IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DANIEL NUNEZ and WILLIAM SATELE,** Defendants and Appellants.	S091915 **CAPITAL CASE**

Los Angeles County Superior Court No. NA039358
The Honorable Tomson T. Ong, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 7, 1999, the Los Angeles County District Attorney filed an information in Los Angeles County Superior Court charging appellants with two counts of premeditated murder (committed on or about October 29, 1998) under Penal Code[1/] section 187, subdivision (a). (2CT 385-388.) On April 21, 2000, an amended information was filed (see footnote 37, *post*) re-charging the murders, and alleging that they were: (1) for a gang purpose under section 186.22, subdivision (b)(1); (2) due to race under section 190.2, subdivision (a)(16); and (3) multiple murders under section 190.2, subdivision (a)(3). As to both murders, it was also alleged that appellants discharged a gun under section 12022.53, subdivision (d), and committed the murders "in concert" because of race under former section 422.75, subdivision (c). (37CT 10674-10681; 2RT 479-481.)

Appellants pled not guilty, and denied the special charges. Trial was by jury. The jury found appellants guilty as charged, and found that the killings were multiple murders for a gang purpose with personal gun-use by each

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1. Unless otherwise indicated, all further statutory references are to the Penal Code.

appellant. The jury found untrue that the murders were committed in concert due to race. (38CT 10925-10944.)

After a penalty phase, the jury selected the death penalty for each appellant on July 6, 2000. On September 14, 2000, the court: (1) denied the motions to modify the verdicts; and (2) imposed the death penalty for each appellant and stayed gun-use enhancements for each murder as to each appellant. (38CT 10941-10944; 39CT 11146-11147, 11156, 11168, 11194, 11202, 11247, 11249, 11251, 11268-11269, 11280, 11292, 11311, 11312-11374.)

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

STATEMENT OF FACTS

A. Summary

About 11:30 p.m. on October 29, 1998, Edward Robinson was standing on a street near his girlfriend Renesha Fuller outside his townhouse in Harbor City when they were shot by a semi-automatic AK-47 rifle. Robinson was between the open driver's door of Fuller's car, Fuller was in her driver's seat, and Robinson's sister, Bertha, was in the townhouse she shared with Robinson. After the shootings, Bertha looked out her upstairs bedroom window and saw a sedan speed away. Ernie Vasquez heard the shots and tried to aid the victims. Fuller died at the scene, Robinson died within hours at a hospital, and both were African-Americans. Appellants were Hispanic (Nunez) and Samoan (Satele) members of the West Side Wilmas gang in Wilmington that rivaled Vasquez's ex-gang, Harbor City Boys. Harbor City and Wilmington are adjacent cities in Los Angeles county separated by the large Interstate 110 freeway close to (and north of) Long Beach county.

No one witnessed the shootings, but Vasquez saw Juan Carlos Caballero driving a "Buick Regal" sedan in the area before the killings, and Satele looked

like one of Caballero's two passengers. About 28 hours later, the Los Angeles Police Department (LAPD) arrested Satele after he and Nunez fled from a "Chrysler" sedan containing the murder weapon (an AK-47 type semi-automatic assault rifle) with 26 bullets in a "clip" that carried 30 bullets. Nunez had possession of this Chrysler, which belonged to Ruby Feliciano, at the time of the killings, and LAPD arrested Nunez two weeks after he fled from the Chrysler.

About one hour after the shootings, Joshua Contreras heard confessions from his fellow gang members, appellants. Contreras denied it at trial, but pre-trial, he told LAPD that he heard Satele or Nunez admit, "I think we hit one of them." Five weeks after the crimes, Satele bragged to Vasquez when they were both in jail, "we did that" or "I did that" shooting. One month later, at a different jail, Nunez bragged to Vasquez that as to "niggers" killed in his turf, "I did that shit." Caballero drove appellants to the shootings in fellow gang member Lawrence Kelly's Buick Regal sedan. Caballero was killed two months later (footnote 17, *post*).

Satele did not testify or offer any alibi. Nunez testified that he, his girlfriend, and her mother were at the girlfriend's apartment during the killings, and these women gave similar alibi testimony.

B. Guilt Phase

1. Prosecution Evidence

a. Events Before, During, And After Shootings Resulting In Murders

Nunez (Speedy) was with fellow West Side Wilmas gang members Contreras (Tweety, age 14) and Caballero (Curly, age 16) about four hours prior to the killings on October 29, 1998. (5RT 1138-1142; 6RT 1203-1213; 7RT 1492-1493, 1505-1514, 1561-1562, 1585, 1590, 1606-1607; 8RT 1646,

1727, 1878; 9RT 2072, 2075-2078, 2091, 2109-2110.) That day, LAPD stopped Nunez, Contreras, and Caballero around 6:30 p.m. for about 15 minutes near fellow gang member Satele (Wil-Bone) in the area of the Dana Strands Housing Project (DSHP) in Wilmington.[2/] Afterwards, Caballero left Nunez and Contreras around 7 p.m., then Nunez and Contreras split up at Contreras's DSHP home at 9:15 p.m. At that time, Nunez, his girlfriend Yolanda Guaca,[3/] and their baby walked towards Guaca's apartment near the DSHP. (7RT 1505-1514, 1516; 8RT 1642-1644, 1662-1666, 1671, 1673-1674, 1727, 1883-1884; 9RT 2072-2079, 2133-2134) Nunez and Caballero lived in the same area near the DSHP (9RT 1957-1959), and the main activity of the

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2. Satele was nearby on a "bike" when Contreras, Caballero, and Nunez were stopped, and Satele was released from LAPD detention when Nunez, Caballero, and Contreras were released. (7RT 1623; 9RT 2078-2079, 2088, 2133-2135.) Wilmington and Harbor City are adjacent cities in Los Angeles county near Long Beach. Interstate 110 separates Wilmington from Harbor City, Wilmington is east of the freeway, and Harbor City is west of the freeway. From these cities, the 110 freeway ends southbound at Pacific Coast Highway (PCH), which runs "east-west" at that point close to Redondo Beach and Manhattan Beach. (5RT 1083, 1087, 1104, 1107-1108, 1135-1136.) The DSHP was "turf" claimed by the West Side Wilmas. This gang began around 1955, it had about 750 members (with about 150 "active" members) at the time of the killings, the gang congregated in a park or playground in the center of the DSHP, virtually all members were Hispanic (like Nunez, Caballero, and Contreras), and a rival was the Harbor City Crips gang that had mostly African-American members. Appellants were "hardcore" members of a gang with no known active African-American members, four Samoan members (including Satele), and Samoans "absolutely" joined Hispanic gangs at the time of the killings. (4RT 929-930; 6RT 1177, 1203-1211, 1219-1227; 7RT 1360-1361, 1364-1365, 1464-1465, 1472-1473, 1493-1502, 1517, 1525, 1565-1580, 1610; 8RT 1627, 1646-1665, 1673-1674, 1715-1719; 9RT 1936-1937, 2072-2081, 2083-2084, 2086-2108, 2112-2122, 2126-2130, 2132-2140, 2150.)

3. Yolanda's name was spelled Guaca (11RT 2598) as well as Guajaca (17RT 4159).

West Side Wilmas was to "benefit the gang" through robbery, narcotic sales, and anything else "all the way up to murder" (9RT 2093).

Around two hours later (near 11:30 p.m.), Robinson and his girlfriend Fuller were shot to death in the "narcotic sales" area and "Harbor City Crips" turf of Frampton Avenue near 254th Street, 15 minutes driving-time from the DSHP. During the shootings: (1) the victims (African-Americans) were at Fuller's Ford Escort car parked at a curb outside a townhouse where Robinson lived; and (2) Robinson's sister Bertha and her husband Frank were in bed in a second floor bedroom in the townhouse.[4] (5RT 977-980, 983-987, 993, 1000-1013, 1016-1021, 1024-1032, 1036-1041, 1050-1059, 1061-1063, 1070, 1073, 1076, 1079-1081, 1083-1086, 1088-1092, 1094-1097, 1121-1131, 1208-1211, 1219-1226; 9RT 2101-2103, 2109-2110, 2115-2118, 2140, 2163, 2183-2184.) Robinson was shot three times (from an unknown distance) in his left upper shoulder, forearm, and hip. (5RT 992-993; 9RT 2012-2023, 2026-2027, 2029-2031, 2034-2035.) Fuller was shot two times in her left upper shoulder and right "back[.]" (5RT 1131-1132; 9RT 2037, 2039-2055, 2060-2064.) When killed, Robinson (age 21) was escorting Fuller (age 21) to her car because his construction job began at 5 a.m., and Fuller was starting her new county job. Fuller died at the scene, and Robinson died within hours at a hospital. (5RT 978-980, 1003-1004, 1052-1054, 1061, 1079-1081, 1089-1093, 1126, 1130; 9RT 2012-2064, 2155.)

After the shootings, Frank said to Bertha, "somebody got a new gun [*sic*] trying it out." (5RT 1053-1054, 1072.) Bertha heard four to seven gunshots and a car accelerating away. (5RT 989, 1028, 1036.) She looked out a front window and saw: (1) Robinson shot and lying on the street; and (2) rear tail lights from a "big older model" sedan "accelerating" southbound on Frampton

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4. Purely to avoid confusion, respondent will refer to Bertha and Frank by their first names.

Avenue.[5/] After Bertha reported her sightings to Frank, he spoke to a "911" operator, then he and Bertha dressed and ran to Robinson.[6/] (5RT 982-984, 987-992, 1000, 1008-1016, 1020-1021, 1024-1031, 1036-1040, 1042-1046, 1052-1054, 1066-1067, 1072-1073, 1079-1081.)

About two minutes after the shootings, a car driven by Vasquez with his girlfriend passenger Kathy Romero stopped at the scene, then Vasquez (a 35-year-old Hispanic former Harbor City Boys gang member) joined Bertha and Frank in aiding the victims.[7/] (5RT 992-994, 997-1003, 1007-1024, 1030-

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5. At the time, there was a light outside from the street light and lights from a commercial building parking lot across the street. Thus, Bertha saw "about a mile" down Frampton Avenue "toward PCH" from her second window after the shootings. (5RT 1020-1021, 1026-1029, 1031, 1039-1040, 1042-1046;, 1056; see 5RT 977-978, 981-982, 1008-1009, 1024, 1026-1027, 1033, 1041-1042, 1044-1046, 1050-1051, 1067-1072, 1076-1078; 9RT 2183-2184.) LAPD Sergeant Jeffrey Pailet opined that a car "could easily get to PCH" from the shootings. (5RT 1107-1108.)

6. Frank testified that he was not "certain" about the timing of post-shooting events. (5RT 1078-1079.) He and Bertha stated that he called 911 two to ten minutes before the 11 p.m. airing of a Jerry Springer television show. (5RT 1013, 1016-1017, 1040-1041, 1052-1054, 1070-1073.) Sergeant Pailet said the call dispatching police to the shootings "went out" at 11:28 p.m., and he was the first at the scene at 11:32 p.m. (5RT 1083-1086, 1088, 1096-1097, 1099-1101, 1103-1104; 9RT 2181-2182.) Thus, the shootings occurred between around 10:50 p.m. and 11:28 p.m.

7. Denise Griffin (a fingerprint expert) said that Vasquez's fingerprints were lifted from the driver's side window of Fuller's car one day after the shootings. (5RT 1111-1119, 1131-1132.) Vasquez had stopped being an "active" Harbor City Boys gang member about five years earlier. (6RT 1171, 1174, 1177; 7RT 1360-1361.) Bertha and Frank identified Vasquez, and Vasquez identified Bertha and Frank. (5RT 999-1000, 1058, 1126-1127.) Bertha said that Vasquez was the "good samaritan" who aided after the shootings. (5RT 1000, 1031, 1037.) Vasquez said that he decided to aid Robinson because "I seen the guy laying on the street." Vasquez also said that he was aiding Robinson in the street when Bertha and Frank arrived. (5RT 1126-1127.)

1033-1041, 1054-1061, 1064-1066, 1071-1076, 1079-1081, 1089, 1091-1093, 1101-1102, 1105-1106, 1121-1137; 6RT 1171, 1174-1176, 1198, 1209, 1220, 1224, 1246-1258, 1281-1286; 7RT 1325-1336, 1360-1361; 9RT 2115-2118.) Vasquez had heard about five gunshots when he and Romero were down the block smoking crack-cocaine in Romero's car (with the engine running) in the driveway of the Heartbreak Hotel. (5RT 999-1000, 1019, 1024, 1121-1130, 1135-1137; 6RT 1252-1258, 1275, 1278-1281, 1291; 7RT 1325-1331.) Earlier, Vasquez saw Caballero drive by the area two or three times in a 10 or 15-year-old "Buick Regal" sedan with two passengers, one of whom looked like Satele. (5RT 1137-1142; 6RT 1148-1152; 6RT 1229-1230, 1246-1254, 1259-1273; 7RT 1339-1356, 1367-1370, 1376-1383, 1391-1395, 1398-1399, 1407; footnotes 17 and 22, *post.*)

Vasquez aided the victims for about 10 minutes until Sergeant Pailet arrived, then Vasquez and Romero left in Romero's car, without giving a statement, because Vasquez had "warrants" due to his cocaine-possession and "domestic violence" cases then pending in nearby superior courts.[8/] (5RT 1002-1004, 1007, 1022-1023, 1034-1035, 1041, 1058-1061, 1075-1076, 1079, 1083-1086, 1088-1090, 1093, 1099, 1105-1106, 1108, 1132-1135; 6RT 1160, 1162-1168, 1286-1288; 7RT 1336-1339.)

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8. Besides smoking cocaine and drinking a beer during the shootings, Vasquez had a stolen VCR in Romero's car. (5RT 998-1000, 1032, 1058, 1094, 1121-1123, 1128-1129, 1135-1136, 1138; 6RT 1171, 1274-12777; 7RT 1330, 1380-1381.) Bertha said Vasquez "seemed to be fine" when he placed a blanket over Robinson's shoulders as comfort. (5RT 1001, 1041, 1055, 1127.) Frank saw Vasquez "console" Robinson by covering him with a blanket. Vasquez also aided in stopping Fuller's car from slightly rolling forward after the shootings. Frank said Vasquez seemed "fine" and "very helpful" after the shootings. (5RT 1001-1002, 1058-1059, 1065-1066, 1071, 1090, 1126-1128, 1131-1132.) Vasquez said he was "not real high" during the shootings, and was "pretty much sober" when he aided Robinson and Fuller. (5RT 1128-1129.)

When Sergeant Pailet arrived, Robinson was lying on the ground with a gunshot wound about 10 feet from the trunk of Fuller's car, and Fuller was "slumped over" in her driver's seat with a gunshot wound. (5RT 1089-1093, 1099, 1101-1102.) When Frank initially went downstairs, he saw Robinson lying on his back behind Fuller's car, and Fuller's driver's door was "partly open."[9/] (5RT 1080-1081.)

b. LAPD Investigation And Other Incriminating Trial Evidence Of Guilt

Around 1:15 a.m. (approximately two hours or less after the shootings), LAPD Detectives Robert Dinlocker and Charles Knolls, the lead detectives, took statements from witnesses at the scene where four expended AK-47 bullet casings (People's Exhibit 57) were recovered from the street. (5RT 1007, 1016-1018, 1030-1031, 1063, 1083-1086, 1094-1096; 8RT 1867-1869, 1902-1906; 9RT 1965, 1972-1973, 1975-1979, 1999.)

The next day, LAPD stopped a 4-door Chrysler sedan (People's Exhibit 47) for driving with turned-off headlights at 3:40 a.m. After the Chrysler stopped at a curb, appellants and George Kalasa (G-Boy) ran from the Chrysler. Nunez was the driver, Satele was the only runner who was caught, and he ran

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9. Frank said an "ambulance and fire truck" were the first to arrive after he dialed 911, and LAPD came five minutes later. (5RT 1073-1076.) By contrast, Sergeant Pailet said that he was the first police at the scene, and no paramedic had arrived. (5RT 1086, 1088, 1097.) Sergeant Pailet also said that upon arrival, he did not hear anyone say "let's get out of here[.]" (5RT 1105-1106, 1127-1128.) But, when he arrived, a male Hispanic was briefly at the scene, and a car may have briefly stopped. (5RT 1093, 1099, 1105.) Vasquez said that Sergeant Pailet may have been there when he and Romero left. (5RT 1134-1135.) Frank said that as Vasquez helped, Romero drove away, then she returned and said, "let's go." (5RT 1060-1061, 1064-1065, 1071-1072, 1074-1076, 1079.) Vasquez said that as he aided the victims, Romero left, but she came back and drove him away. (5RT 1126-1128, 1130-1131, 1134; 6RT 1286-1288; 7RT 1331-1339.)

from the Chrysler's front passenger seat where an operable semi-automatic AK-47 type (Norinco Mak-90) rifle was found.[10/] The rifle had 26 live bullets in a magazine or clip (People's Exhibit 49) that carried 30 bullets. (8RT 1772, 1793-1809, 1812-1815, 1821; 9RT 1945, 1954-1955, 1963, 1965-1967, 1972-1975, 1986-1987, 1999.) Also, the rifle inside the Chrysler was positively the murder weapon (9RT 1963, 1965, 1969-1986, 1992, 2012-2013, 2021, 2024-2025, 2029-2031, 2037, 2039, 2043-2044, 2053-2054, 2155-2157, 2160-2161), but no usable latent fingerprint was lifted from it (9RT 1942, 1945-1947, 1952-1955, 2010-2011). Nunez was arrested two weeks later on November 12, 1998. (7RT 1442-1443.)

At trial, Contreras had recently received a 25-year prison term for his attempted murder conviction of an 85-year-old man (7RT 1492-1494; 8RT 1646, 1666, 1683; 9RT 2090-2093), and he identified appellants as his fellow West Side Wilmas gang members (7RT 1497-1502, 1525; 8RT 1646-1665). But, he also made numerous denials.[11/] Thus, over objection (7RT 1527-1530,

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10. Semi-automatic means "you have to pull the trigger for each shot fired." It would take "milliseconds" to fire four bullets from the AK-47 rifle in the Chrysler. (9RT 1965, 2006-2007.)

11. Contreras testified: (1) he did not know if his "stepfather" Jess Delgado was a West Side Wilmas gang member even though Delgado had "Wilmas" and "WSW" tattoos on his back and chest (7RT 1525, 1530-1531; see 8RT 1652, 1658, 1723; 9RT 2083-2084, 2086-2087); (2) he was not scared to testify merely because his step-father might be a fellow gang member (7RT 1525, 1531-1532); (3) he did not know Satele's "brother" (Kalasa) (7RT 1533-1535, 1604-1607; 8RT 1659-1662; 9RT 2098); (4) "nothing" would happen to a West Side Wilmas gang member who assisted police in arresting a fellow gang member, or testified against a fellow gang member (7RT 1526-1527; 8RT 1742-1743; 9RT 1957-1958, 2091-2092); (5) he was not scared to testify even though Caballero had been killed (7RT 1525, 1527; footnote 17, *post*); (6) he knew nothing about the instant killings (7RT 1517, 1523, 1532-1533; 8RT 1644-1645, 1666-1667, 1671-1672, 1714-1719, 1764-1765); (7) he gave preliminary hearing testimony, but he did not make the incriminating comments in a preliminary hearing transcript (7RT 1523-1525, 1532-1533, 1535); and (8)

1537-1554), Contreras's prior inconsistent statements (at the preliminary hearing and to LAPD on February 2, 5, and 23, 1999) were admitted into evidence.[12/] (7RT 1552, 1561-1594, 1597-1623; 8RT 1626-1641, 1667, 1682-1683, 1720-1723, 1740-1744, 1764, 1826-1831, 1833-1836, 1844-1847, 1858-1863, 1867, 1878-1882, 1901-1902; 9RT 1957-1962.)

Pre-trial, while in custody in a juvenile facility awaiting adjudication of a case unrelated to his attempted murder conviction and this case, Contreras told Detectives Dinlocker and Knolls that appellants owned the seized AK-47 rifle because "they bought it together" and called it "Monster." (8RT 1631-1638, 1668-1669, 1734-1736, 1749-1750; 9RT 2154, 2164-2165, 2185.) Contreras also told LAPD that appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (kill enemies).[13/] (7RT 1581-1583; 8RT 1646-1647; see 9RT 1959-1960, 2090-2093.) Finally, Contreras told LAPD that about one hour after the shootings, i.e., about midnight and while

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even though it admittedly sounds like his voice on the audiotapes of interviews with Detectives Dinlocker and Knolls on February 5 and 23, 1999, he did not make the incriminating statements on the trial audiotapes because he never would have made such statements (7RT 1517, 1519-1523, 1536-1537, 1569-1570; 8RT 1667-1671, 1719-1720, 1722-1723, 1730-1731, 1740, 1746, 1749-1764, 1867-1868, 1878-1882; 9RT 2154, 2164-2165, 2176-2180, 2185).

12. An expert explained to the jury that gang members who initially incriminate fellow gang members often later give "back peddling" (denial) statements to prevent being killed for having been a police "rat" or "snitch." (9RT 2091-2092.)

13. Contreras said that during the killings: (1) he had been a West Side Wilmas "jumped in" gang member for six months; (2) he was friends with appellants for the entire six-month span; (3) he socialized with appellants at and away from the DSHP playground; and (4) he "hung out" with Satele "mostly everyday[.]" (8RT 1659-1665, 1708, 1716; see 9RT 2089-2090.) Also, as noted, since Contreras was 14 years old at the time of the shootings, he did not have a driver's license. Thus, he mainly traveled by bicycle or foot. (8RT 1665-1666.)

on a swing in the DSHP playground next to Caballero, appellants were nearby talking to fellow gang member Kelly (Puppet) as all except Kelly shared "crystal meth[,]" and Contreras heard appellants confess to the shootings.[14/] (7RT 1519-1522, 1534, 1537, 1563-1570, 1583-1594, 1597-1607; 8RT 1629-1830; 9RT 2098, 2149-2150; see footnote 2, *ante*; see also footnotes 15-18, 22, and 26, *post*.)

Specifically, Contreras heard Satele declare, "we were out looking for niggers[,]" and Satele or Nunez said, "I think we hit one of them." (7RT 1597-1598, 1600-1602; 8RT 1631, 1673-1682; 9RT 2102-2104, 2106, 2109-2110.) Later that Friday around 9 p.m., less than 24 hours after the killings, while "kicking it" inside "April's house" with Nunez and Kelly outside, Satele told Contreras and Kalasa that he alone shot the "Black girl and Black guy" in Harbor City that was "in the news." Satele bragged (see 9RT 1937-1938) that when he fired gunshots at the victims from a "black car" with no passengers, Nunez was "in his house when this happened" (8RT 1707).[15/] (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749.)

At the time of the killings, Nunez had been in possession of Feliciano's Chrysler for about two weeks so that he could repair the Chrysler's alternator or alternator-belts. Before the killings, Feliciano saw her Chrysler in the DSHP, and she saw Guaca driving the Chrysler (see footnotes 24-25, *post*). Feliciano tried to retrieve her Chrysler from Guaca before it was impounded two days

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14. At a pre-trial (February 2, 1999) interview with the trial prosecutor, senior prosecutorial investigator John Neff, and several others (including Contreras's mother), Contreras admitted that he was in the DSHP playground when appellants and Caballero arrived there with Taco Bell food after the shootings. (9RT 1957, 1959, 1961, 2162.)

15. A gang expert said that a West Side Wilmas gang member would not enter the area of the shootings (rival Harbor City Crips gang turf) by himself. (9RT 2140.)

after the killings. (8RT 1772-1773, 1776-1787.) After learning about the impoundment, Feliciano had a three-way telephone discussion with Guaca and Nunez while Nunez was jail, and Guaca asked Feliciano to tell police that Nunez was at Guaca's house during the shootings. (8RT 1782-1785; footnotes 26 and 79, *post.*) After the killings, on February 17, 1999, Detectives Dinlocker and Knolls took photos of gang graffiti in the DSHP. Earlier, Detective Dinlocker took photos of Kelly's 1980 Buick Regal sedan (see People's Exhibits 32-33; footnote 22, *post*) parked near the graffiti. (8RT 1649-1652, 1719, 1867-1868, 1882-1884, 1907; 9RT 2165-2166.)

While showing the Chrysler photos to appellants at an interview on February 11, 1999, Detective Dinlocker told appellants that he believed that they used the Chrysler during the shootings. (8RT 1889-1890.) That day, while in transit to meet LAPD, appellants conversed in a sheriff's van that had recording equipment. (8RT 1890-1893, 1896-1901, 1907-1916.) There, they were recorded making incriminating comments, which were played for the jury. Appellants (in part) said LAPD had the "wrong" car in custody. (See footnote 24, *post*; People's Exhibits 52-53; 9RT 2070, 2166-2168, 2171-2172.)[16/]

About 10 weeks earlier, after LAPD stopped his car in Torrance on December 1, 1998, Vasquez was arrested and falsely said his first name was "John" so that his warrants would not surface. He soon cooperated with, and gave videotaped statements to, LAPD in this case in exchange for their

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16. The transcript of the conversation between appellants in the sheriff's van was marked for identification (People's Exhibit 54), but was not admitted into evidence at the prosecutor's request and defense counsel agreement. Likewise, the trial court did not admit into evidence the transcripts of the three separate audiotape interviews between Contreras and LAPD. (9RT 2187-2192; 10RT 2194-2195; Supp. 5CT 1151-1316; see Satele AOB 12; Nunez AOB 9, fn. 4.) As to the actual recordings, the court ruled: "If the jury needs a representation as to what was played on the tape, they should ask for read back of the transcript." (10RT 2194.)

assistance with his criminal cases and other matters. (6RT 1161-1172, 1311-1317; 7RT 1356, 1368-1369, 1387-1388, 1405-1415; 8RT 1867, 1869-1876.) While in jail, since inmates segregate by race regardless of out-of-custody gang rivalries, Vasquez became a confidant to appellants without any police involvement. (6RT 1172-1183, 1197-1229, 1293-1309, 1311-1317; 7RT 1460, 1465, 1472-1473, 1476-1477; 9RT 1934-1939, 2163-2164.)

On December 3, 1998, in a downtown Los Angeles county jail "holding cell" awaiting bus transit to court in Long Beach for respective court appearances (6RT 1199-1211, 1227, 1302-1306, 1312-1315; 7RT 1356-1357, 1360-1362, 1373-1374, 1415-1419, 1425-1427, 1436, 1457-1460, 1463-1465, 1470-1472; 9RT 1933-1934, 1937), Satele told Vasquez about the instant killings, "we did that" or "I did that" shooting and "I AK'd them" or "we AK'd them" (6RT 1210-1211; 7RT 1362, 1364, 1453; see 9RT 1937-1939).

On January 7, 1999, while in a jail "pod" or cell in Lynwood (6RT 1213-1227, 1302-1303; 7RT 1374-1375, 1384-1387, 1415-1424, 1428-1429, 1436-1438, 1442-1443, 1450-1451, 1479-1486; 9RT 1936-1937), Nunez, then a jail "trustee," asked inmate Vasquez, "Did you hear about those niggers that got killed in your neighborhood?" (6RT 1225.) After Vasquez acknowledged the question, Nunez raised "two hands" like he was holding a gun and confessed, "I did that shit." Nunez explained that he was "driving down the street" and "the guy looked at him wrong so he turned around and blasted him." (6RT 1225-1226; see 9RT 1937-1939.)

On January 6, 1999, at a videotaped six-pack photographic lineup with Detective Dinlocker, Vasquez identified Satele's photo (People's Exhibits 22-23) as the man who said (in a holding cell) that "we did that" or "I did that" shooting and "I AK'd them" or "we AK'd them." (6RT 1203-1208, 1210-1213, 1315; 8RT 1867, 1876-1878.) Vasquez said Satele looked like a passenger in the Buick Regal sedan that he saw in the crime area before the

killings. (6RT 1203-1208; 7RT 1391-1395, 1398-1399, 1407.) Two weeks later (January 20, 1999), at a videotaped six-pack lineup with Detective Dinlocker, Vasquez identified Nunez's photo (People's Exhibits 30-31) as the man who admitted (in jail) that "I did that shit" while "driving down the street" because "the guy looked at him wrong[.]" (6RT 1225-1226, 1228-1229; 8RT 1877-1878.) Finally, three weeks later (February 10, 1999), at a videotaped six-pack lineup with Detective Dinlocker, Vasquez identified Caballero's photo (People's Exhibits 13-14) as the driver of the Buick Regal sedan that he saw near the murder scene shortly before the shootings.[17/] (6RT 1156-1160, 1208, 1229-1230, 1272-1274; 7RT 1347, 1351-1352, 1367-1369, 1407; 8RT 1876-1878.)

2. Defense Evidence

a. Satele's Evidence

Lewis Yablonski (a sociologist-criminologist and gang expert) opined that: (1) gang members have turfs (geographic areas) that they own and defend from rival gang members; (2) gang members generally get a "violent response" whenever they are in a rival gang member's turf; (3) some turfs are "cross-over" areas such that rival gang members live in the same area or compete for domination over the same area; (4) gangs have a "hierarchy" such that some members play a larger leadership role within the gang or perform a more active role to benefit the gang; (5) some gangs have "groupies" such that the groupie supports or socializes with the gang but he or she is not an actual member; (6) "kids" generally join gangs or become groupies due to feeling "alienated

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17. One month earlier (in January 1999), Caballero was "murdered," apparently by fellow West Side Wilmas gang members in retaliation for having given statements to LAPD in this case. (7RT 1542, 1561-1562; 9RT 1957-1958, 2079, 2091-2092; see footnotes 2, 11 and 14, *ante*; see also footnotes 18, 22, and 26, *post*.)

from the larger society" coupled with "positive reaction" or support from gang members; (7) gang members sometimes commit violent or lesser crimes to benefit their gang; (8) there are three "kinds" (types) of gang member;[18] (9) gang members "tend to have guns" that are "communal" (shared) weapons for poverty or other reasons; (10) "very low self-esteem" causes some gang members to participate in "bragging and exaggeration about a lot of their behavior for the purposes of impressing" fellow gang members; (11) the "racial problem" (bigotry) in a jail facility is "more so" than in "general" society such that inmates typically become friends with inmates from a similar race for "survival" purposes regardless of gang membership outside of jail; (12) jails often have inmates who "snitch" so that he or she receives favorable treatment as to their situation;[19] (13) the West Side Wilmas was structurally and functionally "similar to other gangs" based on interviews with Satele, Kelly, and the Brooks brothers (Jonathan and Jason);[20] (14) West Side Wilmas gang members (like Satele, Kelly, Jonathan, and Jason) had no abnormal hatred towards African-Americans; and (15) some gang members commit "drive-by murders," but gang members generally do not "attack" people who are "not

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18. Yablonski said the three types of gang member are: (1) the social member, i.e., one who merely socializes in terms of "hanging out, driving around in cars, talking about sports, girls, life in general, dances, parties and the like;" (2) the criminal member, i.e., one who "unbeknownst to everyone else in the gang" commits "robberies, burglaries, assaults, that sort of thing;" and (3) the "gang-banging" (or "stupid") member, i.e., one with a "warfare" mentality who participates in "ridiculous behavior of fighting" with rival gang members who are "suffering from" similar "problems[.]" (11RT 2479-2480.)

19. Yablonski opined that only a "planted" snitch could obtain a confession from a culprit at one jail, then get a confession from a confederate at a different jail. Also, the alleged confession "could just be bragging" to impress a fellow inmate or rival gang member. (11RT 2494-2496.)

20. To avoid confusion, respondent will refer to Jonathan and Jason by their first names.

involved in other gangs" unless the attack was necessary to commit a robbery. (11RT 2473-2488, 2493-2415, 2535-2537, 2539.)

In 1994 (four years before the killings), Willy Guillory (a teacher) met a student (Satele) at the Los Angeles United School District's Carson High School where Guillory taught. At the time, Guillory had known Satele's family for about 24 years, and Guillory knew Satele's father "very well." Guillory never heard Satele refer to African-Americans as "niggers[,]" and Satele never showed animosity towards African-Americans. (11RT 2525-2527, 2529-2531.)

Satele's father ("Richard")[21/] confirmed that Satele was a West Side Wilmas gang member, and that Satele and his fellow gang members claimed the DSHP playground as their turf as shown by the DSHP graffiti that Richard photographed at trial counsel's request. Richard also said that Satele never exhibited racial bias. Finally, around the time of the shootings, Satele lived part-time with Richard, and Satele was otherwise "doing his thing" on a day-to-day basis. (11RT 2462-2468, 2470-2471.)

Kelly (who had a wife, child, and formerly worked in Carson from 10 p.m. until 6 a.m. Mondays through Saturdays) was with fellow West Side Wilmas gang members appellants, Caballero, and Contreras in the DSHP playground about an hour after the killings.[22/] There, Kelly never heard Satele declare, "we were out looking for niggers[,]" and Kelly never heard appellants state, "I think we got one." Kelly never at anytime heard Satele use the

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21. To avoid confusion, respondent will refer to Satele's father by his first name.

22. At the time of the killings: (1) Kelly had been a "jumped in" West Side Wilmas member for 12 years; (2) he had about 40 fellow gang members that included "White, Blacks, Samoans, [and] Mexicans[;]" (3) Kelly's "wife" and "girlfriend" lived in the DSHP; and (4) Kelly owned the 1980 Buick Regal previously noted. (10RT 2394-2395, 2409-2410, 2445-2446.) Kelly said "I don't think I was working" at the time of the DSHP playground meeting after the killings, and "I may have been working that time." (10RT 2415-2416.)

"nigger" word or show racial disrespect. Also, for months up to the killings, Kelly saw Contreras about everyday in the DSHP, Contreras was "under the influence" of "meth, crystal" the "vast majority" of those times, and the drug played "tricks" on Contreras's mind. Further, during the shootings, "Monster" (the murder rifle; footnote 13, *ante*) had been stored with other guns for about a year at a "safe house" in the DSHP for use by any West Side Wilmas gang member: (1) to protect members at a "narcotics transaction"; and (2) to "protect the neighborhood" from rivals.[23] Moreover, West Side Wilmas gang members had no prejudice against African-Americans. Finally, West Side Wilmas gang members did not commit drive-by shootings. Kelly was unaware of any fellow gang member killing someone as a primary activity, but "some" gang members could get killed in retailiation for testifying against a fellow member. (10RT 2393-2404, 2407-2411, 2414-2415, 2417-2447; see footnote 17, *ante*.)

b. Nunez's Evidence

Nunez said that he was a 24-year-old born in San Diego who first heard about the West Side Wilmas gang at age nine when he lived in Wilmington with his grandmother, mother, uncle, aunt, and brother. From ages 10 to 12, he socialized with and stole "bikes" for West Side Wilmas gang members, and while his mother was at work, he used to "sneak out at nighttime" to "hang around" West Side Wilmas gang members "anywhere between" his home and the DSHP. At age 12 (1988), he started selling marijuana and "rock cocaine" to "mostly grown people" on behalf of the West Side Wilmas gang after becoming one of its members following an unofficial "jump in" fight. He was "incarcerated" from ages 14 to 20 for a car-theft conviction and three cocaine-sale convictions, and he did not have a racial dislike of African-Americans

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23. Kelly stated that certain "rival" gang members had access to (and could have used) the murder weapon stored in his gang's "safe" house where "Lashawn" lived. (10RT 2435-2438.)

during that six-year custody span. After his custodial release without a high school diploma in 1996 at age 20, he lived with his mother in Norwalk and worked two months in warehousing before returning to Wilmington to "hang-out" with and sell "dope" for his 10 fellow gang members. From then until the 1998 instant shootings, he was convicted of four crimes including gun possession and an unrelated assault on an African-American woman. (12RT 2782-2822, 2826-2850, 2877-2884, 2891-2900; 13RT 2927-2928.)

During the shootings, Nunez was with his baby's mother (Guaca) and her mother Sandra Lopez at their apartment. That afternoon, his baby ("Daniel Jr.") had a rash so he gave Feliciano's Chrysler key to Lopez so Guaca could drive Daniel Jr. to a doctor. At 9 p.m., Guaca, Daniel Jr., and Guaca's brother (Artie) arrived at Contreras's home in the Chrysler, then Nunez obtained food at an eatery before he drove this group to Guaca's apartment where Nunez stayed until the next day. Nunez slept in Guaca's bedroom, then he left the apartment hours after being awakened at 5 a.m.[24/] (12RT 2836-2847,

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24. According to Nunez, Guaca was "mad at me as usual" about "selling dope" from 10 p.m. to 6 a.m. (12RT 2838, 2885), and Feliciano's Chrysler was the "neighborhood car" in that it stayed in his gang turf for use by any fellow gang member (12RT 2841-2842, 2904-2905). Also, it was the day before the killings (as opposed to an hour afterwards) when Nunez was in the DSHP playground about midnight with Contreras, Kelly, and Caballero. (12RT 2846-2849, 2908-2910.) Nunez denied fleeing the Chrysler when police seized it, Satele, and the rifle two days after the killings. (12RT 2912-2913; 13RT 2929-2930.) Nunez said he had fired handguns in the DSHP playground, but he never fired the murder weapon. (12RT 2847-2848, 2884-2885, 2906.) He said that he and Satele were joking when they were taped making comments about police having the "wrong car" in custody. (13RT 2935-2938, 2944-2949, 2963.) He also said he never chatted with Vasquez in jail because "I don't really associate with guys from Harbor City." (13RT 2974.) He added that he had no hatred towards African-Americans despite his multiple slurs against African-Americans (taped and played for the jury) and habit of using the word "nigga" to refer to African-Americans. (12RT 2850-2855, 2858-2862, 2864-2866.) Nunez was taped explaining to Satele in a sheriff's van (among other things): (1) "I believe in segregation"; (2) "I can't stand how" African-

2885-2888, 2900-2905; 13RT 2929-2930, 2932-2933.)

Guaca and Lopez said that Nunez was at their two-floor apartment seven blocks from the DSHP during the killings. Caballero lived in (or "a couple of buildings" from) the same complex. Around 5:30 p.m., Caballero and Nunez arrived at Guaca's apartment in Feliciano's Chrysler, then Nunez gave the car key to Guaca so that she could drive their baby one mile away to a clinic because he "didn't want to go."[25/] Caballero and Nunez walked to the DSHP as Guaca left in the Chrysler. About 6:30 p.m., Guaca and the baby arrived at the clinic where Guaca signed-in and received the baby's medicine. Guaca and the baby picked up Nunez at Contreras's DSHP home about 8:30 p.m. From there, in Feliciano's Chrysler, Nunez drove himself, his baby, Guaca, and Artie (age 9) to an Anaheim eatery where they bought food, then around 9 p.m. they arrived at Guaca's apartment where Nunez stayed for the next 15 hours (until noon the next day). That night, Nunez and his baby entered Guaca's second floor bedroom about 10 p.m., and Nunez slept or stayed there until around 5 a.m. when Lopez woke up Guaca so that Guaca could drive Guaca's 20-year-old brother ("Luis") to work in Feliciano's Chrysler. When Guaca came home about 7 a.m., Nunez was still asleep with his baby in Guaca's bedroom. Nunez

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Americans "get loud"; (3) "I don't like them to [*sic*] much by me"; and (4) "I just want all [*sic*] Black, no Black people, woods straight woods" for a jury. Nunez told the jury that "woods" meant "White people." (12RT 2854-2855, 2858-2862, 2864.)

25. At trial, Daniel Jr. was nearly two years old, and "Robert" (Nunez's second baby with Guaca) was a one-year-old. (11RT 2545.) Also, Lopez identified Feliciano's Chrysler in a photo (People's Exhibit 47) as the car "parked at my house" before the killings. Lopez and Guaca both drove the Chrysler before the killings even though neither person had a driver's license. (11RT 2575-2581, 2587; 12RT 2675-2679, 2682-2683, 2690-2695.)

did not leave Guaca's apartment until noon.[26/] (11RT 2543-2556, 2572, 2575-2581, 2587-2594, 2598-2599, 2607-2629, 2679-2680, 2689-2708, 2713-2716, 2724-2732, 2875.)

Jesus Esparza (a jail inmate) opined that Nunez was not biased against African-Americans based on Nunez's treatment of African-American fellow inmates. (10RT 2363-2391.) Vondrea Williams (an African-American jail "trustee" awaiting trial for assault with a deadly weapon and aggravated mayhem) met Nunez when they were housed two cells apart on "death penalty row." Williams (a non-gang member) said that inmates were housed in jail based on their choice regardless of race, and he never heard Nunez use the "N" word or racially disrespect anyone. Williams knew that Nunez was a West Side Wilmas gang member, but Nunez was "an all right dude." (10RT 2246-2265, 2268.) Byron Wilson (an African-American on "death row" at San Quentin Prison with a prior robbery conviction) met Nunez when their cells were next to each other at the downtown Los Angeles county jail in September 1999.

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26. In contrast to alibi testimony from Nunez, Guaca, and Lopez, Kelly (in Satele's defense) told the jury that he saw Nunez in the DSHP playground with Satele, Caballero, and Contreras around midnight, about an hour after the killings. (10RT 2409-2410.) Nunez said that Kelly and Contreras were wrong about the date. (12RT 2910-2911.) Guaca said that at the time of the killings, Nunez was an unemployed and active West Side Wilmas gang member who sold drugs and was probably "chasing other women" because he dated Guaca "part-time." (11RT 2598-2604; 12RT 2664-2675, 2687.) Lopez added that Nunez and Guaca were "feuding a little bit" over Nunez's "friends" like Kelly and Contreras, but Lopez "can't say" whether Kelly and Contreras were Nunez's "gang friends." (11RT 2568-2572, 2582; 12RT 2666.) Guaca said that her brother Luis ("Bomber") was a West Side Wilmas gang member who was "extremely close" to Nunez. Moreover, Caballero, Contreras, and Kelly were Nunez's friends during the killings. That day, Guaca knew Satele, but she did not "like him" or the fact that Nunez was "hanging around" his fellow gang members in the DSHP. (12RT 2655-2664, 2679-2683, 2686-2689, 2867-2868.) After the killings, during a three-way telephone chat at Nunez's request, Guaca told Feliciano to go to police to "correct what she said." (12RT 2677-2678, 2906; footnote 79, *post.*)

Wilson never heard Nunez use the "N" word or racially disrespect others even though it was common for Latinos and African-Americans to fight or disrespect each other in jail. (12RT 2754-2773, 2850-2851.)

Jacqueline Oree (an African-American) and appellants were social friends, Oree's 16-year-old twin sons (Jonathan and Jason) were West Side Wilmas gang members, and each appellant had attended parties at Oree's house in Wilmington. Oree never heard appellants use the "nigger" word.[27] (10RT 2285-2301.) Jason said appellants were his fellow gang members, he had known them for about four years, he never heard appellants use the "N" word or racially charged language, he "hung out" in the DSHP, and there were other African-Americans in the West Side Wilmas gang besides him and Jonathan. (10RT 2309-2333, 2336-2339, 2343-2357.)

Finally, David Butler (a firearms examiner) opined that the casings found at the killings were all fired from the AK-47 rifle in evidence. (10RT 2234-2235, 2242-2243.)[28]

3. Rebuttal Evidence

In November 1999, about one month after the killings, Glenn Phillips, a convicted felon, heard Kelly ask Warren Battle (an African-American) if he wanted to make $100. After Battle said yes, Kelly said, "I need you to testify

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27. Oree's sons never "jumped in" their gang. Oree's sons had a 10 p.m. curfew, Oree did not know what appellants did after 10 p.m., and Oree did not know what West Side Wilmas gang members did when she was elsewhere. (10RT 2301-2305, 2338, 2347; see footnote 18, *ante*.)

28. Butler also said: (1) the casings could travel about 15 feet after being fired from the murder weapon; (2) the casings were probably fired from the street area; (3) it could not be determine whether the shooter (or shooters) stood or sat; (4) it probably took about one minute to fire four bullets from the "high capacity rapid fire semiautomatic" murder weapon; and (5) the murder weapon could be locally and legally purchased before the shootings for "about $146 to the Chinese government." (10RT 2198, 2202-2237, 2241-2245.)

we get along with Black people." (13RT 2999-3001.) Also, after the killings, a deputy sheriff saw Satele hit an African-American gang member jail inmate without any provocation, and such act would enhance Satele's "standing" with fellow jail gang members. (13RT 3119-3131.)

C. Penalty Phase

1. Prosecution's Aggravation Evidence

Fuller was 21 years old when appellants killed her, and her murder was mourned by her mother Roberta, an older sister, a younger brother, a natural father, and Simon (Roberta's live-in boyfriend who was an Inglewood police officer and who fathered Fuller's brother).[29] Fuller and her family had lived in Montebello, where Fuller attended high school. In 1995, Fuller and her family moved to Los Angeles. When killed, Fuller was a quiet, sweet, innocent, and smart person with a sense of humor who loved to shop with her mother. She was also a Los Angeles Unified School District teacher's aide. The jury was shown (and Roberta narrated) pictures of Fuller and an hour-long video of Fuller preparing for and attending her high school "prom." (16RT 3659-3678, 3881-3882, 3886, 3889-3906.) When killed, Fuller and Robinson had a great relationship, and their wedding plans were being made. Fuller had recently told her mother about a church that she and Robinson began attending because Robinson wanted Fuller to start Bible study. (16RT 3675-3677, 3889.) While lying in bed around 6 a.m. before dressing for work, Roberta received an LAPD visit informing her that her daughter had been killed. Simon comforted Roberta that morning, and Roberta and others have been devastated since Fuller was murdered by appellants. (16RT 3882-3883, 3886-3889.)

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29. To avoid confusion, respondent will refer to Roberta and Simon by their first names since they shared the same last name.

Robinson's sisters (Bertha and Rosa), father (Albert), and step-mother (Leandrea) testified as follows.[30] Leandrea raised Robinson from an infant (age three months) after she and Albert were married in 1977. Albert also fathered Albert Jr. and Charles, and Leandrea was the mother to Keesha and Jay. Robinson was the youngest of his six brothers and sisters. He was born in 1976, and his natural mother "hemorrhaged to death" three days after his birth. Robinson excelled at a trilingual elementary school in Gardena where he was taught English, Spanish, and Japanese. While in the fifth grade, he attended a Christian school. He graduated from a high school in Texas because Leandrea "wanted to get him out" of California's gang environment. In Texas, Robinson lived with Leandrea's brother (a minister and football coach). The jury was shown photos and a video of Robinson during his life. Robinson enjoyed attending family vacations, he regularly attended church, and he played drums for his church choir. His family and others were devastated that he was murdered, particularly since they had to wait in a hospital for him to die after being shot multiple times by appellants. (16RT 3941-3967, 3973-3985, 3986-3993, 3994-4007.)

A Los Angeles County deputy sheriff said that at about 6 p.m. on August 17, 1999 (about 10 months after the killings), he and deputies were transporting Nunez and about 44 other handcuffed inmates on a bus from court to jail when Nunez managed to un-handcuff himself en route. Nunez seemingly tampered with other handcuffs before being re-handcuffed, and he did jumping jacks and laughed before being re-handcuffed. (16RT 3911-3925.) A second deputy sheriff testified that about four weeks earlier, she was in the court "lock-up" area when a razor blade was found in a Bible in Nunez's property. (16RT 3927-3934.) A third deputy sheriff said that in the court lock-up area

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30. To avoid confusion, since these relatives shared Robinson's last name, respondent will refer to them by their first names.

(during the prosecutor's case-in-chief) on May 8, 2000, Nunez had a metal pin concealed in his mouth that could be used to unlock handcuffs. (16RT 3936-3940.)

2. Defense Evidence

a. Nunez's Mitigation Evidence

Antonio (Nunez's 36-year-old uncle)[31] said he had not "kept in touch" with Nunez since Nunez was about 12 years old, but: (1) Nunez's grandmother arrived in California from Mexico while young, she married a Los Angeles resident, and they later divorced; (2) Nunez's mother had about nine brothers and sisters; (3) Antonio was about 12 years old when Nunez was born out of wedlock; (4) when Nunez was born, his mother "didn't know" how to "deal with" Nunez because Nunez's grandmother "exhausted" relatives due to her heavy drinking; (5) Nunez had a younger brother; (6) Nunez's family "always had financial hardship"; and (7) Antonio was the "breadwinner" in Nunez's early life. There was "constant bickering and fights over any little thing" as Nunez grew up, and "nobody ever had time for" him. As a baby, he often cried due to hunger. Up to age six, he lived "back and forth" between relatives. He began school in Carson or San Diego. Later, his mother and Antonio both worked hard and rented a "big apartment" in Wilmington so Nunez and his brother would not be "embarrassed to bring their friends home" and would have a "normal life[.]" Jorge Flores visited his son (Nunez) merely about nine times in Nunez's entire life, and once was in Carson to borrow Antonio's car when Nunez was five years old. Whenever Nunez's mother left home, Nunez and his brother stayed at home alone. Nunez played sports in school, he was

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31. To avoid confusion, respondent will refer to the uncle by his first name since he shared the same last name as Nunez. (16RT 4020.)

encouraged to join a church, and he gradually became a gang member in Wilmington around the age of 12. (16RT 4019-4053; 17RT 4151-4155.)

Guaca (see footnote 3, *ante*) did not want Nunez executed because she loved him, and his death would make it hard for her to raise their sons (ages two and one). (17RT 4159-4163.)

At counsel's request for "ideas and opinions[,]" Dr. Saul Niedorf (a psychiatrist) reviewed material and interviewed Nunez, Guaca, Antonio, and Nunez's mother. Dr. Niedorf opined that Nunez had a "difficult early childhood because there was a sense of distance and aloofness and removal from his mother who had difficulty" bonding with Nunez. Nunez's "first bond" was with a "teen-age boy" (Antonio), and when Nunez reached about age 12, he "began to focus away from his immediate family" towards teenagers who provided a bond (gang members). Nunez tried not to, but he "drifted into what would be the anti-social or sociopathic drug sales" path where he became very focused and did things (including criminal matters) in a "consistent and methodical way." He played "pranks" or acted in defiance merely as a form of self-esteem. He read at a "high school level[,]" and knew the difference between right and wrong. (17RT 4242-4257, 4259-4277.) Dr. Niedorf opined that "we" failed Nunez because juvenile camps and California Youth Authority officials "missed the boat" by not educating Nunez towards a better path, but California state prisons have "work programs" which could aid Nunez because he was "relatively free of explosive irrational behaviors." (17RT 4257, 4259-4260, 4268, 4274-4276.) According to Dr. Niedorf, Nunez "does not plan to do things that are aggressive or explosive" and only committed such acts when he felt provoked. (17RT 4276-4277.)

b. Satele's Mitigation Evidence

Satele's father Richard (see footnote 21, *ante*) was 26 years old and living in Carson when his only child (Satele) was born out of wedlock to

19-year-old Esther Tufele whom Richard had dated for about a year. Around four months after Satele's birth, Richard married Tufele, then they lived with Richard's parents. Satele was born with a defect requiring him to wear a foot-brace for his first six months, and he often cried during that time. The defect caused tension between Tufele and Richard's mother. Soon, Richard, Tufele, and Satele moved to a rented apartment in Gardena where they lived for two years. During that time, Richard was rarely at home due his nine-hour day job for an air freight company as well as being an Orange County musician. Thus, Satele was raised by Tufele during his first two years, and his parents often physically and verbally argued in his presence about the fact that Richard was never at home. (17RT 4066-4071, 4091.)

At age two, Tufele left home without Satele because she was not "ready to be a mother[.]" Satele and Richard moved in with Richard's parents, and they (plus Richard and his sister) raised Satele until Richard "bought a place" in Redondo Beach when Satele was 12 years old. From ages two to five, Satele heard from Tufele by telephone twice a year. After age five, Tufele's visitation increased at Richard's request. Richard disciplined Satele with a belt or slap because it was how Richard was raised. Richard encouraged Satele's basketball activities, and they took yearly trips to Samoa and had cultural events. (17RT 4071-4074, 4083, 4092-4098.)

Satele's gang interest began at age 12 when he began "tagging" (painting) walls, and Richard stopped hitting Satele about this time after receiving a personal "child abuse" lecture from LAPD. From then on, Richard never again hit Satele, and Tufele briefly moved back in with Richard and Satele. Soon, Richard discovered that Satele had stopped attending school. About age 14, Satele was put in a juvenile camp for three months for tagging public property. Satele re-joined school after juvenile camp, but at age 16, police found him in possession of a gun and he was sent to a military boot camp

for four months. After military camp, he briefly attended high school before dropping out and permanently running away from home at age 17. (17RT 4074-4088, 4095-4101.) Tufele said, "I don't think I was a good mother," in that she did not give Satele "enough guidance" or "love[.]" (17RT 4101.)

Dr. Samuel Miles, a psychiatrist, interviewed Satele and his parents at counsel's request and payment (about $7,500), and he opined that Satele had a "very unusual background" because his parents "split up and got back together many times during the course of his life." Satele "hardly saw his mother" between ages two and six, and he was then raised by a "busy" father suffering from "alcohol abuse" who used "corporal punishment[.]" This was "very significant" because "children develop their identity through the interaction with important adults." Satele had a "history" of daily heavy drinking and methamphetamine use, and this (plus lack of sleep) reduced Satele's ability to "control his impulses." On an intelligence test, Satele "scored in the borderline range[,]" but he "didn't score low enough to be in the mentally retarded range." (17RT 4106-4107, 4110-4117, 4121-4123, 4164.) Dr. Miles opined that Satele had "probable psychosis" and a "borderline personality disorder" due to alcohol and drug abuse that made him "attracted" to a gang culture. (17RT 4119-4120.) Dr. Miles did not ask Satele whether he committed the shootings in this case. (17RT 4127, 4140-4141.)

ARGUMENT

I.

THERE WAS NO *WITHERSPOON* (OR FIFTH OR EIGHTH AMENDMENT) ERROR

Appellants contend that there was Sixth and Fourteenth Amendment error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed. 776] (*Witherspoon*) due to the trial court's removal of prospective juror 2066 over their objection.[32/] They add (for the first time on appeal) that prospective juror 2066's excusal also violated their right to a "reliable penalty determination as guaranteed by" the Fifth and Eighth Amendments. (Satele AOB 246-254 [Arg. XV]; Nunez AOB 243-252 [Arg. XII].) As will appear, they forfeited all claims under the Fifth and Eighth Amendments by failing to challenge the trial court's removal of prospective juror 2066 on those Amendments at the time of her excusal. (See 3RT 617-630 [entire *Witherspoon* voir dire proceeding leading to prospective juror 2066's removal]; *People v. Heard* (2003) 31 Cal.4th 946, 958, fn. 8 (*Heard*).) Finally, the *Witherspoon* claim lacks merit.

A. Standard Of Review

The United States Supreme Court has explained:

> In *Witherspoon*, this Court held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment.

(*Wainwright v. Witt* (1985) 469 U.S. 412, 416 [105 S.Ct. 844, 83 L.Ed.2d 841]

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32. *Witherspoon* held that prospective jurors with death penalty biases may (but must not necessarily be) excused for-cause at a death penalty trial. (*Witherspoon*, *supra*, 391 U.S. at pp. 521-523.)

(*Witt*); see *Uttecht v. Brown* (2007) 551 U.S. 1 [127 S.Ct. 2218, 2222-2224, 167 L.Ed.2d 1014] (*Brown*); *Morgan v. Illinois* (1992) 504 U.S. 719, 728, 732 [112 S.Ct. 2222, 119 L.Ed.2d 492] (*Morgan*); *Ross v. Oklahoma* (1988) 487 U.S. 81, 85 [108 S.Ct. 2273, 101 L.Ed.2d 80] (*Ross*); *Buchanan v. Kentucky* (1987) 483 U.S. 402, 407-408, fn. 6 [107 S.Ct. 2906, 97 L.Ed.2d 336] (*Buchanan*); *Gray v. Mississippi* (1987) 481 U.S. 648, 657-658 [107 S.Ct. 2045, 95 L.Ed.2d 622] (*Gray*); *Darden v. Wainwright* (1986) 477 U.S. 168, 170, 175 [106 S.Ct. 2464, 91 L.Ed.2d 144] (*Darden*); *Adams v. Texas* (1980) 448 U.S. 38, 43 [100 S.Ct. 2521, 65 L.Ed.2d 581] (*Adams*); *Davis v. Georgia* (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339] (*Davis*).) This Court has "adopted the *Witt* standard as the test for determining whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution was violated by an excusal for cause based on a prospective juror's views on capital punishment." (*People v. Griffin* (2004) 33 Cal.4th 536, 558 (*Griffin*), citing *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

The test for *Witherspoon* excusal is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt*, *supra*, 469 U.S. at p. 424; see *Morgan*, *supra*, 504 U.S. at pp. 728, 732-733; *Ross*, *supra*, 487 U.S. at p. 85; *Buchanan*, *supra*, 483 U.S. at p. 408, fn. 6; *Gray*, *supra*, 481 U.S. at p. 658; *Darden*, *supra*, 477 U.S. at pp. 175, 178; *People v. Wilson* (2008) 44 Cal.4th 758, 778-781 (*Wilson*); *People v. Riggs* (2008) 44 Cal.4th 248, 282 (*Riggs*); *People v. Lewis* (2008) 43 Cal.4th 415, 482 (*Lewis*); *People v. Wilson* (2008) 43 Cal.4th 1, 14 (*Wilson*); *People v. DePriest* (2007) 42 Cal.4th 1, 20-21 (*DePriest*); *People v. Alfaro* (2007) 41 Cal.4th 1277, 1313 (*Alfaro*); *People v. Hoyos* (2007) 41 Cal.4th 872, 903-907 (*Hoyos*); *People v. Thornton* (2007) 41 Cal.4th 391, 414 (*Thornton*); *People v. Beames* (2007) 40 Cal.4th 907, 925 (*Beames*); *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1006 (*Lewis and*

Oliver); *People v. Avila* (2006) 38 Cal.4th 491, 539 (*Avila*); *People v. Ramirez* (2006) 39 Cal.4th 398, 448 (*Ramirez*); *People v. Schmeck* (2005) 37 Cal.4th 240, 261-262 (*Schmeck*); *People v. Blair* (2005) 36 Cal.4th 686, 741-744 (*Blair*); *People v. Stitely* (2005) 35 Cal.4th 514, 539-540 (*Stitely*); *People v. Horning* (2004) 34 Cal.4th 871, 896-897 (*Horning*); *Griffin, supra*, 33 Cal.4th at p. 558; *People v. Stewart* (2004) 33 Cal.4th 425, 446 (*Stewart*); *Heard, supra*, 31 Cal.4th at p. 958; *People v. Staten* (2000) 24 Cal.4th 434, 454 (*Staten*); see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120.) "The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of 'critical importance in assessing the attitude and qualifications of potential jurors." (*DePriest, supra*, 42 Cal.4th at p. 21; see *Lewis, supra*, 43 Cal.4th at p. 483; *Lewis and Oliver, supra*, 39 Cal.4th at pp. 1006-1007.)

This Court has held:

> The standard of review of the court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias. If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.

(*Horning, supra*, 34 Cal.4th at pp. 896-897; see *Lewis, supra*, 43 Cal.4th at p. 483; *Wilson, supra*, 43 Cal.4th at p. 14; *DePriest, supra*, 42 Cal.4th at p. 21; *Beames, supra*, 40 Cal.4th at p. 925; *People v. Ledesma* (2006) 39 Cal.4th 641, 671 (*Ledesma*); *Schmeck, supra*, 37 Cal.4th at pp. 261-263; *Griffin, supra*, 33 Cal.4th at pp. 558-559; *Heard, supra*, 31 Cal.4th at p. 958.) "At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*DePriest, supra*, 42 Cal.4th at p. 20, citing *Stewart, supra*, 33 Cal.4th at pp. 446-447; *Heard, supra*,

31 Cal.4th at p. 958.) However, "the trial judge may be left with the 'definite impression' that the person cannot apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*DePriest*, *supra*, 42 Cal.4th at p. 21, citing *Witt*, *supra*, 469 U.S. at pp. 425-426; see *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007; *Griffin*, *supra*, 33 Cal.4th at p. 559.)

Finally, this Court has held that "under the compulsion of United States Supreme Court cases" *Witherspoon* error "requires reversal of defendant's death sentence, without inquiry into prejudice." (*Stewart*, *supra*, 33 Cal.4th at p. 454 [death penalty reversed due to *Witherspoon* error]; *Heard*, *supra*, 31 Cal.4th at p. 966 ["such error does not require reversal of the judgment of guilt or the special circumstance findings"]; see *Morgan*, *supra*, 504 U.S. at pp. 728-729; *Ross*, *supra*, 487 U.S. at p. 85; *Gray*, *supra*, 481 U.S. at pp. 667-668 (plur. opn.); *Adams*, *supra*, 448 U.S. at p. 51; *Davis*, *supra*, 429 U.S. at p. 123 (per curiam).)

B. Factual Discussion

On April 19, 2000, the first 50 prospective jurors, which included juror 2066, entered the courtroom and were administered the trial oath. (2RT 322, 325-330.)[33/] Afterwards, the court told those prospective jurors that the prosecutor was seeking the death penalty. The court also introduced appellants and counsel to the prospective jurors, read the charges to the prospective jurors,

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33. Earlier, on March 21, 2000, the trial court explained to counsel its understanding of the jury selection process (in relevant part) as follows:

> The purpose of voir dire, as I see it, is to, basically, find out biases one way or the other. Whether or not jurors can be objective, can be fair, and can be impartial to both sides and to give both sides a fair trial. With respect to trying to educate the jury, as to any particular evidence, to secure a commitment one way or the other, I just simply don't think that that is an appropriate way to use voir dire, in this case.

(1RT 235.)

and gave the prospective jurors initial instructions. (2RT 322, 325, 330-337.) The court told the prospective jurors that appellants were charged with the October 29, 1998, premeditated murder of Robinson and Fuller due to "race" and "criminal street gang" motives committed "in concert" where both appellants discharged a handgun. (2RT 332-333.) The court also informed the prospective jurors that appellants had pled "not guilty" to both murder charges, had denied all special allegations, and appellants were presumed to be innocent until the contrary was proved by the prosecutor who carried the burden of proving appellants guilty "beyond a reasonable doubt." (2RT 332-337.)

The trial court also explained to the prospective jurors the two potential phrases or "procedures" in this case due to the death penalty issue, and gave other instructions as follows:

> The first question that the jury will be called upon to decide is the question of guilt or innocence of each defendant to each of the charges, and the truth or falsity of the special circumstance or circumstances. A special circumstance is an alleged description which relates to the charged murder upon which the jury is to make a finding.
>
> In the event, and only in the event that the jury finds a defendant guilty of *murder of the first degree*, which will be defined at trial, and the special circumstance or circumstances is or are found to be true, and each of these allegations must be proved beyond a reasonable doubt, then the law provides that the same jury in another phrase of the trial known as the penalty phase will decide what the punishment for a defendant will be. [Italics added.]
>
> Now, in [*sic*] event that we go into the penalty phase of the jury trial; that is, one, that the jury has found beyond a reasonable doubt that a defendant is guilty of murder in the first degree, and two, that a special circumstance is true, then and only then the jury must decide whether the

punishment should be death or life imprisonment without possibility of parole. Those will be the only choices in that situation.

In the second proceeding, which is referred to as the penalty phase, each side has a right to offer additional evidence and arguments of counsel. The determination of punishment is left to the jury, subject to guidelines involving certain factors in aggravation and certain factors in mitigation; that is, certain bad factors and good factors.

If there is to be a verdict imposing the death penalty, all 12 jurors must agree unanimously on that punishment. Therefore, *each juror bears full responsibility in that determination.* [Italics added.]

Now, as I have indicated to you, the Court wants to emphasize that these are the possibilities, and only the possibilities, because as you all know each defendant is presumed to be innocent until and unless guilt is proven beyond a reasonable doubt.

No evidence has been offered, but the Court has indicated to you exactly what the possibilities are and how we will proceed in this trial.

Now, let me reiterate, I have no way of knowing as I start this trial whether or not you will ever be called upon to make the determination as to punishment, because that will depend upon what your findings are first as to the charge of murder, and second, as to the truthfulness or falsity of the special circumstance or circumstances alleged.

You are admonished that you are not to converse with the other jurors or anyone else on any subject connected with the trial. It is also your duty as a juror not to form or express any opinion thereon until the case has been submitted to you for a decision.

During the time that you serve on this jury, there may appear in the newspapers or television or radio reports concerning this case. I do not know if such coverage will occur, but because of the possibility, you are

prohibited, I repeat, prohibited, from reading any newspaper articles or listening to any news programs or television or radio programs involving this case until you are excused from service on this trial regarding this matter.

(2RT 334-337.)

Thus, prospective juror 2066 received the above instructions prior to any voir dire. That same day (April 19, 2000), after she and others in the first group was sent to a jury assembly room to complete a questionnaire[34] (2RT 326, 337-341), a second group of 50 prospective jurors entered the courtroom and accepted the oath.[35] After the second group was sent to an assembly room to complete a questionnaire (2RT 361-364), a third group of 49 prospective jurors entered the courtroom and accepted the oath (2RT 364-367). The third group received similar instructions prior to voir dire commencement. (2RT 367-373; see footnote 35, *ante*.) After the third group was sent to an assembly room to complete a questionnaire (2RT 373-376), a fourth group of prospective jurors

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34. As to the 306 questions in the 42-page juror questionnaire (see 39CT 11187), Question 230 (set forth later in this brief) was a death-qualifying (*Witherspoon*) question that was written by the trial court. Question 232 asked the prospective jurors theirs general views about the death penalty. (2RT 508-511; 3CT 789-831 [sample questionnaire].)

35. Like the first group of 50 prospective jurors, the second group of 50 prospective jurors were: (1) informed that this was a death penalty case; (2) introduced to appellants and counsel; (3) advised of the murder charges and special allegations; (4) admonished that appellants had pled not guilty and denied all special allegations; (5) instructed as to the presumption of innocence and trial burden imposed on the prosecutor; (6) educated about the duty of the jury to decide the facts from the evidence to form a conclusion based on legal instructions from the judge; (7) told to remain open-minded about all trial issues until all evidence was submitted to the jury; (8) tutored about the two possible trial phases in light of the death penalty issue; and (9) warned that they were prohibited from all discussions (or exposure to news coverage) about this case until it was finished. (2RT 350-361.)

(including prospective jurors 4965, 8971, and 2211; discussed in Arguments II-III, *post*) accepted the oath (2RT 376-377, 386, 527-529). The fourth group received instructions prior to voir dire commencement. (2RT 377-383; see footnote 35, *ante*.) After the fourth group was sent to the jury assembly room to complete a questionnaire (2RT 383-386), the court noted that "191 questionnaires" were distributed and should be returned that afternoon, i.e., Wednesday, April 19, 2000 (2RT 322, 386).

The next day, each prospective juror (by group) entered the courtroom to assure that he or she had completed a questionnaire. After such assurance, these prospective jurors were excused and ordered to return to court in four days. Also, during this process, some prospective jurors were excused due to hardship or stipulation.[36] (2RT 394-453.) After these excusals, a fifth group of prospective jurors entered the courtroom and accepted the oath. (2RT 453-455.) Like the others, the fifth group received instructions prior to voir dire commencement. (2RT 455-461; see footnote 35, *ante*.) After the fifth group was sent to the jury assembly room to complete a questionnaire, jury selection recessed until the next day, i.e., Friday, April 21, 2000. (2RT 461-465.) That day, some prospective jurors in the fifth group were excused due to hardship or stipulation,[37] and the remaining persons in the fifth group were ordered to return to court in three days, i.e., Monday, April 24, 2000. (2RT 465-489.)

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36. When each prospective juror received a questionnaire, she or he also obtained a 4-page "hardship disqualification" form (that contained a "declaration under penalty of perjury") to be completed and returned to the trial court. (2RT 337-339; 3CT 832-835 [sample hardship form].)

37. Also, an amended information was filed, and appellants pled not guilty and denied the special allegations in the amended information. (2RT 479-481.) Moreover, for "administrative" purposes, the trial court listed (on the record by prospective juror badge number) all of the approximately 142 persons who had been excused to date due to hardship or stipulation. (2RT 481-483.)

As to all prospective jurors, Question 230 of the questionnaire (see footnote 34, *ante*) asked:

> In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is called the "guilt" phase, where the jury decides on the issue of guilt as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the "penalty" phase. If, and only if, in the guilty phase, the jury finds the defendant *guilty of first degree murder* (which will be defined at trial) and further finds any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder upon which the jury is to make a finding). [Italics added.]
>
> The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating factors and mitigating factors that relate to the facts of the crime and the background and character of the defendant, including a consideration of mercy. The weighting of these factors is not quantitative, but qualitative, in which the jury, in order to fix the penalty of death, must be *persuaded that the aggravating factors are so substantial in comparison with the mitigating factors*, that death is warranted instead of life imprisonment without parole. [Italics added.]
>
> Based on the above:
>
> (a) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilty of first degree murder.

Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant to be guilty of first degree murder, just to prevent the penalty phase from taking place?

Yes _____ No _____

(b) Assume for the same [*sic*] of this question only that, in the guilt phase, the prosecution has proven to be true, one or more special circumstances, beyond a reasonable doubt and you personally believe the special circumstance(s) to be true. Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believe it (them) to be true, just to prevent the penalty phase from taking place?

Yes _____ No _____

(c) Assume for the same [*sic*] of this question only that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

Yes _____ No _____

(d) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life

imprisonment without the possibility and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

Yes _____ No _____

(e) If your answer to either question (c) or question (d) was "yes," would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?

Yes _____ No _____

(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

Yes _____ No _____

(3CT 818-820; see 3RT 553.) Question 231 of the questionnaire asked: "What are your general feelings about the death penalty?" (3CT 820.) Finally, Question 232 of the questionnaire asked:

Please circle the letter of the statement that best describes your views on the death penalty?

A. The death penalty should be imposed in every case where someone deliberately takes another human being's life.

B. While I favor the death penalty, I do believe there are rare cases where the death penalty should not be imposed even if someone has deliberately taken another human being's life.

C. While I am somewhat in favor of the death penalty, I do not believe it should be used as a punishment for most murder cases, even where a life has been taken deliberately.

D. I have no views one way or another on the death penalty.

E. While I am somewhat opposed to the death penalty, I do believe there are rare cases where a death penalty should be imposed for a deliberate murder.

F. While I am strongly opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder.

G. The death penalty should never be imposed for any deliberate murder.

(3CT 820; see *People v. Brasure* (2008) 42 Cal.4th 1037, 1051 (*Brasure*) ["All prospective jurors filled out an extensive questionnaire that asked a series of questions probing the panelists' attitude toward the death penalty"].) Here, counsel for appellants were granted their request for "an extra two days to read" the completed questionnaires from all prospective jurors. (2RT 524.)

On Monday, April 24, 2000, after the trial court and counsel noted that they had reviewed some of the completed questionnaires (see 4CT 845-37CT 10670), the court excused additional prospective jurors due to hardship or stipulation. (2RT 493-507.) Afterwards, the prosecutor asked the court to begin voir dire with "death qualify" (*Witherspoon*) questioning as to those prospective jurors who indicated concern about imposing a death penalty based on his or her answer to Question 230 on the questionnaire. (2RT 507-508.) After Nunez's counsel asked that each such person be questioned "singly" (outside the presence of other prospective jurors) under *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81 (*Hovey*), the court denied the motion citing Code of Civil Procedure section 223 (as amended by Proposition 115) and

Covarrubias v. Superior Court (1998) 60 Cal.App.4th 1168 (*Covarrubias*). (2RT 508-510.)[38] After each prospective juror (in groups 1 through 5) entered the courtroom, he or she was ordered to return to court in two days (Wednesday, April 26, 2000), or was excused from serving on this case due to hardship or stipulation. (2RT 511-536.)

On Wednesday, April 26, 2000, *Witherspoon* questioning began. (3RT 543-553; 37CT 10693-10694.) First, the court noted that the prosecutor had submitted a list of 13 people who were not "death qualified." (3RT 548.) That list included prospective juror 2066 (3RT 546-550) at issue here (see Satele AOB 246-254; Nunez AOB 243-252). Thus, after other jurors were individually questioned for death-qualification (3RT 552-617), prospective juror 2066 was the last person to receive *Witherspoon* voir dire (3RT 617-630; 23CT 6658-6596 [prospective juror 2066's completed questionnaire in full]).

On her questionnaire, prospective juror 2066 revealed that she was a 45-year-old married African-American female "homemaker" with three children and no prior jury service. She was born in Michigan, but she and her family lived in a house that they owned in "North Long Beach" (near the murder scene). Her husband, an employee "inspector" for Bowing Aircraft Company, was a 48-year-old African-American born in Los Angeles, they had high school degrees, and they had been to married to each other for 21 years. Their three teenagers were age 19 (a male), age 18 (a female), and age 17 (a female). Prospective juror 2066 had no military experience, and she did not belong to

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38. Section 223 of the Code of Civil Procedure, as amended on June 5, 1990, by Proposition 115, states (in part): "Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." *Covarrubias* held that section 223 "abrogates *Hovey*'s requirement of individual sequestered voir dire during the death qualification portion of a capital case" and "leaves the matter to the trial court's discretion." (*Covarrubias*, *supra*, 60 Cal.App.4th at p. 1171; see *Brasure*, *supra*, 42 Cal.4th at pp. 1050-1051.)

any law enforcement or crime prevention or political group. Her hobbies were swimming, reading, singing, and time with her family. She enjoyed watching films, especially "love stories" and comedies. She was considering further schooling to pursue a future career in business and management, and she enjoyed reading about business, taxes, and the Internal Revenue Service. (23CT 6558-6565, 6568-6569, 6591.)

On her questionnaire, prospective juror 2066 indicated that she "often" watched television shows involving "real life police activities" such as Cops, America's Most Wanted, and Unsolved Mysteries. (23CT 6565.) She also watched "Judge Judy" and other "courtroom" television shows. (23CT 6572.) Two of her friends were retired police officers. (23CT 6569.) She had never been criminally tried or arrested, but: (1) her husband's cousin was "lucky" to have been acquitted of killing his girlfriend; and (2) she once telephoned police to arrest her son for being "angry" and "violent" with his father. (23CT 6571.) Her son was "undergoing psych care" due to his violence against family members. (23CT 6573.)

On her questionnaire, prospective juror 2066 stated that she was a "conservative" republican with no gun ownership who believed that the gun allegation in this case may affect her ability to be fair and impartial. (23CT 6567-6568.) She believed that racial discrimination against African-Americans was "a very serious problem" in Southern California. (23CT 6576.) She had "no opinion" about whether gangs or gang members were violent or murderers, but her sister's son had "associated with gangs." She would automatically distrust a member of a gang, and leaned towards believing that a gang member would automatically lie. (23CT 6578-6580.) She did not know appellants or any of the lawyers or listed trial witnesses in this case, and she had "no" opinion on whether appellants were guilty or innocent as to the charges in this case. (23CT 6581-6583.) She accepted the "principal" of presumption of innocence

as well as the law that the prosecution carried the burden of proving that appellants were guilty beyond a reasonable doubt. (23CT 6583-6584.)

On her questionnaire, prospective juror 2066 stressed that she was a Christian, and religion was "very important" to her. Indeed, before reaching the *Witherspoon* (death-qualifying) inquires beginning at Question 230 of the questionnaire, when merely asked how religion might affect her jury service (Question 75), she handwrote: "I would not send any person to death. The Bible say thou shall not kill." Her husband was also religious, and both considered religion "#1" in their life. (23CT 6566.)

On Question 230(a) of the questionnaire, prospective juror 2066 wrote "I don't know yet" in response to the inquiry of whether her capital punishment views would cause her to "refuse to find the defendant guilty of first degree murder" to "prevent the penalty phase from taking place" even if: (1) the prosecution had proved first degree murder beyond a reasonable doubt; and (2) she believed that the defendant was guilty of first degree murder. (23CT 6585.)

On Question 230(b) of the questionnaire, prospective juror 2066 checked "no" in reply to the inquiry of whether her capital punishment views would cause her to "refuse to find the special circumstance(s) true" to prevent the penalty phase from taking place. (23CT 6585.)

On Question 230(c) of the questionnaire, prospective juror 2066 checked "yes" in response to the inquiry of whether "in the penalty phase" her capital punishment views would cause her to "automatically refuse to vote in favor the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole" without considering "any of the evidence of any of the aggravating and mitigating factors" regarding "the facts of the crime

and the background and character of the defendant" even if the jury had found: (1) the defendant guilty of first degree murder; and (2) one or more special circumstances were true. (23CT 6585.)

On Question 230(d) of the questionnaire, prospective juror 2066 checked "no" in reply to the inquiry of whether "in the penalty phase" her capital punishment views would cause her to "automatically refuse to vote in favor the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death[.]" (23CT 6585.)

On Question 230(e) of the questionnaire, prospective juror 2066 wrote "I might" as to whether her "yes" answer to Question 230(c) would "change" if (prior to voting) she were "instructed and ordered by the court" that she "must consider and weigh" the evidence and the aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant. (23CT 6586.)

On Question 230(f) of the questionnaire, prospective juror 2066 wrote "I don't know if I could" as to whether she could set aside her "own personal feelings regarding what the law ought to be and follow the law as the court explains it to you[.]" (23CT 6586.)

As to Question 231 of the questionnaire ("What are your general feelings about the death penalty?"), prospective juror 2066 wrote: "I don't feel at ease with it." As to Question 232 ("Please circle the letter of the statement that best describes your views on the death penalty?"), prospective juror 2066 circled "F[,]" which read: "While I am strongly opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder." (23CT 6586.)

As to Question 237 ("Because of moral, religious or personal views and beliefs you may have against the death penalty, would you find it impossible to return a verdict of guilty of first degree murder?"), prospective juror 2066

checked "yes." As to her reason for her "yes" to Question 237, she wrote (in Question 238): "Its [*sic*] not the verdict its [*sic*] the punishment. I'm sensative [*sic*] to [*sic*] because I have a son thats [*sic*] been in & out of mental hospital." (23CT 6587.)

As to Question 254 ("Do you have any philosophical, religious or other belief that would prevent you from sitting in judgment on a case?"), prospective juror checked "yes[.]" As to her explanation for the "yes" to Question 254, prospective juror wrote (in Question 255): "I'm sensitive to death penalty." (23CT 6588-6589.)

As to Question 269 ("List the most influential book you have read; describe its influence on you"), prospective juror 2066 wrote: "Bible & books that talk about good morals." (23CT 6590.)

As to Question 274 ("How would religious principles affect your ability to determine the truth of a charge in a criminal case?"), prospective juror 2066 wrote: "Its [*sic*] just the death penalty. I would rather sentence a person under doctors care first [*sic*] the death." (23CT 6591.)

After submitting the above questionnaire answers to counsel and the trial court, prospective juror 2066 testified (during *Witherspoon* voir dire) that she strongly opposed the death penalty, but there may be rare cases where a death penalty should be imposed for a deliberate murder . On the other hand, at a penalty phase, she "probable would be hesitant" to vote for a death penalty. She said that she could do her best to follow instructions to follow the law as to the death penalty. The prosecutor asked if he proffered "a bunch of aggravating factors about various things" would she still vote for life instead of a death penalty. Prospective juror 2066 replied: "Yes, I think I would." Nunez's counsel asked: "Can you conceive of a crime so heinous that you would ever vote for death?" Prospective juror 2066 answered: "No, I don't think so." (3RT 617-629.)

Over defense objection, the trial court found prospective juror 2066 not qualified. Thus, she was excused. Here, the trial court reasoned:

> This Court has examined the juror's state of mind, particularly the demeanor in this case, and the reluctance of the responses, and the equivocal responses that the juror has had, and the conflicting responses that the juror has had. And this Court makes the determination as to the juror's state of mind, and she is incapable of imposing the death penalty. And the reason ask [*sic*] because of her reluctance to be able to do that when asked [*sic*] her the leading question as to whether or not she could impose it under certain circumstances she said, yes; but when asked if there's another choice, life imprisonment, what would she do, she, without reluctance and without equivocation, chose life imprisonment if there's a choice. [¶] Given that is the case, and given her responses in the questionnaire, her demeanor in the court and her state of mind as observed by this Court, with multiple inferences that are given, the Court infers based upon her responses that she is not death qualified and excuses her for cause.

(3RT 629-630.)

C. Analysis

1. Appellants Forfeited Fifth And Eighth Amendment Claims Of Error

At the proper time, i.e., after prospective juror 2066 finished voir dire and left the courtroom on April 26, 2000 (3RT 543, 628-629), Nunez's counsel argued (in full) as follows:

> She hesitated, I believe, if there is death penalty. But her answer was, in fact, she would consider the evidence. If she considers the evidence and makes a honest decision, which she said she would do, then she has to be on the jury.

(3RT 629.) Immediately afterwards, Satele's counsel argued (in full) as follows:

> I think that anybody on a jury, that is an extremely tough call to make no matter what your background is. I think as long as she is willing to consider and weigh both sides of what is presented to her, then she [*sic*] entitled to be on the jury.

(3RT 629.) The trial court immediately ruled that prospective juror 2066 would be excused on death-disqualification grounds, and neither appellant offered the court any constitutional grounds for why its ruling was error. (3RT 629-630; *Heard*, *supra*, 31 Cal.4th at p. 958, fn. 8.) Later, in their motion for new trial "received" August 29, 2000, appellants did not assert a Fifth or Eighth Amendment claim. (39CT 11173, 11178-11179, 11187-11188, 11227, 11231, 11245.) In their supplemental motion for new trial filed September 5, 2000, appellants did not raise a Fifth or Eighth Amendment claim. (39CT 11150-11154, 11255.)

Now, appellants claim that prospective juror 2066's excusal violated *Witherspoon* (see *Hoyos*, *supra*, 41 Cal.4th at p. 903 [straight *Witherspoon* claim]; *Griffin*, *supra*, 33 Cal.4th at p. 558 [state constitutional "impartial-juror" right claim added to *Witherspoon* claim]), and they add (for the first time) that the excusal also violated a right to a "reliable penalty determination as guaranteed by" the Fifth and Eighth Amendments to the federal Constitution (see *DePriest*, *supra*, 42 Cal.4th at p. 19 ["reliable death verdict" and "cruel and unusual punishment" claims mixed with *Witherspoon* claim]). (Satele AOB 246, 253; Nunez 243, 251.) Appellants concede that *Witherspoon* merely involved "the Sixth and Fourteenth Amendments[.]" (*Id.*) Appellants are correct. (*Witherspoon*, *supra*, 391 U.S. at p. 518 ["this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments"].)

Witherspoon was not decided based on a right to a "reliable penalty determination as guaranteed by" the Fifth and Eighth Amendments to the federal Constitution. (See Satele AOB 246; Nunez AOB 243.) The United States Supreme Court never mentioned such Fifth or Eighth Amendment right anywhere in the majority opinion in *Witherspoon*. (See *Witherspoon*, *supra*, 391 U.S. at p. 520, fn. 18 ["we intimate no view" as to a "defendant's interest in a completely fair determination of guilt or innocence"].) Thus, the Fifth or Eighth Amendment right advanced by appellants (for the first time on appeal) must necessarily involve "facts or legal standards different from those the trial court itself was asked to apply" to prospective juror 2066's death-qualification under *Witherspoon*. (See *DePriest*, *supra*, 42 Cal.4th at p. 19, fn. 6.)

Concurring in the 1968 *Witherspoon* publication, Justice Douglas opined:

> The requirement imposed by the Sixth and the Fourteenth Amendments that a jury be representative of a cross-section of the community is, of course, separate and distinct from the question whether the death penalty offends the Eighth Amendment.

(*Witherspoon*, *supra*, 391 U.S. at p. 531, fn. 13 (conc. opn. of Douglas, J.).) Similarly, the requirement imposed by the Sixth and Fourteenth Amendments that a jury be impartial as to the death penalty (announced in *Witherspoon*) is separate and distinct from the question of whether the death penalty offends the Eighth Amendment or one of the numerous rights guaranteed in the Fifth Amendment. The high court has noted that *Witherspoon* is "best understood in the context of its facts[,]" and is a "limited holding[.]" (*Witt*, *supra*, 469 U.S. at p. 418.) Indeed, in *Witt*, the United Supreme Court made clear: "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (*Id.* at p. 423.) Appellants concede this ruling in *Witt*. (Satele AOB 247; Nunez AOB 244.)

Thus, they must also admit that *Witherspoon* is not grounded on any right guaranteed in the Fifth Amendment.

"The law is unclear as to whether a procedural bar applies to defendants' challenge to [a prospective juror's] excusal for cause." (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007, fn. 8; but see *Hoyos*, *supra*, 41 Cal.4th at p. 904, fn. 16 ["failure to object does not forfeit a *Witt/Witherspoon* claim"]; *Blair*, *supra*, 36 Cal.4th at p. 742 [no forfeiture because trial was "before the law was clarified"]; *Griffin*, *supra*, 33 Cal.4th at p. 562, fn. 12 [Eighth Amendment claim denied].) Here, however, the issue of whether appellants have preserved the right to raise a claim under the Fifth and Eighth Amendments is not "'close and difficult[.]'" (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8, citing *People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6; see *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19 [no forfeiture because "state constitutional claim is based on the same facts underlying the federal claim and requires a legal analysis similar to that required by the federal claim"];*Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3.)

Since appellants clearly did not present a Fifth or Eighth Amendment argument to the trial court after it found prospective juror 2066 death-disqualified under *Witherspoon* (see 3RT 629-630), appellants forfeited a Fifth and Eighth Amendment claim on automatic appeal to this Court. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Thornton*, *supra*, 41 Cal.4th at pp. 462-463; *Heard*, *supra*, 31 Cal.4th at p. 958, fn. 8 ["We agree with respondent that apart from issues relating to the principles discussed in [*Witt*], defendant has waived his constitutional claims regarding the exclusion of these two prospective jurors by failing to challenge the trial court's ruling on those grounds at the time the prospective jurors were dismissed"]; see e.g., *DePriest*, *supra*, 42 Cal.4th at p. 19, fn. 6 [no forfeiture because "most of the time, defendant raised the issue

in the trial court, and explicitly mentioned the constitutional theories advanced on appeal"].)

2. A *Witherspoon* Claim Lacks Merit

"[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." (*Morgan*, *supra*, 504 U.S. at p. 728.) "The prosecutor may remove such potential jurors according to the guidelines set out in *Witherspoon* [citation], as refined by the decision in *Witt*." (*Buchanan*, *supra*, 483 U.S. at p. 408, fn. 6.) *Witt*'s guidelines were obeyed as to prospective juror 2066.

First, the test is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt*, *supra*, 469 U.S. at p. 424 [footnote omitted]; see *Morgan*, *supra*, 504 U.S. at pp. 728, 732-733; *Ross*, *supra*, 487 U.S. at p. 85; *Buchanan*, *supra*, 483 U.S. at p. 408, fn. 6; *Gray*, *supra*, 481 U.S. at p. 658; *Darden*, *supra*, 477 U.S. at pp. 175, 178; *Wilson*, *supra*, 44 Cal.4th at p. 779; *DePriest*, *supra*, 42 Cal.4th at pp. 20-21; *Hoyos*, *supra*, 41 Cal.4th at pp. 903-907; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1006; *Schmeck*, *supra*, 37 Cal.4th at pp. 261-262; *Griffin*, *supra*, 33 Cal.4th at p. 558; *Stewart*, *supra*, 33 Cal.4th at p. 446; *Heard*, *supra*, 31 Cal.4th at p. 958.)

Here, prospective juror 2066 admitted (during voir dire and on her questionnaire) that her personal views would substantially impair her juror performance. (23CT 6566, 6585-6590.) As the trial court read into the record, in her answer to Question 232, prospective juror 2066 wrote that she "strongly opposed" the death penalty. (3RT 620; 23CT 6586; see Satele AOB 249; Nunez AOB 247; *DePriest*, *supra*, 42 Cal.4th at p. 21 ["B.T. strongly disfavored the death penalty"]; *Hoyos*, *supra*, 41 Cal.4th at p. 906 [at voir dire "R.J. stated he was biased against the death penalty"]; *Griffin*, *supra*, 33 Cal.4th at p. 558 [E.B. had "mixed feelings" about death penalty].)

Also, this is not a case where there was no "attempt to determine" whether the prospective juror "could nonetheless return a verdict of death." (See *Witherspoon*, *supra*, 391 U.S. at p. 514; see *Stewart*, *supra*, 33 Cal.4th at p. 446 ["Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*"].) In *Witherspoon*, the United States Supreme Court explained:

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

(*Witherspoon*, *supra*, 391 U.S. at pp. 514-515, fn. 7.) Here, however, prospective juror 2066 conceded multiples times that she could not subordinate her personal views to a duty to abide by her oath as a juror to obey court instructions and governing death penalty law in California.

In short, this is not a case of "mere generalized opposition to the death penalty[.]" (Satele AOB 249; Nunez AOB 246.) At voir dire, the prosecutor asked that if he presented "a bunch of aggravating factors about various things" would she "still vote for that life sentence" over a death penalty. Prospective juror 2066 candidly replied: "Yes, I think I would." (3RT 624.) Appellants concede the above record. (Satele AOB 251; Nunez AOB 248; see *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007 ["A.L. could see himself voting for life imprisonment even where the murder was 'brutal' and aggravation outweighed mitigation"]; *Griffin*, *supra*, 33 Cal.4th at pp. 559-560.) The federal and California test "does not require that a juror's bias be proved with 'unmistakable clarity.'" (*Witt*, *supra* 469 U.S. at p. 424; see *DePriest*, *supra*,

42 Cal.4th at p. 20; *Griffin*, *supra*, 33 Cal.4th at p. 558 [*Witt* test applies to state constitutional impartial-jury right].)

Later, Nunez's counsel asked: "Can you conceive of a crime so heinous that you would ever vote for death?" Prospective juror 2066 confessed: "No, I don't think so." (3RT 624; see *DePriest*, *supra*, 42 Cal.4th at p. 21 ["no" answer given to defense counsel's "conceive of" question]; *Schmeck*, *supra*, 37 Cal.4th at p. 262.) Nunez's counsel asked, "And you believe it would make you nervous and ill at ease to even have to consider [a death penalty], correct?" Prospective juror 2066 declared: "Yes." (3RT 625.) The following exchange ensued between Nunez's counsel and prospective juror 2066:

> [NUNEZ'S COUNSEL]: But if you found you really believed it was the only reasonable solution, not this case but a made up case, you would then vote for death if that's the only solution you see that's fair in this heinous crime?
>
> PROSPECTIVE JUROR 2066: I don't know if you could say yes on that one. I would, like I said before, look at other alternatives if they were presented.
>
> [NUNEZ'S COUNSEL]: If you get to this end point, you see there are only two alternatives, he goes to prison or she goes to prison, or whoever, for the rest of their natural life, or they go up to prison to be killed; are you saying you could never, ever, no matter what it was, say, "well, I will vote for death"?
>
> PROSPECTIVE JUROR 2066: Yes, I'm saying that right now.
>
> [NUNEZ'S COUNSEL]: Right now?
>
> PROSPECTIVE JUROR 2066: Yes.
>
> [NUNEZ'S COUNSEL]: You didn't say that a minute ago?
>
> PROSPECTIVE JUROR 2066: Maybe the question was presented to me a little different.

(3RT 625-626; see 23CT 6566 [Question 75 answer: "I would not send any person to death"].)

When further queried by Nunez's counsel, prospective juror 2066 honestly said: "I believe a case could be that bad, but I still wouldn't want to vote for the death penalty." (3RT 626.) The court asked: "Is it you couldn't or you don't want to, or both?" Prospective juror 2066 replied: "Both." (3RT 627; see *DePriest*, *supra*, 42 Cal.4th at pp. 21-22.) After Satele's counsel opined that it is "hard for everybody" to vote for a "tough decision" like a death penalty, prospective juror 2066 responded: "I don't know if I could." (3RT 627-628; see 23CT 6585.)

"There is nothing in this record which indicates that anybody [ultimately] had trouble understanding the meaning of the questions and answers with respect to" prospective juror 2066. (See *Witt*, *supra*, 469 U.S. at p. 435.) After multiple attempts "to determine whether [she] could nonetheless return a verdict of death" (see *Witherspoon*, *supra*, 391 U.S. at p. 514), prospective juror 2066 gave no assurances that she "could nonetheless subordinate [her] personal views" to her "oath as a juror" to "obey the law of the State" (*id.* at pp. 514-515, fn. 7). As the high court has confirmed, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear[.]'" (*Witt*, *supra*, 469 U.S. at pp. 424-425.) Also, "the trial court has broad discretion over the number and nature of questions about the death penalty." (*Stitely*, *supra*, 35 Cal.4th at p. 540.)

"At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*DePriest*, *supra*, 42 Cal.4th at p. 20, citing *Stewart*, *supra*, 33 Cal.4th at pp. 446-447; *Heard*, *supra*, 31 Cal.4th at p. 958.) Here, the record overwhelmingly shows that under the *Witt* test, prospective juror 2066's

personal views against the death penalty would "'prevent or substantially impair'" her juror performance (see 23CT 6558, 6566, 6585-6590). (See *Witt*, *supra*, 469 U.S. at pp. 424, 432-435; *Griffin*, *supra*, 33 Cal.4th at p. 558.) In sum, prospective juror 2066 clearly indicated that she "would have extreme difficulty imposing capital punishment, even in an appropriate case." (See *DePriest*, *supra*, 42 Cal.4th at p. 22.)

Additionally, the trial court was "free to interpret questioning" by counsel "to clarify any particular statement" by prospective juror 2066. (See *Witt*, *supra*, 469 U.S. at p. 435.) "The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of 'critical importance in assessing the attitude and qualifications of potential jurors." (*DePriest*, *supra*, 42 Cal.4th at p. 21, citing *Brown*, *supra*, 551 U.S. at p. ___ [127 S.Ct. at p. 2224]; see *Darden*, *supra*, 477 U.S. at p. 178; *Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1006-1007.) Thus, the trial court was in a better place than this Court to assess prospective juror 2066's demeanor, tone, and credibility. (*Witt*, *supra*, 469 U.S. at p. 426 ["deference must be paid to the trial judge who sees and hears the juror"]; *Lewis*, *supra*, 43 Cal.4th at p. 483; *DePriest*, *supra*, 42 Cal.4th at pp. 20-21 [trial court's findings "receive substantial deference on appeal"]; *Griffin*, *supra*, 33 Cal.4th at p. 559.)

Here, the trial court cited prospective juror 2066's "demeanor" as grounds for finding death-disqualification under *Witherspoon*. (3RT 629; see *Schmeck*, *supra*, 37 Cal.4th at p. 262 ["demeanor and responses" were "substantial evidence" to support trial court's finding]; *Griffin*, *supra*, 33 Cal.4th at pp. 560-561 ["demeanor" factor inferred from record].) "[T]he trial judge may be left with the 'definite impression' that the person cannot apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*DePriest*, *supra*, 42 Cal.4th at p. 21, citing *Witt*, *supra*, 469 U.S. at

pp. 425-426; see *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007; *Schmeck*, *supra*, 37 Cal.4th at p. 263; *Griffin*, *supra*, 33 Cal.4th at p. 559.)

The trial court also noted that prospective juror 2066 seemed reluctant, and that she gave "conflicting" and "equivocal" responses. (3RT 629; see 23CT 6558, 6566, 6585-6590.) "If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding." (*Horning*, *supra*, 34 Cal.4th at pp. 896-897; see *Lewis*, *supra*, 43 Cal.4th at p. 483; *Wilson*, *supra*, 43 Cal.4th at p. 14; *DePriest*, *supra*, 42 Cal.4th at p. 21; *Beames*, *supra*, 40 Cal.4th at p. 925; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007; *Ledesma*, *supra*, 39 Cal.4th at 671; *Schmeck*, *supra*, 37 Cal.4th at pp. 261-263; *Griffin*, *supra*, 33 Cal.4th at pp. 558-559.)

In *Stewart*, *supra*, 33 Cal.4th 425, and *Heard*, *supra*, 31 Cal.4th 946, this Court has found reversible *Witherspoon* error where excusal was "based solely" on written responses in a juror questionnaire. (*Wilson*, *supra*, 44 Cal.4th at pp. 785-790 [noting grounds for reversal in *Stewart* and *Heard*]; *Stitely*, *supra*, 35 Cal.4th at p. 540.) Appellants claim that prospective juror 2066's removal is indistinguishable from the reversible error in *Heard* and *Stewart*. (Satele AOB 247-248, 252, 254; Nunez AOB 245-246, 249-250, 252.) Respondent disagrees.

In *Stewart*, this Court held that "the trial court erred in excusing five prospective jurors for cause based solely upon their checked responses and written answers on a jury questionnaire." (*Stewart*, *supra*, 33 Cal.4th at p. 441.) By contrast, here, the trial court's ruling was clearly based on more than prospective juror 2066's answers and responses to Questions 230, 231, and 232 of her questionnaire. The trial court, the prosecutor, and appellants all questioned prospective juror 2066 prior to her excusal. (3RT 617-630; 37CT 10693-10694.) Significantly, this Court held in *Stewart* it may be possible for a trial court to grant a *Witherspoon* excusal based solely on checked answers

and written responses contained in a questionnaire (see 23CT 6558, 6566, 6585-6590). (*Stewart*, *supra*, 33 Cal.4th at pp. 449-450.)

Nevertheless, here, the trial court personally questioned prospective juror 2066 (as did appellants and the prosecutor in the court's presence). (3RT 617-630; 37CT 10693-10694.) Appellants concede that unlike the five dismissed prospective jurors at issue in *Stewart*, here, "No. 2066 was questioned" as to her questionnaire "responses." (Satele AOB 249; Nunez AOB 246; see 23CT 6558, 6566, 6585-6590.) Hence, *Stewart* does not govern because this case is factually distinguishable. (*Stewart*, *supra*, 33 Cal.4th at pp. 445 ["We agree that the trial court erred in excluding these prospective jurors on the basis of their questionnaire responses alone"], 450-451 ["We simple do not know how these potential jurors would have responded to appropriate clarifying questions posed to them by the trial court"], 454 [*Witherspoon* error per reversible as to death penalty "under the compulsion of United States Supreme Court cases"].)

In *Heard*, this Court found reversible error as to the death penalty because the trial court's findings for the excusal of prospective juror H were not supported by the record. (*Heard*, *supra*, 31 Cal.4th at pp. 959-966.) Here, as shown, overwhelming evidence exists in the record to support the trial court's finding that prospective juror 2066 was death-disqualified under the test in *Witt*. Appellants allege:

> In response to questions from [Nunez's counsel], No. 2066 indicated that she would never vote for death. (3RT 625.) However, in response to a follow-up question by [Nunez's counsel] and the trial court she indicated that there could be a case so bad that she could vote for the death penalty, although she would not want to do so. (3RT 326.)

(Satele AOB 251; Nunez AOB 249.) In other words, appellants admit that prospective juror 2066's answers to questions were "conflicting or equivocal," and thus, "the court's determination of the actual state of mind is binding" on

this Court. (*Horning*, *supra*, 34 Cal.4th at pp. 896-897; see *Lewis*, *supra*, 43 Cal.4th at p. 483; *Wilson*, *supra*, 43 Cal.4th at p. 14; *DePriest*, *supra*, 42 Cal.4th at p. 21; *Beames*, *supra*, 40 Cal.4th at p. 925; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007; *Ledesma*, *supra*, 39 Cal.4th at 671; *Schmeck*, *supra*, 37 Cal.4th at pp. 261-263; *Blair*, *supra*, 36 Cal.4th at p. 743; *Griffin*, *supra*, 33 Cal.4th at pp. 558-559.)

Indeed, after giving the trial court the above answers, prospective juror 2066 (as noted) told Nunez's counsel: "I believe a case could be that bad, but I still wouldn't want to vote for the death penalty." (3RT 626.) The court asked: "Is it you couldn't or you don't want to, or both?" Prospective juror 2066 replied: "Both." (3RT 627.) Thus, prospective juror 206 directly told the trial court that she could not (and would not) vote for the death penalty. (See *DePriest*, *supra*, 42 Cal.4th at pp. 21-22.) In sum, prospective juror 2066 was not "indistinguishable from the juror in" *Heard* as appellants argue. (Satele AOB 253; Nunez AOB 250; see *Lewis*, *supra*, 43 Cal.4th at p. 487 [distinguishing *Heard*].)

Given the record here (3RT 617-630 [*Witherspoon* hearing]; 23CT 6558, 6566, 6585-6590 [questionnaire]), there was no *Witherspoon* error in excusing prospective juror 2066. (See *Witt*, *supra*, 469 U.S. at pp. 424, 432-435; *Wilson*, *supra*, 44 Cal.4th at pp. 776-790]; *Lewis*, *supra*, 43 Cal.4th at pp. 483-487; *DePriest*, *supra*, 42 Cal.4th at p. 21 ["the record prevents us from second-guessing the trial court's decisions"]; *Hoyos*, *supra*, 41 Cal.4th at p. 906 ["record supports the trial court's conclusions"]; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007 ["The prospective juror's answers were equivocal and conflicting" and "could give rise to a definite impression that A.L.'s views on the death penalty would substantially impair the performance of his duties"]; *Griffin*, *supra*, 33 Cal.4th at pp. 561-562.)

3. Assuming No Forfeiture, There Was No Fifth Or Eighth Amendment Error

Finally, as noted, unlike at trial, i.e., for the first time on appeal, appellants argue:

> Because the prohibition against removing all jurors who may have moral qualms about the death penalty, even when those jurors have indicated a willingness to follow the law, tends to skew the jury panel in favor of death, this further impacts the reliability of the decision to impose the death penalty, in violation of Eighth and Fourteen Amendments, which impose greater reliability requirements in capital cases.

(Satele AOB 253; Nunez AOB 251, citing *Gilmore v. Taylor* (1993) 508 U.S. 333, 334 [113 S.Ct. 2112, 124 L.Ed.2d 306] (*Taylor*), *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235] (*Zant*), and *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (*Woodson*).) Here, appellants cite no part of the record to prove an Eighth Amendment claim (see *Lewis*, *supra*, 43 Cal.4th at pp. 461, 531; *People v. Rogers* (2006) 39 Cal.4th 826, 857 (*Rogers*) ["the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner"]), and they cite no law (or appellate record) to support a Fifth Amendment claim. (Satele AOB 246, 253; Nunez AOB 243, 251.) These claims must be summarily denied. (See *DePriest*, *supra*, 42 Cal.4th at pp. 19-23 ["reliable death verdict" and "cruel and unusual punishment" claims urged, but no non-*Witherspoon* analysis from this Court]; *Schmeck*, *supra*, 37 Cal.4th at pp. 257, 261-263 [Eighth Amendment claim urged, but no Eighth Amendment opinion given]; *Griffin*, *supra*, 33 Cal.4th at p. 562, fn. 12 [Eighth Amendment claim denied in one sentence without citing record or law]; see also *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3.)

Indeed, *Taylor* did not involve a *Witherspoon-Witt* issue, or the Eighth or Fifth Amendment. Instead, *Taylor* involved whether the announcement of a new rule of constitutional law (concerning state instructional error) applied retroactively to justify a grant of federal habeas corpus relief under *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 1060, 103 L.Ed.2d 334]. (*Taylor, supra*, 508 U.S. at pp. 335, 339-346.) In *Taylor*, the United States Supreme Court said: "The retroactivity of *Falconer* under *Teague* and its progeny is the only question before us in this case." (*Id.* at p. 339.) *Taylor* thus does not support the Eighth or Fifth Amendment claim advanced here for the first time on appeal. (See Satele AOB 246, 253; Nunez AOB 243, 251.)

Stephens did not involve a *Witherspoon-Witt* issue. Instead, *Stephens* concerned "whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld." (*Stephens, supra*, 462 U.S. at p. 864.) Since the Eight or Fifth Amendment claim in this case does not involve the question presented to the United States Supreme Court in *Stephens*, reliance (by appellants) on *Stephens* is misplaced. (See Satele AOB 246, 253; Nunez AOB 243, 251.)

Woodson (a plurality opinion) did not involve a *Witherspoon-Witt* issue. Instead, *Woodson* struck down North Carolina's "mandatory" death penalty law. Since California did not have a mandatory death penalty law when appellants were sentenced, *Woodson* does not support the Eighth or Fifth Amendment contention. (See Satele AOB 246, 253; Nunez AOB 243, 251.)

Appellants fail to demonstrate that prospective juror 2066's excusal necessarily resulted in an unreliable penalty verdict. (See Satele AOB 246, 253; Nunez AOB 243, 251.) As noted, appellants did not offer the trial court any Fifth and/or Eighth Amendment argument when prospective juror 2066 was

removed. (See 3RT 629-630.) Also, immediately after prospective juror 2066's removal, voir dire "for cause" commenced as to all other 100 (or so) prospective jurors. At that time, appellants had at least one hour (each) to question potential jurors for cause. After that process ended, appellants had at least 20 peremptory challenges to select a jury capable of rendering a reliable penalty verdict. (See *Blair*, *supra*, 36 Cal.4th at pp. 741, fn. 22 ["At the time of defendant's trial, each side in a capital case was allotted 20 peremptory challenges to the regular jurors"], 743-744; Code Civ. Proc., § 231.)

Prior to commencement of jury selection on April 19, 2000 (2RT 322, 325-330), appellants knew all of the following.

On August 27, 1999, the prosecutor formally announced (on the record) his intent to seek the death penalty as to appellants. (1RT 14, 28.)

On April 10, 2000, the trial court announced the following six evidentiary rulings, mindful of its discretion under Evidence Code section 352 (2RT 268-271): (1) Satele's statements (in the presence of Nunez, Kelly, Caballero, and Contreras) in the DSHP playground made about an hour after the killings, were admissible (see 1RT 246-247, 269-270); (2) Satele's post-killing comments to Vasquez in jail were admissible (see 1RT 247-252, 270); (3) the jury would not be told or instructed that Caballero was never charged with the killings (see 1RT 252-253, 270); (4) prosecution expert testimony (on gangs and racial hatred) was admissible (see 1RT 253-255, 270); (5) if Contreras testifies and recants his pre-trial statements to police, then evidence of fellow gang member Caballero's being killed after the charged killings was admissible to show the jury a reason for trial recantation by Contreras[39] (see 1RT 162-163, 241-242, 255-264, 270-271, 284-285); and (6) Vasquez "passed"

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39. Similarly, as to the admissibility of evidence of Caballero's killing to show the jury the truthfulness or untruthfulness of Vasquez's statements about this case, the trial court took that issue under submission. (See 1RT 241-242, 255, 270, 284-286.)

a polygraph exam and Nunez "failed miserably" a polygraph exam according to the prosecutor (2RT 243), but no reference to "polygraph" was admissible at trial (see 1RT 243-246, 270).

On March 21, 2000, the court stated that it received all proposed jury instructions, but a ruling would be made at a later time (despite the fact that counsel for appellants had already initially reviewed the proposed jury instructions offered by themselves as well as the prosecutor). (1RT 230-232.) That same day, the court announced its intent to exercise discretion by allowing counsel to personally question prospective jurors (for at least one hour) during the jury selection process. (1RT 233-236.)

Thus, before prospective juror 2066's excusal under *Witherspoon*, the two lawyers representing Satele and the two lawyers representing Nunez had a positively firm understanding of the facts and legal issues involved in the guilt and penalty phases of the trial. In other words, prior to prospective juror 2066's removal, appellants clearly knew what type of juror to select to ensure a reliable penalty result in the event that a jury found them guilty of the two charged premeditated killings and found that the charged special circumstance allegations were true. During the voir dire process for cause and for peremptory, appellants no doubt performed at their level best to select a jury to spare them from a death penalty.

In sum, appellants have failed to prove that prospective juror 2066's removal led to an unreliable penalty determination in violation of the Fifth and Eighth Amendments to the United States Constitution. (See Satele AOB 246-254; Nunez AOB 243-252.) Hence, assuming, without conceding, no forfeiture (but see *Heard*, *supra*, 31 Cal.4th at p. 958, fn. 8), reversal of the death penalty is unwarranted because the claim under the Fifth and Eighth Amendments fails on the merits (see *Griffin*, *supra*, 33 Cal.4th at p. 562, fn. 12).

II.

APPELLANTS FORFEITED REVIEW OF THE DENIAL OF THEIR FOR-CAUSE CHALLENGE TO PROSPECTIVE JUROR 8971; THERE WAS NO ERROR; THERE WAS NO PREJUDICE TO REVERSE THE CONVICTIONS AND DEATH PENALTY

Appellants claim that their (non-*Witherspoon*) for-cause challenge to prospective juror 8971 should have been granted. (Satele AOB 255-261 [Arg. XVI]; Nunez AOB 253-260 [Arg. XIII].) Respondent disagrees. (See *People v. Richardson* (2008) 43 Cal.4th 959, 987-988 (*Richardson*); *Lewis*, *supra*, 43 Cal.4th at pp. 488-490 [upheld retention of prospective juror with "strong pro-death-penalty views"]; *Wilson*, *supra*, 43 Cal.4th at pp. 13-15 [forfeiture and upheld retention of prospective jurors with strong pro-death penalty views]; *DePriest*, *supra*, 42 Cal.4th at pp. 22-23 [upheld retention of two prospective jurors who said they could be fair as to both guilt and death penalty despite their law enforcement background]; *Alfaro*, *supra*, 41 Cal.4th at pp. 1313-1314 [upheld retention of prospective juror who found the trial subject matter "emotional" for him]; *Hoyos*, *supra*, 41 Cal.4th at pp. 904-906 [upheld retention]; *Beames*, *supra*, 40 Cal.4th at pp. 924-925 [forfeiture and upheld retention of prospective juror with strong pro-death penalty views]; *Ledesma*, *supra*, 39 Cal.4th at pp. 675-676 [upheld retention of reserve deputy sheriff who said he could be fair on death penalty issue even though friends in law enforcement had been murdered]; *Avila*, *supra*, 38 Cal.4th at pp. 538-540 [forfeiture and upheld retention]; *Ramirez*, *supra*, 39 Cal.4th at pp. 446-449 [same]; *People v. Hinton* (2006) 37 Cal.4th 839, 859-860 (*Hinton*) [same]; *People v. Carter* (2005) 36 Cal.4th 1114, 1178-1179 (*Carter*) [upheld retention]; *Blair*, *supra*, 36 Cal.4th at pp. 742-744 [no error]; *Staten*, *supra*, 24 Cal.4th at pp. 453-454 [upheld retention as to prospective juror whose close relatives were police officers].)

A. Standard Of Review

This Court has held:

> Under our state law, a defendant who wishes to preserve a claim of error in the improper denial of a challenge for cause must (1) use a peremptory challenge to remove the juror in question; (2) exhaust his or her peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with the jury ultimately selected.

(*Blair*, *supra*, 36 Cal.4th at p. 741 [citations omitted]; see *Alfaro*, *supra*, 41 Cal.4th at p. 1314; see also *Wilson*, *supra*, 43 Cal.4th at p. 14 [forfeiture due to failure to object to jury as "finally constituted"]; *Beames*, *supra*, 40 Cal.4th at p. 925 [same]; *Avila*, *supra*, 38 Cal.4th at p. 539 [same]; *Ramirez*, *supra*, 39 Cal.4th at p. 448 [same].)

Assuming no forfeiture, the test for error is whether the challenged juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and oath. (*Lewis*, *supra*, 43 Cal.4th at p. 488; *Wilson*, *supra*, 43 Cal.4th at p. 14; *DePriest*, *supra*, 42 Cal.4th at pp. 20-21; *Ramirez*, *supra*, 39 Cal.4th at p. 448; *Avila*, *supra*, 38 Cal.4th at p. 539.)

Also, a trial court's findings as to the nature and effect of the challenged juror's views "receive substantial deference on appeal." (*DePriest*, *supra*, 42 Cal.4th at pp. 20-21.) "Indeed, where answers given on voir dire are equivocal or conflicting, the trial court's assessment of the person's state of mind is generally binding on appeal." (*Id.* at p. 21; see *Lewis*, *supra*, 43 Cal.4th at p. 483; *Wilson*, *supra*, 43 Cal.4th at p. 14; *Ledesma*, *supra*, 39 Cal.4th at p. 675; *Ramirez*, *supra*, 39 Cal.4th at p. 448; *Avila*, *supra*, 38 Cal.4th at p. 539.) This is so because the trial court "is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of 'critical importance in assessing the attitude and qualifications of potential jurors." (*DePriest*, *supra*, 42 Cal.4th at

p. 21, citing *Uttecht, supra*, 551 U.S. at p. ___ [127 S.Ct. at p. 2224]; see *Lewis, supra*, 43 Cal.4th at p. 483 ["we pay our usual deference to the trial court's resolution of the factual question of the prospective jurors' true states of mind based on that court's unique ability to '"observe and listen to the prospective jurors"'"]; *Lewis and Oliver, supra*, 39 Cal.4th at pp. 1006-1007.) Simply put, "the trial judge may be left with the 'definite impression' that the person cannot apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*DePriest, supra*, 42 Cal.4th at p. 21, citing *Witt, supra*, 469 U.S. at pp. 425-426; see *Lewis and Oliver, supra*, 39 Cal.4th at p. 1007; *Griffin, supra*, 33 Cal.4th at p. 559.)

Finally, this Court has held:

> To establish that the erroneous *inclusion* of a juror violated a defendant's right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence, or that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case.

(*Blair, supra*, 36 Cal.4th at p. 742 [citations omitted]; see *Alfaro, supra*, 41 Cal.4th at p. 1314; *Avila, supra*, 38 Cal.4th at p. 540.)

B. Factual Discussion

After *Witherspoon* voir dire ended, other "for cause" questioning commenced the next day. That day (April 27, 2000), a jury and alternates were selected. (37CT 10693-10696; 4RT 846, 857.) Allegedly, at recess during the for-cause (post-*Witherspoon*) selection process, group 4's prospective juror 8971 (see 2RT 376, 527-528; 3RT 636-637, 649; 26CT 7482-7520 [questionnaire]) echoed the sentiments of juror 2421 and stated (outside the courtroom) that given the chance, he would put all gang members "on an

island" to "do their own thing without hurting innocent people" (4RT 747).[40] The trial court questioned prospective juror 8971, and he assured the court that he was merely expressing an opinion he had since 1981. (4RT 746–748.)

Given the foregoing, on April 27, 2000, the court denied a for-cause challenge (by appellants) to prospective juror 8971. (4RT 751-752.) The trial court reasoned:

> I'm not going to excuse [prospective juror 8971] for cause. It appears the [gang "island"] conversation was an innocuous comment. This Court finds that it is not a willful violation of the Court's instructions not to talk about the case. They were just talking about issues in society. While admittedly, it's not the best choice of issues, the only one person he talked about it [i.e., prospective juror 2421], obviously, was not influenced by it.

(4RT 751-752.) The court added: "You are welcome to use a per-emptory [*sic*]" and asked: "are there any motions before we move on?"[41] Counsel for

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40. In the presence of the trial court and parties, prospective juror 0383 reported a comment by a prospective juror who said (in a jury assembly room): "The gang problem is something that I would resolve within a day. I would have all known gang members rounded up by the police, driven into the desert and be finished with them in one day." Prospective juror 0383 added that after hearing the above, a second prospective juror "echoed" the notion. (3RT 714.) Prospective juror 2421 allegedly made the charged comment, and prospective juror 8971 allegedly echoed the sentiment. After listening to prospective juror 2421's explanation, with the approval of both the prosecutor and Nunez's counsel (and opposition from Satele's counsel), the trial court excused prospective juror 2421 for-cause. The court then questioned prospective jurors individually to see if they heard former prospective juror 2421's gang-solution comment (and/or could be a fair juror despite hearing such comment). (3RT 713-715, 719-721; 4RT 723-730, 734-748.) It was at this point that the trial court questioned prospective juror 8971 as to his gang views. (4RT 746-748.)

41. Earlier that day, after excusing prospective juror 2421, the trial court invited appellants to move for a mistrial. Nunez's counsel replied: "At the appropriate time." (4RT 729.)

appellants replied: "No." Apparently minutes later, Nunez's counsel moved for a mistrial, and the motion was denied. (4RT 752-753.)

The trial court reasoned:

> The motion for mistrial is denied. It appears that whatever comments jurors have [*sic*] in this case have been fully addressed. There is no influence on any other jurors. The one person that has made a strong feeling that violated this Court's order in discussing, I have excused [i.e., former prospective juror 2421]. The other person [prospective juror 8971] was just making an idle comment while waiting for this case to go forward. This Court finds that it was not a violation of this Court's order, just talking about the issues of the times.

(4RT 753; see 18RT 4589-4590 [court's explanation when it denied motion for new trial].)

After jury selection continued, prior to prospective juror 8971 being seated as an alternate juror, appellants used 10 of their 20 peremptory challenges before both sides accepted the seated jury. (4RT 837-847.) Prospective juror 8971 was not on the initial list of six possible alternate jurors. (4RT 847-848.) As to the six peremptory challenges the court gave both sides for the selection of alternate jurors under the law (4RT 849, 854-857), appellants used four peremptory challenges before prospective juror 8971 was seated as alternate juror number 2 (4RT 849-851). After appellants used two more peremptory challenges, both sides accepted the alternate jurors with prospective juror 8971 seated as alternate juror number 2.[42/] (4RT 851-857.)

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42. At first, the court told counsel that it would give both sides 10 peremptory challenges to select the six alternate jurors. Nunez's counsel replied: "I would rather just go back to the six" allotted peremptory challenges under the law. (4RT 854.) Thus, appellants had six peremptory challenges to select the six seated alternate jurors.

After a four-day weekend break leading up to the prosecutor's guilt phase opening statement to the jury, i.e., on May 1, 2000, the trial court asked Satele's counsel: "are you satisfied in the way and procedure of which the jurors were picked?" Counsel answered: "Yes, your Honor." (4RT 867, 870.) When the trial court asked Nunez's counsel, counsel replied:

> Frankly, no, your Honor. I prefer that the voir dire be when we have 12 in the box rather than 90 in the audience. I think it's a better opportunity to handle the voir dire.

(4RT 870.) The trial court asked:

> Other than that portion, which of course I allowed you the one hour to voir dire, which, of course, is not really required by law, but I gave you the opportunity to do that to inquire, are you satisfied with *the way we pick a jury*, other than that particular comment?

(4RT 870 [italics added].) Nunez's counsel responded: "I'm not satisfied with the *result of the picking*, but other than that I have no comment as to the system." (4RT 870 [italics added].) Nunez's counsel did not express any specific dissatisfaction with prospective juror 8971 after the jury was finally constituted. (See 4RT 856-857, 870.)

At the guilt phase (and trial court's May 26, 2000 reading of final instructions to the jury), prospective juror 8971 sat as alternate number 2. With a break each evening plus a lunch (or other) recess each day, the jury deliberated from about 3:15 p.m. on May 26, 2000, until the guilt verdicts were announced at 11:53 a.m. on June 1, 2000.[43] (See 4RT 851, 857; 37CT 10695-10695, 10699, 10701; 38CT 10880, 10882, 10909-10914, 10917-10940.)

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43. As to both appellants, the jury foreperson signed the murder verdict forms on May 31, 2000, and signed the special circumstance forms on June 1, 2000. (38CT 10925-10934.)

The penalty phase began about two weeks later on June 14, 2000. On June 26, 2000, the trial court read final instructions to the jury, and jury deliberations commenced at 11:20 a.m. After an evening recess, jury deliberations resumed the next day (June 27, 2000) from 9:30 a.m. until (with breaks) 2:30 p.m. After a second evening recess, jury deliberations resumed the next day (June 28, 2000) from 9:30 a.m. until (with breaks) 2:30 p.m. After a third evening recess, jury deliberations resumed the next day (June 29, 2000) from 9:30 a.m. until (with breaks) 10:35 a.m. to resolve a problem revealed in the penalty phase juror foreperson's note. Around 9:20 a.m. the next day (June 30, 2000), prospective juror 8971 began service as a deliberating penalty phase juror in place of former juror number 10 (see Argument XVII, *post*).[44/] (4RT 857; 18RT 4442, 4462-4463, 4469-4471, 4473-4474, 4583-4584; 38CT 10994-10997, 11121-11122, 11124-11131, 11134, 11136.) During a recess in penalty phase jury deliberations on July 3, 2000, for medical reasons, juror number 9 was replaced by alternate juror number 4 (see Argument XVIII, *post*). (38CT 11138-11141.) That same day, jury deliberation began anew (see Arguments III and XV, *post*), and a verdict was reached. Two days later, on July 6, 2000, the jury's penalty phase verdict was read to the trial court and parties, and the jury was released from service in this case.[45/] (39CT 11146-

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44. At this point, the penalty phase jury foreperson sent a note to the trial court and counsel reporting that: (1) the jury was "at an impasse on the verdict 10-2" and seeking guidance; and (2) juror number 10 had revealed (during deliberations) that she had "confided" in her friend and mother and that they "sided with her doubts[.]" (38CT 11132.) In response, after an extensive hearing on the issue, on misconduct grounds, juror number 10 was replaced with alternate juror number 2 (i.e., prospective juror 8971). (38CT 11132, 11134, 11136; 18RT 4442-4459, 4462-4463, 4467-4471, 4473-4474, 4583-4584.)

45. As to both appellants, the penalty phase jury verdict forms were filed on Thursday, July 6, 2000, but signed by the foreperson on "July 2, 2000" (a Sunday). (38CT 10941-10944; 18RT 4494-4498.) However, the record

11147.)

On September 14, 2000, the court heard argument on the written motion for new trial filed by appellants (with a written opposition from the prosecutor that was) based in part on the failure to excuse prospective juror 8971 for cause. The motion was denied (18RT 4589-4590), and appellants were formally sentenced to death that day (September 14, 2000). (See 39CT 11173, 11179, 11187-11188, 11227, 11231, 11245, 11268, 11312-111374; 18RT 4515, 4550, 4559-4575, 4587, 4589-4590, 4606-4613 [formal sentencing hearing].)

C. Analysis

1. Appellants Forfeited Review Of Denial Of For-Cause Challenge To Prospective Juror 8971

Appellants claim they "preserved" the instant issue for review. (Satele AOB 258; Nunez AOB 257.) Respondent disagrees. (See e.g., *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

First, the record shows (4RT 746-753) that appellants did not raise any "Eighth Amendment" claim at trial. (Nunez AOB 256; Satele AOB 258, citing *Taylor*, *supra*, 508 U.S. at 333, *Zant*, *supra*, 462 U.S. 862, and *Woodson*, *supra*, 428 U.S. 280.) Thus, such claim must be summarily denied. (See *DePriest*, *supra*, 42 Cal.4th at pp. 19-23; *Schmeck*, *supra*, 37 Cal.4th at pp. 257, 261-263; *Griffin*, *supra*, 33 Cal.4th at p. 562, fn. 12; see also *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3.)

At any rate, appellants failed to express dissatisfaction with prospective juror 8971 after the jury was finally constituted (see 4RT 857, 870), and they do not even try to prove otherwise (see Satele AOB 258; Nunez AOB 257).

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clearly shows that after former juror number 9 was replaced by alternate juror 4, penalty phase jury deliberations "began anew" and a verdict was reached that day (Monday, July 3, 2000). (38CT 11138-11141; 18RT 4469-4471, 4473-4492, 4498-4504.)

When asked if he was satisfied, Satele's counsel said: "Yes, your Honor." (4RT 870.) Nunez's counsel said that he was not satisfied with the selection procedure and "not satisfied with the result of the picking" due to that process, but Nunez's counsel never expressed dissatisfaction with prospective juror 8971. (4RT 870.)

Also, appellants declare: "The defense exhausted the six peremptory challenges to which it was entitled in the selection of alternate jurors." (Satele AOB 257; Nunez AOB 255.) Actually, when prospective juror 8971 was seated as alternate juror 2, appellants had merely used four or their six peremptory challenges for the selection of six alternate jurors. (4RT 847-854.) In fact, after the trial court had advised appellants that they were "welcome to use a pre-emptory [*sic*]" to remove prospective juror 8971 because a for-cause challenge was being denied (4RT 751-752), appellants (each with two lawyers) intentionally left prospective juror 8971 seated as alternate juror 2 as they used two additional peremptory challenges. In other words, while prospective juror 8971 sat as alternate juror 2, appellants used their peremptory challenge number five to remove prospective juror 3785, then they used their peremptory challenge number six to remove prospective juror 7006. (4RT 851-853.)

After the above, the trial court said that it was willing to give appellants a total of 10 peremptory challenges to select the six alternate jurors in this case. In reply, Nunez's counsel said: "I would rather just go back to the six." (4RT 854.) Thus, Nunez forfeited review because he did not want additional peremptory challenges that would have fixed his instant claim of error.

Finally, appellants did not express any dissatisfaction with prospective juror 8971 after he took his oath (see Argument III, *post*) with the other five alternate jurors. (4RT 857, 870; see 18RT 4589-4590.) Indeed, after the alternate jurors took their oath and two alternate jurors (one being prospective juror 8971) requested hardship excusal, Nunez's counsel stated: "I'm willing

to stipulate to eliminate two alternate[s] and go to four." (4RT 864.) Thus, even after prospective juror 8971 had just stated that he did not want to serve on a long case because he was "in the process" of selling his house and buying a house (4RT 861-863), Nunez's counsel never expressed any specific dissatisfaction with prospective juror 8971 based upon denial of the for-cause challenge (see 4RT 864, 870). Appellants also did not express dissatisfaction with prospective juror 8971 after he replaced former juror number 10 (see Argument XVII, *post*) following several days of penalty phase jury deliberations. (18RT 4462-4463, 4467-4471, 4473-4474.) The "express dissatisfaction" law was not in a state of flux when prospective juror 8971 sat as alternate juror number 2 and took his oath on April 27, 2000 (4RT 722, 851-857), or on May 1, 2000, when the trial court specifically asked for dissatisfaction claims (4RT 867, 870). (See *People v. Boyette* (2002) 29 Cal.4th 381, 416 (*Boyette*) [failure to express dissatisfaction deemed no forfeiture because "the law was in a state of flux on this point at the time of defendant's 1993 trial"]; see also *Lewis*, *supra*, 43 Cal.4th at p. 490 [distinguishing *Boyette*]; *Wilson*, *supra*, 43 Cal.4th at p. 14, fn. 4 [same].)

By failing to express dissatisfaction with prospective juror 8971 after the jury was finally constituted, appellants forfeited review of the denial of their for-cause challenge to prospective juror 8971. (See *Wilson*, *supra*, 43 Cal.4th at p. 14 [forfeiture due to failure to object to jury as "finally constituted"]; *Beames*, *supra*, 40 Cal.4th at p. 925; *Ramirez*, *supra*, 39 Cal.4th at p. 448; *Avila*, *supra*, 38 Cal.4th at p. 539; see also *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

2. The For-Cause Challenge To Prospective Juror 8971 Was Properly Denied

In sum, appellants opine: "The record more accurately establishes that Prospective Juror No. 8971 had an entrenched (since 1981), biased opinion

concerning gangs he was eager to share with other jurors despite the court's instruction that jurors not discuss trial-related topics." (Satele AOB 259; Nunez AOB 258.) The record proves otherwise. In addition to prospective juror 8971's answers to the trial court at the hearing (4RT 746-753), as to the gang inquiries in the questionnaire (Questions 176 to 196; see Satele AOB 255; Nunez AOB 253),[46] prospective juror 8971 informed the court that: (1) he had never been afraid of gang members or associates; (2) he had never been associated with gang members or a gang; (3) he had no relatives or friends who were gang members or associates; (4) he and his relatives (and friends) had never been associated with a group dedicated to terminating gangs; (5) he would have to "hear facts" before deciding whether a gang member (or associate) was "guilty just because they are before you" as a defendant; (6) he never had a negative experience with a gang or gang members (or associates); (7) evidence that appellants were gang members would not necessarily effect his ability to be a fair juror in this case; (8) he generally agreed that gangs and gang members were violent; (9) he had "no opinion" as to whether gangs or gang members were murderers; (10) he knew people that lived in a "gang activity" area; (11) "gang activity is all over California in all cities" and towns; (12) he generally did not believe that a gang member would automatically lie; (13) he did not automatically distrust a gang member; and (14) he would not automatically disregard gang member testimony. (26CT 7482, 7502-7504.) Prospective juror 8971 clearly did not have an "entrenched" and "biased opinion" about gangs "since 1981" that he was eager to share with other prospective jurors during jury selection. (See Satele AOB 259; Nunez AOB 258.)

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46. Appellants had "an extra two days to read" prospective juror 8971's questionnaire during jury selection. (2RT 524.) In other words, all counsel and the trial court had several days to read prospective juror 8971's questionnaire to determine whether he was biased against gangs.

Appellants claim: "The record fails to provide substantial evidence to support the conclusion of the juror's fairness and impartiality inherent in the court's refusal to excuse the juror for cause." (Satele AOB 260; Nunez AOB 259.) Respondent disagrees. In addition to prospective juror 8971's responses to the questionnaire's "21 questions devoted to the matter of gangs" (Satele AOB 253; Nunez AOB 255), in his questionnaire, prospective juror 8971 revealed to the trial court (and appellants) that he could be a fair juror and would obey any instruction. (26CT 7482, 7507-7510.) Indeed, his questionnaire indicated that he had previously been a jury foreperson. (23CT 7493.) Further, he had served in this country's Air Force for 28 years (1949 to 1977), pursuant to which he once served as a "special court martial" juror (26CT 7487, 7501) and received legal training in "government law" (26CT 7494).

Also, after accepting his oath as an alternate juror (see Argument II, *post*), when prospective juror 8971 sought hardship excusal (due to his possible un-attentiveness because he was selling and buying houses), the following exchange ensued in the presence of appellants:

> THE COURT: Let me ask you, do your best, okay?
>
> JUROR 8971: Okay.
>
> THE COURT: We accept your best effort, okay. And we accept the fact that everybody in the jury has a life outside of serving on jury duty.
>
> JUROR 8971: Oh, yes.
>
> THE COURT: I have a life outside of jury duty. And from time to time my mind may be pre-occupied with something else. But I try my very best to give my best effort, as you have promised to give your best effort to listen to the evidence and apply the law as I instruct you. And if you are called as a potential member in the box, that you will do your best. And that's all we can ask of you.

JUROR 8971: All right. I'm an ex-chief master sergeant, Judge, so, yes, I have to do my best.

(4RT 862-863.) Prospective juror 8971 clearly promised to be fair and impartial in this case.

Appellants claims: "The trial court has an obligation to determine whether the prospective juror will faithfully and impartially apply the law in the case." (Satele AOB 260; Nunez AOB 258-259.) Here, after prospective juror 8971's answers to gang (and all) questions in the questionnaire, after being alerted to the gang "island" comment (see footnote 40, *ante*), the trial court questioned prospective juror 8971 and became assured (by words, demeanor, and tone) that prospective juror 8971 was merely uttering a general statement that had nothing to do with his ability to be a fair juror in this case. (4RT 746-752.) Before denying the for-cause challenge as to prospective juror 8971, the court separately questioned all prospective jurors who may have heard prospective juror 8971's comment, and those prospective jurors assured the trial court that they could be fair jurors in this case. (4RT 722-745.)

Morever, in denying a motion for new trial (after the penalty phase verdicts were announced and the jury was released from jury service), the trial court re-iterated:

> On the fifth ground relating [*sic*] grounds of jury misconduct because of one juror's comment relating to gang members / [*sic*] being sent to an island, an inquiry was made outside the presence of the other jurors [see 4RT 746-752] and this juror [prospective juror 8971] indicated that he can be fair and impartial, listen to the evidence, and apply the law as instructed by the court. No other persons heard or were impacted by this ["island"] statement, and anyone that did hear and was impacted was
>
> / / / /

excused by the court [see 3RT 713-715, 719-721; 4RT 723-730, 734-748].

(18RT 4589-4590.)

At any rate, the trial court's finding as to prospective juror 8971's state of mind (or sincerity) is "binding" on this Court. (See *Lewis*, *supra*, 43 Cal.4th at p. 483; *Wilson*, *supra*, 43 Cal.4th at p. 14; *DePriest*, *supra*, 42 Cal.4th at pp. 20-21; *Ledesma*, *supra*, 39 Cal.4th at p. 675; *Ramirez*, *supra*, 39 Cal.4th at p. 448; *Avila*, *supra*, 38 Cal.4th at p. 539.) This is so because the trial court "is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of 'critical importance in assessing the attitude and qualifications of potential jurors.'" (*DePriest*, *supra*, 42 Cal.4th at p. 21; see *Lewis*, *supra*, 43 Cal.4th at p. 483; *Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1006-1007.)

Since there is substantial evidence in the record (see 26CT 7482, 7502-7504 [questionnaire answers to gang questions]) to find that prospective juror 8971's "island" gang comment would not prevent or substantially impair his performance as a juror (see 26CT 7482, 7507-7510; *Lewis*, *supra*, 43 Cal.4th at p. 488; *Wilson*, *supra*, 43 Cal.4th at p. 14; *DePriest*, *supra*, 42 Cal.4th at pp. 20-21; *Ramirez*, *supra*, 39 Cal.4th at p. 448; *Avila*, *supra*, 38 Cal.4th at p. 539), each appellant's instant claim fails on the merits.

3. There Was No Prejudice To Justify Reversal Of Conviction Or Sentence

Appellants give no analysis that they suffered prejudice. (See Satele AOB 261; Nunez AOB 260.) Nevertheless, prospective juror 8971 did not deliberate until the penalty phase deliberations had already commenced. Appellants concede this. (Satele AOB 257; Nunez AOB 255.) Hence, any error in denying a for-cause jury selection challenge to prospective juror 8971

had no prejudice to justify reversal of the jury's convictions and special circumstance findings at the guilt phase.

Also, reversal of the death penalty is unwarranted for the following reasons.

First, *Witherspoon* error "requires reversal of defendant's death sentence, without inquiry into prejudice." (*Stewart*, *supra*, 33 Cal.4th at p. 454.) However, appellants did not challenge prospective juror 8971 on *Witherspoon* grounds. In 1990, this Court held:

> It appears that with the exception of an improper "*Witherspoon*" exclusion [citation], an erroneous ruling on a "for cause" challenge is not automatically reversible but is subject to scrutiny for prejudice under harmless-error analysis. Certainly, this is true of an erroneous ruling *denying* such a challenge. [Citations.] Since the exception is plainly inapplicable here, the general rule operates.

(*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1247 (*Gordon*) [italics in original]; accord *People v. Mickey* (1991) 54 Cal.3d 612, 682 (*Mickey*).)

In *Gordon*, the defendant argued that harmless-error analysis was inapplicable in light of certain language in *Gray*, *supra*, 481 U.S. 648. This Court denied the claim. (*Gordon*, *supra*, 50 Cal.3d at p. 1247.) This Court also denied the *Gray* claim in two later capital cases. (*People v. Ashmus* (1991) 54 Cal.3d 932, 966; *Mickey*, *supra*, 54 Cal.3d at p. 683 ["Defendant disagrees with our conclusion that reversal is not required. He may be understood to argue against the applicability of harmless-error analysis. He is too late. Such a point has already been rejected"], citing *Gordon*, *supra*, 50 Cal.3d at p. 1247.)

The *Gordon* harmless-error rule was correct. This Court has held:

> "In general, the qualification[s] of jurors challenged for cause are 'matters within the wide discretion of the trial court, seldom disturbed on appeal.'"

(*People v. Holt* (1997) 15 Cal.4th 619, 655-656 (*Holt*).) Also, the erroneous denial of a for-cause (non-*Witherspoon*) challenge to a prospective juror is at best constitutional "trial error" in the sense that the effect of the denial can be "quantitatively assessed in the context of other" factors to determine whether the error was "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (See *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 307-308 [111 S.Ct. 1246, 113 L.Ed.2d 302] (*Fulminante*).) By contrast, "total deprivation of the right to counsel at trial" or "a judge who was not impartial" are (like an erroneous *Witherspoon* excusal) "structural defects" incapable of quantitative assessment even under *Chapman*, and thus, such errors "defy analysis by 'harmless-error' standards." (*Fulminante*, *supra*, 499 U.S. at p. 309.)

Since the erroneous denial of a for-cause challenge (for reasons other than death-qualification under *Witherspoon*) can be quantitatively assessed in the context of other factors for prejudice, this Court's harmless-error rule in *Gordon* was as correct as "[i]t appears[.]" (See *Gordon*, *supra*, 50 Cal.3d at p. 1247.) Furthermore, since the *Witherspoon* exception is inapplicable here, any error in denying the for-cause challenge to prospective juror 8971 is subject to scrutiny for prejudice under harmless-error analysis. "Prejudice turns on whether the defendant's right to a fair and impartial jury was affected." (*Mickey*, *supra*, 54 Cal.3d at p. 682.) "Error of federal constitutional dimension" is "scrutinized under the 'reasonable doubt' standard[.]" (*Id.*, citing *Chapman*, *supra*, 386 U.S. at p. 24.) Otherwise, "[s]tate-law error of this sort, bearing as it does on penalty in a capital case, is reviewed under the 'reasonable possibility' standard[.]" (*Mickey*, *supra*, 54 Cal.3d at p. 682.)

Here, when prospective juror 8971 was seated as alternate juror 2, appellants had two peremptory challenges to use to remove prospective juror 8971. Yet, appellants failed to remove prospective juror 8971, they did not

request additional peremptory challenges and in fact Nunez refused the court's offer of two additional peremptory challenges, and they had at least two non-court days to read prospective juror 8971's questionnaire for evidence of his alleged gang bias. (2RT 524; 4RT 851-857; footnote 46, *ante*.) This supports a finding that appellants believed that prospective juror 8971 could be fair. Indeed, appellants failed to express dissatisfaction with prospective juror 8971 after the jury was finally constituted as well as after prospective juror 8971 became the new "juror number 10" following several days of penalty phase jury deliberations. (4RT 857; 18RT 4462-4463, 4467-4471, 4473-4474.) This supports a finding that appellants thought that prospective juror 8971 would not be biased against them on the death penalty question. (See *Boyette*, *supra*, 29 Cal.4th at p. 419 ["Furthermore, defendant did not express dissatisfaction with the jury as constituted and, although we decline to find he forfeited the issue as a result, that omission is relevant to determining whether he was prejudiced by the trial court's error"].)

Moreover, prospective juror 8971 was a "mixed" African-American. (See 26CT 7482; 18RT 4492.) This is highly significant here because there was guilt phase evidence that appellants were biased against African-Americans. Indeed, at the guilt phase, the jury heard a recording of Nunez (in a sheriff's van) telling Satele that he did not want African-Americans as jurors in this case (see footnotes 16 and 24, *ante*). Given prospective juror 8971 was African-American, it seems clear that the failure to express dissatisfaction when prospective juror 8971 was seated means that appellants believed that prospective juror 8971 was a fair and impartial person on the issue of the death penalty.

Further, nothing in the record shows that the death penalty verdict was caused in any way by prospective juror 8971's comments during jury selection. (See 18RT 4494-4504.) In fact, as to the persons who heard the comment,

those prospective jurors told the trial court and appellants (during jury selection) that they could be fair jurors. (4RT 722-745.)

Juror 8971 was seated on Friday, June 30, 2000. After a weekend recess, i.e., on Monday, July 3, 2000: (1) juror number 9 was replaced by alternate juror number 4; and (2) the jury voted 12 to 0 in favor of the death penalty for appellants. (See footnote 45, *ante*.) Nothing in the record suggests that prospective juror 8971's quick "island" comment (made during jury selection in April 2000) somehow influenced the new juror number 9 (seated after several days of penalty phase deliberations in July 2000) to vote in favor of the death penalty for both appellants.

Accordingly, reversal of the death penalty is unjustified for lack of prejudice as to the allegedly unforfeited (non-*Witherspoon*) error in denying the for-cause challenge concerning prospective juror 8971. (See *Mickey*, *supra*, 54 Cal.3d at p. 682; *Gordon*, *supra*, 50 Cal.3d at p. 1247; see also *Boyette*, *supra*, 29 Cal.4th at pp. 418-419 [defendant "'fails to demonstrate that he was harmed'"].)

III.

PROSPECTIVE JURORS 4965, 8971 AND 2211 TOOK AN ADEQUATE "TRIAL JUROR" OATH

Appellants claim that the convictions, special circumstances findings, and death penalty must all be reversed because "fewer than" 12 jurors rendered the verdicts. Specifically, appellants contend that "group 4" prospective jurors 4965, 8971, and 2211 (2RT 376, 527-529) took the "alternate juror" oath (4RT 856-857), but they failed to take a "trial juror" oath (see 4RT 846-847) or a functional equivalent prior to becoming deliberating jurors at the: (1) guilt phase, when prospective juror 4965 (or alternate juror 1) became the new juror number 5 almost immediately after selection of the six alternate jurors; and (2) penalty phase, when (a) prospective juror 8971 (or alternate juror 2; see Argument II, *ante*) became the new juror number 10 (see Argument XVII, *post*) after several days of penalty phase jury deliberations; and (b) prospective juror 2211 (or alternate juror 4) became the new juror number 9 (see Argument XVIII, *post*) soon after prospective juror 8971 became the new juror number 10. (Satele AOB 209-225 [Arg. XII]; Nunez AOB 211-229 [Arg. X].) Appellants add that the failure by these three jurors to take the trial-juror oath violated: (1) a "liberty interest" (Satele AOB 224; Nunez AOB 229, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] (*Hicks*); see *People v. Rundle* (2008) 43 Cal.4th 76, 136-137 (*Rundle*)); and (2) the Eighth Amendment (Satele AOB 225; Nunez AOB 229, citing *Taylor*, *supra*, 508 U.S. at 333, *Zant*, *supra*, 462 U.S. 862, and *Woodson*, *supra*, 428 U.S. 280).

Appellants did not raise a "fewer than 12-jurors" claim, a due process "liberty interest" claim (see *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12), or Eighth Amendment claim at trial. They thus forfeited such claims. Assuming arguendo no forfeiture, a functionally equivalent "trial juror" oath was taken by

prospective jurors 4965, 8971, and 2211 when they were seated as jurors. Hence, reversal is unwarranted. (See *People v. Carter, supra*, 36 Cal.4th at p. 1175 [found harmless error in failing to properly administer oath to prospective jurors]; *People v. Lewis* (2001) 25 Cal.4th 610, 629-631 (*Lewis*) [rejecting claim that prospective jurors failed to receive "proper" trial-juror oath; *People v. Cruz* (2001) 93 Cal.App.4th 69, 72-74 (*Cruz*) [citing *Lewis*, *supra*, 25 Cal.4th 610 to deny claim that juror was "sworn incorrectly"].)

A. Introduction

Code of Civil Procedure section 232, subdivision (b), states (in part) as follows:

> As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement "I do":
>
> "Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court."

(See *Carter*, *supra*, 36 Cal.4th at p. 1175, fn. 27.) Here, at jury selection, after 12 jurors were accepted, the 12 chosen jurors agreed to abide by the above trial-juror oath in the presence of group 4's prospective jurors 4965, 8971, 2211, and all other possible alternate jurors. (4RT 846-847; see 2RT 376, 527-528; 4RT 851-857.)

About one hour or less later, prospective jurors 4965, 8971, 2211, and the other three chosen alternate jurors accepted the following oath:

> You understand and agree that you will act as an alternate juror in the case now pending before this Court, and will act as a trial juror when called upon to do so?

(4RT 856-857.) Specifically, the six alternate jurors (in part) consisted of: (1) prospective juror 4965, i.e., alternate number 1 (2RT 376, 527, 529; 3RT 637, 650; 4RT 853, 857) who became the new juror number 5 (following the former juror number 5's for-cause excusal) the day after all six alternate jurors accepted their oath (4RT 860-861, 868-872, 876); (2) prospective juror 8971, i.e., alternate juror 2 (2RT 376, 527-528; 3RT 636-637, 649; 4RT 851, 857) who became the new juror number 10 during penalty phase deliberations (18RT 4469-4470); and (3) prospective juror 2211, i.e., alternate juror 4 (2RT 376, 527, 529; 3RT 637, 650; 4RT 852, 857) who became the new juror number 9 during penalty phase deliberations (18RT 4491). (See 4RT 851-857, 860-863, 868-872, 876; 18RT 4442-4459, 4462-4463, 4467-4471, 4473-4474, 4583-4584; 38CT 11138-11141.)

After he became juror number 10, prospective juror 8971 (in the presence of prospective juror 2211 and the remaining trial and alternate jurors) was instructed as to his duties as a new penalty phase deliberating trial juror as follows:

> Alternate No. 2, I'm going to invite you to have a seat in the box now. You are the substitute for juror No. 10. You're now the new juror No. 10.
>
> Members of the jury, a juror has been replaced by an alternate juror. *The alternate juror was present during the presentation of all the evidence, arguments of counsel, and reading of instructions during the guilt phase* of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to the point.
>
> For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase

of this trial. *Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts and findings and the evidence and law, what penalty should be imposed.*

Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial. That being said, Ladies and Gentlemen, the 12 of you – I'm going to excuse you back into the jury room to deliberate. The two alternates, I'm going to send you back to the jury commissioner. Don't talk amongst yourselves while you're waiting.

(18RT 4470 [italics added].) After becoming juror number 9, prospective juror 2211 received the same instruction. (18RT 4491.)

Earlier, during jury selection, group 4's prospective jurors 4965, 8971, and 2211 (see 2RT 376, 527-529) answered "I will" to the following oath:

You do understand and agree that you will accurately and truthfully answer all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the cause now pending before this Court, and that failure to do so may subject you to criminal prosecution?

(2RT 376-377; see Code Civ. Proc., § 232, subd. (a); *Carter*, *supra*, 36 Cal.4th at p. 1175, fn. 26; *Lewis*, *supra*, 25 Cal.4th at p. 630, fn. 2.) Prospective jurors 4965, 8971, 2211, and the other members of group 4 were also instructed (in part) on: (1) reasonable doubt (2RT 376, 380, 382); and (2) the duty of the jury to decide the facts from the evidence to form a conclusion based on legal instructions from the judge, i.e., the functional equivalent of the statutory trial-juror oath (compare 2RT 376, 380-381 to 4RT 846-847). (See 2RT 376-386; footnote 35, *ante*.) Further, prospective jurors 8971 and 2211 (penalty phase deliberating jurors) were instructed (during jury selection) as follows:

If there is to be a verdict imposing the death penalty, all 12 jurors must

agree unanimously on that punishment. Therefore, each juror bears full responsibility in that determination.

(2RT 382; see 2RT 376, 527-529.)

On the questionnaire during jury selection, prospective jurors 4965, 8971, 2211, and all other prospective jurors were (in part) cautioned as follows:

> This questionnaire is part of the formal jury selection process. It will become part of the Court's public record of the case and will be used by the judge and attorneys in selecting a qualified jury. You must answer it *under penalty of perjury*. [Italics added.] You also must fill it out by yourself and not consult with any other person about your answer. If you have reading or writing inabilities, please contact the clerk or bailiff to arrange for official assistance.

(26CT 2740-2741 [prospective juror 8971's questionnaire], 10294-10295 [prospective juror 4965's questionnaire].)[47] Also, Question 226 asked the following:

> If you are selected as a jury, you must render your verdict based solely on the evidence, and the law as given to you by the Court, free of any passion, prejudice, sympathy or bias, either for or against Daniel Nunez and William Satele, or the State. Do you have any difficulty accepting this principle?

(26CT 7508, 10322.) Under penalty of perjury, prospective juror 8971 checked "No" on his questionnaire (26CT 7481-7482, 7508), prospective juror 4965

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47. The record does not clearly indicate which questionnaire was filled out by prospective juror 2211, but juror 2211's redacted signature under penalty of perjury dated April 19, 2000, is in the record. (Death Penalty-Unidentified Juror Questionnaire Signature Pages 1CT 5.) About 25 percent of the prospective jurors (including prospective juror 2211) failed to write his or her badge number in the space on page 3 of the questionnaire. Also, the signature page (page 42) of each completed questionnaire has been separated from the questionnaires in the record.

checked "No" on her questionnaire (36CT 10294-10296, 10322), and prospective juror 2211 presumably checked "No" given that the juror was both an alternate juror as well as a deliberating penalty phase juror without any challenge of any kind by appellants.

B. Standard Of Review

As this Court has confirmed, "there is a dearth of California case law examining the factual situation here," but *Lewis*, *supra*, 25 Cal.4th at pp. 629-630, is "an analogous case" and thus "is instructive." (*Carter*, *supra*, 36 Cal.4th at p. 1176.) In *Lewis*, this Court has held:

> [O]ur recent decisions describing the judicial practice of conducting voir dire in a capital case by having prospective jurors give written answers to a jury questionnaire imply that a juror questionnaire is part of the "examination" for purposes of Code of Civil Procedure section 232. [Citations.]

(*Lewis*, *supra*, 25 Cal.4th at p. 630.) Further, when a capital defendant claims that "prospective jurors should have been sworn under Code of Civil Procedure 232[,]" he must "establish that he was prejudiced by the trial court's failure to administer the oath[.]" (*Id.* at pp. 630-631 [citations omitted]; see *Carter*, *supra*, 36 Cal.4th at pp. 1176-1177.).)

C. Analysis

1. Appellants Forfeited Their Claims By Failing To Raise Them At Trial

Appellants claim that a failure to take a trial-juror oath (by prospective jurors 4965, 8971, and 2211) violated a "liberty interest" (Satele AOB 224; Nunez AOB 229, citing *Hicks*, *supra*, 447 U.S. at p. 346; see *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12), and the Eighth Amendment (Satele AOB 225; Nunez AOB 229, citing *Taylor*, *supra*, 508 U.S. at 333, *Zant*, *supra*, 462 U.S. 862, and

Woodson, *supra*, 428 U.S. 280). They did not raise these constitutional claims at trial, and they fail to prove that such analysis "requires a legal analysis similar to" their less-than-12-jurors claim. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Thornton*, *supra*, 41 Cal.4th at pp. 462-463; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8.) They thus forfeited liberty interest and Eighth Amendment claims.

2. Prospective Jurors 4965, 8971, And 2211 Took A "Trial Juror" Oath

Assuming arguendo no forfeiture, as in *Lewis*, prospective jurors 4965, 8971, and 2211 "signed their questionnaire under penalty of perjury and were sworn under Code of Civil Procedure section 232 before being personally questioned in open court." (*Lewis*, *supra*, 25 Cal.4th at p. 631; see *Carter*, *supra*, 36 Cal.4th at p. 1177 ["as in [*Lewis*], the prospective jurors each filled out a juror questionnaire that was signed under penalty of perjury, a circumstance that undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court's failure to timely administer the oath set forth in Code of Civil Procedure section 232, subdivision (a)"].) It appears that prospective jurors 4965, 8971, and 2211 were never administered the statutory trial-juror oath in subdivision (b) of section 232 of the Code of Civil Procedure. However, they took the oath in subdivision (a) of section 232 (see 2RT 376-377, 527-529), and their answers under penalty of perjury to Question 226 of the questionnaire served as the functional equivalent of subdivision (b), the statutory trial-juror oath (see *Lewis*, *supra*, 25 Cal.4th at p. 630 ["a juror questionnaire is part of the 'examination' for purposes of Code of Civil Procedure section 232"]).[48/]

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48. Code of Civil Procedure section 234 (in part) states that alternate jurors "shall take the same oath as the jurors already selected[.]"

Indeed, in Question 226, prospective jurors 4965, 8971, and 2211 were asked if they had "any difficulty accepting" the principle that they must "render" their verdict "based solely on the evidence" and the law received from the trial court. (26CT 7508, 10322.) The statutory trial-juror oath required nothing more than the above. (See *Cruz*, *supra*, 93 Cal.App.4th at pp. 72-73 [discussing statutory trial-juror oath and "division of labor between trial court and jury" in that "jurors decide the facts and the court instructs them on the law"].)

Also, Question 226 emphasized to prospective jurors 4965, 8971, and 2211 that they must render a verdict "free of any passion, prejudice, sympathy or bias, either for or against Daniel Nunez and William Satele, or the State." (26CT 7508, 10322.) By contrast, the statutory trial-juror oath merely emphasized that a juror understand and agree to reach a verdict "according only to the evidence presented to you and to the instructions of the court." (Code Civ. Proc., § 232, subd. (b).) In other words, the answers and signatures under penalty of perjury to Question 226 (by prospective jurors 4965, 8971, and 2211) were a stronger declaration of commitment to (and understanding of) a trial juror's duty than the trial-juror oath in subdivision (b) of section 232 of the Code of Civil Procedure. (See *Carter*, *supra*, 36 Cal.4th at p. 1177.)

Further, prospective jurors 4965, 8971, and 2211 took the following oath:

> You understand and agree that you will act as an alternate juror in the case now pending before this Court, and will act as a trial juror when called upon to do so?

(4RT 856-857.) Thus, in addition to taking a functional equivalent trial-juror oath in Question 226 of the questionnaire, prospective jurors 4965, 8971, and 2211 (in open court) took an oath to "act as a trial juror when called upon to do so[.]" The latter oath was administered to prospective jurors 4965, 8971, and

2211 merely one hour or less after they witnessed the court administer the statutory trial-juror oath to the initial 12 trial jurors. Hence, a less-than-12-jurors claim lacks merit. (See *Carter*, *supra*, 36 Cal.4th at p. 1177 ["In view of the virtual certainty that these prospective jurors understood that they were required to answer truthfully the questionnaires, we reasonably may infer that the same prospective jurors similarly understood that they were required to respond truthfully to the questions posed during the voir dire examination–much of which was essentially a followup to the prospective jurors' answers given in response to the questions set forth in the questionnaires"]; *Cruz*, *supra*, 93 Cal.App.4th at p. 73 ["The jury in this case was not unmindful of its duty"].)

Appellants fail to show how a missing statutory trial-juror oath (as to prospective jurors 4965, 8971, and 2211) denied a liberty interest (see *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12) and violated the Eighth Amendment given that a functional equivalent oath exists in the record. (See Satele AOB 224-225; Nunez AOB 229.) Thus, such claims lack merit. (See *Lewis*, *supra*, 25 Cal.4th at pp. 630-631 [rejecting claims under "Fifth, Sixth, Eighth, and Fourteenth Amendments" for failure to properly administer statutory oath to prospective jurors].)

3. Appellants Fail To Demonstrate Prejudice

Even if appellants are correct about a missing statutory trial-juror oath as to prospective jurors 4965, 8971, and 2211, appellants fail to satisfy their burden to prove that they were "prejudiced by the trial court's failure to administer the oath[.]" (*Lewis*, *supra*, 25 Cal.4th at p. 630.) They claim that error here is "structural" and thus per se reversible despite the fact that this Court used harmless error analysis in *Lewis*. (Satele AOB 209, 221-224; Nunez AOB 211, 224-229.) As will appear, a missing statutory trial-juror oath is (at best) "trial error" in the sense that the effect of the error can be "quantitatively assessed in the context of other" factors to determine whether the error was

"harmless[.]" (See *Fulminante*, *supra*, 499 U.S. at 307-308.) This Court has previously denied a claim that a missing statutory trial-juror oath is "structural" error under *Fulminante*. (*Carter*, *supra*, 36 Cal.4th at pp. 1175-1176.)

Here, as shown, answers by prospective jurors 4965, 8971, and 2211 under penalty of perjury to Question 226 of the questionnaire were the functional equivalent of the missing statutory trial-juror oath in subdivision (b) of section 232 of the Code of Civil Procedure. (See *Lewis*, *supra*, 25 Cal.4th at p. 631 ["Defendant does not assert, nor does the record suggest, that the prospective jurors took their obligation to truthfully answer the questions posed to them on paper any less seriously than their duty to do so during oral questioning by the trial court and counsel"].) Also, prospective jurors 4965, 8971, and 2211 took an oath to "act as a trial juror when called upon to do so[.]" (4RT 856-857.) Earlier, at jury selection, they answered "I will" to an oath to "accurately and truthfully answer all questions" to "serve as a trial juror" subject to "criminal prosecution[.]" (2RT 376-377, 527-529.)

Soon after taking the latter oath, prospective jurors 4965, 8971, and 2211 were instructed on the duty of the jury to decide the facts from the evidence to form a conclusion based on legal instructions from the trial court, i.e., the functional equivalent of the statutory trial-juror oath. (See 2RT 376, 380-381; 4RT 846-847; footnote 35, *ante*.) They were also instructed: "If there is to be a verdict imposing the death penalty, all 12 jurors must agree unanimously on that punishment. Therefore, each juror bears full responsibility in that determination." (2RT 382; see 2RT 376, 527-529.) It must be presumed that prospective jurors 4965, 8971, and 2211 followed all instructions. (See *Shannon v. United States* (1994) 512 U.S. 573, 585 [114 S.Ct. 2419, 129 L.Ed. 459] (*Shannon*); *Carter*, *supra*, 36 Cal.4th at pp. 1176-1177; *People v. Mayfield* (1993) 5 Cal.4th 142, 179 (*Mayfield*); *Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17; *Cruz*, *supra*, 93 Cal.App.4th at pp. 73-74.)

Indeed, as explained in *Cruz*:[49]

> Defendant contends that it is specious to rely on the trial court's instructions to the jury as a basis to conclude the jurors followed the law, unless they explicitly agreed to follow the instructions. Absent a separate duty to follow the court's instructions, this argument might have some plausibility. But, as we have seen, statutory and case law establishes a duty independent of the jury oath. The court's instructions served merely to remind the jury of this duty, as would the oath if properly administered.

(*Cruz*, *supra*, 93 Cal.App.4th at p. 73.) The *Cruz* court held: "Even if the jury did not expressly agree to perform a duty, we must presume that an official duty has been performed." (*Id.*, citing Evid. Code, § 664.) In finding no prejudice, *Cruz* relied on this Court's harmless error analysis in *Lewis*, *supra*, 25 Cal.4th at p. 630. (*Cruz*, *supra*, 93 Cal.App.4th at p. 74.) In *Carter*, this Court followed *Lewis*, and cited *Cruz* with approval. (*Carter*, *supra*, 36 Cal.4th at p. 1176.)

Appellants fail to cite *Carter*, and they find *Cruz* and *Lewis* unimpressive. (Satele AOB 219, 223-224; Nunez AOB 222, 226-228.) They seem content in their belief that error here is per se reversible even though in 2005 this Court held otherwise, citing *Fulminante*, *supra*, 499 U.S. 279. (*Carter*, *supra*, 36 Cal.4th at pp. 1175-1176.) In other words, appellants cite no evidence in the record to show that they were prejudiced by the missing statutory trial-juror oath as to prospective jurors 4965, 8971, and 2211. (See *Carter*, *supra*, 36 Cal.4th at pp. 1176-1177 ["Although the trial court omitted giving the first oath, the jury ultimately was instructed as to its duty to follow the trial court's instructions and was presumed to have performed its official

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49. Nunez's counsel in this Court was the appellate counsel for the defendant in *Cruz*.

duty, and defendant has failed to establish that he was prejudiced by the trial court's failure to administer the required oath at the outset of questioning some of the prospective jurors"]; *Cruz*, *supra*, 93 Cal.App.4th at p. 74 ["Defendant, arguing only that failure to instruct the jury properly is structural error requiring automatic reversal, makes no showing that the jury did not perform its duty of following the law as laid down by the trial court. Therefore, the presumption holds that the jury followed the trial court's instructions"].)

By contrast, respondent has provided this Court with numerous examples of how there was no prejudice (assuming arguendo there was error). (See *Lewis*, *supra*, 25 Cal.4th at p. 631 ["Nor does anything else in the record suggest the voir dire examination was inadequate"].) Reversal is thus unjustified for lack of prejudice resulting from a missing statutory juror oath as to prospective jurors 4965, 8971, and 2211. (See *Cruz*, *supra*, 93 Cal.App.4th at pp. 73-74.)

IV.

THE MURDER DEGREE WAS ADEQUATELY SPECIFIED, AND APPELLANTS FORFEITED CONSTITUTIONAL CLAIMS BY FAILING TO URGE THEM AT TRIAL

On June 2, 2000, the trial court's clerk read to all parties the guilt phase verdicts and special findings. Those verdicts found appellants guilty of "willful, deliberate, premeditated murder" with "malice aforethought" on counts 1-2, but did not at that time expressly state that the murders were of the first degree. (15RT 3457-3458; 38CT 10925-10940; see *People v. San Nicolas* (2004) 34 Cal.4th 614, 634-636 (*San Nicolas*).)[50/] As to whether appellants were guilty or not guilty of second degree murder on counts 1-2, the jury left those eight verdict forms blank. (38CT 10949-10957.) Later, the jury's penalty phase verdict forms (on counts 1-2) declared that appellants were guilty of "first degree" murder. (18RT 4494, 4497-4503; 38CT 10941-10944.)

Appellants nevertheless claim that since the jury did not expressly specify the murder degree at the guilt phase: (1) the murders must be set at second degree; and (2) the death penalty must be reversed. (Satele AOB 118-154 [Arg. VI]; Nunez AOB 157-179 [Arg. VI].) They admit that a nearly

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50. Section 1157 states:

> Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguishable into degrees, the jury, or the court if a jury is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be the lesser degree.

(See *People v. Gray* (2005) 37 Cal.4th 168, 194-195, 199-201 (*Gray*) [section 1157 inapplicable to felony-murder because it is not "distinguishable into degrees"]; *People v. Mendoza* (2000) 23 Cal.4th 896, 900, 907-925 (*Mendoza*) [same]; *People v. Bonillas* (1989) 48 Cal.3d 757, 769, fn. 4 (*Bonillas*) ["decisions of this court have insisted on an express finding of the degree to satisfy section 1157, no matter how plain the implied finding"].)

identical claim was denied in *San Nicolas*, but contend that this Court's unanimous rejection in *San Nicolas* was wrong. (Satele AOB 118, 132-145, 149; Nunez AOB 158, 168-179.) Also, for the first time, they claim that the section 1157 error violated: (1) a liberty interest (Satele AOB 146, 153; Nunez AOB 179, citing *Hicks*, *supra*, 447 U.S. at p. 346; see *Rundle*, *supra*, 43 Cal.4th at pp. 136-137; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12); (2) the Eighth Amendment's "reliability" rule (Satele AOB 145; Nunez AOB 175, citing *Taylor*, *supra*, 508 U.S. at 333, *Zant*, *supra*, 462 U.S. 862, and *Woodson*, *supra*, 428 U.S. 280); and (3) Sixth Amendment rights to a jury trial, speedy trial, public trial, and an impartial jury (Satele AOB 149; Nunez AOB 178). Reversal of the first degree findings and death penalty is unjustified because there was no section 1157 error (*San Nicolas*, *supra*, 34 Cal.4th at pp. 634-636), and each appellant's derivative constitutional claims all accordingly fail.

A. Standard Of Review

"Section 1157 applies 'whenever the jury neglects to explicitly specify the degree of the crime' in the verdict form." (*San Nicolas*, *supra*, 34 Cal.4th at p. 634 [citations omitted].) But, there is no "infirmity" when the "verdict form itself" shows that the jury made the "specific finding" that a defendant committed a murder willfully, deliberately, and with premeditation within the meaning of section 189. (*Id.* at p. 635.) "This is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is therefore not implicated." (*Id.*)

B. Analysis

1. Appellants Forfeited Derivative Constitutional Claims

Insofar as appellants are claiming that there was section 1157 error that violated their constitutional rights in certain ways, their claim must be rejected since there was no section 1157 error, as explained below. If appellants are

claiming that regardless of section 1157, their constitutional rights were violated by the jury's failure to specify the degree of murder at the guilt phase, such constitutional claims have been forfeited. Indeed, at trial, they never claimed that the jury's failure to specify the degree of murder at the guilt phase violated a liberty interest, the Eighth Amendment's "reliability" rule, or Sixth Amendment rights to a jury trial, speedy trial, public trial, and an impartial jury. Here, appellants fail to prove that such analysis "requires a legal analysis similar to" a section 1157 analysis. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; see also *Rundle*, *supra*, 43 Cal.4th at pp. 136-137; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.) They thus forfeited all constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

2. There Was No Section 1157 Error

This case is indistinguishable from *San Nicolas*. In both cases, the jury made a specific finding in the verdict form itself that the murder was committed willfully, deliberately, and with premeditation. (15RT 3457-3458; 38CT 10925-10940.) "This is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is therefore not implicated." (*San Nicolas*, *supra*, 34 Cal.4th at p. 635.) This is so because section 189, which defines the degrees of murder, states that "[a]ll murder" perpetrated by "any" kind of "willful, deliberate, and premeditated killing" is "murder of the first degree." (See *San Nicolas*, *supra*, 34 Cal.4th at p. 635, fn. 4.) Simply put, there was no error here (or in *San Nicolas*) because section 189 mandates that a "willful, deliberate, and premeditated killing" is not "distinguishable into degrees" within the meaning of section 1157. The instant claim thus fails under *San Nicolas*.

Indeed, the guilt phase jury received the following CALJIC No. 8.20 instruction: "All murder which is perpetrated by any kind of willful deliberate

and premeditated killing with express malice aforethought is murder of the first degree." (14RT 3186; 37CT 10768.) Hence, when the foreperson signed the verdict form finding appellants guilty of willful, deliberate, and premeditated murder (15RT 3457-3458; 38CT 10925-10940), the jury clearly knew that it was making a specific "first degree" finding. CALJIC No. 8.74 instructed the jury that it must "agree unanimously" as to whether appellants were guilty of murder in the first degree. (37CT 10774; 14RT 3190.) Accordingly, the jury unanimously made a "first degree" finding at the guilt phase.

Further, the jury received the following CALJIC No. 8.25.1 (drive-by murder) instruction:

> Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree.

(37CT 10769; 14RT 3188.) Section 189 states that "any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree."[51] (See *People v. Sanchez* (2001) 26 Cal.4th 834, 838 (*Sanchez*) ["The district attorney prosecuted defendant for first degree murder on two theories: premeditated first degree murder [citation and footnote] and first degree murder perpetrated by means of intentionally discharging a firearm from a motor vehicle with specific intent to inflict death"].)

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51. In closing argument, the prosecutor (in part) argued:

> There is a jury instruction that says if it is a drive-by murder where these individuals shoot a gun from inside a car at someone, with the intent to kill, that is also first degree murder. And that's what we have in this case.

(14RT 3212.)

In the verdict forms, the jury made specific findings that appellants "personally and intentionally discharged" a gun at both victims resulting in the murders. (38CT 10926-10934; 15RT 3458-3481.) Moreover, the jury received uncontradicted evidence that the murders occurred when at least four bullets were fired from (or by use of) a motor vehicle while Robinson was between the open driver's door of Fuller's car and Fuller was in her driver's seat. The guilt phase jury made a specific finding that appellants committed the murders with "specific intent" to "promote, further or assist" their gang. (37CT 10927-10928, 109032-10933; 15RT 3460, 3462.) Given the record, section 1157 did not apply because section 189 mandated that the "drive-by" murders in this case were not "distinguishable into degrees" within the meaning of section 1157.[52] The instant claim thus lacks merit because the jury made a "first degree" finding at the guilt phase.

Finally, the jury received the following CALJIC No. 8.22 (murder by destructive device or explosive or armor-piercing ammunition) instruction:

> Murder which is perpetrated by means of a knowing use of ammunition designed primarily to penetrate metal or armor is murder of the first degree.

(14RT 3188; 37CT 10788.) Section 189 states that "[a]ll murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor . . . is murder of the first degree."

Here, the jury received unimpeached proof that Robinson and Fuller were killed by a bullets fired from the AK-47 semi-automatic assault rifle found (with appellants in Kelly's Chrysler) about 28 hours after the murders. (See 9RT 1963, 1965, 1969-1986, 1992, 2012-2013, 2021, 2024-2025, 2029-2031,

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52. Indeed, elsewhere in his brief, Nunez admits: "The evidence here establishes a drive-by shooting." (Nunez AOB 49.)

2037, 2039, 2043-2044, 2053-2054, 2155-2157, 2160-2161.) Given the above and other proof, the prosecutor justifiably gave the jury the following closing argument:

> Another theory of first degree murder is if they commit a murder, knowingly using ammunition which is designed primarily to pierce armory, is also first degree murder. And you heard the witness David Butler by the defense, he said this Norinco Mak-90 is made in China. Those rounds were designed to pierce armor in military operations. Like light carrying vehicles [*sic*]. But it pierces the armor. So that is another theory of first degree murder.

(14RT 3212.)

Simply put, given the evidence, there was no violation of section 1157 because section 189 mandated that the destructive-device murders in this case were not "distinguishable into degrees" within the meaning of section 1157. The instant claim thus lacks merit because the jury made a "first degree" finding at the guilt phase.

Indeed, given the prosecution's destructive-device theory and evidence, drive-by theory and evidence, and "willful, deliberate, and premeditated killing" theory and evidence, as the prosecutor argued to the jury (after presentation of all guilt phase evidence):

> Three different theories, three that all apply. This is a first degree murder case, and I don't care what the defense says when they get up here. You can decide, it's your choice. But there are three different theories that it's first degree murder. That's all I'm going to talk to you about with regards to that.

(14RT 3212.) The prosecutor repeated the "three separate theories" theme in rebuttal argument to the jury. (14RT 3396-3397.) In other words, there is more

evidence of compliance with section 1157 in this case than in *San Nicolas*. Hence, reversal of the first degree findings (and death penalty) is unwarranted because there clearly was no section 1157 violation in this case.

3. There Was No Prejudice

The jury expressly found appellants guilty of "first degree" murder on counts 1-2. (38CT 10941-10944.) Appellants concede this fact, but argue that the jury's express verdict was not a legal "finding" of first degree murder because it came "too late" at the penalty phase. (Satele AOB 150-151; Nunez AOB 173.) Section 1157 does not include any language demanding that a capital jury make a "degree" finding before penalty phase commencement. (See *Mendoza*, *supra*, 23 Cal.4th at pp. 907-908 [statutory construction rules].) Also, to the extent that appellants rely on *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), and *People v. Hughes* (1959) 171 Cal.App.2d 362 (*Hughes*) (Satele AOB 150-151; Nunez AOB 166), this Court is not bound by a lower court's opinion and this Court partially overruled *McDonald* in *Mendoza* (see *San Nicolas*, *supra*, 34 Cal.4th at p. 314; *Mendoza*, *supra*, 23 Cal.4th at p. 914).

Nevertheless, at the guilty phase, the jury made the specific finding that defendant committed murder willfully, deliberately, and with premeditation within the meaning of section 189. (15RT 3457-3458; 38CT 10925-10940.) "This is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is therefore not implicated." (*San Nicolas*, *supra*, 34 Cal.4th at p. 635.) Second, section 189 mandated that the apparent drive-by murders in this case were first degree and not "distinguishable into degrees" within the meaning of section 1157. Third, as shown, section 1157 did not apply because section 189 mandated that the destructive-device murders in this case were first degree and not "distinguishable into degrees" within the meaning of section 1157.

Moreover, as to whether appellants were guilty or not guilty of second degree murder on counts 1-2, the jury specifically left those eight verdict forms blank as instructed. (38CT 10949-10957.) Indeed, at the guilt phase, under CALJIC Nos. 8.70, 8.71, 8.74, and 8.75, the trial court instructed the jury as follows:

> Murder is classified into two degrees. If you find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree.
>
> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder has to [*sic*] the second degree as well as a verdict of not guilty in the first degree.
>
> Before you may reach a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilt [*sic*] at this [*sic*] of and [*sic*] unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree.
>
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in counts 1 and 2 and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime.
>
> You will be provided had [*sic*] with guilty and not guilty verdict forms as to counts 1 and 2 for the crime of murder in the first degree and

the lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree.

Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto. In doing so, you have discretion to choose the order in which you evaluate each crime and consider evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdict.

Disregard the instruction previously given which requires that you return but one verdict form as to this count.

Before you return any final or formal verdicts, you must be guided by the following:

Number one, if you unanimously find a defendant guilty of first degree murder as to counts 1 or 2, your foreperson should sign and date the corresponding guilt verdict forms. All other verdict forms should be left unsigned [see instant jury's "unsigned" eight second degree verdict forms at 38CT 10949-10957]; if you are unable – [*sic*]

Number 2, if you are unable to reach a unanimous verdict as to the charge in counts 1 or 2 of first degree murder, do not sign any verdict forms as to that count and report your disagreement to the Court;

Number 3, the Court cannot accept a verdict of guilty of second degree murder as to counts 1 or 2 unless the jury also unanimously find and returns assigned [*sic*] verdict form of not guilty as to murder of the first degree in the same count;

Number 4, if you find a defendant not guilty, of murder in the first degree as to counts 1 or 2, but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the

not guilty of murder in the first degree form, and should report your disagreement to the Court. Do not sign any other verdict forms;

Number 5, if you unanimously find a defendant not guilty of first degree murder, but guilty of second degree murder, your foreperson should sign and date the corresponding verdict forms. Do not sign any other verdict form as to that count;

Number 6, if you unanimously find a defendant not guilty of murder in the first degree and not guilty of murder in the second degree, your foreperson should sign and date the not guilty verdict form for first and second degree murder.

(14RT 3190-3193; 37CT 10772-10777.) Thus, at the guilt phase, the jurors were instructed that they had to unanimously agree on first degree murder in order to make such finding, and that they could demonstrate such unanimity by leaving all eight second degree verdict forms blank (as they did). The jury presumably followed all instructions. (See *Shannon*, *supra*, 512 U.S. at p. 585; *Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17.)

The jury corroborated its guilt phase first degree findings by expressly confirming that the murders were of the first degree, when it rendered its penalty phase verdicts. As to the penalty phase, as this Court has held:

> Where, as here, further proceedings are to take place, the jury has not been discharged, the jurors have been specifically instructed that they are still jurors in the case, they have been admonished not to discuss the case with anyone nor to permit anyone to discuss the case with them, and they have been directed not to read anything about the case, the jurors have not thrown off their character as jurors nor entered the outside world freed of the admonitions and obligations shielding their thought processes from outside influences.

(*Bonillas*, *supra*, 48 Cal.3d at p. 773.)

In capital cases like the instant, where there is no separate first degree finding at the guilt phase, but there is a specific finding on the verdict form that is tantamount to a finding of first degree murder (see *San Nicolas*, *supra*, 34 Cal.4th at p. 635), a defendant suffers no prejudice under section 1157 when the jury expressly finds at a penalty phase that the killing was "first degree" murder. Reversal is thus unwarranted because any section 1157 violation was "harmless beyond a reasonable doubt" in this case. (See e.g., *Fulminante*, *supra*, 499 U.S. at pp. 307-309; *Chapman*, *supra*, 386 U.S. at p. 24; see also *Mendoza*, *supra*, 23 Cal.4th at p. 925 ["we need not consider the Attorney General's alternative" argument that "any error in failure to comply with section 1157 did not 'result[] in a miscarriage of justice'"].)

V.

JURY UNANIMITY AS TO PRINCIPAL AND AIDER IS NOT REQUIRED UNDER FEDERAL OR STATE LAW

The jury found true allegations that both appellants "personally and intentionally discharged" a gun resulting in the murders within the meaning of section 12022.53, subdivision (d). (38CT 10927-10929, 10932-10934; see 15RT 3458-3481.) Thus, appellants received gun-use enhancements of 25 years to life for each murder, which were ordered stayed. (39CT 11349-11350, 11355-11357.) Here, they claim the gun-use enhancements must be struck because only one of them personally used a firearm. In fact, they argue that the murder convictions (and death penalty) must also be reversed based upon the multiple personal use of firearm findings. (Satele AOB 30-58 [Arg. I]; Nunez AOB 40-102 [Args. I-II].)

In his post-penalty phase motion for new trial, Nunez argued that since "the jurors found that each defendant was the shooter and they did so without evidence sufficient to make that determination[,]" to find defendants guilty of murder, "the shooter must be established and alternatively an aider and abettor status be found as to the other defendant" (see Satele AOB 35). Nunez added that the jury should have been instructed that "the actual killer have the requisite express malice" and that "the aider and abettor must act with the knowledge of the actual killer's criminal purpose (intent to kill) and also with the intent of aiding the commission of the killing." Further, in Nunez's opinion, the jury's true finding against both appellants on the gang charge (under section 186.22) "in no way" served as a lawful substitute for the jury's obligation to make a specific finding as to which defendant was the "shooter" and which defendant was the "aider." Finally, Nunez urged that error violated his "federal constitutional rights to trial by jury and due process." (39CT 11152-11154; see 39CT 11173, 11190-11192 [prosecutor's reply brief].)

Appellants urge the foregoing here as an alternative to their main claim that it was "factually impossible" for the jury to find that they were both shooters because only one gun was the murder weapon. (Satele AOB 30-58; Nunez AOB 40-102.) Satele adds that error violated the Fifth and Eighth Amendments. (Satele AOB 30.) As will appear: (1) the Fifth and Eighth Amendment claims were forfeited; (2) the Fifth, Sixth, and Eighth Amendment claims lack merit because jury unanimity findings (on principal and aider) were not required under federal or state law; and (3) the factual impossibility claim fails because there was substantial evidence to support the findings that either appellant could have fired the gun, and the prosecutor's theory was that both were liable for the personal gun use, regardless of who fired the fatal shots.

A. Standard Of Review

This Court has held as follows:

> When determining whether the commission of a crime is factually impossible, we do not concern ourselves "with the niceties of distinction between physical and legal impossibility . . . ." [Citation.] Instead, we focus on the elements of the crime and the intent of the defendant. Where a defendant has the requisite criminal intent but "elements of the substantive crime [are] lacking" due to "circumstances unknown" to him, he can only be convicted of attempt – and not the substantive crime itself. [Citations.] If, however, the evidence at trial is sufficient to establish *all* elements of the crime, then the defendant may be found guilty of the substantive crime. [Citation.]

(*People v. Rizo* (2000) 22 Cal.4th 681, 684-685 [italics in original].)

This Court has also held as follows:

> The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]

> On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]
>
> Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]

(*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*); see *People v. Hovarter* (2008) 44 Cal.4th 983, 996-1001 (*Hovarter*) [denying various claims including assertion that jailhouse informant's testimony was "inherently improbable" and unreliable under Eighth Amendment].)

Moreover, this Court has held:

> Section 12022.53(d) enhances the sentence of anyone who, in the commission of specified felonies including murder and attempted murder [citation], "intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in [Penal Code] Section 12022.7, or death, to any person other than an accomplice . . . ."

(*People v. Bland* (2002) 28 Cal.4th 313, 333-334 (*Bland*).) The enhancement has been held to apply to an aider and abettor who is not the actual shooter, subject to certain conditions including that the crime be committed for the benefit or in association with a criminal street gang. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1174 (*Garcia*).)[53]

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53. *Garcia* involved a defendant (driver) convicted of second degree murder as an aider and abettor where the one accused of being the shooter was

Finally, reversal is "unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*), quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755; see *Hovarter*, *supra*, 44 Cal.4th at p. 997.)

B. Analysis

1. Appellants Forfeited Fifth And Eighth Amendment Claims

In his post-penalty phase motion for new trial, Nunez merely argued that error violated his "federal constitutional rights to trial by jury and due process." (39CT 11152.) Satele now adds that error violated the Fifth and Eighth Amendments. (Satele AOB 30.) Nunez agrees. (Nunez AOB 40.) They did not raise specific Fifth and Eighth Amendments claims at trial, and they fail to prove that such analysis is "similar to" a factual impossibility (due process) analysis or a Sixth Amendment analysis. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; see also *Thornton*, *supra*, 41 Cal.4th at pp. 462-463, 468-469.) They forfeited Fifth and Eighth Amendment claims.

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acquitted. At sentencing, the defendant's prison term was enhanced due to a true finding as to gun use under section 12022.53, subdivision (d). An appellate court reversed the enhancement on grounds that subdivision (d) required that the actual shooter be convicted. This Court (unanimously) reversed the appellate court, holding that a shooter's conviction is not required to impose vicarious liability under subdivision (d) of section 12022.53. (*Garcia*, *supra*, 28 Cal.4th at pp. 1169, 1173-1178.) As will appear, the jury in this case received substantial evidence to find that either appellant could have fired the gun regardless of who fired the fatal shots. Thus, any reliance by appellants on *Garcia* is misplaced.

2. The Fifth, Sixth, And Eighth Amendment Claims Lack Merit

In his reply to Nunez's motion for new trial, the prosecutor said: "Defense counsel correctly states that there was no evidence [Nunez] was the shooter" and "I conceded this fact throughout the trial." (39CT 11190.) The prosecutor argued to the jury: "I did not prove to you who the actual shooter was" (14RT 3211), but it was unnecessary to decide who was the shooter and who was the aider (14RT 3210-3211, 3214, 3222; see Satele AOB 33, 35). As will appear, the jury received overwhelming evidence that either appellant could have shot the victims, and that both certainly were liable for the murders regardless of who shot the victims. At any rate, in reply to Nunez's motion for new trial, the prosecutor correctly explained that: (1) the jury was instructed on principals and "aiding and abetting" under CALJIC Nos. 3.00 and 3.01 (39CT 11190; see 37CT 10754-10755; 14RT 3177-3178; footnote 78, *post*); and (2) "[t]he law is clear that the jury does not have to make a finding of aiding and abetting" and "a unanimous finding as to theory of liability is not even required" (39CT 11192, citing *People v. Millwee* (1998) 18 Cal.4th 96, 160 (*Millwee*), and *People v. Pride* (1992) 3 Cal.4th 195, 249 (*Pride*); see *Thornton, supra*, 41 Cal.4th at p. 469).

Although the prosecutor cited *Millwee* and *Pride* (39CT 11192), appellants fail to acknowledge (or even cite) *Millwee* or *Pride* in their opening briefs. Instead, as Nunez sees it:

> The jury's special findings were the product of a defective jury instruction, defectively phrased verdict forms, and the prosecutor's misapprehension of and uncorrected incorrect statement of the law to the jury in argument.

(Nunez AOB 41.) Satele agrees. (Satele AOB 2.) As will appear, the prosecutor did not give a "misleading argument" to the jury, and the "language

in the verdict forms given to the jury" was not "incorrect" as alleged. (Satele AOB 30.)

In *Millwee* and in *Pride*, the capital defendants argued to this Court that the jury should have received a "unanimity" instruction as to whether their first degree murder conviction was based on a premeditated theory or a felony-murder theory. Otherwise, according to them, a lack of unanimity increases the likelihood of conviction even where some jurors have rejected a premeditation theory, and thus, the statutory scheme fails to properly narrow the class of persons death-eligible. In *Pride*, the defendant added that error violated the Fifth, Sixth, and Eighth Amendments. This Court denied the above, and affirmed the death penalty in *Millwee* and *Pride*. (*Millwee*, *supra*, 18 Cal.4th at pp. 160-161; *Pride*, *supra*, 3 Cal.4th at pp. 249-250.) Later, this Court held that *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (*Ring*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), "has not changed our prior conclusions" regarding "jury unanimity" on penalty phase findings. (*Thornton*, *supra*, 41 Cal.4th at p. 469, citing *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1068.)

Also, when "defendant's conduct as an aider and abettor or as a direct perpetrator could result only in one criminal act and one charge[,]" a unanimity instruction is not required. (*People v. Maury* (2003) 30 Cal.4th 342, 423 (*Maury*), citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1025-1026 (*Jenkins*); see also *Champion*, *supra*, 9 Cal.4th at p. 931; *People v. Beardslee* (1991) 53 Cal.3d 68, 93 (*Beardslee*).) As this Court has held:

> Under these circumstances, "[j]urors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion."

(*Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026; accord *Maury*, *supra*, 30 Cal.4th at p. 423.)

At any rate, standing (or falling) on their belief that there was factual impossibility in the jury's firearm use findings, appellants essentially make the same claim denied by this Court in *Jenkins* and in *Maury*, i.e., the jury should have received a unanimity instruction as to: (1) which appellant was the shooter; and (2) which appellant was a mere aider because (in their view) the aider was less deserving of the death penalty. (Satele AOB 2, 31-32, 34-36, 42-58; Nunez AOB 40-45, 51-102.) Based on his view that it was factually impossible for him and Satele to both fire a gun, Nunez cites *Garcia*, *supra*, 28 Cal.4th 1166 (Nunez AOB 54-58; see footnote 53, *ante*), and makes the following additional claims (previously stated in short-form).

Appellants allege:

> The instruction given [the] jury was in error because it failed to distinguish between the proof requirements for the actual shooter and the aider and abettor and failed to define the term "intentionally and personally discharged a firearm" as used in the instruction and thus failed to define critical elements of the enhancement. (37CT 10788; 14RT 3200-3201.) The instruction was also in error because, in language proposed by the prosecution, it created a presumption that relieved the prosecution of proving that appellant was in fact a principal in the commission of the crime, either in the capacity of the shooter who intentionally and personally discharged the firearm proximately causing death or as the accomplice who possessed the required mental state to be held liable for the enhancement. Instead, the jury was instructed that it was required to find appellant was in fact a principal in the commission of the offense and subject to the enhancement if it found appellant had been *charged* as a principal in the commission of the offense and the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) had been pled and proved. (37CT 10788; 14RT 3200-3201.) Finally, the

instruction was subject to an interpretation that the jury could find the personal weapon use enhancement to be true as to appellant based on alternate legal theories, one of which was legally incorrect. Reversal of the enhancement is requested on that ground because it is not possible to determine that the jury did not rely on that incorrect legal theory in finding the enhancement to be true as to appellant.

(Nunez AOB 41-42; see also Satele AOB 45; Nunez AOB 58-76.)

Nunez also contends:

The verdict forms prepared for the jury's use were defective because in each case the language set forth on the form provided only for [his] liability as the actual shooter and failed to provide [his] jury with the legally available range of verdict options, which would have included findings related to [his] liability in the capacity of an accomplice in the commission of the crimes.

(Nunez AOB 42.)

Nunez further argues:

The prosecutor misapprehended the law governing liability under the enhancement and incorrectly argued to the jury that it could find the enhancement true as to both [he] and Satele despite the "personal use" requirement because they were vicariously liable as the result of the gang enhancement. (14RT 3223.) The prosecutor's incorrect statement of the law to the jury was not corrected and was particularly prejudicial because it forcefully asserted that the law was as the incorrect presumption in the instruction regarding the enhancement stated it to be.

(Nunez AOB 42; see also Nunez AOB 53-58.)

Finally, Nunez opines:

As a result of this combination of errors, the jury found [him] and Satele both intentionally and personally discharged the Norinco

MAK-90 proximately causing the deaths of Robinson and Fuller. The constitutionally infirm jury instruction and the circumstances described herein require that the section 12022.53 enhancement be stricken.

(Nunez AOB 42.)

All of the above fails if this Court holds that the jury received sufficient proof to find that either appellant could have fired the gun regardless of who actually fired the fatal shots. Indeed, subdivision (d) of section 12022.53 "applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland*, *supra*, 28 Cal.4th at p. 338; *Sanchez*, *supra*, 26 Cal.4th at pp. 848-849; *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1351, 1359-1362 (*Zarazua*); *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1146, 1150-1153 (*Palmer*).) Satele admits "it is true that there was some evidence that could support a finding that both defendants shot the victims" given their "admissions to that effect" to Vasquez and Contreras. (Satele AOB 37, 42.) From Vasquez, the jury received strong evidence that each appellant took sole responsibility for being the shooter in this case. As Nunez sees it, in the event this Court gives Vasquez's "extraordinary" testimony "any weight, the reasonableness of a finding there was but one shooter must be balanced against the likelihood appellant and Satele both made false confessions." (Nunez AOB 49.) Appellants ignore well-settled law that witness-credibility is for the jury's determination. (See *Hovarter*, *supra*, 44 Cal.4th at pp. 996-1001.) As will appear, the jury in this case received overwhelming evidence to find each appellant liable for discharging a firearm at the victims.[54/]

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54. Later, respondent will separately address Nunez's claims of instructional error, defective verdict form, burden-shifting, improper argument, and other assertions related to the "unanimity" contention predicated on his opinion that it was factually impossible for the jury to find that both he and Satele personally fired a firearm at the victims. (See Arguments VII and XI,

At any rate, in support of the above, appellants rely on *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] (*Tison*). (Satele AOB 31, 35, 41; Nunez AOB 85, 156.) "*Tison* was concerned with whether imposition of the *death* penalty on an accomplice to a felony murder who neither killed nor intended to kill the victim would violate the Eighth or Fourteenth Amendments." (*People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).) *Tison* was a "kidnaping-robbery" murder case. (*Tison*, *supra*, 481 U.S. at p. 158.) By contrast, appellants were not charged with (or convicted of) felony-murder. Instead, appellants were fellow gang members who were each convicted of a "willful, deliberate, and premeditated killing" based on the firing a "metal or armor" penetrating device (AK-47 semi-automatic rifle) from or by using "a motor vehicle[.]" (See § 189 [defining various types of first degree murder in addition to felony-murder variety].)

Additionally, here, the jury received proof from fellow gang member Contreras that at the time of the murders, appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (kill enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960, 2090-2093; Satele AOB 12.) Indeed, as will appear, the jury received overwhelming proof that appellants were both personally liable for the firing of the gun at the victims. The jury also found that appellants committed the murders with "specific intent" to "promote, further or assist" their gang. (37CT 10927-10928, 109032-10933; 15RT 3460, 3462.)[55/]

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post.)

55. The *Tison* (felony-murder) mandates are in section 190.2, subdivision (d). Assuming arguendo that appellants did not forfeit an Eighth Amendment claim, the "major" participant and "reckless indifference" *Tison* mandates (*Tison*, *supra*, 481 U.S. at pp. 152, 158) did not apply to appellants because they were not prosecuted for felony-murder (as in *Tison*).

In *Millwee*, this Court (unanimously) held:

> It is settled, however, that unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law. Each juror need only have found defendant guilty beyond a reasonable doubt of the single offense of first degree murder as defined by statute and charged in the information. [Citations.] Moreover, California's capital sentencing scheme permissibly applies to persons found guilty of first degree murder with special circumstances under any applicable theory, including murder in the commission or attempted commission of certain enumerated and inherently dangerous felonies. [Citations.] Thus, the trial court did not err and trial counsel was not incompetent insofar as jurors were not told to agree on the reason for the first degree murder.

(*Millwee*, *supra*, 18 Cal.4th at pp. 160-161.)

In *Millwee*, this Court cited *Pride* (among other cases) in support of the foregoing mandate. Under *Millwee* and its progeny, as the trial prosecutor argued in opposition to Nunez's motion of new trial, the jury was not required to unanimously agree on which appellant was the "shooter" and which appellant was the "aider" as long as the jury found appellants guilty beyond a reasonable doubt of first degree premeditated murder as defined by statute and charged in the information. (*Millwee*, *supra*, 18 Cal.4th at p. 160; see *Riggs*, *supra*, 44 Cal.4th at p. 313.) Also, here, since each appellant's conduct "could only result in one criminal act and one charge[,]" a unanimity instruction was not required. (*Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026.)

Further, the jury was instructed that: (1) principals include aiders and abettors; (2) an aider and abettor is one who has "knowledge of the unlawful purpose of the perpetrator" and "by act or advice aids, promotes, encourages or

instigates" the commission of a crime "with the intent or purpose of committing or encouraging or facilitating" the commission of the crime[56/] (see *Garcia*, *supra*, 28 Cal.4th at p. 1174 [announcing prosecution's pleading burden as to section 12022.53, subdivision (d), "in order to find an aider and abettor–who is not the shooter–liable"]; (3) "mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting" (see Satele AOB 47); (4) mere knowledge that a crime is being committed and a failure to prevent it does not amount to aiding and abetting; (5) "[i]f you find" Nunez or Satele guilty of one or both murders, "you must determine whether" Nunez or Satele "intentionally and personally discharged a firearm"; (6) the gun-use charge (under section 12022.53) applies to "any person charged as a principal" as to the murders when a gun-use charge and gang charge (under section 186.22, subd. (b)) "are pled and proved"; (7) the People have the burden of proving the truth of the gun-use charge; (8) "[i]f you have a reasonable doubt that it is true, you must find it to be not true"; and (9) "[i]nclude a special finding on that question in your verdict, using a form that will be supplied for that purpose." (14RT 3177-3178, 3200-3201; 37CT 10754-10755, 10788.)

The jury presumably followed the above and all other applicable instructions. (See *Shannon*, *supra*, 512 U.S. at p. 585; *Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17.) Indeed, based on the prosecutor's vicarious liability theory urging the jury to return the section 12022.53 findings as to each appellant

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56. Section 190.2, subdivision (c), states:
Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found true under Section 190.4.

because each was liable regardless of the personal use wording of the verdict form (14RT 3210-3214, 3222-3223), the jury found that appellants: (1) "personally and intentionally discharged" a gun resulting in the murders (38CT 10927-10929, 10932-10934; see 15RT 3458-3481); and (2) committed the murders with "specific intent" to "promote, further or assist" their gang (37CT 10927-10928, 109032-10933; 15RT 3460, 3462). (See *People v. Jones* (1997) 58 Cal.App.4th 693, 710-711 (*Jones*) [form of verdict immaterial if jury's intent to convict is unmistakably expressed].)

Given the above, as to the issue of the jury's true finding on the gun-use charge as to each appellant, there clearly was no violation of the Sixth Amendment right to a trial by jury. Under *Millwee*, the factually-impossibility claim must be denied "as a matter of state or federal law." (*Millwee*, *supra*, 18 Cal.4th at p. 160; see *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026.) Hence, the Fifth, Sixth, and Eighth Amendment claims (see Satele AOB 30) equally lack merit. (See *Pride*, *supra*, 3 Cal.4th at p. 249 [denying claim that "Fifth, Sixth, and Eighth Amendments to the federal Constitution somehow preclude such a result"].) Reversal (as to the death penalty, the murder convictions, or the jury's gun-use truth findings) is consequently unwarranted. (See *Sanchez*, *supra*, 26 Cal.4th at pp. 845 ["We have upheld a murder conviction even where the jury was uncertain whether the charged defendant actually shot the victim or served as an aider and abettor"], 846 ["it has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death"].)

3. It Was Not Factually Impossible To Find That Each Appellant Fired A Gun

Finally, the jury was properly instructed, pursuant to modified CALJIC No. 17.19, that the personal gun use finding could be found "true" based on

principal liability since the shootings were committed by gang members with the specific intent to benefit their gang's criminal purposes. Thus, any confusion in the verdict forms as to whether the jury found firearm use liability based on each appellant being the actual shooter or an accomplice was not prejudicial in this case under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), or *Chapman*, *supra*, 386 U.S. 18. (See *Jones*, *supra*, 58 Cal.App.4th at pp. 715-716.)

Nonetheless, appellants fail to prove (Satele AOB 37; Nunez AOB 41, 45-51, 95-102) that "upon no hypothesis whatever" (*Bolin*, *supra*, 18 Cal.4th at p. 331) is there sufficient evidence to find that each of them could have fired the murder weapon at the victims in this case (see *Bland*, *supra*, 28 Cal.4th at p. 338; *Sanchez*, *supra*, 26 Cal.4th at pp. 848-849; *Zarazua*, *supra*, 162 Cal.App.4th at pp. 1359-1362; *Palmer*, *supra*, 133 Cal.App.4th at pp. 1150-1153). Each appellant took sole responsibility for the shootings in their separate admissions to Vasquez. Satele attacks Vasquez's credibility, and the credibility of his fellow gang member (Contreras). (Satele AOB 38-42.) These were factual issues that the jury clearly decided against appellants, and the jury's credibility decision demands deference by this Court. (See *Hovarter*, *supra*, 44 Cal.4th at pp. 996-1001; *Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

In addition to arguing evidence from Vasquez, the prosecutor argued proof that one day after the shootings, Satele bragged to Kalasa and Contreras that "I shot" the "Black guy and a Black girl" that was on the news. (14RT 3249-3250; see 7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749.) The prosecutor also argued that "when [appellants] pulled up, they stopped at [Fuller's] car, took aim and shot four rounds." (14RT 3239-3240.) The prosecutor also argued evidence that about one hour after the shootings, appellants singularly or jointly confessed to fellow gang members Contreras, Caballero, and Kelly in the DSHP playground: "I think we got one." (14RT

3247-3248; see 7RT 1597-1598, 1600-1602; 8RT 1631, 1673-1682; 9RT 2102-2104, 2106, 2109-2110; footnotes 14 and 26, *ante*.) The prosecutor emphasized the "we did that" or "we" theme in rebuttal argument to the jury. (14RT 3424, 3426-3427, 3431-3434.) Hence, in addition to arguing a vicarious liability theory (14RT 3210-3214, 3222-3223), the prosecutor clearly argued or strongly hinted to the jury that each appellant could have fired the murder weapon at the victims.

The prosecutor argued that the four bullet wounds "could happen in less than a second." (14RT 3240.) However, the expert testified that "semiautomatic" meant "you have to pull the trigger for each shot fired." (9RT 1965.) A defense expert testified that the shooter (or shooters) may have sat or stood during the shootings (footnote 28, *ante*). At that time, Frank and Bertha were in their second floor bedroom. Frank heard, "pow, pow, pow[,]" but he did not state how rapidly the shots were fired. Bertha said that she heard four to seven gunshots, then she ran to the window and saw Robinson "laying on the ground" as well as "a car accelerating" away. (5RT 988-989, 1008-1009, 1012-1015, 1028, 1030, 1036, 1053-1054, 1072-1073.) Bertha told the jury that the shots were "fast[,]" but she did not indicate how "rapid" (Satele AOB 33) the four to seven shots were fired. (5RT 1008.)[57] The evidence showed that Bertha and Frank were confused about the timing of the events. (See footnote 6, *ante*.) Vasquez testified that he heard five to seven "loud" and "real fast" gunshots, but he also stated that he did not see the shooting. (5RT 1121, 1123-1125; 6RT 1252, 1280-1281; see footnote 8, *ante*.) From the above evidence, the jury was free to find that the shootings lasted long enough for each appellant to fire a firearm.

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57. Nunez claims that Bertha "testified to a timeline that *indicates* a sequence of *rapidly* fired shots." (Nunez AOB 48 [italics].) This is sheer speculation. In other words, the jury was free to find that the overall shootings lasted long enough for each appellant to fire a gun.

Nunez claims that in this "drive-by shooting" case, "[t]he expended casings were found in a cluster, leading reasonably to the inference 'Monster' was not moved any distance between shots." (Nunez AOB 49, citing 10RT 2212-2214.) This is speculation. The cited pages from the record involves hired testimony from Nunez's gun expert who admitted, "I wasn't there that night." (10RT 2212.) This expert opined: (1) "the casings were grouped together indicating that the gun wasn't moved a great deal[;]" and (2) "the vehicle or the individual was not traveling in a line as he was shooting, but he was somewhat stationary when the shooting occurred." (10RT 2213.) These opinions were based on "reports" and "photographs" (10RT 2212) and an assumption that "the casings were not kicked about or moved" and "were not touched" after they "landed" (10RT 2211).

The jury received evidence that Frank, Bertha, and Vasquez were all in the area of the casings rending aid to the murder victims, and Vasquez assisted in halting Fuller's car after it rolled forward after the shooting. (Footnotes 6-9, *ante*; 5RT 1001-1002, 1058-1059, 1065-1066, 1071, 1090, 1126-1128, 1131-1132.) Also, the defense expert testified that it was "customary" for AK-47 casings to "bounce" or "roll" on the ground "depending on the surface they hit" and "[t]he casings do not come out exactly the same" because "they don't come out like projectiles." This expert opined that casings fired from the murder weapon "don't have what they call a stable flight or consistent flight." (10RT 2212-2213.) Given the above, the jury could infer that the four casings were moved (unintentionally or intentionally by Vasquez, Frank, Bertha, or others during rescue acts or other post-shooting events) prior to police discovery and photography (8RT 1903-1906), and thus, the defense "cluster" opinion was based on a false assumption.

Finally, during a hearing after appellants rested their case, the prosecutor argued: "I don't think they are going to get up in closing argument and say they

got out of the car, these defendants got out of the car and shot." (13RT 3081-3082.) Nunez's counsel replied:

> The witness, Your Honor, who testified as to the fact that it would appear there was a person standing there, just as well as anything else. In other words, that it was a stationary shooter.

(13RT 3082.) Satele's counsel added: "And they can tell whether it was shot from a vehicle or from outside the vehicle. That's up to the jury." (13RT 3082.) Thus, after appellants rested their case, they recognized that the jury received sufficient evidence to find that one of them fired a gun from outside the car. Since the jury could find that appellants had enough time to fire the murder weapon from outside their car, the jury could also find that each appellant had time to fire a gun.

Robinson was obviously standing at Fuller's opened driver's door when he was initially shot. Thus, the jury could find that the first shot was fired from inside the Buick Regal. Robinson's body was found about 10 feet from the trunk of Fuller's car, and he was shot about three times, i.e., in his upper left shoulder (which is not necessarily fatal), his forearm (which is equally non-fatal), and his hip (which could be fatal). (5RT 992-993, 1080-1081, 1089-1093, 1099, 1101-1102; 9RT 2012-2023, 2026-2027, 2029-2031, 2034-2035.) From this evidence, the jury could find that after one appellant fired a firearm at Robinson from inside the Buick Regal, the other appellant then shot Robinson from outside the Buick Regal. Given the above, it made sense for Satele or Nunez to tell fellow gang members Contreras, Caballero, and Kelly: "I think *we* hit one of them." (7RT 1598 [italics added].)

At any rate, during or seconds after Robinson was fatally shot from an unknown distance, while seated in the driver's seat of her parked car, Fuller was fatally shot in her left upper shoulder and right "back" area. (5RT 1131-1132; 9RT 2037, 2039-2055, 2060-2064.) Given all of the foregoing evidence,

appellants fail to prove that "upon no hypothesis whatever" (*Bolin*, *supra*, 18 Cal.4th at p. 331) is there sufficient proof to find that each of them could have fired the murder weapon. "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial." (*People v. Holt* (1997) 15 Cal.4th 619, 669 (*Holt*); see *Hovarter*, *supra*, 44 Cal.4th at pp. 996-1001.) Therefore, reversal (of either the death penalty, the murder convictions, the stayed gun-use prison terms, or the jury's gun-use special findings) is unjustified as to each appellant.

VI.

PROOF THAT SATELE HIT AN AFRICAN-AMERICAN AND PROOF OF KELLY'S $100 OFFER FOR FAVORABLE TESTIMONY WERE PROPER REBUTTAL TO DEFENSE EVIDENCE THAT APPELLANTS "LIKED" AFRICAN-AMERICANS

Appellants presented the jury with witnesses who opined that appellants (and their gang) had no racial hatred against African-Americans. Three witnesses gave such testimony on Satele's behalf: (1) Richard (Satele's father; 11RT 2467-2468); (2) Guillory (Richard's friend and Satele's high school teacher; 11RT 2526); and (3) Kelly (fellow gang member to appellants; 10RT 2396, 2398). Six witnesses gave such testimony on Nunez's behalf: (1) Nunez (12RT 2798-2802, 2814-2815, 2819, 2821, 2832-2833); (2) Espaza (a jail inmate; 10RT 2367-2368, 2372); (3) Williams (an African-American jail trustee; 10RT 2261-2262, 2264); (4) Wilson (an African-American death-row inmate; 12RT 2761-2767); (5) Oree (an African-American friend of appellants; 10RT 2286-2294); and (6) Jason (Oree's son who said he was a fellow gang member of appellants; 10RT 2310, 2322-2324). Mainly due to the above defense evidence, the jury found "not true" the charge the murders were committed because of the "race" of the victims within the meaning of section 190.2, subdivision (a)(16). (39CT 10927-10928, 10932-10933.)

At any rate, given the defense race evidence from Kelly and others, the prosecutor (over objection) presented the jury with rebuttal evidence that Phillips, about one month after the murders, heard Kelly offer Battle, an African-American, $100 to testify that "we get along with Black people." (13RT 2999-3001.) Appellants claim that testimony by Phillips was improper rebuttal evidence, violated the Eighth Amendment, and "raises due process concerns." (Satele AOB 155-164 [Arg. VII]; Nunez AOB 180 [Arg. VII], 338 [joining in Satele's contention].) The prosecutor also presented rebuttal

evidence that after the murders, a deputy sheriff saw Satele hit an African-American in jail. (13RT 3119-3131.) Appellants claim the foregoing was improper rebuttal evidence, violated Evidence Code section 352, denied a right to a fair trial, violated a "liberty" interest. (Satele AOB 188-200 [Arg. X]; see Nunez AOB 338 [joining in Satele's contention].) As will appear, there was no abuse of discretion in admitting the rebuttal evidence (see *People v. Harris* (2005) 37 Cal.4th 310, 335-336 (*Harris*)),[58] appellants forfeited some of their constitutional claims (see *Riggs*, *supra*, 44 Cal.4th at p. 292; *People v. Partida* (2005) 37 Cal.4th 428, 437-438 (*Partida*)), the constitutional claims fail, and any abuse of discretion was harmless (see *Harris*, *supra*, 37 Cal.4th at p. 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227 (*Marks*); *People v. Watson, supra*, 46 Cal.2d at p. 836.

A. Factual Discussion

1. Ruling On Evidence That Satele Hit African-American Fellow Inmate

During his guilt phase case-in-chief, the prosecutor put appellants on "notice" of his intent to present the penalty phase jury with proof that Satele had recently (two weeks ago) hit ("cold-cocked") an "Asian gang banger" fellow inmate without provocation. The court replied: "We'll argue whether or not to allow that at another time." (7RT 1321-1322.)

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58. Evidence Code section 352 states:

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

(See *Riggs*, *supra*, 44 Cal.4th at p. 290; *People v. Waidla* (2000) 22 Cal.4th 690, 724 (*Waidla*); *People v. Alvarez* (1996) 14 Cal.4th 155, 215 (*Alvarez*).)

Later, on direct-examination in Satele's defense, Satele's cousin (Darnell Demery) told the jury: (1) he had never heard Satele use "the 'N-word'" or make derogatory comments about "Black" people; (2) he had never seen Satele act aggressively, argumentatively, or physically towards anyone; (3) Satele "gets along with everybody" and does not have a temper; and (4) Satele treated "minorities" with "respect." (10RT 2451-2452.) Afterwards, the prosecutor asked (at sidebar) if he could cross-examine Demery based on evidence of Satele "attacking" inmates[59] because Satele had "opened the door" to his "character" through Demery. (10RT 2452-2454.) Satele's counsel disagreed. He argued that the door to Satele's character was not opened because there was a "huge difference" between jail "behavior" versus the "entirely different environment" of a "normal family" setting. (10RT 2452-2453.) The trial court ruled against the prosecutor because "any probative value is outweighed by the prejudicial effect." (10RT 2454.)

Finally, on direct-examination in Satele's defense, Guillory (Satele's father's friend and Satele's high school teacher) told the jury: (1) he never heard Satele show animosity towards African-Americans; (2) he never heard Satele refer to "Black people" as "niggers"; (3) Satele never caused "problems" at school; and (4) he never saw Satele behave "against" a "racial component in our society[.]" (11RT 2526-2527.) Afterwards, the prosecutor asked at sidebar if he could cross-examine Guillory based on evidence of Satele's "inter-racial" jail fights because, through Guillory and gang expert Yablonski, Satele had presented the jury with evidence that he liked, and was non-violent towards, African-Americans. (11RT 2527-2529.) As the prosecutor put it, "one time the

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59. The prosecutor submitted proof that Satele had recently (without provocation) hit two "restrained" fellow inmates, and one alleged victim was African-American. (10RT 2452, 2454.)

court ruled I couldn't get into it[,]" but they "keep bringing it up" with their witnesses. (11RT 2527.)

Nunez's counsel objected that "inter-racial inter-ethnic violence" was not proof of "animus to people of different races or ethnic groups[.]" Satele's counsel agreed, and added: (1) "we haven't asked it of every witness"; and (2) "we haven't brought anything other than [*sic*] history" of Satele. (11RT 2528.) Appellants never raised an Eighth Amendment or liberty interest claim (see *Rundle*, *supra*, 43 Cal.4th at pp. 136-137; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12) as barring rebuttal proof that Satele had hit an African-American. (Satele AOB 189-190.)

The trial court ruled that the prosecutor could question Guillory as to whether his opinion on Satele's character would change based on evidence that Satele had racially-assaulted fellow inmates. The court also ruled that the prosecutor could present the alleged inmate-assault proof to the jury on rebuttal. The court based its ruling on the fact that Guillory was the "second" character witness on the "same issue" presented to the jury by Satele. (11RT 2528-2529.)

On cross-examination, Guillory told the jury that it would be "highly unusual" if true that Satele had punched in the face a "handcuffed" African-American inmate being escorted into the jail, and this was "not the young man I knew" in high school. (11RT 2529-2530.) Also, on rebuttal, a deputy sheriff (Larry Arias) told the jury that he saw Satele (without provocation) hit an African-American (gang member) in jail. (13RT 3119-3131; see Satele AOB 188-190.)

2. Ruling On Rebuttal Testimony From Phillips As To Kelly's Offer To Battle

After appellants rested their case, a hearing ensued where Phillips was questioned as to Kelly's alleged $100 offer to Battle (Phillips's employee) for favorable trial testimony (in this case) that "we get along with Black people."

(13RT 2985.) Phillips was cross-examined by the trial court, and counsel for both appellants. (13RT 2978-2990; 38CT 10876-10879.) Phillips heard the offer while in his house seated on a sofa with Battle and Kelly, and previously, Kelly told Phillips that he was a West Side Wilmas gang member. Given the above, Phillips assumed that "we" meant the West Side Wilmas gang. Phillips also assumed that "we" meant the West Side Wilmas gang because "the associate" who Kelly was meeting (at the time of the offer to Battle) had told Phillips that Kelly was acting "weird lately" due to "a couple of guys" with "problems" stemming from "a couple" that "had gotten killed[.]" (13RT 2984-2988.)

After listening to Phillips, Satele's counsel raised a lateness objection, arguing the prosecutor's notice was "the day before" Phillips was being scheduled for rebuttal testimony. (13RT 2990.) The prosecutor (in part) replied that "the information about the hundred dollar's bribe was in the chronological log of [lead] Detective Dinlocker, which was given to the defense weeks before trial." (13RT 2991.) Also, during Satele's defense, Kelly (on cross-examination) told the jury: (1) he knew Phillips; (2) he was once inside Phillips's house in Redondo Beach when an African-American was present; and (3) he never offered $100 to an African-American man (at Phillips's house) in exchange for testimony that "Westside Wilmas and African-Americans get along[.]" (10RT 2412-2414.) Thus, the prosecutor argued (to the trial court) that testimony from Phillips was proper for the limited purpose of rebutting Kelly's denial of having made monetary offers. (13RT 2991-2992.)

Satele's counsel replied that Phillips's proposed rebuttal testimony was "remote" and "opens the door for so many different opinions as to what that means." Specifically, counsel argued: (1) there was no evidence that Phillips had "knowledge" of appellants; and (2) there was no evidence that Kelly's alleged offer involved "this particular case." Thus, counsel urged that rebuttal

testimony from Phillips should be excluded under Evidence Code section 352 because the "probative value is so small and the prejudicial value is much larger in scope than what it is doing." (13RT 2994.) Appellants never raised an Eighth Amendment objection, or claimed that they had a "liberty interest" in barring Phillips's proposed rebuttal proof. (See Satele AOB 156.)

The trial court ruled that since Phillips would be presenting the jury with evidence in "direct contradiction" of Kelly's testimony in defense of Satele, the prosecutor was "entitled" to impeach Kelly with Phillips on rebuttal under Evidence Code section 352 because "probative value outweighs the prejudicial effect." (13RT 2995-2998.) Hence, on rebuttal, Phillips told the jury that (about one month after the murders) he heard Kelly offer Battle (an African-American) $100 to testify that "we get along with Black people." (13RT 2999-3001; Satele AOB 155-157.)

B. Standard Of Review

This Court has held:

> [a]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].

(*Waidla*, *supra*, 22 Cal.4th at p. 724; see *Riggs*, *supra*, 44 Cal.4th at p. 290; *Alvarez*, *supra*, 14 Cal.4th at pp. 214-215.)

This Court has also held:

> The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.] "'[P]roper rebuttal evidence does not include a material part of the case

in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" [Citations.]

(*Harris*, *supra*, 37 Cal.4th at pp.335-336.) This Court has explained:

Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusing the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid "unfair surprise" to the defendant from confrontation with crucial evidence late in the trial.

(*People v. Young* (2005) 34 Cal.4th 1149, 1199 (*Young*).)

Error here is reviewed for prejudice under the test in *Watson*, *supra*, 46 Cal.2d at p. 836, as opposed to the federal constitutional test in *Chapman*, *supra*, 386 U.S. at p. 24. (*Harris*, *supra*, 37 Cal.4th at p. 336; *Marks*, *supra*, 31 Cal.4th at pp. 226-227.) In other words:

Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]

(*Partida*, *supra*, 37 Cal.4th at p. 439.)

Finally, this Court has held:

To the extent defendant on appeal raises a federal constitutional claim distinct from his claim that the trial court abused its discretion under Evidence Code section 352, he forfeited this claim by failing to identify that ground in his objections to the trial court.

(*Riggs*, *supra*, 44 Cal.4th at p. 292; *Partida*, *supra*, 37 Cal.4th at pp. 437-438.)

C. Analysis

1. Appellants Forfeited Eighth Amendment Claim

Appellants forfeited their Eighth Amendment claim (see Satele AOB 155, 163, 190) by failing to raise it with their Evidence Code section 352 objection (see 11RT 2528-2529; 13RT 2990-2998). (*Riggs*, *supra*, 44 Cal.4th at p. 292; *Partida*, *supra*, 37 Cal.4th at pp. 437-438; see *Thornton*, *supra*, 41 Cal.4th at pp. 462-463; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.)

2. Testimony From Phillips Was Proper Rebuttal Evidence

Phillips's rebuttal evidence was not a "collateral" issue, he was not "improperly impeached[,]" and there was no "likelihood of confusion[.]" (Satele AOB 158, 160, 162.) As Satele's witness, Kelly told the jury that he knew Phillips, he was at Phillips's house when an African-American was present, and (while there) he never offered $100 to an African-American for testimony that "Westside Wilmas and African-Americans get along[.]" (10RT 2412-2414.) As the court put it, Phillips's rebuttal was a "direct contradiction" of Kelly's denial (13RT 2996), and "[e]vidence tending to contradict a witness's testimony is relevant for purposes of impeachment" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1025 (*Cunningham*)). In short, Phillips's proof was "made necessary" due to Kelly's denial. (See *Harris*, *supra*, 37 Cal.4th at p. 336.) Also, since Kelly's denial occurred in Satele's defense case, the "substance" of Phillips's proof "had already been conveyed to the jury" prior to Phillips's rebuttal testimony. (See *Young*, *supra*, 34 Cal.4th at p. 1199.) Thus, Phillips was not an "unfair surprise" to appellants. (See *Id.*)

Finally, there was nothing unduly prejudicial in Phillips's rebuttal proof because: (1) Kelly was not on trial; (2) the meaning of "we" was never explained to the jury by Phillips; (3) Kelly had admitted to the jury that he was in the same gang as appellants; (4) appellants had presented the jury with nine

witnesses (including Kelly) who said that appellants got along with African-Americans; (5) the substance of Kelly's offer ("we" get along with African-Americans) did not harm appellants; and (6) the jury received an admonition as to Phillips (14RT 3168).

Hence, the court did not "clearly" err (Satele AOB 159) in allowing Phillips to rebut Kelly's denial. Instead, there was no abuse of Evidence Code section 352 discretion. (*Harris*, *supra*, 37 Cal.4th at pp. 335-336; *Young*, *supra*, 34 Cal.4th at pp. 1199.)

3. Testimony From Deputy Sheriff Was Proper Rebuttal Evidence

It is not "clear" that the deputy sheriff's proof should have been excluded (Satele AOB 193), or that his rebuttal was "outside the scope of the California statutory scheme" (Satele AOB 195). "[T]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24; accord *In re Lucas* (2004) 33 Cal.4th 682, 733.) Here, after defense testimony that Satele liked African-Americans and was not aggressive towards them, there was no abuse of discretion in a deputy sheriff's rebutting the claim by telling the jury that he saw appellant hit a handcuffed African-American inmate without provocation. (13RT 3119-3131.) The deputy sheriff's rebuttal was "made necessary" by Satele's defense that he liked, and was not aggressive against, African-Americans. (See *Harris*, *supra*, 37 Cal.4th at p. 336; *Young*, *supra*, 34 Cal.4th at p. 1199.)

The court had barred the prosecutor from offering bad-character evidence. (10RT 2454.) But, after Satele kept asked his witnesses to tell the jury that he liked African-Americans and would not hit them due to race, fairness required that the court allow the prosecutor to rebut such claim with

proof that Satele had hit an African-American for no apparent reason other than race. The "full context" of Satele's "behavior" could only be "examined" (Satele AOB 194) with admission of the deputy sheriff's rebuttal. "A defendant who offers evidence of his or her good character widens the scope of the evidence of bad character that may be introduced in rebuttal." (*Cunningham*, *supra*, 25 Cal.4th at p. 1024.) As the court stated, Guillory was the second character witness on the "same issue" offered to the jury by Satele. (11RT 2528-2529.) The deputy sheriff was not "unfair surprise" (*Young*, *supra*, 34 Cal.4th at p. 1199), and the prosecutor did not commit "misconduct" or "withhold" the deputy sheriff's evidence (Satele AOB 196-199).

Finally, the rebuttal (Satele punched an inmate) was not unduly prejudicial given that appellants were charged with killing people during a "drive-by" with armor-piercing bullets from an AK-47 rifle. The jury received cautionary "character" instructions. (14RT 3169-3170.)

Therefore, the trial court properly denied an Evidence Code section 352 objection.

4. Constitutional Claims Lack Merit

Assuming, without conceding, the constitutional claims "were properly preserved for review [citation], they are without merit" because "the trial court did not err in admitting the rebuttal testimony." (See *Young*, *supra*, 34 Cal.4th at p. 1200.)

5. Assuming Arguendo Error, Appellants Suffered No Prejudice

Satele argues:

> Appellant anticipates that respondent may argue the issue is moot or the error is harmless because the hate crime special circumstance was found not true.

(Satele AOB 162.) Respondent's position is the foregoing. Nevertheless, Satele speculates:

> the prejudicial impact of this testimony was profound and extended far beyond the narrow issue of the hate crime special circumstance.

(Satele AOB 162.) Respondent disagrees. Also, as noted, appellants presented the jury with nine witnesses (including Kelly) who opined that appellants got along with African-Americans. Thus, the rebuttal testimony (that someone other than appellants may have tried to bribe a man and that Satele may have punched a fellow jail inmate without provocation) was not "profound."

The above is particularly true as to Satele because the jury received proof that one day after the murders, he bragged (to Contreras and Kalasa) that he fired bullets from the AK-47 rifle at the "Black girl and Black guy" in Harbor City that was "in the news." Satele also alleged: (1) he was alone in the car when he shot the murder victims; and (2) Nunez was "in his house." (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749; 9RT 1937-1938; footnote 15, *ante*.) Given Satele's above admission to Contreras that he was a shooter, plus the fact that the "race" special circumstance charge was found not true by the jury, it is not "reasonably probable the verdict would have been more favorable" to Satele had the rebuttal testimony been excluded. (See *Partida*, *supra*, 37 Cal.4th at p. 439.) As this Court has held:

> the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the "reasonable probability" standard of *Watson*, *supra*, 46 Cal.2d at page 836. [Citations.]

(*Marks*, *supra*, 31 Cal.4th at p. 227.) Satele's *Chapman* reliance (Satele AOB 160, 195) fails under settled precedent. (*Partida*, *supra*, 37 Cal.4th at p. 439; *Harris*, *supra*, 37 Cal.4th at p. 336; *Marks*, *supra*, 31 Cal.4th at p. 227.)

Nunez suffered no prejudice because he personally told the jury that he was with his girlfriend (Guaca) and their baby in Guaca's bedroom at the time of the murders. Guaca and her mother (Lopez) swore to the jury that Nunez's claim was true. Despite live alibi testimony from these three witnesses, the jury found Nunez guilty of the murders, found true that he was liable for the firearm use, and found true that he committed the murders for his gang's criminal purpose. In other words, since the jury clearly found that Nunez and his alibi were not credible, it is not reasonably possible that a result more favorable to Nunez would have been reached had the rebuttal evidence testimony been omitted.

Indeed, the jury listened to a recording of Nunez telling Satele what he thought about African-Americans. (See footnote 24, *ante*.) The jury heard Nunez declare: (1) "I believe in segregation"; (2) "I can't stand how" African-Americans "get loud"; (3) "I don't like them to [*sic*] much by me"; and (4) "I just want all [*sic*] Black, no Black people, woods straight woods" for a jury. (12RT 2854-2855, 2858-2862, 2864.) Given Nunez's own comments as to his bias against African-Americans, plus the fact that the "race" special circumstance charge was found not true, it clearly is not reasonably probable that a result more favorable to Nunez could have been reach had the rebuttal testimony been excised.

Finally, even if the "odds" were "astronomical" (Satele AOB 160), the jury clearly received proof that appellants individually and separately confessed to Vasquez that they shot the victims. Later, Vasquez identified photographs of appellants and Caballero at separate six-pack line-ups. Vasquez told police that Satele looked like a passenger in the Buick Regal (owned by Kelly; 10RT 2393, 2445) and that he saw Caballero driving in the area of the murders shortly before commencement. (6RT 1156-1160, 1203-1208, 1210-1213, 1225-1230, 1272-1274, 1315; 7RT 1347, 1351-1352, 1362, 1364, 1367-1369, 1391-1395,

1398-1399, 1407, 1453; 8RT 1867, 1876-1878; 9RT 1937-1938.) The jury also received evidence that about one hour after the murders, Satele told two fellow gang members (Kelly and Contreras in the presence of Caballero and Nunez), "we were out looking for niggers[,]" then Satele or Nunez added, "I think we hit one of them." (7RT 1597-1598, 1600-1602; 8RT 1631, 1673-1682; 9RT 2102-2104, 2106, 2109-2110.) Further, the jury received proof that appellants jointly purchased the AK-47 rifle used to kill the victims, the weapon was found in a car with appellants merely one day after the murders, the rifle (when found) had 26 bullets in a clip that held 30 bullets, and police found four murder-weapon casings at the murder scene. (8RT 1772, 1793-1809, 1812-1815, 1821, 8RT 1903-1906; 9RT 1945, 1954-1955, 1963, 1965-1967, 1969-1987, 1992, 1999, 2012-2013, 2021, 2024-2025, 2029-2031, 2037, 2039, 2043-2044, 2053-2054, 2155-2157, 2160-2161; see footnote 13, *ante*.)

Given the above, any error in admitting the rebuttal testimony was unquestionably harmless under *Watson*. (See *Partida*, *supra*, 37 Cal.4th at p. 439; *Harris*, *supra*, 37 Cal.4th at p. 336; *Marks*, *supra*, 31 Cal.4th at p. 227.) Any error here also was "harmless beyond a reasonable doubt" (Satele AOB 160-161, 195). (See *Fulminante*, *supra*, 499 U.S. at pp. 307-308; *Chapman*, *supra*, 386 U.S. at p. 24.) Reversal is thus unwarranted. (See *Marks*, *supra*, 31 Cal.4th at p. 227 ["Although we apply *Watson*, we note that the result would be the same under *Chapman*"].)

VII.

A VOUCHING CLAIM WAS FORFEITED BY A FAILURE TO REQUEST AN ADMONITION, AND THERE WAS NO PREJUDICE (ASSUMING ARGUENDO THERE WAS PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT)

Appellants claim that the prosecutor's argument was misconduct by "vouching for a witness" (see 14RT 3232, 3404-3405, 3411), and "arguing inconsistent factual theories" as to shooter versus aider (see Argument V, *ante*). As to vouching, the court sustained the objections (14RT 3232, 3405), and appellants did not request an admonition. As to arguing inconsistent factual theories, appellants do not claim that the prosecutor's guilt phase argument was factually inconsistent. Instead, they claim it was misconduct for the prosecutor to argue at the penalty phase that Satele was the shooter given that he argued at the guilt phase that he did not prove who was the shooter. (Satele AOB 201-208 [Arg. XI]; Nunez AOB 205-210 [Arg. IX].) Also, for the first time, appellants claim that the alleged error violated the Eighth Amendment. (Satele AOB 206-207.) As will appear, appellants forfeited an Eighth Amendment claim, a "vouching" claim was forfeited by the failure to request an admonition, and there was no prejudice (assuming arguendo there was misconduct). (See 14RT 3204-3271 [prosecutor's closing argument], 3395-3434 [prosecutor's rebuttal argument].)

A. Standard Of Review

"Improper remarks by a prosecutor can "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*People* v. *Earp* (1999) 20 Cal.4th 826, 858 (*Earp*) [citation omitted]; see *Darden, supra*, 477 U.S. at p. 181; *Donnelly* v. *DeChristoforo* (1974) 416 U.S.

637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431] (*DeChristoforo*).) Also, this Court has held:

> "[C]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"

(*Earp*, *supra*, 20 Cal.4th at p. 858 [citations omitted].)

B. Analysis

1. Appellants Forfeited An Eighth Amendment Claim

Appellants did not raise an Eighth Amendment claim during the challenged argument (see Satele AOB 206-207), and they fail to prove that such analysis "requires a legal analysis similar to" a due process claim. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8.) They thus forfeited Eighth Amendment review. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

2. Appellants Forfeited A Vouching Claim

"To preserve a misconduct claim a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the misconduct claim preserved for review." (*People v. Cook* (2006) 39 Cal.4th 566, 606 (*Cook*), citing *Earp*, *supra*, 20 Cal.4th at p. 858.)

As to vouching, the prosecutor gave the following (challenged) closing argument:

> He [Vasquez] identified Curly [Caballero] as the driver of that Buick. Isn't it amazing that Curly just happened to be with Speedy [Nunez] and Wil-Bone [Satele] earlier and it was brought out that he [Caballero] was with them later, that Ernie Vasquez hit the nail on the head? He

identified Curly. What a coincidence. Because I guarantee that is the truth. What he testified to was corroborated.

(14RT 3232; see Satele AOB 201.) Nunez's counsel objected to the "guarantee" comment, and the trial court sustained his objection. (14RT 3232.) Appellants did not request an admonition, and they fail to demonstrate that "an admonition would not have cured the harm" (*Cook*, *supra*, 39 Cal.4th at p. 606). Thus, they forfeited a "vouching" claim as to the foregoing.[60/]

Also, as to the recording of appellants played in court for the jury, the prosecutor gave the following (challenged) rebuttal argument:

> [A]ll you have to do is listen to his own words. Listen to Daniel Nunez'[s] own words track 2 at 2250, you will hear [*sic*] defendant's counsel says you can't hear this stuff on the CD. You will hear it. I will back up my words. You will hear this. You will hear [Nunez] say, I want black and then he thinks a – no Blacks. There is a hesitation they'll just think it's another – and unfortunately the click noise. What does that tell you about his feelings? We know what's going on in this mind of [Nunez]. They can't justify it. The only way they can justify it you won't hear that on the CD. I will stake my reputation on it. You listen [*sic*] that tape, that CD at that point, and you will hear it.

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60. Nunez claims the trial court "overruled" his objection "in language from which it might be readily inferred the defense objection had no legal basis, from which it might be inferred in turn that the prosecution's guarantee was good." (Nunez AOB 205.) Satele equally asserts:

> When the defense objected to this "guarantee," the judge overruled the objections, *stating only*, "Your objection is improper argument. State a legal objection."

(Satele AOB 201 [italics added].) The record clearly states:

> THE COURT: Your objection is improper argument. Please make a legal basis. [¶] *Sustained*. Carry on.

(14RT 3232 [italics added].) Simply put, the above claims fail because the trial court "sustained" Nunez's objection. (14RT 3232.)

(14RT 3404-3405; see Satele AOB 201.) Nunez's counsel objected to the "guarantee" by the prosecutor, and the court "sustained" the objection. (14RT 3405.) Appellants did not request an admonition, and they fail to prove that "an admonition would not have cured the harm" (*Cook*, *supra*, 39 Cal.4th at p. 606). Thus, they forfeited a "vouching" claim as to the foregoing.[61]

3. There Was No Prejudice (Assuming Arguendo There Was "Vouching")

This Court has held:

> The general rule is that improper vouching for the strength of the prosecution's case "'involves an attempt to bolster a witness by reference to facts outside the record.'" [Citation.] Thus, it is misconduct for prosecutors to vouch for the strength of their case by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation.] Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. [Citations.]

(*People* v. *Huggins* (2006) 38 Cal.4th 175, 206-207 (*Huggins*).)

As to Vasquez's identification of Caballero as the driver of the car seen before the murders, the prosecutor argued: "I guarantee that is the truth." (14RT 3232.) As to his belief that appellants "can't justify" their recorded opinions about African-Americans, the prosecutor argued: "I will stake my reputation on it." (14RT 3404-3405.) Given the circumstances, especially the sustaining of the defense objections and the prosecutor's express

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61. Here, appellants concede that the trial court "sustained" their objection. (Nunez AOB 205-206; Satele AOB 201.)

acknowledgment to the jury that he should not have made the latter comment (see 14RT 3411), neither comment infected the trial with unfairness as to make the resulting conviction a denial of due process. (See *Darden*, *supra*, 477 U.S. at p. 181; *Earp*, *supra*, 20 Cal.4th at p. 858.) Indeed, it is "'not enough'" that the challenged misconduct is "'undesirable or even universally condemned.'" (*Darden*, *supra*, 477 U.S. at pp. 180-181.) What matters is whether a defendant received a fair trial despite the alleged misconduct. (*Id.* at p. 181.) This is so because "'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'" (*Rose v. Clark* (1986) 478 U.S. 570, 579 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Cunningham*, *supra*, 25 Cal.4th at p. 1009.) Here, while the challenged arguments may have been undesirable or even universally condemned, appellants clearly received a "fair trial" (see Nunez AOB 205) despite the alleged misconduct.

As appellants emphasize (Satele AOB 205-206), at the guilt phase, the prosecutor argued to the jury: "I did not prove to you who the actual shooter was[.]" (14RT 3211.) Thus, even if the prosecutor's challenged remarks were improper, appellants received a fair trial because the prosecutor also argued that he had failed to prove who had actually shot the victims. The prosecutor made the latter argument even though (as shown) the jury received overwhelming evidence that each appellant were involved in the firing their jointly purchased AK-47 rifle at the victims. (See Argument V, *ante*.) Here, Satele admits: "It is true that in the guilt phase there was evidence of two admissions by [him] as to his involvement[.]" (Satele AOB 206.) Earlier in his opening brief, Satele conceded: "it is true that there was some evidence that could support a finding that both defendants shot the victims" given their "admissions to that effect" to Vasquez and Contreras. (Satele AOB 37, 42.) In other words, appellants received a fair trial despite the challenged remarks because the prosecutor also

argued to the jury that he did not prove who had actually shot the victims, despite overwhelming evidence that each appellant was involved in the shooting of the victims.

Also, as to Vasquez having told the truth about Caballero being the driver at the murders, the only contradictory evidence involved Satele. Indeed, the jury received evidence that one day after the murders, Satele bragged that when he fired bullets from the AK-47 rifle at the "Black girl and Black guy" in Harbor City that was "in the news[,]" he was alone in a black car, and Nunez was "in his house." (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749; 9RT 1937-1938; footnote 15, *ante*; Satele AOB 11.) The jury rejected this testimony, which was overwhelmingly refuted by the other evidence presented at trial, as previously discussed.

Further, Nunez personally told the jury that he was with his girlfriend (Guaca) and their baby in Guaca's bedroom at the time of the murders. (See 12RT 2836-2847, 2885-2888, 2900-2905; 13RT 2929-2930, 2932-2933; footnote 24, *ante*.) Guaca and her mother (Lopez) swore to the jury that Nunez's alibi testimony was true. (See 11RT 2543-2556, 2572, 2575-2581, 2587-2594, 2598-2599, 2607-2629, 2679-2680, 2689-2708, 2713-2716, 2724-2732, 2875; footnote 26, *ante*.) Also, in Satele's defense, Kelly testified that Contreras was untrustworthy because he was "under the influence" of "meth, crystal" the "vast majority" of the time involving the murders and the drug played "tricks" on Contreras's mind. (10RT 2407-2409.) Kelly further testified that various people had access to (and could have used) the murder weapon at the time of the killings. (10RT 2435-24-38; see footnote 23, *ante*.)

Despite all of the above defense and alibi evidence, the jury found Nunez guilty of the murders, and found true that Nunez shot the victims to benefit his gang's criminal purpose. (38CT 10925-10929.) In other words, this

case was not "closely balanced." (See Nunez AOB 208.) The prosecutor's challenged remarks to which objections were sustained, plainly did not deprive appellants of a fair trial.

Moreover, as Nunez states, "credibility issues cast a long shadow over Vasquez's testimony." (Nunez AOB 208.) Here, appellants attacked Vasquez's credibility due to: (1) his criminal past; (2) his former gang involvement; (3) his drug use at the time of the murders; (4) his alleged cooperation with police in exchange for benefits as to his pending criminal cases; (5) his alleged desire to get a $50,000 reward for capturing the killers; and (6) his flight from the murder scene prior to police arrival. Thus, appellants received a fair trial (despite the challenged arguments) because the jury heard defense evidence impeaching Vasquez's testimony.

Additionally, as to the challenge to the prosecutor's "reputation" rebuttal remark, as appellants concede, soon after the remark, the prosecutor argued to the jury:

> I shouldn't say I state [*sic*] my reputation. You be the judge you [*sic*]. Listen you [*sic*], judge for yourself.

(14RT 3411; see Nunez AOB 206; Satele AOB 201.) In other words, after the lawyers for both appellants clearly failed to request an admonition (see 14RT 3404-3405), the prosecutor properly admonished the jury to "judge for yourself" rather than rely on "my reputation" (14RT 3411). Thus, the prosecutor's prior "reputation" remark was not prejudicial (Nunez AOB 208). (See e.g., *Middleton v. McNeil* (2004) 541 U.S. 433, 438 [124 S.Ct. 1830, 158 L.Ed.2d 701] (*McNeil*) [noting that any jury instruction "ambiguity" was properly resolved by prosecutor's argument].)

Nunez claims, "the jury is bound to have a high regard for the Deputy District Attorney, who, they have been told, is a representative of the People." (Nunez AOB 209.) Here, the trial court properly instructed the jury that

"statements made by the attorneys during the trial are not evidence" (14RT 3155), and the jury presumably followed the instruction (see *Shannon*, *supra*, 512 U.S. at p. 585).[62] This Court (and the United States Supreme Court) has confirmed:

> [A]rguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to

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62. Citing and quoting *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316] (*Boyde*), the United States Supreme Court has held:

> "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'"

(*McNeil*, *supra*, 541 U.S. at p. 437.) Here, besides the instruction that "statements made by the attorneys during the trial are not evidence" (14RT 3155), the trial court also properly instructed the jury that: (1) "evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact" (14RT 3157-3158); (2) "you must determine what facts have been proved from the evidence and not from any other source" (14RT 3154); (3) "you must not be influenced by pity for or prejudice against a defendant" (14RT 3154); (4) "a defendant in a criminal trial has a constitutional right not to be compelled to testify" and you must not draw any inference from the fact that a defendant [Satele] does not testify" (14RT 3171-3172); (5) "a defendant in a criminal action is presumed to be innocent until the contrary is proved" and "this presumption places upon the People the burden of proving him guilty beyond a reasonable doubt" (14RT 3176); (6) "you are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether the statement is true in whole or in part" (14RT 3172-3173); (7) "you are not bound by an opinion" and "give each opinion the weight you find it deserves" and "you may disregard any opinion if you find it to be unreasonable" (14RT 3175); and (8) "any conflict in the evidence of defendant's character and the weight to be given to that evidence is for you to decide" (14RT 3170). The jury presumably followed the foregoing (and all other) instructions. (See *Shannon*, *supra*, 512 U.S. at p. 585.) Here, clearly: "The jury was not left without any judicial direction." (*Brown v. Payton* (2005) 544 U.S. 133, 146 [125 S.Ct. 1432, 161 L.Ed.2d 334] (*Payton*).)

the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."

(*People v. Mendoza* (2007) 42 Cal.4th 686, 703 (*Mendoza*), citing *Boyde*, *supra*, 494 U.S. at p. 384; see *Payton*, *supra*, 544 U.S. at pp. 141-147; *McNeil*, *supra*, 541 U.S. at p. 438.)

Finally, as noted the trial court sustained objections to the challenged "vouching" remarks. (14RT 3232, 3405; see footnote 60-61, *ante*.)

Given the above, the prosecutor's challenged remarks did not violate due process. Indeed, assuming arguendo the prosecutor violated state "vouching" law (see *Huggins*, *supra*, 38 Cal.4th at pp. 206-207), as demonstrated, since appellants received a fair trial, any state law error was harmless under the test in *Watson*, *supra*, 46 Cal.2d at page 836. Appellants must prove that there is a "reasonable likelihood" his jury construed or applied the complained-of methods in an "objectionable fashion." (*Cunningham, supra,* 25 Cal.4th at pp. 1001-1002.) Since both alleged "vouching" objections were sustained by the trial court and appellants did not request admonition to the jury, appellants cannot prove there is a reasonable likelihood the jury construed or applied the "vouching" remarks in an objectionable fashion. Here, the jury found untrue special charges that: (1) appellants committed the murders due to race; and (2) appellants committed the shooting due to race, while acting in concert. (38CT 10927-10928, 10932-10933.) Given all of the above, it is not reasonably probable that a result more favorable to appellants would have been reached had the prosecutor omitted his alleged "vouching" arguments. Thus, reversal is unjustified here.

4. Appellants Forfeited A "Factually Inconsistent" Claim

Appellants claim it was misconduct for the prosecutor to argue at the penalty phase that Satele was the shooter given that he argued at the guilt phase

that he did not prove who was the shooter. (Satele AOB 205-206.) They did not object on such grounds during the prosecutor's penalty phase argument. Also, they never timely raised such claim in the trial court. Thus, they forfeited review of their "misconduct" claim. (See *Cook*, *supra*, 39 Cal.4th at p. 606.)

5. There Was No Factually Inconsistent Argument At The Guilt Phase

Appellants do not claim that the prosecutor's guilt phase argument was factually inconsistent as to each of them. (See Satele AOB 205-206.) The prosecutor argued that both appellants were certainly involved in the murders, even though the evidence might be less than clear as to which one of them actually killed the two victims. Thus, they have no basis for urging that the prosecutor committed misconduct by giving a "factually inconsistent" argument at the guilt phase when he suggested that Satele shot the victims.

Also, if the prosecutor had expressly argued at the penalty phase that Satele was the sole shooter after specifically arguing at the guilt phase that Nunez was the sole shooter, then appellants would perhaps have a legitimate basis for a claim that the prosecutor argued "factually inconsistent" theories in violation of federal or state law. Here, however, there was nothing "factually inconsistent" in a prosecutor arguing to a guilt phase jury that both appellants were surely involved in the shooting murders of the two victims, and pointing out to the same jury at the penalty phase that the evidence tended to show that one particular co-defendant was more likely the actual "shooter" or killer.

Appellants cite *In re Sakarias* (2005) 35 Cal.4th 140 (*Sakarias*), but that case involved conflicting theories of guilt presented at the "separate trials of two defendants[.]" (Satele AOB 205.) In *Sakarias*, this Court held:

> [W[e conclude that fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, *in separate trials*, a criminal act only one defendant could have committed.

(*Sakarias*, *supra*, 35 Cal.4th at pp. 155-156 [italics added].) *Sakarias* does not establish that there was misconduct in this case involving the same jury at one trial. *Sakarias* is also distinguishable because this is not a case where "only one defendant could have committed" the murder. (*Id.*) As shown (Argument V, *ante*), here, the jury received overwhelming evidence that each appellant "could have committed" shootings leading to the murders and were positively involved in the murders. In other words, the prosecutor in this case clearly did not argue to the penalty phase jury a "false factual basis" in a "search for truth[.]" (*Sakarias*, *supra*, 35 Cal.4th at p. 156.) Also, appellants do not accuse the prosecutor of changing theories "between the two trials" through "deliberate manipulation of the evidence put before the jury[.]" (*Ibid.*) Hence, *Sakarias* does not aid appellants here.

As in their "factually impossible" claim, appellants cite *Tison*'s progeny, *Edmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (*Enmund*). (Satele AOB 207.) As shown (Argument V, *ante*), since appellants were not prosecuted for felony-murder, their reliance on *Tison*, *supra*, 481 U.S. 137, or *Enmund, supra*, 458 U.S. 782, is misplaced.

Instead, as shown (see Argument V, *ante*), the jury in this case was not required to unanimously agree on which appellant was the "shooter" and which appellant was the "aider" as long as the jury found each appellant guilty beyond a reasonable doubt of liability for being a shooter as defined by the gun-use statute (§ 12022.53, subd. (d)) and charged in the information. (See *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026; *Millwee*, *supra*, 18 Cal.4th at p. 160; *Pride*, *supra*, 3 Cal.4th at pp. 249-250.) This is true "as a matter of state or federal law." (*Millwee*, *supra*, 18 Cal.4th at p. 160.) Hence, there seemingly is no "misconduct" when a prosecutor argues to a penalty phase jury that the evidence it previously heard at the guilt phase

tended to show that a particular co-defendant had shot a murder victim even though he or she made no similar argument to the same jury at the guilt phase.

Accordingly, an "inconsistent factual theories" claim (Satele AOB 205-208) fails.

6. There Was No Prejudice Due To Alleged "Factually Inconsistent" Theories

Finally, any "misconduct" here was not prejudicial to appellants. In the context of a proven factually inconsistent theory involving *separate* trials, this Court has held in *Sakarias*:

> The prejudice question is in these circumstances a complex one, involving two questions as to each petitioner and each culpability-increasing act inconsistently attributed to petitioners; for each petitioner we ask, first, whether the People's attribution of the act to the petitioner is, according to all the available evidence, probably false or probably true, and, second, whether any probably false attribution of a culpability-increasing act to the petitioner could reasonably have affected the penalty verdict.

(*Sakarias*, *supra*, 35 Cal.4th at p. 164.) Since this case did not involve separate trials, the above prejudice test does not apply here. Nevertheless, in *Sakarias*, this Court held: "We need not decide here what result obtains when the likely truth of the prosecutor's inconsistent theories *cannot* be determined[.]" (*Sakarias*, *supra*, 35 Cal.4th at p. 164 [italics in original].) Here, the "likely truth" of the prosecutor's allegedly inconsistent theories can be determined.

First, the guilt phase jury received evidence that one day after the killings, Satele bragged (to Contreras and Kalasa) that he fired bullets from the AK-47 rifle at the "Black girl and Black guy" in Harbor City that was "in the news." (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749; 9RT 1937-1938; footnote 15, *ante*.) In other words, the prosecutor's penalty phase

argument (that Satele was a shooter) was "probably true" within the meaning of *Sakarias*, and thus, Satele clearly suffered no prejudice as to the penalty verdict that he received. (See *Sakarias*, *supra*, 35 Cal.4th at pp. 164["Only as to the defendant convicted or sentenced by use of the probably false theory can it be said the prosecution has presented a materially false picture of the defendant's culpability"], 167-168.)

Further, the prosecutor had argued that each appellant was liable for the murders, and the jury returned death verdicts as to both Satele and Nunez. Nunez had presented an alibi defense, and the balance of the aggravating versus mitigating evidence was not greater as to him than Satale at the penalty phase. As discussed (Argument V, *ante*), the jury received powerful proof to convict each appellant for the firing of their AK-47 rifle to benefit their gang's criminal purpose. Finally, as shown (footnote 62, *ante*), the guilty phase jury in this case "was not left without any judicial direction" (*Payton*, *supra*, 544 U.S. at p. 146). In short, assuming, without conceding, the alleged "misconduct" was error, there is overwhelming evidence in the record to find beyond a reasonable doubt that the prosecutor's penalty phase argument (that Satele was a shooter) "played no role in the penalty decision" as to appellants (see *Sakarias*, *supra*, 35 Cal.4th at p. 166), and there is no reasonable possibility there would have been any different result in the absence of the challenged remarks (see *People v. Abilez* (2007) 41 Cal.4th 472, 526-527 (*Abilez*)). Reversal is therefore unwarranted here.

VIII.

THERE WAS NO ERROR IN OMITTING CALJIC NO. 8.31

An "implied-malice second degree murder" instruction is in CALJIC No. 8.31.[63/] (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1235, fn. 34 (*Bunyard*).) Satele omitted CALJIC No. 8.31 from his written list of 79 requested instructions. (37CT 10683-10684.) On May 22, 2000 (after appellants rested their case), counsel discussed CALJIC No. 8.31 at a hearing on proposed instructions (13RT 2926, 2978, 3011-3102; 38CT 10876-10879). The prosecutor said CALJIC No. 8.31 did not apply because it involved "a wreckless [*sic*] driving-type thing or something[,]" and, "I think the instructions we have incorporate second degree murder."[64/] The court asked: "Do you

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63. When appellants were tried in 2000, CALJIC No. 8.31 provided:

> Murder of the second degree is [also] the unlawful killing of a human being when:
>
> 1. The killing resulted from an intentional act,
>
> 2. The natural consequences of the act are dangerous to human life, and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

(See *People v. Jackson* (1989) 49 Cal.3d 1170, 1199, fn. 8 (*Jackson*); Satele AOB 59-60, fn. 10.)

64. Later, with no defense opposition, the jury was instructed on "unpremeditated murder of the second degree" (CALJIC No. 8.30). (37CT 10770; 13RT 3043.) At defense request, the jury was instructed to make a special finding on "intentional discharge of firearm from vehicle" if it found that the killings were second degree murder (CALJIC No. 8.35.2). (37CT 10771.) Finally, the jury was instructed on degree of murder (CALJIC No. 8.70), what to do if it had a "doubt" as to whether the killings were first or second degree murder (CALJIC No. 8.71), and unanimity as to first or second degree murder versus manslaughter (CALJIC No. 8.74). (37CT 10772-10774.)

agree[?]" Satele's counsel answered: "Well, I have some of my own in my package." The court replied: "I'll get to yours in a second." Nunez's counsel said: "I thought we had second degree included." Both the court and prosecutor replied: "Yes." The court added: "All right. [¶] The second degree issue has been addressed in the other instruction." (13RT 3071; see Satele AOB 64; Nunez AOB 111.)

Appellants did not object. Now, they claim CALJIC No. 8.31 should have been given "sua sponte[,]" and its omission violated the Sixth and Eighth Amendments and denied a liberty interest (see *Rundle*, *supra*, 43 Cal.4th at pp. 136-137; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12). (Satele AOB 59-72 [Arg. II]; Nunez AOB 103-125 [Arg. III].) As will appear: (1) constitutional claims were forfeited; (2) any error was invited (see *Thornton*, *supra*, 41 Cal.4th at p. 436; *Bunyard*, *supra*, 45 Cal.3d at pp. 1234-1236); (3) there was no substantial proof of "implied malice" for a sua sponte duty (see *Bunyard*, *supra*, 45 Cal.3d at pp. 1232-1234); and (4) any error was harmless under *Watson*, *supra*, 46 Cal.2d. 818 (*People v. Rogers* (2006) 39 Cal.4th 826, 867-871 (*Rogers*); *People v. Coddington* (2000) 23 Cal.4th 529, 593 (*Coddington*), overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, superseded on other grounds by statute as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107; *People* v. *Breverman* (1998) 19 Cal.4th 142, 176-178 (*Breverman*); *Jackson*, *supra*, 49 Cal.3d at p. 1199).

A. Standard Of Review

This Court has held:

"The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." [Citation.]

> For the doctrine to apply, "it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." [Citation.] However, [t]he existence of some conceivable tactical purpose will not support a finding that defense counsel invited an error in instructions. The record must reflect that counsel had a deliberate tactical purpose." [Citation.]

(*Bunyard*, *supra*, 45 Cal.3d at p. 1234; see *Thornton*, *supra*, 41 Cal.4th at p. 436.)

At any rate, a trial court has a sua sponte duty to instruct on general principles of law that are closely and openly connected with the evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 115 (*Valdez*); *People v. Lopez* (1998) 19 Cal.4th 282, 287; see *Jackson*, *supra*, 49 Cal.3d at p. 1199.) But, instruction is warranted only if there is "substantial" evidence for it. (*Rogers*, *supra*, 39 Cal.4th at pp. 866-867; *Coddington*, *supra*, 23 Cal.4th at p. 591; *Breverman*, *supra*, 19 Cal.4th at p. 162.) Indeed, the existence of any evidence, no matter how weak, will not justify instructions. (*Breverman*, *supra*, 19 Cal.4th at p. 162.) In other words, """[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense."""" (*Valdez*, *supra*, 32 Cal.4th at p. 116.)

In short, sua sponte instruction is unwarranted when there is no evidence that the offense was less than that charged. (*Bunyard*, *supra*, 45 Cal.3d at p. 1232.) This Court has held:

> In a first degree murder case, the trial court therefore need not have instructed sua sponte on the necessarily included offense of second degree murder on a theory of implied malice unless there was evidence sufficient to deserve consideration by the jury, i.e., evidence by which

a jury composed of reasonable persons could have concluded that defendant had acted intentionally but without express malice.

(*Id.* at p. 1233 [citations omitted.].)[65/]

Finally, if a jury finds "a premeditated, deliberate, first degree murder, any error in failing to instruct on implied-malice second degree murder would clearly be harmless." (*Jackson*, *supra*, 49 Cal.3d at p. 1199; see *Coddington*, *supra*, 23 Cal.4th at p. 593.) Otherwise, error here is generally reviewed for prejudice under *Watson*, *supra*, 46 Cal.2d. at page 836. (*Rogers*, *supra*, 39 Cal.4th at pp. 867-868; *Coddington*, *supra*, 23 Cal.4th at p. 593; *Breverman*, 19 Cal.4th at pp. 176-178.) However, this Court has held:

> There is an exception to [the *Watson*] rule when the failure to instruct on a lesser included offense rises to the level of a federal constitutional violation because it renders the capital verdict unreliable under the Eighth Amendment. [Citation.] There also may be an exception when the error deprives the defendant of the federal due process right to present a complete defense. [Citation.]

(*Rogers*, *supra*, 39 Cal.4th at p. 868, fn. 16; see Satele AOB 68; Nunez AOB 115-116.)

B. Analysis

1. Appellants Forfeited Liberty Interest And Sixth/Eighth Amendment Claims

Appellants did not raise a Sixth or Eighth Amendment claim (Satele AOB 60-61, 68, 72; Nunez AOB 104, 106, 124) or a "liberty interest" claim (Nunez AOB 124) at trial (13RT 3071), and they do not prove that such analysis (see *Rogers*, *supra*, 39 Cal.4th at p. 868, fn. 16) "requires a legal analysis similar to" a sua sponte instructional error claim (see *Lewis*, *supra*, 43

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65. Satele cites *Bunyard* in his opening brief. (Satele AOB 182.)

Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8). They thus forfeited constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

2. Appellants Are Barred From Review Under The Invited Error Doctrine

As noted, Satele omitted CALJIC No. 8.31 from his written list of 79 requested instructions. (37CT 10683-10684.) Also, after the prosecutor argued that CALJIC No. 8.31 did not apply, the court asked: "Do you agree, counsel[?]" Satele's counsel replied: "Well, I have some of my own in my package." (13RT 3071.) Thus, Satele's counsel agreed that CALJIC No. 8.31 did not apply to this case because he had his own (different) proposed second degree murder instructions. Nunez's counsel added: "I thought we had second degree included." (13RT 3071.) Nunez's counsel was correct. Earlier, the court had asked defense counsel: "[CALJIC No.] 8.30 unpremeditated murder of the second degree [see footnote 64, *ante*], any objection?" Nunez's counsel answered: "No." Satele's counsel replied: "No." (13RT 3043.)

Counsel for each appellant did not act out of an "ignorant or mistaken impression that no instruction on second degree murder on an implied-malice theory" was warranted under the facts at trial. (See *Bunyard*, *supra*, 45 Cal.3d at p. 1235.) Also, in *Bunyard*, where this Court found invited error, the record did not show "whether CALJIC No. 8.31 was ever discussed at the instructional conference or expressly waived[.]" (*Id.* at p. 1235, fn. 34.) Here, CALJIC No. 8.31 was discussed at the instructional conference, and defense counsel stated that they had a different idea as to how the jury should be instructed on second degree murder. (13RT 3071.)

Here, counsel did not decide to go "all-or nothing." Instead, they arguably invited the trial court to abstain from giving CALJIC No. 8.31 because they tactically wanted the jury to consider second degree murder as defined in

CALJIC No. 8.30. Over the prosecutor's objection, the court granted the defense request for CALJIC No. 8.35.2 (second degree murder for "intentional discharge of firearm from vehicle"). (37CT 10771; 13RT 3082.) Thus, counsel encouraged the trial court to instruct on second degree murder without using CALJIC No. 8.31.

Hence, appellants tactically agreed with the prosecutor that CALJIC No. 8.31 did not apply. Thus, they are banned from seeking review because error (if any) was invited by them. (See *Thornton*, *supra*, 41 Cal.4th at pp. 435-436; *Bunyard*, *supra*, 45 Cal.3d at pp. 1234-1236.)

3. No Substantial Evidence Warranted CALJIC No. 8.31 Sua Sponte

Appellants claim: "Although there was substantial evidence of second degree implied malice murder, the court failed to instruct the jury on this lesser included offense" and this was "clearly" error. (Satele AOB 61; Nunez AOB 106.) Satele urges: "In this case, there was ample evidence from which the jury could have concluded the killings were second degree murder." (Satele AOB 63.) Nunez alleges: "substantial evidence showed that Robinson and Fuller were the random victims of a rapidly executed drive-by shooting rather than the selected targets of a carefully planned shooting carried out in a particular and exact manner." (Nunez AOB 108-109.) Respondent disagrees with all of the above assertions.

First, speculation of "one shooter" is not "substantial evidence" of implied malice for CALJIC No. 8.31 as to the "non-shooter[.]" (See Satele AOB 65-67; Nunez AOB 113-114.) Here, both appellants were tried on the theory of, and found to have participated in, as a principal or aider and abettor, the premeditated murders by use of a firearm for the benefit of their gang. Also, speculation of "random" or "rapidly" is not substantial proof of implied malice for CALJIC No. 8.31 in this case, based upon the evidence showing the

use of an armor-penetrating firearm jointly purchased by appellants to intentionally kill the victims during a drive-by type shooting for the benefit of their gang. (See Nunez AOB 108-109.) Moreover, appellants claim: "The physical and testimonial evidence regarding [their] intent is neither overwhelming nor are they substantial." (Satele AOB 72; Nunez AOB 124.) The record totally proves otherwise.

Satele did not testify, and the jury heard no alibi or mitigating evidence as to him. Indeed, the jury received proof that one day after the killings, Satele bragged that when he fired bullets from the AK-47 rifle at the "Black girl and Black guy" in Harbor City that was in the news, he was alone in the car. (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749; 9RT 1937-1938.) Thus, there was positively no evidence of "implied malice" as to Satele. Instead, all evidence made Satele unequivocally guilty of express malice first degree murder due to being a cold-blooded (late night) drive-by type shooter of well-aimed, fatal armor-piercing bullets fired from an AK-47 rifle at unarmed strangers in a rival gang's turf.[66/] The jury also received evidence that one day after the killings, after a car was pulled over for traveling with turned-off headlights at 3:40 a.m., police caught Satele fleeing from the front passenger seat where police found the murder weapon. (See footnote 12, *ante*; 8RT 1772, 1793-1809, 1812-1815, 1821; 9RT 1945, 1954-1955, 1963, 1965-1967, 1972-1975, 1986-1987, 1999.) The foregoing established that Satele shot the victims with express malice, and that he was looking for others to kill when he was captured.

Satele notes trial evidence that Nunez told Vasquez that he shot Robinson because Robinson had "looked at him wrong[.]" (Satele AOB 60.)

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66. Contreras told police that Satele bragged that while "driving" in Harbor City "he saw a Black guy or Black girl hugging or kissing or something and he just shot them." (8RT 1707.)

Satele's reliance on Vasquez is truly remarkable given that at trial: (1) the main defense was that Vasquez's proof was unbelievable (see Nunez AOB 116); and (2) there was evidence that Satele bragged that Nunez was "in his house" when Satele alone committed the charged shootings (8RT 1704, 1707; footnote 15, *ante*). At any rate, turning a car around to fire an AK-47 rifle at someone giving a "wrong" look is not substantial evidence of "implied malice."

Further, Nunez told the jury that he was at Guaca's apartment at the time of the killings, and Guaca and her mother gave corroborating alibi testimony in his defense. In other words, either Nunez had an alibi, or he was totally guilty of express malice first degree murder based upon his confessions to Vasquez and other evidence presented by the prosecution to show that regardless of whether he was a shooter or aider and abettor, he was a fully liable participant in the first degree murders of the victims. Thus, the jury received no substantial proof that Nunez "acted intentionally but without express malice" to warrant CALJIC No. 8.31 sua sponte. (See *Bunyard*, *supra*, 45 Cal.3d at p. 1233.)

Nunez contends: "The prosecution presented no evidence as to the actions or the mental state of any of the car's occupants prior to and at the time of the shooting." (Nunez AOB 116.) Respondent disagrees. (See footnote 66, *ante*.) Vasquez told the jury that on January 7, 1999, while in a jail "pod" in Lynwood (6RT 1213-1227, 1302-1303; 7RT 1374-1375, 1384-1387, 1415-1424, 1428-1429, 1436-1438, 1442-1443, 1450-1451, 1479-1486; 9RT 1936-1937), Nunez asked Vasquez, "Did you hear about those niggers that got killed in your neighborhood?" (6RT 1225). After Vasquez replied, Nunez raised "two hands" like he was holding a gun and admitted, "I did that shit." Nunez said that he was "driving down the street" and "the guy looked at him wrong so he turned around and blasted him." (6RT 1225-1226; 9RT 1937-1939; footnote 17, *ante*.) Vasquez also told the jury that in a downtown Los Angeles county jail holding cell on December 3, 1998 (6RT 1199-1211,

1227, 1302-1306, 1312-1315; 7RT 1356-1357, 1360-1362, 1373-1374, 1415-1419, 1425-1427, 1436, 1457-1460, 1463-1465, 1470-1472; 9RT 1933-1934, 1937), Satele confessed to Vasquez, "we did that" or "I did that" shooting and "I AK'd them" or "we AK'd them" (6RT 1210-1211; 7RT 1362, 1364, 1453; 9RT 1937-1939; Satele AOB 9, 36-37). Thus, the jury heard evidence of "selected targets of a carefully planned shooting carried out in a particular and exact manner." (See Nunez AOB 108-109.)

The jury received proof that appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (kill enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960, 2090-2093.) The jury also received evidence that about one hour after the killings, appellants singularly or jointly confessed to fellow gang members in the DSHP playground: "I think we got one." (14RT 3247-3248; see 7RT 1597-1598, 1600-1602; 8RT 1631, 1673-1682; 9RT 2102-2104, 2106, 2109-2110.) Coupled with physical evidence, which included the use of armor piercing bullets for well-aimed shots that killed both victims, the mental state of each appellant was indisputably established at trial, and showed they participated in the deliberate, premeditated, and cold-blooded murders of the two victims for the benefit of their gang.

Simply put, the jury received no "substantial evidence" that the killings were less than that charged. (See *Bunyard*, *supra*, 45 Cal.3d at p. 1232.) Thus, the court had no sua sponte duty to give CALJIC No. 8.31.

4. Error (If Any) Was Harmless

Satele claims: "The state of the evidence makes it impossible to conclude that beyond a reasonable doubt that [*sic*] a different result would not have been reached had the jury been instructed on second degree murder committed with implied malice." (Satele AOB 69.) Nunez agrees. (Nunez AOB 116.) Appellants admit that this Court's *Breverman* majority held that *Watson* generally applies, but they claim this Court must use *Chapman* under Justice

Kennard's dissenting analysis in *Breverman*. (Satele AOB 68; Nunez AOB 115-116.)

First, since the jury found appellants guilty of deliberate first degree murder, any error in failing to instruct on implied-malice second degree murder was clearly harmless even under this Court's other precedent. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 85 (*Lancaster*); *Coddington, supra*, 23 Cal.4th at p. 593;[67] *Jackson, supra*, 49 Cal.3d at p. 1199 ["we need not and do not decide whether, on the particular facts of this case, the court should have instructed on second degree 'implied malice' murder" because "in view of the jury having found a premeditated, deliberate, first degree murder, any error in failing to instruct on implied-malice second degree murder would clearly be harmless"], citing *People v. Sedeno* (1974) 10 Cal.3d 703, 720-721 (*Sedeno*).) Indeed, given the evidence in this case, the jury could easily find appellants guilty of express malice first degree murder based on either: (1) CALJIC No. 8.20 (deliberate killing; see 14RT 3186; 37CT 10768); (2) CALJIC No. 8.25.1 (drive-by murder; see 37CT 10769; 14RT 3188); or (3) CALJIC No. 8.22 (murder by destructive device or explosive or armor-piercing ammunition; see 14RT 3188; 37CT 10788). (See Satele AOB 59; Nunez AOB 103.) The fact that the jury rejected a second degree murder option, when considered with all the evidence, establishes that any error in failing to give a different second degree murder instruction was harmless. (See *Abilez, supra*, 41 Cal.4th at p. 516.)

Alternatively, here, as previously demonstrated, the "evidence of intent to kill was 'overwhelming[.]'" (See *Coddington, supra*, 23 Cal.4th at p. 593.) Also, the jury received CALJIC 2.02 instruction on what to do "if the evidence as to any specific mental state was susceptible of two reasonable

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67. Appellants cite *Coddington, supra*, 23 Cal.4th at pp. 591-594. (Satele AOB 70; Nunez AOB 121.)

interpretations[.]" (*Ibid.*; see 37CT 10718.) Further, the jury was "clearly instructed that first degree murder required not only an intentional killing, but one that is deliberate and premeditated" under CALJIC No. 8.20. (See *Rogers*, *supra*, 39 Cal.4th at p. 868; see 37CT 10766-10767.) Moreover, the jury received CALJIC No. 8.71, i.e., that appellants must receive the benefit of any doubt as to whether the killings were first or second degree murder. (See *Rogers*, *supra*, 39 Cal.4th at p. 868; 37CT 10733; footnote 64, *ante*.) Thus, any error was harmless under *Watson*, *supra*, 46 Cal.2d. at page 836. (See *Rogers*, *supra*, 39 Cal.4th at pp. 867-868; *Coddington*, *supra*, 23 Cal.4th at p. 593; *Breverman*, 19 Cal.4th at pp. 176-178.)

Indeed, Nunez testified that he was at Guaca's house at the time of the killings, and Guaca and her mother gave corroborating alibi testimony. Thus, Nunez clearly was not deprived of a right to present a complete defense due to omission of CALJIC No. 8.31. (See *Rogers*, *supra*, 39 Cal.4th at p. 872 ["Because defendant was allowed to present the defense he chose, followed by jury instructions he agreed to, he was not denied due process by being deprived of the opportunity to present a complete defense"].)

Similarly, Satele elected not to testify, and Kelly told the jury (in Satele's defense) that Contreras's evidence was untrustworthy. Satele's father gave defense testimony that Satele was a West Side Wilmas gang member, but Satele was not biased against African-Americans. Appellants presented the jury with defense witnesses who said that appellants had no racial hatred towards African-Americans, and the jury found not true the special allegation that appellants: (1) killed the victims due to race; and (2) acted in concert with a race-based motivation. Further, appellants clearly tried to impeach Vasquez's credibility. As shown, the jury received two varieties of second degree murder instructions. (See footnote 64, *ante*.)

Accordingly, appellants were not deprived of a right to present a complete defense due to omission of CALJIC No. 8.31. Instead, any error was harmless beyond a reasonable doubt (see *Chapman*, *supra*, 386 U.S. at p. 24), and the capital verdict was reliable (see *Rogers*, *supra*, 39 Cal.4th at p. 868, fn. 16), for all the reasons discussed in this section. Reversal of the murder convictions (and death penalty) is therefore unjustified here.

IX.

THE JURY WAS ADEQUATELY INSTRUCTED AS TO THE SECTION 186.22(B)(1) GANG PURPOSE CHARGE

On counts 1 and 2, the jury found true the gang charge. (38CT 10928, 10933.) Appellants claim these findings must be struck because the trial court erroneously instructed on the substantive offense under subdivision (a)(1) of section 186.22 rather than the "enhancement" under subdivision (b)(1), and error denied a "liberty interest" and violated the Fifth, Sixth, and Eighth Amendments. (Satele AOB 73-83 [Arg. III]; Nunez AOB 126-138 [Arg. IV].) As will appear, they forfeited review, but if not, the jury was adequately instructed. Also, reversal is unjustified because error (if any) was harmless under *Watson, supra*, 46 Cal.2d at p. 836. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320-321, 326-327 (*Sengpadychith*).)

A. Introduction

Subdivision (b)(1) of section 186.22 is an enhancement as to most gang-related crimes, but it was not an "enhancement" here because appellants were convicted of a felony (first degree murder) that was punishable by death or prison for an indeterminate term of life. Thus, in this case, a true finding as to subdivision (b)(1) resulted in the potential use of an "alternative" scheme, i.e., a 15-year minimum prison term under subdivision (b)(5). (*Sengpadychith, supra*, 26 Cal.4th at 320-321, fn. 2; see *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6; *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Subdivision (b)(1) of section 186.22 also allowed each appellant to be liable for the firearm use under the applicable section 12022.53, subdivision (e)(1).

About one month after the jury's gang finding in this case, the high court held:

Other than the fact of a prior conviction, *any fact that increases the*

penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.

(*Apprendi*, *supra*, 530 U.S. at p. 490 [italics added].) [68] Here, appellants were convicted of first degree murder with the multiple murder special circumstance, which has a statutory maximum of "death[.]" (§ 190, subd. (a).) Thus, in this case, subdivision (b)(1) of section 186.22 did not increase the penalty "beyond the prescribed statutory maximum" within the meaning of *Apprendi*. This Court has explained:

> A defendant sentenced to life imprisonment for a gang-related crime is statutorily required to serve at least 15 years of that sentence before becoming eligible for parole. Because for this category of offenses the gang statute does not increase the maximum penalty for the crime, the failure to instruct on the primary activities requirement [or other element in subdivision (b)(1) of section 186.22] does not violate the federal Constitution. In that situation, therefore, *Apprendi* does not apply. Instead, it is a matter of state law error, subject to the test this court articulated in [*Watson* fully cited therein], which asks whether without the error it is "reasonably probable" the trier of fact would have reached a result more favorable to the defendant. [Footnote.]

(*Sengpadychith*, *supra*, 26 Cal.4th at pp. 320-321.) Thus, if there was instructional error, *Watson* applies as to the gang purpose finding under subdivision (b)(1) of section 186.22 in this case.[69]

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68. The high court filed *Apprendi* on June 26, 2000, i.e., after the jury's (May 31, 2000) true finding on the gang charge in this case.

69. In urging that *Chapman* applies, appellants fail to cite *Sengpadychith* even though they cite CALJIC No. 17.24.2, and that CALJIC's comment cites *Sengpadychith*. (See Satele AOB 74, 79; Nunez AOB 129, 133.)

Here, as to the gang purpose charge, the jury received CALJIC No. 6.50.[70] About four years earlier, in 1996, this Court held:

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70. CALJIC No. 6.50 instructed the jury in this case as follows:

Defendant is accused in counts 1 and 2 of having violated section 186.22, subdivision (b) of the Penal Code, a crime.

Every person who actively participates in any criminal street gang with knowledge that the members are engaging in or have engaged in a pattern of criminal gang activity, and who *willfully promotes, furthers, or assists* in any felonious criminal conduct by members of that gang, is guilty of a violation of Penal Code section 186.22, subdivision (b), a crime.

"Pattern of criminal gang activity" means the commission of, or attempted commission of, or solicitation of sustained juvenile petition for, or conviction of two or more of the following crimes, namely, murder and assault with deadly weapon, provided at least one of those crimes occurred after September 23, 1988 and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons.

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities, (1) the commission of one or more of the following criminal acts, murder and assault with deadly weapon, (2) having a common name or common identifying sign or symbol, and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Active participation means that the person (1) must have a current relation with the criminal street gang that is more than in name only, passive, inactive or purely technical, and (2) must devote all, or a substantial part of his time or efforts to the criminal street gang.

Felonious criminal conduct includes murder and assault with deadly weapon. In order to prove this crime, *each of the following elements* must be proved:

1. A person *actively and currently participated* in a criminal street gang;

2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

3. That person knew that the gang members engaged in

Under either provision [subdivisions (b)(1) or former (c) of section 186.22], the offense of which the defendant is convicted in the present case must have been "committed for the benefit of, at the direction of, or in association with any *criminal street gang*" and the defendant must have committed the offense with "the specific intent to promote, further, or assist in any criminal conduct" by members of the street gang. [Citation.] As we noted at the outset, subdivision (f) of section 186.22 defines the terms "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more" criminal acts enumerated in subdivision (e) of the statute, [footnote] and which has "a common name or common identifying sign or symbol, [and] whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*." (Italics added.) Subdivision (e) of section 186.22 defines the phrase "pattern of criminal gang activity" as "the commission, attempted commission, or solicitation of *two or more*" (italics added) of the offenses enumerated in that subdivision "provided at least one of those offenses occurred after the effective date of this chapter [September 26, 1988,] and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons."

(*People v. Gardeley* (1996) 14 Cal.4th 605, 615-616 (*Gardeley*).)

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or have engaged in a pattern of criminal gang activity; and

4. That person *aided and abetted* a member of that gang in committing the crimes of murder and assault with deadly weapon.

(37CT 10761-10762 [italics added]; 14RT 3180-3183.)

About seven years after the filing of *Gardeley* (or about three years after the trial herein), CALJIC No. 17.24.2 was created. It instructs on subdivision (b)(1) of section 186.22. Thus, here, the trial court could not (and did not) give CALJIC No. 17.24.2.[71]

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71. CALJIC No. 17.24.2 instructs as follows:

> It is alleged in Count[s] _____ that the crime[s] charged [was] [were] committed for the *benefit of, at the direction of, or in association with* a criminal street gang, with *specific intent to promote, further, or assist* in any criminal conduct by gang members.
>
> "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, _____, (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
>
> "Pattern of criminal gang activity" means the [commission of] [, or] [attempted commission of] [, or [conspiracy to commit] [, or] [solicitation of [, or] [sustained juvenile petition for] [, or] [conviction of] two or more of the following crimes, namely _____, provided at least one of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions, or by two or more persons.
>
> The phrase "primary activities," as used in this allegation, means that the commission of one or more of the crimes identified in the allegation, be one of the group's "chief" or "principal" occupations. This would of necessity exclude the occasional commission of identified crimes by the group's members. In determining this issue, you should consider *any expert opinion evidence offered*, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crime[s] charged in this proceeding.
>
> The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.
>
> Include a special finding on that question, using the form that will be supplied to you.

B. Appellants Forfeited Fifth, Sixth, And Eighth Amendment Claims

Appellants urge that instructional error as to the gang purpose finding violated the Fifth, Sixth, and Eighth Amendments. (Satele AOB 76-80.) Nunez adds that a "liberty interest" was violated, and he never received "notice" of the gang charge. (Nunez AOB 128, 135.) The amended information alleged subdivision (b)(1) of section 186.22 on counts 1 and 2. (37CT 10674-10676.) As to that charging document, appellants denied the special allegations at their arraignment. (37CT 10679, 10681.) Thus, a "notice" claim positively lacks factual support in the record. As to constitutional claims, appellants never asserted such claims at trial, and they fail to prove that such analysis is similar to their present instructional error claim. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; see *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.) They thus forfeited constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

C. Satele Individually Forfeited Alleged Instructional And Constitutional Error

When proposed instructions were discussed, the trial court asked: "[CALJIC No.] 6.50 [see footnote 70, *ante*], gang crime, any objection?" Satele's counsel immediately replied: "I have no objection." (13RT 3041.) Nunez's counsel did not claim that CALJIC No. 6.50 was erroneous in that it

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> The *essential elements* of this allegation are:
>
> 1. The crime[s] charged [was] [were] committed for the *benefit of, at the direction of, or in association with* a criminal street gang; and
>
> 2. [These] [This] crime[s] [was] [were] committed with the *specific intent to promote, further, or assist* in any criminal conduct by gang members.

(Italics added.)

allegedly omitted elements required for a gang purpose finding under subdivision (b)(1) of section 186.22. Nunez also did not allege that CALJIC No. 6.50 violated a liberty interest (see *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12) and his rights under the Fifth, Sixth, and Eighth Amendments. His counsel merely objected on grounds that there allegedly was insufficient proof of a "pattern of criminal gang activity" under CALJIC No. 6.50. (13RT 3042.)

Later, in the presence of the jury, Nunez's counsel objected when the prosecutor asked his police gang expert witness the following "hypothetical" question:

> I want it clear, just so we can understand this; in your expert opinion, if on the evening after you had contact with Curly [Caballero, see footnote 2 and 17, *ante*], Speedy [Nunez] and Wil-Bone [Satele] they were in a vehicle and that vehicle went to the area of 254th and Frampton, and Edward Robinson and Renesha Ann Fuller were gunned down and murdered with four rounds from a Norinco Mak-90, that those facts are true, in your opinion, your expert opinion, that crime was it committed with the *specific intent* [italics added] to promote, further or assist in the criminal activity of West Side Wilmas?

(9RT 2110.) Nunez's counsel objected on grounds that the expert's answer to the jury would be a "legal conclusion." The trial court "overruled under the phrasing of the question." (*Ibid.*) Thus, before the jury received CALJIC No. 6.50, Nunez's counsel either understood that a "specific intent" element existed in CALJIC No. 6.50, or counsel forfeited appellate review of a claim that CALJIC No. 6.50 erroneously omitted a specific intent element (see footnote 70, *ante*). Satele's counsel was present when Nunez's counsel objected to the gang expert's "legal conclusion" on specific intent. Hence, Satele must have believed that a "specific intent" element existed in CALJIC

No. 6.50, or he forfeited a claim that CALJIC No. 6.50 erroneously omitted a specific intent element.

After CALJIC No. 6.50 was read to the jury, the prosecutor immediately requested a hearing. There, he said that his "only problem" with CALJIC No. 6.50 concerned the definition of "criminal street gang" because the court had limited the evidence available to prove the charge. After some discussion, the trial court asked, "Any objections." (14RT 3183.) Satele's counsel replied:

> Well, if you are going to recite the code book, you should have recited it in full content. *I think that what you have recited, based upon the evidence of this case, I think that is sufficient.* The reason to go – to add to it, it's the evidence is clear to what it is. *I don't know why we need to go any deeper.*

(14RT 3183-3184 [italics added].) Since Nunez's counsel had no objection, the court ruled, "I'm going to go, ahead and leave the [CALJIC No. 6.50] instruction as it is." (14RT 3184.) Thus, at the above hearing, appellants never urged that CALJIC No. 6.50: (1) denied a liberty interest; (2) violated the Fifth, Sixth, and Eighth Amendments; and (3) was error in that it omitted a "specific intent" element and a "benefit of, at the direction of, or in association with" element.

During closing arguments, the prosecutor (in part) argued to the jury:

> The last element of that gang allegation is that this crime [murder] was committed *for the benefit of that gang*. [Italics added.] You heard me question [police gang expert] Julie Rodriguez. She testified it was, in her opinion. [¶] You also can see it from People's [Exhibit] 43 from the actions of Wil-Bone [Satele] against [jail inmate] Mr. Keys [shown through rebuttal evidence] that they [appellants] did this [murder] to promote their gang.

(14RT 3222.) Thus, as to the gang purpose charge, the prosecutor properly told the jury that he had a burden to prove that appellants committed the murder to "benefit" or "promote" their gang.

After the jury heard the foregoing, Satele's counsel argued to the jury that Satele was a West Side Wilmas gang member who had a "strange sense" of loyalty and "code of silence within the gang." (14RT 3346.) Counsel added it is "undisputed" that Satele "was a passenger" in a car where the murder weapon was found about "30 hours after the shooting[.]" Counsel also argued: "We don't know how the shooting occurred, because no one saw it. The experts say it was from a stationary position in the street on Frampton." (14RT 3353.) Counsel added that the murder weapon was a "gang gun" or "belongs to the gang." (14RT 3363, 3384-3385.) Counsel also argued that according to the defense gang expert, "'we' refers to the gang in bragging about the gang, not the individual." In other words, counsel argued to the jury that even if Satele told Vasquez that "we" committed the killings, such admission did not necessarily mean that Satele was a shooter because a true shooter "would take personal credit" instead of saying "we" did it. (14RT 3364.) However, counsel argued that "bragging" could "improve" Satele's gang "status." (14RT 3383.) Counsel also argued: Satele's "confession is false. It's not truthful, because he didn't know what really happened, only what he heard about on the news or what his buddy told him was on the news." (14RT 3384.) Thus, as to the gang purpose charge, counsel did not argue to the jury that Satele lacked "specific intent" or that the murders did not "benefit" Satele's gang. Instead, Satele's counsel essentially argued to the jury that there was insufficient evidence to find that Satele was a shooter and/or present during the killings. (See 14RT 3385, 3392.)

Here, Satele admits it "does not appear" that he objected to CALJIC No. 6.50, but he claims he "should not be precluded from raising this issue on

grounds of waiver" because: (1) under section 1259, instructional errors that affect "substantial rights" are not waivable; (2) trial courts have a sua sponte duty to give correct instructions on "elements" of an crime; and (3) there is no waiver if objection would be "futile" and "there is no reason to suspect that the trial court would have ruled in a different manner" if he had objected (under the Fifth, Sixth, and Eighth Amendments) given that Nunez "unsuccessfully objected" to CALJIC No. 6.50 "albeit on the ground the prosecution had failed to present evidence of a pattern of criminal gang activity." (Satele AOB 74-75, fns. 15-16.) Respondent disagrees.

It would not have been "futile" to object on grounds raised in this appeal, i.e., that CALJIC No. 6.50 was erroneous because it allegedly omitted a "specific intent" element and a "benefit" element. In 1996 (about four years prior to the trial herein), this Court held that such elements existed. (*Gardeley*, *supra*, 14 Cal.4th at pp. 615-616.) Thus, this is not a case where a court could not quickly remedy alleged instructional error after a timely objection by the accused. (See 13RT 3041-3043.) As shown, a "specific intent" element was mentioned in the prosecutor's hypothetical question to a police gang expert. (9RT 2110.) Also, without objection, a "benefit" element was admitted to the jury by the prosecutor during his closing argument. (14RT 3222.) Thus, appellants and the jury clearly knew that the prosecutor was required to prove the elements of specific intent and benefit. (See *People v. Hart* (1999) 20 Cal.4th 546, 622 [defendant may not complain on appeal that an instruction that is correct in law and responsive to the evidence was incomplete, unless defendant requested clarifying language].) Finally, it would not have been futile for appellants to add that the alleged error denied a "liberty interest" and violated the Fifth, Sixth, and Eighth Amendments. Hence, appellants jointly forfeited alleged error, or Satele individually forfeited appellate review.

D. The Jury Was Adequately Instructed On All Elements As To The Gang Charge

Clearly, CALJIC No. 6.50 (footnote 70, *ante*) contained all essential elements in CALJIC No. 17.24.2 (footnote 71, *ante*) except the "specific intent" phase and the "benefit of, at the direction of, or in association with" phrase (see *Gardeley*, *supra*, 14 Cal.4th at pp. 615-616). However, there was no error in this case because the jury was adequately instructed on the above two elements as follows:

1. The Jury Was Adequately Instructed On The "Specific Intent" Element

As to specific intent, CALJIC No. 6.50 instructed that there must be proof that the accused "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" (footnote 70, *ante*). "The use of the word 'willfully' in a penal statute usually defines a general criminal intent, absent other statutory language that requires 'an intent to do a further act or achieve a future consequence.'" (*People v. Atkins* (2001) 25 Cal.4th 76, 85 (*Atkins*); see *People v. Licas* (2007) 41 Cal.4th 362, 366.) Here, CALJIC No. 6.50 instructed that "willfully" meant an intent to do a further act or achieve a future consequence, i.e., promoting, furthering, or assisting felonious criminal conduct by fellow gang members through active participation.

CALJIC No. 6.50 instructed that "active participation" meant the defendant: "(1) must have a *current relationship* with a criminal street gang that was *more than in name only, passive, inactive or purely technical*, and (2) must devote *all, or a substantial part of his time or efforts to the criminal street gang*." (37CT 10761-10762 [italics added]; see 14RT 3219-3220 [prosecutor's argument on above elements].) Thus, CALJIC No. 6.50 adequately instructed the jury that "willfully" meant an intent to do a further act or achieve a future consequence beyond the charged murder, i.e., specific intent. This explains

why the prosecutor asked the police gang expert to opine to the jury whether appellants committed the murders with the "specific intent to promote, further or assist in the criminal activity" of their gang, i.e., to benefit their gang. (9RT 2110.)

CALJIC No. 6.50 also instructed that there must be proof that the accused "aided and abetted" a fellow gang member in committing the murder (footnote 70, *ante*). CALJIC No. 1.01 instructed the jury to consider all instructions "as a whole and each in light of all" others. (37CT 10711; see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220; *People v. Howard* (2008) 42 Cal.4th 1000, 1026 (*Howard*).) CALJIC 3.01 instructed on aiding and abetting as follows:

> A person aids and abets the commission of a crime when he or she,
>
> (1) with knowledge of the unlawful purpose of the perpetrator and
>
> (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) by act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(37CT 10755.) The mental state required for liability as an aider and abettor is "specific intent." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131 (*Mendoza*); see *Ledesma, supra*, 39 Cal.4th at p. 719 ["a reasonable juror would have understood that the intent element required in order to find defendant guilty of the crime of murder under the aiding and abetting instructions was a

'specific intent or mental state'"]; *Atkins*, *supra*, 25 Cal.4th at pp. 92-93.) Moreover, "[w]hen the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator[,]'" and "this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).) Here, CALJIC No. 3.31 instructed the jury that murder (counts 1 and 2) required evidence of "specific intent in the mind of the perpetrator." (37CT 10758.)

Given the above, as to the gang charge under subdivision (b)(1) of section 186.22, the jury in this case was adequately instructed that the murder must have been committed with "specific intent to promote, further, or assist" the criminal street gang's criminal conduct. (See *Gardeley*, *supra*, 14 Cal.4th at pp. 615-616.)

2. The Jury Was Adequately Instructed On Benefit, Direction, Or Association

Simply put, the jury was adequately instructed on the "benefit of, at the direction of, or in association with" element as follows.

First, as noted, the jury received CALJIC No. 1.01 ("instructions as a whole"). (37CT 10711.) The jury also received CALJIC No. 2.90 ("reasonable doubt"). (37CT 10753.) Moreover, as shown, CALJIC No. 6.50 instructed that "active participation" meant the accused: "(1) must have a current relationship with a criminal street gang that was more than in name only, passive, inactive or purely technical, and (2) must devote all, or a substantial part of his time or efforts to the criminal street gang." (Footnote 70, *ante*.) From the above, the jury was required to deduce that to find the gang charges true, there had to be proof beyond a reasonable doubt that appellants (at the very least) committed the murders "in association with" their gang. As to "pattern of criminal gang

activity" defined in CALJIC No. 6.50, the jury was properly instructed that it could consider proof that the defendant committed the charged murders. Thus, CALJIC No. 6.50 (coupled with CALJIC No. 2.90) adequately instructed the jury that to find the gang charges true, there must be evidence beyond a reasonable doubt that the charged murders were committed for the "benefit of, at the direction of, or in association with" the defendant's gang. All CALJIC No. 17.24.2 did when it was adopted years after the trial in this case was highlight or pinpoint such element. (See footnote 71, *ante*.)

Further, while CALJIC No. 17.24.2 contains no language on aiding and abetting, CALJIC Nos. 2.90 and 6.50 instructed the jury in this case that there must be evidence beyond a reasonable doubt that the defendant "aided and abetted" a fellow gang member in committing the charged murder. (37CT 10762.) As previously shown, the mental state for aiding and abetting is "specific intent." (*Atkins*, *supra*, 25 Cal.4th at p. 92.) Also, this Court has held:

> an aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." [Citation.]

(*Prettyman*, *supra*, 14 Cal.4th at p. 259.) As noted, the jury received CALJIC No. 3.01 (aiding and abetting instructions) in this case. (37CT 10755; footnote 77, *post*.) Given the above, the jury was adequately instructed that to find the gang charges true, there must be evidence beyond a reasonable doubt that the charged murders were committed for the "benefit of, at the direction of, or in association with" the defendant's gang. Indeed, as noted, during closing argument, the prosecutor admitted to the jury that he had the burden to proving that appellants committed both murders to "benefit" or "promote" their gang. (14RT 3222.)

Hence, there was no instructional error as to the gang finding on counts 1 and 2.

E. Any Error Was Harmless Due To Overwhelming Evidence Of A Gang Purpose

For the same reasons that there was no instructional error, any error was harmless. As to the alleged missing elements ("specific intent" and "benefit"), the prosecutor argued to the jury that he had to prove that appellants committed both murders to "benefit" or "promote" their gang. (14RT 3222.) Also, after the prosecutor asked the police gang expert whether the murders were committed with the "specific intent to promote, further or assist the criminal activity" of the West Side Wilmas, the expert opined to the jury that appellants had the requisite specific intent. (9RT 2110.) Thus, here, the jury was aware of the alleged missing elements before it deliberated. In other words, any error was harmless under *Watson*, *supra*, 46 Cal.2d at p. 836 (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 320-321, 327; footnote 69, *ante*), and *Chapman*, *supra*, 386 U.S. at p. 24 (assuming, without conceding, *Chapman* applies).

Besides the instructional error claim, Nunez adds that there was insufficient proof to find that the shootings were for a gang purpose. (Nunez AOB 40.) Respondent disagrees (see Argument V, *ante* [standard of review as to claims of insufficient evidence]).

Before deliberating, the jury received proof (from fellow gang member Contreras) that at the time of the murders appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (killed enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960.) Also, the police gang expert opined to the jury that hardcore West Side Wilmas gang members such as appellants would do "anything that's going to benefit" their gang "all the way up to murder." (9RT 2091, 2093.)

Moreover, the jury received evidence that the murders were committed in a rival gang's "turf[,]" and such area was defined as a "neighborhood" where gang members "let the other gangs" know that "they should stay" away. (9RT 2093-2094, 2100-2102.) Appellants committed the murders in turf claimed by two gangs (Harbor City Boys and Harbor City Crips), and the police gang expert told the jury she had "never" seen West Side Wilmas gang members in such turf. (9RT 2101-2102, 2140.) The police gang expert opined to the jury that the "only reason" why three West Side Wilmas gang members, i.e., the driver (Caballero) and his fellow gang member passengers (appellants), would be driving in "Harbor City" turf at night armed with an AK-47 type semi-automatic rifle containing "armor piercing bullets" would be to "commit a murder" in a "drive by" (or similar) manner with "specific intent to promote, further or assist in the criminal activity" of their gang. (9RT 2102-2104, 2109-2110.) The expert added that a West Side Wilmas gang member would never "venture" alone into the area of the murder. (9RT 2140; footnote 15 *ante*.) This Court has held that expert testimony may be sufficient to prove elements under subdivision (b)(1) of section 186.22. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

The jury also received proof that after the murders, Satele bragged to his brother Kalasa and Contreras that "I shot" the "Black guy and a Black girl" that was "on the news[.]" (14RT 3249-3250; see 7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749.) The jury also heard proof that after the foregoing, Satele confessed to Vasquez (in a downtown Los Angeles jail holding cell), "we did that" or "I did that" shooting and "I AK'd them" or "we AK'd them" (6RT 1210-1211; 7RT 1362, 1364, 1453; 9RT 1937-1939.) The jury also received evidence that nearly four weeks after the foregoing, while in a jail "pod" in Lynwood (6RT 1213-1227, 1302-1303; 7RT 1374-1375, 1384-1387, 1415-1424, 1428-1429, 1436-1438, 1442-1443, 1450-1451, 1479-1486; 9RT

1936-1937), Nunez asked Vasquez, "Did you hear about those niggers that got killed in your neighborhood?" (6RT 1225). After Vasquez replied, Nunez raised "two hands" like he was holding a gun and admitted, "I did that shit." Nunez explained that he was "driving down the street" and "the guy looked at him wrong so he turned around and blasted him." (6RT 1225-1226; 9RT 1937-1939.)

Finally, the defense gang expert (in part) told the jury that: (1) gang members have turfs (geographic areas) that they own and defend from rival gang members; (2) gang members generally get a "violent response" whenever they are in a rival gang member's turf; (3) gangs have a "hierarchy" such that some members play a larger leadership role within the gang or perform a more active role to benefit the gang; (4) gang members sometimes commit violent or lesser crimes to benefit their gang; (5) "very low self-esteem" causes some gang members to participate in "bragging and exaggeration about a lot of their behavior for the purposes of impressing" fellow gang members; (6) the West Side Wilmas was structurally and functionally "similar to" other gangs; and (7) some gang members commit "drive-by murders," but gang members generally do not "attack" people who are "not involved in other gangs" unless the attack was necessary to commit a robbery. (11RT 2473-2488, 2493-2415, 2535-2537, 2539.)

Given the foregoing largely uncontradicted and powerful evidence, the jury could easily find that appellants committed the murders with specific intent to benefit their gang, at the direction of their gang, or in association with their gang. In other words, any instructional error as to the jury's gang purpose finding on counts 1 and 2 pursuant to subdivision (b)(1) of section 186.22 was harmless under *Watson, supra*, 46 Cal.2d at p. 836. (See *Sengpadychith, supra*, 26 Cal.4th at pp. 320-321, 327; footnote 69, *ante*.) Reversal of the gang finding is thus unjustified.

F. There Was No Additional Error (Or Prejudice)

Despite all of the foregoing, appellants claim the jury's gang purpose finding on counts 1 and 2 violated *Apprendi*, *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), and thus, *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). (Satele AOB 76; Nunez AOB 127.) As shown, since there was no *Apprendi* error in this case (footnote 68-69, *ante*; *Sengpadychith*, *supra*, 26 Cal.4th at pp. 320-321, 327), there was no error under *Apprendi*'s progeny (*Blakely* and *Cunningham*).

Appellant also argue that since the jury's gun use finding on counts 1 and 2 was "a result" of the gang finding, the gun use finding was "constitutionally infirm[.]" (Satele AOB 83; Nunez AOB 138.) Further, according to appellants, since the trial court used the gun use finding "to impose the death penalty" and the gun use finding was infirm due to instructional error as to the gang finding, the death penalty must be reversed. (*Ibid.*) Finally, as noted (see Argument V, *ante*; footnote 54, *ante*), Nunez adds that assuming arguendo it was "factually impossible" to find that both appellants were shooters, as to the jury's gun use finding, there was instructional error, a defective verdict form, improper burden-shifting, and improper prosecutorial argument to the jury. (Nunez AOB 40-94, 133-135.)

In short, the above claims fail because (as shown): (1) there was no instructional error as to the gang purpose finding; (2) any gang purpose instructional error was harmless under *Watson*, *supra*, 46 Cal.2d at p. 836 (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 320-321, 327); and (3) there was no error as to the gun use finding on counts 1 and 2. Hence, reversal of the gang purpose finding, gun use finding, and death penalty is unwarranted in this case.

X.

BECAUSE THE JURY NECESSARILY FOUND EACH APPELLANT EITHER WAS THE ACTUAL SHOOTER OR INTENDED TO KILL, ANY ERROR IN CALJIC NO. 8.80.1 WAS HARMLESS

Revisiting the factual-impossibility theme, appellants claim CALJIC No. 8.80.1[72/] (see *Lancaster*, *supra*, 41 Cal.4th at pp. 88-89) should have been

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72. As requested by appellants, CALJIC No. 8.80.1 instructed the jury as follows:

> If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following circumstances are true or not true: that is Penal Code section 192(a)(3) or Penal Code 190.2(a)(16).
>
> The People have the burden of proving the truth of a special circumstances. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is and [*sic*] element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that the defendant was not the actual killer of the – of a human being, or if you are unable to decide whether the defendant [w]as the actual killer, or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless your satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded[,] induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced[,] solicited, requested, or assisted in the commission of the crime of Penal Code section 190.2(a)(3) or Penal Code section 190.2(a)(16), which resulted in the death of a human being, namely Edward Robinson and Renesha Ann Fuller.
>
> A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to and [*sic*] innocent human being.

redacted because it misled the jury into believing that it could find the multiple-murder special circumstance true based on accomplice liability for reckless indifferent conduct, without the required "intent to kill." (Satele AOB 84-97 [Arg. IV]; Nunez AOB 139-156 [Arg. V].) As will appear, review was forfeited as to an instructional error claim and constitutional claims, but if not, the instant claim fails because the jury necessarily found that each appellant was either the actual shooter or intended to kill the victims.

A. Appellants Forfeited Review As To CALJIC No. 8.80.1 And Invited Any Error

Appellants never requested that CALJIC No. 8.80.1 be redacted. It was given at their request (13RT 3045; 37CT 10778) even though they now complain about its reckless indifference language, and allege that its use violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Satele AOB 84, 93-94; see Nunez AOB 147-148.) Appellants never raised such claims at trial, and the instruction did not affect either appellant's substantial rights as discussed below. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*,

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> You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you can not [*sic*] agree as to all the defendants, but can agree as to one or more of them, you may make your findings as to the one or more upon which you do agree.
>
> You must decide separately each special circumstance alleged in this case as to each of the defendants. If you can not a [*sic*] agree as to all of the special circumstances but agree as to one or more of them, you must make your findings as to the one or more upon which you do agree.
>
> In order to find a special circumstance alleged in this case to be true or untrue, you must a [*sic*] agree unanimously.
>
> You will state your special findings as to whether this special circumstance is or is not true on the form that will be supplied.

(14RT 3193-3195; 37CT 10778-10779; see footnote 55, *ante*.)

43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8.) They thus forfeited instructional and constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.) They also invited any error here by requesting CALJIC No. 8.80.1 without redaction. (See *Id.* at pp. 435-436.)

B. There Was No *Blakely* Error

Assuming arguendo no forfeiture, there was no error under *Blakely*, *supra*, 542 U.S. 296 (Nunez AOB 147), because the multiple murder finding was made by a jury in this case (see *People v. Ward* (2005) 36 Cal.4th 186, 218-219 (*Ward*) [denying *Blakely* claim]).

C. Sufficient Proof Of "Intent To Kill" Justified The Jury's Multiple-Murder Findings

The instant claim fails if it this Court agrees with respondent that the jury necessarily found sufficient evidence to find "intent to kill" as to both appellants, regardless of whether they were actual shooters or accomplices.

There was evidence implicating both appellants as the shooter. As to Satele, the jury received proof that he bragged about having fired "Monster" when he spoke to his brother and Contreras at April's house less than 24 hours after the murders. Indeed, there, Satele claimed: (1) he was alone in the car when he shot the "Black girl and Black guy" in Harbor City that was "in the news"; and (2) Nunez was "in his house." (8RT 1707; see footnote 15, *ante*; 7RT 1615-1622; 8RT 1626-1628, 1631, 1699-1711, 1747-1749.) The jury also received evidence that while in a downtown Los Angeles jail cell on December 3, 1998, Satele confessed to Vasquez that as to the shooting in Harbor City, "we did that" or "I did that" and "I AK'd them" or "we AK'd them." (6RT 1199-1200, 1203-1204, 1208-1211.) The jury also received proof that about one hour after the murders, fellow gang member Contreras heard Satele claim, "we were out looking for niggers[,]" then Satele or Nunez

admitted that "I think we hit one of them." (7RT 1597-1602; 8RT 1629-1631, 1673-1682.) The jury also received evidence that on the day after the crimes, police arrested Satele after he ran from the front passenger's seat of a car driven by Nunez where the murder weapon was found "in the middle" between the front passenger's seat and the driver's seat.[73] (8RT 1793-1809, 1813-1815, 1821; 9RT 1963, 1972-1975, 1986.) Unlike Nunez, who gave alibi testimony, Nunez exercised his constitutional right by refusing to testify in his defense. Thus, the "facts" did not "strongly suggest" that Satele "was not the actual shooter." (See Satele AOB 84, fn. 17.)

As to Nunez (see Nunez AOB 149-156), he proved his consciousness of guilt to the jury when he ran from police, his murder weapon, and his fellow gang member (Satele) merely one day after the killings (footnote 73, *ante*). The jury also received evidence that while in jail following his arrest, Nunez persuaded Guaca (the testifying mother of his baby) to speak with Feliciano (the owner of the car where police found the murder weapon) in order to persuade Feliciano to "correct" whatever she had told detectives investigating the killings in this case. During the three-way conversation with Nunez listening on a telephone while in jail, Guaca asked Felicano to tell police that Nunez was at Guaca's apartment during the killings when Feliciano allegedly telephoned Guaca to demand the return of her Chrysler. (8RT 1782-1785; 12RT 2677-2678, 2906.) Further, the jury listened to an audiotape of appellants talking in a sheriff's van where they said police had the "wrong" car in custody. (Footnote 16, *ante*; 9RT 2070, 2166-2168, 2171-2172.) The jury heard Nunez tell Satele (in part): (1) "I believe in segregation"; (2) "I can't stand how" African-Americans "get loud"; (3) "I don't like them to [*sic*] much by me"; and (4) "I just want all Black, no Black people, woods straight woods" for a jury.

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73. Nunez successfully fled, but he was arrested two weeks later. (7RT 1442; 8RT 1800.)

Nunez testified to the jury that "woods" meant "White people." (12RT 2854-2855, 2858-2862, 2864; footnote 24, *ante*.) Thus, Nunez demonstrated his consciousness of guilt: (1) on an audiotape heard by the jury; (2) by trying to dissuade Feliciano from cooperating with police; and (3) fleeing from police after he and Satele ran from Feliciano's car where their jointly purchased murder weapon was found on the day after the killings.

Also, as noted, the jury received proof that about one hour after the murders, Contreras heard Nunez or Satele admit, "I think we hit one of them." (7RT 1597-1602; 8RT 1629-1631, 1673-1682.) Indeed, despite alibi testimony from Nunez, Guaca, and Lopez (Guaca's mother), fellow gang member Kelly told the jury in Satele's defense that he saw Nunez in the DSHP playground, with fellow gang members Satele, Caballero, and Contreras, about one hour after the murders. (10RT 2409-2411; footnote 26, *ante*.) Thus, Kelly partially corroborated Contreras as to confessions by appellants by placing appellants in the DSHP playground merely one hour or so after the killings.

Finally, the jury heard proof that while in a Lynwood jail cell on January 7, 1999 (about nine weeks after the killings), Nunez bragged to Vasquez that as to "those niggers that got killed in your neighborhood[,]" "I did that shit." Nunez raised "two hands" like he was holding a gun, then he admitted that he was "driving down the street" and "the guy looked at him wrong so he turned around and blasted him." (6RT 1219-1220, 1225-1226; 7RT 1420-1424, 1427-1428, 1479-1486; 9RT 1938.)

The foregoing evidence showed both appellants could have been the shooter. The evidence at trial plainly established that the shooter intended to kill, based upon the use of armor piercing bullets, the well-aimed shots, and the gang motive. As to aider and abettor, the jury was instructed under all instructions as a whole that to convict on that theory, the accomplice must have

intended to kill. (See footnote 72, *ante*; 37CT 10754-10755, 10762, 10769, 10764-10769, 10783, 10788.)

In other words, the jury necessarily found both appellants had the intent to kill the victims, regardless of who fired the fatal shots.

D. Any Error In Failing To Redact CALJIC No. 8.80.1 Was Harmless

CALJIC No. 1.01 instructed the jury to consider all instructions "as a whole" and each in light of all others (37CT 10711; see *Howard*, *supra*, 42 Cal.4th at p. 1026), and the jury presumably followed this instruction (see *Shannon*, *supra*, 512 U.S. at p. 585). Thus, the jury presumably knew that it had to find "intent to kill" (on the multiple-murder special circumstance allegations) because such instruction was in: (1) CALJIC No. 3.01, where the jury was told that to find the defendant aided and abetted, there had to be proof that he had "the intent or purpose" of committing the charged crime (37CT 10755), i.e., or intent to kill; (2) CALJIC Nos. 3.31 and 3.31.5, where the jury was told that to find the defendant guilty of murder on counts 1 and 2, there had to be proof that he had "specific intent" or a "certain mental state in the mind" as defined "elsewhere in these instructions" (37CT 10758-10759); (3) CALJIC No. 8.11, where the jury was told that "express" malice for the crime of murder required proof of "an intention unlawfully to kill a human being" (37CT 10765); (4) CALJIC No. 8.20, where the jury was told that first degree murder required proof of "a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation" and "[t]o constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill" (37CT

10768-10767); (5) CALJIC No. 8.22, where the jury was told that a killing by armor-piercing ammunition was first degree murder (37CT 10768); (6) CALJIC No. 8.25.1, where the jury was told that a killing committed when a gun is fired from a car "intentionally at another person outside of the vehicle" is first degree murder if the shooter "specifically intended to inflict death" (37CT 10769); (7) CALJIC No. 8.70, where the jury was told it "must determine" and "find" whether the murder was first or second degree (37CT 10772); (8) CALJIC No. 8.71, where the jury was told that it must fix the murder at second degree if it had a doubt as to whether the killings were first versus second degree (37CT 10773); (9) CALJIC No. 8.74, where the jury was told that it must "unanimously agree" on whether the defendant was guilty of first or second degree murder (37CT 10774); (10) CALJIC No. 8.81.3, where the jury was told that to find the multiple-murder special circumstance allegation true, there had to be proof that the defendant committed first degree murder as well as a second murder in the first or second degree (37CT 10780); and (11) CALJIC 8.83.1, where the jury was told that as to the special circumstance allegations, the "specific intent" or "mental state" with which the act was done may be proved by circumstantial evidence (37CT 10783).

Given the above instructions considered as a whole with the evidence presented, CALJIC No. 8.80.1 could not have misled the jury into believing that it could find the multiple-murder special circumstance true without deciding whether appellants had "intent to kill," if they were liable under an accomplice theory. In other words, the jury either found each appellant guilty as the actual shooter, in which case CALJIC No. 8.80.1 did not apply, or it necessarily was required to find intent to kill under the accomplice liability instructions. Further, even as to the actual shooter, the jury's findings under the instructions made it clear that they found the shooter also intended to kill. In finding true the special charge that each appellant used a gun to commit the murders (38CT

10928, 10933), the jury clearly found that appellants had "intent to kill." Also, in finding true that appellants committed the killings to "benefit" their gang and with "specific intent to promote, further or assist" their gang (38CT 10928, 10933), the jury obviously found that appellants had "intent to kill." Indeed, by finding "not true" the special circumstance allegation that the murders were committed due to the "race" of the victims (38CT 10928, 10933), the jury demonstrated that it had the capacity to reject a true finding even if there was arguably strong evidence to support it.

Moreover, there was no dispute that the victims were killed with armor-piercing bullets. It was also undisputed that appellants were fellow gang members, and that Satele had no alibi. Indeed, it was undisputed that Satele was caught fleeing from the front passenger seat of a car where the murder weapon was found one day after the killings, and that when found, the AK-47 rifle had 26 live bullets in a "clip" that carried 30 bullets. Police chased Nunez when he ran from the driver's seat of that car. Finally, the jury received evidence that appellants were riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (killed enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960, 2090-2093.)

Given the above, the jury clearly found that appellants had "intent to kill" as to the multiple-murder special circumstance charges. Reversal of the jury's multiple-murder special circumstance findings is thus unwarranted based on any error regarding the reckless indifference language in CALJIC No. 8.80.1.

XI.

THERE WAS NO ERROR IN INSTRUCTING THE JURY WITH MODIFIED CALJIC NO. 17.19

Based on their undying belief that it was "factually impossible" for the jury to find that they both fired a gun, as previously noted (footnote 54, *ante*), appellants claim that the court mis-instructed on the gun-use charge (Satele AOB 98-117 [Arg. V]) and there were related errors (Nunez AOB 40-94 [Arg. I]). As will appear, as to the gun-use findings under section 12022.53, there was no: (1) instructional error; (2) defective verdict form; (3) improper burden-shifting; (4) improper prosecutorial argument; (5) violation of a "unanimity" duty; or (6) prejudice.

A. Appellants Forfeited Constitutional Attacks On Modified CALJIC No. 17.19

As to the gun-use charge, appellants did not object to the prosecutor's modified CALJIC No. 17.19 instruction at their trial in 2000 or propose clarifying language. (13RT 3048-3049.) Now, they claim the jury should have received CALJIC No. 17.19.5. (Nunez AOB 62–63; Satele AOB 106-107.) Nunez claims his failure to object "does not prevent this Court's review" of his claims (Nunez AOB 59), he adds that his "liberty interest" was violated (Nunez AOB 70), and appellants claim that the modified CALJIC No. 17.19 violated the Fifth and Eighth Amendments (Satele AOB 99, 114; Nunez AOB 70, 79, 88). As previously shown (Argument V, *ante*), they forfeited the above constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

B. The Modified CALJIC No. 17.19 Was Not Error As To Gun-Use Charges

On the gun-use charges, the jury received a modified CALJIC

No. 17.19.[74]

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74. CALJIC No. 17.19, as modified in this case, instructed the jury as follows:

> It is alleged in Counts One and Two that defendants Daniel Nunez and William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, during the commission of the crimes charged, in violation of Penal Code section 12022.53(d).
>
> If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, *you must determine whether* the defendants Daniel Nunez or William Satele *intentionally and personally discharged a firearm*, and *proximately caused death to a person not an accomplice to the crimes*, in the commission of those felonies.
>
> The word "firearm" includes a Norinco MAK-90.
>
> Death is a proximate cause of the discharge of a firearm if it is a direct, natural, and probable consequence of the discharge of the firearm, and if, without the discharge of the firearm, death would not have occurred.
>
> This allegation pursuant to Penal Code section 12022.53(d) applies to *any person charged as a principal* in the commission of an offense, when a violation of Penal Code sections 12022.53(d), and 186.22(b) are plead [*sic*] and proved.
>
> *The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.*
>
> Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(37CT 10788 [italics added].) In this case, the jury received CALJIC No. 17.19 on May 24, 2000 (14RT 3148, 3200-3201), and it announced its gun-use findings on June 2, 2000 (38CT 10929, 10934, 10937-10940; 15RT 3455, 3460-3463). In January 2000, CALJIC No. 17.19.5 was added to the list of CALJIC, and it was revised in 2002. A "comment" to CALJIC No. 17.19.5 states: "This 2002 revision makes no substantive change." CALJIC No. 17.19.5 instructed:

> It is alleged [in Count[s] ____] that the defendant[s] ____ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] during the commission of the crime[s] charged.
>
> If you find the defendant[s] ____ guilty of the [one or

While discussing his proposed modified instruction with the court and counsel, the prosecutor stated:

> I would note on that one, Your Honor, I ask the court if they have my correction. I inserted a sentence in there that I think applies which was that this allegation – I will be the first to admit that I have not proven which of the two defendants was the *actual shooter*. Therefore, I included the language, "this allegation, pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense when a violation of Penal Code sections

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> more] of the crime[s] thus charged, you must determine whether the defendant[s] ____ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] in the commission of [that] [those] [felony] [felonies].
>
> The word "firearm" includes [a ____.] [any device designed to be used as a weapon from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.]
>
> The term "intentionally and personally discharged a firearm," as used in this instruction, means that the defendant [himself] [herself] must have intentionally discharged it.
>
> [The term "great bodily injury" means a significant physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury.]
>
> [A [proximate] cause of [great bodily injury] [or] [death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [great bodily injury] [or] [death] would not have occurred.]
>
> The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.
>
> Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(See *Bland*, *supra*, 28 Cal.4th at p. 335 ["CALJIC No. 17.19.5 (2002 rev.) (6th ed. 1996) is the current standard instruction regarding the section 12022.53(d) enhancement, although it did not exist at the time of trial here"].)

12022.53(d) and 186.22(b) are pled and proved." The reason being was pursuant to [section] 12022.53(e).

(13RT 3048-3049 [italics added].) By "actual shooter[,]" the prosecutor seemingly meant that it was unclear to him which appellant fired the fatal shots from the gun they jointly purchased. At any rate, as noted earlier, appellants did not object to the prosecutor's modified CALJIC No. 17.19 instruction. (See 13RT 3049.)

Now, appellants speculate:

> [T]he [modified CALJIC No. 17.19] instruction was subject to the interpretation that the personal weapon use enhancement could be found true as to [Satele] based on alternate legal theories, one of which was legally incorrect. Because it is not possible to determine that the jury did not rely on that incorrect legal theory in finding the enhancement to be true as to [Satele], reversal is required.

(Satele AOB 99, 111-114; see also Nunez AOB 42, 67-71.) Appellants essentially make the same claim previously denied by this Court as earlier noted (see *Riggs*, *supra*, 44 Cal.4th at p. 313; *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026; *Millwee*, *supra*, 18 Cal.4th at p. 160; *Pride*, *supra*, 3 Cal.4th at pp. 249-250), i.e., that there was some error in the failure to demand jury unanimity as to: (1) which appellant was the shooter; and (2) which appellant was an aider.

As demonstrated in Argument V, *ante*, there was no erroneous legal theory, just alternate ways in which the jurors could conclude that each appellant was liable for the gun use, either as the actual shooter or as a principal. Reliance by appellants on *Garcia*, *supra*, 28 Cal.4th 1166 (Satele AOB 98, 102-103, 105, 108, 111-112, 116; Nunez AOB 41, 51-52, 54-59, 63, 67-68, 74-75, 81), is misplaced since nothing in the case supports a finding that error occurred here. The jury was not required to unanimously agree on which

appellant was a "shooter" and which appellant was an "aider" as long as the jury found appellants guilty beyond a reasonable doubt of first degree murder as defined by law and charged. (See *Riggs*, *supra*, 44 Cal.4th at p. 313; *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026; *Millwee*, *supra*, 18 Cal.4th at p. 160; *Pride*, *supra*, 3 Cal.4th at pp. 249-250.) Here, there was no error in the modified version of CALJIC No. 17.91, because it appropriately allowed the jury to find firearm use liability based on each appellant either being the shooter or a principal in the murder. CALJIC No. 17.19.5 was inapplicable since it addressed only the shooter's liability, without reference to the liability of a non-shooter principal for the use of a firearm, as provided in section 12022.53, subdivision (e).

Although appellants claim the jury was not required to find that they actually were principals, only that they had been charged as principals, their strained reading of the instruction does not entitle them to relief. By finding both appellants guilty of murder after being appropriately instructed on principals and aiders and abettors (CALJIC No. 3.00; 37CT 10754), the jury unequivocally determined that both appellants were principals in the commission of the crime. Additionally, the modified CALJIC No. 17.19 instructed the jury that if they found appellants guilty of murder, then they were to determine the firearm use allegation. (37CT 10788; footnote 74, *ante*.) Given all instructions considered as a whole, the jury necessarily found both appellants were actual principals, not simply charged as principals.

For these reasons, the modified CALJIC No. 17.19 was not instructional error.

C. There Was No Improper Prosecutorial Argument As To The Gun-Use Findings

Appellants claim:

The prosecutor incorrectly argued to the jury that it could find the

> enhancement true as to both [Satele] and Nunez despite the "personal use" requirement because they were both liable as the result of the gang enhancement. (14RT 3223.) As a result, the jury found that [Satele] and Nunez both intentionally and personally discharged the Norinco MAK-90 proximately causing the deaths of Robinson and Fuller. The constitutionally infirm jury instruction and the circumstances described herein require that the section 12022.53 enhancement be stricken.

(Satele AOB 99, 101-105; see Nunez AOB 42.) Respondent disagrees. Simply put, there was no prosecutorial misconduct during closing argument.

Here, the prosecutor could properly argue to the jury that it was not required to decide which appellant was the "shooter" and which was an "aider" as long as it found appellants guilty beyond a reasonable doubt of first degree murder as defined by statute and charged. (See *Riggs*, *supra*, 44 Cal.4th at p. 313; *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026; *Millwee*, *supra*, 18 Cal.4th at p. 160; *Pride*, *supra*, 3 Cal.4th at pp. 249-250.) Hence, the prosecutor could properly argue to the jury that it did not need to decide which appellant actually killed the victims, and evidence had been presented that either appellant could have fired a gun and both surely were principals in the "drive-by" murders. As to whether the charged "riders"[75] personally fired a gun that was a substantial factor in the death of the victims, the prosecutor drew only reasonable inferences based on the evidence and committed no misconduct in his gun-use closing argument to the jury.

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75. As previously noted, the jury received evidence (from fellow gang member Contreras) that appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (kill enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960, 2090-2093.)

D. There Was No Violation Of A "Unanimity" Duty As To The Gun-Use Findings

As previously discussed, this Court has held that "unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law." (*Millwee*, *supra*, 18 Cal.4th at p.160; see *Riggs*, *supra*, 44 Cal.4th at p. 313; *Maury*, *supra*, 30 Cal.4th at p. 423; *Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026, *supra*, 3 Cal.4th at pp. 249-250.) Hence, here, the jury was not required to unanimously agree on who was a "shooter" and who was merely an "aider." (See *Sanchez*, *supra*, 26 Cal.4th at p. 845.) Section 12022.53, subdivision (e), imposed liability for the gun use on both appellants, regardless of who was the shooter, under the evidence and instructions as a whole as presented to the jury. CALJIC No. 17.19, as modified and applied in this case, was a correct statement of the law.

E. There Was No Defective Verdict Form As To The Gun-Use Findings

As previously discussed in Argument V, *ante*, any confusion in the verdict forms as to the jury's firearm use findings was harmless. Although the wording of the verdict forms was phrased to indicate each appellant personally discharged a firearm, the prosecutor argued that the jury could return "true" findings based upon a finding that each appellant was a principal in the commission of the murders. Given the overwhelming evidence that both appellants could have fired the gun they jointly purchased, that at least one them fired a gun, and that both were principals subject to liability for the gun use under section 12022.53, subdivision (e), the wording of the verdict forms was immaterial since the verdicts unmistakably signaled the jury's intention to find both appellants liable for the gun use. (See *Jones*, *supra*, 58 Cal.App.4th at pp. 710-711.)

F. There Was No Burden-Shifting As To The Gun-Use Findings

Appellants claim that CALJIC No. 17.19, as modified, lightened the prosecution's burden of proof. As summarized by Satele:

> The [modified CALJIC No. 17.19] instruction was also in error because, in language proposed by the prosecution, it created a presumption that relieved the prosecution from proving that [appellant] was in fact a principal in the commission of the crime, either as the shooter who intentionally and personally discharged the firearm proximately causing death, or as the accomplice who possessed the required mental state to be held liable for the enhancement. Instead, the jury was instructed that it was required to find [appellant] was in fact a principal in the commission of the offense and subject to the enhancement if it found [appellant] had been *charged* as a principal in the commission of the offense and the gang benefit enhancement [citation] had been pled and proved.

(Satele AOB 98-99 [italics in original], 105, 108-111; Nunez AOB 41-42, 64-67.) Simply put, the modified CALJIC No. 17.19 instruction that appellants failed to object to (footnote 74, *ante*; 13RT 3049) created no improper burden-shifting or "mandatory presumption" in favor of a truth finding on the gun-use charge. (See *People v. Romero* (2008) 44 Cal.4th 386, 415-416 (*Romero*) [denying burden-shift claim]; *People v. Parson* (2008) 44 Cal.4th 332, 355-358 (*Parson*) [same]; *Riggs*, *supra*, 44 Cal.4th at p. 314 [same]; *People v. Salcido* (2008) 44 Cal.4th 93, 155-156 (*Salcido*) [same]; *People v. Frye* (1998) 18 Cal.4th 894, 960-961 (*Frye*) [same].) Satele adds:

> As also noted in Argument I, the impact of the errors in the firearm enhancement instruction was further exacerbated by the fact that the jury was never actually instructed on the gang enhancement of section 186.22(b), but was instead instructed on the substantive offense of

section 186.22, subdivision (a) – an offense with which neither defendant had actually been charged.

(Satele AOB 99-100, fn. 19; Nunez AOB 43, 80.) As shown, there was no error (or prejudice) as to the gang finding because the jury was adequately instructed. (Argument IX, *ante*.)

Appellants claim that the "defects" (to the modified CALJIC No. 17.19) were not corrected by other instructions. (Satele AOB 114-115; Nunez AOB 72-73.) Satele speculates:

> A reasonable jury would *not* have applied CALJIC No. 3.00 and 3.01 [footnote 77, *post*] in its deliberations concerning the truth of the personal and intentional firearm use enhancement to [Satele] because the instruction challenged here required it to find [Satele] was a principal by virtue of being charged and therefore vicariously liable for the enhancement. Under the instruction given, the jury never had to reach the question of whether [Satele] had the requisite mental state to be held liable as an accomplice and to look to other instructions in an attempt to resolve that question in order to return a finding on the weapon use enhancement.

(Satele AOB 114-115.) Respondent disagrees. The jury was instructed that they were to consider the firearm use allegation only if it found appellants guilty of the murder. (See footnote 74, *ante*.) This Court has held: "We presume that jurors comprehend and accept the court's directions." (*Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17; see *Shannon*, *supra*, 512 U.S. at p. 585.) Here, pursuant to CALJIC No. 1.01, the jury was properly instructed to consider all instructions "as a whole and each in light of all" others. (37CT 10711; see *Howard*, *supra*, 42 Cal.4th at p. 1026.) Hence, it must be presumed that the jury in this case found each appellant guilty of the murders, either as the shooter or as an accomplice, before determining the truth of the firearm use allegation,

and also "applied CALJIC Nos. 3.00 and 3.01 [and all other instructions] in its deliberations concerning the truth of the personal and intentional firearm use enhancement[.]" (See Satele AOB 114-115.)

Further, in this case, the jury was properly instructed that: (1) if you find Nunez or Satele guilty of one or both murders, you must decide whether Nunez or Satele "intentionally and personally discharged a firearm"; (2) the People have the burden of proving the truth of the gun-use charge; (3) "[i]f you have a reasonable doubt that it is true, you must find it to be not true"; (4) "[i]nclude a special finding on that question in your verdict, using a form that will be supplied for that purpose"; (5) the gun-use charge under section 12022.53, subdivision (d), applies to "any person charged as a principal" as to the murders when a gun-use charge and gang charge under section 186.22, subdivision (b), are pled "and proved"; (6) principals include aiders and abettors; (7) an aider and abettor is one who has "knowledge of the unlawful purpose of the perpetrator" and "by act or advice aids, promotes, encourages or instigates" the commission of a crime "with the intent or purpose of committing or encouraging or facilitating" the commission of the crime (see *Garcia*, *supra*, 28 Cal.4th at p. 1174 [noting burden under section 12022.53, subd. (d)]; (8) "mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting" (see Satele AOB 106, fn. 22); and (9) mere knowledge that a crime is being committed and a failure to prevent it does not amount to aiding and abetting. (14RT 3177-3178, 3200-3201; 37CT 10754-10755, 10788.)

Moreover, as previously discussed (Argument X, *ante*), there was no error or prejudice as to CALJIC No. 8.80.1. (Satele AOB 115; Nunez AOB 45, 88.) In short, there was no improper burden-shifting on the gun-use charge because "there is no reasonable likelihood that the jury misconstrued or misapplied" the modified CALJIC No. 17.19 instruction. (See *Romero*, *supra*,

44 Cal.4th at p. 416; *Riggs*, *supra*, 44 Cal.4th at p. 314; *People v. Prieto* (2003) 30 Cal.4th 226, 254 (*Prieto*) ["no reasonable likelihood juror would misconstrue CALJIC No. 2.51 as 'a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90'"].)

G. There Was No *Apprendi-Blakely* Error As To The Gun-Use Findings

Like the gang purpose finding (see footnotes 68, *ante*; Nunez AOB 127), Nunez claims sentencing on the gun-use finding violated *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and thus, *Cunningham*, *supra*, 549 U.S. 270 (Nunez AOB 77). As previously noted, *Apprendi* held:

> Other than the fact of a prior conviction, *any fact that increases the penalty* for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.

(*Apprendi*, *supra*, 530 U.S. at p. 490 [italics added].) Appellants were convicted of first degree murder with a multiple murder special circumstance, which has a statutory maximum of death. (§ 190, subd. (a).) Thus, there was no error under *Apprendi* (or *Blakely* or *Cunningham*) because the gun-use finding did not increase the penalty for appellants "beyond the prescribed statutory maximum[.]"

H. Any Error Was Harmless

Nunez claims the modified CALJIC No. 17.19 instruction was "structural error" that was "reversible per se." Alternatively, he claims instructional error here was prejudicial under *Chapman*, *supra*, 386 U.S. at p. 24.) (Nunez AOB 71, 83.) "Considering the instructions as a whole," any error was harmless under *Watson*, *supra*, 46 Cal.2d at p. 836. (See *Parson*, *supra*, 44 Cal.4th at p. 357.) Indeed, error (if any) was "harmless under any standard." (*Bland*, *supra*, 28 Cal.4th at p. 338.)

Satele admits "it is true that there was some evidence that could support a finding that both defendants shot the victims" given their "admissions to that effect" to Vasquez and Contreras. (Satele AOB 37, 42, 112-113.) Nunez speculates that in the event this Court gives Vasquez's "extraordinary" evidence "any weight, the reasonableness of a finding there was but one shooter must be balanced against the likelihood [he] and Satele both made false confessions." (Nunez AOB 49.) Simply put, since the jury in this case received overwhelming evidence to support its finding that appellants were both principals in the murders of the two victims, and thus both subject to the gun use enhancement regardless of who fired the fatal shots, any error as to the gun-use charge was harmless under *Watson* (see *Parson*, *supra*, 44 Cal.4th at p. 357) or *Chapman*, *supra*, 386 U.S. at p. 24 (see Satele AOB 113-114). Alternatively, as shown above, as to the gun-use charge, there was no: (1) instructional error; (2) defective verdict form; (3) improper burden-shift; (4) improper prosecutorial argument; or (5) violation of a "unanimity" duty (see footnote 54, *ante*). Hence, reversal as to the gun-use finding is unjustified. (See *Sanchez*, *supra*, 26 Cal.4th at p. 854 ["We conclude defendant's first degree murder conviction rested on one or more legally sufficient theories, and that the record does not affirmatively demonstrate the jury relied on an unsupported theory in reaching that verdict. Accordingly, defendant's murder conviction must be affirmed"].)

Finally, the lack of error (and prejudice) concerning the jury's gun-use finding means there is no need to reverse the "guilt and penalty" phase verdicts. (Satele AOB 116-117; Nunez AOB 45, 81-94.)

XII.

THERE WAS NO ERROR IN REFUSING TO GIVE PINPOINT INSTRUCTION ON AIDING AND ABETTING

Appellants claim the court should have given Nunez's pinpoint instruction on aiding and abetting: "Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilt verdict." (38CT 10868; Nunez AOB 192-204 [Arg. VIII]; Satele AOB 165-178 [Arg. VIII].)[76] The prosecutor objected because the above had "almost the exact language" in CALJIC No. 3.01,[77] and CALJIC Nos. 3.01 and 2.90 "suffices." The trial court agreed. (13RT 3058.) As will appear, appellants forfeited constitutional claims, there was no error, and error (if any) was harmless.

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76. At trial, all proposed defense instructions were "jointly requested[,]" but Nunez was the one who specifically requested the special or pinpoint instruction at issue. (13RT 3057-3058.)

77. As noted earlier, CALJIC No. 3.01 instructed the jury on aiding and abetting as follows:

> A person aids and abets the commission of a crime when he or she,
>
> (1) with knowledge of the unlawful purpose of the perpetrator and
>
> (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) by act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> *Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.*
>
> *Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.*

(37CT 10755 [italics added]; 14RT 3177-3178.)

A. Appellants Forfeited Constitutional Claims

Appellants claim the refusal to give the pinpoint instruction violated due process, the Sixth and Eighth Amendments, and a "liberty interest[.]" (Satele AOB 165, 151, 173-174, 178; Nunez AOB 192, 199, 201, 202-204.) They did not raise these claims at trial (13RT 3058), and they fail to show that they require an "analysis" similar to the denial of a pinpoint instruction (see *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8). They thus forfeited constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

B. There Was No Duty To Give Special Or Pinpoint (Aiding And Abetting) Instruction

1. Standard Of Review

A trial court has no *sua sponte* duty to give amplifying or pinpoint instructions. (*People v. Stanley* (2006) 39 Cal.4th 913, 946 (*Stanley*); *People v. Hughes* (2002) 27 Cal.4th 287, 361 (*Hughes*); *People v. Welch* (1999) 20 Cal.4th 701, 757; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 (*Saille*).) Also, "a trial court need not give a pinpoint instruction if it merely duplicates other instructions." (*Whisenhunt*, *supra*, 44 Cal.4th at p. 220, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99 (*Coffman and Marlow*); *People v. Bolden* (2002) 29 Cal.4th 515, 558 (*Bolden*); *People v. Catlin* (2001) 26 Cal.4th 152, 558 (*Catlin*); *People v. Garceau* (1993) 6 Cal.4th 140, 192-193 (*Garceau*) *Garceau*, *supra*, 6 Cal.4th at pp. 192-193.)

2. Analysis

Here, the trial court could properly refuse to pinpoint that "[m]erely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilt verdict" (38CT 10868; 13RT 3058) because this point was covered in CALJIC No. 3.01, which clarified: (1) "[m]ere presence

at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting"; and (2) "[m]ere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting" (37CT 10755). (See *Coffman and Marlow*, *supra*, 34 Cal.4th at p. 99 [instruction "adequately informed the jury that it could consider the evidence of battered woman syndrome"].)

Indeed, this Court has held:

> An instruction that does no more than affirm that the prosecution must prove a particular element of a charged offense beyond a reasonable doubt merely duplicates the standard instructions defining the charge offense and explaining the prosecution's burden to prove guilt beyond a reasonable doubt.

(*Bolden*, *supra*, 29 Cal.4th at pp. 558-559.) Here, the court's ruling (13RT 3058) was not error. (*Catlin*, *supra*, 26 Cal.4th at p. 558 ["The trial court properly could refuse the instruction on the ground that the point adequately was covered in the instructions related to the prosecution's burden of proof and the elements of murder"]; *Garceau*, *supra*, 6 Cal.4th at pp. 192-193 ["To the extent that special instruction D could be read to embrace stated principles of law involving reasonable doubt, it was repetitious of other instructions given, notably CALJIC No. 2.90, which this court has recognized as 'the best available definition of the standard of proof beyond a reasonable doubt'"].)

Since there was no error in denying the pinpoint instruction, reversal is unjustified in this case. (See *Hovarter*, *supra*, 44 Cal.4th at pp. 1021-1022.)

C. There Was No Prejudice Under *Watson* (Or *Chapman*)

Assuming arguendo there was error here, this Court has recently held: "Instruction error is subject to harmless error review[,]" and when "the asserted error is one of state law," it is "subject to the reasonable probability standard of harmless error under" *Watson*, *supra*, 46 Cal.2d at pp. 836-37. (*Whisenhunt,*

supra, 44 Cal.4th at p. 214.) Specifically, the erroneous refusal to give a pinpoint instruction is reviewed for prejudice under *Watson*. (*Stanley*, *supra*, 39 Cal.4th at p. 946; *People v. Fudge* (1994) 7 Cal.4th 1075, 1111-1112 (*Fudge*).)

Here, besides receiving instructions on aiding and abetting under CALJIC No. 3.01 (footnote 77, *ante*), the jury was instructed on: (1) the prosecution's burden of proof under CALJIC No. 2.90 (37CT 10753); (2) sufficiency of evidence under CALJIC Nos. 2.00, 2.01, and 2.02 (37CT 10716-10718); (3) witness-believability under CALJIC Nos. 2.20, 2.23, and 2.23.1 (37CT 10729-10730, 10735); (4) credibility (37CT 10731); (5) the right to refuse to testify under CALJIC No. 2.60 (37CT 10744); (6) principles under CALJIC No. 3.00 (37CT 10754); (7) viewing informant testimony with caution under CALJIC No. 3.20 (37CT 10756); (8) the elements of the first degree murder charges (and distinctions between first and second degree murder) plus the elements of the gang purpose, gun-use, and multiple-murder special allegations (37CT 10759-10785, 10788); and (9) evidence considered against one defendant could not be considered against the other defendant under CALJIC Nos. 2.07 and 2.08 (37CT 10722-10723; see footnote 79, *post*).

Satele claims he was "profoundly prejudiced by the refusal" to give the aiding and abetting pinpoint instruction. (Satele AOB 176.) Respondent disagrees. Armed with the above instructions, the jury considered the overwhelming evidence of each appellant's guilt, as previously discussed in this brief. Simply put, it is not "reasonably probable" that Satele would have received a more favorable verdict if the jury had received the pinpoint instruction on aiding and abetting. (See *Whisenhunt*, *supra*, 44 Cal.4th p. 214; *Stanley*, *supra*, 39 Cal.4th at p. 946; *Fudge*, *supra*, 7 Cal.4th at pp. 1111-1112; *Watson*, *supra*, 46 Cal.2d at p. 836.) Indeed, given the overwhelming proof that Satele was a shooter (plus proper instructions given to the jury), "beyond

a reasonable doubt[,]" Satele suffered no prejudice from the omitted pinpoint instruction. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

Nunez claims the shooting evidence was "spare." (Nunez AOB 203.) The record is otherwise, as previously discussed in earlier arguments. The evidence implicating Nunez included his own inculpatory admissions and gang evidence among other things. Under the evidence and instructions actually presented at trial, the jury necessarily found that Nunez was not "[m]erely being in the company of a person believed to have committed a felony" (38CT 10868).

Given all of the above, it is not "reasonably probable" that Nunez would have received a more favorable verdict if the jury had received the pinpoint instruction on aiding and abetting. (See *Whisenhunt*, *supra*, 44 Cal.4th p. 214; *Stanley*, *supra*, 39 Cal.4th at p. 946; *Fudge*, *supra*, 7 Cal.4th at pp. 1111-1112; *Watson*, *supra*, 46 Cal.2d at p. 836.) On this record, it is clear "beyond a reasonable doubt" that Nunez suffered no prejudice from the omitted pinpoint instruction. (See *Chapman*, *supra*, 386 U.S. at p. 24.) Reversal is therefore unjustified.

XIII.

THE COURT DID NOT ERR IN FAILING TO MODIFY CALJIC NOS. 2.04 AND 2.05 TO APPLY ONLY TO NUNEZ

Satele claims the court erred by refusing to give the jury a limiting instruction that some evidence and instructions (CALJIC Nos. 2.04 and 2.05; see footnote 80, *post*) did not apply to him because there was no proof that he was involved with efforts by Nunez and Guaca to get witness Feliciano to fabricate evidence or testify falsely.[78] (Satele AOB 179-187.) Satele did not offer an instruction, but instead raised the issue by objecting to CALJIC Nos. 2.04 and 2.05. The prosecutor explained that the instruction related to two witnesses whose testimony related solely to Nunez. The court ruled that other instructions would adequately cover any concern.[79] The court said it was

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78. The jury heard proof that (by telephone) Nunez persuaded Guaca to try to get Feliciano to "correct" what she had told police and to claim that Nunez was at Guaca's house at the time of the killings. (8RT 1782-1785; 12RT 2677-2678, 2906; footnote 26, *ante*; see 13RT 3016-3019)

79. Along with CALJIC No. 17.31 (footnote 81, *post*), CALJIC No. 2.07 instructed the jury:

> Evidence has been admitted against one of the defendants, and not admitted against the other.
>
> At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant.
>
> Do not consider this evidence against the other defendant.

(37CT 10722; 14RT 3162-3164; see Satele AOB 180.) CALJIC No. 2.08 instructed the jury:

> Evidence has been received of a statement made by a defendant after his arrest.
>
> At the time the evidence of this statement was received you were instructed that it could not be considered by you against the other defendant.
>
> Do not consider the evidence of this statement against the other defendant.

particularly concerned about giving a limiting instruction because it could harm Nunez's defense. Thus, the court told Satele's counsel that he could simply argue to the jury that CALJIC Nos. 2.04 and 2.05 did not apply to Satele.[80] (13RT 3016-3019.) As will appear, the trial court committed no error in

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(37CT 10723; 14RT 3163.) CALJIC No. 2.09 instructed the jury:

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

(37CT 10725; 14RT 3163.) Finally, CALJIC No. 17.00 instructed the jury:

> You must decide separately whether each of the defendants is guilt or not guilty. If you cannot agree upon a verdict as to both the defendants, but do agree upon a verdict as to any one of them, you must render a verdict as to the one as to whom you agree.

(37CT 10786; 14RT 3199.)

80. CALJIC No. 2.04 instructed the jury as follows:

> If you find that *a defendant* [attempted to] [or] [did] persuade a witness to testify falsely or [attempted to [or] [did]] fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

(37CT 10719 [italics added]; 14RT 3161-3162.) CALJIC No. 2.05 instructed the jury as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(37CT 10720; 14RT 3162.)

refusing to give a limiting instruction in addition to CALJIC Nos. 2.07, 2.08, 17.00, and 17.31,[81] and error (if any) was not prejudicial under *Watson*.

A. Standard Of Review

As noted earlier, a court has a sua sponte duty to instruct on general principles of law that are closely and openly connected with the evidence. (*Valdez*, *supra*, 32 Cal.4th at p. 115.) However, "a trial court need not give a pinpoint instruction if it merely duplicates other instructions." (*Whisenhunt*, *supra*, 44 Cal.4th at p. 220.) Also, as to "highlight" instructions:

> Because the latter type of instruction "invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence," it is considered "argumentative" and therefore should not be given.

(*Earp*, *supra*, 20 Cal.4th at p. 886.) Finally, "[i]nstruction error is subject to harmless error review[,]" and when "the asserted error is one of state law," it is "subject to the reasonable probability standard of harmless error under" *Watson*, *supra*, 46 Cal.2d at pp. 836-37. (*Whisenhunt, supra*, 44 Cal.4th at p. 214.)

B. Factual Discussion

1. Trial Court's Rulings

At a hearing on instructions, the prosecutor said that CALJIC No. 2.04 was proper because it was neutral in that it did not reference either appellant.

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81. CALJIC No. 17.31 instructed the jury as follows:

> The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. *Disregard any instruction which applies to facts determined by you not to exist.* Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.

(37CT 10790 [italics added]; 14RT 3201-3202.)

Instead, it instructed the jury to decide whether there was proof that "a defendant" attempted to fabricate evidence or persuade a witness to testify falsely. Satele's counsel objected that "there has been zero evidence" that CALJIC No. 2.04 applied to Satele. (13RT 3016; footnote 80, *ante*.) The trial court replied that "the instruction that says if it doesn't apply you don't consider it [CALJIC No. 17.31] will solve that problem." (13RT 3016-3017; footnote 81, *ante*.) The court stated its concern as follows:

> I'm not going to *finger point*, if you find defendant Nunez attempted to persuade a witness to testify false *because that simply would create problems for [Nunez's counsel]*, and I think that the *neutral context of the instructions*, if you find that a defendant, *seems to be the most innocuous way without pointing*. You can always argue in your closing argument that CAL. JIC. [*sic*] instruction does not apply.

(13RT 3017 [italics added].) The trial court specifically stressed to Satele's counsel as follows:

> CAL. JIC. [*sic*] 2.04, as phrased, appears to be quite correct, and I will let you argue and you can argue that CAL. JIC. [*sic*] 2.04 as instructed by the judge does not apply to your client, and *I'm not restricting your argument on that and you're welcome to argue that*, and that instruction will come in.

(13RT 3017 [italics added].) As to CALJIC No. 2.05, the court similarly ruled as follows:

> 2.05 will be given. Counsel will be allowed to argue that it does not apply to your particular client as in .204 [*sic*]. And if there are two different ways of looking at a certain situation or piece of evidence, why I leave that to your persuasive skill in front of the jury to explain to them you position. 2.05 will be given.

(13RT 3019.)

2. Closing Arguments As To Feliciano And "Race" Charge Found "Not True"

The jury found untrue the special charge that appellants killed the victims because they were African-Americans ("race") within the meaning of section 190.2, subdivision (a)(16). (38CT 10928, 10933.) To prove the claim, the prosecutor (in part; see footnotes 16 and 24, *ante*) presented the jury with testimony from an African-American "jail" inmate (Collins) whose house was "right across the street" from the DSHP that was the main "turf" claimed by appellants' gang (footnote 2, *ante*). She (in part) told the jury that around 7 p.m. on September 16, 1997 (over one year before the murders), while outside her house, an "intoxicated" Nunez repeatedly called her a "nigger[,]" hit her in the mouth with an "object[,]" and argued that she had his money concerning "drugs[.]"[82/] Afterwards, when her African-American husband displayed a "cap gun[,]" Nunez commented to a fellow gang member: "hey Cranky, come here, the nigger wants to shoot me?" (4RT 921-936.) Later, when police asked why she did not "press charges[,]" she said: (1) she knew Nunez and was scared of his gang; and (2) she had a son who was in custody and was concerned about his safety. (4RT 933-936; 5RT 952-956.) Finally, Collins testified that while being transported with Nunez from the downtown Los Angeles county jail to testify in this case, the "guys in the bus" called her a "snitch" and began to "cuss" at her. Nunez commented, "Are you testifying? Don't testify." (5RT 954-955; see Satele AOB 180, fn. 29, 185.)

Hence, the prosecutor (14RT 3204) gave the jury the following closing argument:

Then I ask to you [*sic*] consider the threats made to her [Collins] on

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82. At trial, Collins was in "county jail" custody for "narcotics sales." In November 1999, she was convicted of cocaine "possession[.]" (4RT 921, 930; 5RT 952-953.)

the bus. Remember [Collins] is not the only one that said the defendant made threats. Ruby [Feliciano] said Speedy [Nunez] made threats [footnotes 26 and 79, *ante*]. So consider all these witnesses that said Speedy threatened them. There's a jury instruction [CALJIC Nos.] 2.04, [*sic*] 05 and [*sic*] 06 [footnote 80, *ante*] that tells you you can take that threat as a consciousness of guilt of Speedy. If you didn't commit these crimes, why are you [Nunez] threatening people that are coming to court? No reason, let them come to court and testify and prove your innocence. But you [Nunez] don't need to threaten them. And you can consider that as a consciousness of guilt that only guilty persons would threaten individuals. You can think about that. And that's what he [Nunez] did in this case.

(14RT 3225.) Satele's counsel did not address the foregoing evidence, instructions, or argument in his argument to the jury. Instead, he spent virtually all of his time arguing that Vasquez and Contreras were not credible witnesses, and that Satele had no hatred towards African-Americans. (14RT 3345-3392.)[83/] Nunez's counsel mainly gave the same "credibility" and "race" arguments along with an "innocence" defense based on "alibi" testimony from Nunez, Guaca, and Guaca's mother. (14RT 3273-3343.)[84/]

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83. As to the audiotape of appellants in a sheriff's van (footnotes 16 and 24, *ante*), Satele's counsel (in part) argued:

> They are in custody, they are talking to each other, and you can't – you will hear that tape and I want you to listen to it carefully. As many times [*sic*] you want. There's nothing to infer any *consciousness of guilt* for this particular case. This case had not been filed, had not been charged at that time. And they were already going to court for some other case.

(14RT 3387 [italics added].)

84. Unlike silence by Satele's counsel, as to Feliciano, Nunez's counsel (in part) argued:

> The only thing I know about, a comment that I recall, is that the

C. Satele Forfeited All Constitutional Claims

Satele urges that the court's failure to instruct the jury that CALJIC Nos. 2.04 and 2.05 were limited to Nunez violated due process and the Eighth Amendment. (Satele AOB 183, 187.) He did not raise the above at trial (13RT 3016-3019), and he fails to show that they require an "analysis" similar to a denial of a limiting instruction (see *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8). Satele forfeited his constitutional claims. (*Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

D. There Was No Error In Refusing To Give An Additional Limiting Instruction

Satele admits that the jury received "no evidence" that he tried to suppress proof, and a jury is "presumed to follow the court's instructions," presumably including CALJIC No. 17.31, which told the jury to disregard an instruction that applies to facts that do not exist. In other words, he fails to show why any further "limiting" instruction was compelled. Instead, he speculates that other proper instructions did not cure the alleged harm to him. (See Satele AOB 179-187.) Respondent disagrees.

As the trial court ruled, given the "neutral" language therein, CALJIC No. 2.04 did not require a limiting instruction that it only applied to Nunez. (13RT 3017.) The court was properly concerned with potentially prejudicing

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> comment was, "You should tell the truth. It's a drug case, not anything else, and you should tell that to the police." [¶] Now, that is the comment to which she [Feliciano] refers she was threatened with. I don't think that is a threat. My client's understanding of that, and his recollection is he got to use the car, which he did, for having the drugs. And she didn't pay cash for it.

(14RT 3302-3303.) Nunez's counsel argued Nunez's alleged fight with Collins was no "reason" to convict Nunez of the murders. (14RT 3337-3338.)

Nunez's defense by pinpointing to the jury proof of Nunez's consciousness of guilt in trying to fabricate evidence or persuade Feliciano and Collins to testify falsely. (13RT 3016-3017.) Satele admits that the court's "concern with Nunez's right to a fair trial was admirable[.]" (Satele AOB 182.) Further, a limiting instruction to CALJIC Nos. 2.04 and 2.05 would have been an improper "highlight" or "argumentative" instruction. (See *Bolden*, *supra*, 29 Cal.4th at p. 558; *Hughes, supra,* 27 Cal.4th at p. 361; *Earp*, *supra*, 20 Cal.4th at p. 886; *Garceau*, *supra*, 6 Cal.4th at p. 192.)

Finally, the court properly noted that to the extent CALJIC Nos. 2.04 and 2.05 did not apply to Satele, the jury could disregard those instructions under CALJIC No. 17.31 (footnote 81, *ante*). As the court put it, CALJIC No. 17.31 "will solve that problem." (13RT 3016-3017.) Given the foregoing, there was no error.

E. Satele Suffered No Prejudice

Satele claims that he suffered prejudice under *Chapman*, *supra*, 386 U.S. at p. 24. (Satele AOB 187.) Assuming arguendo instructional error, for a plethora of reasons, he was not prejudiced under *Watson*, *supra*, 46 Cal.2d at pp. 836-37. (See *Whisenhunt, supra*, 44 Cal.4th at p. 214.) First, as counsel argued at the hearing on instructions, the jury had "zero evidence" that Satele tried to fabricate evidence or persuade someone to testify falsely. (13RT 3016.) Accordingly, Satele suffered no prejudice from CALJIC Nos. 2.04 and 2.05.

Second, besides the neutral language in CALJIC Nos. 2.04 and 2.05, CALJIC No. 1.01 instructed the jury to consider all instructions "as a whole" and each in light of all others (37CT 10711; see *Howard*, *supra*, 42 Cal.4th at p. 1026). Also, CALJIC No. 17.31 instructed the jury to "[d]isregard any instruction which applies to facts determined by you not to exist[,]" and the jury received cautionary instructions under CALJIC Nos. 2.07, 2.08, and 17.00 (footnote 79, *ante*). Further, the jury presumably followed all instructions. (See

Shannon, *supra*, 512 U.S. at p. 585; *Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17.) Hence, the issue of CALJIC Nos. 2.04 and 2.05 being limited to Nunez was adequately conveyed to the jury by other proper instructions.

Third, the prosecutor argued to the jury that "consciousness of guilt" instructions in CALJIC Nos. 2.04 and 2.05 were limited to Nunez. (14RT 3225.) Even though the court told Satele's counsel that he could argue that CALJIC Nos. 2.04 and 2.05 did not apply to Satele (13RT 3017-3019), counsel did not address the issue in his closing argument (14RT 3345-3392). In fact, counsel gave a "consciousness of guilt" argument that was unrelated to Feliciano and Collins (footnote 84, *ante*), which shows that counsel had the capacity to argue that CALJIC Nos. 2.04 and 2.05 were limited to Nunez if counsel seriously believed that such issue was unclear to the jury. Indeed, Satele's counsel argued after Nunez's counsel, and Nunez's counsel had argued that Feliciano offered insufficient proof that Nunez had threatened her (footnote 84, *ante*). Thus, the jury was left with positively no impression that CALJIC Nos. 2.04 and 2.05 applied to Satele.

Finally, Satele speculates:

> In light of the weaknesses in the prosecution's case, the danger of confusion inherent in conspiracy cases, and the likelihood that the jury would misuse this evidence [apparently concerning Collins and Feliciano], it is clear that [he] was prejudiced by the failure of the trial court to correctly instruct the jury as to the proper use of this evidence.

(Satele AOB 187.) As shown (see Guilt Phase Argument IX(C), *ante*), the proof against him was powerful. Hence, it is not reasonably probable that he would have had a more favorable verdict if the jury had received an instruction that CALJIC Nos. 2.04 and 2.05 did not apply to him. (See *Whisenhunt*, *supra*, 44 Cal.4th p. 214; *Watson*, *supra*, 46 Cal.2d at p. 836.) Indeed, given that the jury received overwhelming evidence that Satele was indisputably guilty of

participating in shooting the murder victims for a gang purpose, beyond a reasonable doubt, Satele suffered no harm from an omitted limiting instruction. (See *Chapman*, *supra*, 386 U.S. at p. 24.) Therefore, reversal is unwarranted.

XIV.

THERE WAS NO CUMULATIVE ERROR AT THE GUILT PHASE

The final guilt phase claim is that reversal is required due to cumulative error. (Satele AOB 226-232 [Arg. XIII]; Nunez AOB 330-332 [Arg. XVIII].) As shown earlier in this brief, there was no error during the guilt phase, or any error was minimal or harmless as shown under *Watson*, *supra*, 46 Cal.2d at p. 836, and/or *Chapman*, *supra*, 386 U.S. at p. 24. (See *Ward*, *supra*, 36 Cal.4th at p. 216 [To the extent there were any errors in the guilt phase, they were minimal. We therefore rejected defendant's claim of cumulative error"]; *Cunningham, supra,* 25 Cal.4th at p. 1009 ["The few errors that occurred during defendant's trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one"]; *People v. Samayoa* (1997) 15 Cal.4th 795, 849 ["In light of our conclusions, however, that none of defendant's claims of error, considered separately, has merit, we reject defendant's contention that cumulative error requires reversal"].) Therefore, a cumulative error claim does not warrant reversal in this case.

XV.

CALJIC NO. 17.51.1 ADEQUATELY INSTRUCTED THE JURY AFTER ALTERNATE JURORS 2 AND 4 BECAME DELIBERATING JURORS

Prospective juror 8971 (alternate juror 2) became juror number 10 after several days of penalty deliberations (2RT 376, 527-528; 3RT 636-637, 649; 4RT 851, 857; 18RT 4469-4470), and prospective juror 2211 (alternate juror 4) became juror number 9 soon thereafter[85] (2RT 376, 527, 529; 3RT 637, 650;

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85. After prospective juror 8971 became juror number 10, the jury (in front of prospective juror 2211 and the remaining alternate jurors) received CALJIC No. 17.51.1 as "requested by" appellants (38CT 11119; see 37CT 10683-10684; 17RT 4219, 4224) as follows:

> Alternate No. 2, I'm going to invite you to have a seat in the box now. You are the substitute for juror No. 10. You're now the new juror No. 10.
>
> *Members of the jury*, a juror has been replaced by an alternate juror. The alternate juror was present during the presentation of all the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point.
>
> For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. *Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts and findings and the evidence and law, what penalty should be imposed.*
>
> *Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase* of the trial. That being said, Ladies and Gentlemen, the 12 of you – I'm going to excuse you back into the jury room to deliberate. The two alternates, I'm going to send you back to the jury commissioner. Don't talk amongst yourselves while you're waiting.

(18RT 4470 [italics added].) After becoming deliberating juror number 9, prospective juror 2211 (alternate juror 4) received the same (CALJIC

4RT 852, 857; 18RT 4491). Earlier, appellants said reversal was justified because alternate jurors 2 and 4 did not take a "trial juror" oath, but such claim fails for the reasons stated in Argument III, *ante*. Now, they claim the death penalty must be reversed because the jury was not instructed "to set aside and disregard all prior discussions" and to "begin penalty deliberations anew" after alternate jurors 2 and 4 became deliberating jurors. They urge this even though they requested CALJIC No. 17.51.1, and add for the first time ever that error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Satele AOB 233-245 [Arg. XIV]; Nunez AOB 230-242 [Arg. XI].) They forfeited review, CALJIC No. 17.51.1 adequately instruct the jury to deliberate "anew" (see *People v. Leonard* (2007) 40 Cal.4th 1370, 1412-1413 (*Leonard*); *Ledesma*, *supra*, 39 Cal.4th at p. 743; *People v. Cain* (1995) 10 Cal.4th 1, 64-68 (*Cain*); *Fudge*, *supra*, 7 Cal.4th at p. 1100; *People v. Proctor* (1992) 4 Cal.4th 499, 536-538 (*Proctor*); *People v. Collins* (1976) 17 Cal.3d 687, 694 (*Collins*); footnote 90, *post*; see also *Boyette*, *supra* 29 Cal.4th at p. 462, fn. 19), and no reversal is required even assuming any error.

A. Appellants Forfeited Review Or Invited Error By Requesting CALJIC No. 17.51.1

Appellants discuss *Collins*, but they ignore that: (1) they "requested" CALJIC No. 17.51.1 (38CT 11119); and (2) a defendant may "waive the right to have the jury instructed to begin its deliberations anew" (*Collins*, *supra*, 17 Cal.3d at p. 695, fn. 4). They also discuss *Cain*. (Satele AOB 237-245; Nunez AOB 233-242.) In *Cain*, five years before jury deliberations in this case, this Court found "adequate" instructions that contained the "deliberate anew" advisement. (*Cain*, *supra*, 10 Cal.4th at pp. 64-68). Although "anew" wording is omitted from CALJIC No. 17.51.1, the "comment" to CALJIC No. 17.51.1

No. 17.51.1) instruction. (18RT 4491.)

(6th ed. 1996) cited *Cain*. Satele admits this. (Satele AOB 241.) Thus, either CALJIC No. 17.51.1 (as requested) adequately instructed the jury to deliberate anew, or appellants forfeited review or invited alleged error by failing to request a clarifying instruction using language (now relied on) contained in *Cain, Collins*, or CALJIC No. 17.51.[86/]

Satele claims: "it is important to understand the difference between CALJIC Nos. 17.51 and 17.51.1." (Satele AOB 241.) His trial occurred after *Cain* and *Collins*. Thus, appellants had an opportunity to consider such alleged differences before they requested CALJIC No. 17.51.1.

Appellants cite *People v. Renteria* (2001) 93 Cal.App.4th 552 (*Renteria*). (Nunez AOB 234, 239-240; Satele AOB 242-243.) There, the court denied a claim that the defendant forfeited review by failing to request CALJIC No. 17.51 or an equivalent instruction when the alternate replaced the discharged juror. (*Id.* at p. 560.) Here, on notice that *Cain* was cited in CALJIC No. 17.51.1's comment, appellants requested that their jury receive CALJIC No. 17.51.1 rather than CALJIC No. 17.51. *Renteria* is therefore distinguishable.

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86. As noted earlier:

> "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." [Citation.] For the doctrine to apply, "it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." [Citation.] However, [t]he existence of some conceivable tactical purpose will not support a finding that defense counsel invited an error in instructions. The record must reflect that counsel had a deliberate tactical purpose." [Citation.]

(*Bunyard*, *supra*, 45 Cal.3d at p. 1234; see *Thornton*, *supra*, 41 Cal.4th at pp. 435-436.)

Indeed, a juror "substitution" issue was the last instruction discussed. The court stated:

> I will tell you there is only one other instruction, it's the substitution of jury during penalty phase, [*sic*] 7.51, assuming that we get to that particular information, let me just read the instruction. We may have to read that instruction[.] . . .

(17RT 4224.) Thus, the court and appellants were aware of CALJIC No. 17.51 when the court made these comments on June 20, 2000. (17RT 4174, 4129, 4224.) Six days later (June 26, 2000), the jury received initial penalty phase instructions. That Monday, at 11:20 a.m., the jury was excused for deliberations. (18RT 4404-4434.) On Friday, June 30, 2000 (ten days after the CALJIC No. 17.51 remark or six days after instructions to the jury): (1) alternate juror 2 became juror number 10; and (2) the jury received CALJIC No. 17.51.1 as "requested by" appellants. (18RT 4442, 4469-4470; 38CT 11119.) On Monday, July 3, 2000 (13 days after the court's CALJIC No. 17.51 remark or a full weekend after alternate juror 2 became juror number 10): (1) alternate juror 4 became juror number 9; and (2) the jury received a second CALJIC No. 17.51.1 instruction. (18RT 4471-4472, 4491.)

During all of the above time periods, appellants never claimed on the record that CALJIC No. 17.51.1 inadequately instructed the jury to deliberate anew. Instead, on notice that *Cain* was cited in CALJIC No. 17.51.1's comment, appellants tactically requested CALJIC No. 17.51.1 rather than CALJIC No. 17.51. Given this record, appellants must have concluded that CALJIC No. 17.51.1 (as requested) adequately instructed the jury to deliberate anew, or appellants forfeited review or invited alleged error. (See footnote 86, *ante*; see also *People v. Valles* (1979) 24 Cal.3d 121, 127 (*Valles*) ["we hold that a defendant may not complain on appeal of the presence of an alternate

juror in the jury room during deliberations when his counsel stipulates to the procedure"].)

Further, when alternate jurors 2 and 4 became deliberating jurors, appellants never argued that alleged error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments, so they have forfeited these claims on appeal. (18RT 4469-4470, 4491.) They fail to prove that such constitutional violations are analyzed "similar to" a failure to instruct a jury anew. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.) At any rate, here, appellants forfeited review, or they invited the alleged error. (See *Thornton*, *supra*, 41 Cal.4th at pp. 435-436, 462-463.)

B. There Was No *Apprendi-Blakely* Error

Appellants urge that an omitted "deliberate anew" instruction violated *Apprendi*, *supra*, 530 U.S. 466, *Ring*, *supra*, 536 U.S. 584, *Blakely*, *supra*, 542 U.S. 296, and thus, *Cunningham*, *supra*, 549 U.S. 270. (Satele AOB 235; Nunez AOB 233.) This contention is meritless, because each appellant received a unanimous verdict by all 12 jurors that death was the appropriate penalty. (*Rundle*, *supra*, 43 Cal.4th at pp. 198-199 [determination of punishment in capital case is different from determination of guilt, since it involves moral, normative decision].)

C. There Was No Instructional Error

Assuming arguendo no forfeiture, as will appear, there was no instructional error.

1. Standard Of Review

A trial court has broad discretion to replace a juror in the midst of trial (*Boyette*, *supra* 29 Cal.4th at p. 462, fn. 19), but the court must then "instruct

the jury to set aside and disregard all past deliberations and begin deliberating anew" (*Collins*, *supra*, 17 Cal.3d at p. 694; see *Leonard*, *supra*, 40 Cal.4th at p. 1413; *Ledesma*, *supra*, 39 Cal.4th at p. 743; *Cunningham*, *supra*, 25 Cal.4th at p. 1030; *Proctor*, *supra*, 4 Cal.4th at pp. 537-538; *People v. Anderson* (1990) 52 Cal.3d 453, 482-483 (*Anderson*); *People v. Wright* (1990) 52 Cal.3d 367, 420 (*Wright*); *People v. Odle* (1988) 45 Cal.3d 386, 404-405 (*Olde*); *Valles*, *supra*, 24 Cal.3d at p. 128; *Fudge*, *supra*, 7 Cal.4th at p. 1110). In *Collins*, this Court explained:

> The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had. We are confident that juries made aware of the rights involved will faithfully follow such instructions. [Footnote.]

(*Collins*, *supra*, 17 Cal.3d at p. 694; see *Cain*, *supra*, 10 Cal.4th at pp. 64-68.) In *Anderson*, this Court held that its announcement in *Collins* involved "prophylactic procedures" or "cautionary instructions" that were "recommended[.]" (*Anderson*, *supra*, 52 Cal.3d at p. 483; see *Odle*, *supra*, 45 Cal.3d at p. 405.)

2. Analysis

Appellants claim that they were deprived of "having a verdict that is the result of full participation of all twelve jurors" as "discussed in" *Collins*, *supra*, 17 Cal.3d 687. (Satele AOB 241; Nunez AOB 233-237.) Respondent disagrees. As requested by appellants (38CT 11119; 17RT 4219, 4224), CALJIC No. 17.51.1 instructed the jury that due to the presence of the new

replacement jurors:

> Your function *now* is to determine along *with the other jurors*, in the light of the prior verdict or verdicts and findings and the evidence and law, what *penalty* should be imposed. [¶] *Each of you must participate fully in the deliberations*, including any review as may be necessary of the evidence presented in the guilt phase of the trial.

(18RT 4470, 4491 [italics added].)

In *Proctor*, this Court denied a claim that a court's instruction did not "embody all elements of the instruction required by" *Collins*. (*Proctor*, *supra*, 4 Cal.4th at pp. 536-537.) The trial court in *Proctor* instructed the jury:

> [It] "would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also."

(*Id.* at p. 536.) As the whether the foregoing was *Collins* error, this Court held: "Defendant's contention must be rejected." (*Id.* ["By instructing the jury to 'kind of start, start from scratch, so to speak,' the court implied that the jury should disregard its previous deliberations" and "[b]y providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate" and "the court did not suggest that the jury might not have reconsider any matter already considered or decided"], citing *Odle*, *supra*, 45 Cal.3d at p. 405.)

Unlike in *Proctor*, here, the court did not merely instruct the jury that it would be "helpful" to "kind of start" from "scratch" and give the alternate the "benefit" of prior "thinking" and an "opportunity" to give "input[.]" (See *Proctor*, *supra*, 4 Cal.4th at p. 536.) Here, the trial court clearly instructed the

jury that "[y]our function *now*" is to deliberate "with" the replacement juror, and "[e]ach of you *must participate fully* in the deliberations." (18RT 4470, 4491 [italics added].) Given *Proctor*, CALJIC No. 17.51.1 adequately instructed the jury as "recommended" in *Collins*. (See *Anderson*, *supra*, 52 Cal.3d at p. 483; see also *Ledesma*, *supra*, 39 Cal.4th at p. 743; *Valles*, *supra*, 24 Cal.3d at p. 128 ["If the alternate is substituted for an original juror during deliberations, the jury should be instructed to begin its deliberations anew *to the extent necessary to permit the former alternate to fully participate*"] [italics added]; CALJIC No. 17.51.1 ["comment"], citing *Cain*, *supra*, 10 Cal.4th at p. 66.)

While CALJIC No. 17.51.1 did not expressly state the deliberations were to begin anew, that concept was adequately conveyed. The instructions use the word "now," complied with the command that all jurors must participate in the deliberations, and viewed in the context that the jury's verdict was to be a moral and normative decision rather than a factual resolution, provided appropriate guidance.

Satele speculates: "There is a natural tendency among people to not want to re-harsh matters that have previously been reviewed and possibly resolved." (Satele AOB 242.) "Such speculation cannot form the basis for a successful attack on the verdict or judgment." (*Anderson*, *supra*, 52 Cal.3d at p. 483.) Indeed, a "newly constituted jury" is "not required to deliberate for the same length of time as the original jury" and is not "required to review the same evidence." (*Leonard*, *supra*, 40 Cal.4th at p. 1413.) Further, in addition to twice receiving CALJIC No. 17.51.1 (footnote 86, *ante*), the jury presumably followed all applicable instructions (see *Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17). In other words, with each replacement juror, the jury presumably "now" began deliberations "with" all jurors participating "fully[.]" (18RT 4470, 4491; see *Leonard*, *supra*, 40 Cal.4th at p. 1413 ["When, as here, there

are no indications to the contrary, we assume that the jurors followed the trial court's instructions and started afresh"]; *Ledesma*, *supra*, 39 Cal.4th at p. 743 ["Defendant provides no reason for us to doubt that the jury in this case was able to follow the court's instructions"].)

Further, in this case, as noted earlier in Argument III, *ante*, about an hour after the initial 12 selected jurors took a trial-juror oath in front of prospective jurors 8971 and 2211 (4RT 846-847), prospective jurors 8971 and 2211 (and the other alternate jurors) accepted the following oath:

> You understand and agree that you will act as an alternate juror in the case now pending before this Court, and will act as a trial juror when called upon to do so?

(4RT 856-857.) Further, during jury selection, prospective jurors 8971 and 2211 were instructed:

> If there is to be a verdict imposing the death penalty, all 12 jurors must agree unanimously on that punishment. Therefore, each juror bears full responsibility in that determination.

(2RT 382; see 2RT 376, 527-529; footnote 35, *ante*.) Thus, before the guilt phase began, the jury in this case understood "the principle that the jury must reach its verdict through common, shared deliberations." (*Cain*, *supra*, 10 Cal.4th at p. 66, citing *Collins*, *supra*, 17 Cal.3d at p. 693.)

Appellants claim that "to the extent that the jury was obligated to reconsider any guilt phase issues that may have had an impact on penalty deliberations, such as issues relating to lingering doubt, [they were] also deprived of the protections afforded under" *Cain*, *supra*, 10 Cal.4th 1. (Satele AOB 241-242; see Nunez AOB 235-241.) Appellants forfeited such claim by failing to raise it at trial and by requesting CALJIC No. 17.51.1 without modifications that address these matters. Also, although "a sua sponte instruction on lingering doubt is not required at the penalty phase"

(*Cunningham*, *supra*, 25 Cal.4th at p. 1030), appellants requested a "lingering doubt" instruction ("special instruction No. C"), which was given to the penalty phase jury as follows:

> Each of you may consider as a mitigating factor any lingering doubt or residual doubt that you may have as to the guilt of the defendant. Lingering or residual doubt is defined as doubt concerning proof that remains after you have been convinced beyond a reasonable doubt.

(18RT 4423; 38CT 11089; see 17RT 4212, 4221-4222.)

Further, appellants requested a "mercy" instruction, and the jury was instructed:

> After considering all the aggravating and mitigating factors that are applicable in this case, *you may decide to impose the penalty of life in prison without possibility of parole in exercising mercy on behalf of the defendant.*
>
> You may decide not to impose the penalty of death by granting the defendant mercy, *regardless of whether or not you determine he deserves your sympathy.*

(18RT 4424-4425 [italics added]; 38CT 11100; see 17RT 4223.) Finally, appellants requested a "sympathy" instruction, and the jury was instructed:

> It is not only appropriate but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.

(18RT 4424; 38CT 11099; see 17RT 4219-4221, 4223.)

Alternate juror 2 and 4 were present when the court gave the penalty phase jury the foregoing, and all other penalty phase instructions. Accordingly, all jurors were adequately instructed within the meaning of *Cain*.

For all above reasons, there was no error here. (See *Leonard*, *supra*, 40 Cal.4th at p. 1413; *Ledesma*, *supra*, 39 Cal.4th at p. 743; *Proctor*, *supra*, 4

Cal.4th at p. 536; *Odle*, *supra*, 45 Cal.3d at p. 405; *Valles*, *supra*, 24 Cal.3d at p. 128; CALJIC No. 17.51.1 ["comment"].) Instead, CALJIC No. 17.51.1, along with earlier instructions, "adequately protected [the] right to jury trial untainted by any prior deliberations" under the "recommended" instructions in *Collins*. (See *Anderson*, *supra*, 52 Cal.3d at p. 483; see also *Wright*, *supra*, 52 Cal.3d at p. 420 ["there is no basis upon which to conclude that defendant suffered any prejudice due to the trial court's failure to fashion, sua sponte, a modified *Collins* instruction"]; but see *People v. Martinez* (1984) 159 Cal.App.3d 661, 664-666 (*Martinez*) [disagreeing with People's claim that court "essentially complied with the mandate in *Collins*" because court's instruction failed to include the phrase "set aside and disregard all past deliberations"].) Unlike in *Martinez*, here, as requested under CALJIC No. 17.51.1, as to each replacement juror, the jury was told to "now" deliberate "with" all jurors participating "fully[.]" (Footnote 85, *ante*.) This was adequate under *Collins* given *Proctor*, which this Court decided nearly eight years after the lower court's suspect opinion in *Martinez*.

D. Instructional Error (If Any) Was Not Prejudicial

Appellants rely on *Renteria*, *supra*, 93 Cal.App.4th 552, as proof that they suffered prejudice. (Nunez AOB 234, 239-240; Satele AOB 242-243.) No reversal is required because appellants have failed to demonstrate under the state law standard that there was a reasonable probability that the alleged deficient instruction affected the death verdict. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) Under the federal standard, the alleged error did not contribute to the verdict, beyond a reasonable doubt. (*Id.* at p. 1222.)

"[T]he closeness of the case and the comparison of time spent deliberating before and after the substitution of the alternate juror [are] factors to be considered when determining prejudice from *Collins* error." (*Odle*, *supra*, 45 Cal.3d at p. 405; see *Proctor*, *supra*, 4 Cal.4th at p. 537.) However, a

"newly constituted jury" is "not required to deliberate for the same length of time as the original jury" and is not "required to review the same evidence." (*Leonard*, *supra*, 40 Cal.4th at p. 1413.)

Here, alternates 2 and 4 were present when the trial court gave all the penalty phase instructions previously discussed, and the following instructions, which ensured the reliability of the unanimous death verdicts by the jury. "Special jury instructions" #2, #3, and #4, told the jury it could consider victim impact evidence. (18RT 4425; 38CT 11102-11104; see 17RT 4217-4219.) The jury received live testimony that the killings of Fuller and Robinson caused tremendous suffering to family members. The victims were young, and were planning their wedding when they were shot to death by appellants for no reason other than a gang purpose (in light of the jury's "not true" finding that the shootings were racially motivated). Ironically, Robinson was earlier sent to Texas, where he graduated from high school because his step-mother "wanted to get him out" of California's gang environment. He did not die at the scene, and the jury heard live testimony that family members endured the agony of watching him suffer from multiple gunshot wounds until he finally died in a hospital. He had regularly attended church and played drums for his church choir. Prior to her killing, Fuller had told her mother about a church that she and Robinson began attending because Robinson wanted Fuller to start Bible study. Fuller was a Los Angeles United School District teacher's aide when appellants shot her to death. Further, her mother's live-in boyfriend was an Inglewood police officer during her killing, and he was present when LAPD arrived to report the shootings to the family around 6 a.m. (about seven hours after the shootings). (See Statement of Facts, Penalty Phase (C)(1), *ante*.)

At the penalty phase, the jury received unimpeached proof that about 10 months after the killings, Los Angeles sheriff deputies were transporting Nunez and about 44 handcuffed inmates on a bus from court to jail when Nunez

un-handcuffed himself en route. Nunez tampered with other handcuffs before being re-handcuffed, and he did jumping jacks and laughed before being re-handcuffed. (16RT 3911-3925.) A deputy also testified that about four weeks earlier, she was in the court "lock-up" area when a razor blade was found in a Bible in Nunez's property. (16RT 3927-3934.) Another deputy testified that in a court lock-up area during the prosecutor's guilt phase case-in-chief in this case, Nunez had a metal pin concealed in his mouth that could be used to unlock handcuffs. (16RT 3936-3940.)

During the penalty phase, alternate jurors 2 and 4 were present when the court instructed the jury on all of the relevant penalty determination factors listed in section 190.3, including subdivision (k), which allowed consideration of:

> Any other – *any other circumstance which extenuates the gravity of the crime even though its not a legal excuse for the crime and any sympathetic or other aspects of the defendant's character or record that the defendant offers as a basis for a sentence less than death*, whether or not related to the [*sic*] to the offense for which he's on trial. You must *disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.*

(18RT 4420-4422 [italics added]; 38CT 11086-11086; CALJIC No. 8.85; see 17RT 4211.)

Alternate jurors 2 and 4 were also present when the trial court gave "special jury instruction #1[,]" which mandated to the jury:

> In the guilt phase of this trial, you were instructed that the People have the burden of proof and the People must prove their case beyond a reasonable doubt.
>
> Those instructions do not apply in the penalty phase. Instead[,] you are instructed as follows.

Number one, *the People do not have the burden of proof in the penalty trial. The defendant does not have the burden of proof in the penalty trial.*

Number 2, neither side is required to prove the existence of a factor in aggravation or mitigation beyond a reasonable doubt, except with regards to violent criminal activity as defined in instruction 8.85(b).

Number 3, *it is not required that all twelve jurors agree on whether a factor in aggravation or mitigation has been proven before an individual juror may consider that factor.*

Number 4, it is not required that the People prove beyond a reasonable doubt that the factors in aggravation outweigh the factors in mitigation.

Number 5, *it is not required that the People prove beyond a reasonable doubt that the death penalty is the appropriate penalty.*

(18RT 4422-4423 [italics added]; 38CT 11088; see 17RT 4215-4217.)

Alternate jurors 2 and 4 were also present when the court instructed the jury:

It is now *your duty to determine which of the two penalties* death or confinement in the state prison for life without the possibility of parole, *shall be imposed on each defendant.*

After having heard all of the evidence, and after having heard and considered the arguments of counsel you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An *aggravating fact* is any fact, condition or event attending the commission of a crime which *increases its guilt or enormity*, or adds to it's injurious consequences which is *above and beyond the element of the crime itself.* A *mitigating circumstance* is any fact[,] condition or

event which does not constitute justification or excuse for the crime in question, but *may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.*

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. *Your [sic] free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.* In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances [with the totality of the mitigating circumstances] [see 38CT 11116]. *To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.*

In this case, *you must decide separately the question of the penalty as to each of the defendants.* If you *cannot agree upon the penalty* to be inflicted on both defendants, but do agree on the penalty as to one of them, you must render a verdict as to the one on which you do agree.

You shall *now retire to deliberate on the penalty.* The foreperson previously selected may preside over your deliberations *or you may choose a new foreperson.* In other to make a determination as to the penalty, *all twelve jurors must agree.*

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(18RT 4432-4433 [italics added]; 38CT 11116-11117; CALJIC No. 8.88; see 17RT 4184, 4215; *Anderson, supra*, 52 Cal.3d at p. 483.)

In mitigation, Nunez gave the jury proof that: (1) his childhood was difficult; (2) he gradually became a gang member around the age of 12; (3) Guaca did not want him to die because it would then be hard for her to raise their sons (ages two and one); and (4) in an opinion from Dr. Niedorf, juvenile camps and California Youth Authority officials "missed the boat" by not educating Nunez towards a better path prior to the killings in this case. (See Statement of Facts, Penalty Phase (C)(2)(i), *ante*.) Satele offered to the jury proof that: (1) his childhood was difficult; (2) he became a gang member around the age of 12; (3) he lived in a juvenile camp and a military camp prior to the killings; and (4) in an opinion from Dr. Miles, Satele's history of daily heavy drinking and methamphetamine use (plus lack of sleep) reduced his ability to "control his impulses[,]" and Satele had a low IQ test score, although he "didn't score low enough to be in the mentally retarded range." (See Statement of Facts, Penalty Phase (C)(2)(ii), *ante*.)

As noted, after alternate jurors 2 and 4 separately became deliberating jurors, the jury received CALJIC No. 17.51.1 (see footnote 85, *ante*). Earlier, as noted, alternate jurors 2 and 4 were present when the court gave: (1) a "lingering doubt" instruction ("special instruction No. C") (18RT 4423; 38CT 11089; see 17RT 4212, 4221-4222; *Cunningham, supra*, 25 Cal.4th at p. 1030); (2) a "sympathy" instruction (18RT 4424; 38CT 11099; see 17RT 4219-4221, 4223); and (3) a "mercy" instruction (18RT 4424-4425; 38CT 11100; see 17RT 4223).[87]

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87. Alternate jurors 2 and 4 were present when the court gave other special instructions, including: (1) special instruction E (18RT 4423; 38CT 11090); (2) special instruction F (18RT 4423; 38CT 11091; see 17RT 4222); (3) special instruction B (18RT 4423; 38CT 11092); (4) special instruction L (18RT 4424; 38CT 11094; see 17RT 4224); (5) special instruction M (18RT

Simply put, CALJIC No. 17.51.1 instructed the jury to "now" begin deliberations with the replacement juror, and that all jurors must participate "fully" (18RT 4470, 4491). This, plus the above instructions, confirms that any omission in the language in CALJIC No. 17.51.1 was harmless, since the jury was as adequately instructed to deliberate anew.

Regarding reliance by appellants on the brevity of the deliberations after the alternates were seated, on Monday, June 26, 2000, (1) the jury was instructed at the penalty phase; and (2) the jury began deliberations for about two and fifty-two minutes, i.e., from 11:20 a.m. to 11:35 a.m., and 1:37 p.m. to 4 p.m. (38CT 11121-11122; 18RT 4404-4434). The next day (Tuesday, June 27, 2000), the jury deliberated for about two hours and fifty minutes, i.e., from 9:30 a.m. to 10:15 a.m., 10:43 a.m. to 11:50 a.m., and 1:38 p.m. to 2:30 p.m. (38CT 11124-11125.) The next day (Wednesday, June 28, 2000), the jury deliberated for about for about two hours, i.e., from 1:30 p.m. to 1:55 p.m., and 2:10 p.m. to 3:45 p.m. (38CT 11126-11127.) The next day (Thursday, June 29, 2000), the jury deliberated for one hour, i.e., from 9:30 a.m. to 10:30 a.m. until it was excused for that day after it sent a note to the court. (38CT 11130-11131.) The foreperson's note (in part) reported:

> We are at an impasse on the verdict 10-2, what and how do we go on? Need answer ASAP.

(38CT 11132.) The note also reported that juror number 10 said she "confided with her friend & mother and that they sided with her doubts[.]" After a hearing, the court excused juror number 10 for misconduct. (38CT 11132, 11134-11136; footnote 44, *ante*; Argument II, *ante*.) Although the jury had deliberated about nine hours, an unknown portion of this time was due to

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4424; 38CT 11095; see 17RT 4224); (6) special instruction N (18RT 4424; 38CT 11096; see 17RT 4224); (7) special instruction D (18RT 4424; 38CT 11097; see 17RT 4222); and (8) special instruction #2 (18RT 4424; 38CT 11098).

complications.[88] (See *Leonard*, *supra*, 40 Cal.4th at pp. 1412-1413 [during deliberations "on Tuesday afternoon, Wednesday, and Thursday morning" the jury "spent much of this time listening to audiotapes and viewing videotapes that were admitted into evidence, and listening to readback of testimony"].)

The next day (Friday, June 30, 2000): (1) alternate juror 2 became juror number 10; (2) the jury received CALJIC No. 17.51.1 for the first time; and (3) the jury deliberated for two hours (from 9:20 a.m. to 10 a.m. and 10:15 a.m. to 11:35 a.m.) until the jury was excused for the day after the foreperson sent a note to the court that (in part) stated the jury was at "11-1." (38CT 11133-11136; 18RT 4442, 4469-4471.) The foreperson also reported:

> We have a juror that feels "God" has the final judgment and that she feels "God's" judgment on herself if she found death as her conviction would go against her on Judgment Day. My question is should she have been placed on the jury with special circumstances . . . .

(38CT 11133.) The record shows that there were two hours of deliberations with alternate juror 2 as juror number 10 following CALJIC No. 17.51.1 instruction, which included the holdout juror's participation resulting in the jury moving from 10 to 2 apparently in favor of the death penalty to 11 to 1 in favor of the death penalty.

After a two-day weekend break, on Monday (July 3, 2000), following a hearing: (1) the trial court excused juror number 9 for medical (pregnancy)

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88. At a hearing on whether there was misconduct, former juror number 10 admitted that "Wednesday night we had reached the verdict" (18RT 4448) and the jury was "going to turn in the verdict in the morning" (18RT 4450), but "it didn't sit right with me" (18RT 4445). Thus, after deliberating eight hours, it appears the jury was about to announce a death penalty recommendation as to appellants. At any rate, as will appear, there was no error in removing former juror number 10 on "misconduct" grounds. (18RT 4443-4459, 4467-4471; Argument XVII, *post.*)

reasons;[89] (2) alternate juror 4 became juror number 9; (3) the jury received CALJIC No. 17.51.1 (footnote 85, *ante*) for the second time; and (4) the jury deliberated for 50 minutes (10:45 a.m. to 11:35 a.m.) at which point it reached a verdict. (38CT 11134-11136, 11138-11141; 18RT 4471-4472, 4491-4493; footnote 45, *ante*; Argument II, *ante*.)

"[T]he brevity of the deliberations proves nothing." (*Leonard*, *supra*, 40 Cal.4th at p. 1413.) Unlike the guilt phase, there were no complicated factual issues for the jury to resolve. Instead, each juror was called upon to make a moral, normative determination as to the appropriate punishment. Hence, here, after alternate juror 2 became juror number 10, two hours was adequate time for the jury to deliberate anew and shift from a 10-2 vote to a 11-1 vote. (See *Leonard*, *supra*, 40 Cal.4th at p. 1413 [after a juror was replaced, the jury "deliberated for roughly two and one-half hours before notifying the court that it had reached a verdict"].) For this reason, each appellant's claim that error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments (see Satele AOB 233-245; Nunez AOB 230-242), should be rejected.

For the same reasons, after alternate juror 4 became juror number 9, roughly 50 minutes was adequate time for the jury to deliberate anew and reach a verdict in this case. As shown, there was overwhelming evidence against appellants at the guilt phase. (See *Proctor*, *supra*, 4 Cal.4th at p. 537 ["the evidence against defendant was extremely strong"]; *Odle*, *supra*, 45 Cal.3d at p. 406 ["In this case the evidence against defendant was overwhelming"]; *Collins*, *supra*, 17 Cal.3d at p. 697 ["The case against defendant is very strong"]; see also *Leonard*, *supra*, 40 Cal.4th at p. 1412 ["we see no evidence

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89. As will appear, there was no error in removing former juror number 9 for "cause" due to her "high risk" pregnancy. (18RT 4475-4485; Argument XVIII, *post*.)

of prejudging; rather, Juror No. 8 apparently concluded, based on the evidence presented at trial, that the evidence of defendant's guilt was so overwhelming that there was nothing left to discuss"].) Also, the jury received powerful aggravating evidence and weak mitigation proof at the penalty phase. Further, the jury heard CALJIC No. 17.51.1 after alternate jurors 2 and 4 became juror numbers 10 and 9 (footnote 85, *ante*). Finally, alternate jurors 2 and 4 attended the guilt phase and were present during the reading of all previously discussed penalty phase instructions leading up to CALJIC No. 17.51.1 being read twice to the jury. (*Wright, supra*, 52 Cal.3d at p. 420 ["Defendant acknowledges that Lutz 'had been present and had heard all the evidence at the guilt/special circumstance phase,' and that 'therefore [she] was in a position to evaluate the case based on all the evidence at all stages of the trial'"].) Hence, "[i]t is not reasonably possible the outcome of the [penalty phase] would have been different had the jury been instructed, in more exact language, to begin its deliberations anew." (See *Proctor*, *supra*, 4 Cal.4th at pp. 537-538; *Wright*, *supra*, 52 Cal.3d at p. 420 ["there is no basis upon which to conclude that defendant suffered any prejudice due to the trial court's failure to fashion, sua sponte, a modified *Collins* instruction"].) Instead, given all of the above, the jury clearly understood that it "must reach its verdict through common, shared deliberations." (*Cain*, *supra*, 10 Cal.4th at p. 66.) In other words, reversal of the death penalty as to appellants is unjustified because error (if any) was not prejudicial under the state law "reasonable possibility" standard, or the applicable *Chapman* standard for federal constitutional error.

XVI.

DUPLICATIVE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE FINDINGS WAS HARMLESS ERROR

Citing plurality opinions in *People v. Allen* (1986) 42 Cal.3d 1222, 1273 (*Allen*), and *People v. Harris* (1984) 36 Cal.3d 36 (*Harris*), along with adoption of *Harris* and *Allen* by a majority in *People v. Sanders* (1995) 11 Cal.4th 475, 537 (*Sanders*), and *People v. Champion, supra*, 9 Cal.4th at p. 936, appellants claim it was error to allow two multiple-murder findings (as to counts 1 and 2) because "there can only be one multiple murder" finding in a capital case, and this denied due process "[a]s with the case of improper character evidence" in that there is a "grave danger" their "culpability" was "improperly inflated in the penalty phase" due to the presence of two special circumstance findings. (Satele AOB 290-292 [Arg. XIX]; Nunez AOB 290-293 [Arg. XVI].) They did not raise the above issue during the trial or in post-verdict motions to strike the special circumstance findings. (39CT 11220-11226.) However, the Attorney General has previously conceded error on this point in other cases (*People v. Hardy* (1992) 2 Cal.4th 86, 191), and this Court has "consistently found such error to be harmless" (*Champion, supra*, 9 Cal.4th at p. 936, citing *People v. Jones* (1991) 53 Cal.3d 1115, 1149 (*Jones*), and *People v. Andrews* (1989) 49 Cal.3d 200, 225-226 (*Andrews*); see *People v. Marshall* (1996) 13 Cal.4th 799, 855 (*Marshall*).)

Here, it was clear to the jury that the multiple-murder special circumstances were based on the two charged murders. "[D]uplicative multiple-murder special circumstances is harmless where, as here, the jury knows the number of murders on which the special circumstances are based." (*Marshall, supra*, 13 Cal.4th at p. 855.) Also, in *Jones*, this Court stated:

> Although we assume that the jury considered the invalid special-circumstance finding independent of its underlying facts, we cannot

conclude that the jury gave the finding any significant weight. [Citation.] There is no reasonable possibility that the extra special circumstance affected the verdict.

(*Jones*, *supra*, 53 Cal.3d at p. 1149.)

XVII.

THE COURT PROPERLY EXCUSED FORMER JUROR NUMBER 10 DURING THE PENALTY PHASE

Appellants claim it was an abuse of discretion to remove former juror number 10 at the penalty phase, and error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Satele AOB 262-279 [Arg. XVII]; Nunez AOB 261-277 [Arg. XIV].) They forfeited constitutional claims, and reversal of the death penalty is unjustified because the former juror proved to a "demonstrable reality" an inability to perform as a juror after she: (1) discussed this case with her mother and a friend after the jury purportedly was "going to turn in the verdict in the morning" (18RT 4444-4452); and (2) told the other jurors the next day that her mother and her close friend "sided with her doubts" that appellants deserved the death penalty (38CT 11132). (See footnote 88, *ante*.)

A. Standard Of Review

Juror removal under section 1089 is no longer reviewed for "abuse of discretion" in search of "substantial evidence" to affirm. (See *Wilson*, *supra*, 44 Cal.4th at p. 821; see also *Leonard*, *supra*, 40 Cal.4th at p. 1409 ["trial court's determination is reviewed for abuse of discretion"]; *Ledesma*, *supra*, 39 Cal.4th at p. 743 ["upheld if supported by substantial evidence"]; *People v. Samuels* (2005) 36 Cal.4th 96, 132 (*Samuels*); *People v. Cleveland* (2001) 25 Cal.4th 466, 474 (*Cleveland*).)[90] After acknowledging prior cases had

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90. At the time of the trial in this case, section 1089's final paragraph stated in full:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, *or upon other good cause shown to the court* is found to be unable to perform his or her duty, *or if a juror requests a discharge and good cause appears therefor* [see Argument XVIII, *post*; footnote 89, *ante*], the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be

indicated that a court's decision to remove a juror was reviewed for abuse of discretion, this Court stated in *Wilson*:

> To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.

(*Wilson*, *supra*, 44 Cal.4th at p. 821, quoting *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 (*Barnwell*); see also *Ledesma*, *supra*, 39 Cal.4th at p. 743; *Samuels*, *supra*, 36 Cal.4th at p. 132; *Cleveland*, *supra*, 25 Cal.4th at p. 474.) If the record fails to prove to a "demonstrable reality" that the removed juror was "unable to perform his duty as a juror," reversal may be warranted. (*Wilson*, *supra*, 44 Cal.4th at p. 841 [where no demonstrable reality, "we have no choice but to reverse the death penalty"]; *Leonard*, *supra*, 40 Cal.4th at p. 1410, citing *Collins*, *supra*, 17 Cal.3d at p. 691.)

This Court has explained:

> The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test [i.e., the "substantial evidence inquiry" and the "demonstrable reality test"]. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.

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subject to the same rules and regulations as through he had been selected as one of the original jurors.

In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality.

The evidence bearing on the question whether a juror has exhibited a disqualifying bias during deliberations may be in conflict. Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it. [Citation.] In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal.

(*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053 [italics in original].)

Further, "[w]hen a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*." (*Barnwell*, *supra*, 41 Cal.4th at p. 1051 [italics in original].) "Bias may be established by the testimony of other jurors." (*Ibid.*) "A distinction must be made, of course, between a juror who cannot fairly deliberate because of bias and one who, in good faith, disagrees with the others and holds his or her ground." (*Ibid.*) "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge." (*Ibid.*)

Also, a juror "may rely on their own experiences in evaluating the testimony of the witnesses[,]" but "[a] jury verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters." (*Leonard*, *supra*, 40 Cal.4th at p. 1414; accord *Wilson*, *supra*, 44 Cal.4th at p. 829.) This Court has confirmed:

> A juror commits misconduct if the juror conducts an independent investigation of the facts [citation], *brings outside evidence into the jury room* [citation], injects the juror's own expertise into the deliberations [citation], or engages in an experiment that produces new evidence [citation].

(*Wilson*, *supra*, 44 Cal.4th at p. 829 [italics added].) Misconduct like the foregoing "'leads to a presumption'" that one side in a case was "'prejudiced'" due to "'juror bias.'" (*Ibid.* [citation omitted].) Indeed, "a juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty." (*People v. Daniels* (1991) 52 Cal.3d 815, 864 (*Daniels*), accord *Leonard*, *supra*, 39 Cal.4th at p. 743.)[91]

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91. Here, the trial court cited *Daniels* in removing former juror number 10. (18RT 4456.) In *People v. Keenan* (1988) 46 Cal.3d 478 (*Keenan*), this Court held:

> At the outset, we emphasize that when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud. The law is clear, for example, that the court must investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute.

(*Keenan*, *supra*, 46 Cal.3d at p. 532.) "'Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an *abuse of discretion* subject to appellate review.' [Citation.]" (*Ibid* [italics in original].) Finally:

> Since the court has power to investigate and discharge jurors who refuse to adhere to their oaths, it may also take less

B. Factual Discussion

As noted earlier (Argument XV, *ante*), on Monday, June 26, 2000, the jury received all instructions except CALJIC No. 17.51.1, and it began deliberations for about three hours. (38CT 11121-11122; 18RT 4404-4434). The next day, it deliberated for about three hours. (38CT 11124-11125.) The next day, it deliberated for about two hours. (38CT 11126-11127.) The next day, it deliberated for one hour until it was excused for that day after it sent a note to the trial court (38CT 11130-11131) which reported: "We are at an impasse on the verdict 10-2, what and how do we go on? Need answer ASAP." (38CT 11132.) The foreperson also stated that juror number 10 said she "confided with her friend & mother and that they sided with her doubts[.]" After a hearing where juror number 10 answered questions and counsel gave arguments, the court removed the juror. The court then replaced the juror with alternate juror 2, and read CALJIC No. 17.51.1 to the jury for the first time. (18RT 4443-4459, 4467-4471; 38CT 11132, 11134-11136.)

At the hearing, before her removal, former juror number 10 admitted to the court: (1) on the night after the jury deliberated for a third day (Wednesday, June 28, 2000), she indeed "confided with her friend and mother about issues" in this case because "it didn't sit right" with her (18RT 4445-4446); (2) she told her mother and friend "about the two defendants in this case" (18RT 4446); (3) her telephone discussion with her mother about this case lasted a "minute or two" (18RT 4447); (4) her home discussion with her "close friend" about this case lasted "about five minutes or a little longer" (18RT 4448-4450); (5) she told her friend how she would vote the next day although "Wednesday

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> drastic steps where appropriate to deter any misconduct or misunderstanding it has reason to suspect. Of course, any intervention must be conducted with care so as to minimize pressure on legitimate minority jurors.

(*Id.* at p. 533.)

night [the jury] had reached the verdict" (18RT 4447-4448, 4450; footnote 88, *ante*); and (6) her friend "did share" her "views relating to the death penalty" and that a vote herein must be "right" (18RT 4449-4451). (See Satele AOB 266; Nunez AOB 265.)

After listening to the foregoing, the prosecutor (in sum) urged, "I think she should be excused at this point." (18RT 4453.) Appellants disagreed. Nunez's counsel (in part) argued, "there's no reason to excuse this lady at all if the jury verdict has been reached." (18RT 4454.) Satele's counsel agreed. As he put it: "I would like to know what was done Wednesday night, what it is that she thought they had arrived at, and what it is that maybe 11 other people thought they had arrived at." (18RT 4454-4455.) In other words, appellants disagree (Satele AOB 266-267; Nunez AOB 266-267), but the record shows that they never addressed whether the former juror had in fact violated the order to remain silent about this case until a verdict was announced.

Therefore, the trial court ruled as follows:

> All right. This Court, based upon what Juror No. 10 has described for this Court, finds that there is juror misconduct. The fact that the juror maybe believed that there is a verdict, it is actually a taking of a vote. Jurors take several votes and continue deliberating. The only time that they have a verdict is when they sign the verdict form. The fact that they may have taken a vote, even if they're at an impasse, did not mean there was a verdict.
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> Now that she has discussed the matter with outside parties, it effectively takes away the opportunity for this Court to even give further instructions or further readbacks, and that taints the process, that closes it; and the only thing that I can say is that it happened not in the guilt phase, but at the penalty phase on Wednesday night, specifically or Wednesday after adjournment; and the only thing that she disclosed to

the jurors, as I understand from her statement, is that she said she confided in her mother and a friend.

So therefore, based upon the case of [citing *Daniels*; footnote 91, *ante*], this Court finds based upon *the juror's demeanor*, and also based upon *the juror's comments*, that there is misconduct on the juror's part pursuant to Penal Code section 1089 – misconduct – I believe it's 1089 or the applicable section of the Penal Code – there's grounds for substituting an alternate. This Court believes that the juror is guilty of misconduct, and guided by [*sic*] Supreme Court case of [citation].

(18RT 4455-4456, citing *Daniels*, *supra*, 52 Cal.3d 815; see Satele AOB 267; Nunez AOB 267.)

After the juror's removal, Nunez's counsel (in part) argued:

I do not think you are allowed to remove a juror after they have reached an impasse and they are hung, which then may result in a verdict without being hung, and this juror did not discuss anything with anybody until they were hung. Therefore, in my opinion, it is entirely improper to excuse a juror because that may let them get around somehow – I don't know how she was voting, but let them get around their position of being hung in order to arrive at a verdict.

(18RT 4468.) Satele's counsel agreed. (18RT 4468-4469.) The prosecutor disagreed as follows:

Can I just say one thing. I agree with the Court that according to the testimony we heard from the jurors, there was an agreement – not a verdict, but an agreement on Wednesday. She [former juror number 10] went home, committed misconduct, and then there was an impasse the next day, which doesn't necessarily mean it's a complete impasse, but

the foreperson was asking for guidance. [¶] I disagree with counsel, and I agree with the Court.

(18RT 4469; see Satele AOB 267-268; Nunez AOB 267-268.)

C. Appellants Forfeited Constitutional Claims

After former juror number 10 left the courtroom and answered questions about her discussions with her mother and a friend, appellants never argued that her removal violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See 18RT 4452-4459, 4467-4469; Satele AOB 269, 279; Nunez AOB 269, 277.) They also fail to show that such analysis is "similar to" a "demonstrable reality" claim. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19; *Wilson*, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.) They thus forfeited constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463; *Leonard*, *supra*, 40 Cal.4th at p. 1410 ["our conclusion that the trial court did not violate [section 1089] necessarily disposes of his constitutional claims"].)

D. Reversal Is Unjustified Because There Was No Violation Of Section 1089

Satele asserts, "the communication in this case is not the type of communication that mandates a juror being excused." (Satele AOB 270.) The test is not what was mandated. Instead, the issue was whether the court was within its discretion in excusing former juror number 10 because her inability to perform as a juror was shown as demonstrable reality. Further, citing *Daniels*, *supra*, 52 Cal.3d 815, the court partially based its ruling on former juror number 10's "demeanor" and "comments" to questions about discussions with her mother and a friend. (18RT 4456.) This Court must "afford deference to the trial court's factual determinations, based, as they are, on firsthand

observations unavailable to us on appeal." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

This Court cited *Daniels* with approval in *Leonard*. In *Daniels*, this Court held that "a juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty." (*Daniels*, *supra*, 52 Cal.3d at p. 864, accord *Leonard*, *supra*, 39 Cal.4th at p. 743.) In *People v. Holloway* (1990) 50 Cal.3d 1098 (*Holloway*), this Court found misconduct because a juror had "read a newspaper article about the case." (*Daniels*, *supra*, 52 Cal.3d at p. 864 [discussing *Holloway*].) *Daniels* held:

> a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to follow instructions in the future.

(*Id.* at p. 865.) Recently, this Court has held that "[a] juror commits misconduct" if he or she "brings outside evidence into the jury room[.]" (*Wilson*, *supra*, 44 Cal.4th at p. 829.) Finally, as noted, a juror "may rely on their own experiences in evaluating the testimony of the witnesses[,]" but "[a] jury verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters." (*Leonard*, *supra*, 40 Cal.4th at p. 1414; accord *Wilson*, *supra*, 44 Cal.4th at p. 829.)

Here, former juror number 10's improper "communications" were not "brief, isolated, and ambiguous" and unlikely to cause her to "change her views[.]" (Satele AOB 270; Nunez AOB 272.) She admitted that the "Wednesday night" decision to "turn in the verdict in the morning" was not "sitting right already when I got home." (18RT 4448, 4450). Thus, at home that night after the jury's tentative decision, she willfully violated the instruction to refrain from discussing this case by discussing this case for about two minutes with her mother by telephone. She then violated the instruction a

second time by discussing this case in greater detail for a longer time period (about five minutes) with a "close" friend in person. She deliberately confided to these two non-jurors "about the two defendants" in this case. Her friend "asked the question," so she volunteered how she would vote. Worst, her friend expressed views relating to the death penalty.[92/] Finally, the next day, former juror number 10 violated a court order for the third time by intentionally informing the other jurors that her mother and her friend "sided with her doubts" as to the death penalty. In other words, due to her, the entire jury was exposed to extrinsic matters, the irrelevant opinions of others regarding the appropriate penalty for appellants. (18RT 4444-4452; 38CT 11132.) The above was not "inadvertent" conduct (Satele AOB 276; Nunez AOB 274), and Nunez concedes that the foregoing "may be" enough to find misconduct (Nunez AOB 274).

As the prosecutor put it, the former juror "went home, committed misconduct, and then there was an impasse the next day, which doesn't necessarily mean it's a complete impasse, but the foreperson was asking for guidance." (18RT 4469.) As the foreperson wrote to the court, "possibly replacing her would be appropriate" (38CT 11132) given the foregoing. After listening to the former juror, Nunez's counsel basically urged, "there's no reason to excuse this lady at all if the jury verdict has been reached." (18RT 4454.) Satele's counsel essentially argued: "I would like to know what was

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92. Satele claims former juror number 10 did not "receive" views "as to the death penalty" (Satele AOB 270; see Nunez AOB 272), but the juror testified otherwise (18RT 4451). She also admitted to the court that when she came home on Wednesday night, she telephoned her mother, who was "at church." (18RT 4451.) This suggests former juror number 10 was seeking extrinsic or expert religious views during her penalty deliberations because her tentative verdict was not "sitting right" in direct violation of two separate court orders: (1) to remain silent while deliberating; and (2) to refrain from considering extrinsic matters.

done Wednesday night, what it is that she thought they had arrived at, and what it is that maybe 11 other people thought they had arrived at." (18RT 4455.) In other words, appellants clearly never disputed that former juror number 10's inability to perform as a jury was a "demonstrable reality." (See *Wilson*, *supra*, 44 Cal.4th at p. 821; *Samuels*, *supra*, 36 Cal.4th at p. 132; *Cleveland*, *supra*, 25 Cal.4th at p. 474.)

Given the foregoing, the trial court justifiably found that removal of former juror number 10 was warranted under "section 1089[.]" (18RT 4456.) The court properly reasoned:

> Now that she has discussed the matter with outside parties, it effectively takes away the opportunity for this Court to even give further instructions or further readbacks, and that taints the process, that closes it; and the only thing that I can say is that it happened not in the guilt phase, but at the penalty phase on Wednesday night, specifically or Wednesday after adjournment; and the only thing that she disclosed to the jurors, as I understand from her statement, is that she said she confided in her mother and a friend.

(18RT 4456.) After former juror number 10 exposed the other jurors to "death penalty" beliefs from her mother and friend, the purported jury "verdict" apparently changed from a unanimous agreement for the death penalty (18RT 4448), to an impasse of "10-2" for the death penalty (38CT 11132). Otherwise, former juror number 10 would not have had "doubts" about the jury decision to "turn in the verdict in the morning[.]" (18RT 4450; 38CT 11132.)

At any rate, this Court has held:

> A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting "an opinion explicitly based on specialized information obtained from outside sources," which we have described as misconduct. [Citation.]

(*People v. Steele* (2002) 27 Cal.4th 1230, 1266; accord *Wilson*, *supra*, 44 Cal.4th at p. 830.) Here, former juror number 10 did not merely use her own background to change her mind. Instead, there was no "conflict" in the proof (see *Barnwell*, *supra*, 41 Cal.4th at p. 1051) that she actually changed her vote in reliance on "extrinsic matters" (*Leonard*, *supra*, 40 Cal.4th at p. 1414) from her mother and a friend which she later exposed to the other jurors. Given that former juror number 10 proved to a demonstrable reality her inability to perform as a juror, section 1089 was not violated in this case. Therefore, reversal of the death penalty is unwarranted as to appellants.

XVIII.

THERE WAS "GOOD CAUSE" TO REMOVE FORMER JUROR NUMBER 9 DUE TO HER ADVANCED PREGNANCY

Appellants claim it was an abuse of discretion to remove former juror number 9, and error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Satele AOB 280-289 [Arg. XVIII]; Nunez AOB 278-289 [Arg. XV].) They forfeited constitutional claims, and reversal of the death penalty is unjustified because the former juror was shown, to "demonstrable reality," to be unable to perform as a juror due to her "high risk" pregnancy.[93/] (18RT 4475-4485; see footnote 89, *ante*.)

A. Standard Of Review

The standard of review for juror removal under section 1089 was explained in extensive deal in Argument XVII, *ante*. Simply put, if the record fails to prove to a "demonstrable reality" that the removed juror was "unable to perform his duty as a juror," reversal may be warranted. (*Wilson*, *supra*, 44 Cal.4th at p. 841.) Section 1089 "permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*Cleveland*, *supra*, 25 Cal.4th at p. 474; accord *Thornton*, *supra*, 41 Cal.4th at pp. 462-463; *Samuels*, *supra*, 36 Cal.4th at p. 132; *People v. Roberts* (1992) 2 Cal.4th 271, 324-325 (*Roberts*).) Appellants agree. (See Satele AOB 264; Nunez AOB 263.)

B. Factual Discussion

Prospective juror 6187 (former juror number 9) was in the group of 50 potential initial jurors at jury selection on Wednesday, April 19, 2000. (2RT

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93. Satele's trial counsel admitted that this involved a "high risk" pregnancy. (18RT 4476.)

322, 327, 517; 3RT 633, 651; 4RT 722, 732, 746, 772-774, 822, 836, 847.) Over one week later, on Thursday, April 26, 2000, prospective juror 6187 initially failed to appear in court with other potential jurors, but after the clerk was asked to "see if 6187 is upstairs[,]" prospective juror 6187 appeared. (3RT 646, 651.)[94/]

About two months later (on Tuesday, June 20, 2000), i.e., near the third month of former juror number 9's high risk pregnancy, a recess was declared during the penalty phase due to her unavailability. That morning, the court was advised that the juror "had to go" to a hospital "emergency room." The court said that its inclination was to excuse the juror for "cause" unless the parties could stipulate on the issue, but it would wait for a doctor's report. Meanwhile, the court and counsel discussed proposed jury instructions. (17RT 4174-4178.) After a hearing on all instructions, the court read into the record a letter concerning the former juror's condition. The letter (signed by the juror's doctor that day) stated that the former juror had "hemorrhagenic" of the "right ovary with severe pain" and was "being sent home to remain at bed rest[.]" (17RT 4225.) That afternoon, the court had an transcribed telephone hearing with the juror's physician (Dr. Michael Bianchi) in the presence of appellants and all counsel. Dr. Bianchi opined that the juror "will be recovered sufficiently to return to jury duty most likely within 48 to at the most 72 hours." (17RT 4232-

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94. The record contains the prosecutor's written motion as to thirteen "for cause" removals filed on April 26, 2000, and his list omitted prospective juror 6187. (37CT 10681.) No similar written list appears in the record as to appellants. However, on April 27, 2000, before the court ruled on the defense's removal list, Nunez's counsel stated that as to "6187[,]" there was "some question if [she] was on the list." In reply, the court said: "All right, I'll take the number down." (4RT 822.) After a recess (4RT 826), the court did not mention prospective juror 6187 when it explained (in the presence of defense counsel) why it was denying removal as to potential jurors on the defense's removal list (see 4RT 829-836).

4234.) Due to the above, the penalty phase recess lasted three days until Friday, June 23, 2003. (17RT 4236-4239; 38CT 11016; see 18RT 4476-4478.)

Three days later, after a weekend recess (i.e., on Monday, June 26, 2000), the jury began penalty deliberations for about three hours. (38CT 11121-11122; 18RT 4404-4434). The next day, it deliberated for about three hours. (38CT 11124-11125.) The next day, it deliberated for about two hours. (38CT 11126-11127.) The next day, it deliberated for one hour until it was excused for that day. (38CT 11130-11132.) The next day (Friday): (1) alternate juror 2 became juror number 10; (2) the jury heard CALJIC No. 17.51.1 (footnote 85, *ante*) for the first time; and (3) the jury deliberated for two hours until it was excused for the day after it sent a note to the court. (38CT 11133-11136; 18RT 4442, 4469-4471.) After a two-day weekend break, on Monday (July 3, 2000), following a hearing: (1) the court excused juror number 9 for medical reasons (18RT 4475-4485); (2) alternate juror 4 became juror number 9; (3) the jury heard CALJIC No. 17.51.1 for a second time; and (4) the jury deliberated for 50 minutes at which point it reached a verdict. (38CT 11134-11136, 11138-11141; 18RT 4471-4485, 4491-4493.)

Prior to a hearing on July 3, 2000, the trial court received a note (dated Sunday, July 2, 2002) from former juror number 9.[95] Over objections from appellants, citing *Keenan*, *supra*, 46 Cal.3d at p. 533, the trial court found "ample cause to investigate this issue" by way of a hearing on former juror

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95. Former juror number 9 wrote the following to the court:

> "Your Honor, respectfully, I am asking if I may be removed from this case. I feel the high amount of stress this case created will be detrimental to the health of my unborn child, as well as towards myself. Because I am considered high risk pregnancy, I want to make sure I do everything possible to increase my chances of being able to carry this baby to full term. I wish to thank you for your time, effort, and compassion in rendering of your decision. Sincerely –" signed by Juror No. 9.

(18RT 4475; see Satele AOB 282; Nunez AOB 279.)

number 9's removal request due to her high risk pregnancy. (18RT 4475-4478; see footnote 92, *ante*.)

Immediately after the foregoing, former juror number 9 testified: (1) she was three months pregnant; (2) she wrote the note to the court; (3) on June 20, 2000, her doctor "cleared" her to continue with this case, but she was nonetheless concerned about the health of her fetus because she had a miscarriage "at five months" merely two years earlier while "under a lot of stress" at work; (4) continued jury deliberations would cause her stress because it had already caused "a great amount of stress" and this was "especially" true "Friday" (June 30, 2000); (5) it would be in her "best interest" and the best interest of her "unborn child" if she were "excused" from further jury deliberations; and (6) the prior Friday was when she "began to feel the pains" which she had "felt in the past." (18RT 4478-4481.)

After the above, the prosecutor urged that the juror be dismissed "for her benefit, as well as the integrity of this case[.]" As the prosecutor put it: "Obviously her unborn child is of the utmost concern to everyone and should be, but obviously, any concern she has for that unborn child obviously would affect her deliberations, and I think she should be excused." (18RT 4481.) Appellants disagreed. (18RT 4481-4483; see Satele AOB 283.)

Nunez's counsel argued:

> No, Your Honor, I don't think that she should be excused. I think one of the problems that we have here is that – is that this jury was accepted by the defense because of its gender makeup and because the jurors 9 and 10 I believe were the only [*sic*] at the time the African Americans that were on the jury, and she has previously seen a doctor that had – that had cleared her. She has not seen a doctor in regards to this latest complaint, and I would ask that she remain on the jury. And

frankly, I think this jury is hung, and I think a mistrial should be declared.

(18RT 4481-4482; Nunez AOB 280.) The court denied the motion for mistrial. (18RT 4482.)

Satele's counsel disagreed with removal for his stated reasons as follows:

> Absolutely, Your Honor. I think the court misspoke when the court said that individuals are the barometers of their personal health. I've never found that to be true. I always thought that's why we had doctors in societies for that. And especially with pregnancies, Your Honor, and high risk pregnancies, it seems to me that the best estimate to conclude that is her doctor, who would be the person that knows her medical history and her biological processes better than you, me, and better than her. And I say that because of living with a wife who's had four children.
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> I've heard all sorts of things during my 25 years, Your Honor, so that she's high risk says that she went to the right doctor, but she's not exhibiting any of the concerns that she had a week ago or two weeks ago, Your Honor. She didn't say that she began to hemorrhage. She didn't say that she began to do anything other than the deliberations were a stressful situation.
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> That stressful situation hasn't changed since the jurors were put into this case. It has been a stressful case, Your Honor. It's been stressful since day one, and now we're at the end of the process. For this Court to excuse this juror for her belief and her medical conditions I think would be improper, because you have no evidence in front of you that states that she has a medical concern other than the stress caused by the deliberations.

Thank you.

(18RT 4482-4483; see Satele AOB 283.)

After the foregoing, the court removed former juror number 9 for these reasons:

> Yes, thank you. The Court finds good cause to excuse Juror No. 9. Just so that record is perfected, the Court has considered Penal Code section 1089 [see footnote 90, *ante*] and Code of Civil Procedure 233, which is formerly Penal Code section 1123, and this Court finds that this juror's unable to perform her duty; and given that *she had two years ago lost a child at five months because of stress* at work, and given the stress that this case has caused upon her throughout this trial -- *she has suffered one hemorrhage*, and now she is *having pains again* starting Friday – to ask her to continue on to *endanger her life and also the life of her unborn child*, if that is the ultimate risk, would be – would be a *high price to pay for jury duty*.
>
> And so based upon the Court's exercise of its discretion, the Court finds good cause that this juror is unable to perform the juror's duty because she's sick. I mean, she's got a stomach ache that's related to that pregnancy, and I'm excusing her. . . .

(18RT 4483-4484 [italics added]; see Satele AOB 283-284; Nunez AOB 281-282.)

C. Appellants Forfeited Constitutional Claims

After former juror number 9 left the courtroom, having answered questions about her pregnancy, appellants never argued that removal would violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See 18RT 4475-4485; Satele AOB 284-285; Nunez AOB 283-284.) Also, they fail to prove that such constitutional analysis is "similar to" an abuse of discretion based on demonstrable reality claim. (See *Lewis*, *supra*, 43 Cal.4th at p. 490, fn. 19;

Wilson, *supra*, 43 Cal.4th at pp. 13-14, fn. 3; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1008, fn. 8; *Boyette*, *supra* 29 Cal.4th at p. 445, fn. 12.) They thus forfeited constitutional claims. (See *Thornton*, *supra*, 41 Cal.4th at pp. 462-463.)

D. Reversal Is Unjustified Because There Was No Abuse Of Discretion

Here, former juror number 9's removal was justified by a "demonstrable" reality. Section 1089 "permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or *other circumstances*." (*Cleveland*, *supra*, 25 Cal.4th at p. 474 [italics added]; accord *Samuels*, *supra*, 36 Cal.4th at p. 132.) Here, in writing the note to the court on Sunday (July 2, 2000) requesting removal, former juror number 9 obviously thought long and hard about the issue. After this deep consideration, the juror clearly decided that having suffered a prior miscarriage two years earlier due to stress, in this instant high risk pregnancy, she could not further risk endangering both her life and that of her unborn child due to the stress she was experiencing from penalty deliberations in this case. (18RT 4475.) The next day, she appeared in court and gave live testimony about her health and concerns for the safety of her unborn child. (18RT 4478-4481.) Simply put, she proved that her inability to perform a juror's duty was a demonstrable reality. As the trial court put it, there was "good cause" because the foregoing, including the "ultimate risk" of potentially endangering the life of the juror and that of her unborn child, was "a high price to pay for jury duty." (18RT 4484.) Like the prosecutor (18RT 4482), respondent agrees.

In a prior death penalty case affirmed by this Court, *People v. Gallego* (1990) 52 Cal.3d 115 (*Gallego*), during testimony about the murder of a pregnant victim, "the court was informed by a juror that alternate Juror Thomas–who was pregnant–was not feeling well, and was upset about the

effect of the testimony on her pregnancy." Thomas "approached the court and stated that she felt she could not continue, having become very upset about the testimony" of the murder. "The court suggested that Thomas be excused, and defense counsel stated he had no objection to doing so." Thus, the trial court "explained to the jury that Thomas was excused 'for medical reasons.'" (*Id.* at p. 204.)[96/] "A juror may be replaced if ill[,]" section 1089 "makes clear that the decision to replace an ill juror with an alternate is discretionary[,]" and the "reasons for discharge must appear" as a "demonstrable reality." (*Roberts*, *supra*, 2 Cal.4th at pp. 324-325.)

Here, although on June 20, 2000, her doctor had "cleared" her to continue with this case, the former juror was properly concerned about the health of her fetus because she had a miscarriage "at five months" merely two years earlier while "under a lot of stress[.]" Also, the court could properly consider the juror's demeanor when she testified that further deliberations would cause her stress because it had already caused "great" stress. (18RT 4478-4481.) Further, this Court must "afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

Moreover, after June 20, 2000, i.e., during deliberations on Friday, June 30, 2000, the juror "began to feel the pains" which she had "felt in the past." Besides her prior miscarriage two years earlier, less than two weeks earlier, the juror had hemorrhaged. At that time, the juror was sent home to rest in bed following a visit to a hospital emergency room, and her hemorrhage

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96. To the above, this Court denied the defendant's claim that the remaining jurors should have been sua sponte examined to determine if they were "improperly influenced" by Thomas. (*Gallego*, *supra*, 52 Cal.3d at pp. 204-205.) Unlike here, in *Gallego*, the capital defendant never urged that pregnancy (or stress on pregnancy due to jury service on a capital case) was not "good cause" to remove a pregnant juror for medical reasons under section 1089.

caused a three-day recess in this case. Indeed, at that time, the court stated that its "inclination" was to "excuse" the juror for "cause" unless the parties could stipulate on the issue, but it would wait for the doctor's report. (17RT 4174-4178, 4225, 4236-4239.)

Finally, notwithstanding Satele's counsel's pregnancy history with his wife, the court could properly consider former juror number 9's knowledge of her own body and belief that it would be in her best interest and that of her unborn child if she were excused from further jury deliberations. (18RT 4478-4481, 4483-4484.) This is especially true when the court had already consulted with the juror's doctor in the presence of counsel and appellants before the juror's new reported illness (17RT 4233-4234). (See *Roberts*, *supra*, 2 Cal.4th at p. 325 ["Here the court did its duty by telephoning the ill juror, discussing the matter on the record with counsel, and stating its reasons"].) Also, inquiry into pregnancy was personal, and involved former juror number 9's constitutionally protected privacy rights. (See *Gunn v. Employment Development Dept.* (1979) 94 Cal.App.3d 658, 663.)

The foregoing proved to a demonstrable reality that former juror number 9 was unable to perform as a juror, and that there was "good cause" to remove her from further penalty deliberations. (See *Thornton*, *supra*, 41 Cal.4th at p. 463; *Samuels*, *supra*, 36 Cal.4th at p. 132; *Cleveland*, *supra*, 25 Cal.4th at p. 474; *Roberts*, *supra*, 2 Cal.4th at p. 325 ["there was no abuse of discretion in its ruling that good cause existed to discharge the ill juror"].) Therefore, reversal of the death penalty is unjustified as to appellants.

XIX.

THE FEATURES IN CALIFORNIA'S DEATH PENALTY SYSTEM (VIEWED IN ISOLATION OR IN COMBINATION) ARE NOT UNCONSTITUTIONAL

Appellants concede that this Court consistently denied similar claims, but they nonetheless broadly attack various features in California's death penalty scheme on federal constitutional grounds. (Satele AOB 293-324 [Arg. XX]; Nunez AOB 294-328 [Arg. XVII].) As Satele sees it:

> Many features of California's capital sentence scheme, alone or in combination with each other, violate the United States Constitution, Because challenges to most of these features have been rejected by this [C]ourt, [he] presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. [¶] To date the Court has considered each of the defects identified [by him] in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective.

(Satele AOB 293.) Nunez agrees. (Nunez AOB 294.) They provide no basis for this Court to reconsider its precedent as to the constitutionality of California's death penalty scheme. (See *Hovarter*, *supra*, 44 Cal.4th at pp. 1029-1030; *Riggs*, *supra*, 44 Cal.4th at pp. 329-330; *People v. Watson* (2008) 43 Cal.4th 652, 703-704 (*Watson*); *Thornton*, *supra*, 41 Cal.4th at pp. 468-470; *Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1066-1068; *Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Brown* (2004) 33 Cal.4th 382, 401-404 (*Brown*); *Prieto*, *supra*, 30 Cal.4th at 275-276.)

A. The Special Circumstance Statute (Section 190.2) Is Not Impermissibly Broad

Appellants provide no compelling basis (see Satele AOB 296-297; Nunez AOB 295-296) for this Court to reconsider its denial of a claim that section 190.2 is impermissibly broad (see *Riggs*, *supra*, 44 Cal.4th at p. 329; *Thornton*, *supra*, 41 Cal.4th at p. 468; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1066; *Ward*, *supra*, 36 Cal.4th at p. 222; *Brown*, *supra*, 33 Cal.4th at p. 401; *Prieto*, *supra*, 30 Cal.4th at p. 276).

B. The Aggravation-Mitigation Statute (Section 190.3) Is Not Arbitrary And Capricious

Appellants provide no compelling basis (see Satele AOB 298-300; Nunez AOB 297-298) for this Court to reconsider its denial of a claim that section 190.3 is arbitrary and capricious (see *Hovarter*, *supra*, 44 Cal.4th at p. 1029; *Thornton*, *supra*, 41 Cal.4th at p. 469).

C. The Law Has Adequate Safeguards To Avoid Arbitrary And Capricious Sentencing

Appellants provide no compelling basis (see Satele AOB 300-323; Nunez AOB 298-319) for this Court to reconsider its denial of claims that California's death penalty system has inadequate safeguards (see *Hovarter*, *supra*, 44 Cal.4th at p. 1029; *Riggs*, *supra*, 44 Cal.4th at pp. 329-330; *Watson*, *supra*, 43 Cal.4th at pp. 703-704; *Thornton*, *supra*, 41 Cal.4th at pp. 468-470).

1. Appellants Received Trial By Jury With Proof Beyond A Reasonable Doubt

Appellants provide no compelling basis (see Satele AOB 301-303; Nunez AOB 299-301) for this Court to reconsider its denial of claims concerning burden of proof, trial by jury, and unanimity (see *Hovarter*, *supra*, 44 Cal.4th at pp. 1029-1030; *Riggs*, *supra*, 44 Cal.4th at p. 329; *Thornton*,

supra, 41 Cal.4th at p. 469; *Ward*, *supra*, 36 Cal.4th at p. 221; *Brown*, *supra*, 33 Cal.4th at pp. 401-402).

2. There Was No Error "In The Wake Of" *Apprendi*, *Blakely*, And Progeny

Appellants provide no compelling basis (see Satele AOB 303-309; Nunez AOB 302-307) for this Court to reconsider its denial of claims based on *Apprendi* and its progeny (see *Hovarter*, *supra*, 44 Cal.4th at p. 1030; *Watson*, *supra*, 43 Cal.4th at p. 703; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1068; *Ward*, *supra*, 36 Cal.4th at pp. 221-222; *Brown*, *supra*, Cal.4th at p. 402; *Prieto*, *supra*, 30 Cal.4th at p. 275).

3. There Was No Burden Of Proof Error As To Aggravation And Mitigation

Appellants provide no compelling basis (see Satele AOB 309-310; Nunez AOB 307-308) for this Court to reconsider its denial of a claim as to the burden of proof concerning aggravation and mitigation factors (see *Riggs*, *supra*, 44 Cal.4th at pp. 329-330; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Ward*, *supra*, 36 Cal.4th at p. 221).

4. There Was No Due Process Error Or Error As To Cruel And Unusual Punishment

Appellants provide no compelling basis (see Satele AOB 311-313; Nunez AOB 308-311) for this Court to reconsider its denial of claims involving due process and principles of cruel and unusual punishment (see *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1068; *Ward*, *supra*, 36 Cal.4th at pp. 221-222; *Brown*, *supra*, 33 Cal.4th at p. 404).

5. There Was No Error As To "Written Findings" On Aggravating Factors

Appellants provide no compelling basis (see Satele AOB 314-316;

Nunez AOB 311-313) for this Court to reconsider its denial of a claim that a jury's aggravating findings must be in writing (see *Riggs*, *supra*, 44 Cal.4th at p. 329; *Watson*, *supra*, 43 Cal.4th at p. 703; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Brown*, *supra*, 33 Cal.4th at p. 402).

6. There Was No Error As To "Inter-Case Proportionality" Review

Appellants provide no compelling basis (see Satele AOB 316-317; Nunez AOB 313-315) for this Court to reconsider its denial of a claim involving inter-case proportionality review (see *Hovarter*, *supra*, 44 Cal.4th at p. 1030; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Lewis and Oliver*, 39 Cal.4th at p. 1067; *Brown*, *supra*, 33 Cal.4th at p. 402; *Prieto*, *supra*, 30 Cal.4th at p. 276).

7. There Was No Error As To Reliance On "Unadjudicated Criminal Activity"

Appellants provide no compelling basis (see Satele AOB 318-319; Nunez AOB 315-316) for this Court to reconsider its denial of a claim involving unadjudicated criminal activity (see *Riggs*, *supra*, 44 Cal.4th at p. 330; *Watson*, *supra*, 43 Cal.4th at p. 704; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Ward*, *supra*, 36 Cal.4th at pp. 221-222; *Brown*, *supra*, 33 Cal.4th at p. 402).

8. There Was No Error As To "Use Of Restrictive Adjectives" As To Mitigation Factors

Appellants provide no compelling basis (see Satele AOB 320; Nunez AOB 316) for this Court to reconsider its denial of a claim involving "use of restrictive adjectives" as to mitigating factors (see *Watson*, *supra*, 43 Cal.4th at p. 704; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Brown*, *supra*, 33 Cal.4th at p. 402).

9. There Was No Instructional Error As To Mitigation Factors

Appellants provide no compelling basis (see Satele AOB 320-323; Nunez AOB 316-319) for this Court to reconsider its denial of a claim involving instructions on mitigating factors (see *Thornton*, *supra*, 41 Cal.4th at p. 469; *Brown*, *supra*, 33 Cal.4th at p. 402).

D. There Was No Equal Protection Violation

Appellants provide no compelling basis (see Satele AOB 323-325; Nunez AOB 320-322) for this Court to reconsider its denial of claims involving principles of equal protection (see *Hovarter*, *supra*, 44 Cal.4th at p. 1030; *Riggs*, *supra*, 44 Cal.4th at p. 330; *Thornton*, *supra*, 41 Cal.4th at p. 469; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1067; *Brown*, *supra*, 33 Cal.4th at p. 402).

E. The Law Is Not "Short Of International Norms Of Humanity And Decency"

Appellants provide no compelling basis (see Satele AOB 326-328; Nunez AOB 322-324) for this Court to reconsider its denial of a claim involving "international norms of humanity and decency" (see *Hovarter*, *supra*, 44 Cal.4th at p. 1029; *Riggs*, *supra*, 44 Cal.4th at p. 330; *Watson*, *supra*, 43 Cal.4th at p. 704; *Thornton*, *supra*, 41 Cal.4th at p. 470; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1066; *Ward*, *supra*, 36 Cal.4th at p. 222; *Brown*, *supra*, 33 Cal.4th at pp. 403-404).

Accordingly, reversal of the death penalty is unwarranted as to appellants.

XX.

THERE WAS NO CUMULATIVE ERROR AT THE PENALTY PHASE

Finally, appellants claim that there was cumulative error. (Satele AOB 325-329 [Arg. XXI]; Nunez AOB 329-337 [Arg. XVIII].) Simply put, since there was no error of significance or prejudice at the penalty phase, "there was no error to cumulate." (*Thornton*, *supra*, 41 Cal.4th at p. 453; see *Hovarter*, *supra*, 44 Cal.4th at p. 1031; *Riggs*, *supra*, 44 Cal.4th at p. 330; *Watson*, *supra*, 43 Cal.4th at p. 704.) Hence, reversal of the death penalty is unjustified as to appellants.

CONCLUSION

For the foregoing reasons, respondent respectfully asks that this Court affirm the judgment of conviction and death penalty for each appellant.

Dated: October 29, 2008

Respectfully submitted,

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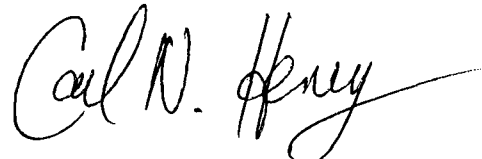

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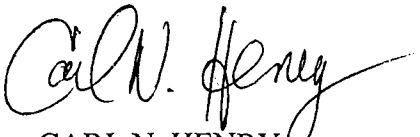
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 79,368 words.

Dated: October 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Daniel Nunez and William Satele*** Case No.: **S091915**

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 that same day in the ordinary course of business.

On **October 29, 2008**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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DELIVER TO: Hon. Tomson T. Ong, Judge

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 **October 29, 2008**, at Los Angeles, California.

Ronda Jones
Declarant

Ronda Jones
Signature

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