addition to searching the computers, the second warrant was designed to give officers authority to open two safes at the ranch that were locked during the first search. (2 RT 121-122.)

The court held that the second search warrant affidavit did contain evidence sufficient to establish probable cause for another search, both because Desiree was a citizen informant and because it was necessary to open the locked safes. Furthermore, the court held that even if probable cause had been lacking, evidence from the search should not be suppressed because the officers acted in good faith when they relied on the judge's authorization to conduct the second search. (2 RT 122-123.)

**B. Applicable Law**

As discussed above, to justify issuance of a search warrant, there must be probable cause to believe that the material sought to be seized will be on the premises to be searched when the warrant is served. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) A motion to quash a search warrant, unlike a motion to traverse, accepts the factual allegations in the warrant affidavit as true but argues that they are simply insufficient to establish probable cause. (See *In re Christopher R.* (1989) 216 Cal.App.3d 901, 903-904.) The existence or nonexistence of probable cause is assessed by applying a "totality of the circumstances" test, which entails consideration of "the whole picture." (*United States v. Cortez* (1981) 449 U.S. 411, 417 [101 S.Ct. 690, 66 L.Ed.2d 621].) The issuing magistrate must make a practical and commonsense determination whether, given all the information in the affidavit, "there is a fair probability that contraband or

evidence of a crime will be found in a particular place." (*Gates, supra*, 462 U.S. at p. 238.)

"The order issuing a warrant in a criminal case may be set aside only if the affidavit, as a matter of law, does not establish probable cause." (*County of Contra Costa v. Humore, Inc.* (1996) 45 Cal.App.4th 1335, 1346, internal quotations omitted.) On appeal, a reviewing court must determine "whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (*Kraft, supra*, 23 Cal.4th at p. 1040.) The reviewing court must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the magistrate's findings. (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784; *People v. Stanley* (1999) 72 Cal.App.4th 1547, 1554 ["On appeal, we accord the magistrate's determination great deference, inquiring only whether there was a substantial basis to conclude that the warrant would uncover evidence of crime."].)

Moreover, even "[e]vidence seized pursuant to a warrant unsupported by probable cause need not necessarily be excluded. The Fourth Amendment exclusionary rule does not bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1015, quoting *People v. Lim* (2000) 85 Cal.App.4th 1289, 1296, 102 Cal.Rptr.2d 604. The question is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." (*Hochanadel, supra*, 176 Cal.App.4th at p. 1015, quoting *United States v. Leon* (1984) 468 U.S. 897, 922, fn. 23 [104 S.Ct. 3405, 82 L.Ed.2d 677].) The objective reasonableness of the officers' decision to apply for a warrant must be based on the affidavit and the evidence of probable cause contained therein,

and not the fact that the magistrate accepted the affidavit. (*People v. Camarella* (1991) 54 Cal.3d 592, 605.)

### C. The July 31 Search Warrant Affidavit Set Forth Probable Cause For the Second Search, and the Court Did Not Err By Denying the Motion To Suppress

The July 31 search warrant affidavit set forth two new sets of facts which justified a second search of appellant's home. First, it reflected Desiree's recollection that Pam's computer data was stored on devices at the ranch house, and, second, that there were certain safes that had not been accessed during the first search. These facts must be considered in the context of the case as a whole. (*Cortez*, *supra*, 449 U.S. at p. 417.) From the beginning of the investigation, it was known that appellant was a wealthy man who was divorcing Pam, and while video surveillance (and appellant's alibi at the legal meeting) suggested he was not Pam's actual attacker, the getaway vehicle was rented in his name. (4 CT 919-922.) These facts suggested a murder-for-hire plot. The potential existence of computer records was important because authorities were aware that appellant and Pam were embroiled in a contentious divorce before Pam died, and appellant had possession of Pam's computer. Information in this computer's files could include financial data or correspondence that would shed light on appellant's motive or intention to kill her, and/or evidence that he had contracted with a third party to do so. In addition, access to the safes was important in the search for payment to any third parties and physical evidence hidden after the crime. All of the above reasons established probable cause for the second search. "[F]rom the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206.)

Appellant describes Desiree's recollection in the affidavit as a "blanket statement" that does not contain facts (AOB 174), but this is a mischaracterization. Desiree specifically stated that Pam "kept records and documentation" on a computer that was "in her father's residence . . . ." (4 CT 923.) In other words, police had credible information from a citizen informant (who knew both the prime suspect and the victim well) that the suspect was in possession of the victim's computer. This information was sufficient to establish probable cause. Appellant further argues that the affidavit did not make clear that certain safes were inaccessible in the first search. (AOB 174, fn. 59.) However, this information is implicit, since the first affidavit did not specifically mention safes at all. (4 CT 931.)

Next, appellant claims that the second affidavit was "moot" because it copied certain language from the first affidavit, suggesting that police should have already collected any evidence as to those issues in the first search. (AOB 175-176.) This argument must fail. The "one warrant, one search" rule that appellant cites is designed to prevent repeated police searches as to the *same warrant*. (See *People v. James* (1990) 219 Cal.App.3d 414, 418.) Here, there were two warrants, separately authorized by a magistrate. The second warrant included an amendment with new facts. Appellant cites no authority that an amended affidavit which leads a magistrate to authorize a second search on the same premises must omit any duplicative language from the first affidavit. Indeed, such a rule would be contrary to common sense. In a case such as this one, where police could not access certain areas during the first search, a suspect likely will anticipate that officers will return to access the remaining areas. If officers were barred from re-searching the areas from the first search, the suspect could simply move any incriminating items from the locked areas to the previously searched areas.

In addition, appellant claims that the second affidavit alleged "stale" information. (AOB 176-177.) The doctrine of staleness relating to search warrant affidavits is designed to prevent searches that are "remote in time" and are "thus unworthy of consideration" when compared to the time that the alleged crime took place. Although there is no bright-line rule for gauging staleness, delays of more than four weeks are generally considered excessive to support probable cause. (*People v. Jones* (2013) 217 Cal.App.4th 735, 741-742.) However, this has no bearing on the instant case. The second search was only a few days after the first, and both took place within one week of the murder. Appellant claims that any evidence "should have been seized pursuant to the initial warrant" (AOB 177), but he cites no authority that the doctrine of staleness should be extended to bar subsequent searches (based on separately authorized warrants) of the same residence, especially when certain areas were inaccessible in the first search.

Appellant also claims that the second warrant was overly broad. (AOB 177-178.) In considering whether a warrant is sufficiently particular, courts consider the purpose of the warrant, the nature of the items sought, and "the total circumstances surrounding the case." (*People v. Eubanks* (2011) 53 Cal.4th 110, 133-134, quoting *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1008.) Given the totality of the circumstances, it would have been inappropriate to limit the searches of computers to those clearly identifiable as belonging to Pam, as appellant suggests. (AOB 178.) Officers could not know at a glance which computer belonged to which individual or whether a computer was shared by more than one person, and, in any event, files could easily be transferred from one machine to another. Furthermore, where the crime in question is elaborate, involving planning among multiple individuals, the associated search warrant will necessarily be more broad. "[I]n a complex case resting upon the piecing together of

'many bits of evidence,' the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence." (See, e.g., *Carpenter*, *supra*, 21 Cal.4th at p. 1043, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1291 [investigation of suspected serial killer of numerous victims along hiking trails justified broad seizure of suspect's effects]; see also *Kraft*, *supra*, 23 Cal.4th at p. 1043 [broadly worded warrant for search of suspect's vehicle was permissible where he was suspected of committing multiple murders].) Here, appellant was suspected of involving third parties in a murder-for-hire scheme relating to his finances and his divorce, and he lived on an expansive ranch with Moya, who was one of the other suspects. During the first search, certain areas of the ranch were inaccessible. It was appropriate that the second warrant should be relatively broad under these circumstances.

Finally, as discussed above, even if a Fourth Amendment violation did occur, it was harmless. The most powerful evidence against appellant was his surreptitiously recorded admission to Smith, and thus the use of any unlawfully obtained evidence from the second search of the ranch house was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. 24 [reversal not warranted for constitutional error if harmless beyond a reasonable doubt].)

## VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING NO DISCOVERY VIOLATION BY THE PEOPLE

Appellant argues that the People committed a discovery violation when the prosecutor failed to timely disclose the existence of a recording in which Mercedes denied soliciting Pam's murder. (AOB 181-188.) Appellant's argument fails. The recording is most accurately characterized as impeachment information rather than as real evidence gathered in the

course of the investigation into Pam's murder. Thus, the trial court's admission of the recording and holding that the People had not violated any discovery requirements was reasonable; in any event, even if the court erred, the error was harmless.

### A. Procedural History

Prior to trial, the defense expressed its intention to call Mercedes as a witness in order to question her about whether she attempted to solicit Taboga's husband Kurt to kill Pam. (13 CT 3397.) This line of questioning was based on a letter that Taboga had ostensibly sent to appellant in custody on March 9, 2011, which made the allegation against Mercedes. (13 CT 3370-3372.) However, outside the presence of the jury, Mercedes invoked her Fifth Amendment right not to incriminate herself as to all relevant subject areas raised by defense counsel. (4 RT 456-464.) The court therefore ruled that Mercedes was unavailable as a witness.[37] (4 RT 461.)

Due to Mercedes's unavailability, the defense was permitted to elicit hearsay testimony from Taboga that Mercedes had offered to pay Kurt $200,000 to kill Pam. (10 RT 1903-1904.) In rebuttal, the People requested admission of a recorded statement in which Mercedes denied doing so.[38] (10 RT 1992-1993, 1995.) Defense counsel objected that he had not been previously informed of the existence of such a recording, and that, if the People wished to present it on rebuttal, the prosecutor should have granted Mercedes immunity and offered it in the form of her live testimony. (10 RT 1996-1997.) The prosecutor stated that the recording

---

[37] The People did not offer Mercedes immunity.

[38] The recording was made during a telephone call between police and Mercedes on March 30, 2011, several weeks before Mercedes invoked her Fifth Amendment right. (10 RT 1997.)

was offered merely to impeach Taboga's credibility and did not need to be disclosed to the defense in advance, that it was subject to a hearsay exception under Evidence Code section 1202, and that Mercedes's decision to invoke the Fifth Amendment did not obligate the People to grant her immunity. (10 RT 1993, 1997-1998.) The court sided with the prosecutor, admitted the evidence, and implicitly found that the People had not committed a discovery violation. (10 RT 2008.) However, the recording of Mercedes was redacted such that only her statements that directly contradicted Taboga's testimony were admitted. (10 RT 2008-2019.)

**B. Applicable Law**

A witness may be contradicted by the direct testimony of a rebuttal witness when the initial witness's credibility is a relevant issue at trial. (*People v. Fisk* (1975) 50 Cal.App.3d 364, 370.) Evidence Code section 1202 specifically allows such an attack on the credibility of statements which themselves were admitted under a hearsay exception:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.

(Evid. Code, § 1202.)

With respect to discovery, section 1054, subdivision (e), provides that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions or as mandated by the Constitution of the United States." Under section 1054.1, the People have a duty to "disclose to the defendant or his or her attorney. . . (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged." (§ 1054.1, subd. (c).) However, no part of section

1054.1 compels the People to disclose information used to impeach a defense witness's credibility. (*People v. Tillis* (1998) 18 Cal.4th 284, 294.)

Trial court rulings on discovery matters are reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Violations of section 1054.1 are not grounds for reversal unless it is reasonably probable that the defendant would have obtained a more favorable result at trial but for the error. (*People v. Verdugo* (2010) 50 Cal.4th 263, 280, citing *Watson, supra*, 46 Cal.2d at p. 836.)

### C. The Trial Court Did Not Err When It Held That There Was No Discovery Violation by the People; In Any Event, Any Error Was Harmless

Appellant argues that the People had a duty to disclose the recording of Mercedes as soon as it became clear that the defense would elicit from Taboga the claim that Mercedes attempted to solicit Pam's murder. Appellant claims the recording was "real evidence" under section 1054, subdivision (c). However, appellant's position fails because the recording, as actually used by the People, was merely impeachment information and not affirmative evidence relating to the murder investigation.

In *Tillis*, this Court held that mere "impeachment information" need not be disclosed during discovery by the People to the defense. There, the prosecutor impeached a defense witness's credibility on cross-examination via questions about his past drug use. (*Tillis, supra*, 18 Cal.4th at pp. 288-289.) The defense objected that the prosecutor should have disclosed his intention to do this pursuant to section 1054.1, subdivision (a), which requires disclosure of potential witnesses, because "the prosecutor must have intended to call witnesses to establish the impeaching facts had the [defense witness] not admitted them." (*Id.* at p. 287.) This Court held, however, that there was no way to know whether the prosecutor would have called such witnesses (nor did trial counsel object on that basis),

meaning the undisclosed facts about the defense expert could only be characterized as "impeachment information" on appeal. Mere impeachment information was not covered under the discovery statute, and so the failure to disclose it was not a discovery violation. (*Id.* at pp. 291-293.)

The principles of *Tillis* militate against mandatory disclosure of Mercedes's interview because none of the sub-parts of section 1054.1 accurately describe it. Contrary to appellant's claims, the interview was not "seized or obtained as a part of the investigation of the offenses charged" within the meaning of section 1054.1, subdivision (c). By citing Evidence Code section 1202, the prosecutor made clear that he sought to have the recording admitted solely as an impeachment of Taboga's credibility, not as affirmative evidence relating to Pam's murder. Indeed, the prosecutor[39] only conducted the interview after defense counsel disclosed Taboga's March 9, 2011, letter, which was a patently implausible, last-minute attempt to scapegoat Mercedes shortly before appellant's trial. The only basis to find Mercedes's interview relevant and admissible was to cast doubt on Taboga's claims. There is no indication that prosecutors ever suspected Mercedes of actually planning Pam's murder.[40] From the very night of the crime, appellant was the prime suspect, and police immediately discovered overwhelming evidence to back up that suspicion, such as his contacts with Moya and his connection to the getaway vehicle. Moreover, several months after the murder, appellant blatantly admitted his involvement in Pam's murder to Smith, a police informant. Mercedes's

---

[39] Both police and the trial prosecutors were involved in the telephone conversation with Mercedes. (10 RT 1992-1993, 2007-2008.)

[40] Indeed, as discussed in Argument III.B.2 above, the truth or falsity of the claim that Mercedes solicited Kurt to kill Pam had no bearing on appellant's guilt or innocence in the instant case.

interview took place on March 30, 2011, nearly *three years* after these events. Therefore, though the CD containing Mercedes's interview was a tangible object which was admitted into evidence, it is inaccurate to characterize it as "real evidence" of the "investigation" into Pam's murder, as contemplated by section 1054.1, subdivision (c).[41] As such, the trial court did not abuse its discretion in finding that no discovery violation occurred.

Appellant's reliance on *Jordan v. Haunani-Henry* (9th Cir. 1999) 199 F.3d 1332, is misplaced. In that unpublished Ninth Circuit case (which of course is not binding on this Court), the undisclosed evidence in question was a written record intended to *impeach the testimony of the victim herself* as to the substantive crimes. (*Id.* at pp. 1-2.) Such evidence must be produced to the People under the statutory requirement that the defense disclose "[a]ny real evidence which the defendant intends to offer in evidence at the trial." (§ 1054.3, subdivision (a)(2).) In the instant case, on the other hand, neither Mercedes's interview nor Taboga's testimony had any direct bearing on appellant's guilt or innocence. Indeed, the trial court explicitly refused to instruct the jury that Taboga's statement, even if believed, would exculpate appellant. (10 RT 2096.) Therefore, unlike in

---

[41] The interview with Mercedes obviously was not exculpatory, meaning the prosecutor also had no duty to disclose it under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] [due process clause of Fourteenth Amendment requires prosecution to disclose to the defense any material, exculpatory evidence]. The interview was presented as part of the People's rebuttal case, which implicates the prosecutor's duty to disclose his or her rebuttal witnesses, but appellant does not claim that the prosecutor failed to give notice that Detective Abdul would testify. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375 [discovery statute requires rebuttal witness disclosure].)

*Jordan*, Mercedes's interview was tangential to the substantive issues in the People's case against appellant, and was only admissible to rebut the credibility of a defense witness who raised an outlandish theory at the last minute before trial.

In any event, even if the trial court should have held that the People committed a discovery violation, it was not reasonably probable that appellant would have obtained a more favorable trial outcome but for this error. (*Verdugo*, *supra*, 50 Cal.4th at p. 280.) A trial court may, in the exercise of its discretion, consider a wide range of sanctions in response to the prosecution's violation of a discovery order (*Ayala*, *supra*, 23 Cal.4th at p. 299), but here defense counsel was simply requesting that the court simply exclude the interview. (10 RT 2008.) Admittedly, exclusion of the interview would have left Taboga's testimony unrebutted, but her claims were patently implausible on their face. As the prosecutor noted during Taboga's cross-examination, it would be bizarre to believe that Taboga would not confront Mercedes after Pam's death had Mercedes recently tried to solicit Pam's murder, or that Taboga would wait years after appellant's arrest to come forward with such shocking information. (10 RT 1911, 1935-1938, 1941-1943.) Taboga's claims also did nothing to explain why there was a mountain of evidence incriminating appellant for the murder, not least of which was his admission to Smith. As such, any discovery error was harmless under any standard.

## VIII. THE TRIAL COURT DID NOT COMMIT EVIDENTIARY ERROR

Appellant argues that the trial court wrongly admitted evidence of the federal indictment, hearsay testimony by Carol Neve, and various photographs. (AOB 188-204.) He further claims that the court wrongly limited defense counsel's examination of Mark Aveis, Greg Herring, and Patricia Taboga, as well as evidence that appellant was physically incapable

of committing murder. (AOB 205-214.) These arguments are all meritless.

**A. Applicable Law**

As set forth above, all relevant evidence is admissible, and trial courts have broad discretion to admit evidence which they abuse only by acting in an arbitrary, capricious, or patently absurd manner resulting in a miscarriage of justice. (Evid. Code, § 351; *Jordan*, *supra*, 42 Cal.3d at p. 316; *Albarran*, *supra*, 149 Cal.App.4th at pp. 224-225; *v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 343.)

The applicable standards for admission of prior acts evidence under Evidence Code section 1101 (and related considerations under Evidence Code section 352) were previously set forth at length in Argument I.G, *ante*, in the discussion of Smith and the surreptitiously recorded admission.

Hearsay is evidence of a statement made other than by a witness testifying at the hearing in question that is offered to prove the truth of the matter asserted. Unless subject to some exception provided by law, hearsay is inadmissible. (Evid. Code, § 1200.) One such exception is provided in Evidence Code section 1250, which allows evidence "of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" when offered to prove the declarant's state of mind or emotion at any relevant time, or to prove or explain the declarant's acts or conduct. (Evid. Code, § 1250, subds. (a)(1)-(a)(2).) Such evidence is more properly characterized as non-hearsay, since it is not admitted for the truth of the matter asserted. (See *Bridge v. Ruggles* (1927) 202 Cal. 326, 330-331.) However, this exception does not apply if the statement in question "was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) Another hearsay exception is set forth in Evidence Code section 1230, which permits hearsay that subjects

the declarant to the risk of criminal liability such that a reasonable person would not have made the statement unless he believed it were true. (Evid. Code, § 1230.) A third hearsay exception raised in the instant case exists for prior statements of a declarant who also offers live testimony if and only if "evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement," or "[a]n express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, §§ 791, 1236.)

Regarding photographs, the general rules of evidence concerning relevance and undue prejudice apply. Specifically, the decision to admit victim photographs is a discretionary matter for the trial court which should not be disturbed on appeal unless there was an abuse of discretion; namely, photographs must have been relevant, and their prejudicial effect must not clearly outweigh their probative value. (*People v. Davis* (2009) 46 Cal.4th 539, 615; *People v. Lewis* (2009) 46 Cal.4th 1255, 1282.)

### B. The Trial Court Did Not Err By Admitting Evidence of the Federal Indictment

Appellant claims the trial court erred by admitting evidence of the federal indictment and investigation. (AOB 191-196.) However, the trial court's admission of this information was proper.

The defense initially moved prior to trial to exclude all reference to the federal indictment against appellant and Goldfinger for violation of 18 U.S.C. § 1960, or any of the facts underlying the associated investigation. (12 CT 3160- 3172.) The defense position was that the investigation was not probative of appellant's motive to kill Pam because the People had not

"asserted any facts surrounding the federal case" pursuant to Evidence Code section 1101. (12 CT 3167.) The motion also argued that admission of evidence relating to the federal indictment would prejudice the defense pursuant to Evidence Code section 352. (12 CT 3171.) The People opposed the motion. (13 CT 3252-3268.) The People's principal position was that the federal investigation and indictment were admissible as evidence of appellant's motive to kill Pam, and had probative value which was far greater than any prejudicial effect. (13 CT 3257-3267.)

At oral arguments on the motion, defense counsel conceded that appellant knew there was a federal subpoena of financial documents and a federal "criminal probe" of his activities relating to Goldfinger. However, counsel argued that appellant did not specifically know about the indictment, and thus there was no basis for the People to present evidence or argue that appellant killed Pam in order to "silence her as a witness," and that allowing such an approach would prejudice the defense. (3 RT 312-316.) The prosecutor responded that the People intended "to present evidence that [appellant] knew that Pam Fayed was going to testify against him." The prosecutor noted that in appellant's surreptitiously recorded statements to Smith, appellant repeatedly complained that Pam was "running her mouth" to third parties, and that he could not simply pay Pam to get rid of her. (3 RT 316.) The prosecutor also highlighted the anticipated testimony from Pam's friend Carol Neve, which suggested that Pam was concerned about Goldfinger's potentially illicit activities, Pam's dispute with appellant during the divorce regarding a money transfer license for Goldfinger, and Pam's consultations with criminal defense attorneys relating to the federal investigation. (3 RT 316-319.) The prosecutor also pointed out that evidence of the federal indictment and investigation weakened the defense's plan to shift blame from appellant to

Mercedes, since Mercedes was not under federal investigation and did not have this motive to kill Pam, as appellant did. (3 RT 321.)

The court held that the federal indictment and criminal investigation of appellant and Goldfinger was relevant and admissible to show appellant's motive for murder, though the defense was free to argue that any bitterness between appellant and Pam was solely regarding the divorce. (3 RT 324.) As to prejudice, the court held that "the money laundering charge . . . pales in comparison to this murder for hire conspiracy charge," and that a jury instruction could insulate appellant from being impugned by it. (3 RT 324-325.)

The trial court did not err. Details about the money transfer license investigation were admissible under evidence Code section 1101, subdivision (b), which specifically permits admission of evidence that the defendant committed a crime (or some other act) other than the charged offense when it is relevant to establish his motive for committing the charged offense. (Evid. Code, § 1101, subd. (b).) For example, in *Rogers*,[42] the defendant was a county sheriff's deputy accused, inter alia, of killing a prostitute who fled from his car after they disagreed about payment. The People presented evidence under Evidence Code section 1101, subdivision (b), that several years prior to the murders, the defendant had been temporarily terminated from the sheriff's department (but later reinstated) due to complaints about his behavior by a different prostitute. (*Id.* at p. 845, 861.) This Court upheld the trial court's admission of the defendant's prior termination because it was relevant to prove his motive for killing the prostitute who tried to flee years later, since it "tended to show defendant had a reason to fear the consequences of any report [she] might make." (*Id.* at p. 862.) There was no indication that the *Rogers*

---

[42] *Rogers*, *supra*, 39 Cal.4th at p. 826.

defendant was still under investigation for that prior wrongdoing at the time he committed the murder. (See also *People v. Barnett* (1998) 17 Cal.4th 1044, 1118 [testimony that defendant had previously assaulted murder victim's friend, and that victim requested the friend to report defendant to police, was properly admitted under Evidence Code section 1101 as proof of motive to kill victim].)

Here, similarly, evidence of the federal investigation was admissible to prove appellant's motive to kill Pam because it was reasonable to believe that appellant was worried Pam would incriminate him or Goldfinger in the federal probe. Neve told Pam that Goldfinger needed certain money transfer licenses to operate legally, and Pam responded that she would obtain them. (7 RT 1371-1373.) Appellant thereafter accused Pam of embezzling $800,000 from Goldfinger, which Pam maintained she spent to obtain the licenses. (6 RT 1162.) Appellant believed these licenses were not necessary. (7 RT 1261.) Then, though the federal indictment was sealed, both appellant and Pam became aware that the federal government was investigating Goldfinger's financial records via the subpoena of Pyne Waltrip. (7 RT 1245-1248.) Both appellant and Pam retained criminal defense attorneys in connection with the federal investigation. Pam discussed with her attorneys the possibility of cooperating with the federal investigation rather than being included as a target of it. (7 RT 1278, 1387-1388.) One of Pam's attorneys raised the possibility that Pam would cooperate with a federal prosecutor. (7 RT 1234-1235, 1251, 1283.) After appellant was arrested and put in federal custody, Smith suggested that "it would've been cheaper to keep her," in other words saying that killing Pam was not worth the financial consequences. But appellant responded, "No . . . she wouldn't . . . listen to reason dude." (3 CT 577.) He then explained that one of his problems with Pam was that she had started to "believe her own lies" about how Goldfinger was engaged in misconduct. (3 CT 602.)

This suggests appellant had some knowledge of Pam's preliminary overtures to the federal prosecutor about potentially cooperating with him. Thus, there was strong evidence of a link, pursuant to section 1101, between the federal investigation and the murder.

Appellant emphasizes that there was no "direct connection" between the federal investigation into Goldfinger's money transfer operation and Pam's murder because the People failed to prove that appellant "knew" Pam would "testify against him" and that her "cooperation [with the federal authorities] was the reason [a]ppellant decided to kill her." (AOB 193.) This argument fails as a matter of common sense. The prosecutor argued that the People would "present evidence" that appellant knew Pam would testify against him, but the People were not obligated to prove that fact beyond a reasonable doubt. All of the circumstantial evidence described above reasonably supports the conclusion that appellant was very worried that Pam would cooperate with federal authorities. That is a reasonable conclusion even if appellant did not know every detail of the federal indictment. Indeed, no prospective defendant can know for certain how a prosecution against him will proceed, or which witnesses will be instrumental to the People's case. In the same way, the defendant in *Rogers* did not know for certain that the prostitute he killed would have filed a complaint against him with the police if he had let her live. Nevertheless, he still had a motive to kill her due to the risk that she posed to him. Similarly, appellant here undisputedly knew that Pam believed Goldfinger had been operating illegally for some time, and that Goldfinger was under investigation. This was a sufficient basis to admit evidence of the indictment to demonstrate appellant's motive for murder.

Appellant further argues that the evidence should have been excluded pursuant to Evidence Code section 352 as unduly prejudicial. (AOB 194-196.) This argument is also meritless. As the trial court noted, evidence of

the federal indictment was not particularly prejudicial because it outlined a crime which was not remotely as egregious as the charged offense. Moreover, as discussed above, the evidence was highly relevant and probative of motive. Though appellant is correct that motive is not an element of murder, it of course may be relevant to prove guilt. (*People v. Northcott* (1930) 209 Cal. 639, 644.) As discussed in detail above, the federal investigation was one of three main motives set forth by the People for appellant to kill Pam. First, appellant suspected Pam of infidelity and other personal betrayals, such as his belief that she was poisoning him. (3 CT 611-612.) Second, he did not want to divide the estate via divorce. (6 RT 1156-1157, 1160-1161.) And third, he was concerned that she might cooperate with the federal authorities. Thus, the federal investigation was one of the main prongs of the People's theory of motive.

Finally, even if the court erred by admitting evidence of the federal indictment or investigation, or should have imposed stricter limits on the scope of that evidence, such error was harmless under any standard.[43] Appellant's theory that this evidence portrayed him in a negative light is purely speculative. (AOB 196.) The court instructed the jury that though evidence was introduced that appellant "was at one time charged with or may have committed" a different crime than the one charged, "[t]his evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes; it may be considered by you only for the limited purpose of

---

[43] Appellant characterizes the admission of this evidence as a federal constitutional error, which would be subject to a *Chapman* analysis of harmless beyond a reasonable doubt, but generally errors in application of the Evidence Code are subject to the *Watson* standard for reversal, namely whether there is a reasonable probability of a different result had the error not occurred. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

determining, if it tends to show, that the defendant had a motive to commit the charged crimes." (11 RT 2123.) Jurors are presumed to follow their instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.)

### C. The Trial Court Did Not Err By Admitting Neve's Hearsay Testimony

Appellant claims the trial court erred by admitting Neve's testimony regarding Pam's intention to obtain the money transfer licenses. (AOB 197-199.) This argument fails.

During the direct examination of Neve, the prosecutor asked whether she had warned Pam that Goldfinger needed to obtain the licenses. (7 RT 1371.) Defense counsel objected that the question called for hearsay, and was leading and irrelevant. The court overruled the hearsay portion of the objection, holding that the answer to the question would not be admitted for the truth of the matter asserted, but merely whether Neve so advised her. (7 RT 1371.) Neve testified that she told Pam that her company (Goldfinger) was at risk. (*Ibid.*) Then, the prosecutor asked about Pam's response to Neve's warning, and whether she indicated her intent to obtain the licenses. (7 RT 1373.) Defense counsel objected again on the basis that the question called for hearsay. The court overruled that objection, citing to Evidence Code section 1250. Neve testified that Pam expressed her intention to obtain the licenses. (*Ibid.*)

The trial court did not err because Evidence Code section 1250 permits evidence which would otherwise be excluded as hearsay when it is offered not for the truth of the matter asserted but rather "to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a)(2).) Here, the declarant was Pam. Her statement that she intended to obtain the licenses helped explain conduct on her part which gave appellant a motive to kill her. For example, Pam's statement that she intended to purchase the licenses suggests that she subsequently did so, which helps

explain the conflict she had with appellant over the missing $800,000. (6 RT 1162.) Furthermore, the fact that Pam was openly discussing her intent to obtain the licenses with Neve suggests that she likely would have raised the issue with appellant, meaning that appellant would have known that Pam was skeptical about Goldfinger's practices. This is strong evidence of appellant's motive to kill Pam, since he was aware that the federal investigation was targeting them both, and it would explain what he meant when he told Smith that Pam was starting to "believe her own lies." (3 CT 602.)

Appellant's reliance on *People v. Noguera* (1992) 4 Cal.4th 599, is inapposite. (AOB 198-199.) There, the People introduced evidence that the murder victim expressed fear and hatred of the defendant. (*Id.* at p. 620.) The People's theory was that such statements were admissible to establish the victim's state of mind shortly before her murder. However, the case against the defendant had nothing to do with the victim's state of mind, since "neither [the victim's] state of mind nor her conduct was relevant to any part of the People's case; nor did the defense raise any issue concerning her state of mind or behavior at or before the night she was murdered." (*Id.* at 622.) Therefore, this Court held that the hearsay exception under Evidence Code section 1250 was inapplicable. (*Ibid.*) In the instant case, on the other hand, Pam's state of mind and conduct were highly relevant to prove that appellant was aware of her suspicions about the illegality of Goldfinger's activities, which in turn established a motive for the murder. Of course, appellant "could have held [the] belief" (AOB 198) that Pam would cooperate with the federal investigation in any event, but Neve's hearsay testimony bolstered this theory in a relevant and important way.

Next, appellant also characterizes Neve's testimony about her own statements to Pam as hearsay. (AOB 199.) However, like Neve's

recollection of Pam's statements, Neve's own past statements were actually non-hearsay. Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*" (Evid. Code, § 1200, emphasis added.) Neve's advisement to Pam that she should obtain the licenses was not offered to prove that Pam actually should have obtained the licenses. Rather, the trial court correctly stated that the statement was merely offered to prove "that that's what Miss Fayed was advised" (7 RT 1371), which was relevant non-hearsay evidence because it led to the reasonable inference that Pam subsequently obtained the licenses, that appellant found out, and that this may have motivated him to kill her. (See *People v. Smith* (2009) 179 Cal.App.4th 986, 1004 [fact that out-of-court statement was made is admissible non-hearsay evidence if relevant to an issue in dispute].)

### D. The Trial Court Did Not Err By Admitting the Crime Scene Photographs or the Other Photographs of Pam

Appellant claims the trial court erred by admitting a limited number of photographs of Pam's bloody clothes and possessions from the crime scene. (AOB 200-202.) However, the photographs were admissible because they "served to illustrate and corroborate the testimony" of witnesses such as Edwin Rivera, who described Pam's injuries immediately after she was stabbed. (*People v. Scheid* (1997) 16 Cal.4th 1, 18.)

During the testimony of Detective Spears, the prosecutor displayed photographs of the crime scene, including an image of a white shirt and pants that were soaked with blood. The pants and shirt were also actually brought to court so that the jury could view them in person. (8 RT 1458-1459.) Defense counsel objected based on Evidence Code section 352 that this evidence (presumably both the photographs and the items themselves) were cumulative and prejudicial because there was no dispute that Pam was stabbed to death. (8 RT 1459.) The court asked the

prosecutor about the purpose of this evidence, and the prosecutor responded that the brutal and vicious manner in which Pam was killed was significant, and that he would not stipulate to those facts. The prosecutor also noted that "much, much more" bloody evidence was in police possession but was being omitted. (8 RT 1459-1460.) The court instructed the prosecutor not to "drag it out" and to make clear that the shirt was cut off Pam's body by paramedics, not by the attacker. (8 RT 1460.)

Appellant claims that there was no dispute that Pam was stabbed and therefore that the photographs "did not relate to a fact at issue." (AOB 201.) This argument fails. The photographs "portrayed the manner" in which Pam was killed, which was admissible. (*Scheid, supra,* 16 Cal.4th at p. 18.) The People's theory about the manner of Pam's death was that appellant hired a hitman to kill her, which was obviously in dispute, and which depended on the jury believing that the manner of her death was consistent with a hired murder. Photographs were probative on this issue because a hired killer, for example, would likely try to kill his victim as quickly (and potentially brutally) as possible, as opposed to a robber or rapist who might murder his victim hesitantly during the course of some other crime. Furthermore, contrary to appellant's arguments, the fact that Rivera and a pathologist gave testimony about the crime scene and Pam's injuries did not make the photographs cumulative under Evidence Code section 352. (*Id.* at p. 19 [testimony regarding facts visible in crime scene photographs does not make photographs cumulative].) Appellant's reliance on *People v. Smith* (1973) 33 Cal.App.3d 51, is inapposite. There, the reviewing court held that the trial court erred by admitting photographs of a "seminude, terribly mutilated, bloody corpse . . . ." (*Id.* at p. 69.) The photographs of bloody clothing in the instant case are not remotely similar. Moreover, in *Smith*, the brutal nature of the injuries was irrelevant to any point the People sought to prove. If anything, the random brutality

supported the defense position in that case that the defendant was mentally incapable of premeditation. (*Id.* at p. 61.) In the instant case, on the other hand, the murder's brutality was probative as to the use of a hitman.

The trial also did not err by admitting "sentimental" photographs of Pam, Desiree, and some Disneyland passes. (AOB 203; 6 RT 1036, 1039; 8 RT 1433-1434.) Defense counsel did not object to the admission of any of these photographs, thereby forfeiting the issue on appeal. It is well established that a constitutional right, or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508]].) In other words, "if a defendant fails to make a *timely* objection on the *precise ground* asserted on appeal, the error is not cognizable on appeal." (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194, emphasis added.) In any event, the photos of Pam with her daughters were relevant as a foundational matter because the family relationships between Desiree, Jeanette, Pam, and appellant helped shed light on the divorce.

### E. Appellant Forfeited the Argument That the Trial Court Erred By Limiting Aveis's Cross-Examination Regarding Goldfinger's Potential Defenses Against the Federal Investigation; In Any Event, the Trial Court Did Not Err In This Regard

Appellant claims the trial court erred by improperly limiting the cross-examination of Mark Aveis, the Assistant United States Attorney who had been investigating Goldfinger for operating a money exchange without a license. (AOB 204-207.) This argument is meritless.

Defense counsel asked Aveis how he became aware that Goldfinger's defense to the federal money licensing allegations was that it did not need the licenses to operate legally. (7 RT 1261.) The prosecutor objected on

the basis of relevance, but the objection was overruled. (7 RT 1261-1262.) Defense counsel then re-asked the question, "So in the course of your investigation, you learned that Goldfinger and Mr. Fayed were not agreeing that they needed the licenses which you said they needed, correct?" The prosecutor then objected that the question called for hearsay, and the objection was sustained. (7 RT 1262.) Defense counsel then reworded the question to inquire whether Aveis had been anticipating (prior to Pam's death) that he would have to "litigate in court the issue of whether or not licenses were required . . . ." (7 RT 1262.) The prosecutor objected on the basis of relevance, and that objection was sustained. (*Ibid.*) Defense counsel did not challenge either of these two rulings limiting his cross-examination.

Appellant forfeited the argument that the trial court erroneously upheld the prosecutor's hearsay objection about whether Aveis knew that Goldfinger and appellant "did not agree that they required licenses" to legally operate the business. (7 RT 1262.) Appellant claims that the defense sought to elicit this information as non-hearsay, merely to shed light on appellant's mental state under Evidence Code section 1250, since a belief that the licenses were not required would cast doubt on his motive to kill Pam. (AOB 206-207.) However, on its face, the question called for hearsay, namely, for Aveis to articulate appellant's and/or Goldfinger's legal position. Defense counsel did not explain to the trial court that he intended the testimony not be admitted for its truth pursuant to Evidence Code section 1250. In fact, defense counsel did not oppose the hearsay objection on any basis at all. Thus, appellant forfeited the opportunity to make this claim on appeal. (*Saunders, supra*, 5 Cal.4th at pp. 589-590.)

In any event, notwithstanding the forfeiture, the court's ruling was facially correct. The prosecutor objected to the questioning on the basis of hearsay, indicating that he believed defense counsel was seeking to admit

evidence of Goldfinger's defense strategy for its truth (i.e., whether Goldfinger actually needed the licenses under federal law). Defense counsel failed to dispel this notion. Therefore, it appears the court rightly assumed that this was the defense's intention and correctly excluded the evidence as hearsay. Appellant's current argument about the potential non-hearsay interpretation of this line of questioning was never raised.

### F. Appellant Forfeited the Argument That the Trial Court Erred By Limiting Herring's Cross-Examination Regarding Goldfinger's Liquidation; In Any Event, the Trial Court Did Not Err In This Regard

Appellant claims the trial court erred by limiting the cross-examination of Pam's divorce attorney, Greg Herring. (AOB 207-209.) This argument is also meritless.

During Herring's cross-examination, defense counsel inquired about a letter Herring had received from appellant's divorce attorneys shortly before Pam's death indicating that appellant intended to liquidate Goldfinger. (6 RT 1196.) Herring testified that he believed appellant was "trying to accomplish an end run so that they would continue to stonewall me" on producing financial information that would help Pam receive assets in the divorce. (6 RT 1197.) Herring made clear, however, that "I don't know what [appellant's divorce attorney] Mr. Foley was thinking when he sent that. I don't know what he and [appellant] had discussed, or what his instructions were or anything like that, so I don't pretend to know that." (6 RT 1198-1199.) Nevertheless, defense counsel then asked Herring about the rationale set forth in the letter for the liquidation. The prosecutor objected on the basis of hearsay and a lack of foundation. (6 RT 1199-1200.) Defense counsel stated that his intention was to elicit from Herring "whether the liquidation was motivated in part by a desire to avoid having to spend the money on buying licenses that Pam was insisting on." The

court sustained the prosecutor's objection on hearsay grounds. (6 RT 1200-1201.)

Appellant argues that the court erred by sustaining the hearsay objection because the evidence was admissible as non-hearsay under Evidence Code section 1250. (AOB 208-209.) However, defense counsel never made that argument at trial. Therefore, the argument was forfeited for purposes of appeal. (*Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) In any event, notwithstanding the forfeiture, the court did not err. It is unclear exactly what statements defense counsel intended to elicit from Herring in order to demonstrate that appellant or his attorneys pursued liquidation to avoid spending money on the licenses. In any case, defense counsel's failure to seek admission of such statements as non-hearsay left open the potential that they could be admitted for their truth; in other words, that liquidation would have *actually* obviated the need to purchase the licenses under the applicable law. Since defense counsel did not explain that this was not his intent, the prosecutor's objection was well-taken and the court did not err.

Finally, the trial court's exclusion of the testimony was also correct on the basis of the prosecutor's other objection, a lack of foundation, even though the court did not rule on that objection. It is well established that a trial court's ruling may be upheld if it is correct based on any theory of the law applicable to the case. (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1076; *People v. Zapien* (1993) 4 Cal.4th 929, 976; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) Appellant claims that Herring's excluded testimony would have cast doubt on his motive to kill Pam because it would have demonstrated appellant's "desire to wind down the business rather than purchase the money transmitting licenses . . . ." (AOB 209.) However, immediately before the question at issue, Herring

testified that he had no knowledge of appellant's or appellant's attorneys' true motivations for liquidating Goldfinger. (6 RT 1198-1199.) Thus, Herring lacked foundation to opine on appellant's motivations. (Evid. Code, § 403 [proponent of evidence has burden to establish foundational facts].)

Furthermore, even if Herring had a foundation to opine about appellant's motivations for liquidating Goldfinger, this was inadmissible to cast doubt on appellant's motive to kill Pam because it was irrelevant for that purpose. (Evid. Code, § 210 [relevant evidence is that which has tendency to prove or disprove disputed fact of consequence in the action].) Appellant claims that evidence he intended to liquidate Goldfinger in 2008 "would have negated the government's theory" that he murdered Pam to prevent her from cooperating with federal investigators regarding the missing licenses, presumably because the licenses would no longer be necessary. (AOB 209.) However, Aveis was investigating Goldfinger in connection with its *past* activities, which he believed had facilitated illegal money transfers from Ponzi schemes. (7 RT 1218-1219.) Liquidating Goldfinger in 2008 would not have exonerated appellant from any prior violations of money transfer laws, meaning that Pam's potential cooperation with federal authorities still would have been harmful to appellant regardless of the liquidation, and thus still would have provided a motive for murder.

Finally, appellant claims that permitting Herring to testify about appellant's motivation for the liquidation would have cast doubt on appellant's motive to kill Pam by negating the argument that he was "up against a hard, looming deadline in the divorce case," since the liquidation would have prolonged the divorce process. (AOB 209.) However, the evidence was irrelevant for that purpose because Herring testified that the liquidation tactic would not have stopped the July 29 divorce hearing from

taking place, and, notwithstanding the liquidation, there was likely to be "some real resolution of some major issues on that day" which probably would have resulted in Pam obtaining significant relief. (6 RT 1194-1195.)

### G. Appellant Forfeited the Argument That the Trial Court Erred By Limiting Taboga's Direct Examination Regarding Mercedes's Alleged Hatred of Pam, and the Trial Court Did Not Err By Excluding Taboga's March 9, 2011, Letter

Appellant claims the trial court erred by limiting the scope of the defense witness Patricia Taboga's testimony in various ways. (AOB 210-213.) All of his arguments in this regard fail.

First, appellant affirmatively waived the argument that the trial court erred by limiting Taboga's testimony that Mercedes hated Pam strictly to those statements which were against Mercedes's penal interest. (AOB 210-211.) During the direct examination of Patricia Taboga, defense counsel asked her whether she had "conversations with Mary Mercedes in the year 2007 about Jim and Pam's divorce?" (10 RT 1901.) The prosecutor objected on the basis of hearsay. At sidebar, defense counsel responded that the answers he sought to elicit "are going to be an exception to the hearsay rule" because they were "statements against penal interest." He argued that Taboga would describe Mercedes "savaging Pam" when she discussed the divorce, and that this would bolster Taboga's testimony that Mercedes solicited Taboga's husband to kill Pam. (10 RT 1901-1902.) The court accepted defense counsel's proffered rationale and admitted Taboga's statements to the extent they were truly statements against Mercedes's penal interest. (10 RT 1902.) Defense counsel subsequently was permitted to ask Taboga various questions regarding Mercedes's attempt to solicit Pam's murder. (10 RT 1902-1916.)

The penal interest hearsay exception, Evidence Code section 1230, permits hearsay which subjects the declarant to the risk of criminal liability

such that a reasonable person would not have made the statement unless he believed it were true. This was the only basis defense counsel set forth for admission of Taboga's testimony regarding Mercedes's statements about Pam. Now, appellant claims that additional negative statements by Mercedes should have also been admitted as non-hearsay pursuant to Evidence Code section 1250 to establish her "animus" against Pam. (AOB 210.) However, defense counsel *limited himself* to eliciting only those statements by Mercedes that were covered by the penal interest exception. Indeed, when the court agreed with defense counsel that Taboga's hearsay testimony "has to be a statement against [Mercedes's] penal interest," counsel stated, "I will do that." (10 RT 1902.) Since defense counsel made a "conscious, deliberate tactical choice" regarding the basis to admit Taboga's testimony, the doctrine of invited error bars appellant from challenging its scope on appeal. (*People v. Cooper* (1991) 53 Cal.3d 771, 832 [where counsel makes conscious, deliberate, tactical choice on trial strategy, party represented may not claim associated error on appeal].)

Next, appellant claims that the trial court improperly sustained the prosecutor's hearsay objections to (1) defense counsel's inquiries about whether Mercedes told Taboga that appellant was involved in Mercedes's supposed plot to kill Pam, and (2) whether Taboga discussed Pam's death with Mercedes. (AOB 211-212; 10 RT 1906, 1909.) Appellant claims that this testimony was admissible under the penal interest hearsay exception. (Evid. Code, § 1230.) However, a statement by Mercedes regarding appellant's involvement in her putative plot to kill Pam would not have subjected Mercedes to any criminal liability beyond that which her other statements (i.e., that she solicited Kurt to kill Pam) already had. Similarly, Mercedes's supposed statements to Taboga about the supposed solicitation in phone conversations after Pam's death also would not have subjected Mercedes to any additional criminal liability. The only statements by

Mercedes covered by the penal interest hearsay exception in this regard were those surrounding the original alleged solicitation, which were of course admitted.

Finally, appellant claims that the trial court wrongly excluded evidence of Taboga's March 9, 2011, letter to appellant in which she initially accused Mercedes of soliciting Pam's murder. Specifically, appellant claims the letter was admissible as a prior consistent statement under Evidence Code section 1236. (AOB 212-213.) However, careful consideration of the timeline in this case reveals that this argument is meritless. Taboga testified that Mercedes attempted to solicit Pam's murder in May 2008. (10 RT 1903-1904.) The People's theory was that Taboga's story was patently unbelievable and that Taboga lied about Mercedes in order to help exculpate appellant. (11 RT 2214-2223.) One piece of evidence presented by the People which cast doubt on Taboga's story was a police interview with Mercedes on March 30, 2011, in which she denied Taboga's claims. (10 RT 1995.) Defense counsel sought admission of the March 9, 2011, letter under the prior consistent statement hearsay exception (Evid. Code, §§ 791, 1236) because the letter made the same accusations against Mercedes as Taboga did at trial, and the "the prosecution basically accused [Taboga] of fabricating this whole story, so this is a statement . . . to rebut an accusation of a recent fabrication." (10 RT 2052.) However, the court held that for the letter to be admissible, it would have to have taken place in "2008 or 2007 . . . something in there." (*Ibid.*)

The court's ruling was correct because a prior consistent statement is only admissible if it was made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).) Here, the People's theory was that Taboga's motive to lie was to exculpate appellant, which became necessary almost immediately after

Pam's death in July 2008, since he instantly became the prime suspect. However, the March 9, 2011, letter was written nearly three years later and therefore was correctly excluded. Appellant attempts to obfuscate the issues by arguing that the letter was admissible because it preceded Mercedes's March 30, 2011, conversation with police. (AOB 213.) But that is irrelevant. Taboga's motive to lie had nothing to do with the date of Mercedes's police interview. In order to be admissible, any prior consistent statement by Taboga supporting her accusations against Mercedes would have to have been made before Pam's murder.

### H. The Trial Court Did Not Err By Excluding Evidence That Appellant Was Physically Incapable of Committing Murder For Hire

Appellant argues that the trial court erred by excluding evidence suggesting that appellant was so heavily medicated prior to Pam's death that he could not have committed the acts charged, namely, planning her murder and hiring Moya to execute it. (AOB 214.) Before trial, the court held a hearing on this issue at the defense's request. The court asked defense counsel how this theory could comport with section 22 (since renumbered section 29.4), which limits evidence of voluntary intoxication "solely" to the issue of whether a defendant actually formed the required specific intent to commit the crime or, in the case of murder, that he premeditated, deliberated, or harbored express malice aforethought. (3 RT 327; § 29.4, subd. (b).) Defense counsel stated that the evidence would *not* go to appellant's intent, but rather would prove that appellant was so heavily medicated that he could not *physically* have done the acts necessary to plan the murder, such as picking up a phone and calling Moya. (3 RT 327-330.) As to physical capacity, the prosecutor noted that there was undisputed video depicting appellant walking around at the time of Pam's murder, and the court added that appellant "was at least well enough to go

to the lawyer's office that day." (3 RT 333.) The prosecutor then argued that the defense theory also fell outside the permissible scope of voluntary intoxication evidence under section 22, since counsel conceded he would not use it to challenge appellant's intent. (3 RT 335.) The court agreed and excluded the evidence. (3 RT 336-337.)

As a matter of common sense (and notwithstanding section 22), "[o]f course, evidence that the defendant at the crucial time was so [intoxicated] that he could not have committed the physical acts constituting the offense is relevant on the issue of guilt." (R.W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236, § 5 (1966).) Here, however, the People's theory was that appellant planned a murder for hire, not that he physically attacked Pam. As noted above, there was no dispute that appellant was ambulatory and physically capable of conversing with people (such as his attorneys) on the day of the murder. Thus, the only permissible use of voluntary intoxication evidence went to appellant's specific intent under section 22, a strategy that defense counsel expressly stated he would not pursue. (3 RT 329.) The court was therefore correct to exclude the evidence.

## IX. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE SPECIAL CIRCUMSTANCES TRUE

Appellant claims there was insufficient evidence to support the jury's findings that the two murder special circumstances alleged in this case were true, namely that the murder was committed for financial gain and by lying in wait. (AOB 214-225.) Appellant's arguments are meritless.

### A. Applicable Law

When determining whether the trial evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) The same test applies for evidence of special circumstances in capital cases. (*Scott*, *supra*, 52 Cal.4th at p. 487.) This standard is also the same regardless of whether the evidence is circumstantial or direct. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

"We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) In other words, so long as the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Therefore, it is not enough for defendant to simply say there was no evidence; instead, he must *affirmatively demonstrate* that the evidence is insufficient on the point in dispute. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) In fact, reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The two special circumstances alleged in the instant case were as follows:

> (1) The murder was intentional and carried out for financial gain.
>
> . . .
>
> (15) The defendant intentionally killed the victim by means of lying in wait.

(8 CT 1790-1791; § 190.2, subd. (a)(1), (a)(15).)

Regarding the financial gain special circumstance, the relevant inquiry is whether the defendant committed the murder in the expectation that he

would thereby obtain the desired financial gain. It is not required that the murder be committed exclusively or even primarily for financial gain, nor that that the killing be the only means of obtaining such gain. (*People v. Crew* (2003) 31 Cal.4th 822, 850-851.)

The lying in wait special circumstance requires proof of "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Hardy* (1992) 2 Cal.4th 86, 163.) This special circumstance applies whether the defendant himself lay in wait while personally killing the victim, or whether a third party he solicited did so. (*People v. Bonilla* (2007) 41 Cal.4th 313, 330-331.)

### B. There Was Sufficient Evidence That Appellant Killed Pam For Financial Gain

There was overwhelming evidence that appellant contracted a third party to kill Pam for appellant's own personal financial gain. Pam was killed on July 28, 2008. Before she died, she and appellant had been principals in Goldfinger, a family business with gross revenues of $160 million in 2007, which they both knew was being investigated by federal authorities. (7 RT 1222-1223, 1227, 1245-1248.) Though the specific details of the federal indictment were still sealed at the time of Pam's death, the fact that appellant's lawyers were aware of the investigation suggests he knew the company's fortunes were at risk. Meanwhile, his relationship with Pam was toxic. She and appellant were embroiled in an extremely contentious divorce in which Pam was seeking $1 million, plus $66,000 per month in spousal and child support, plus monetary sanctions against him. (6 RT 1178-1180, 1189.) Appellant obstructed the divorce by withholding information that Pam's attorney needed. (6 RT 1156-1157, 1167-1170.) A major hearing on the divorce was scheduled for July 29, 2008. (6 RT 1182-

1183.) In the meantime, Pam had expressed interest in possibly cooperating with federal authorities in exchange for being treated as a witness rather than a suspect. (7 RT 1234-1235, 1251, 1283.) Pam's death obviously eliminated both the possibility that appellant would have to divide Goldfinger's assets in the divorce as well as the risk that she would cooperate with federal authorities in the investigation of Goldfinger. (6 RT 1184; 7 RT 1236-1237.) After appellant was arrested, he admitted to Smith that he had indeed contracted for Pam's murder because he believed she had betrayed him, saying that she had begun to "believe her own lies" about Goldfinger and that she "wouldn't . . . listen to reason . . . ." (3 CT 577, 602.) Thus, there was sufficient evidence for the jury to find that appellant solicited Pam's murder in the expectation that he would obtain financial gain. (*Crew*, *supra*, 31 Cal.4th at pp. 850-851.)

Appellant claims there was insufficient evidence of the financial gain special circumstance because the People, at most, merely proved that Moya profited from the murder contract, but failed to prove that either appellant or the actual killer did. (AOB 216-217.) This position misstates the People's main argument, misstates the law, and confuses the issues. Appellant was prosecuted for murder under an aiding and abetting theory as a principal. (§ 31.) One of the People's main theories was that appellant himself would benefit from Pam's murder by preventing her from dividing his estate in the divorce. (See, e.g., 11 RT 2176.) A classic example where this special circumstance applies is when a defendant himself stands to gain from the murder, as here. (See, e.g., *People v. Howard* (1988) 44 Cal.3d 375, 413.) Under this theory, it is irrelevant whether Moya or the actual killer also benefited. It is also irrelevant whether appellant had any contact with the killer himself. "[O]ne who hires for murder is subject to the financial-gain special circumstance regardless of whether he directly hires

the actual killer or there is an intermediary between the hirer and the actual killer." (*People v. Battle* (2011) 198 Cal.App.4th 50, 82-83.)

Appellant largely ignores the above issues and instead focuses on attacking the People's alternate theory that the jury could also find the financial gain special circumstance true even if only Moya benefited from Pam's death. (AOB 216-217; 11 RT 2177-2178.) In support of that theory, the prosecutor cited *People v. Freeman* (1987) 193 Cal.App.3d 337, which held that the financial gain special circumstance applies to the hirer of a contract killer even when only the killer (and not the hirer) benefits financially. (11 RT 2177-2178; *Freeman, supra*, 193 Cal.App.3d at p. 338.) Appellant argues that *Freeman* is contradictory to *People v. Bigelow* (1984) 37 Cal.3d 731, which he claims held that the financial gain circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant. (AOB 216; *Bigelow, supra*, 37 Cal.3d at p. 751.)

Appellant's argument misses the mark for numerous reasons. First, as discussed above, there was ample evidence that Pam's murder benefited appellant, making the focus on Moya largely a digression. Second, this Court has made clear that the limitation *Bigelow* placed on the financial gain special circumstance (namely, that it "applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant") only applies where there are multiple *overlapping* special circumstances alleged. In other words, the limitation is designed for use in cases where a single act could suffice to prove more than one special circumstance, which would be improper. However, "*Bigelow*'s formulation . . . is not intended to restrict construction of 'for financial gain' when overlap is *not* a concern." (*Crew, supra*, 31 Cal.4th at p. 850, quoting *People v. Howard* (1988) 44 Cal.3d 375, 410, italics original.) Here, the *Bigelow* limitation did not apply because the only other

special circumstance alleged was lying in wait, which does not overlap with financial gain, as they share no requisite acts.

Finally, appellant claims that even if *Freeman* does not contradict *Bigelow*, it still requires that the People prove the actual killer—and not just an intermediary—benefited financially in order for appellant to be subject to the financial gain special circumstance. (AOB 217.) This argument directly contradicts the law. A person who hires a killer is subject to the financial gain special circumstance whether it was the hirer or the killer who was motivated by money. (*Battle*, *supra*, 198 Cal.App.4th at p. 82; *Freeman*, *supra*, 193 Cal.App.3d at p. 338.) Moreover, the existence of an intermediary between the hirer and the killer does not insulate the hirer from being subject to this special circumstance. (*Battle*, *supra*, 198 Cal.App.4th at pp. 82-83.) In addition, the hirer is subject to the special circumstance even if the murder is not committed exclusively or even primarily for financial gain, and even if the killing is not the only means of obtaining such gain. (*Crew*, *supra*, 31 Cal.4th at pp. 850-851.) In sum, evidence that either the hirer or an intermediary committed a murder for financial gain (via aiding and abetting, such as by employing a third-party killer) is sufficient to subject both of them to the financial gain special circumstance regardless of whether the actual killer also benefited financially.

### C. There Was Sufficient Evidence That Pam Was Killed By Means of Lying in Wait

There was ample evidence that Pam's murder was accomplished by means of lying in wait. Both appellant's actions and those of his hired killer and intermediary are important parts of the analysis on this point. (See *Battle*, *supra*, 198 Cal.App.4th at p. 79 [lying in wait special circumstance applied to defendant who hired two killers and then invited

victim to wait in parking lot under false pretenses to expose him to the killers before they ambushed and killed him].)

On the day of the murder, Moya's and Simmons's cellular phones were located in Century City for hours before the attack took place, and Moya's phone was sending messages and calls to appellant's phone during this time. (9 RT 1728-1729, 1789-1792.) Witness Edwin Rivera saw the suspects' SUV parked at 5:30 p.m. in the area of the structure where Pam would be murdered. (8 RT 1510-1513.) During the attack, witness Matthew Grode heard piercing screams and saw Pam being attacked from behind while she was yelling for help. (8 RT 1416-1418, 1421-1425.) The attacker then jumped in the SUV while it was moving, and the vehicle left the area. (8 RT 1517-1519, 1521, 1528.) When appellant admitted to Smith that he had hired Moya to arrange Pam's murder, he noted that Moya and his associates had already botched four previous opportunities to kill her over the course of three months. Appellant noted that that he had arranged one of these prior opportunities in a rural area of Malibu, and another when Pam was at the ranch house. (3 CT 582-584.) Appellant obviously had concealed all of these plans from Pam and had engaged in a substantial period of watching and waiting for an opportune time to act (both in the months preceding the murder and on the day itself), while Moya and the other assailants finally committed the killing via surprise attack. Thus, both appellant and the third parties he hired variously lay in wait to kill Pam, and all of their actions are relevant to prove the special circumstance as applied to appellant. (*Hardy*, *supra*, 2 Cal.4th at p. 163; *Bonilla*, *supra*, 41 Cal.4th at pp. 330-331.)

Appellant challenges this Court's holding in *Bonilla* that a defendant who hires a third-party killer, and thus is not personally involved in the attack, may be subject to the lying in wait special circumstance. (AOB 218-222.) In *Bonilla*, this Court interpreted a prior version of section 190.2

that exempted aiders and abettors (as opposed to actual killers) from certain of its special circumstances. For example, aiders and abettors were not subject to the special circumstance for having a prior murder conviction. (§ 190.2, subd. (a)(3).) However, aiders and abettors were *not* exempted from the special circumstance for lying in wait. This Court held that if the Legislature had intended to exempt aiders and abettors from the lying in wait special circumstance, it would have included it among the exemptions, stating that "[w]e decline to attach special significance to the choice of the words 'the defendant,' as opposed to the 'the killer' or 'the murderer,' where to do so would negate in whole or in part another statutory provision." (*Bonilla, supra*, 41 Cal.4th at p. 331.) Appellant argues that recent reforms have stripped all these exemptions from the current version of section 190.2, which currently applies all special circumstances to aiders and abettors so long as they had the intent to kill. Therefore, he claims, application of the *Bonilla* rule (i.e., that there is no special distinction between a "defendant" and the actual killer for purposes of section 190.2) to the current version of the statute would lead to absurd results. In particular, appellant argues that under the *Bonilla* rule, the special circumstance for having previous murder convictions would unfairly apply to a defendant who merely hires a killer with such prior convictions. (AOB 221.)

Appellant's creative argument is ultimately a red herring in this case. The question of whether aiders and abettors under the current version of section 190.2 should be exempted from the same special circumstances which they were exempted from under the prior version of the statute (e.g., the prior murder conviction special circumstance) is not at issue here. As *Bonilla* explained, aiders and abettors were *not* exempted from the lying in wait special circumstance under the prior version of section 190.2, nor are they exempt from it under the current version. (*Bonilla, supra*, 41 Cal.4th

at p. 331.) Appellant did have the specific intent that his hired killers lie in wait for Pam, and indeed had previously orchestrated four botched opportunities for Moya and his henchmen to ambush Pam before they finally killed her. Thus, *Bonilla* is indistinguishable on any basis which is actually at issue here. Moreover, courts have applied the lying in wait special circumstance in cases of hired killings under the current version of section 190.2 without necessarily addressing the logical consistency of other portions of the statutory scheme. (See *Battle*, *supra*, 198 Cal.App.4th at p. 79 [lying in wait special circumstance applied to hirer of killers where hirer merely invited victim to wait in parking lot while assailants physically stalked and killed him].) Therefore, this Court need not reach appellant's argument calling extraneous portions of section 190.2 into question.

Next, appellant claims there is "disconcerting" confusion about "who had to 'lay in wait,'" and argues that the special circumstance should not apply to him because he did not personally do so. (AOB 221-225.) However, as noted above, when a defendant hires others to kill his victim, actions by any of them may satisfy the lying in wait special circumstance as to any of them. (See *Battle*, *supra*, 198 Cal.App.4th at p. 79.) For example, in *Battle*, the hirer lured the victim to the scene of the crime and asked him to wait in a parking lot while the two hired killers waited, watched, and ultimately ambushed the victim by sneaking up and shooting him to death. (*Ibid.*) Having summarized the various actions of the hirer and the killers, the *Battle* court stated, "Thus, all of the elements of lying in wait were established." (*Ibid.*) Here, similarly, appellant paid Moya to kill Pam months before the attack. On July 28, after four aborted attacks, Pam went to meet appellant in Century City. Meanwhile, appellant was communicating throughout the day with Moya, who waited for hours in the structure where Pam had parked. Moya and his men then ambushed Pam as she left the meeting. The case is indistinguishable from *Battle*.

Next, appellant claims that even if the actual killers did murder Pam by lying in wait, their methods cannot be used against him, since this would violate his right to due process. Appellant argues that he personally lacked the mental state and committed no acts in support of their particular tactics. (AOB 222-225.) As discussed above, this argument fails because appellant was the person who masterminded the murder and directed Moya and the others exactly how to proceed. Appellant is generally correct that an "aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, emphasis original.) Here, that requirement was satisfied because there was overwhelming evidence that appellant knew Moya and his associates were in Century City and that their objective was to ambush and kill Pam. Appellant had reached an agreement with Moya to kill Pam approximately three months before the murder took place. (3 CT 584.) On the afternoon of the murder, there were numerous phone calls and messages between appellant's phone and Moya's phone, suggesting last minute planning was taking place. (9 RT 1728-1729, 1789-1792.) Then, there were additional messages between them after the murder, suggesting a cover-up. (9 RT 1740-1742.)

Furthermore, there was ample evidence that appellant specifically directed Moya to kill Pam *surreptitiously*, by means amounting to lying in wait. In fact, appellant repeatedly complained to Smith that Moya's approach had been too blunt, and he wished that the killers had been *more* discreet, professional, and competent than they actually were. In other words, appellant wished Moya had been *better* at lying in wait. For example, appellant told Smith that Moya "really fucked shit up" by killing Pam in such an amateurish manner, especially since he had previously "miss[ed] the target four times." (3 CT 581-582.) Appellant also said,

"There was four different other occasions *where I had it* so it was perfectly clean." (3 CT 582, emphasis added.) On one occasion, appellant said "I even had the time, dates, everything location. All he had to do was *sit there, wait for her to get in the car, and jack it.*" (3 CT 582-583, emphasis added.) Thus, appellant had an ongoing understanding with Moya that Pam should be killed in a discreet manner, and that appellant would handle the logistics. This satisfies the due process requirement that appellant have both the "intent to kill" her and that he "command[ed]" or "solicit[ed]" third parties to accomplish the task by lying in wait. (§ 190.2, subd. (c).)

Finally, appellant also claims that consideration of the killers' methods also violates his protection from cruel and unusual punishment, since it supports application of the death penalty without a particularized consideration of his own culpability. (AOB 223; *Tison v. Arizona* (1987) 481 U.S. 137, fn. 3 [107 S.Ct. 1676, 95 L.Ed. 2d 127] (dis. opn. of Brennan, J.) This argument fails because here, unlike in *Tison*, there was evidence that appellant personally instructed and paid Moya to kill Pam in a particular manner that implicated the lying in wait special circumstance. Appellant claims his statement to Smith that Moya went "rogue" suggests that he did not approve of Moya's methods. (AOB 224-225.) But from the context of appellant's statements to Smith conversation, it is clear that appellant only believed Moya went "rogue" in that he used a recognizable getaway car and was too sloppy. (3 CT 587.) In other words, in *Tison*, the defendants expressed "surprise, helplessness, and regret" that their co-conspirators had resorted to murder. (*Id.* at p. 166.) Appellant's only regret, on the other hand, was that he had not known a true professional killer who could have eliminated Pam without being caught. (3 CT 564, 588.)

## X. THE PROSECUTORS DID NOT COMMIT MISCONDUCT

Appellant argues the prosecutors committed misconduct by emphasizing Pam's suffering just before her death, by misstating the law in various ways, and by referencing facts outside the record during closing arguments. (AOB 225-242.) As discussed below with respect to each sub-claim, appellant either forfeited these arguments by failing to timely object on the basis of prosecutorial misconduct at trial, or his contentions are meritless, or the errors he describes were harmless.

### A. Applicable Law

Generally, a prosecutor's conduct violates the federal Constitution "when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill* (1998) 17 Cal.4th 800, 819, internal quotations omitted.) Conduct that falls short of that standard may still violate state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury," misstates the law, or attempts to absolve the prosecution from its obligation to overcome reasonable doubt. (See, e.g., *Hill, supra,* 17 Cal.4th at p. 819; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133 [deceptive or reprehensible argument is misconduct]; *People v. Crew* (2003) 31 Cal.4th 822, 839 [elicitation of testimony in violation of court order is misconduct]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [misstating law is misconduct]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215 [applying standard less than reasonable doubt is misconduct].)

Violation of the federal standard for misconduct is grounds for reversal unless harmless beyond a reasonable doubt (*Chapman*), whereas violation of the state standard is reversible error only if there was a

reasonable probability of a more favorable result for appellant but for the error (*Watson*). (*People v. Booker* (2011) 51 Cal.4th 141, 186.)

As a general rule, an appellant may not complain of prosecutorial misconduct unless defense counsel timely objected to the purported misconduct at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Samayoa* (1997) 15 Cal.4th 795, 820.) Appellant only "will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*Hill, supra,* 17 Cal.4th at pp. 820-821.)[44] Otherwise, the argument is forfeited. (See, e.g., *People v. Jasmin* (2008) 167 Cal.App.4th 98, 116 [defense counsel must object to purported misconduct or the issue is forfeited].)

### B. The Prosecutor's Arguments Regarding Pam's Suffering Did Not Prejudice the Defense

Appellant claims the prosecutor made improper statements during closing arguments regarding Pam's suffering just before her death. (AOB 226-228.) Specifically, he notes the following argument:

> And remember what the doctor said about this time. She had time. Her spine wasn't severed; she wasn't unconscious. She was very much alive, very much conscious, very much aware. And she had time. What do you think she might have been thinking? Those two or three or even four minutes when she had time to think? Time to feel? Time to realize what was happening? She would never again touch the hand of her daughter, never kiss the cheek of Gigi, never see their smiling faces. And she had time. How long do you think a minute is?

---

[44] Futility means that the court's past rulings make clear that any objections will be overruled. (See, e.g., *Hill, supra,* 17 Cal.4th at p. 821 [toxic environment of trial and repeated insults directed at defense counsel by prosecutor and judge meant that objections were futile and would have merely provoked "the trial court's wrath"].)

> She had three or four. While all this is going through her mind, how long do you think that minute lasted? An eternity. Think about what she was going through. And I am going to ask you just to think for one minute, starting now.

(11 RT 2240-2241.)

At that point, defense counsel objected, stating that "I believe this crosses a line where the only purpose now is to engender prejudice," since "the length of time before she expired . . . is irrelevant and prejudicial, but probative of nothing." (11 RT 2241-2242.) The prosecutor responded that "[t]he circumstances of [Pam's] death and the evidence that was produced and adduced in front of this jury about the brutality of how she died, the fact that was a personal execution is absolutely relevant." (11 RT 2242.) The court overruled the defense objection. (*Ibid.*)

Later, on rebuttal, the prosecutor stated, "Who chose her final minute? Who chose Pam's Fayed's final minute on that filthy floor in Century City? He did. Not us. Now we have to do our job." (11 RT 2302.)

The prosecutor's remarks were arguably improper insofar as they asked the jury to imagine Pam's final seconds of life, but they did not infect the trial with unfairness or constitute deceptive trial tactics. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1407 [prosecutor's request for jury to imagine thoughts of victims being shot was improper], citing *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, overruled on other grounds by *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293].) Such improper arguments are not prejudicial where there is overwhelming evidence of guilt or when they are only a small part of the closing argument. (*Leonard, supra*, 40 Cal.4th at p. 1407 [no prejudice where improper argument is made but there is overwhelming evidence of guilt]; *Stansbury, supra*, (1993) 4 Cal.4th at p. 1057 [no prejudice where improper statements only small part of argument].)

Here, the prosecutor's statements were harmless under both *Leonard* and *Stansbury*. First, the evidence against appellant was overwhelming. As described at length above, appellant was involved in a bitter divorce with Pam and was faced with the possibility that she would cooperate with federal authorities against him in the Goldfinger investigation. At stake was the company they had founded together, which earned $160 million in 2007. There were phone records indicating that Moya, appellant's assistant, was waiting in Century City and communicating with appellant immediately before Pam left the meeting on the day she was murdered. Rivera saw the suspects' SUV flee the scene, which was a vehicle that had been rented in appellant's name months earlier. The vehicle was then returned with Pam's bloodstains on it. After appellant was arrested, he admitted to Smith that he had indeed hired Moya to kill Pam and, after a series of failed attempts, Moya had finally succeeded in doing so, albeit sloppily. Appellant then tried to hire another killer to eliminate Moya in order to prevent him from being arrested and cooperating with the police. Given all this, the prosecutor's passing comment about the moments before Pam's death was utterly harmless. (*Leonard*, *supra*, 40 Cal.4th at p. 1407.)

Second, the comments in question were only a small part of an otherwise proper closing argument by the prosecutors. For example, the prosecutor began by discussing the generally applicable law regarding first degree murder, the special circumstances, conspiracy, and aiding and abetting liability. (11 RT 2167-2184.) The prosecutor then discussed the beginnings of appellant's marriage to Pam and the origins of Goldfinger. (11 RT 2184-2188.) Next, the prosecutor discussed the federal investigation into Goldfinger, the dispute between appellant and Pam about the money transfer licenses, the growing rift in their marriage, and appellant's fear that Pam would cooperate with the federal investigation. (11 RT 2187-2193.) The prosecutor then detailed the evidence that

appellant hired Moya to kill Pam in the same terms that appellant himself used when he spoke to Smith. (11 RT 2193-2195.) The prosecutor also described the evidence that Moya, Marquez, and Simmons were in Century City on July 28, at a time and place when appellant knew where Pam could be found, and that Moya was in contact with appellant. (11 RT 2195-2201, 2203-2206.) The prosecutor described the crime scene and the assailants' getaway and the 25 text messages between appellant and Moya on the night after the murder. (11 RT 2201-2205.) Having discussed the evidence, the prosecutor then reiterated appellant's motives for murder, the connections between Moya and Marquez, and the large amounts of gold and cash found in appellant's house. (11 RT 2206-2208.) The prosecutor then discounted the defense theory that Mercedes was responsible for Pam's death and also discussed the details of appellant's admissions to Smith by playing excerpts of the recording. (11 RT 2214-2240.) Much of the rebuttal consisted of casting doubt on the defense theory about Mercedes, a recap of appellant's motives, and further discussion of appellant's admissions to Smith. (11 RT 2306-2321, 2325-2350.) Among approximately 113 pages of appropriate argument, the potentially improper statements comprised approximately one page, and thus were harmless. (*Stansbury*, *supra*, (1993) 4 Cal.4th at p. 1057.)

### C. Appellant Forfeited the Argument That the Prosecutor Misstated the Law Regarding Withdrawal; In Any Event, the Argument Is Meritless

Appellant claims the prosecutor misstated the law regarding withdrawal from a conspiracy. (AOB 229-230.) First, he argues that the prosecutor was wrong when he told the jury that appellant had to have done everything in his power to stop the crime:

> The second thing he has to do is, he has to do everything in his power, everything in his power to prevent the commission of the murder. So let's look at what Mr. Fayed did to prevent the

> murder. Nothing. He didn't do anything. Not a darn thing. Something as simple as - - if he truly was conspiring and wanted to withdraw, you can think many things that he could have done that would have been effective. Sitting in the room with the woman. "Pam, I did something really terrible, and I am going to prevent its commission right now. I plotted your murder, and you need to be escorted out of here by security. We are going to go straight to the police station." He needs to pick up the phone and call the police and tell them exactly what is that he has done to prevent the commission of this crime. And instead, he does nothing. He lets her walk out that door to her death.

(11 RT 2342-2343.)

Appellant forfeited the argument that the prosecutor misstated the law on this point because defense counsel failed to object, and there is no indication that an objection would have been futile. (*Samayoa*, *supra*, 15 Cal.4th at p. 820.)

In any event, appellant's argument is meritless. It is true that a prosecutor's misstatement of the law is misconduct. (*People v. Gray* (2005) 37 Cal.4th 168, 217-218.) Here, however, the prosecutor did not misstate the law. The jury instruction given in the instant case regarding withdrawal from a conspiracy was CALJIC No. 3.03, which indeed requires that an aider and abettor "must do everything in his power to prevent [the crime's] commission." (11 RT 2133-2134.) As discussed above in Argument III.C., this instruction "is a correct statement of the law." (*Richardson*, *supra*, 43 Cal.4th at p. 1022; see also *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055 ["To be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes, and (2) he did everything in his power to prevent the crime or crimes from being committed."] The prosecutor correctly pointed out that calling the police was one obvious

example of something appellant could have done that might have met the above standard, considering that he was in a lawyer's office and had ready access to his cellular phone just before the murder.

Next, appellant claims that the prosecutor made improper arguments when he stated that "there is a pretty demanding legal standard that you have to meet before you can escape responsibility for a crime if you are saying you engaged in a conspiracy but then withdrew," and that appellant "has no business telling you that he withdrew from this crime." (11 RT 2341, 2343.) Appellant forfeited this claim of misconduct by failing to object. (*Samayoa*, *supra*, 15 Cal.4th at p. 820.)

In any event, this also was a correct statement of the law. The defendant "must produce evidence" showing the two elements of withdrawal to avoid responsibility for aiding and abetting a crime, namely, notification of the other principals and doing everything in his power to stop the crime. (*Shelmire*, *supra*, 130 Cal.App.4th at p.1055.) The People still carry the burden of proof of proving non-withdrawal beyond a reasonable doubt. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 386.) But when a prosecutor makes clear that the People have the burden of proof, and simply highlights that the defense has failed to rebut the People's powerful evidence, the mere fact that he draws attention to the defense's failure is not improper burden-shifting. (*People v. Marshall* (1996) 13 Cal.4th 799, 831-832 [prosecutor's argument that defense "had to come up with another possible suspect to create in your minds that reasonable doubt" was not misconduct because it was made in context that burden was clearly on the People].) Here, approximately two pages before the putative misconduct, the prosecutor stated, "I am not saying [appellant] has any burden of proof whatsoever to bring evidence into court, because he doesn't; that is entirely on us." (11 RT 2337-2338.) The prosecutor then outlined the extensive phone contacts between appellant and Moya shortly

before the murder. (11 RT 2338-2341.) In that context, the prosecutor then argued that appellant had failed to adduce any persuasive evidence of withdrawal as required by law (i.e., that he did everything in his power to stop the crime). (11 RT 2341, 2343.) Thus, the overall burden of proof clearly remained on the People, but the prosecutor properly focused the jury's attention on the weakness of the defense theory of withdrawal. There was no misconduct.

### D. Appellant Forfeited the Argument That the Prosecutor Improperly Used a "Real Life" Example To Explain Aiding and Abetting; In Any Event, the Argument Is Meritless

Appellant claims that the prosecutor used an inappropriate "real life" football analogy to illustrate the law on aiding and abetting (AOB 231-232):

> Think about the Super Bowl, all right [*sic*]? You have got a team - - who won last year's Super Bowl? Green Bay. Thank you. All right [*sic*]. So you have got a Super Bowl winning team. Green Bay shows up on the field, and they have got a starting quarterback. Every team has one, but they have also got a backup quarterback who sits on the bench. And that backup quarterback never takes a snap. Never throws a touchdown pass or hands the ball off, never gets on the field. But he is in uniform ready to go. He is encouraging, he is promoting, facilitating the win of that game because he is there. He is ready. He has agreed. He is part of the team. Even though he doesn't take part in the actual win; he is part of the team. Who gets the Super Bowl ring at the end of the day? Well, he gets one just like everybody else. Aiding and abetting simply means that you are somehow facilitating or engaging or taking part in the commission of that particular crime.

(11 RT 2182-2183.)

Defense counsel failed to object to this argument, thereby forfeiting the argument that the analogy misstated the law on aiding and abetting. (*Samayoa, supra*, 15 Cal.4th at p. 820.)

In any event, the argument was appropriate. Of course, prosecutors should not make arguments that trivialize the law by using everyday examples that are "based on a standard far less" than those applicable in the case. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.) Here, however, that did not happen. The prosecutor merely used an example rooted in common knowledge to illustrate the law, which is permissible. (*People v. Gingell* (1931) 211 Cal. 532, 541-542.) A person is guilty of aiding and abetting a crime if, acting with knowledge of the unlawful purpose of the perpetrator and the intent or purpose of committing, encouraging, or facilitating the commission of the offense, by act or advice aids, promotes, encourages, or instigates the commission of the crime. (§ 31; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) The backup quarterback analogy is apt because, contrary to appellant's assumption, a backup is not just "sitting on the bench and doing nothing . . . ." (AOB 231.) The prosecutor made clear in the analogy that the backup "is . . . facilitating the win of that game because he is there." (11 RT 2182.) It is common knowledge (and obvious from the word "backup") that a backup player facilitates his team's win by allowing the starters to play with the knowledge that they have replacements. If the starters knew they had no backups, they would likely play more cautiously and less effectively overall. The sporting analogy also makes clear that the backup has an incentive to encourage his team's win because he benefits from it by receiving credit as a team member (i.e., the "ring"). Thus, the example comports with section 31, and the prosecutor did not commit misconduct by employing it.

### E. Appellant Forfeited the Argument That the Prosecutor Misstated the Law on Lying In Wait; In Any Event, the Argument Is Meritless

Appellant claims that the prosecutor misstated the law regarding the lying in wait special circumstance when he suggested that some of

appellant's own actions (as well as those of the actual killer) met the requirements of the law. (AOB 232-233.) Specifically, the prosecutor stated that "[t]here is an argument that [appellant] himself was actually lying in wait; he was sitting in a room, not five feet from Pamela Fayed thirty seconds before she was killed. So certainly he was concealing his purpose as well." (11 RT 2179.) Appellant forfeited the position that this argument was improper because defense counsel failed to object to it. (*Samayoa*, *supra*, 15 Cal.4th at p. 820.)

In any event, there was no misconduct. The lying in wait special circumstance requires proof of "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Hardy*, *supra*, 2 Cal.4th at p. 163.) As discussed at length in Argument IX.C., *ante*, the actions of an aider and abettor (such as the hirer of a paid killer) may satisfy some of the requirements of lying in wait. (See *Battle*, *supra*, 198 Cal.App.4th at p. 79 [both hirer and actual killers variously satisfied the requirements of lying in wait].) *Bonilla* does not take a contrary view, as appellant suggests. There, the hirer argued (and it was apparently undisputed) that he did *not* personally take any actions that met the requirements of lying in wait. Therefore, this Court correctly held that the issue in that case was whether the actual killer did so. (*Bonilla*, *supra*, 41 Cal.4th at p. 331.) However, as the facts of *Battle* suggest, that is not always the case. In some cases, as here, the hirer may personally participate in the acts constituting lying in wait, and when that occurs, the jury may consider it.

The jury instruction given regarding lying in wait is not contrary to the above interpretation. The jury was instructed that the People must prove "[t]he defendant intentionally killed the victim" and "[t]he murder was committed by means of lying in wait," which was defined as "waiting

and watching for an opportune time to act, together with a concealment by ambush . . . ." (14 CT 3675; CALJIC No. 8.81.15.1.) The only reference to the actual killer comes in the next sentence, which specifies that the overall amount of time that the lying in wait must occur is such that "the killer had a state of mind equivalent to premeditation or deliberation." (*Ibid.*) This reference to the killer, however, does not bar the jury from considering whether an aider and abettor also personally participated in at least some of the waiting, watching, or concealment of purpose.

### F. Appellant Forfeited the Argument That the Prosecutor Made Various Arguments Based On Facts Outside the Record; In Any Event, the Argument Is Meritless

Appellant makes various claims that the prosecutor's choice of words during closing arguments mischaracterized the evidence in several ways. (AOB 234-242.) These claims all were forfeited by defense counsel's failure to timely object (*Samayoa*, *supra*, 15 Cal.4th at p. 820), and, in any event, are all meritless. Prosecutors have wide latitude to discuss and draw inferences from the evidence and information duly presented at trial. (*People v. Lewis* (2006) 39 Cal.4th 970, 1061; *People v. Panah* (2005) 35 Cal.4th 395, 463, quoting *People v. Lewis* (1990) 50 Cal.3d 262, 283 ["[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper."].) It is a matter within the discretion of the trial court to determine whether counsel stays within the permissible range of discussion. (*People v. Simpson* (1954) 43 Cal.2d 553, 570.)

According to appellant, the first putative misstatement of evidence occurred when the prosecutor argued that appellant became aware of the federal subpoena served on Pyne Waltrip on or shortly after May 27, 2008, and that this was relevant to explain the many communications that took

place in the following days between appellant and Moya, and between Moya, Marquez, and Simmons. Appellant claims there was no evidence of exactly when appellant became aware of the subpoena. (AOB 234-235.) Appellant is correct on that point, but the prosecutor never argued anything to the contrary. The prosecutor merely stated that "the accountant showed [the subpoena] to the divorce attorneys, and *then everyone ended up knowing about it.*" (11 RT 2134, emphasis added.) The prosecutor did not say that there was evidence that appellant had absolutely become aware of the subpoena on a particular date. He simply stated that appellant's phone records suggested that he had in fact found out about it by May 29. (11 RT 2134-2135.) Indeed, there was evidence that it would not have taken long for word of the subpoena to reach appellant and Pam, so two days was a reasonable inference. For example, Aveis testified that it was "totally clear" to him that word of the subpoena leaked to the parties quickly after it was issued. (7 RT 1247.) Pam's divorce attorney Herring testified that he discussed the subpoena with Pam "roughly in May of 2008." (6 RT 1165.) The prosecutor therefore made a reasonable inference that appellant, who was running Goldfinger's operations, would have learned about the subpoena at least as quickly as Pam did, and that this explained his and Moya's actions on May 29. The jury was free to decide for itself whether to agree with that inference.

Appellant claims the second misstatement of the evidence occurred when the prosecutor argued that "154 days before [Pam's] murder, the indictment comes out." (11 RT 2311.) Appellant argues that this amounted to a claim by the People that appellant knew about the sealed federal indictment, but that there was no evidence presented to that effect. (AOB 236.) However, this argument simply takes the prosecutor's words out of context. In the next sentence, which appellant does not quote, the prosecutor stated that defense counsel "wants you to believe that the

question is, did [appellant] know that there was a sealed indictment against him and therefore murder Pam? *That's not the question* . . . The question is, did [appellant] believe that [Pam] was going to have a hand in dropping the hammer? And the answer is yes. He believed that she was going to talk to the feds." (11 RT 2311-2312, emphasis added.) Thus, the prosecutor never argued that the evidence proved appellant had actual knowledge of the sealed indictment itself, but rather only that he knew there was an ongoing federal investigation.

Next, appellant argues that the prosecutor misstated the evidence by arguing that Pam "would be" a witness in the federal investigation of Goldfinger, or "was going to cooperate in that federal prosecution." (AOB 236-237.) However, the portions of the prosecutor's argument that appellant complains of do not include those phrases. The prosecutor merely argued that Willingham testified that "Pam wanted to be cooperative," that Willingham believed Pam "should be a witness" rather than a suspect, and that Pam "wanted to be witness." In fact, the prosecutor conceded that there "wasn't a formal agreement signed" regarding Pam's status as a witness. (11 RT 2313.) The evidence on Pam's intentions in this regard was very clear, and was consistent with the prosecutor's arguments. For example, Willingham, Pam's first defense attorney, told Aveis that Pam should be treated as a witness rather than a suspect, and plans were made to discuss that possibility. (7 RT 1234-1235, 1251, 1283.) Pam hoped she would not be prosecuted along with appellant and Goldfinger, but she died before the federal authorities made a final decision or entered into a contract with her about treating her as a witness. (7 RT 1284-1285.) The prosecutor did not mischaracterize these facts.

Appellant also argues that the prosecutor committed misconduct by arguing that appellant knew Pam intended to cooperate with the federal authorities. (AOB 237-238; 11 RT 2192-2193, 2305, 2313.) The

prosecutor's statements to this effect were also reasonable inferences based on the evidence. The prosecutor did not claim that he could read appellant's mind regarding this information. Rather, the prosecutor based his inference on the evidence, such as the fact that the parties became aware of the federal investigation after the Pyne Waltrip subpoena, and that appellant and Pam had already argued about the propriety of Goldfinger's activities with respect to the money licenses.

Appellant also claims that the prosecutor misstated the evidence when he described appellant as infuriated with Pam and stated that greed had caused appellant's initial withdrawal from family life. (AOB 238-239.) Again, these arguments were valid inferences based on the evidence. In the interest of efficiency, respondent will not reiterate every fact which supports the inference that appellant was extremely angry at Pam, but one key piece of evidence to that effect was appellant's own statement to Smith that Pam had to be killed because she was "such a fuckin' liar" who had begun to "believe her own lies," and had "made all these stupid accusations . . . against me just to try and make me look bad." (3 CT 602.) Furthermore, there was evidence that greed was a factor in appellant's withdrawal from family life because appellant accused Pam of embezzling money from Goldfinger around the time that the divorce proceedings began in late 2007. (6 RT 1126-1127, 1140-1141.)

In addition, appellant claims that the prosecutor improperly "invented" testimony of Carol Neve during closing arguments that she did not actually give. (AOB 240-241.) Specifically, he points to the prosecutor's argument that Neve had a company which "became a focus of federal investigation, and her company got shut down . . . [b]ecause they didn't follow the federal guidelines and have money transfer licenses. You have to have one for each state, according to Carol. And James Fayed didn't have any." (11 RT 2187-2188.) Appellant claims Neve never

testified about "her business being shut down" or "what you have to do in each state." (AOB 240.) It is true that Neve did not explicitly state that her business had been shut down or discuss the state-by-state licensing requirements, but she did say that her company was "faced with charges of money transmitter licenses," namely, a failure to have one. (7 RT 1372.) Appellant also faults the prosecutor for arguing that, according to Neve, money transfer licenses cost hundreds of thousands of dollars, that they are designed to prevent "Madoff-type" fraud, that Pam purchased the money transfer license 293 days before her murder, and that she did so by writing a check. (AOB 240-241.) Neve's actual testimony was similar, though perhaps somewhat less detailed. She testified that she told Pam to obtain the license in September or October of 2007, and that Pam appeared intent on doing so, and that the license in question was "very expensive." (11 RT 1370-1373.)

To the extent the prosecutor's remarks exceeded the scope of Neve's testimony, appellant forfeited the argument that this statement (like all the other statements above) constituted prosecutorial misconduct[45] and, in any event, it was harmless. The prosecutor's minor mischaracterizations of Neve's legal problems and the precise purpose of money transfer licenses was so far afield from the substantive issues in this case that it could not possibly have prejudiced appellant's defense under any standard. (*Booker*, *supra*, 51 Cal.4th at p. 186.) The People were not reliant on evidence that

---

[45] Appellant implies that because there was a pre-trial defense objection limiting Neve's testimony, this constitutes an objection to the prosecutor's argument. (AOB 240.) However, defense counsel did not specifically object to the prosecutor's argument when he made the above statements during closing arguments, let alone on the specific basis of prosecutorial misconduct. Thus, this argument, like all the others regarding misstatement of evidence, is forfeited. (*Samayoa*, *supra*, 15 Cal.4th at p. 820.)

the federal investigation into Goldfinger would have led to exactly the same sanctions that Neve's business faced for similar misconduct, nor was Neve called to testify on how money transfer licenses actually work. In fact, the only purpose for which Neve's testimony was admitted was the effect her warning had on Pam, which was relevant to explain Pam's subsequent actions, since these led to her clash with appellant. (7 RT 1371.)

Finally, appellant cites various other miscellaneous statements in the prosecutor's closing arguments that he claims fell outside the evidence. (AOB 241-242.) All of these were reasonable inferences based on the evidence admitted. For example, appellant attacks the prosecutor's argument that "Moya is not going to go out and kill on [Mercedes's] behalf when he doesn't know Mary and he doesn't think that she can pay up." (11 RT 2335.) This argument was an appropriate way of highlighting the fact that the defense had failed to present persuasive evidence to back up its theory that Mercedes was the one who actually solicited Pam's death. Prosecutors may allude to the defense's failure to present exculpatory evidence, as long as they do not attempt to shift the burden of proof or fault the defendant for choosing not to testify. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257.) Casting doubt on the defense theory was particularly appropriate here, given that the theory was based solely on Taboga's testimony and had no other evidentiary support. Appellant also claims the prosecutor committed misconduct when he argued what appellant and Moya were doing and what they were discussing in the text messages and phone calls between them shortly after the murder. (11 RT 2205, 2198.) For example, the prosecutor argued that Moya was busy destroying evidence of the murder, and that appellant was repeatedly texting him until Moya finally responded at 1:35 a.m., "probably in an effort to say, 'Stop texting me. I am getting rid of this phone.'" (11 RT 2205-2206.) The prosecutor made clear to the jury, however, that the

content of these communications were deleted and not in evidence. (11 RT 2336.) The prosecutor was merely inferring what he believed they contained based on other evidence. This was not a misstatement of facts, but rather a reasonable deduction that the jury could believe or disbelieve.

### G. The Cumulative Effect of the Alleged Misconduct Does Not Warrant Reversal

Appellant claims that the cumulative and "pervasive" alleged prosecutorial misconduct discussed above warrants reversal. (AOB 242.) This argument fails. Of all the supposed incidences of misconduct, only one was not forfeited for appellate purposes. That incident, a fleeting reference to Pam's feelings just before her death, was harmless for the reasons already discussed. In any event, even if this Court were to find that additional incidences of misconduct occurred, none of them justify reversal in and of themselves or when taken cumulatively. Prosecutorial misconduct that violates a defendant's federal constitutional rights[46] may be deemed harmless beyond a reasonable doubt. (*Booker*, *supra*, 51 Cal.4th at p. 186.) Here, none of the alleged misconduct went directly to the heart of the People's case. Even if all of it had not occurred, the jury still would have heard damning evidence, including that appellant and Pam were involved in a bitter divorce fraught with disputes over a multi-million dollar estate and a business being investigated by federal authorities, that Pam was killed by assailants driving a car rented in appellant's name which contained traces of her blood, and that appellant admitted to his cellmate that he hired a third party to kill her.

---

[46] Appellant does not claim that reversal is warranted for prosecutorial conduct that fell short of violating his federal constitutional rights but constituted "deceptive or reprehensible methods" by the prosecutors under state law. (*Hill, supra,* 17 Cal.4th at p. 819.)

## XI. APPELLANT'S DUE PROCESS AND FAIR TRIAL RIGHTS WERE NOT VIOLATED BY ADMISSION OF EVIDENCE AT THE PENALTY PHASE

Appellant argues that the admission of certain evidence at the penalty phase of his trial deprived him of due process and his right to a fair trial. (AOB 243-250.) This argument is meritless.

### A. Applicable Law

The jury at the penalty phase of a capital case "shall take into account . . . if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (§ 190.3, subd. (a).) This has been interpreted to include "the injury inflicted by the defendant—including evidence about the victim and the impact of the crime on the victim's family . . . ." (*People v. Sandoval* (1992) 4 Cal.4th 155, 191, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720] [victim impact evidence is permissible under the federal Constitution]; *People v. Edwards* (1991) 54 Cal.3d 787,833-836.) For example, evidence of the victim's family's grief at having lost a loved one is admissible. (*Panah, supra*, 35 Cal.4th at p. 448 [media accounts of crime constituted admissible victim impact evidence]; *People v. Cruz* (2008) 44 Cal.4th 636, 682 [family members testifying about their love for the victims and displaying photographs of them was admissible victim impact evidence].) Victim impact evidence is limited in that it should not introduce irrelevant or inflammatory material that diverts the jury's attention from its proper role or invites an irrational, purely subjective response. However, even lengthy videos depicting the victim's life, skills, talents, or personality may be permissible, so long as they do not amount to a "memorial service" for the victim. (*People v. Prince* (2007) 40 Cal.4th 1179, 1288-1290.) In fact, the federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair." (*Lewis, supra*, 39

Cal.4th at p. 1056, quoting *Payne*, *supra*, 501 U.S. at p. 825.) Even if victim impact evidence is wrongfully admitted, it does not warrant reversal if it was harmless beyond a reasonable doubt. (*People v. Kelly* (2007) 42 Cal.4th 763, 799.)

On the other hand, capital defendants are permitted under the federal Constitution during the penalty phase to introduce all relevant evidence in mitigation with respect to their character or record. (*People v. Dyer* (1988) 45 Cal.3d 26, 69-70, citing *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973].) However, "the trial court determines relevancy in the first instance and retains discretion to exclude [mitigation] evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Cain* (1995) 10 Cal.4th 1, 64.) The rule allowing all relevant mitigating evidence also does not abrogate the Evidence Code. (*People v. Carpenter* (1997) 15 Cal.4th 312, 404.) For example, mitigation evidence may be excluded as hearsay. (*People v. Thornton* (2007) 41 Cal.4th 391, 442-443 [video of doctor discussing poor treatment in school of children with learning disabilities such as those defendant had was properly excluded as hearsay].)

### B. The Court Did Not Err By Admitting the Letter From Pam To Her Daughters as Victim Impact Evidence

Appellant faults the trial court for admitting as victim impact evidence a letter Pam wrote to Desiree (to be delivered in the event of her death) for its effect on Desiree in light of the murder. (AOB 246-249.) The court had excluded the letter in the guilt phase as hearsay, but the People sought its admission again in the penalty phase. (12 RT 2427-2428.) The letter stated:

> To my dear sweet baby girls. Please hear me and know that I am forever with you. You are the fruit of my labor in this life, and I am so proud of you both. Listen for my voice to guide

> you. I want so much to hold you in my arms and kiss your sweet faces for eternity. Please keep my family together with gentle love and understanding. You are all that exists for me now. Never abandon. Family is truly the only thing that is important. Protect each other at all costs. Love you with all my being. Mamma.

(12 RT 2428-2429.)

Defense counsel objected that the letter was hearsay if admitted for its truth, irrelevant for any purpose as non-hearsay, and also lacked foundation because it could not be authenticated as having been written by Pam. (12 RT 2428-2429.) The prosecutor responded that there was adequate foundation because the letter was found in Pam's personal storage shed in a box that was accessibly only to her, and was enclosed with her will. (12 RT 2429-2430.) The prosecutor then stated that the letter was admissible non-hearsay in that would be introduced solely to shed light on the impact that Pam's death had on Desiree, since the letter was intended only to be read after Pam's death. (12 RT 2430.) The court held that showing Desiree the letter for the first time on the stand, as the prosecutor intended to do, would be more prejudicial than probative because it would evoke a strong emotional response. (12 RT 2431.) The prosecutor offered to show Desiree the letter in advance of the hearing. The court stated that would still be improper because the letter was apparently written over two years before Pam's death. (12 RT 2432.) The prosecutor argued that insofar as the letter was meant to be delivered to Pam's daughters only on the occasion of her death, and appellant caused that death, then the letter was relevant to illustrate the impact the murder had on the girls. (12 RT 2433.) Nevertheless, the court excluded the letter. (12 RT 2433.)

At a later hearing, the prosecutor asked the court to revisit the issue in light of the fact that he had been mistaken when he previously told the court

that Desiree had never seen the letter,[47] and in light of certain additional legal authority. (13 RT 2561-2562.) The prosecutor cited various cases relating to victim impact statements and letters by the deceased. (13 RT 2563-2568.) Defense counsel argued that the letter was improper victim impact evidence because it had been written years before the circumstances surrounding the murder and had not been shown to Pam's daughters at that time, and therefore was "not part of Desiree's keepsakes, not part of her interaction with her mother . . . before her mother died . . . ." Defense counsel also reiterated that the letter was hearsay or, even if non-hearsay (i.e., if its statements were not admitted for their truth), that it had no bearing on any relevant issues. (13 RT 2572.)

The court stated that its primary concern in originally excluding the letter had been addressed insofar as it would not be the first time Desiree saw it. (13 RT 2574.) The court then asked the prosecutor to explain how the letter met the standard of victim impact evidence. The prosecutor responded that it "pertains to the way that [Desiree] is going to move through life" because it conveys the understanding that "future events will be absent the decedent, for instance, weddings, and birthdays, and Christmases, and the birth of a child, those things have all been held as roundly pertinent." The prosecutor added that the letter contained "the thoughts, and the feelings, and the emotions that Pamela Fayed wanted to impart on Desiree and on Gigi in the event of her passing." (13 RT 2575.) Defense counsel countered that the letter was merely Pam's "philosophy about life," and was not directly related to her murder. (13 RT 2576-2577.) The court agreed with the prosecutor, changed its prior order, and admitted the letter, emphasizing that it would not be the first time Desiree saw it and

---

[47] Desiree had been shown the letter by her attorneys during the disposition of Pam's will. (13 RT 2561.)

that Desiree would not have been forced to grapple with the issues it raised had appellant not caused Pam's death. (13 RT 2577.)

During Desiree's direct examination in the penalty phase, the prosecutor asked her to read the letter aloud, and she did so. (13 RT 2622-2623.) The prosecutor inquired, "What does [the letter] make you think as you move into the future without your mom?" Desiree answered, "It saddens me and depresses me, and it not only affects mine and Jeanette's life and everyone involved right now, but it affects our future families . . . the whole thing is terrible. I don't understand how anyone could honestly live with themselves after doing something like this." (13 RT 2623.) That was the only testimony elicited from Desiree about the letter.

The court did not err by admitting the letter as victim impact evidence. The letter was originally written to convey Pam's feelings about her daughters in the event of her death. Several years later, appellant was found guilty of causing that death. Thus, Desiree's feelings of loss and emptiness in reaction to the letter were the quintessential form of victim impact evidence. (*Cruz*, *supra*, 44 Cal.4th at p. 682.) Indeed, a creative expression or communication sent from a murder victim to her family prior to her death may be admissible as victim impact evidence where it "demonstrate[s] the close bond" between them, "the relationship lost as a result of [the] murder, and the impact [the victim's] death had on her [family member]." (*People v. Verdugo* (2010) 50 Cal.4th 263, 288-289 [cassette tape of songs given by victim to her father before she died was admissible as victim impact evidence].) The grief felt by the father in *Verdugo* upon hearing the songs his deceased daughter had given him is analogous to Desiree's grief in reading Pam's letter. In both cases, the decedents sent a heartfelt communication to their loved ones without knowing they would soon pass away, and the communication highlights the family member's feelings of loss in retrospect.

Appellant attempts to distinguish the instant case from others in which victims' letters were admitted, such as *People v. Valencia* (2008) 43 Cal.4th 268. In particular, appellant claims the letter "was not relevant to show the relationship" between Desiree and Pam merely because Desiree did not read it until after Pam died. (AOB 248.) This argument has no basis in fact, law, or common sense. Obviously, the letter could still describe the relationship between Pam and her daughters from Pam's point of view, which would and did emotionally affect Desiree when she read it after the murder. Moreover, there is no requirement that a family member's grief must be based on information known to him or her prior to the victim's death in order to be admissible as victim impact evidence. In any event, victim impact evidence is generally admissible "[u]nless it invites a purely irrational response from the jury," since "the devastating effect of a capital crime on loved ones and the community is relevant and admissible" under section 190.3, subdivision (a). (*Verdugo*, *supra*, 43 Cal.4th at p. 268.) In *Verdugo*, the murder victim was beloved by his family, and his father read his final letter to them for the jury. This Court held that such a letter is "well within permissible limits and, indeed, was very typical of the victim impact evidence we routinely permit." (*Ibid.*) Pam's letter outlining her love for her daughters is no different.

Finally, appellant also claims the prosecutor used the letter as hearsay evidence despite representing it to the court as non-hearsay. (AOB 248-249.) In support of this argument, he argues that the prosecutor "read the letter to the jury as a piece of evidence, making no reference to its limitations." (AOB 248.) The letter, of course, *was* a piece of evidence, relevant to shed light on Desiree's state of mind and the impact Pam's death had on her. (13 RT 2623.) Nothing in the prosecutor's direct examination suggested that it was admitted for any hearsay purpose (for example, to probe the truth of whether Pam actually loved her daughters),

nor did the prosecutor imply such a thing in closing arguments. In fact, when the prosecutor re-read the letter in closing arguments, he did not elaborate or draw any inferences about it at all. (13 RT 2808-2809.)

### C. The Court Did Not Err By Admitting Photographs of Pam's Gravesite as Victim Impact Evidence

Next, appellant argues that the court should have excluded photographs and video of Pam and her gravesite and funeral. (AOB 249-250.) This argument is meritless. Photographs and video of murder victims while they were alive, from their autopsies, and at their funerals or gravesites are commonly and properly admitted as victim impact evidence to illustrate the devastating effects of murder. Even victim impact evidence consisting of video or hundreds of photographs, and accompanied by music, may be admissible so long as it does not devolve into a eulogy or memorial service for the deceased. (See *Kelly*, *supra*, 42 Cal.4th at pp. 793-799.) Here, a photograph of Desiree kissing Pam's coffin was not unduly prejudicial to appellant when compared with evidence admitted in other murder cases. For instance, a video montage depicting murder victims' lives, culminating with an image of their gravesites, is appropriate, non-inflammatory victim impact evidence. (*Zamudio*, *supra*, 43 Cal.4th at pp. 367- 368.) Indeed, far more explicit images than those admitted in the instant case have been admitted as victim impact evidence. (*People v. Jackson* (2014) 58 Cal.4th 724, 756-757 [autopsy photograph of fetus that died as a result of pregnant mother's murder was admissible as victim impact evidence]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 299 [photograph of murder victim's "charred corpse" was admissible as victim impact evidence].) The photographs appellant complains of in the instant case were quite restrained by comparison.

### D. The Court Did Not Err By Excluding Melanie Jackman's Testimony Regarding Appellant's Feelings for Pam as Mitigation Evidence

Appellant argues that the court erroneously limited mitigating evidence that he recognized and wanted to ameliorate Pam's unhappiness prior to the divorce. (AOB 251-252.) This argument fails.

During the penalty phase direct examination of Melanie Jackman by defense counsel, she testified that appellant told her before the divorce that Pam was unhappy. Defense counsel inquired whether appellant asked Jackman for marital advice at that time. The prosecutor objected on the basis of hearsay. (13 RT 2695.) Defense counsel argued at sidebar that the testimony he intended to elicit was admissible under the hearsay exception in Evidence Code section 1250 for a declarant's then-existing state of mind:

> The offer of proof is that [appellant] called Melanie before he and Pam separated, [and] said "Pam is not happy, what can I do to make her happy," and Melanie tried to advise him about making her happy, basically about spending time at home.
> . . .
> There was a time in [appellant's] life that he loved Pam and he was very upset with the break-up of the marriage and he told Melanie about that. I want to get that in to show, the full scope of the family's life.

(13 RT 2696-2697.)

The prosecutor argued, and the court agreed, that appellant's own mental state was admissible under Evidence Code section 1250 (i.e., that he sounded unhappy during the phone call with Jackman), but that Jackman's testimony about appellant's characterization of *Pam's* mental state called for inadmissible hearsay. (13 RT 2697-2698.)

Mitigation evidence is subject to the rules of evidence, including the bar on hearsay. (*Thornton*, *supra*, 41 Cal.4th at pp. 442-443.) Appellant claims the court erred because appellant's descriptions of Pam's unhappiness would have been "non-assertive" conduct, which is not

hearsay. (AOB 252.) Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. (Evid. Code, § 1200.) A "statement" in this context is defined as an "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) Nonassertive conduct, on the other hand, is not subject to the hearsay rule, and includes evocative behavior such as an individual's failure to express a normal emotional response to shocking news, or involuntary fainting. (See, e.g., *People v. Snow* (1987) 44 Cal.3d 216, 227 [individual expressed nonassertive conduct by failing to react normally to news of murder]; *People v. Clark* (1970) 6 Cal.App.3d 658, 668 [individual expressed nonassertive conduct by fainting in reaction to being asked a question].)

Appellant's argument was forfeited because defense counsel never argued that Jackman's description of Pam's unhappiness would be limited to nonassertive conduct, and the court had no basis to believe that would be the case. (*Polk, supra*, 190 Cal.App.4th at p. 1194 [if defendant fails to object on precise ground asserted on appeal, error is not cognizable on appeal].) To the contrary, defense counsel's offer of proof (that appellant believed Pam was unhappy) suggests that counsel would have engaged in a line of questioning that specifically called for hearsay. Without knowing the nature of the hearsay statements Pam conveyed to appellant that led him to believe she was unhappy, Jackman's testimony would have lacked foundation. The expression by a spouse that she is unhappy in her marriage cannot readily be expressed by a nonassertive act such as fainting or a blank facial expression, let alone described as such by the other spouse to a third party over the phone.

In any event, even if the court erred by excluding this evidence (either on the basis that it was nonassertive conduct or on the basis of Evidence Code section 1250, as counsel argued at trial), such error was harmless.

Notwithstanding the federal constitutional right to present mitigating evidence, the standards governing admission of such evidence are those set forth in the Evidence Code. (*Carpenter*, *supra*, 15 Cal.4th at p. 404.) Therefore, the proper standard for reversal is for state law error, namely, whether there was a reasonable probability of a more favorable result but for the error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Here, the omission of Jackman's testimony that appellant told her he felt bad that Pam was unhappy would not have led to a different result at the penalty phase. First, Jackman was not a credible witness. For example, after lauding appellant as a good person who never said anything negative about Pam, Jackman was confronted on cross-examination by emails sent from appellant to her in which he called Pam a "sociopathic-lying-money-grubbing whore," and a "Super-Bitch," and in which he regretted that he "let [Pam] get away with this shit for years." (13 RT 2705-2706.) Jackman implausibly claimed she could not remember receiving these emails. (13 RT 2706.) In any event, even if Jackman's testimony that appellant once said he cared about Pam's unhappiness were both admitted and believed, that still would not have outweighed the mountain of evidence that appellant hated and disdained Pam (particularly his admissions to that effect to Smith) which was presented in the guilt phase and must be considered at the penalty phase as well. (§ 190.4, subd. (d).)

## XII. APPELLANT FORFEITED THE CLAIM THAT HIS RIGHTS WERE VIOLATED BY THE PROSECUTION'S PENALTY PHASE CLOSING ARGUMENTS; IN ANY EVENT, APPELLANT'S POSITIONS ARE MERITLESS

Appellant argues that the prosecutor committed various misconduct in his penalty phase closing arguments. (AOB 235-257.) These arguments are all meritless.

### A. Applicable Law

Prosecutors are allowed wide latitude in penalty phase argument, so long as the beliefs they express are based on the evidence presented. (*People v. Parson* (2008) 44 Cal.4th 332, 360.) A prosecutor's closing argument at the penalty phase of a capital case is inappropriate only "if it called upon irrelevant facts, or led the jury to be overcome by emotion." (*People v. Sanders* (1995) 11 Cal.4th 475, 550, quoting *People v. Raley* (1992) 2 Cal.4th 870, 916.) The trial court's allowance of a particular closing argument will not be reversed absent an abuse of discretion. (*Cole*, *supra*, 33 Cal.4th at p. 1233.)

### B. Appellant Forfeited the Argument That the Prosecutor Invoked a Sense of Vengeance; In Any Event, the Argument Is Meritless

First, appellant claims the prosecutor evoked an emotional response from the jury by appealing to a sense of vengeance. (AOB 253-255.) Specifically, appellant points to the following passage:

> Sympathy is what it really comes down to and pleas for leniency, that is what it comes down to. Requests for mercy. Make no mistake about it, you can give [appellant] mercy and that's withholding the punishment that he deserves, even when justice demands it. You can give him that. You can be that jury who does that, or you can give the appropriate penalty in the case, that's justice. What kind of jury do you want to be? Do you want to be the jury that gives mercy to a man when he gave none? You can do that. You can give mercy to him, but you can't give justice to them and mercy to him. It's your choice. It's the fork in the road for you. Mr. Fayed has had a trial. He's had a judge. He's had a jury of his peers. He's had evidence in mitigation, and he's going to ask you for mercy when Pam Fayed had none of these? Pam didn't have a trial. James Fayed was her judge, jury and executioner. Don't you think Pam Fayed would have liked the opportunity to say, I'm sorry, objection, Steven Simmons. Before you kill me, I'd like to interpose the - - a very strict legal - - don't you think she would have liked that chance? Or maybe the chance of the Goudies to

> say, objection. We would like the opportunity at this time to present mitigating evidence of what a great sister Pam was before she is slaughtered by James Fayed's hit man. And he's going to ask you for mercy?

(13 RT 2807-2808.)

Appellant forfeited the position that the above argument was improper, since defense counsel failed to object. (*Sanders*, *supra*, 11 Cal.4th at p. 549; *Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) In any event, the prosecutor's discussion of "mercy" and comparison of Pam's death to appellant's trial was appropriate in that it highlighted the brutality of appellant's crime. The gist of the prosecutor's argument was that Pam had no chance even to beg for her life because appellant employed a hired killer who she did not even know. This Court has "repeatedly approved prosecutors arguing that a defendant is not entitled to mercy, and in particular arguing that whether the defendant was merciful during the crimes should affect the jury's decision." (*Gamache*, *supra*, 48 Cal.4th at pp. 389-390.) Furthermore, a prosecutor's comments also do not constitute misconduct if they merely set forth that the defendant inflicted great suffering on the victim's family, and that granting him mercy would be like "slap in the face" to them. (*Sanders*, *supra*, 11 Cal.4th. at pp. 548-551.) Such remarks constitute "obvious truisms to the effect that they [the family] were aggrieved." (*Id.* at p. 550.) The prosecutor's comments about Pam's family focused on their loss in much the same way as the prosecutor did in *Sanders*. The Eighth Amendment "erects no per se bar to the admission of evidence about the impact of murder on the victim's family," and arguments to that effect also do not violate a defendant's due process rights. (*Ibid.*)

### C. Appellant Forfeited the Argument That the Prosecutor Relied on Facts Not in Evidence; In Any Event, the Argument Is Meritless

Next, appellant claims that the prosecutor referred to facts not in evidence by stating that the jury could not consider sympathy for appellant's family as a mitigating factor in sentencing, even though the defense had never set forth that position. (AOB 256-257.) Specifically, appellant challenges the following argument:

> It's not your job to decide what's best for Jeanette. And it will say it in the instructions, and you can read it. You can't consider . . . sympathy for Mr. Fayed's family. And I'm not going to lie to you, for a while during the penalty phase, it seemed like that was the elephant in the room, Jeanette, right? What about Jeanette, this girl. Is she a victim? Is she suffering? Will she suffer more? Well, Mr. Fayed cannot come in here and use as his last remaining card his daughter and sympathy for her as a human shield. It doesn't work that way. You can't kill the child's mother and then say, don't make her an orphan because you kill me, she doesn't have anybody left.
> . . .
>
> He didn't think about [Jeanette] before. He had a cold, calculated, deliberate, brutal, vicious plan that he set into motion. And now to hide behind her is more cowardly than it was to dispatch your two-bit assassins to ambush your wife in that parking lot.

(13 RT 2788-2789.)

Again, appellant forfeited this argument by failing to object. (*Sanders*, *supra*, 11 Cal.4th at p. 549; *Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) In any event, the prosecutor did not commit misconduct. Appellant's position is that the above argument was based on facts not in evidence because it wrongly implied that the defense had appealed to the jury's sympathy for Jeanette. But the argument above does not accuse the defense of doing so; rather, it was merely a summary of the applicable law. (*People v. McDowell* (2012) 54 Cal.4th 395, 437 [prosecutor permitted to

accurately summarize law provided in jury instructions during penalty phase closing argument].) The prosecutor was clearly concerned that some jurors might be swayed by their own emotions to consider Jeanette's situation because that this was the "elephant in the room." (13 RT 2788-2789.) Indeed, much of Desiree's penalty-phase testimony was focused on how Jeanette was coping with the trauma of the situation. (13 RT 2611-2613, 2615, 2619, 2623.) Moreover, on cross-examination, defense counsel elicited from Desiree that appellant loved Jeanette dearly. (13 RT 2635.) Therefore, the prosecutor appropriately told the jury that the law and their instructions bar consideration of Jeanette's welfare when determining appellant's penalty. (14 CT 3687 ["Sympathy for the family of the defendant is not a matter that you can consider in mitigation."]; *People v. Bennett* (2009) 45 Cal.4th 577, 601 ["The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation."].) The prosecutor's statement that appellant could not "hide" behind Jeanette appropriately addressed the defense's elicitation from Desiree that appellant loved Jeanette. Thus, there was no misconduct.

Next, appellant argues that the prosecutor relied on facts outside the evidence when he argued that Pam was "offering a very direct and concrete benefit to the community in her willingness to cooperate with the federal authorities," and that Pam's last thought is that appellant "won" and that "[h]e got me." (AOB 257; 12 RT 2449; 13 RT 2795.) Both of these statements by the prosecutor were reasonable inferences based on the evidence, which are given wide latitude during closing arguments. (*Lewis, supra*, 39 Cal.4th at p. 1061; *Panah, supra*, 35 Cal.4th at p. 463.) The argument that Pam was cooperating with the federal authorities was a reasonable inference based on the fact that Willingham, Pam's first defense attorney, told Aveis that Pam should be treated as a witness rather than a suspect. The record was clear that though there was no formal agreement

for Pam to testify before she died, Willingham and Pam hoped that she would not be prosecuted and that Pam believed Goldfinger had been wrong to go without the money transfer licenses. This issue was the subject of extensive testimony by multiple witnesses, and the prosecutor's argument would not have misled the jury as to the facts. Finally, the prosecutor's inference as to Pam's last thoughts obviously was not the subject of any witness's direct testimony. However, the evidence was clear that Pam and appellant had a very antagonistic relationship, that appellant was blocking progress on the divorce, that they disagreed about the propriety of Goldfinger's activities, and that Pam had the intention of cooperating with federal authorities against appellant. The prosecutor's argument was reasonable in this context.

## XIII. THERE WAS NO CUMULATIVE ERROR WHICH JUSTIFIES REVERSAL

Appellant contends that the cumulative effect of all the errors above deprived him of a fair trial and justifies reversal. (AOB 258-259.) Respondent disagrees. Appellant fails to demonstrate that any error occurred in the vast majority of claims that he makes, and those few errors that did occur were not prejudicial. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 675; *Ochoa*, *supra*, 26 Cal.4th at p. 447.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) The record shows appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

## XIV. CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE THE FEDERAL OR CALIFORNIA CONSTITUTIONS

Appellant raises numerous familiar arguments generally characterizing California's death penalty as unconstitutional. (AOB 260-326.) All of these arguments fail.

### A. The Special Circumstances Set Forth In Section 190.2, Factor (a), Are Not Impermissibly Broad

Contrary to appellant's position (AOB 265-273), neither the lying in wait nor the felony murder special circumstances render the death penalty unconstitutional. Section 190.2, which sets out the special circumstances that render a defendant eligible for the death penalty (including lying in wait and various forms of felony murder), adequately narrows the class of eligible offenders in conformity with the requirements of the Eighth and Fourteenth Amendments. (See, e.g., *People v. Elliot* (2012) 53 Cal.4th 535, 593; *People v. Lee* (2011) 51 Cal.4th 620, 653-654; *People v. Martinez* (2010) 47 Cal.4th 911, 967.)

### B. The Death Penalty Is Not Applied In an Arbitrary or Capricious Manner

Appellant argues that the death penalty is applied arbitrarily to some crimes rather than others, and that its procedural rules are arbitrary and capricious. (AOB 273-279, 295-299.) These claims are meritless. Appellant's heavy reliance on *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], is misplaced given the current state of California law. "In *Gregg v. Georgia* (1976) 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859, a high court plurality stated that 'the concerns expressed in [*Furman*] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that

ensures that the sentencing authority is given adequate information and guidance.'" (*People v. Weaver* (2012) 53 Cal.4th 1056, 1093.)

Section 190.3, factor (a), governs application of the death penalty and allows the trier of fact, in determining penalty, to take into account: "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." This Court has "'repeatedly have held that consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious imposition of the death penalty. [Citations.]'" (*People v. Brasure* (2008) 42 Cal.4th 1037, 1066; see also *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. Souza* (2012) 54 Cal.4th 90, 141-142; *People v. Moore* (2011) 51 Cal.4th 386, 415.)

### C. The Death Penalty Is Not Unconstitutionally Severe Punishment

Appellant next argues that the death penalty is unconstitutional because it is unusually severe and conflicts with basic human dignity and evolving societal standards. (AOB 279-288.) These arguments are inapposite. A sentence of death that comports with state and federal statutory and constitutional law does not violate international law or norms, or the Eighth Amendment to the United States Constitution. (*People v. Fuiava* (2012) 53 Cal.4th 622, 733.) California also does not employ capital punishment in a manner that violates norms of humanity and decency. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true. (*People v. Jennings* (2010) 50 Cal.4th 616, 690.)

### D. The Death Penalty Serves the Goals of Retribution and Deterrence

Appellant's opinions on whether the death penalty serves its societal goals of retribution and deterrence (AOB 288-295) are inapposite and are not based on any binding authority. As explained above, the death penalty is both constitutional and statutorily authorized. In any event, this Court has held that the death penalty does in fact provide retributive justice. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1079, quoting *People v. Zambrano* (2007) 41 Cal.4th 1082, 1178 ["[r]etribution on behalf of the community *is* an important purpose of all society's punishments, including the death penalty"].) Moreover, the Court has also noted that consideration of the death penalty's deterrent effect should be reserved for the Legislature. (See *Marshall*, *supra*, 13 Cal.4th at p. 859 ["Questions of deterrence or cost in carrying out a capital sentence are for the Legislature . . . ."].)

### E. The Death Penalty Does Not Apply an Improper Burden of Proof

Appellant makes numerous arguments challenging the death penalty on the basis that it does not require jurors to apply the correct burden of proof. For example, he claims that the death penalty is unconstitutional because it does not require jurors to unanimously find beyond a reasonable doubt that the aggravating factors are true, that the aggravating factors outweigh the mitigating factors, or that death is the appropriate sentence. Appellant further claims the death penalty is unconstitutional because it does not require these findings to be made in writing. (AOB 299-319, 322-324.) All these arguments fail.

As Court held in *Carpenter*, "[T]he sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under [California's death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.

Because of this, instructions associated with the usual fact-finding process—such as burden of proof—are not necessary." (*Carpenter*, *supra*, 15 Cal.4th at pp. 417-418, internal quotation marks and citations omitted.) In other words, "[t]here is no penalty phase burden of persuasion." (*People v. Smith* (2005) 35 Cal.4th 334, 370-371; *Lee*, *supra*, 51 Cal.4th at p. 652 ["The lack of any burden of proof or persuasion as to penalty does not violate the Eighth or Fourteenth Amendment, and the trial court does not have to instruct the jury that there is no burden of proof or persuasion."]; *People v. Riggs* (2010) 44 Cal.4th 911, 329; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 227.)

Similarly, in *Moore*, this Court stated:

> "'Our statute "is not invalid for failing to require (1) written findings or unanimity as to aggravating factors, (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt." No instruction on burden of proof is required in a California penalty trial because the assessment of aggravating and mitigating circumstances required of penalty jurors is inherently "'normative, not factual' and, hence, not susceptible to a burden-of-proof quantification.'" Nor is an instruction on the *absence* of a burden of proof constitutionally required." The United States Supreme Court's decisions in *Apprendi v. New Jersey* [(2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny do not establish a Sixth Amendment right to determination of particular aggravating factors, or the balance of aggravation and mitigation beyond a reasonable doubt, or by a unanimous jury. "Finally, [n]o instruction on a presumption that the sentence should be life without parole, rather than death, was constitutionally required."

(*Moore*, *supra*, 51 Cal.4th at pp. 415-416, quoting *People v. Bell* (2007) 40 Cal.4th 582, 620, emphasis original, internal citations omitted; see also *Williams, supra,* 58 Cal.4th at p. 294 ["'the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase'"]; *People v. Loy* (2001) 52 Cal.4th 46, 78 ["The instructions do not

impermissibly fail to inform the jurors regarding the standard of proof and lack of need for unanimity as to mitigating circumstances"]; *Lightsey*, *supra*, 54 Cal.4th at p. 731; *People v. Page* (2008) 44 Cal.4th 1, 57 [rejecting claim that instructions failed to inform the jury that it was required to return a life sentence if it found that mitigation outweighed aggravation]; *People v. Lewis* (2008) 43 Cal.4th 415, 533-534.) Finally, the standard penalty instructions are not deficient for omitting the requirement of jury unanimity as to the aggravating factors. (*People v. Tate* (2010) 49 Cal.4th 635, 712.)

### F. The Death Penalty Is Not Unconstitutional Due To the Lack of an Instruction That the Absence of Mitigating Factors Is Not an Aggravating Factor

Appellant argues that the death penalty is unconstitutional because the jury was not instructed that the lack of a mitigating factor does not amount to an aggravating factor. (AOB 319-322.) As appellant himself recognizes, however, this Court has rejected that very argument on numerous occasions. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 692; *Riggs*, *supra*, 44 Cal.4th at p. 328.)

### G. The Death Penalty Is Not Unconstitutional For Failing to Require Inter-Case Proportionality

Appellant asserts that the death penalty is unconstitutional because it does not provide a mechanism that allows an appellate court to review whether a defendant's death penalty punishment is disproportionate to the punishment imposed on other individuals convicted of similar crimes. (AOB 324-325.) Both the United States Supreme Court and this Court have held that inter-case proportionality review is not constitutionally required in California. (AOB 492-493; *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *Lee*, *supra,* 51 Cal.4th at p. 651;

*Parson*, *supra*, 44 Cal.4th at pp. 368-369; *Riggs*, *supra*, 44 Cal.4th at p. 330.)

### H. The Use of the Adjectives "Extreme" and "Substantial" In Section 190.3, Subdivisions (d) and (g), Does Not Render the Death Penalty Unconstitutional

Appellant argues that the use of the words "extreme" and "substantial" in section 190.3, subdivisions (d) and (g), is unconstitutional because they serve as barriers to the consideration of mitigating factors in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 325.) However, This Court has repeatedly rejected that claim. (*Parson*, *supra,* 44 Cal.4th at pp. 369-370; *Williams*, *supra*, 43 Cal.4th at p. 649; *Thornton*, *supra*, 41 Cal.4th at p. 469.)

### I. The Death Penalty Is Not Unconstitutional Due To Its Reliance On Unadjudicated Criminal Activity

Appellant argues that the death penalty is unconstitutional because section 190.3, subdivision (b), allows the jury to consider unadjudicated criminal activity. (AOB 326.) However, this Court has held that "'[t]he jury's reliance on unadjudicated criminal activity as a factor in aggravation under section 190.3, factor (b), without unanimously agreeing on its existence beyond a reasonable doubt, does not deprive a defendant of any rights guaranteed by the federal Constitution, including the Sixth Amendment right to jury trial.'" (*People v. Whalen* (2013) 56 Cal.4th 1, 91, quoting *People v. Clark* (2011) 52 Cal.4th 856, 1007.)

### J. The Death Penalty Is Not Unconstitutional For Providing Fewer Procedural Protections than Defendants Receive In Non-Capital Cases

Appellant argues that the death penalty violates the Equal Protection Clause of the United States Constitution because it provides fewer procedural safeguards for defendants facing a death sentence than are afforded to those charged with non-capital crimes. (AOB 326.) This Court

has repeatedly rejected this contention, finding that the two categories of defendants are not similarly situated. (*Lee*, *supra*, 51 Cal.4th at p. 653 ["The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated."], citing *People v. Redd* (2010) 48 Cal.4th 691, 758 [because capital defendants are not similarly situated to noncapital defendants, death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants], and *Martinez*, *supra*, 47 Cal.4th at p. 968 [same]; *Riggs*, *supra*, 44 Cal.4th at p. 330.)

## CONCLUSION

Accordingly, respondent respectfully asks that the judgment of conviction and sentence of death be affirmed.

Dated: June 30, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General

IDAN IVRI
Deputy Attorney General
Attorneys for Respondent

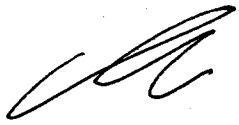
II:vss
LA2011505419
51540112.doc

## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13-point Times New Roman font and contains **69, 780** words.

Dated: June 30, 2014

KAMALA D. HARRIS
Attorney General of California



IDAN IVRI
Deputy Attorney General
Attorneys for Respondent

## DECLARATION OF SERVICE

Case Name: ***PEOPLE* v. *JAMES MICHAEL FAYED*** Case No.: **S198132**

I declare:

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

On June 30, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

**PLEASE SEE ATTACHED SERVICE LIST**
On June 30, 2014, I caused fourteen copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **OnTrac**; Tracking Number **B10271635881**.

On June 30, 2014, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On June 30, 2014, I caused one copy of the **RESPONDENT'S BRIEF** in this case to be hand delivered to the California Court of Appeal at 300 South Spring Street, 2nd Floor, Los Angeles, CA 90013.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 30, 2014, at Los Angeles, California.

Vanida S. Sutthiphong
Declarant

Signature

**DECLARATION OF SERVICE LIST BY U.S. MAIL**

Case Name: ***PEOPLE* v. *JAMES MICHAEL FAYED*** Case No.: **S198132**

Mary Jameson
Automatic Appeals Unit Supervisor
Supreme Court of the State of California
350 McAllister Street, 1st Floor
San Francisco, CA 94102-3600

Kelly C. Quinn, Esq.
Law Offices of Mark J. Werksman
888 West 6th Street, 4th Flr.
Los Angeles, CA 90017

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Los Angeles County District Attorney's Office
Major Crimes Division
18000 Foltz Criminal Justice Center
210 W. Temple Street, 17th Floor
Los Angeles, CA 90012

Bertha Magana
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647