In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY R. NAVARRO, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S165195

Orange County Superior Court Case No. 02NF3143
Honorable Francisco Briseño, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant Anthony Navarro (Navarro), a long term member and eventual shot-caller in the Pacoima Flats gang, arranged for the murder of David Montemayor, in a murder for hire conspiracy. Montemayor's sister planned the murder because she did not like the way her brother was running the family business. Navarro enlisted three junior Pacoima Flats gang members to commit the actual murder and robbery. The three were caught as they attempted to flee the scene. A jury found Navarro guilty of first degree murder with three special circumstances—robbery, kidnapping, and that the murder was gang-related, as well as conspiracy to commit murder and street terrorism. A jury also found true gang and gun use enhancements as well as strike and serious felony priors.

In this automatic appeal, Navarro raises several challenges to the guilt phase, namely, the sufficiency of evidence, the trial court's decision concerning defense opening statement, several evidentiary rulings by the trial court, and the conduct of the prosecutor. For the penalty phase, Navarro challenges the admission of and instructions concerning his prior assault, prior shooting, and solicitation to commit violence under factor (b) evidence. None of his claims have merit.

There was overwhelming evidence of Navarro's controlling role in the conspiracy to rob and murder, and the ultimate murder of Montemayor, including but not limited to, incriminating notes, phone records, gang status and relationships, and the use of a vehicle connected to Navarro by his co-conspirators and actual killers, just to name a few. The trial court also acted well within its discretion in requiring defense counsel to make a sufficient showing of admissibility concerning certain proposed factual statements during opening before permitting the statements. Likewise, the court acted well within its discretion in excluding vague, unreliable and/or untimely divulged hearsay statements and defense exhibit I, an extensive

log detailing the FBI's interactions with Navarro, and in admitting gang evidence in this gang-related case. The prosecutor did not commit misconduct during his examination of Navarro, and even if any error occurred, no prejudice ensued. Finally, in the penalty phase, the trial court properly admitted the challenged factor (b) evidence as there was sufficient evidence from which the jury could conclude Navarro was involved in the criminal activity. Further, the trial court properly instructed the jury on the factor (b) evidence, and Navarro's routine challenges to California's capital-sentencing scheme must fail as this Court as repeatedly rejected the same claims.

STATEMENT OF THE CASE

On August 13, 2007, the Orange County District Attorney filed a fifth amended information charging Navarro, in count 1, with the murder of David Montemayor (Pen. Code, § 187, subd. (a)), in count 2, with conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)), and in count 3, with street terrorism (Pen. Code, § 186.22, subd. (a)).[1] As to count 1, three special circumstances were alleged: robbery (§ 190.2, subd. (a)(17)(A)), kidnapping (§ 190.2, subd. (a)(17)(B)), and murder committed for criminal gang purpose (§ 190.2, subd. (a)(22)). It was further charged that counts 1 and 2 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)); and as to count 1, Navarro was a principal in the commission of a felony committed for the benefit of, et cetera., a criminal street gang under section 186.22, subd. (b)(1), and during commission of that offense,

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

another principal intentionally discharged a firearm causing death to David Montemayor (§ 12022.53, subds. (d) and (e)). (6 CT 1551-1556.)

The information also alleged Navarro committed two previous serious felony convictions, within the meaning of sections 667, subdivision (a)(1), and 1192.7, subdivision (c); two prior prison offenses, within the meaning of section 667.5, subdivision (b); and two or more prior and serious felonies within the meaning of sections 667, subdivisions (d), (e)(2)(A), and section 1170.12, subdivisions (b), (c)(2)(A). (6 CT 1551-1556.)

On that same date, Navarro pled not guilty to all counts. (6 CT 1565.)

The jury was sworn on August 23, 2007. (6 CT 1634.) On October 18, 2007, the jury convicted Navarro of all counts and found the special circumstances and enhancements allegations to be true. (7 CT 1930-1938, 1949-1950; 30 RT 5266-5272.) Navarro subsequently admitted all of the alleged prior offense allegations to be true. (7 CT 1976; 30 RT 5300-5302.)

The penalty phase began on October 25, 2007. (8 CT 1987.) On November 15, 2007, the jury imposed death. (8 CT 2120, 2124; 38 RT 6751.)

On July 11, 2008, the trial court denied Navarro's motions for a new trial and modification of the death verdict (§§ 1181 and 190.4, subd (e)), and sentenced him to death. The court imposed a sentence of 25 years to life for the gang member's vicarious discharge of a firearm enhancement, and five years each for the prior serious felony conviction enhancements, for a total of 35 years to life. The court stayed under section 654 a 25 years to life sentence on count 2, and struck, for purposes of sentencing, count 3 and the gang enhancements attendant to counts 1 and 2. (8 CT 2259-2265, 2274-2275; 39 RT 6801-6809, 6818-6831.)

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

STATEMENT OF FACTS

I. GUILT PHASE—NAVARRO JOINS AND PARTICIPATES IN A CONSPIRACY TO KILL DAVID MONTEMAYOR

A. Montemayor's Sister Plots His Murder Because He Was Taking Over the Family Business

David Montemayor was the part-owner and general manager of Interfreight Transport, a family-owned trucking company located in Rancho Dominguez. (13 RT 2386; 14 RT 2565.) His parents, who owned 55 percent of the company, were in the process of retiring and Montemayor was taking over control. (13 RT 2386; 14 RT 2547-2548, 2651; 16 RT 2925-2927, 2933-2934.) Montemayor's sister, Deborah Perna,[2] worked at the company as the office manager/bookkeeper. (13 RT 2387; 14 RT 2565-2566; 16 RT 2927.) Perna disliked Montemayor and believed that he was skimming cash from the family business. Perna thought this was the reason the formerly successful business began to run into the red. (13 RT 2396; 14 RT 2629-2631, 2652; 16 RT 2927-2928, 2930-2931, 2938.) Perna and other employees of Interfreight believed Montemayor kept a large sum of cash in coffee cans in his garage. (14 RT 2553-2554, 2562-2563.)

In early 2002, Perna hired Edelmira (Mira) Corona[3] to work part-time as an office assistant. (14 RT 2555-2556, 2567-2568, 2627-2628; 15 RT 2737.) Corona often heard Perna and Montemayor arguing, and Perna used foul language and called Montemayor names. (14 RT 2630-2632.) Around May 2002, Perna told Corona that her life would be better if Montemayor

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[2] Before Navarro's trial, Perna was convicted of first degree special circumstance murder and sentenced to state prison for life without the possibility of parole for her part in the murder. (*People v. Perna* (July 23, 2007, G036905) [nonpub. opn.])

[3] On March 24, 2004, Corona pled guilty to voluntary manslaughter, and admitted gang and firearm enhancements. (15 RT 2725-2726, 2916; 9 CT 2309-2313.)

was dead. She asked Corona if she knew of anyone who could have Montemayor killed. (14 RT 2632-2636.) Corona laughed, and told Perna no, she did not know anyone. (14 RT 2636.) After this, Perna frequently brought up the subject of having her brother killed. (14 RT 2636-2637, 2650-2651.)

At some point, Perna gave a note to Corona with Montemayor's home address and telephone number, and again asked Corona if she could have someone kill Montemayor. Corona wrote "one hand" on the note.[4] Perna suggested that Corona's friend with the tattoos, who repaired Corona's car, commit the murder. (14 RT 2643-2646, 2649-2650; 15 RT 2800, 2817; 16 RT 2928-2929; Exh. No. 3.) Perna later found the note on Corona's desk, and asked Corona why she had not given it to her friend. (14 RT 2654; 15 RT 2821.)

Thereafter, Perna met Navarro when he came to Interfreight to deliver methamphetamine to Corona. (14 RT 2654-2657, 2660-2670; 15 RT 2789, 2818, 2820, 2848-2849.) At the time Navarro was a shot-caller for the Pacoima Flats gang and dealt drugs, among other criminal activity, in furtherance of his gang. (13 RT 2515-2516; 17 RT 3194-3198, 3204-3206.) After meeting Navarro, Perna suggested that Navarro commit the murder. Corona agreed to ask him. (14 RT 2568-2659; 15 RT 2818, 2824.)

In the summer of 2002, Corona acted as the intermediary between Perna and Navarro, assisting in arranging a plot for Navarro to kill Montemayor. (14 RT 2675, 2697.) In exchange for killing Montemayor, Navarro would steal a large sum of cash that Montemayor kept in coffee cans in his home garage. (14 RT 2705-2707.) Corona gave the note with Montemayor's home address and phone number to Navarro, who wrote

[4] Montemayor was an amputee with only one arm. (13 RT 2393.)

"manitas todo" on the note. (13 RT 2391-2393, 2397-2398; 14 RT 2698-2703, 2708; Exh. No. 3.)

Over the following weeks, Perna continually asked Corona when the hit was going to happen. (14 RT 2711-2713.) Corona called Navarro to ask him about it. Navarro said that he lost the note with Montemayor's address on it, and asked Corona if she could get the address. (14 RT 2712.) Although Corona never did ask Perna for the address again, it turned out Navarro had Perna's note and had made his own notes on it. (13 RT 2440-2444; 14 RT 2712; Exh. No. 3.)

B. At Navarro's Direction, His Gang Subordinates Murder Montemayor

Navarro eventually enlisted the aid of junior gang members Armando Macias, Alberto Martinez, and Gerardo Lopez[5] to commit the murder. Their gang monikers were Pirate, Crook, and Sniper, respectively.

The day before the murder, on October 1, 2002, Macias rented a car, drove to Navarro's home at 30419 Sunrose Place in Canyon Country, and parked the rental car in front of the home. (13 RT 2475-2476; 17 RT 3090-3091.) Macias, Martinez, and Lopez then got into another vehicle, a Chevrolet Blazer. The Blazer was registered to Navarro's roommate at the Sunrose address, Daniel Chaidez, and contained assorted property of Navarro. (13 RT 2465, 2523; 17 RT 3090-3091.) The trio drove to Interfreight Transport to wait until Montemayor arrived the next morning, after which they planned to take him to his home, take the money they believed was in coffee cans in his garage and murder him. (13 RT 2465; 15 RT 2850; 16 RT 2961-2966, 2969; 17 RT 3091.)

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[5] Before Navarro's trial, Lopez was convicted of Montemayor's murder and sentenced to life without the possibility of parole plus 25 years in state prison. (*People v. Lopez* (July 23, 2007, G037163) [nonpub. opn.].)

On October 2, 2002, Montemayor left his Buena Park residence at 6:00 a.m. for his 15-minute commute to work. Montemayor always opened the business and was present when the employees arrived. (13 RT 2385, 2389-2390, 2394; 14 RT 2560-2561.) However, at approximately 6:30 a.m. that morning, employees of the trucking company arrived to find the business unlocked but no sign of Montemayor or his vehicle. (14 RT 2546, 2549-2553.) This was quite unusual and, as one employee recalled, had never happened before. (14 RT 2552.) Nothing was missing at the business, and there was no evidence of a ransacking or burglary. (14 RT 2563, 2575.)

Around 6:50 a.m., Martin Torrez, Montemayor's next door neighbor, saw Montemayor's white Expedition SUV driving on a residential street about half a mile from his home. (14 RT 2585-2588, 2592.) He recalled a black-over-blue older SUV was following closely behind. (14 RT 2589-2591.) As Torrez pulled up to his house, Montemayor's SUV and the older SUV continued down the street, past Montemayor's house. (14 RT 2588-2589.) The two vehicles stopped about a mile past Montemayor's house, near Pinyon and Locust. (14 RT 2532, 2594.) At approximately 6:55 a.m., residents heard yelling outside of their windows and saw Montemayor standing in the street. Macias and Lopez, who both appeared angry, were confronting Montemayor, while yelling "Where's the money? Where's the money?" (9 CT 2279-2287, 2291.) Montemayor backpedaled holding up his one arm, and then he turned and ran. Armed with handguns, Macias and Lopez chased Montemayor, both firing their guns. (9 CT 2279-2287, 2290, 2294-2296.) A bullet hit Montemayor in the temple, killing him. (14 RT 2532-2538, 2594-2595; 17 RT 3089; 9 CT 2280-2287.) Macias and Lopez ran back to their vehicle, and Martinez, who was waiting in the driver's seat, drove away. (14 RT 2538; 9 CT 2280-2287.)

An eyewitness gave police a partial plate of the Blazer, and Buena Park Police detectives spotted it at the transition from the eastbound 91 freeway to the southbound 5 freeway. (13 RT 2403-2405; 14 RT 2541-2544.) A pursuit ensued. (13 RT 2405-2410, 2420-2422.) The morning rush-hour pursuit was televised on the local FOX channel 11. (13 RT 2476-2477.) It covered five freeways, and during the pursuit the suspects threw three loaded guns, including the murder weapon, from the vehicle. (13 RT 2412-2414, 2484-2489, 2499-2504; 17 RT 3092.) During the pursuit, Lopez leaned out the window and flashed his gang sign—"P" for Pacoima. (13 RT 2423-2424.) When the Blazer exited the 55 freeway in Orange, officers used a "PIT" maneuver[6] to stop the vehicle. (13 RT 2425, 2431-2433.) Macias jumped out of the Blazer and threw into the bushes a cell phone, later determined to be registered to Navarro's girlfriend, Sarah Ochoa, with the number 818-266-8145. (13 RT 2425, 2433; 17 RT 3084-3085.) The officers took Macias, Martinez and Lopez into custody. (13 RT 2425, 2431-2433.)

Cell phone records established that in the hour before, and the half hour after the murder, the cell phone thrown away by Macias was in contact with Navarro's cell phone 18 times. (17 RT 3085-3087; 9 CT 2315; Exh. No. 100.) Police found Montemayor's driver's license in Macias's property at the hospital.[7] (16 RT 3068-3069, 3071; 17 RT 3100-3102, 3143.) Montemayor's wallet, which was found in his pocket, contained $199 in cash but no identification. (17 RT 3089.) Macias had a business card in his wallet and handwritten on the back was "Dropey," Navarro's gang

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[6] A "PIT" maneuver is a Pursuit Intervention Technique where the officer drives the patrol car into the rear portion of the pursued vehicle, causing it to spin out of control and stop. (13 RT 2425, 2428.)

[7] Officers shot Macias as he tried to flee after the pursuit.

moniker, and "335-4994," one of Navarro's several cell phone numbers. (17 RT 3111-3112, 3124; 18 RT 3253; Exh. No. 136.)

Martinez had in his wallet a piece of paper with the name "Anthony Navarro" written on it. The corner of the paper said "1357," and an auto club membership number for Navarro was written on the paper. (17 RT 3111-3112, 3124; 18 RT 3253.)

At approximately 8:53 a.m. on October 2nd, Navarro's wife, Bridgette Navarro, called Los Angeles County Sheriff's Department to report that a 1978 Chevrolet Blazer, license plate 3LLN324, was stolen from 30419 Sunrose Place in Canyon Country. (16 RT 2940-2942.) The deputy who took the call had recently watched the televised pursuit, and noted that the make and model of the reported stolen vehicle was the same as the blue Chevrolet Blazer involved in the pursuit. (16 RT 2948-2949.) After Buena Park police impounded the Blazer, no one ever contacted the police department to request release of the vehicle. (17 RT 3090.)

Two weeks later, police stopped Navarro while he was driving a Lexus. (13 RT 2437, 2512.) The back windshield of Navarro's car said "Heavy D and the Boyz." (13 RT 2438.) A search of the vehicle's glovebox uncovered a note handwritten by Perna with Montemayor's home address and phone number on it. The words "one hand" and "manitas todo" were also written on the note. (13 RT 2440-2444.) The officers also found a photograph of Corona inside a CD case. (13 RT 2444-2445.) Written on the exterior of the CD case in graffiti-style writing was "Droopee," "Lil Pirate," and "Pacoima" with a "F" inside the "O." It also said "GS3000" and "Monte Carlo, Impala." (13 RT 2455-2447.) An invoice dated April 20, 2002, inside the car said "Keyes Lexus" with Navarro's name and the phone number 482-9592, another phone number used by Navarro. (13 RT 2448-2449; 16 RT 3034-3035, 3042-3043.) The name Rosalinda Razo was on a temporary vehicle registration and

insurance card, both showed an address on Lehigh Avenue in Pacoima but on the back of the temporary vehicle registration Navarro's address, "30419 Sunrose Place," was handwritten. (13 RT 2449-2451; 17 RT 3091.) Some cell phones with SIMM cards[8] missing were inside the car. (13 RT 2453.)

Also found inside the Lexus was a cassette tape labeled "Droop Stuff," and paperwork that said "Rims from Spanks, Lil Crook" and "Tattoo shop." (13 RT 2451-2452.) During the stop, Navarro confirmed to Detective Pelton that he was an older member and a heavy hitter of the Pacoima Flats street gang. Navarro also said that he knew people in the Mexican Mafia. (13 RT 2515-2516.)

On October 18, 2002, Buena Park Police Detectives Pelton and Anderson interviewed Corona. (17 RT 3116; 9 CT 2321.) Corona acknowledged her involvement in the murder plot. Corona said that Perna wrote the note. (9 CT 2327, 2332-2351.) Corona explained that Perna set the conspiracy in motion after hearing her parents were going to give Montemayor full control of the business. Perna wanted Navarro to kill Montemayor and, in return, Navarro would get the money Montemayor kept in coffee cans in his garage. (17 RT 3129, 3131; 9 CT 2333-2334, 2338-2343, 2345.)

C. Cell Phones and Other Records Link Members of the Conspiracy

The cell phone that Macias threw in the bushes when the pursuit ended had a telephone number of 818-266-8145, and was registered to Navarro's girlfriend Sarah Ochoa with a North Hollywood post office box address. Another number registered to the same account, 968-0683, was found on the nightstand in Ochoa's residence. (17 RT 3085, 19 RT 3508;

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[8] A SIMM card is a small chip in newer phones that retain all the phone numbers and activity for that number, and can be put in multiple phones. (13 RT 2453.)

26 RT 4650; Exh. No. 99.) Navarro used that post office box in the letters he wrote. (19 RT 3509.) A postcard from Ricky Cruz, addressed to "Anthony Rodriguez"[9] at this post office box was found in Navarro's Las Vegas residence on Bonita. (16 RT 2989-2990.)

During 2002, Daniel Johnston, a mechanic, lived at Navarro's Sunrose residence and worked on some of Navarro's vehicles. (16 RT 3030, 3038-3039.) Johnston testified that on July 9, 2002, he opened a Nextel cell phone account with five cell phones—he kept the number 661-816-8564 for himself, and the other four numbers in numbers ending -63, -65, -66, and -67 he gave to Navarro. (16 RT 3031-3033, 3042.) Navarro programmed the number 818-482-9592 into Johnston's phone. (16 RT 3034-3035, 3042-3043.) When Johnston moved from Navarro's home, he kept the one cell phone, and at some point it was turned off. He did not know what happened to the other four phones. (16 RT 3033-3034.)

On August 22, 2002, the Nextel cellular account that was registered to Daniel Johnston showed that one of the cell phones on that account had the number 818-335-4994. (Exh. No. 101.) This was the same number that was written on a business card found in Macias's wallet. (17 RT 3111-3112, 3124; 18 RT 3253; Exh. No. 136.) By September 24, 2002, the 4994 number had been changed to 483-1600. (18 RT 3253; Exh. No. 100.)

A Nextel cell phone bill dated September 26, 2002, and linked to the Sunrose address showed several numbers listed on an account belonging to Johnston, including numbers ending in 8564 and 8567. The other three numbers were 335-4995, 335-4996, and 483-1600. (16 RT 3035-3036; 17 RT 3086; Exh. Nos. 100 & 101.) Johnston was not familiar with these last three numbers. (16 RT 3036.) Johnston said he never called Nextel asking

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[9] Bridgette Navarro's maiden name was Rodriguez. (16 RT 3007.) She passed away on May 8, 2005. (18 RT 3379; 19 RT 3611-3612.)

to change any of the cell phone numbers nor did he authorize anyone to do so. (16 RT 3033-3034, 3036.) The parties stipulated that in September and October 2002, these three numbers were registered to Daniel Johnston at 30419 Sunrose Place in Canyon Country. (17 RT 3086.)

On the afternoon of October 2nd, a woman identifying herself as Ms. Johnston called Nextel and asked to have the 1600 number changed. The contact number for this woman was 661-251-5779[10]. Nextel changed this number to 335-5937 at 4:43 that afternoon. (17 RT 3086; Exh. No. 100.) That same afternoon, the 4996 number on the account, listed as Bridgette's phone number in Navarro's address book, made two calls to Nextel customer care. (17 RT 3086; Exh. No. 101.)

Navarro's address book, which was found in his Sunrose address, listed a phone number for his wife Bridgette as 335-4996, one of the numbers listed on Johnston's account. The address book showed that the 335-4995 number belonged to Navarro's cousin, "Sammy Boy." (16 RT 2980-2981; 19 RT 3574; Exh. No. 56.)

The phone number 494-5885, also used by Navarro, was written on the back window of the Blazer along with the words "For Sale." (20 RT 3832, 3834; 21 RT 3960.) Navarro listed this phone number for himself in a November 2002, letter giving his mother permission to enroll his son in school. (20 RT 3831-3832.)

Evidence establishing that the 1600 number belonged to Navarro included Navarro's letter to Casper, telling Casper he was "back in business," listed Navarro's cell phone number as 482-1600. (18 RT 3385, 3388-3389; 19 RT 3475-3477, 3610; 21 RT 3995-3996.) On cross-examination, Navarro acknowledged that he had that number, but claimed it

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[10] This was the home telephone number for Navarro's Sunrose Place residence. (19 RT 3562.)

was only for a week or two, around July 2002. (18 RT 3478-3479.) The cell phone found on Navarro's girlfriend Sarah Ochoa's nightstand was most frequently called from the 1600 number. (17 RT 3086; 26 RT 4650; Exh. Nos. 99 & 100.) Phone records for the 1600 number showed that from October 1st through the 3rd, 60 percent of the outgoing calls were made to Martinez, Ochoa, or people in Navarro's personal address book. (17 RT 3086; Exh. Nos. 100 & 144.)

Looking at the phone records together, Corona called Navarro around 5:00 p.m. on October 1st. Navarro started calling Bridgette and Sammy Boy at 6:00 and 7:00 p.m., and at 9:00 p.m. that night there were several calls on Navarro's 1600 phone, including calls to Corona, Sammy Boy and Bridgette. At 11:00 p.m. on October 1st, there was a call from the 1600 number to Macias, two calls to Martinez's home phone number, another call to Macias, and a 2:00 a.m. call to Corona. Throughout the night there were more calls to Sammy Boy, Corona, Macias, and Bridgette. (17 RT 3085-3087; 19 RT 3570-3571, 3576-3586, 3603-3606; Exh. Nos. 99, 100 & 113.) Then there were the phone calls in the morning between the 1600 phone and Macias's cell phone. (17 RT 3084-3086; 18 RT 3483-3484; 9 CT 2315; Exh. No. 100.) At 7:00 a.m. the 1600 phone called Bridgette. (19 RT 3605-3606; Exh. No. 100.) At 8:55 a.m., Bridgette used the 4996 number to call 911. (16 RT 2981.) Between 7:14 a.m. and 9:34 a.m., there were several calls from Bridgette's number to Navarro's cell phone and pager. (17 RT 3086; Exh. Nos. 100 & 101.)

Corona attempted to call Macias's cell phone three times at 6:31 a.m. on October 2nd. A fourth call connected at 6:38 a.m. and lasted for 56 seconds. (17 RT 3087-3088.)

At 6:08 a.m., Macias's cell phone pinged off of a cell phone tower next to Interfreight Transport on Artesia Boulevard in Rancho Dominguez. (16 RT 2993-2994.) Between 6:30 a.m. and 7:00 a.m. that morning, the

cell phone pings progressed along the route the Blazer took on the 91 freeway. (16 RT 2994-2996.)

D. Jailhouse Letters Reflecting Appellant's Strong Gang Ties

The prosecution introduced several jailhouse letters establishing Navarro as a shot-caller, and the relationship between him and Martinez and Macias. (17 RT 3093; Exh. No. 112.) A letter to Martinez dated November 17, 2002, talked about Ochoa putting money on the books for Martinez and Macias weekly. Navarro signed the letter, "Much love, Hometown Dee." (17 RT 3206-3207; 20 RT 3835-3836; Exh. No. 112-B.) On December 22, 2002, Navarro wrote to Macias, starting with "Say Bro, comos estas a young C." The letter said "Tell Crook to write me okay and shoot me Pirate (Craig Juarez) address." (18 RT 3501-3504; Exh. No. 112-L.)

On January 6, 2003, Navarro again wrote to Macias and said "I got much love for you and Crook. I watch Crook grow up when he was just a big head boy running around with me and Weas up to no good." "Weas" was Steve Martinez, Alberto Martinez's brother. In this letter, Navarro also talked about his Mexican Mafia boss (F150) sending greetings to Macias and Crook and said "you're in like Flynn." Navarro also said "About little Snipes (Lopez), it never left my lips. We have to school him really, really good." (20 RT 3836-3845; Exh. No. 112-M.) Navarro also wrote, "Shoot me Spooky's number. The older Homie Kiki is mopping up some dirty floors in P Town for myself and F150, but might need stand bys." (20 RT 3847-3852; Exh. No. 112-M.) The letter also said, "Don't ever trip Homie because if I get out, you'll never be without. F (Flats) all day, baby." (20 RT 3848-3854; Exh. No. 112-M.)

On January 24, 2003, Navarro wrote to Martinez again about putting money on his books. (Exh. No. 112-G.) A little over a week later, Navarro

wrote to Martinez, apparently talking about jail visitation and that somebody had told Bridgette about Navarro's girlfriend visiting him. Navarro told Martinez the snitch was his brother, Weas, and Navarro told Martinez to tell his brother to "Keep my name out of his mouth," and to "check him, Homie." (Exh. No. 112-K.)

In November 2002, Navarro wrote Bridgette a letter from jail. (19 RT 3618; Exh. No. 146.) Navarro wrote, "You're my Bonnie and I'm your Clyde. I got me down a girl on my team." (19 RT 3618-3619.) Navarro also wrote, "I'm ready to throw in the towel. I'm serious. Please call Rod or Stark because I want out. Call the D.A. I don't care what people say or think anyway. Now you got me thinking about Sammy the Bull." (19 RT 3619.) At trial, Navarro claimed the Bonnie and Clyde statement was in reference to a song, and that he did not want to get blamed for a murder that he did not commit, so he wanted Bridgette to contact the D.A. (19 RT 3619-3621.)

Navarro wrote another letter to Bridgette around December 11, 2002, addressing her as "To my ensharito," and signing the letter, "With love, your husband, Antonini." (21 RT 4031-4032; Exh. No. 151.) Navarro included a letter to "Nino"[11] with this letter, and told Bridgette to pass the letter to Nino but not the envelope. (21 RT 4032-4033.) The letter to Nino talked about "Chino" and said he was false. Chino had just gotten out of prison and was telling people that Navarro was an informant and could not be trusted. (21 RT 4035-4036.) Navarro was trying to convince Chino that he was not an informant, and he did not want Chino to know that Navarro was in the county jail. (21 RT 4036-4037, 4133-4134.) In the letter,

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[11] Navarro testified that "Nino" was someone he knew from the Valley, and that he did not know his real name. Navarro said he bought some cars from Nino, and "did a little bit of dope trade" with him. (21 RT 4033.)

Navarro also wrote "Mandalo ala verga." (21 RT 4136.) Rodriguez testified that "mandala ala verga" means that you are getting rid of that person. (23 RT 4211.)

Other letters were introduced to show Navarro's relationship with other gang members. Exhibit 93 was a letter Navarro wrote to Jonathan Mulrosky aka "Casper." (18 RT 3388-3389, 3457.) The second page of the letter said "My cell is 818-482-1600" with a smiley face. He also wrote that his pager number was 818-494-6222. (18 RT 3457-3459, 3475-3478.) Two latent fingerprints were obtained from this page. (18 RT 3257-3259.) The fingerprints matched known prints that belonged to Navarro. (18 RT 3269-3272, 3278, 3280.) Page three of this letter was signed "Dee." (18 RT 3259.)

Navarro also received a letter from a known member of the Mexican Mafia, Tomas Grajeda. In August 2001, Tomas Grajeda wrote to Navarro—the letter began, "Say Homie, first of all, saludos to you, Marino, and Larry." (21 RT 3961; Exh. No. 55.) Tomas Grajeda aka Wino was a Mexican Mafia member. In the letter he wrote, "Larry will be receiving a call for T-Top within a week or so." (21 RT 3963.) At trial, Navarro denied that this reference was to narcotics, and said it was about cars. (21 RT 3964-3966.)

Navarro wrote letters using reference to his gang moniker and referring to the Mexican Mafia. On December 17, 2002, Navarro wrote a letter to Miguel "Kiki" Ortega, Bridgette's uncle and a member of the Mexican Mafia. (20 RT 3851-3853; 21 RT 4004-4006; Exh. No. 112-F.) Navarro signed the letter "Little Dee" and included with it a letter for Bridgette. (21 RT 4006.) The letter said, "A old man, what's crackin. I spoke to Bibi and she ran me down on what you told her. Look Homie, John Nemo is falso, no senores got his back, not even his brother." (21 RT 4007-4008.) Navarro testified that he was telling Kiki that Nemo was a

snitch. (21 RT 4008.) Navarro thought that Bridgette had told Kiki that Navarro was an informant, but Navarro claimed he was not trying to politic by writing this letter. (21 RT 4011.)

The letter to Kiki continued with Navarro writing that a lot of people owed him money. (21 RT 4011-4012.) Navarro said, "I only play right. I ain't no half stepping. F150 will tell you." (21 RT 4012-4013.) Navarro said this meant that Chato would vouch for Navarro. (21 RT 4013.) "Nemo needs to stop all the drama and stop saying things about my wife, that's my boo, and I will rock the mutha fuckin valle if she's played outta pocket." "Ask Jimbo. He knew I flew a straight kite." Jim Ortega was Kiki's brother. (21 RT 4013.) Navarro wrote to be careful and tell Nemo, Chito, and Pretty Boy to watch out. (21 RT 4014.) He then said, "I'm legit fool, juice card for weeks." Navarro claimed this did not mean he was a made member of the Mexican Mafia; it meant he had a section of the valley. (21 RT 4014-4015.)

In August 2003, Navarro wrote to Tomas Grajeda. (21 RT 4018; Exh. No. 148.) According to Navarro, the letter did not say anything like, "you would never believe it, this girl who said she was Chispa's daughter, but was lying to me, has got me twisted up on a murder that I had nothing to do with." (21 RT 4018-4019.)

In an undated/unaddressed letter, Navarro wrote "I do think I'm a bad person." (22 RT 4147-4148; Exh. No. 150.) At trial, Navarro thought that he meant to write "I don't think I'm a bad person." (22 RT 4148.) In parenthesis, the letter said, "So I like to beat people up, little broken bones here and there, couple of missing teeth or so, but hey, they should have stayed on the sidewalk because the street is mine, you know what I mean." (22 RT 4149.) Navarro claimed this was a figure of speech, that he grew up in the street. (22 RT 4151.) At the bottom of the letter, Navarro wrote, "I'm good at what I do, and now that I dropped four Niggas, I'll be making

all the dough again. Just a minor setback." (22 RT 4152.) Navarro claimed that he was not referring to Anthony Valles, Jeffrey Bueno, Jesus Casares, or Jose "Primo" Mendez, all people he had turned in to the police. (22 RT 4152-4153.)

E. Gang Culture Generally and Pacoima Flats Specifically

Buena Park Police Detective Nathaniel Booth testified as a gang expert for the prosecution. (17 RT 3148-3154.) Booth explained that Hispanic gangs have distinctive characteristics that were different from gangs of other races. Hispanic gangs usually connect themselves with a specific neighborhood or territory called a "barrio." (17 RT 3154-3155.) Their city name may be their slogan, such as "Pacoima" or "Paca." (17 RT 3155.) Booth described the different ways to get into a gang, and explained the importance of respect within the gang. (17 RT 3156-3160.) One way for a gang member to gain respect was to instill fear in the community. Another way was to be willing to commit violence for the gang. (17 RT 3160-3161.) Committing violent crime was glorified, and gang members often were aware of crimes committed by their fellow gang members. (17 RT 3164-3165.)

Booth explained the difficulties of getting out of a gang, and that sometimes the only way out was to be killed. (17 RT 3167-3168, 3173.) There were repercussions for falsely claiming a gang or for denying membership when one was a gang member, and doing either could result in death. (17 RT 3168-3169.) A gang member was expected to represent the gang and to put in work, which meant committing crimes for the gang. This could range from selling drugs to killing a rival gang member. (17 RT 3171-3172.) Older gang members were more or less supervisors of the younger gang members because they already had committed violent crimes and proven themselves. (17 RT 3173.) Gang members often committed crimes with other gang members. (17 RT 3174-3175.)

In the gang culture, gang members have monikers or gang names, and last names were usually not known, even to fellow gang members. (17 RT 3176-3177.) Gang members communicated through gang graffiti—they used it to mark their territory, to threaten rivals, and as a roll call to show the names of the members who were in good standing with the gang. (17 RT 3178.) A roll call was a list of gang members, and commonly the author of the roll call and the listed gang members committed crimes together. (17 RT 3179-3180.) Gang members got tattoos to show their rivals and the general public that they were a member of a certain gang. (17 RT 3180.)

Booth testified that Pacoima Flats was a Hispanic street gang that also was referred to as "Paca Flats," "P Flats," "The Flats," or sometimes just "Pacoima." (17 RT 3181.) The common symbol was "PF" or "P," and members showed their gang affiliation by making the hand sign for "PF" or "P." (17 RT 3181-3182.) Pacoima Flats territory consisted of about four square blocks that included the projects in Pacoima, and the boundaries were Filmore, Bradley, Pierce, and San Fernando streets. (17 RT 3182-3183.) In October 2002, Pacoima Flats had about 250 active members. (17 RT 3183.) It was a Mexican Mafia affiliated gang, and blue was the primary color. Its members wore Pittsburgh Pirates and Pittsburgh Steelers clothing because of the "P" on the clothing. (17 RT 3183-3184.)

Booth described four felony predicate offenses committed by Pacoima Flats. Jose Antonio Martinez aka "Froggy," a Pacoima Flats gang member, was convicted of second degree robbery in 1995, and in 2000, was convicted of possession for sale of cocaine base. (17 RT 3184-3186.) Victor Lopez Andrade aka "Gangster," a Pacoima Flats gang member, was convicted in 1994 of sale or transportation of cocaine, and convicted in 2001 for possession for sale of cocaine base. (17 RT 3187-3188.) Juan Antonio Calzada, a Pacoima Flats gang member, was convicted in 1998 of

six counts of attempted murder that involved a drive-by shooting of a rival gang member. (17 RT 3188-3189.) Finally, Daniel Hueso, a Pacoima Flats gang member, was convicted in 2001 of second degree robbery. (17 RT 3193-3194.)

Booth was familiar with Navarro. (17 RT 3194.) He confirmed that Navarro's gang moniker was "Droopy." (17 RT 3200.) As photographs were shown to the jury, Booth described Navarro's various tattoos. "Pacas" was written across Navarro's lower back, and there was a "P" on the back of his head. (17 RT 3194-3195; Exh. No. 121.) "Droopy" was written towards Navarro's right shoulder, and close to his neck it said, "Sur." (17 RT 3195, 3196-3197; Exh. No. 122.) Booth explained that "Sur" was Spanish for Southern, and "Sur" or "Sureno" indicated affiliation with the Mexican Mafia, a prison gang that oversaw most of the traditional Hispanic street gangs that are located south of Fresno. (17 RT 3195-3196.) The number "13" also signified Mexican Mafia affiliation because "M" is the 13th letter of the alphabet. (17 RT 3196.) "EME," "La EME," or "VM" were other symbols for the Mexican Mafia. (17 RT 3197.)

Across Navarro's chest was tattooed "Valle" which signified a gang member from the San Fernando Valley. (17 RT 3198; Exh. No. 122.) "Lil Droop" and "818" were tattooed on Navarro's right arm (Exh. No. 126), and on Navarro's left arm was the letter "P" with "Pacas" and "Flats" spelled out on the stem. (17 RT 3199; Exh. No. 129.) Booth said that tattoos of a gang's names and symbols showed membership in that gang. (17 RT 3199-3200.)

In 1984, Navarro admitted to law enforcement that he had been a member of Pacoima Flats street gang for four years, and his moniker was "Droopy." (17 RT 3204.) Navarro again admitted his Pacoima Flats gang membership to law enforcement in 1997 and 1999. (17 RT 3204.) In June 2001, while testifying at a trial, Navarro testified that he had been a

member of Pacoima Flats gang his whole life. (17 RT 3204-3205.) During the October 17, 2002, contact with Navarro, he told Pelton he was an older member with clout in the Pacoima Flats gang. (17 RT 3205-3206.)

A search of Navarro's residence at Sunrose Place also produced evidence of his gang ties. On October 4, 2002, Detectives Booth and Pelton searched the residence at 30419 Sunrose Place in Canyon Country. (16 RT 2973, 3055; 17 RT 3146.) They were looking for indicators of potential gang affiliation. (16 RT 2976.) Pelton found a daytime organizer that said on the first page, "Anthony" and "PF, Pacoima Flats, Droopy, Pacas, EFE." (16 RT 2975.) There were telephone number listings for "Primo, Lizard, Wolf, Weasel, Payaso, Soy," and it said "Droopy PF" and "San Fernando Valle." (16 RT 2978.) A letter postmarked August 10, 2001, was addressed to Navarro at a Filmore Street address, and it was from Tomas Grajeda. (16 RT 2978-2979.) In a CD case, Pelton found papers that were labeled "notes" and one page said "Visit manitas." The pages contained names and phone numbers for other gang members as well as the phone number for Navarro's mother. (16 RT 2980-2981.)

Detective Pelton located documents with graffiti-style writing that said "Crook PF," "L Droops, PF, Sur," "Los Kamsters, Kam, Droopy, The Flats, P Town," and last page said "Crook, Pirate, Droop PF" and "Crook Peefe." (16 RT 2982; 17 RT 3202.) A leather case labeled "business cards" contained various business cards. "Pirate, 661-435-6527" was written on the back of one. (16 RT 2983-2984.) Also inside the house were phone listings for "Toro" and "Sammy Boy." (16 RT 3061.) A certificate of title for the Chevy Blazer showed that Daniel Chaidez was the owner. (16 RT 3061-3062.) A clipboard found inside the den said "Droopy's Write'n Board" and "PF." Handwritten papers on the clipboard said "Senor Kasp," and "Casper," and a page with a salutation of "Much heart P Town. Gone. Dee." (16 RT 3064-3065.)

The walls inside the garage of the Sunrose residence contained a lot of graffiti-style writing including the names "Droops, Crook, Pirate, PF, Lil Pirate, Lil Droops, Blackie, Chito, VPF Gang, D'Sta, Weaz, PF1, Droop Dog, Sambo, Dee, Droop Baby." "Crook" was Martinez's moniker, and "Pirate" was Macias's. Booth explained that the lists on the garage walls were roll calls, and it showed the gang members who associated with each other. (16 RT 3056-3060; 17 RT 3200-3202; Exh. Nos. 77-81, 84-85.) A message board mounted on a wall said "OF," "714," and "Tio Guero." (16 RT 3059-3060; Exh. No. 83.) A freshly painted Monte Carlo was inside the garage. "Droops" was written on the rearview mirror. (16 RT 3062-3063.) The interior of the glove box said "Lil Droops," and inside was a traffic ticket issued to Anthony Navarro, Junior, dated September 6, 2002. (16 RT 3063-3064.)

During a subsequent search, Pelton found paperwork that said "Felipe Vivar" with an address for Pelican Bay in Crescent City that included "SHU," for the Secure Housing Unit, and a "C" number that is assigned to prisoners. (16 RT 2984-2985.)

Pelton also searched Martinez's residence at 29512 Hunstock Street in Valverde. (16 RT 2996.) He found writings including "494-6222, pager Droopy," "Soy Crook," and "Pacoima Flats." (16 RT 2998-2999.) An envelope postmarked September 25, 2002, addressed to Alberto Martinez from Luiz Martinez said "Droopy" and "494-6322" on the back. (16 RT 2999.) An address book said "Lil Pirate 661-789-2187" and a listing for "Weasel" on the first page, and "Vamp PF" and "Sniper PF" on the second page. (16 RT 2999-3000.) The top of one of the pages said "Mayra." (16 RT 3028.) Pelton also found several photographs including ones of Martinez and Macias. (16 RT 3000-3002.) Pelton did not find any photographs of Navarro. (16 RT 3017.)

On November 25, 2002, Pelton searched Navarro's sister's residence at 1072 Bonita Avenue in Las Vegas. (16 RT 2985-2986.) He found a six-ring binder with graffiti-style writing that said "The Flats," "Puro Valle," and "Droopy, Lil Pirate, Lil Chico, Blackie," and "Pacoima Flats." (16 RT 2986-2987; 17 RT 3202-3203.) There was paperwork that said "Bridgette" and "Tony" and "482-9592." There was also a letter that began, "My mother, Rosalinda Razo, has my authorization to enroll my son in school," and it was signed "Anthony Navarro, Junior" with a signature and phone numbers including "818-494-5885." The next page said "Crook," "Little Pirate," and "494-6222." (16 RT 2987-2988.) Letters addressed to Navarro were also found during the search. (16 RT 3010.)

A postcard postmarked July 16, 2002, and addressed to "Anthony Rodriguez, Post Office Box 16314, North Hollywood, California" was found at the Las Vegas residence. The return address was "Ricky Cruz" and a "C" number at Pelican Bay State Prison. (16 RT 2989-2990.)

Written on a CD case found in Navarro's Lexus was "Droopee, Lil Pirate, Pacoima," and there was a "F" inside the "O" of "Pacoima" that stood for "Flats." (17 RT 3203.)

A search of Lopez's residence also produced evidence of his gang ties to Pacoima Flats and appellant. Former Buena Park Police Detective Mike Riley searched Lopez's residence at 10861 Telfair Avenue in Pacoima. (17 RT 3104-3105, 3211.) He found a notebook with graffiti-style writing that said "Pacoima Flats 13" and "Sniper." (17 RT 3106.) The second page of the notebook said "Sniper, Vamp, Crook, Blanco, Dizzy, Flats, Pirate," and down the middle some of the letters were connected to spell "Pacoima." (17 RT 3106-3107.) The third page contained a roster that included the names "Crook, Pirate, Droops," and next to "Droops" it said "482-9592." (17 RT 3107.) A light switch inside of the residence said "Sniper" on it,

and a mirror had graffiti-style writing that said "Pirate," "Crook," and "PF 13." (17 RT 3108-3109.)

Jailhouse letters between Navarro, Macias, and Martinez referenced their gang ties. In a letter dated November 22, 2002, Navarro wrote to Martinez, "Homie, I'm gone. Much love hometown. C/R Dee." Booth explained that "C/R" meant "con respecto" or with respect. (17 RT 3206.) A December 6, 2002, letter from Martinez to Navarro started with, "Anthony, what's the happs homer?" and towards the end said, "I already got a Spook about Napoleon and his Crack Jack box stories." Booth said this was a sort of gossip between gang members, and "Spook" may be someone's moniker. (17 RT 3207.) The letter said, "Well, homeboy, I'm outee 5,000 boyee" and towards the bottom it said, "PeaFunk sends his saludos." (17 RT 3208.) Another letter from Navarro to Martinez, dated December 13, 2002, had further gang references, including "A bro, como estas," showing respect like a brother or close relation. (17 RT 3210-3211.)

At trial, Booth described gang photographs involving Lopez, Martinez, and Macias. (17 RT 3211-3213; Exh. Nos. 116 & 117.) All three had admitted their gang affiliation to law enforcement, and had gang-related tattoos. (13 RT 2504; 17 RT 3213.) At trial, Booth opined that on October 2, 2002, Armando Macias, Alberto Martinez, and Gerardo Lopez were all members and active participants in the Pacoima Flats criminal street gang. (17 RT 3214.) A photograph from the MySpace account of Craig Juarez, Junior aka Lil Pirate showed Craig Suarez, Senior standing next to Navarro. The caption said "My dad in the 24 jersey, VPF X3 O.G.'s" which translates to here is my dad and the original gangsters from Varrio Pacoima Flats. (17 RT 3244-3246.)

Based on a hypothetical mirroring the facts of this case, Booth opined the crime was committed for the benefit of Pacoima Flats criminal street gang because the money from the robbery would have been shared by

members of the gang, and the crime was very newsworthy and brought the gang notoriety. (17 RT 3215-3219.) Booth further opined that the crimes were committed to further the activities of the Pacoima Flats criminal street gang. (17 RT 3221.)

On cross-examination, Booth acknowledged that Canyon Country was not in Pacoima Flats territory. (17 RT 3227-3228.) Booth testified that the worst thing a gang member could do was inform on other gang members. (17 RT 3234-3235.) He would not expect a gang member in good standing with his gang to inform his handler of a murder plot. (17 RT 3238.) Booth said if three gang members were in a holding cell with another gang member who they stabbed about 13 times, he would not think the stabbing victim was in good standing with the gang. (17 RT 3246.) The stabbing could be consistent with the three gang members thinking the fourth was an informant, but Booth acknowledged he had no idea what the reasons could have been for the stabbing. (17 RT 3247.)

F. Defense

1. Navarro's Admission of Gang Ties and Claims of Being an Informant

Navarro's defense sought to prove that he was not the mastermind behind the murder of Montemayor; he was a police informant who tried to stop the killing. Navarro testified in his own defense. Navarro admitted he was a Pacoima Flats gang member, and was about 12 years old when he was jumped into the gang . (18 RT 3318.) Navarro claimed the last gang tattoo he got was in 1988. (18 RT 3319.) In 1995, after he was arrested for robbery and sent to prison, Navarro was validated as an associate of the Mexican Mafia. Navarro also had relatives who were Mexican Mafia members. (18 RT 3321.)

In 2000, after Navarro got out of prison, his parole officer Dan Evanilla told Navarro that he heard that he was validated, and asked

Navarro if he wanted to work for Evanilla, or the Federal Bureau of Investigations (FBI). (18 RT 3323, 3413.) Navarro was upset because the Mexican Mafia had recently killed his cousin Adrian, so Navarro signed a contract with the FBI and was given the code name "Alaska."[12] (18 RT 3324.) Navarro added that his code name for his handlers was "manitas," and he would say "I have to visit manitas" or "call manitas" so that his ex-wife or others in his house would not catch on to what he was doing.[13] (18 RT 3324-3325.) Later, Navarro said he used that code name to refer to his handlers because there were always "homies" around. (18 RT 3330.) Navarro said "manitas" meant little hands, but he would write "manitas todo" to remind himself to tell his handlers everything. (18 RT 3330.) Navarro wrote "manitas todo" on Exhibit Number 3 because it meant to give his handler all of the information. (18 RT 3366.)

Navarro started working as a paid informant for the Los Angeles office of the FBI in April 2000. His handlers were Carlos Alaguirre or Aguirre, and Curran Thomerson. (19 RT 3624-3625.) Navarro said in 2000, when he signed up as an informant with the FBI, in his mind, he was no longer a gang member. (19 RT 3623.) In late 2000, the FBI said

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[12] On cross-examination, Navarro said that after he was paroled, he was approached by FBI Agent Carlos Alaguirre about becoming an informant. (18 RT 3413-3415.) He also acknowledged that in 1995, he was informing for Carlos Sanchez at LAPD. This was five years before his cousin was killed, and he acted as an informant at that time to save his own skin. (18 RT 3419-3421.) Navarro then said this began when Officer Randolph from LAPD pulled him over, and Navarro told him he could give him such good information that it would make him a sergeant. (18 RT 3422-3423.)

[13] Navarro later testified that "Manitas" was his code name for Rodriguez. (19 RT 3498, 3520.) On cross-examination, Navarro said that he thought Bridgette knew he was an informant when he worked for Sanchez. (19 RT 3617.) He also said that he introduced Bridgette to Starkey. (19 RT 3618.)

Navarro was getting "too hot" and needed to move. A letter from the FBI stated, "Closed as FBI informant October 26, 2000." The FBI gave Navarro $8,000 to relocate. (18 RT 3445-3446; 19 RT 3625.) Navarro began informing for the San Diego FBI office but he did not move to San Diego. (18 RT 3445-3446.) On November 27, 2000, Agent Thomerson introduced Navarro to Agent Steve Rees. The San Diego FBI office closed out Navarro on November 15, 2001. (19 RT 3626.)

While working for the FBI, Navarro attended four or five meetings with the Mexican Mafia while wearing a pager that was a wire, and a camera on his shirt. (18 RT 3326.) Navarro said he gave the FBI information on the Tijuana Cartel and the Arellano-Felix Cartel, and helped Agent Steve Rees catch a Mafioso named "Batman." (18 RT 3327-3328.) At some point, the FBI heard that people on the street knew that Navarro was an informant, so in 2001 they ended their contract with him. (18 RT 3330-3331, 3355.) Navarro believed this was true because he was shot at on two separate occasions. (17 RT 3355-3356.)

Navarro explained the term "collecting rent" or "taxes" meant going to different gangs or cliques and collecting $350 from each for the Mexican Mafia. (18 RT 3331.) Navarro was given money by the FBI to give to the Mexican Mafia so they would believe Navarro was collecting rent or taxes. Tomas Grajeda aka "Wino" was a notorious Mexican Mafia member who sometimes collected rent from Navarro. (18 RT 3332-3333.)

Navarro also informed for Los Angeles Police Detective Carlos Sanchez and helped him catch some murderers. Navarro later had problems with Sanchez involving one of Navarro's Harley Davidson motorcycles. Navarro testified for Internal Affairs and Sanchez was terminated from the police department. (18 RT 3329-3330.) While working for LAPD, Navarro intercepted four or five messages from the Mexican Mafia regarding contract killings and gave these messages to the

FBI. Navarro said he gave the FBI approximately 60 cassettes of recordings. (18 RT 3328-3329.)

In April 2002, Navarro began working as an informant for Agent James Starkey from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and for Detective Rodney Rodriguez of the Foothill Division of the Los Angeles Police Department. Starkey and Rodriguez were partners in a joint task force. (18 RT 3340; 19 RT 3627-3628.) While working for Rodriguez, Navarro gave him information about gang members Jeffrey Bueno aka "Spanky," and Anthony Valles aka "Villain," and the two were arrested. (18 RT 3346-3347, 3446-3447.) Navarro also told Rodriguez about Juan Deleon aka "Bad Boy" who committed three homicides at a house party. (18 RT 3347.)

While informing for Starkey, Navarro gave him information about where he could find a large amount of guns. Everyone thought Navarro was the "Ilavero" or key holder, i.e. he had keys to the Valley or neighborhood, so they would give Navarro information. Navarro would then pass on that information to the government. (18 RT 3334, 3347-3348.) Navarro explained that to keep up his image as being a shot-caller, he sold drugs, and he also gave people cell phones. (18 RT 3348.) Navarro said he had at least nine cell phones and everyone in his house had access to these phones. He could not remember if his handlers knew about all of the cell phones. (18 RT 3348-3350.) Some of the phones were in Johnston's name, and some in Sarah Ochoa's name. (18 RT 3369-3370.)

Navarro said he was selling small amounts of methamphetamine while informing for LAPD. He said his handlers did not really care what he was doing as long as he gave them good information. (18 RT 3382-3383.) During this time, Navarro was arrested for having a concealed weapon, but no charges were filed. (18 RT 3383, 3447-3450.) Navarro said that around 2000-2002, he was selling drugs for income, and that it

was not a large amount. (21 RT 3965-3969, 3971-3972.) Navarro did not tell Thomerson, his FBI handler that he was doing this, but they knew what he was doing and told him if he got caught, he would be arrested and prosecuted. (21 RT 3970-3971.) Navarro also did not tell Starkey or Rodriguez that he was selling drugs. (21 RT 3972, 3974.)

Around May 31, 2002, Starkey told Navarro they did not like what they were hearing about Navarro. There was a report that Navarro was engaging in unauthorized criminal activity, so they were going to close him out. (19 RT 3628-3629.) Starkey told Navarro to keep in touch until things were formally closed down. Navarro, however, continued to stay in contact with Rodriguez. (19 RT 3629.) The ATF formally closed Navarro down as an informant on July 1, 2002. (19 RT 3629.)

Navarro lived in several houses in 2002 including a house on Remick in Sun Valley, and off and on at the house on Sunrose Place in Canyon Country. (18 RT 3344-3345.) On October 2, 2002, Navarro was also living in Las Vegas, and only went to the house on Sunrose occasionally to see his son and stepdaughter. (18 RT 3371-3372.) The only property he had left at the Sunrose house was his Monte Carlo in the garage because it could not be moved. (18 RT 3372.)

Daniel Chaidez lived in the back house on Remick Street. (18 RT 3370-3371.) Chaidez also lived in the house on Sunrose Place in Canyon Country, and he drove the blue Chevrolet Blazer. Macias had borrowed the Blazer from Chaidez a few times. (18 RT 3371.)

Navarro said he met Macias in 2002, through Craig Juarez aka Big Pirate, who was Macias' brother-in-law. (18 RT 3343, 3405-3406.) Macias hung out at Navarro's house with a lot of other gang members. Rodriguez knew that gang members hung out at Navarro's house. (18 RT 3343-3344.) Macias and Martinez were about 10 years younger than Navarro, and Lopez was even younger. They were considered a younger

generation of the gang and their clique was "Midget Locos." (18 RT 3406-3407.)

Navarro initially testified that he met Mira Corona in June or July 2002 at Branford Park, in Arleta, which was near Pacoima and was a hangout for Pacioma Flats gang members. (18 RT 3341-3342.) When Navarro arrived, Macias was there and he introduced Corona to Navarro. (18 RT 3342-3343; 21 RT 4069.) Corona asked Navarro if he was "Droopy," and he said yes. (21 RT 4069.) Corona told Navarro she had heard he was the Llavero, and that she was told to talk to him. (18 RT 3350.) Corona said she was "Chispa's" daughter and was running things from the Pico Rivera area to Hollywood. (18 RT 3352; 21 RT 4069-4070.) Navarro testified that at that time, he did not know who Chispa was, except that he was a mafia boss who was close to Arturo Padua. (18 RT 3351.) Corona said that Chispa wanted Navarro to take care of a hit in Orange County. Navarro said he was not going to take orders from a female, and that he did not know who she was. (18 RT 3352-3353.) A guy named "Alfonso" told Navarro that Corona was "legit." (21 RT 4070.) On redirect, Navarro claimed he made inquiries with law enforcement about Corona and Chispa, trying to find out if he had any daughters. (21 RT 4072.)

According to Navarro, Corona gave him her father's address, and Navarro wrote to Chispa to clarify what was going on. Exhibit Number 59 was a copy of the envelope with Navarro's handwriting. (18 RT 3353-3354.) Corona told Navarro that he owed the Mexican Mafia money. The Mexican Mafia had a green light on Navarro because they thought he was keeping the tax money. (18 RT 3354-3355.)

Navarro's next meeting with Corona was at a McDonald's in Los Angeles. Navarro asked Corona to remove the green light in exchange for a truck and $7,000. (18 RT 3356-3359; 19 RT 3517-3518; 21 RT 4073.)

Corona gave Navarro the address of the victim and asked Navarro if he would get somebody to kill this person. (19 RT 3518, 3531-3533.) Navarro said he wrote "manitas" on the note and then put it in the glove compartment of his car, and it stayed there until October 17, 2002, when Detective Pelton found it. (19 RT 3519-3520, 3558.) Navarro said he forgot that he put the note there, even though he had written "manitas" on it to remind himself to tell his handler everything. (19 RT 3520.)

On cross-examination, Navarro's story changed. Navarro said he already knew Corona in June, and that he did not remember when he first met her. (19 RT 3513.) Navarro then said he met Corona at Branford Park around April 2002, and that was when she said something about her father being Chispa and Chispa wanting Navarro to "touch up" somebody in Orange County. (19 RT 3513-3514; 21 RT 3988.) Navarro said he next spoke to Corona after he was shot on the 210 freeway. Navarro claimed that Macias had called him and said Corona was Mafia and that Navarro was "fucking up" by not listening to her. The shooting scared Navarro and prompted him to call Corona because she was Chispa's daughter and would know why he got shot. (19 RT 3515-3517.) After this telephone conversation with Corona, Navarro met her at the McDonalds in Los Angeles. (19 RT 3515, 3517.)

After Navarro received the note from Corona, he contacted Agent Starkey about the proposed murder. (18 RT 3361; 19 RT 3630-3631, 3634-3635.) Navarro testified that he told Starkey that a girl who said she was "Chispa's" (aka Felipe Vivar) daughter said that Chispa wanted somebody killed. Navarro could not remember if he told Starkey that he had an address for the intended victim. (19 RT 3631-3632.) Starkey said he was investigating a bombing, and told Navarro to call Rodriguez. (19 RT 3632, 3635.) Navarro did not tell Starkey Mira Corona's name, or that the

intended victim was her boss who only had one hand, and did not say it was supposed to happen in Orange County. (19 RT 3632.)

Navarro went to the Foothill station and told Rodriguez about meeting Corona, and what she had said she wanted to happen in Orange County. Navarro said he misplaced the address that was given to him at McDonald's. Rodriguez said that if Corona called again, to get the address and name. (18 RT 3362; 19 RT 3622-3623; 20 RT 3800-3801.) On cross-examination, Navarro added that he told Rodriguez that a girl approached him and said that Chispa wanted somebody from the San Fernando area to go to Orange County to kill somebody. Rodriguez asked Navarro for the name of the intended victim, and Navarro said he did not know and that he only had the address. (19 RT 3526; 20 RT 3801-3803.) Navarro said he did not know Corona's last name, so he did not tell Rodriguez that the intended victim was Corona's boss; however, he did mention that the girl said she was Chispa's daughter. (19 RT 3527-3528, 3623.) Navarro also said he told Rodriguez the note with the intended victim's address was in the glove box of his Lexus. According to Navarro, Rodriguez said he would go to Navarro's house to get the note.[14] (19 RT 3526-3527, 3540, 3543-3544, 3557-3558; 20 RT 3790-3791, 3793-3794.)

In late July/early August 2002, Navarro went with Corona to Crescent City to visit Chispa in Pelican Bay. (18 RT 3366-3367; 19 RT 3521-3522; 21 RT 4105-4106.) Navarro wanted Chispa to take the green light off of him. (18 RT 3367; 19 RT 3547-3548.) Navarro also wanted to find out

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[14] Navarro later testified that he told Rodriguez that a girl who said she was Chispa's daughter approached him about doing a hit because the intended victim owed Chispa money. Navarro thought he told Rodriguez the girl's name was Mira; Navarro did not remember having Mira's phone number at that time. (19 RT 3636.) Navarro could not recall if he had the note when he spoke with Rodriguez. (19 RT 3637.)

more information about the proposed hit because Rodriguez said he could not do anything without a name. (19 RT 3523-3525.) Corona told Navarro that this person owed Chispa money, and that he had money in coffee cans in his garage. (18 RT 3367; 19 RT 3530-3531, 3633.) Navarro said he asked Corona for the intended victim's name, but she would not give it to him. (19 RT 3530.) Corona said something about Navarro having his "homies" do it, but Navarro did not think she was serious. (18 RT 3368.) On cross-examination, Navarro said he thought that when Corona gave him the note, she said the victim was her boss, but Navarro did not know where she worked. Navarro later testified that he did not know if Corona said it was her boss. (19 RT 3524-3525, 3533-3534.) Navarro claimed he had never been to the trucking company in Dominguez Hills. (18 RT 3369.)

After that, Navarro tried to avoid Corona's calls, but because Rodriguez told Navarro to get a name, he eventually talked to her. Navarro asked Corona for the address again. Corona said she would get back to him, but she never did. (18 RT 3368-3369; 21 RT 3990-3992.)

Navarro said that after he was arrested, his defense counsel and Rodriguez met with him in jail. Navarro gave two somewhat inconsistent versions of that conversation. First, Navarro said he tried to remind Rodriguez that he had told him about the note in the glove box, and he thought Rodriguez more or less remembered this conversation, but not quite exactly. (20 RT 3788-3790.) Later, Navarro testified that he was not trying to remind Rodriguez of anything when he spoke to him at jail. He just asked Rodriguez if he remembered the note, and Rodriguez said that he remembered something about it but was not sure. (20 RT 3792-3793.)

Navarro testified that Corona became friends with his ex-wife Bridgette, and that she sometimes stayed at Bridgette's house. (18 RT 3360-3361.) Later, Navarro admitted that he did not know what Bridgette's

relationship to Corona was, and he only knew that Corona called Bridgette several times over the summer. (21 RT 4098-4099.)

Navarro claimed that in October 2002, his cell phone number was not 482-1600. (18 RT 3385-3386.) He also claimed that he stopped using pager number 818-494-6222 when he filed for divorce from Bridgette, which was February or March 2002. (18 RT 3387-3388.) However, on cross-examination, he acknowledged that in a December 4, 2002, letter to a woman in jail, he wrote "here is my voice mail number, 818-494-6222." (19 RT 3486-3487.) And further, that when Bridgette wrote to him in June 2003 and said that she wanted a divorce, he wrote back that he was not going to give her a divorce. (19 RT 3613-3615.)

Navarro had a business card holder that contained a Sam's Club card in his name. (19 RT 3509-3510; Exh. No. 58.) The back of one of business cards in the holder said, "Pirate 661-435-6527." Navarro testified that he did not know if that number belonged to Craig Juarez Senior or to Macias. (19 RT 3510.) There was a business card for Alfred Ortega aka "Chato," and a business card North Valley Collision Center with a number for "Hugo." Hugo worked under Felipe Vivar aka Chispa. (19 RT 3511.) There was a page with a number for Myra, 562-233-3524. Navarro thought that was Corona's cell phone number but he did not remember when he wrote down that number. (19 RT 3512.)

Navarro said he did not order Macias, Martinez, and Lopez to go to Orange County and kill Montemayor, and he did not know they were going to do so. (18 RT 3374; 21 RT 4047.) He wrote them letters in jail to keep things friendly and because he was worried they would find out he was an informant. He also had his girlfriend put money on their books in jail. (18 RT 3374-3375; 20 RT 3812-3813, 3835-3854; 21 RT 4050.)

Navarro claimed he found out about the murder when he was in Las Vegas, where he had been staying for at least one week.[15] Navarro saw the pursuit on television and recognized the blue Blazer. (18 RT 3379-3380; 20 RT 3770, 3777-3779.) Navarro did not call either Starkey or Rodriguez after seeing the pursuit. (20 RT 3770-3772.) Navarro said he did not know it was the murder that Corona was talking about until after he was arrested, and then he called Rodriguez. (20 RT 3774-3777; 21 RT 4109.) Navarro said the AAA number found in Martinez's possession belonged to him, but he did not give it to Martinez. Navarro had given his AAA number to Chaidez because his truck kept breaking down. (18 RT 3384; 21 RT 4045.)

In February 2003, Navarro was in a holding cell in North Court with about 25 to 30 people, including Macias, Martinez, and Lopez. (18 RT 3375-3376; 21 RT 3954-3956.) Lopez and Macias began stabbing him and calling him a "fucking rat." (18 RT 3376-3377; 21 RT 3956.) Navarro was stabbed 11 times, and sustained permanent nerve damage in his left arm. (18 RT 3377-3378; 21 RT 3957, 4057-4058.) According to Navarro, Corona was in the holding cell next to him, and she told him that was what he got for being a rat. (18 RT 3378.)

On cross, Navarro agreed his personal phone list identified 661-251-5779 as the home phone number for the Sunrose Place (19 RT 3562), 257-1779 as the phone number for the Martinez residence on Hunstock (19 RT 3562), and 661-789-2187 as the number for the Macias/Juarez residence, thus, further evidence of Navarro's connection with Martinez and Macias. (19 RT 3562-3563.)

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[15] After the prosecutor showed Navarro an incident report dated September 26, 2002, from the Sunrose address, Navarro acknowledged that that may have been his last day there before going to Las Vegas. (20 RT 3779-3780.)

Navarro acknowledged the stipulation regarding the request to change his 1600 phone but denied having anything to do with it or using the 1600 number. (19 RT 3565-3566.) He did not remember if his prior number was the 4994 number, and he did not know how the writing "Droopy, 818-335-4994" got on the back of a business card that was in Macias's wallet. (19 RT 3566.) Navarro said he had a lot of phones and he could not remember what numbers he had at certain times. (19 RT 3566-3567.)

Navarro also said that he did not know that the 1600 was registered to the account for only nine days, but he knew that he did not write that his cell phone number was 818-482-1600 (Exh. No. 93) during that nine day time frame, and he could not remember when he had that number. (19 RT 3567, 3610.) The prosecutor showed Navarro phone records that showed a call going to the 1600 number at 4:30 p.m. on October 2nd, and then about an hour later, the call was to the 5937 number. These records show the number was changed from the 1600 number to the 5937 number sometime on October 2nd. (19 RT 3567-3569.) Navarro denied making calls from the 4994/1600 number on September 23rd to Corona's number. (21 RT 3993-3994.) He said he also did not call Macias's number at 3:00 a.m. on September 24th. (21 RT 3998.) He did not make or receive any calls to or from Corona on September 24th or 25th. (21 RT 3999-4002.) Navarro surmised that Bridgette may have taken over the 1600 number, but he could not answer why she would have used the 1600 number to call her own cell phone number. (21 RT 4001-4002.)

On October 1st, calls were made from the 1600 number to Corona's number and also to Bridgette's cell phone. (19 RT 3570-3571.) Navarro denied making or receiving several phone calls on October 1st and 2nd from the 1600 number. (19 RT 3578-3590, 3603-3609; 21 RT 4046-4047.) Navarro claimed he had a prepaid Nokia cell phone with him in Las Vegas, but he did not have any records for it. (19 RT 3589-3590.)

Navarro testified that he met Lopez aka Sniper in 2001 or 2002 when he dropped off drugs for the "youngsters" to sell. (19 RT 3596.) Lopez treated Navarro with respect. Navarro was known as the Llavero or key holder of the Valley, but he claimed he was not a shot-caller. (19 RT 3598-3599, 3602-3603.) Lopez did not know that Navarro was a confidential informant. (19 RT 3600.)

On November 17, 2002, Navarro wrote a letter to Bridgette that said, "Just so glad you're a loyal wife and we are a Bonnie and Clyde team." Navarro claimed that was lyrics from a song that they liked. (19 RT 3615.) Navarro wrote in the letter that they had a great relationship that he did not want to ruin, and that he was "so heavily totally in love with you." (19 RT 3619.) Navarro also wrote, "I'm ready to throw in the towel. I'm serious. Please call Rod or Stark because I want out. Call the D.A. I don't care what people say or think anyway. Now you got me thinking about Sammy the Bull." (19 RT 3619.) Sammy the Bull was an Italian Mafia member who was a prosecution witness against some of the biggest heads in the Italian Mafia. (19 RT 3620.) Navarro claimed that the letter meant he did not care if he was exposed as an informant because he was being blamed for a murder that he did not commit. (19 RT 3620-3621.)

Navarro had no idea how a picture of Mira Corona got into a CD case in his blue Lexus. He speculated that she may have put it in there during the drive to Crescent City. (20 RT 3797.)

In June 2001, Navarro testified at a trial of a Pacoima Criminals gang member. (20 RT 3808, 3810.) Navarro lied on the stand when he said he would never "snitch on a homeboy," because at that time, he was working as an informant. (20 RT 3811-3812.)

Regarding the gang graffiti found at his Sunrose house, Navarro said the spray painting of monikers on his garage walls was probably written about a month before he went to Las Vegas. He probably wrote, "Droops,

Crook, Pirate, PF." (20 RT 3813-3815.) Navarro thought he also wrote, "Thug, Life, Fool," but could not remember when he wrote it. (20 RT 3815.) Navarro also wrote "Droops PF" with a happy face, "D'Sta," and "Danny Boy" aka Danny Chaidez. (20 RT 3816-3817.) Navarro admitted writing some of the other monikers on the walls. (20 RT 3817-3823.)

A photograph of the house on Remick showed Chaidez's Chevrolet Blazer parked in front. In the back window was a For Sale sign, listing a phone number of 494-5885. (20 RT 3829-3830.) Navarro said he could not remember if that was his phone number, but he did not write it on the sign or offer the vehicle for sale. (20 RT 3831.) That same telephone number was written in a letter giving Navarro's mother authorization to enroll Navarro's son in school in Las Vegas. Navarro did not know when he wrote that letter, and he thought the number was for a pager. (20 RT 3831-3832.)

2. Navarro's contacts with the FBI

Special Agent Curran Thomerson testified for the defense. He was a special agent for the FBI, and in 2000, he was assigned to the Los Angeles Safe Streets Task Force. (20 RT 3678-3679.) He worked with informants. Around February or March or possibly April 2000, he debriefed Navarro, which meant exchanging information to see what kind of information Navarro had. (20 RT 3680-3681, 3683, 3740.) Both he and Agent Aguirre handled Navarro. (20 RT 3681-3682.) After getting out of prison, Navarro voluntarily contacted the FBI and told the agents that he was trying to get out of the criminal life. Navarro said he was a validated associate of the Mexican Mafia, and he agreed to give the FBI information about the FBI and the gangs that Navarro was associated with in the San Fernando Valley. (20 RT 3683-3685, 3751, 3756.) If the Mexican Mafia knew someone was providing information to law enforcement, they would try to kill that person

or his family. (20 RT 3684-3685.) Thomerson was not aware of Navarro having a code name for him. (20 RT 3703.)

Thomerson believed that Navarro wore a wire to several Mexican Mafia meetings. (20 RT 3687.) Navarro told the FBI that Tomas Grajeda, a leader in the Mexican Mafia, had assigned him to collect "rent" or "taxes" from a certain part of the city. (20 RT 3683-3684, 3692.) Thomerson said it was possible the FBI gave Navarro money to pretend that he was collecting rent. (20 RT 3692, 3726-3727.) Thomerson explained that a lot of informants keep up the guise that they are still active gang members; however, informants were not authorized to participate in criminal activity. (20 RT 3693-3694.) Certain activities, like minor narcotics sales may be allowed with several levels of approval, and any money received during the sale was to be given to the FBI. (20 RT 3694-3695.) Violating these rules would result in termination of the informant relationship. (20 RT 3695-3696.) As far as he knew, Navarro was considered to be a credible informant, and he never heard that Navarro was not reliable. (20 RT 3759-3761.)

The FBI kept a chronological log of the interactions with Navarro. (20 RT 3682; Exh. I.) There were about 64 entries between April 2000 and sometime in 2001. (20 RT 3710.) Navarro informed the FBI of murder plots, including the Mexican Mafia's plan to attack Blinky Rodriguez, an anti-gang community worker. (20 RT 3696-3697.) According to the log, on June 6, 2000, Navarro said that John Garcia aka Nemo had a green light on him for being an informant. (20 RT 3697-3698.) Navarro also gave the FBI information regarding Pacoima Flats gang members, though none of this information led to a federal arrest of any Pacoima Flats gang member. (20 RT 3700-3701, 3719.) On August 8, 2000, Navarro turned over at least three recorded meetings with Mexican Mafia members. (20 RT 3704-3705.)

The only payment Thomerson was aware of Navarro receiving from the FBI was $8,000 for him to relocate outside of Los Angeles. (20 RT 3707, 3718-3719.) Navarro stopped working for the Los Angeles FBI office because he starting providing more information regarding the Arellano-Felix cartel, which was being investigated out of the San Diego office. (20 RT 3711, 3713-3714.) Thomerson was not aware of any of this information contributing to the prosecution of the cartel. (20 RT 3721.) Another reason for the suggested relocation was because there was a green light on Navarro in Los Angeles. (20 RT 3714.) Thomerson closed out Navarro's file in late Fall of 2000, but Navarro continued to give the agents information. (20 RT 3686-3687, 3740-3741.) In November 2000, Navarro signed up with the San Diego FBI office to work as an informant. According to the reports, Navarro worked as an informant for the San Diego office until November 15, 2001. (20 RT 3722-3723, 3741.)

On December 17, 2001, Navarro told Agent Aguirre about a San Fernando gang member dealing in narcotics. (20 RT 3692-3693, 3757-3758.) This was after the San Diego FBI office had closed Navarro's file. This information was never verified or passed on to local law enforcement. (20 RT 3758.)

On cross-examination, Thomerson acknowledged that they could not always verify the information given to them by Navarro. (20 RT 3715.) He also agreed that informants sometimes played both sides of the fence, and remained active gang members because it could be a "get-out-of-jail-free card." (20 RT 3716-3717.) An informant was never authorized to carry a gun. (20 RT 3717.) Hypothetically, just because an informant was credible and gave information that led to arrests, did not mean the informant had changed his life. The informant could be trying to eliminate competition on the streets, or settle a vendetta. (20 RT 3763-3764.)

3. Navarro's contacts with the LAPD and ATF

In 2002, Los Angeles Police Detective Rodney Rodriguez was working gang detail and working with informants out of the Foothill Division in Pacoima. (23 RT 4203-4304.) That year, Los Angeles Police Detective Carlos Sanchez introduced Navarro to Rodriguez. Rodriguez knew that Navarro was a Pacoima Flats gang member, and that he was an informant. (23 RT 4205-4206.) Navarro had a reputation for being a "case maker," meaning that he provided good information. (23 RT 4206-4207.) Navarro was a "shot-caller" in the Pacoima Flats gang, and in Rodriguez's opinion, this put Navarro in a unique position to gather information. (23 RT 4207.) Rodriguez said it was common for an informant to hold himself out as being a shot-caller in a gang and allow gang members to hang out at his house and write their monikers on the garage wall. (23 RT 4209, 4211-4212.) It was also not uncommon for such an informant to provide cell phones to other gang members and to get the bills in order to keep track of the gang members. (23 RT 4211.) Rodriguez did not know if Navarro provided cell phones to other gang members, and Navarro never said he was doing this to keep track of the other gang members. (23 RT 4261.)

Rodriguez said it was common for gang members to use a stolen vehicle or a "g-ride" to commit a crime. (23 RT 4212.) He did not think it would make sense for a gang member to rent a car to use in a crime, or to commit a crime with a car that could be traced back to a shot-caller because that could be suicidal to that gang member. (23 RT 4214-4215.) However, a gang member may use a car that could be traced back to a fellow gang member if he was trying to get rid of that person. (23 RT 4216.)

Rodriguez met Navarro after a gun was found in his car, and police arrested him for being a felon in possession of a firearm.[16] (23 RT 4217, 4263.) Rodriguez introduced Navarro to Agent James Starkey at the ATF because he thought Navarro could be of use to him. (23 RT 4263-4264.) Navarro actually became an informant for the ATF, and Starkey, not Rodriguez, was Navarro's handler. (23 RT 4264-4265, 4289.) However, Navarro often called Rodriguez with information, probably because it was easier to get a hold of Rodriguez. (23 RT 4326.)

At first, Navarro called often and provided information that led to three arrests. (23 RT 4268-4270, 4273.) Navarro informed Rodriguez of an attempted murder involving gang retaliation and an AK-47 rifle. Based on Navarro's information, police stopped the suspect and found an AK-47 wrapped in a towel in the backseat of his vehicle. (23 RT 4218.) Navarro also supplied Rodriguez with good information that led to the arrest of Pacoima Flats gang member Antonio Valles aka Villain, and information that led to the arrest of Jeffrey Bueno aka Spanky. (23 RT 4218-4220, 4269-4270.) As time went on, Navarro provided less information and it was more generalized and vague, and involved Navarro asking more questions than providing useful information. (23 RT 4273-4278, 4291-4292.)

In July 2002, Navarro called Rodriguez and asked if he would handle some type of kidnap for ransom or murder for hire in Orange County. (23 4220-4221, 4243, 4249-4250, 4280-4281, 4284-4285.) Rodriguez told Navarro he need information for the suspect and the name of the victim, but Navarro said he did not have this information. Rodriguez asked Navarro to

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[16] Navarro testified that he did not meet Rodriguez as a result of being arrested; he voluntarily went to the police station. (21 RT 3976-3981.)

get this information for him i.e. to find out as much information as he could. (23 RT 4221-4222, 4285.) Navarro did not tell Rodriguez that he had the address of the intended victim written on a note, or that the note was in the glove box of his car. Navarro did not mention coffee cans inside the intended victim's garage, and he did not say that the intended victim was the boss of a potential suspect. (23 RT 4283-4284.) Nor did Navarro say the name "Mira," or anything about the daughter of a Mexican Mafia member, Felipe Vivar or "Chispa." (23 RT 4283-4284.) Rodriguez also did not recall Navarro saying anything about "Big Homies." (23 RT 4222.)

A couple of weeks later, Navarro again called Rodriguez and mentioned the kidnap for ransom case in Orange County. Navarro asked Rodriguez if he would handle this kind of case. Rodriguez said no, but that he still needed specific information so he could put Navarro in contact with the appropriate Orange County law enforcement agency. (23 RT 4286.) Again, Navarro never said that he had a note with the home address and telephone number of the intended victim, or that the intended victim had one hand. (23 RT 4287, 4289.) Navarro also did not mention the name "Mira," the Mexican Mafia, or that Felipe Vivar wanted the intended victim to be "touched up." (23 RT 4287-4288.) Rodriguez said had Navarro given him the home address of the intended victim, law enforcement could have tracked him down. (23 RT 4288-4289.) Navarro told Rodriguez that he would get back to him, but Navarro never did. (23 RT 4286-4287.)

On cross-examination, Rodriguez agreed that a person could simultaneously be a gang member and an informant, and that an active gang member could be motivated to be an informant for personal reasons, such as a personal vendetta against someone or to get rid of competition. Another reason for being an informant was to get advantages from law enforcement. (23 RT 4259-4260.) It was not uncommon for an informant to drop a few "cookie crumbs" before committing a crime so there would

be a safety net if the informant was caught. (23 RT 4292.) Rodriguez opined that Navarro was a shot-caller in Pacoima Flats gang and also an informant. (23 RT 4260.) Navarro did not tell Rodriguez he was selling narcotics with Valles or with Bueno before giving him information that led to their respective arrests. (23 RT 4292.)

Rodriguez never told Navarro to refer to him as "manitas" and he never heard Navarro call him this name. Rodriguez did not have a code name, and he always told informants not to write anything down. (23 RT 4260-4261, 4329.) "Manitos todos" means little hands everything. Rodriguez did not know of any gang members with the moniker "Manitos." (23 RT 4331-4332.)

Agent James Starkey worked for the Bureau of Alcohol, Tobacco, Firearms and Explosives of the Department of Justice. On March 26, 2002, Navarro began working for the ATF as an informant. (21 RT 3873-3875, 3892, 3904.) Several police officers told Starkey that Navarro was reliable. Navarro worked as an informant for the Los Angeles Police Department at the same time he was informing for Starkey. (21 RT 3875-3876, 3912.) In the contract that Navarro executed with the ATF, Navarro agreed to not participate in any unlawful activities without express authorization from the ATF. (21 RT 3892-3895.) Part of the contract asked for the reasons Navarro wanted to be an informant. The contract said, "Informant is providing information to LAPD to escape felon in possession charges; is providing information to ATF to avoid federal charges and earn extra income." (21 RT 3897, 3910.) Starkey said the felon in possession arrest

was from the gun found in the hidden compartment in Navarro's Lexus on March 15, 2002.[17] (21 RT 3898.)

Navarro called him frequently, and put Starkey in touch with one gun dealer where he set up the purchase of a gun. (21 RT 3876, 3883-3884.) Much of the information Navarro gave Starkey was general intelligence and not specific. (21 RT 3884.)

On May 31, 2002, Bridgette Navarro met with Starkey.[18] (21 RT 3876-3877.) She told Starkey that Navarro was dealing in narcotics and possessed/carried a firearm. (21 RT 3878, 3901, 3920.) After learning this information, Starkey began the termination process and told Navarro that the ATF was no longer going to use him as an informant. This was not solely based on the information provided by Bridgette – it was because Navarro's information was not always reliable and he was not happy with the information that Navarro provided. (21 RT 3881, 3883, 3895, 3901, 3936.) Navarro's removal document said, "This C.I. should not be retained in the informant identification file due to allegations of unauthorized involvement in criminal activities." (21 RT 3884.) This was in reference to narcotics activity and carrying a gun. (21 RT 3884-3885.)

Around early June, Navarro called Starkey and said that somebody was going to "hit" somebody. Navarro did not know who was going to be hit, where it was going to occur, or when it was supposed to happen. Navarro also did not say anything about being hired to do a hit. (21 RT 3879-3881, 3891, 3902.) Navarro did not mention the names "Mira" or

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[17] Navarro testified that Starkey was incorrect when he said Navarro became an informant for the ATF to work off a potential case because no charges were filed.

[18] Starkey said he considered Bridgette a reliable source of information, and noted that Navarro brought Bridgette to his first informant interview with Starkey. (21 RT 3895-3896, 3913.)

"Chispa," and never said anything about a girl who said she was the daughter of a Mexican Mafia dealer. (21 RT 3902-3903.) Navarro also did not say the victim was a one-hand man and was the girl's boss. (21 RT 3903.) Starkey told Navarro to get more information, and to call Rodriguez if he got the information because Starkey was responding to another incident. (21 RT 3878, 3880, 3918-3919, 3946.) Starkey did not hear from Navarro again regarding the proposed hit. (21 RT 3939.)

Like Rodriguez, Starkey never told Navarro to call him by a code name, or by "manitas." He thought Navarro might have called him "Starks." (21 RT 3904.) Starkey did not think that Rodriguez gave Navarro a code name either. (21 RT 3936.) Starkey did not authorize Navarro to pass out cell phones to his "homeboys," and Navarro did not tell Starkey that he was doing this and tracking their whereabouts with the cell phone records. (21 RT 3904.)

After Navarro was arrested, Starkey and Detective Rodriguez went to visit Navarro in jail. (21 RT 3882; 23 RT 4244-4245.) The two first spoke to Detective Pelton, but they did not tell Pelton that in July, Navarro had mentioned a robbery and murder in Orange County. (23 RT 4247-4248.)

Special Agent Jason Hammond with the Bureau of Alcohol, Tobacco, Firearms and Explosives met with Navarro at the Orange County Jail in October 2003. (21 RT 4086-4088.) Hammond interviewed Navarro because Rodriguez had told him that Navarro may have information relating to some of his cases pending in the San Fernando Valley. (21 RT 4089.) Navarro provided Hammond with some historical information on some individuals involved in the cases. Navarro also gave him information regarding an individual involved in firearms trafficking and ATF opened an investigation based on this information. (21 RT 4089-4092.)

Near the end of 2003/beginning of 2004, while Navarro was in custody on this case, he told Hammond about a potential hit that was going

to occur in Orange County. Navarro provided him with the name of the alleged victim and name of the alleged hit man, and after corroborating the information, the alleged hit man was arrested.[19] (21 RT 4090-4091.) Navarro never asked Hammond for help with his present case, and Hammond could not recall any specific instances of Navarro being deceptive with him. (21 RT 4090-4091.)

4. Defense gang expert

Retired Los Angeles County Sheriff's Sergeant Richard Valdemar testified as an expert on the Mexican Mafia. (25 RT 4419-4427.) Valdemar was familiar with Navarro as working as an informant for the FBI and Thomerson. (25 RT 4427-4428.) Valdemar said that Felipe Vivar aka Chispa was a validated member of the Mexican Mafia and one of the bosses. (25 RT 4432-4433.) Valdemar interpreted a letter Vivar wrote to Corona in Spanish as a warning to not speak about Vivar's business to anybody, and it also said that the Mexican Mafia had heard different stories about Navarro and that he was not to be trusted. The letter was a warning to Corona not to get involved with Navarro.[20] (25 RT 4441-4443.)

Valdemar said it was consistent for an informant to associate and conduct himself as a gang member in order to obtain information. (25 RT 4443-4444.) It was also common for an informant to provide cell phones, cars and other things to gang members to integrate themselves into the gang. (25 RT 4445.) Valdemar opined that a gang member would only

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[19] On cross-examination, he explained that the alleged hit man was arrested for a parole or probation violation for having an illegal weapon, not for conspiracy to commit attempted murder. The agents never corroborated that a hit was going to take place. (21 RT 4092, 4094.)

[20] Defense counsel had asked Corona about this letter on cross-examination. (15 RT 2877-2884.) Corona did not interpret the letter as a warning that the Mexican Mafia had heard bad things about Navarro and not to trust him. (15 RT 2885.)

leave a rental car in front of another gang member's house, and then use a car traceable to the gang member to commit a crime if he intended to implicate the person to which the car could be traced back. (25 RT 4447.) It was not consistent for three gang members to borrow a car from a shot-caller's house to commit a crime. If it was a serious crime, the punishment for doing so could be death. (25 RT 4448.)

After being given a hypothetical based on the facts surrounding the stabbing of Navarro in the holding cell, Valdemar opined the stabbing was consistent with someone carrying out a green light. (25 RT 4452-4453.)

Deborah Almodovar testified that in November 2004, she was in the Orange County Women's jail with Corona. (19 RT 3646-3647.) Corona told her that she was in jail because a woman hired her to do something to that woman's brother, and that she met with someone named "Pirate" and "whatever they were going to do to Deborah's brother." (19 RT 3647-3648, 3565.) Corona also told her that she was having a sexual relationship with "Pirate." (19 RT 3648, 3656.) Almodovar said she spoke with Navarro through the jailhouse pipes in the bathrooms – the men's bathroom was above the women's bathroom. (19 RT 3648-3649.) She then changed her testimony and said she really had not spoken with Navarro, it was her friend who spoke with him, and that Corona would tell her that Navarro said "hi." (19 RT 3649.) Almodovar's boyfriend was also in the county jail. (19 RT 3649.) On cross-examination, she said her boyfriend was a gang member from Costa Mesa who was friends with Navarro in jail. (19 RT 3652-3653.) Almodovar also said that after she got out of jail, she spoke with Navarro a few times through three-way calls initiated by appellant's girlfriend, Ochoa. (19 RT 3658-3659.)

Rosalinda Razo is Navarro's mother. (26 RT 4687.) She lived in Las Vegas, and testified that during the summer of 2002, Navarro was in the process of moving to Las Vegas. (26 RT 4688.) In early October 2002,

Navarro was staying at her house in Las Vegas, and she was staying at a hotel with her fiancé and friends. (26 RT 4688-4690, 4696.) Navarro told her to turn on the television because there was a police chase, and Navarro knew the person being chased. (26 RT 4688-4691, 4704.) Razo also testified that Bridgette called her regularly, and on the day that the police chase was on television, Bridgette called her all day and part of the night looking for Navarro. (26 RT 4691-4693.)

G. Prosecution's Rebuttal—Navarro's Self-Serving Dealing With Law Enforcement

Los Angeles Police Sergeant Dan Randolph testified that on June 7, 1995, while working gang detail, he stopped a vehicle driven by Navarro. Navarro lied about his name and birthdate, and he did not find out Navarro's true identity until they were at the police station. (26 RT 4615-4616, 4629-4630.) Navarro told Randolph he wanted to provide him information in exchange for any consideration possible. Navarro also said he could provide so much information that it would make Randolph a sergeant. (26 RT 4617-4618, 4628-4629.) Randolph had ongoing contact with Navarro until September 11, 1995, when Navarro was arrested for grand theft auto. (26 RT 4620-4621.) Randolph arranged for leniency on the grand theft auto charge because of information Navarro had provided him. (26 RT 4624-4625.)

On November 27, 1995, Navarro was released from custody, and he provided information to Randolph regarding criminal dealings by Big Vamp and Nemo Garcia. (26 RT 4625-4626.) Navarro returned to custody on December 18, 1995, and Randolph did not see him again. (26 RT 4626-4627.)

Detective Pelton testified on rebuttal that on November 7, 2002, he searched Ochoa's residence in North Hollywood. (26 RT 4650.) On Ochoa's dresser was a framed photograph of Navarro. (26 RT 4651.) An

undated letter that started "Hey now" was in the home. (26 RT 4651; Exh. No. 150.) There were two cell phones in the bedroom; the phone number for one was 818-968-0683, which was the number most frequently called by the 1600 number. (17 RT 3086; 26 RT 4650, 4652; Exh. Nos. 9 & 100.)

To further explain Navarro's December 11th letter to Nino, Fannie Kraiem, a certified Spanish language interpreter, translated the third page of the letter. (26 RT 4653; Exh. No. 151 (Spanish version); Exh. No. 155 (English translation).) The bottom part of page three said, "Send that Chinese dude to hell, he is false and an addict. I'm here with four men that will support you to fuck them up. Don't let them go. Okay? I send you my support as well. And send the names of those that do not listen to you. Okay?" (26 RT 4655-4656.) Kraiem said that to the best of her ability, this was an accurate translation. (26 RT 4646.) On cross-examination, Kraiem acknowledged that she was not familiar with Spanish expressions used by gangs. (26 RT 4665.)

II. PENALTY PHASE

A. Aggravating Circumstances

1. Impact of Montemayor's murder on his family

Susan Montemayor was David's wife. She described David as "an all-around good guy" who never took anything too seriously. (34 RT 6174.) Before the murder, she was a stay-at-home mom who cared for their children. After his death, she had to figure out how to support the family financially. (34 RT 6175.) She also had to become the disciplinarian of the children, which has been difficult. (34 RT 6180-6181.)

She wanted to "wash her hands" of everything at Interfreight Transport, so she signed over David's shares in the company to his father. Interfeight ended up closing down, and the employees had to find new jobs.

(34 RT 6175-6176.) Susan no longer has much of a relationship with David's parents. (34 RT 6176.)

Christmas was not the same without David. He used to get up early and make the children wait to open their presents. He would put a yule log picture on the television, and video the children as they opened their gifts. (34 RT 6177-6178.) Susan sometimes still feels overwhelmed by her husband's death, but because of her children, she manages to get through every day. (34 RT 6174-6175.) Susan misses her husband's companionship and his laughter. (34 RT 6181.)

Amy Montemayor, one of David's daughters, was 12 years old when her father was killed. (34 RT 6168.) Amy said her father was fun to be around and always told corny jokes. (34 RT 6168-6169.) Amy missed her father's jokes, and she missed going camping and on family vacations with him. (34 RT 6169-6170.) Amy shared her memories of Christmas mornings when her father would sit by the Christmas tree and video record the family as they opened presents. (34 RT 6172.) It saddened Amy that she did not have a father to whom to introduce boys, or to walk her down the aisle when she gets married. (34 RT 6172.)

Rachel Montemayor was David's other daughter and she was nine years old when he was killed. (34 RT 6161.) It was very hard on her when her father died because he was very loving, trustworthy and caring. Rachel liked to watch television and just be around her father, and she now misses him. (34 RT 6162.) Rachel said that her father always had something funny to say, and that it was now quiet without him. (34 RT 6163.) Rachel added that she would give "a lot" to have him at her next birthday party. (34 RT 6167.)

2. Navarro's extensive and violent criminal history

Paul Parent was a mechanic for Navarro between September 2001 and April 2002. Parent met Navarro through a friend, Eddie Mena, while

working on a car at Mena's house. (33 RT 5835-5836.) Navarro offered Parent about $1,000 a week to work for him as a mechanic. Payment was to be made in cash and narcotics. (33 RT 5837, 5841.) Parent began working as a mechanic for Navarro and at some point, moved into Navarro's house on Remick. (33 RT 5838-5841.) Anthony Valles, aka Villain, was also living at the house, as were some other people including Navarro's wife Bridgette and her daughter. (33 RT 5843.)

After living with and working for Navarro for a few weeks, Parent noticed certain things going on that made him scared for his life. Around November 13, 2001, Parent tried to leave and go back to Mena's house, but Navarro, Valles, and fellow gang member Pirate attacked him. (33 RT 5845-5846, 5848.) Navarro hit him in the face, someone else hit him from behind with a beer bottle, and someone hit his finger with a hammer. Parent's finger was smashed to the bone, and he had to get 12 staples in his head. (33 RT 5845-5847.) Parent went back to work for Navarro because he was told he would be killed if he did not. (33 RT 5849-5850.)

About a month later, Parent tried again to leave but was caught and returned to Navarro's house. (33 RT 5851-5852.) Navarro told him that everything was alright, but later that day, Navarro and four others attacked him and beat him up. (33 RT 5853-5856.)

Parent testified that Navarro had several guns at his house on Remick. Navarro also kept a lot of firearms in a secret compartment in the trunk of his Monte Carlo, and in a shed in his next-door neighbor's backyard. (33 RT 5861-5862, 5864-5865.) Parent said that all of the gang members that he saw at Navarro's house had guns, and Navarro always had a Glock or revolver on his hip or in his waistband. (33 RT 5863.) Navarro was a shot-caller in his gang and Parent observed the other gang members do whatever Navarro said. (33 RT 5894.)

In April 2002, Navarro told Parent he would give him a mechanic's van if he would help Navarro move from the Remick house to a house in Canyon Country. (33 RT 5857.) After Parent helped Navarro move, Navarro gave him the van and Parent drove two houses down, to a friend's house, and began sorting through his stuff. (33 RT 5901-5903.) Navarro called Parent and said "Rudy is going to shoot you." A couple of minutes later, Rudy shot Parent in the back. (33 RT 5903-5905, 5909-5911.) As a result of his injuries, Parent was in the hospital for six months and is now permanently disabled. Parent no longer has a spleen or a gallbladder, part of his liver is gone, and one of his lungs was damaged. (33 RT 5907.)

On the night of February 2, 2002, David Gallegos-Estrada, Juan Bermudez-Lopez aka Blackie, and Steve Newman were at Laurie Fadness's house in the San Fernando Valley. Fadness had gone out to get food. (31 RT 5501-5503; 32 RT 5632-5633, 5710.) After knocking on the door, gang members Philip Hirsch, Fila, Capone, Casper, and Primo entered the house, all armed with pistols. (32 RT 5633-5636.) Hirsch and Primo accused Gallegos of stealing ephedrine from Hirsch. (32 RT 5708.) Hirsch told Blackie that "Droopy" wanted to talk to him. (32 RT 5636-5637, 5721.) After Blackie replied that he had nothing to talk about, the gang members started attacking the group. Someone hit Gallegos in the face and he thought that he passed out. (32 RT 5637-5638.)

Fadness returned to the house as Philip Hirsch was running out of the back door. (31 RT 5504-5505, 5522.) As she was walking towards the house, Fadness heard two loud bangs. Hirsch told her that she did not want to go in there, and did not want to know what was going on. (31 RT 5505-5506, 5523-5524.) When Fadness entered the house she saw about 10 Hispanic males leaving. (31 RT 5507.) Fadness recognized Primo and Capone or Lil Capone. (31 RT 5509-5510, 5524.) Fadness heard Primo say, "Droopy, Jesse, let's go." (31 RT 5510-5512.)

Fadness's house was destroyed. Furniture was overturned and broken, and there was blood everywhere. (31 RT 5513.) Blackie was sitting in her bathroom doorway with blood gushing out of his head. (31 RT 5508.) Blackie was bleeding from his head and his fingers were hanging with broken skin. Blackie was unresponsive and looked like he was in shock. (31 RT 5514; 32 RT 5638-5639.) Newman was next to him, covered in sweat and he looked like he had seen a ghost. (31 RT 5508.) Gallegos was sitting on the floor with a blank look on his face. (31 RT 5506-5507, 5514.) Gallegos could not talk. (31 RT 5514-5516.) Gallegos's jaw was broken and he had to have it wired shut for two months. (32 RT 5639-5640; 33 RT 5800-5801.)

At some point after this incident, "Chonga" gave Gallegos a letter to deliver to a Pacoima Flats gang member. He delivered the letter to a Pacoima Flats gang member who he believed was Navarro's friend at a Jack-in-the-Box.[21] (32 RT 5640-5646, 5723-5726, 5733-5734, 5736-5737.) A couple of weeks later, on March 18, 2002, Gallegos went to his friend "Richard's" house which was five houses down from Navarro's on Remick. A few gang members came out of the house and forced Gallegos to walk down to Navarro's house. (32 RT 5651-5657.) When they got there, Navarro was inside his garage with about seven other gang members. Navarro asked the other gang members if Gallegos was the person who passed the letter. (32 RT 5658-5661.) Navarro asked him who gave him the letter, and Gallegos said it was Chonga from Vineland Boys. Capone, Fila and Casper were also from Vineland Boys, and Fila was in Navarro's garage that evening. (32 RT 5662.)

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[21] Gallegos testified that the person shown in Exhibit 167 was to whom he gave the letter. This individual was present when Gallegos was taken from the motorhome to where he was shot. (32 RT 5766, 5771-5772.)

After Gallegos said that Chonga gave him the letter, Navarro and everyone else started hitting him. (32 RT 5659, 5663.) The gang members knocked down Gallegos and continued to hit him while he was on the ground. They tied him up with duct tape, placing it over his whole body including his eyes, and used a torch to burn his feet. (32 RT 5663-5667.) Someone stuck a pen inside his nose, and an individual named "Compa" used pliers to squeeze his fingers. Compa also removed some of the wires from his mouth, which was still wired shut. (32 RT 5668-5670, 5674.) Someone put a rope that was hanging from the rafters around his neck, and pulled him up a few times, choking him. (32 RT 5670-5671.) While this was occurring, he could not see anything because of the tape over his eyes. He could hear voices, but at that time did not hear Navarro's voice. (32 RT 5672.)

After everyone left the garage, Gallegos found a machete and was able to break free. All of a sudden he heard them coming back, so he closed and locked the garage door. (32 RT 5675-5676.) Gallegos saw Primo running towards the back of the garage, and heard Navarro outside the garage say, "He's got to go." (32 RT 5677.) Gallegos asked Navarro why they were torturing him, and Navarro said it was because of the letter. Navarro then told Gallegos he would let him go, and they took him to a motorhome parked down the street. (32 RT 5678-5680.)

Primo and three other gangbangers drove Gallegos to an apartment where he formerly lived. (32 RT 5680-5681.) As they were driving to the apartment, the men told Gallegos that he would give them whatever he had and they would then let him go. Gallegos tried to explain that he no longer lived there. (32 RT 5683-5684.) At gunpoint, they walked him to the door of the apartment and kicked in the door before realizing that other people were living there. (32 RT 5682-5683.)

The gang members took Gallegos back to the motorhome and locked him inside. Later, the gang member to whom he gave the letter returned to the motorhome and told Gallegos to get into a brownish color Chevrolet Tahoe or Suburban. (32 RT 5685-5689.) He was told to get on the floorboard and they drove for about 15 minutes. The next thing Gallegos remembered was waking up in the hospital with about 14 gunshots. (32 RT 5690.) Gallegos was paralyzed with no use of his legs, and half of his face was paralyzed. (32 RT 5691-5692, 5697.) One of the bullets went from the back of his neck through his left ear and he could no longer hear out of that ear. (32 RT 5762.)

On March 19, 2002, Brandy Stonecipher lived in the San Fernando Valley near Redbank and Kewen streets. (33 RT 5815.) Early that morning, he heard several gunshots from what sounded like two different guns. He looked at the monitor for his security cameras and he saw what looked like a white Expedition or Navigator-type of SUV racing around the corner. (33 RT 5816-5818, 5822.) Stonecipher went outside and found a Hispanic male laying on the ground with multiple gunshot wounds. (33 RT 5819-5821.) He asked the man if he knew who shot him, and he said, "Trusty shot me." (33 RT 5821.)

Los Angeles Police Officer David Ortiz responded to the scene. (32 RT 5601-5602.) Gallegos was face down on the ground with several gunshot wounds to his upper torso. (32 RT 5603-5605, 5608.) Gallegos told Ortiz that some "Cholos" aka gang members had shot him, and after Ortiz said that he needed a name, he said "Trusty." (32 RT 5607-5608, 5610, 5615-5616.)

Los Angeles Police Detective Kerry Edwards interviewed Gallegos about the shooting. (34 RT 6108.) Gallegos originally said that the shooter was "Trusty," but told Edwards that Trusty and Navarro shot him. (34 RT 6110, 6152, 6155.) In a six-pack photographic line-up, Gallegos identified

Navarro as one of the shooters. (33 RT 5804-5805, 5811-5812; 34 RT 6111-6114, 6117.) During the investigation, Edwards discovered that "Trusty" was Benjamin Garcia from the Vineland gang. (34 RT 6123-6124.) After being shown other six-pack photographic line-ups, Gallegos identified Jeffrey Bueno as Chonga, the person who gave him the letter. (34 RT 6136-6138, 6148.) Edwards thought Gallegos said he gave the letter to Valles at Jack-in-the-Box, and that Valles was "Trusty," the other shooter. (34 RT 6139, 6152, 6154.) Gallegos also identified Filadelfo Cuadra and Philip Hirsch as two of the assailants from the assault at Fadness's house. (34 RT 6147-6148, 6153-6154.)

Kerensa Spellman knew Navarro in early 2002. She was romantically involved with Anthony Valles, and she and Valles lived Navarro's back house on Remick. (33 RT 5971-5974; 34 RT 6020.) Jeffrey Bueno aka Spanky was the father of her daughter. (33 RT 5971-5972.) Spellman met Valles because she sold crystal methamphetamine to him. She met Navarro through Eddie Mena, and Navarro became a methamphetamine customer. (33 RT 5975-5976; 34 RT 6012-6013.)

Spellman sensed an ongoing battle or power struggle between Navarro and Valles. (33 RT 5977-5978.) At one point, Navarro called her and wanted to buy methamphetamine for a price lower than what she paid for it. She told Navarro she could not sell it to him for that price, and he put someone else on the phone who threatened her. (33 RT 5985-5986; 34 RT 6017, 6045-6046.) Spellman ended up selling the methamphetamine to Navarro. Navarro then called her and said it was bad dope, and he told Spellman he was going to "feel her cap." (33 RT 5986-5987.) Spellman interpreted this as a threat to kill her, and it was not the first time Navarro had threatened to kill her. (33 RT 5987.)

In April 2002, Los Angeles police officer Karolin Knop received a radio call requesting a vehicle stop of a 1999 tan Chevrolet Tahoe.

Detective Rodriguez requested the stop and said that the driver, Anthony Valles, was a narcotics suspect. (31 RT 5546, 5550, 5557; 33 RT 5978-5979.) Knop found the vehicle and began following it. The Tahoe pulled over and Kerensa Spellman got out. (31 RT 5546, 5550; 33 RT 5981-5982.) The driver, Valles, sped off and a pursuit ensued ending with Valles losing control and crashing into a chain link fence. (31 RT 5546-5547, 5551.) Valles got out of the vehicle and threw a .45 Colt handgun into the gutter as he tried to flee. (31 RT 5547-5548, 5551.)[22] Inside the Tahoe, officers found a .223 rifle, several magazines and ammunition, a night scope, and various forms of narcotics including methamphetamine, heroin and marijuana. In addition to the Colt there was a blue steel 9 millimeter gun outside of the vehicle. (31 RT 5551-5556.)

After Valle was arrested, Navarro called Spellman and said he needed to talk to her about some property that Valle had. (33 RT 5987-5988.) Spellman went to Navarro's house, and he took her into the garage and assaulted her by punching her in the head, knocking her to the ground, and kicking her on the floor. (33 RT 5988-5989.) Spellman said that Navarro was trying to get information about Valles but she would not tell him anything, so he beat her up. (33 RT 5990.) Navarro locked Spellman in the garage, and she thought she was there for two weeks. (33 RT 5989; 34 RT 6007, 6026-6027.) Eventually, Paul Parent let her out of the garage. (33 RT 5991; 34 RT 6027.)

Cris Jakubecy lived across the street from Navarro on Remick Street. (34 RT 6057.) In August 2002, she took pictures of Navarro's house and of all the cars she saw in front of the house. (34 RT 6057-6058.) She took

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[22] The parties stipulated that ballistic tests revealed this handgun fired an expended cartridge found at the scene of the March 19, 2002 shooting of Gallegos-Estrada. (37 RT 6552.)

pictures of Parent washing the cars and mechanically working on them. (34 RT 6060-6062.) One day she looked out of her window and saw Navarro beating up Parent in the front yard. (34 RT 6063-6064.)

On March 15, 2002, Los Angeles police officer Jeff Smith stopped a blue Lexus with paper license plates driven by Navarro. (31 RT 5530-5531.) A search of the car revealed a loaded .380 semi-automatic handgun hidden in a secret compartment underneath the driver's side floorboard. (31 RT 5531-5534.) Navarro claimed to have no knowledge of the gun. (31 RT 5534.)

On October 17, 2002, while searching Navarro's Lexus, Los Angeles Police Sergeant Shawn Morgan found in the bottom of the center console a secret compartment that contained a loaded Colt .25 caliber semi-automatic handgun. (31 RT 5496-5498, 5500.)

The parties stipulated that Navarro previously had been convicted of the following felonies: voluntary manslaughter in 1984; second degree robbery with use of a weapon in 1995; and unlawfully taking a vehicle in 1995. (37 RT 6553; 9 CT 2373-2377.)

In addition to the stipulation, the prosecutor offered as factor (b) evidence, the facts underlying the voluntary manslaughter and second degree robbery convictions and voluntary manslaughter.

Regarding the voluntary manslaughter conviction, the prosecution introduced evidence that on October 14, 1983, Navarro and his fellow Pacoima Flats gang members got into a gun fight with another gang and member of the other gang was killed. Navarro and fellow gang members went to Recreation Park, which was on the perimeter of San Fernando and Los Angeles, and was a hangout for San Fer, a local San Fernando gang. (31 RT 5479-5481; 34 RT 6079, 6081, 6084.) The Pacoima Flats gang members went to the park to retaliate for a shooting and assault on Pacoima gang members by San Fer gang members. (34 RT 6081-6084.) When the

Pacoima Flats gang members arrived at the park, the San Fer gang members yelled gang slogans including "Bruto Pacas." A fight ensued and shots were fired. (34 RT 6086-6087.) San Fernando police officer Jack Richards responded to the park after receiving a call for shots fired. He found two young Hispanic males near the "Rec" building. (31 RT 5478, 5480.) Both victims were San Fer gang members. (34 RT 6080.) One of the victims, Reynaldo Meza, suffered a gunshot wound to his head and his chest, and he died. (31 RT 5481-5482; 34 RT 6079.) The other victim, Samuel Hernandez, had a gunshot wound and was bleeding from his nostrils and head area, but appeared to be breathing. Mr. Hernandez was paralyzed as a result of the shooting. (31 RT 5481-5482; 34 RT 6079-6080.) During the subsequent investigation Navarro denied being the actual shooter and no evidence was found to show that he was. (34 RT 6087.)

Regarding the second degree robbery convictions, Francisco Chavez testified that, on November 18, 1995, he and his wife Yanira Chavez were walking to his car in Pacoima along with their purebred Pomeranian dog. (31 RT 5419-5422.) The dog was worth about $1,000. (31 RT 5421.) Navarro and another man approached the couple. Navarro said "cute dog" and started playing with dog. Francisco replied that the dog was cute and expensive. After Navarro asked how much he paid for the dog, Francisco said $1,000. (31 RT 5422.)

A conversation ensued about Guess-brand clothing that Francisco was selling. Navarro was interested in buying some clothes but he did not have any money on him, so they arranged to meet at a Food 4 Less in Pacoima later that evening. (31 RT 5422-5428, 5443-5444, 5447.) At the Food for Less Navarro's companion directed Francisco where to park. He then reached into the car, grabbed the Pomeranian and handed the dog to a person in a car next to them. (31 RT 5428-5429, 5447, 5470-5472.)

Navarro arrived and got into the backseat of Francisco's car and put a knife to Francisco's throat. (31 RT 5430, 5448-5449, 5473-5474.) Navarro's companion pulled Yanira Chavez out of the front passenger seat, got into the front seat of the car and put a knife to Francisco's stomach. (31 RT 5430-5432, 5434, 5473-5475.) The two asked Francisco for his money and the clothes. (31 RT 5434, 5475.) Navarro and his companion took about $475 from Francisco's pockets and took the clothing that he was trying to sell. (31 RT 5434, 5437.)

Before leaving, Navarro lifted his shirt, exposing a gun in his waistband, and told Francisco that they were from a big gang, and if he called the police, they knew where he lived and they would kill him. (31 RT 5438-5440.) One of the robbers slit one of Chavez's tires with a knife. (31 RT 5438.)

B. Defense's Case in Mitigation

In mitigation, Navarro presented evidence from his prior law enforcement handlers. Agent James Starkey testified that he received information regarding the Paul Parent shooting. Specifically, Starkey said at some point, he received information that Villain was the shooter and that Rudy accompanied him, but Starkey could not recall from whom he received this information. Starkey also thought at one point he spoke with Navarro about the shooting, and that Navarro said the shooter was Villain or Rudy. (35 RT 6199-6202.)

Detective Rodney Rodriguez testified regarding the Gallegos shooting, specifically his interview with Kerensa Spellman after she was arrested. Spellman appeared to be under the influence of methamphetamine or cocaine, her clothing was dirty, she had not bathed in a few days, and she said she had not slept for a few days. (35 RT 6204-6205.) Spellman said the night that Gallegos was shot, she was having dinner with Valles, and Valles cut the dinner short and went to Navarro's house. (35 RT 6205-

6206.) The next day, Valles appeared very nervous and was watching the news. He told Spellman that he and some other men had taken someone to Navarro's garage and tortured him and held him hostage. (35 RT 6206.) The individual escaped, so he had to leave dinner to go find him. Eventually they dumped the body, and Valles was watching the news to see if the police located the body and if the man died. (35 RT 6206-6207.) Spellman did not mention Navarro as being a participant in the torture. (35 RT 6207.)

Rodriguez also testified to an arrest he made following information provided by Navarro. Based on information that Navarro provided to him that was passed on to patrol officers, a Jeffrey Bueno was contacted at a gas station and found possessing a gun. (35 RT 6207-6208.)

Rodriguez additionally explained that, after Navarro was arrested in this case, he stayed in contact with Rodriguez. Rodriguez referred other officers to Navarro and Navarro gave them some good information that led to arrests and recovery of several guns. (35 RT 6209.) The information that Navarro has provided since 2002 has been accurate and probably helped stop crime and save some lives. (35 RT 6210-6211.) Rodriguez did not think Navarro should suffer the ultimate penalty in this case. (35 RT 6211-6212.)

FBI Agent Curran Thomerson testified that Navarro was a credible, reliable informant and he had at least 64 contacts with him. (36 RT 6353-6355.) While working as an informant, Navarro put his and his family's lives at risk, but he continued to provide information, even after being told he was a target. (36 RT 6357-6358.) Navarro provided information that prevented criminal conduct from occurring, and information that led to arrests. He gave the FBI information regarding various criminal enterprises including individuals involved in manufacturing and distributing narcotics. (36 RT 6358-6359.) If Navarro provided phony or inaccurate information,

that would have been noted in his file. Thomerson did not remember any such notations. (36 RT 6360.)

Navarro recorded several conversations with Mexican Mafia members and other individuals associated with gangs or the criminal element. (36 RT 6360-6361.) Navarro's name was never revealed as a source because the Mexican Mafia would have killed him if they saw paperwork showing Navarro was an informant. (36 RT 6363-6364.) At some point, Navarro's value as an informant for the Los Angeles office became compromised, so they terminated their relationship but referred Navarro to the San Diego office and Steve Rees. (36 RT 6371-6372.)

Thomerson recalled two arrests that resulted from information provided by Navarro. (36 RT 6374-6375.) Thomerson did not know what motivated Navarro to provide the information. (36 RT 6375, 6382-6383.) In April 2000, when Navarro began informing for him, Navarro had just been released from prison, and Thomerson heard that he had associated with highly connected members of the Mexican Mafia while in prison. (36 RT 6378.) Navarro had orders from Tomas Grajeda aka Wino to report to Frank Rodriguez aka Junior, but because Navarro delayed in contacting Rodriguez because he was meeting with the FBI, Grajeda targeted Navarro. (36 RT 6378-6380.)

In January 2001, Navarro told Thomerson that Grajeda wanted to meet with him in the Harbor area of Los Angeles, and the meeting would include James Abel aka Player and Scrappy, Abel's brother. (36 RT 6383-6384.) Navarro said that Grajeda wanted to kill Scrappy and Player because he suspected they were taxing individuals for their own use. (36 RT 6384.) Thomerson told Navarro to contact Rees, and not attend the meeting. (36 RT 6385, 6389.) Several days later, Scrappy was found dead, and a month later, Navarro provided information leading to Player's arrest.

Navarro told Thomerson that he had worked out any problems with Grajeda by speaking with him. (36 RT 6385.)

The first contact Agent Stephen Rees had with Navarro was in November 2000 when Thomerson told him Navarro's status as an informant in Los Angeles may have been compromised and Thomerson suggested Navarro work for the San Diego office. (37 RT 6427-6428.) Rees was Navarro's handler and Navarro was instructed to obtain information on Jose Albert Marquez aka Bat from the Arellano-Felix Cartel in Mexico. (37 RT 6428-6429, 6431.) Navarro provided Rees with such information on about 10 to 20 occasions. (37 RT 6432.) However, Rees never confirmed any of the information Navarro gave him regarding Marquez, and some of the information Navarro gave him regarding Marquez did not match up with information received from other informants. (37 RT 6448-6449, 6458.)

Navarro provided information on Philip Sanchez aka Boxer, who was subsequently arrested. Navarro said Sanchez was associated with the Arellano-Felix Cartel, but this information was not corroborated. (37 RT 6439.) Navarro also reported on a Jorge Arellano who he said was associated with the Cartel. Rees did not know of such individual and for the most part, Rees was familiar with the entire Arellano-Felix family tree. (37 RT 6440.)

Rees knew that Navarro was still living in Los Angeles, and this was with Rees's consent. Navarro was reliable when he had to meet with Rees. (37 RT 6434-6435.) Navarro worked for Rees until November 2001. Part of the reason was that the agency's focus turned toward counter-terrorism after September 11th. Also, Navarro had not provided Rees with any specific information leading to the location of Marquez or the collection of evidence. (37 RT 6437-6438.)

Special Agent Daniel Evanilla worked for the Special Service Unit of the California Department of Corrections. (37 RT 6460.) In July 1999, Evanilla met Navarro when he arrested him for a parole violation. (37 RT 6461-6462, 6473.) After Navarro was again released on parole, Evanilla, Thomerson, a parole agent, and a parole administrator met with Navarro regarding the FBI's use of Navarro as an informant. (37 RT 6462-6463, 6473-6474.) With the consent of the parole division, Navarro began working as an informant for Thomerson, and Evanilla was the parole division's liaison. (37 RT 6464.) While on parole, Navarro kept in touch with Evanilla and complied with the conditions of parole. (37 RT 6464-6465.) Navarro provided Evanilla good information on five or six cases where individuals were violating parole by having weapons or narcotics. Evanilla considered Navarro to be a reliable informant. (37 RT 6467-6469.)

Navarro introduced evidence to show he was no longer an active gang member. George Birrell was a writer, filmmaker, and producer. In 1997 he wrote a script about a gang war in Southern California, named No Salida. (35 RT 6257-6258.) Birrell hired Demetrius Navarro, Navarro's brother, to star in the movie. (35 RT 6257-6260.) Birrell met Navarro at a screening of the movie for at-risk youths. The movie screening was part of the L.A. Bridges program that tried to educate the youth that there were better choices than the gang life. (35 RT 6261-6262.) After the movie was shown, Navarro talked to the group about his life as a gang member and being incarcerated, and Birrell was impressed by what Navarro shared with the children. (35 RT 6263-6265.) Navarro attended several of the movie's screenings and was not paid for participating in the discussions. (35 RT 6266-6268.)

Demetrius Navarro, testified that Navarro was his older brother and the person he loved most in life. (35 RT 6286.) Navarro was a father-

figure and protected Demetrius and their sister. (35 RT 6287, 6290.) Navarro worked with Demetrius as a consultant on films and as a grip on film sets. (35 RT 6299-6301.) Navarro went with Demetrius to screenings of No Salida, and he participated in a question and answer session at the end which involved Navarro speaking openly about his life as a gangster. (35 RT 6302-6303.) Even today, teenagers ask Demetrius about Navarro and tell him that Navarro was an influence in changing their lives. (35 RT 6307.)

On cross-examination, Demetrius said that last time Navarro spoke about the dangers of being in a gang was around September 2002. (35 RT 6308.) Navarro talked to the groups about being involved in a gang, being incarcerated because of being in a gang, and what gang life was like in and out of prison. (35 RT 6309.) Navarro said he was not still a gang member but that he was a victim of gangs and that he still knew gang members. Navarro told the teenagers to learn from his experience. (35 RT 6309.)

In 2000/2001, Robert Coppel worked for the California Family Health Council in Teen Pregnancy Prevention and Family Planning, and as part of the program, he started a website, teensource.org, that addressed issues or problems of teenagers. (35 RT 6274.) Navarro consulted with him on the website, and on some of the videos made about choices with which teenagers faced. Navarro attended outreach presentations and spoke with teenagers about his personal experiences of being involved in a gang and dissuading them from engaging in the gang life. (35 RT 6275-6279, 6281.) Navarro told the teenagers that he had left the gang lifestyle. (35 RT 6284.)

Amanda Navarro, Navarro's daughter, was 16 years old at the time of trial. Amanda lived in Arizona with her mother and step-father, but said she had a lot of contact with her father while growing up. (36 RT 6340-6341.) Navarro often wrote to Amanda and told her to stay away from the kind of life that he led, and to not make the same mistakes. (36 RT 6342.)

Amanda loved her father very much, and thought he was one of the "best dads in the world." (36 RT 6343.)

Navarro also introduced the testimony of Orange County District Attorney's Investigator Ernesto Gomez to impeach the testimony of Laurie Fadness, Paul Parent, and Kerensa Spellman. (37 RT 6480.) Gomez interviewed Fadness regarding the 2002 incident at her home. Fadness did not tell him that she saw Navarro at her house that night, or that she heard the name "Droopy" or Anthony Navarro. (37 RT 6483-6487.)

Gomez interviewed Parent twice, while Parent was in prison. (37 RT 6487-6488.) Parent told him the time that passed between receiving the phone call and being shot was five minutes. (37 RT 6489.) Parent said something about Valles not trusting Navarro and wanting to kill him. (37 RT 6490-6491.) With respect to letting Spellman out of a garage, Parent remembered a time when he let Spellman out of a locked garage, but it was at Eddie Mena's house and there was a pitbull in the garage with Spellman. (37 RT 6491-6492.) Parent did not recall letting Spellman out of Navarro's garage. (37 RT 6493.)

Gomez also interviewed Spellman. (37 RT 6494.) Spellman said at one point, she was living with Valles. Valles became suspicious of Navarro after the March 2002 possession of a handgun arrest and he said he could not trust Navarro. (37 RT 6494-6495.) Spellman told him that both Navarro and Valles claimed to be keyholders, i.e. sanctioned by the Mexican Mafia to have control over a certain area, and they competed with each other. (37 RT 6495-6497.)

Navarro also re-called Paul Parent to impeach Spellman's testimony. (35 RT 6213.) Parent said there was one time that he had to release Eddie Mena's pit bull from his garage. He did not remember if Spellman helped him do so. (35 RT 6214.) Parent vaguely remembered unlocking a door to a garage for Spellman at the Remick house, but he was not really sure. (35

RT 6215.) His memory since he was shot was not good, but he remembered something about Spellman being detained in the garage. Parent did not remember Spellman being locked in the garage for two weeks, or even two days, and he was not sure if she was in there for 24 hours. (35 RT 6217.) Parent said he spoke to Investigator Gomez a few times, and he told Gomez he was there when Spellman tried to release the pit bull from the garage at Mena's house. (35 RT 6218-6219.)

Steve Newman testified regarding the February 2, 2002, incident at Laurie Fadness's house. (35 RT 6249-6250.) That evening, about eight or nine men went into the house and were arguing with Gallegos and another man who was there about money and respect. (35 RT 6250-6252.) They were speaking in Spanish and he did not understand what they were saying, and he did not hear any names being mentioned. (35 RT 6253-6255.)

C. Prosecution Rebuttal Evidence

While Navarro was incarcerated in 1997, he was caught trying to smuggle/deal drugs. Special Agent Richard Overman, who worked for the California Department of Corrections and Rehabilitation, testified regarding a time when he was assigned to Chuckwalla State Prison, where Navarro was incarcerated in September 1997. (37 RT 6513.) Between September 14 through 18, 1997, Navarro made about 13 recorded telephone calls that were brought to Overman's attention. (37 RT 6514-6515.) The telephone calls involved Navarro speaking with his girlfriend about bringing narcotics into the prison. The woman was supposed to pick up the narcotics from Navarro's relatives and bring them to Navarro when she visited him. (37 RT 6151.) The prison officials believed Navarro wanted to use the narcotics to pay off a debt for another inmate who was his friend. (37 RT 6515.) After Navarro was confronted with the recorded telephone calls, he listened to part of one, said that was enough, and he pled guilty. (37 RT 6516-6517.)

In 1995, Navarro became an informant for Los Angeles Police Officer Dan Randolph after being contacted during a traffic stop. (37 RT 6518.) Officer Randolph terminated the relationship after six months because of Navarro's criminal activity and misstatements concerning his dealings with Officer Randolph. Officer Randolph explained that time Navarro had been arrested four times, including concerning the robbery at Food 4 Less. (37 RT 6519-6520.) After his arrest for the Food 4 Less robbery, Navarro asked Officer Randolph for help in getting consideration for some of his cases, particularly the robbery for which he was facing 25 years to life. (37 RT 6519-6520.) Randolph told Navarro that he had done everything he could for him. The next day, Randolph received information from officers in a joint task force through Los Angeles Police Department and the FBI that Navarro was saying that Officer Randolph set him up on the robbery charges and was doing nothing for him. (37 RT 6520-6521.) Officer Randolph spoke with his officer in charge after hearing this, and because it was not a healthy relationship to pit one agency against another, they considered Navarro an undesirable informant. Randolph completed paperwork labeling Navarro as such, and it was documented in Navarro's file. (37 RT 6521-6523.)

On cross-examination, Randolph acknowledged that Navarro had provided credible information that led to some arrests. (37 RT 6529-6530.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS NAVARRO'S CONVICTION FOR MURDER

Navarro claims that insufficient evidence supports his conviction for participating in the conspiracy to rob and kill Montemayor. First, he contends that there was insufficient evidence that he ever agreed to take part in the conspiracy. Alternatively, he argues that if the evidence was sufficient to show he entered the conspiracy, the evidence established that

he withdrew from the conspiracy when he informed law enforcement of the plot. (AOB 80-99.) Substantial evidence, however, established that Navarro entered into the conspiracy to kill Montemayor and never withdrew.

The principles governing a claim of insufficient evidence are well settled. " 'When considering a challenge to the sufficiency of the evidence to support a conviction, [appellate courts] review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27; see also *People v. Kelly* (2007) 42 Cal.4th 763, 787-788.) The existence of every fact the jury could reasonably infer from the evidence is presumed by this Court. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 27.) Reversal is "not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) A reviewing court does not reweigh the evidence or re-evaluate the credibility of witnesses in reviewing a claim of insufficiency of the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

"The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1322, original emphasis, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed. 2d 560]. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt

beyond a reasonable doubt. [Citation.]" (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1322, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Navarro was charged with murder and conspiracy to commit murder. Section 187, subdivision (a), defines murder as the unlawful killing of a human being, with malice aforethought. Section 182, subdivision (a)(1), states that a conspiracy is committed when two or more persons conspire to commit any crime. A criminal conspiracy exists when there is an unlawful agreement between two or more people to commit a crime, and an overt act in furtherance of the agreement. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) The prosecution must show the defendant intended to agree and intended to commit the offense. (*Ibid.*; *People v. Morante* (1999) 20 Cal.4th 403, 416.)

Due to the secrecy usually involved in a conspiracy, the People need not provide direct evidence that the conspirators met and came to an express or formal agreement to commit the target crime. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 861.) Rather, a criminal conspiracy may be shown by direct or circumstantial evidence that the parties came to a mutual understanding to accomplish the act. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.) Thus, "a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.) Additionally, one may join a previously formed conspiracy by actively participating in it with the same intent as the original conspirators. (*People v. Aday* (1964) 226 Cal.App.2d 520, 534.)

Furthermore, a conspirator need not personally participate in any of the overt acts associated with the conspiracy as long as he or she conspired to commit the crime and an overt act is committed by a coconspirator. (*People v. Morante*, *supra*, at p. 417; *People v. Cooks* (1983) 141 Cal.App.3d 224, 312.) Throughout the duration of the conspiracy, the act of one conspirator is the act of all members of the conspiracy. Each coconspirator is responsible for the criminal acts of all other conspirators where those acts are within the scope of the conspiracy and reasonably foreseeable as the natural consequence of the conspiratorial agreement. (*People v. Hardy* (1992) 2 Cal.4th 86, 188; *People v. Morante*, *supra*, at p. 417.) The existence of a conspiracy may "be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]" (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1135.) "Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove, as a matter of defense, that he effectively withdrew from the conspiracy." (*People v. Sconce* (1991) 228 Cal.App.3d 693, 701.)

Here, the conduct, relationship, interests and activities of Navarro, Corona, Martinez, Macias, and Lopez before, during and after the murder provided a strong evidentiary basis from which to infer that these individuals had reached a tacit agreement to commit the murders.

Navarro undisputedly had relationship with Corona. (14 RT 2660-2671, 2675-2693; 15 RT 2849; 18 RT 3341, 3356-3357.) Navarro had Corona's phone number in his address book. (19 RT 3512-3513.) A photograph of Corona was in Navarro's Lexus. (13 RT 2444-2445.) Both evidence the connection between Corona and Navarro. There was no such evidence tying Corona to Macias, Martinez, or Lopez. Contrary to Navarro's testimony that he stopped calling Corona or taking her calls, there were several telephone calls between Navarro and Corona between

September 23rd and October 5th. Navarro called Corona three times in the 4:00 a.m. hour on October 2nd. (17 RT 3086-3087; Exh. Nos. 100 & 102.) After October 2nd—the day of the murder—and the cell phone number change, there continued to be phone calls between the two. (14 RT 2719; Exh. Nos. 100 & 102.)

At Perna's suggestion, Corona gave Navarro a piece of paper with Montemayor's home address and telephone number on it. This note was handwritten by Perna using a notepad that she kept on her desk. (13 RT 2331-2332; 2391-2393; 14 RT 2643, 2654-2658, 2674-2675, 2698-2701, 2708; 15 RT 2817-2820, 2825; Exh. No. 3.) Corona told Navarro that in exchange for killing Montemayor, he could keep a large sum of cash that Montemayor kept in coffee cans in his garage. (14 RT 2705-2707.) Upon receiving the note, Navarro wrote "manitas todo" on it. (14 RT 2701-2704, 2708; 18 RT 3366; 19 RT 3519.) This note was found in Navarro's glove box in his Lexus a couple of weeks after the murder. (13 RT 2440-2444.)

Corona's interview with Pelton and Anderson corroborated Navarro's involvement in the conspiracy. When Navarro brought methamphetamine to Corona at Interfreight, she introduced him to Perna. (9 CT 2331, 2335-2338.) This put the wheels in motion starting with Perna suggesting to Corona that Navarro kill Montemayor and Corona eventually passing along Perna's note with her brother's home address. (9 CT 2331-2334.) Corona said she gave this piece of paper to Navarro, and told him there was money in Montemayor's garage, and that Perna wanted Montemayor to be killed. (9 CT 2332, 2339-2340, 2342, 2345; 17 RT 3129, 3131.)

Furthermore, Navarro was significantly connected to the killers. Navarro was a shot-caller in Pacoima Flats criminal street gang, the same gang to which Martinez, Macias, and Lopez belonged. (17 RT 3204-3206.) The walls of Navarro's garage contained roll calls with Navarro's moniker "Droops," Martinez's moniker "Crook," and Macias's moniker "Pirate." It

also had "PF" for Pacoima Flats. Other roll calls had various gang member monikers including "Blackie," "Chito," and "Weas," and "VPF" for Varrio Pacoima Flats gang. (16 RT 3057-3060; 17 RT 3200-3202; 20 RT 3814-3819.) This graffiti indicated that Navarro's Sunrose house was a sort of headquarters for the gang, and a place where they gathered. Moreover, gang expert Detective Booth explained that older gang members or shot-callers who had already committed violent crimes and proven themselves often supervised the younger gang members. Roll calls often listed the gang members who committed crimes together. (17 RT 3173, 3179-3180.)

Inside Navarro's home, Pelton found papers with various phone numbers, including numbers for fellow gang members Casper, Lil Pirate, and Myra. (16 RT 2980-2981.) One document had graffiti-style writing that said "Crook, Pirate, Droop, PF." (16 RT 2982.) A business card said "Pirate" and "661-435-6527." (16 RT 2984; 18 RT 3509-3510.) At the Bonita Avenue residence in Las Vegas, Pelton found a six-ring binder with graffiti-style writing that included the names "Droopy" and "Lil Pirate." (16 RT 2986-2988.)

In addition to the roll calls found at Navarro's house—the names of gang members in good standing—there was gang graffiti on the outside of a CD case found in Navarro's Lexus indicating "Droopee," "Lil Pirate," and "Pacoima" with a "F" inside the "O." (13 RT 2447.) Paperwork found inside of Martinez's house said "494-6222, pager Droopy." (16 RT 2998.) Also, written on the backside of an envelope was "Droopy 494-6322." (16 RT 2999.) Roll calls listing "Sniper, Vamp, Crook, Blanco, Dizzy, Flats, Pirate" were located at Lopez's residence in Pacoima. (17 RT 3106-3107, 3211.) A roster in the same notebook included the names "Crook, Pirate, Droops," and next to "Droops" it said "482-9592." (17 RT 3107.)

Navarro was also closely connected to the Blazer used by his accomplices. The Blazer was registered to Navarro's roommate Chaidez at the Sunrose address. (13 RT 2465, 2523; 15 RT 2961-2966; 16 RT 3061-3062; 17 RT 3091; 18 RT 3371.) It contained a speaker spray painted with Navarro's moniker. (17 RT 3090; 21 RT 3959-3960.) Martinez had a piece of paper with the name "Anthony Navarro" along with an Auto Club membership number written on it. The parties stipulated that this Auto Club number belonged to Navarro. (17 RT 3111-3112, 3124; 18 RT 3253.) A few hours after the murder, Bridgette Navarro called the police to report stolen the Chevrolet Blazer. (16 RT 2940-2942, 2948-2949.)

The cell phone that Macias tried to get rid of when he was arrested, which belonged to Navarro's girlfriend, was in contact with Navarro's cell phone 18 times between 6:08 a.m. and 7:06 a.m. the morning of October 2, 2002. (17 RT 3084-3086; 18 RT 3483-3484; 9 CT 2315; Exh No. 100.) One of the calls occurred at the approximate time of Montemayor's shooting, further evidencing that Navarro, the shot-caller, was involved in the conspiracy. (17 RT 3085-3086; 9 CT 2315; Exh. No. 113.) A business card with "Dropey" and "335-4994" was found inside of Macias's wallet. (17 RT 3111-3112, 3124; 18 RT 3253; Exh. No. 136.) Cell phone records established that the 4994 number preceded the 1600 number. (18 RT 3253; Exh. No. 100.)

Further evidencing Navarro's guilt is the fact that his wife attempted to distance him from the cell phone number that he used to stay in contact with his co-conspirators around the time of the murder. The afternoon of the murder, Navarro's wife used her cell phone to call the phone company, and phone company records reflect that a woman identifying herself as "Ms. Johnston" called to have the 1600 number changed to 818-335-5937. (17 RT 3086-3087; 19 RT 3565; Exh. No. 100.)

The flurry and timing of cellphone activity among Navarro and his co-conspirators corroborated Navarro's intimate role in the conspiracy. The night before the murder, Navarro made several phones calls late into the night, including repeated calls to Corona, Macias, and Martinez. (17 RT 3085-3087; 19 RT 3570-3571, 3576-3586, 3603-3606; Exh. Nos. 99, 100 & 113.) Then, around the time of the police chase, Navarro made only one call and it was to Bridgette. (19 RT 3605-3606; Exh. No. 100.) Roughly two hours later, Bridgette called 911 to report the Chevrolet Blazer stolen. (16 RT 2981.) Between 9:24 a.m. and 9:34 a.m. that morning, Bridgette called Navarro's phone three times, and Navarro's pager once. (17 RT 3086; Exh. Nos. 100 & 101.) It is reasonable to infer from the timing of their phones and pager that Navarro and Bridgette were attempting to distance Navarro from the Blazer and the murder. Again, this evidenced a consciousness of guilt concerning the conspiracy.

The manner in which the killing was carried out demonstrated the existence of an agreed-upon plan. The three killers were waiting for Montemayor when he arrived at his place of business early in the morning on October 2nd and then took him to his home where the coffee can money was kept. Although Navarro claimed that he lost the note with Montemayor's home address, the evidence established that he knew Montemayor's place of business and that is where his accomplices first confronted Montemayor. (14 RT 2712; 9 CT 2331, 2335-2338.) The cell phone used by Macias pinged off a cell phone tower next to Interfreight Transport at 6:08 that morning. (16 RT 2993-2994.) As nothing indicated that Martinez, Macias, or Lopez knew Montemayor, it would be reasonable to infer that they were informed where Montemayor worked and how to recognize him by someone, like Navarro, who had this information.

Likewise, the evidence supported the conclusion Navarro told his junior gang members about the money in Montemayor's garage, and that it

was the plan to take that money as well as murder Montemayor. One, although they confronted Montemayor at work, they did not rob or kill him there. Instead, the trio escorted Montemayor back to his home. Before killing Montemayor near his home, they yelled "where's the money, where's the money." (9 CT 2279-2287, 2291.) They also did not take the money in Montemayor's wallet. Macias had Montemayor's driver's license in his pocket, yet Montemayor's wallet was found with almost $200 cash. (16 RT 3068-3069, 3071, 3089; 17 RT 3100-3102, 3143.) Finally, Navarro's jailhouse letters to Martinez and Macias demonstrated his ongoing relationship with his junior gang members, and his attempts to encourage them not to reveal Navarro's part in the conspiracy. (19 RT 3812-3813; 20 RT 3835-3854; 21 RT 4050.)

Considering the totality of the evidence here, and presuming the existence of every fact in support of the judgment that the jury could reasonably infer from the evidence here, substantial evidence of a conspiracy existed, and this claim must be rejected.

Navarro alternatively contends that even if the evidence was sufficient to establish that he entered into the conspiracy, he withdrew from the conspiracy when he notified law enforcement of the proposed plan. (AOB 91-97.) As demonstrated above, there is substantial evidence Navarro participated in the conspiracy through to the bitter end. His vague communication to law enforcement a few months before the murder did not constitute a withdrawal. One, California requires the conspirator to advise his co-conspirators of the withdrawal, which admittedly was not done here. Two, even if contacting law enforcement could suffice, Navarro's contact was wholly insufficient to withdraw from the conspiracy because it was utterly devoid of any meaningful information about the conspiracy. The more reasonable inference concerning Navarro's vague contact is that he was hedging his bets, and laying the groundwork for a request for leniency

in the event the murder did not go as planned and his conspirators were caught. Navarro's informant history shows how situational, self-serving and calculated his information to law enforcement usually was..

"Withdrawal from a conspiracy requires 'an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the coconspirators. [Citations.]'" (*People v. Sconce, supra,* 228 Cal.App.3d at p. 701, quoting *People v. Crosby* (1962) 58 Cal.2d 713, 730-731.) "'Generally, a defendant's mere failure to continue previously active participation in a conspiracy is not enough to constitute withdrawal . . . Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove, as a matter of defense, that he effectively withdrew from the conspiracy.'" (*People v. Lowery* (1988) 200 Cal.App.3d 1207, 1220.)

Here, there was no evidence Navarro told his co-conspirators that he wanted to withdraw from the conspiracy. Navarro agrees. However, he contends that because other jurisdictions allow a conspirator to withdraw from a conspiracy by telling law enforcement about the conspiracy plot, this Court should find that Navarro withdrew from the conspiracy when he communicated the plot to law enforcement. (AOB 91-97.) However, the law in California clearly establishes that the only way to withdraw from a conspiracy is to communicate the withdrawal to the co-conspirators and the jury here was properly instructed on such. Moreover, even if this Court finds that communicating the pending plot to law enforcement is sufficient to withdraw from a conspiracy, here, the "cookie crumbs" Navarro gave Rodriguez were not sufficient to constitute withdrawal.

Under federal law, in order to withdraw from a conspiracy by telling law enforcement, the conspirator must make "a clean breast to authorities." (*United States v. Bowie* (8th Cir. 2010) 618 F.3d 802, 813, citing *United States v. Jackson* (8th Cir. 2003) 345 F.3d 638, 648.) Here, despite

knowing who precisely was to be killed, where the victim worked and most likely where he lived, who was arranging for the murder (either Perna or Corona or both) and which gang members (including himself) were tasked to accomplish the murder and robbery, Navarro provided only minimal information, i.e. enough to later claim that he told his handler about the crime.

The information Navarro gave Rodriguez was so vague and void of detail that Rodriguez had nothing with which to work. Rodriguez testified that Navarro gave him "some general information regarding similarities to this case," and this occurred sometime in July 2002. (23 RT 4279-4280.) Rodriguez said that he remembered Navarro asking that if there was a kidnap, would Rodriguez handle it. (23 RT 4220-4221, 4243, 4249-4250, 4280-4281, 4284-4285.) The next time Navarro spoke with Rodriguez, he asked if the crime occurred in Orange County, would Rodriguez handle it. Rodriguez said he would not, but that he needed more information so he could refer Navarro to the proper agency. Navarro never got back to Rodriguez with any more information. (23 RT 4286.)

Rodriguez also said that if Navarro had provided him with more detailed information, he would have referred it to the proper agency. The identity or description of the potential victim, or his address, information that Navarro possessed but did not disclose, would have helped Rodriguez refer the matter to the proper agency. (23 RT 4288-4289.) Thus, even if notifying law enforcement could constitute a withdrawal from a conspiracy under California law, the scarce information provided by Navarro would not have been enough.

In sum, substantial evidence of Navarro's participation in the conspiracy existed for a rational trier of fact to find him guilty beyond a reasonable doubt. Navarro is essentially asking this Court to reweigh the evidence and substitute its judgment for that of the trier of fact. This is not

the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *People v. O'Connor* (1992) 8 Cal.App.4th 941, 948.) It is the trier of fact, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) A reviewing court must view the record favorably to the judgment below to determine whether there is evidence to *support* the conviction, not scour the record in search of evidence suggesting a contrary view. (*Id.* at p. 1143, emphasis in original.) Accordingly, Navarro's contention that substantial evidence did not support the jury's finding should be rejected.

II. THE TRIAL COURT'S RULING REGARDING THE DEFENSE OPENING STATEMENT WAS PROPER

Navarro next claims that the trial court's ruling, limiting what defense counsel could say during his opening statement, essentially forced him to defer his opening statement until after the prosecution's case-in-chief, in violation of Navarro's rights to due process and to present a defense. (AOB 100-130.) The trial court, however, acted well within its discretion by precluding defense counsel from mentioning possible inadmissible hearsay during his opening statement because the relevance and admissibility of the proposed comments would not be known until after the prosecution's case.

A. Procedural Background

Before trial, the prosecutor objected to the proposed testimony of Agent Starkey regarding what Navarro told him about a murder in Orange County because such testimony was hearsay. (10 RT 1956-1959.) Defense counsel responded that it was not hearsay because it was being offered for Navarro's state of mind, and not the truth of the matter. (10 RT 1959-1960.) Defense counsel said he believed the prosecutor would offer evidence showing that Perna contacted Corona about the murder, and then Corona contacted Navarro. The defense planned to establish that Navarro then contacted Starkey to tell him about the proposed hit. (10 RT 1960-

1961.) Starkey would then testify that he told Navarro to contact Detective Rodriguez at Los Angeles Police Department because it was something that that agency should handle. (10 RT 1961.)

In addition, Detective Rodriguez would testify that Navarro spoke with him sometime during the beginning of summer 2002, and said that somebody approached him about committing a murder in Orange County. (10 RT 1961.) Rodriguez would say that Navarro asked Rodriguez if he could handle something that was going to happen outside of Los Angeles County. Detective Rodriguez asked Navarro to get more information. (10 RT 1961-1962.) The parties further discussed Rodriguez's proposed testimony. (10 RT 1962-1968.) In response to the court's question, defense counsel confirmed that Rodriguez would testify Navarro told him he knew information about a murder that Navarro was being recruited to commit in Orange County, and Rodriguez told Navarro to get more information such as the name of the victim, who was involved, and where it was going to happen. (10 RT 1968-1969.) Rodriguez would further testify that Navarro never got back to him. (10 RT 1969.)

The trial court asked defense counsel if he was offering these statements under the state of mind exception to the hearsay rule. (10 RT 1970.) Defense counsel replied that it was not hearsay because it was not being offered for the truth, i.e. that people were trying to get Navarro involved in a murder in Orange County. Rather, the statements were being offered to show Navarro was not a member of the conspiracy because he was trying to help the police. (10 RT 1970-1971.)

The trial court asked about Navarro's statement to Starkey, that the reason for his arrest was the murder he had told Starkey about that summer. (10 RT 1971.) Defense counsel said that statement was being offered for a couple of reasons. First, to rebut any questions as to why Navarro did not tell police when he was arrested that he had informed his handlers about the

proposed murder. (10 RT 1971.) Rodriguez would explain that every handler had told Navarro not to discuss his cases with other police officers. This testimony would show that as soon as Navarro had the chance, he told Starkey and Rodriguez that his arrest involved the case about which he previously told them. (10 RT 1973.) The prosecutor interjected that it appeared defense counsel was offering the statement for its truth, i.e. that this was the murder Navarro had been talking about. (10 RT 1973.) Defense counsel disagreed, and said it was being offered for the fact Navarro said it, not the truth of what was said. (10 RT 1973-1974.)

Later, the trial court ruled that Navarro's statements to Agent Starkey and Detective Rodriguez, as well as Navarro's statements to his mother, were inadmissible hearsay. The ruling was without prejudice because there were contingencies that could take place during the prosecution's case-in-chief that could entail a review of the court's ruling. (11 RT 2119-2120.) However, the trial court told defense counsel that in opening statement, he could not refer to any alleged statements Navarro made to Starkey, Rodriguez, or his mother. (11 RT 2120.)

At the request of defense counsel, the court held an in camera hearing. (11 RT 2123 (unsealed).) Defense counsel told the court that he intended to call Navarro as their first witness. Thus, during his opening statement, he wanted to tell the jury he believed the evidence would show that after Navarro spoke with and received the note from Corona, Navarro went directly to his handlers and told them about the conversation with Corona. (11 RT 2123.) Counsel said he realized the court was making its ruling without the benefit of Navarro's testimony, but Navarro planned to testify. Without saying who would be testifying regarding this information, counsel wanted to tell the jury that Navarro told his handlers about the alleged plot and agreed to try to get further information for his handlers to aid in the investigations. (11 RT 2123-2124.)

The trial court reminded defense counsel that the court could not tell the prosecutor whether or not Navarro was going to testify or anything about the defense tactics. (11 RT 2124.) Even assuming defense counsel's representation was correct, there was the legal standard that until Navarro was called to testify, the court did not know whether or not he would testify. (11 RT 2124.) Moreover, the prosecutor had objected to admission of Navarro's alleged statements to Starkey and Rodriguez, and the court did not think it was appropriate at that time to make a final ruling on the objection. (11 RT 2124-2125.) The court repeated that it could not tell the prosecutor that Navarro planned to testify regarding this information. (11 RT 2125.)

The court said there were a lot of contingencies that could happen in either the prosecution's case-in-chief, or in the manner the defense presented its witnesses that could affect the court's ruling. (11 RT 2125.) Thus, at that stage, the court could not rule that Navarro's statements to his handlers or to his mother were admissible, but the court's ruling was without prejudice. During opening statement, defense counsel could say that Navarro contacted Rodriguez and Starkey, but that was the extent of it. (11 RT 2125-2126.)

Defense counsel posited that even if Navarro did not testify, the statements to his handlers were not being offered for their truth, but rather to show Navarro's state of mind, i.e. that he was a cooperating conspirator or cooperating active informant. (11 RT 2126.) The court said assuming that occurred, the prosecutor would still get to object and the trial court would have to make a ruling—a ruling that it could not make at that time. (11 RT 2126.) Until the actual situation was before the court, it was not in a position to make a final ruling. (11 RT 2126-2127.)

As another alternative, defense counsel wanted to know if the court would make a ruling if he told the prosecutor that Navarro was going to

testify. (11 RT 2127.) Defense counsel wanted to know at that point what was going to be admissible because if the court was not going to allow the challenged statements, it would destroy the defense case and defense counsel would want immediate review of the ruling. (11 RT 2127.) The trial court said defense counsel could make his own tactical decisions. The court was just suggesting that one way for the statements to come in through Starkey and Rodriguez was for Navarro to testify regarding what he said to them, and then the court would rule on the evidentiary issue. (11 RT 2127.) The court said there were too many unknowns in the proposed content of the testimony for the court to definitively rule at that time. (11 RT 2128.) The court held that defense counsel's statements during opening would be limited to saying that Navarro contacted Starkey and Rodriguez and the dates the contact was made. (11 RT 2128.)

Later, back in open court, the trial court concluded by ruling that the admissibility of Navarro's statements would depend on what was introduced during the prosecution's case, and therefore, both sides were precluded from mentioning these statements during their opening statements. (11 RT 2149-2151.)

A few days later, the court held another in camera hearing with defense counsel to discuss the outline of his proposed opening statement. (12 RT 2292 (unsealed).) The court noted that a large portion of his opening statement was predicated on Navarro testifying, and the prosecutor did not know whether Navarro would be testifying, so it could trigger objections during counsel's opening statement. (12 RT 2292-2293.) The court did not want defense counsel, at that point, to have to disclose his tactics, so in order not to interfere with the contents or scope of his opening, the court said it was prepared to defer defense counsel's opening statement until the completion of the prosecution's case-in-chief. (12 RT 2293.) The

court said the other alternative was to disclose that Navarro planned to testify and the contents of his testimony. (12 RT 2293.)

After conferring with co-counsel, defense counsel said the remedy for statements made during opening statements that were not proven at trial was for opposing counsel to address those matters during closing argument. (12 RT 2294.) What defense counsel intended to tell the jury during opening statement was based upon several different witnesses, some of whom they may have difficulty bringing to court. The defense position was that they should not have to reveal that Navarro was going to testify until it was time to put him on the stand. (12 RT 2294-2295.) The trial court agreed and said the law was quite clear in that regard. (12 RT 2295.)

The court said that to avoid putting defense counsel in a difficult position and to allow him to present the opening statement in his outline, the court asked defense counsel to defer his opening statement until the completion of the prosecution's case-in-chief. (12 RT 2295.) The trial court noted that the Evidence Code provides that the court can control the proceedings to ensure the rights of all of the parties were maintained. (12 RT 2295.) The court said it had ruled that certain areas would not be mentioned during opening statements because they would be objected to by the opposing party, and the court would sustain the objections because until Navarro testified, the defense would not have the foundation to present that evidence. (12 RT 2296.) Defense counsel disagreed and said his statements to the jury regarding what he believed the evidence would reveal was not objectionable on any grounds. (12 RT 2296.) The court knew that Navarro intended to testify and much of his testimony would be corroborated or testified to by other witnesses. (12 RT 2296-2297.) Even if Navarro did not testify, everything in the outline of his opening statement would be presented to the jury. (12 RT 2297.) Counsel added that it was critical to present the defense opening statement before the jury heard any

evidence because it would give them an idea of the defense's position while hearing all of the evidence. (12 RT 2297.)

The court read through defense counsel's proposed opening statement. (12 RT 2297-2298.) The court asked about the statement, "He was encouraged to buy phones, cars, and other things to keep in the good graces with gang members," and noted that defense counsel did not know which law enforcement officer would testify to this. (12 RT 2298.) Defense counsel said he did not know, but that Navarro would testify to that. The court said that was why there was a problem and if counsel wanted to make his opening statement before the prosecution's case, he would have to delete that. (12 RT 2298-2299.)

Defense counsel said if the court was going to force him, he would tell the prosecutor that Navarro was going to testify. (12 RT 2299.) The trial court said it was not telling that to defense counsel. Defense counsel felt that the court was giving him the option to either delete things from his opening, or reveal that Navarro was going to testify, and given that option, he would tell the prosecution. (12 RT 2299.) The court again said it was not telling defense counsel to tell the prosecutor that Navarro was going to take the stand and testify about being encouraged to buy phones, cars, etc. (12 RT 2299.)

The trial court was also concerned with the next paragraph in defense counsel's opening statement where he said Rodriguez and Starkey were going to testify that Navarro reported the incident with Corona to them. (12 RT 2300.) Defense counsel said that the prosecutor interviewed Starkey and Rodriguez and was aware of this proposed testimony. (12 RT 2300.) After some more discussion about the proposed opening statement, defense counsel told the court it was the defense's responsibility to support the representations made in their opening statement, and if they failed to do that, they suffered. (12 RT 2303.) Counsel did not believe he should be

precluded from advising the jury what the defense believed the evidence would show, and he thought he had a right to give his opening statement at the beginning of the case. (12 RT 2303-2304.)

The trial court told defense counsel he was wrong, and that the court had the authority, without interfering with his tactical decisions, to control how the matter was tried and proceeded. (12 RT 2304-2305.) Defense counsel would still have the chance to make his opening statement and present his witnesses; therefore, the court was not interfering with Navarro's rights as a litigant. (12 RT 2305.) Defense counsel continued to argue that it was critical to the defense to present the opening statement at the beginning of the case. (12 RT 2305.)

The court said it was not telling defense counsel to disclose that Navarro was going to testify. (12 RT 2305.) The court pointed out that in several 402 hearings, the prosecutor objected to proffered evidence based on lack of foundation or hearsay. (12 RT 2305-2306.) The court had made explicit rulings that defense counsel could not mention some of those subject matters in front of the jury without a hearing outside the presence of the jury to determine whether he had laid the foundation or satisfied a hearsay exception. (12 RT 2306.) Allowing defense counsel to state these matters in his opening statement would vitiate the court's prior rulings. The trial court had the judicial authority to control the manner of the proceedings without interfering in the absolute rights of the defendant. The areas discussed on page four of defense counsel's opening statement were of the most concern to the court. (12 RT 2306.) If defense counsel wanted to disclose these areas to the prosecutor to see if he had any objections, without mentioning whether Navarro was going to testify, to make a determination if there was sufficient foundation, that was a separate matter. (12 RT 2306.) Because defense counsel asked the court not to disclose the

nature of his opening statement, the court had not done so. (12 RT 2306-2307.)

Defense co-counsel said that the court would instruct the jury that opening statements were not evidence, and if the defense failed to present evidence to support the representations made during its opening statement, the prosecutor would comment on that to the jury. (12 RT 2307.) The trial court acknowledged that was one alternative, but thought it had a better alternative, to defer the defense opening statement until the commencement of the defense case. This did not deprive Navarro of any of his rights. (12 RT 2307.) Defense counsel said it would give page four of his opening statement to the prosecutor to read. (12 RT 2307.) The court said that before doing that to go to lunch and confer with co-counsel, and then let the court know if there was something prejudicial to him or Navarro by deferring the opening statement. (12 RT 2308.)

Defense counsel clarified that if he told the prosecutor that Navarro was going to testify, he could then present his opening statement at the beginning of the case. (12 RT 2310.) The court said no, because if that occurred, the court would show the prosecutor defense counsel's opening statement so they could figure out if there were any objections to the proposed testimony. (12 RT 2310.) The court again stated it was not telling defense counsel to release any information or decisions about Navarro testifying to the prosecutor. (12 RT 2311.) The court thought that some of the information in the proposed opening statement could only come from Navarro. Defense counsel said "it speaks for itself" and thought the prosecutor could figure that out also. (12 RT 2311.) The court wanted defense counsel to think about it, but suggested that if he decided to show

page four to the prosecutor, they would make sure discovery and *Roland*[23] was complied with regarding those areas, and counsel could then proceed with his opening statement. (12 RT 2312.)

After the lunch break, defense co-counsel informed the court that after conferring with defense counsel, and in light of the court's indications, the defense intended to reserve the right to make an opening statement at the commencement of the proceedings. (12 RT 2327.) Counsel said they wanted to withdraw the proposed opening statement, and reserved the right to present a new and different opening statement after hearing the prosecution's case-in-chief. (12 RT 2327.) Thus, defense counsel agreed that he was going to defer his opening statement until the commencement of the defense case. (12 RT 2327-2328.) Defense counsel later stated in open court that the defense planned to reserve their opening. (12 RT 2331.)

B. A Criminal Defendant Does Not Have a Right to Present Opening Statement Before the Prosecution's Case-in-Chief

Navarro argues that the trial court's ruling, preventing him from mentioning his statements to Starkey or Rodriguez, essentially forced him to defer his opening statement, resulting in prejudicial error. (AOB 115-122.) The trial court, however, properly precluded both parties from mentioning potentially inadmissible hearsay during their opening statements. Further, even if defense counsel's decision to defer his opening statement was caused by the trial court's ruling, no error occurred because the trial court has discretion to ask defense counsel to defer opening statement until after the prosecution's case-in-chief.

In relevant part, Penal Code section 1093 provides that before the introduction of the prosecution's evidence, the defense may make an

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[23] *Roland v. Superior Court* (2004) 124 Cal.App.4th 154.

opening statement, or may reserve the making of an opening statement until after the prosecution's case. (Pen. Code, § 1093, subd. (b).) However, "[s]ection 1094, Penal Code, provides that 'When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in [section 1093] may be departed from.'" (*People v. Struve* (1961) 190 Cal.App.2d 358, 360.)

The Court of Appeal for the Second Appellate District found that it was

> clear that under section 1093 of the Penal Code a defendant in a criminal case does not have an absolute right to make his opening statement prior to the introduction of evidence by the people, but that such right is discretionary with the court (*People v. Dunn* [(1940) 40 Cal.App.2d 6]), and its action in that regard will not be disturbed on appeal, absent a clear showing of abuse of such discretion. (*People v. Moore* [(1945)] 70 Cal.App.2d 158, 162.)

(*People v. Struve*, *supra*, 190 Cal.App.2d at p. 360.) In *People v. Moore* (1945) 70 Cal.App.2d 158, 162, the Court of Appeal found that the trial court's discretion to manage the proceedings under section 1093 is so great that to warrant a finding of error, the court must have "grossly abused" its discretion and "this abuse must affirmatively appear" in the record.

Navarro is unable to demonstrate an abuse of discretion, let alone a gross abuse of discretion.

In opening statement, "it is the duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove." (*People v. Cooley* (1962) 211 Cal.App.2d 173, 215, disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774). Thus, counsel should confine opening statement to "evidence he intends to offer which he believes in good faith will be available and admissible." (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 121.) Navarro claims the trial court abused its discretion by preventing defense counsel from mentioning that

Navarro told his handlers that he was solicited to commit a murder in Orange County on the ground it was inadmissible hearsay. (AOB 100-126.) The trial court properly determined, based on defense counsel's offer of proof, that the proposed statement was inadmissible hearsay and precluded defense counsel from mentioning it during opening until such time an adequate offer of proof could be made.

Evidence Code section 1200 provides that hearsay evidence is inadmissible, unless otherwise provided by law. Hearsay evidence is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." (Evid. Code, § 1200, subd. (a).) The word "statement" is defined as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.)

The only relevance of Navarro's statements to Starkey and Rodriguez, i.e. that he told them about the proposed murder and then after his arrest, told them he was arrested for the murder about which he had previously told them, was if these statements were true. Without hearing the prosecution's evidence, the trial court could not determine whether this hearsay fell into any exception that may have made it admissible. In addition, as the trial court mentioned during an in camera hearing, statements Navarro made to Starkey or Rodriguez regarding a murder in Orange County would be admissible to corroborate Navarro's testimony, but the court could not rule on that until the contingency actually came up. (See 10 RT 1984-1985 (unsealed).) Thus, the trial court correctly deferred ruling on the admissibility of this testimony and ordered the parties not to mention it during opening statements.

Furthermore, even if the trial court encouraged defense counsel to defer his opening statement, it properly exercised its discretion in doing so.

The trial court heard extensively from defense counsel regarding what he planned to say during his opening statement and the justifications for his representations. (See 11 RT 2123-2128, 2149-2151; 12 RT 2292-2312.) Because some of what defense counsel planned to say during his opening was potentially inadmissible evidence, the trial court reasonably suggested that defense counsel defer his opening statement until commencement of the defense case.

In sum, the trial court properly exercised its discretion by telling defense counsel he could not mention potentially inadmissible hearsay during his opening statement. To the extent the trial court's ruling may have encouraged defense counsel to defer his opening statement, Navarro cannot establish error because he did not have an absolute right to present his opening statement before the prosecution's case-in-chief.

C. Any Error Was Harmless

Even if the trial court abused its discretion, the error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Before taking any evidence, the trial court admonished the jury to keep an open mind during the course of trial, and not to decide any issue before the matter was submitted for its decision. (CALJIC No. 50; 2 RT 2352.) "There is a presumption that jurors perform their duty." (*People v. Struve*, *supra*, 190 Cal.App.2d at p. 360.) In addition, the trial court informed the jury that it could expect defense counsel's opening statement at the conclusion of the prosecution's case and the court thus invited counsel to make an opening statement just before the defense presented its case. (2 RT 2358, 2381; 18 RT 3296.)

Furthermore, the notion that there is somehow a guaranteed advantage to making an opening statement at the outset of trial as opposed to after the prosecution's case-in-chief is not accurate. Quite the opposite. Because the opening statement "commits the defense to the pursuit of certain conduct even before the prosecution's evidence is fully known or submitted, the

making of such statement is ill-advised, particularly where, as here, the defense has a weak case." (*People v. Corona* (1978) 80 Cal.App.3d 684, 725; *Tahl v. O'Connor* (S.D.Cal.1971) 336 F.Supp. 576, 582.) Thus, "reasonably competent counsel" may wait to hear the prosecution's case before presenting an opening statement. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [finding counsel was not ineffective for deciding not to present a defense after hearing the prosecution's case].)

Moreover, the evidence of Navarro's involvement in the conspiracy was overwhelming. Furthermore, as shown above, the evidence of Navarro's guilt was abundant. Navarro had extensive contacts with Corona, and Corona's testimony established that Navarro and Perna were part of the plot to kill Montemayor. (13 RT 244-2445; 14 RT 2660-2671, 2675-2693, 2705-2707, 2719; 15 RT 2849; 17 RT 3086-3087; 18 RT 3341, 3356-3357; 19 RT 3512-3513; 9 CT 2332-2334, 2339-2340, 2342, 2345; Exh. Nos. 100 & 102 [evidencing phone calls between the two].) The note handwritten by Perna with Montemayor's home address and telephone number was found in Navarro's glovebox. (13 RT 2391-2393, 2440-2444; 14 RT 2643, 2654-2658, 2674-2675, 2698-2704, 2708; 15 RT 2817-2820, 2825; 18 RT 3366; 19 RT 3519; 9 CT 2331-2332; Exh. No.3.) In addition, Navarro knew where Montemayor worked. (9 CT 2331, 2335-2338.)

Navarro was connected to the killers through their gang, Pacoima Flats, and the evidence established several contacts between Navarro and his fellow junior gang members. (13 RT 2447; 16 RT 2980-2982, 2984, 2986-2988, 2998-2999, 3057-3060; 17 RT 3106-3107, 3111-3112, 3124, 3173, 3179-3180, 3200-3206, 3211; 18 RT 3253, 3509-3510; 20 RT 3814-3819.) The Chevrolet Blazer used during the crime was registered to Navarro's address, Navarro's moniker was spray-painted on a speaker box in the vehicle, and shortly after the murder, Navarro's wife tried to report the vehicle stolen. (13 RT 2465, 2523; 15 RT 2961-2966; 16 RT 2940-

2942, 2948-2949, 2981, 3061-3062; 17 RT 3090-3091; 18 RT 3371; 21 RT 3959-3960.) In the minutes before and after the murder, numerous phone calls were made between Navarro's cell phone and the cell phone Macias was using, which was registered to Navarro's girlfriend. (17 RT 3084-3086; 18 RT 3483-3484; 9 CT 2315; Exh. Nos. 100 & 113.)

Finally, contrary to Navarro's assertion, deferral of defense counsel's opening statement did not interfere with his constitutional rights to effective counsel and to present a defense. (AOB 127-130.) There is no authority supporting a constitutional right to make an opening statement, let alone the right to do so before the prosecution's case-in-chief. As noted by the Second Circuit, "a defendant's unfettered right to make an opening statement, unlike his right to make a closing argument, is not one of the 'traditions of the adversary factfinding process that has been constitutionalized by the Sixth and Fourteenth Amendments.'" (*United States v. Salovitz* (2d Cir.1983) 701 F.2d 17, 19, quoting *Herring v. New York* (1975) 422 U.S. 853, 857 [95 S.Ct. 2550, 45 L.Ed.2d 593].) At the time of the drafting of the Sixth Amendment, "there was no settled body of English law concerning opening statements to which the framers of our Constitution could look...." (*United States v. Salovitz*, *supra*, 701 F.2d at p. 19.) In addition, the *Salovitz* court found the states were not uniform in their treatment of when the defense may make an opening statement (*id.* at pp. 19-20, fns. 1-4) and there were no federal statutes or rules of procedure pertaining to a criminal defendant's opening statement. (*Id.* at p. 20.) The court concluded the Constitution does not guarantee the defendant an opening statement and a trial court may, in its discretion, determine "the making and timing of opening statements." (*Id.* at p. 21.)

III. THE TRIAL COURT'S DISCOVERY SANCTION PROHIBITING FURTHER QUESTIONING OF RODRIGUEZ CONCERNING A VAGUE AND HEARSAY-LADEN CONVERSATION WITH NAVARRO DID NOT VIOLATE NAVARRO'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Navarro claims that the trial court violated his federal constitutional rights to present a defense and violated his rights to due process and a fair trial by limiting Rodriguez's testimony based on an unduly strict interpretation of defense discovery obligations under *Roland* and section 1054.3. (AOB 131-169.) To the contrary, the trial court correctly precluded the defense from eliciting testimony from Rodriguez that was not disclosed to the prosecution during the discovery process and that constituted inadmissible hearsay. Furthermore, any error in limiting Rodriguez's testimony was harmless because it is not reasonably probable Navarro would have received a more favorable result.

A. Procedural Background

During direct examination of Rodriguez, defense counsel asked if Navarro called him in July 2002, and if so, what was the nature of the conversation. (23 RT 4220-4221.) Rodriguez said Navarro did call him and basically asked if Rodriguez would handle either a kidnap for ransom, or murder for hire case. Rodriguez asked Navarro for more information such as the names of the suspect and proposed victim, and the address. (23 RT 4221.) Navarro said that he did not know at that point. (23 RT 4221.) Rodriguez testified that Navarro later called him back with some additional information. (23 RT 4221.) The following colloquy occurred:

> DEFENSE COUNSEL: Did he say, was there anything about, do you remember anything about Big Homies?
>
> RODRIGUEZ: No.
>
> DEFENSE COUNSEL: Do you recall a conversation you and I had just a few days back?

RODRIGUEZ: Yes.

DEFENSE COUNSEL: Okay. And you mentioned that you remembered something about Big Homies being involved?

RODRIGUEZ: Yes. As I tried to explain, we are going back to '02 and Navarro and I had a lot of conversations. And I do remember him bringing up the Big Homies, and I specifically remember asking about this murder for hire or it was a kidnap for ransom or murder for hire case.

DEFENSE COUNSEL: What does "Big Homies" mean?

RODRIGUEZ: Those are the shot callers that are in control of the EME, or the Mexican Mafia.

(23 RT 4222.)

Rodriguez then said that he told Navarro to get more information about the people involved, and to get back to him. (23 RT 4222.) Rodriguez acknowledged that he had spoken with defense counsel and counsel's daughter (associate counsel) several times over the past couple of years. (23 RT 4223.) Defense counsel asked, "And I believe you, during one of your conversations, you were talking about Mr. Navarro, saying some woman who was harassing the defendant trying to get him involved in this thing - -" The trial court then sustained the prosecutor's objection based on vagueness. (23 RT 4223.) Defense counsel tried again, asking, "Did you tell Ms. Halpern that Mr. Navarro, that you have recollection, you said that some woman was behind this also trying to get the defendant to do something?" (23 RT 4223.) The prosecutor objected based on vagueness, and the trial court sustained his objection. (23 RT 4224.) Defense counsel added, "Behind this, I mean this murder." The prosecutor again objected based on vagueness. Defense counsel said, "In Orange County." The trial court sustained the objection. (23 RT 4224.)

After defense counsel started to asked Rodriguez if he told "Ms. Halpern during one of your interviews of her," the trial court excused the

jury and asked defense counsel for an offer of proof. (23 RT 4224.) Defense counsel said that as long ago as three years ago, Rodriguez spoke with Ms. Halpern and said he recalled that Navarro told him about the Big Homies and that there was some woman involved who was trying to bring Navarro to Orange County to do something. Defense counsel said that notes were taken about this conversation, and that he is now trying to see if Rodriguez remembers that conversation. (23 RT 4224-4225.)

The prosecutor said that he never received any discovery regarding this interview. (23 RT 4225.) The trial court reminded defense counsel that before Rodriguez took the stand, they discussed the legal requirements of the anticipated testimony, and defense counsel submitted two written reports. The information defense counsel was now seeking was not in those reports, and the trial court accepted the prosecutor's representation that this information was not disclosed to him. (23 RT 4225.) Defense counsel disagreed with the trial court's assessment, but acknowledged he did not know if this information was contained in the reports. (23 RT 4225.) Counsel said he spoke with the prosecutor several times regarding Rodriguez's proposed testimony, and he may have inadvertently left it out. (23 RT 4225.) The trial court again reminded defense counsel about his obligation to disclose to the opposing party the contents of any material evidence he planned to present during his case, and that neither of the reports he submitted regarding Rodriguez's testimony referenced the subject matter upon which he was trying to inquire. (23 RT 4226.)

After conferring with Ms. Halpern, defense counsel told the court the following,

> Last night I had lunch, brunch, with Mr. Rodriguez, and I think Mr. Rodriguez, she's tell me now, and I might not even have heard it, because I was doing other things, had said that somebody, not necessarily a woman, was trying to get him involved to come down to Orange County.

> I also have a recollection of one of our conversations that it was a woman. I'm not sure if it comes from Mr. Rodriguez or whether it comes from my client.
>
> I have tried to put down everything, every word that Mr. Rodriguez says to me at any given time. I made good faith effort, and not trying to hide anything that I was obligated to do, even if I agree or disagree - - even though I don't agree with the law, I have tried to comply with the law as well as possible. I don't know - -

(23 RT 4226-4227.)

The trial court said it did not accept that representation because defense counsel had not conducted himself in a fashion indicating that he had disclosed everything. For that reason, the court and counsel had extensively discussed the scope of Rodriguez's proposed testimony. (23 RT 4227.) The court reminded defense counsel that it was during the defense case that it was disclosed, for the first time, that he and Rodriguez went to the jail to meet with Navarro. (23 RT 4227-4228.) So this was not the first time the court had concerns with defense counsel complying with *Roland*, given that defense counsel previously appeared dissatisfied that the law now requires defense attorneys to disclose the contents of the proposed testimony of a defense witness. (23 RT 4228.)

The trial court continued that defense counsel knew that he had to comply with the discovery obligations under *Roland* because he did submit two written statements regarding Rodriguez's testimony. (23 RT 4228-4229.) However, because counsel did not comply with *Roland* with respect to the area upon which he was trying to question Rodriguez, the court would not allow him to inquire on that subject. (23 RT 4229.) The trial court reiterated that it did not accept counsel's representation that the error was made in good faith. (23 RT 4229.)

Defense counsel explained,

> It was whispered in my ear as I'm cross-examining, as I'm taking this witness on exam, by my daughter, who is in the courtroom, don't forget about the information about him, somebody trying to get him involved. I thought she had told me that some girl had did it.
>
> I have a faint memory of, and I thought I did remember, Mr. Rodriguez saying something about a girl wanting to get him involved. I can't - - as we've been talking, I've been looking through my notes. I can't find that in my notes.
>
> My daughter tells me that he told her something similar to that last - - yesterday afternoon. We were all - - Mr. Kallen, myself, and my daughter were all talking to Mr. Rodriguez at a restaurant in the northeast part of the Valley. I was extremely tired. I was talking to him, I was eating my lunch. I don't remember him exactly even saying that. She said that she heard him say that last night or last, or yesterday afternoon. She is in the courtroom. I have not - - I have this in my notes. I have not tried to hide this from the prosecution. . . .

(23 RT 4231.)

The trial court told defense counsel that this subject matter came up three or four years ago with Rodriguez, and not now as he was asserting. (23 RT 4232.) Defense counsel said if the court had been listening to him, he said he was not sure when Rodriguez gave him this information, or from where he even got the information. It could have come from Rodriguez, and that was why counsel wanted to ask Rodriguez if he recalled it. (23 RT 4232.) Counsel said that he was trying to remember what was said to him—he had a feeling he had heard it before but he did not write it down. He tried to give the prosecutor everything that he had. His understanding was that he did not have to include things that were extraneous to the testimony. (23 RT 4233.) Counsel again explained that he tried to write down everything from his conversation with Rodriguez the day before, and

most of it was the same as he had already disclosed to the prosecutor. (23 RT 4234.)

The trial court said that was all good; however, the court informed counsel at the beginning of the proceedings about the requirements under *Roland* and that if counsel interviewed a witness he planned to call at trial, then he needed to disclose the contents of the interview to the opposing party. (23 RT 4234-4235.) Here, what defense counsel was trying to introduce was not a minor matter. It was something that would have caught his attention that it needed to be disclosed to the prosecutor. (23 RT 4235.) The trial court advised defense counsel that he had several opportunities to make this disclosure, including right before Rodriguez testified. Thus, if defense counsel realized the day before that Rodriguez had something more to say, counsel should have documented and disclosed it pursuant to *Roland.* (23 RT 4235.)

Defense counsel believed the court was sanctioning Navarro by not allowing this relevant evidence to be admitted. Counsel asked that the court instruct the jury on late discovery or find defense counsel in contempt rather than limiting Rodriguez's testimony. (23 RT 4236.) Counsel did not know if Navarro even said anything to Rodriguez about a girl, and that was why he was asking Rodriguez what was said. (23 RT 4236-4237.)

The trial court did not agree with defense counsel's assertion that the trial court was punishing Navarro for counsel's failure to disclose this information. The court was simply precluding counsel from inquiring in this one subject area because the matter was not disclosed as it should have been under *Roland.* (23 RT 4237.) The court then gave defense counsel the opportunity to disclose anything else that may have arisen last minute with this witness. (23 RT 4237.) Defense counsel did not think there was anything. He said that he planned to ask Rodriguez what was said to him by Navarro. (23 RT 4238-4239.)

The prosecutor wanted to address the representation by defense counsel that he was given oral notice three years ago of an interview between defense counsel and Rodriguez where Rodriguez purportedly said that Navarro told him some girl was trying to drag him into a murder. (23 RT 4240.) The prosecutor said he was never given written or oral notice of such statement. The only notice that he received were the two documents referred to by the court. (23 RT 4240.) The prosecutor objected to questions relating to this undisclosed evidence as a result of defense counsel's failure to timely provide discovery. (23 RT 4240.)

The trial court concluded the hearing by ruling that because the two reports that were disclosed did not contain any reference to the subject matter about a girl trying to drag Navarro into something, under *Roland*, the trial court was precluding defense counsel from further inquiry on this subject. (23 RT 4241.)

On cross-examination, while discussing what Navarro told Rodriguez regarding the possible kidnap for ransom, the prosecutor asked if Navarro had told him the suspect was some girl who said she was the daughter of a Mexican Mafia member. (23 RT 4284.) Rodriguez said, no, Navarro did not mention this. (23 RT 4284.) Later, when discussing Rodriguez's second conversation with Navarro regarding the incident, the prosecutor asked Rodriguez if Navarro had told him that a woman who said she was Felipe Vivar's daughter contacted him and said the potential victim was connected to her or Vivar. (23 RT 4288.) Rodriguez said that Navarro did not tell him this. (23 RT 4288.)

During redirect examination, defense counsel asked Rodriguez if he spoke to Navarro sometime after his arrest. Rodriguez said he did, probably within a few days of the arrest. (23 RT 4296.) Counsel asked, "Do you remember exactly what he told you there, names and places and so on?" The prosecutor objected on hearsay grounds. (23 RT 4296.) Defense

counsel explained he was only asking Rodriguez if he had a recollection of it. The court allowed Rodriguez to answer that he did, but he did not remember word for word. (23 RT 4296.)

Defense counsel then asked Rodriguez, "Without telling us names, did he mention names?" The prosecutor again objected that this question called for hearsay. (23 RT 4296.) Defense counsel said he was not asking for names; he just wanted to know if Rodriguez remembered things like names. The trial court then held another hearing outside the presence of the jury. (23 RT 4296-4297.) The court asked Rodriguez if he recalled a conversation with Navarro a couple of days after his arrest. (23 RT 4297.) Rodriguez said that he remembered some specific information when he and Starkey interviewed Navarro in custody. Rodriguez said Navarro mentioned the phone calls to him about the Orange County incident. Navarro then made a comment about this female who was having Navarro meet with the Big Homies, and that was what the kidnap for ransom case was based around, i.e. her, the Big Homies, and somebody in Orange County. (23 RT 4297.) Navarro asked Rodriguez if he remembered Navarro telling him about the kidnap case, and Rodriguez replied that he did. Navarro then said that was the reason he was in jail. Rodriguez recalled, "He said, remember, he started going into the story about this girl, blah, blah, blah, telling me this story." (23 RT 4297.)

Rodriguez said he asked Navarro if he spoke to Pelton about this, and if anybody knew about Navarro's involvement. (23 RT 4297.) Navarro told him that nobody would talk to him because they all knew his history. (23 RT 4297-4298.) Rodriguez told Navarro that he did not know the circumstances of the case, and that he was not there to discuss it. He said he was there with Starkey to close out Navarro's file. (23 RT 4298.) Rodriguez explained that he did not write down anything Navarro told him

because at that point, it had nothing do with him. He said he "washed [his] hands of it and went back to [his] division." (23 RT 4298.)

The trial court asked Rodriguez if he could repeat his best recollection of what Navarro said. Rodriguez said he could not repeat exactly what was said. (23 RT 4298.) Rodriguez added that Navarro told him he was in custody for the information that he was trying to give Rodriguez. Navarro mentioned the phone call he made to Rodriguez, and the kidnap for ransom or murder for hire case, and said that was why he was in jail. (23 RT 4298.) Navarro also said that he was arrested because there was a note in the car. (23 RT 4298.)

The trial court asked Rodriguez if during this conversation in jail, if Navarro gave him any names of who was participating in this crime. (23 RT 4298-4299.) Rodriguez said that he did not remember the names. He only remembered that at the jail, Navarro was talking about a female and the Big Homies, which to him meant the guys in prison who were calling the shots for the Mexican Mafia. (23 RT 4299.)

The prosecutor said he had a problem with Rodriguez testifying to what Navarro told him after he was arrested because it was hearsay that was being offered for the truth. The prosecutor said the statements were self-serving, unreliable and hearsay. (23 RT 4299.)

Defense counsel replied that the statements were prior consistent statements made by Navarro, and that his credibility was impeached as to what really occurred, and the way he said it occurred. (23 RT 4299-4300.) Second, defense counsel said he wanted to show that Rodriguez could not remember the exact conversations and information that Navarro gave him, so defense counsel was inquiring as to whether he could recall if names were mentioned. (23 RT 4299-4300.)

The prosecutor pointed out that a prior consistent statement had to have been made a time before an alleged improper motive to fabricate had

arisen. Here, it was obvious Navarro, who was in jail, had a self-serving motive of wanting to save his own skin. (23 RT 4300.) Because the improper motive had already arisen, the foundational requirements of Evidence Code section 791 were not present and it was not admissible as a prior consistent statement. (23 RT 4300.)

The trial court was not sure it agreed with the prosecutor's assessment of prior consistent statements, but said it would give him a brief recess to research the matter. (23 RT 4301.) After the recess, the court said it looked at Evidence Code sections 791 and 1236. The prosecutor cited a case, *People v. Hitchings* (1997) 59 Cal.App.4th 915, that discussed section 791. (23 RT 4301.) The prosecutor noted that in *Hitchings*, the prosecution did not impeach the defendant with a prior inconsistent statement, so under section 791, subdivision (a), the defense could not bring in the prior consistent statement. (23 RT 4301.) The prosecutor compared it to this case because here, he did not use the October 17th arrest interview with Detective Pelton to impeach Navarro with any prior inconsistent statements. (23 RT 4301-4302.)

The prosecutor further explained that under subdivision (b) of section 791, the defense must show that the prior consistent statement was not made under a similar motive as the testimony at trial. Here, it was the classic situation of where the motive existed after Navarro was arrested and in jail. Thus, it was a self-serving statement that was untrustworthy because Navarro was trying to extricate himself from guilt. (23 RT 4302.) Because neither subdivision (a) nor (b) of section 791 applied, the statement was inadmissible. (23 RT 4302.)

Defense counsel asked to make an offer of proof, and give the court and the prosecutor some information that was learned over the break after speaking with Rodriguez. (23 RT 4302.) Defense counsel said he believed Rodriguez would testify as follows:

> That he went down and he spoke to my client at the county jail in which my client related several factual things that he can recall . . . basically something to the effect that a woman brought him down here to Orange County who got him involved in this deal, and that it involved Big Homies, meaning Mexican Mafia people, and something to do with the Mexican Mafia. And I don't know the details, again, because I was getting it quickly in the hallway.

(23 RT 4302-4303.)

Defense counsel added that Rodriguez would testify that this triggered his memory, of what Navarro told him in July. (23 RT 4303.) Counsel said that Rodriguez would testify that,

> when it was told to him in October 2002, when the defendant was in county jail, at that time he did not think that what Mr. Navarro was telling him was untrue, . . . in other words, he didn't say you did not tell me this, Mr. Navarro . . . [or] this is the first time I'm hearing it. He did not say that to Mr. Navarro, nor did he think that. And as he testifies today, five years later, he is not sure where he heard that, whether it was in the county jail for the first time or whether it was in July for the first time.

(23 RT 4303.)

Defense counsel also said that Rodriguez would further testify that when Navarro told him this in the county jail, Rodriguez did not think it was inconsistent with anything that Navarro previously told him two months before. (23 RT 4303.) Thus, defense counsel claimed it was not an inconsistent or consistent statement. (23 RT 4303-4304.) In sum, defense counsel believed Rodriguez would testify that what Navarro told him while in county jail could have been consistent with what he told him in July. Because five years had passed, he was not sure, but when Navarro said it in jail, he did not think it was false. (23 RT 4304.)

The trial court said at that point, it was not going to let the statements come in. The court advised defense counsel to look at the Evidence Code sections and *Hitchings*, and said they would discuss it further. (23 RT

4304.) Defense counsel wanted to know if he could ask Rodriguez if he could say with any certainty that Navarro did not tell him in July that a woman from Orange County was trying to get him involved in a murder in Orange County and that it involved Big Homies. (23 RT 4304.) The trial court said defense counsel still had the *Roland* problem that was discussed that morning. And the other part was whether the prior consistent statement to Navarro's in-court testimony was admissible, and that was what the parties were going to look at. (23 RT 4304-4305.) Additionally, Rodriguez had already testified regarding his best recollection of what Navarro told him a couple of days after his arrest. (23 RT 4305.)

Defense counsel said he would research prior consistent statements, and would not ask Rodriguez about any statements Navarro made at the jail. However, he wanted to ask Rodriguez if, after speaking with defense counsel at the break and thinking back to July 2002, he could say with any certainty that Navarro did not tell him about the woman from Orange County being connected with the Big Homies. (23 RT 4305.) Counsel explained that he was not eliciting a consistent statement. He was just asking Rodriguez to reconsider his earlier testimony. (23 RT 4305.)

The trial court thought that fell under the ambit of their prior discussion regarding defense counsel's compliance with *Roland.* (23 RT 4305-4306.) Defense counsel replied that he was surprised by Rodriguez's testimony because he believed Rodriguez initially told him that the murder had something to do with the Big Homies, and that he could not remember whether it was a woman or not. Counsel claimed that he included this in the report he gave to the prosecutor. (23 RT 4306.) When defense counsel spoke with Rodriguez in the hallway, he was surprised by his testimony so he asked Rodriguez if, during the conversation with Navarro at jail, did he tell Navarro he had not heard before what Navarro was then telling him. (23 RT 4306.) Rodriguez said he did not say this to Navarro. Defense

counsel said this was the first time he had asked Rodriguez this question. (23 RT 4306.)

While in the hallway, defense counsel further asked Rodriguez if now he was sure that Navarro did not tell him these things in July 2002. (23 RT 4306.) For the first time, Rodriguez said it was five years ago, and he was not sure if he got the information at the jail or earlier, but when he spoke with Navarro at the jail, he did not think Navarro was telling him anything new. (23 RT 4306-4307.) The trial court said that at that point, defense counsel should not get into that area of inquiry, and that they would have further legal discussions on the subject. (23 RT 4307.) The court added that the exception to the hearsay rule was a very complicated area, and therefore, before making a final ruling, the court wanted defense counsel to look at the Evidence Code section and the case cited by the prosecutor. (23 RT 4307-4308.)

Defense counsel persisted and wanted to ask Rodriguez if he had had a chance to think about his previous answer regarding his conversation with Navarro in July, and whether he wanted to modify that answer. (23 RT 4308.) The trial court would not allow that, but said in the future, after more discussion, it may reconsider this ruling. (23 RT 4308.) Defense counsel said he felt that the trial court was restricting him from asking Rodriguez whether he made a mistake in his earlier testimony. (23 RT 4309.)

Before resuming redirect examination of Rodriguez, defense counsel asked the trial court if he could ask Rodriguez questions that followed up on the prosecutor's cross-examination regarding what Navarro told him in July. (23 RT 4310.) Counsel wanted to ask, if upon reflection, did Navarro tell him certain things. (23 RT 4311.) The trial court said that the problem was that defense counsel admitted that morning he had a certain contact with Rodriguez concerning that topic, and he did not provide the prosecutor

with that information, so there was a *Roland* issue and defense counsel could inquire on that subject. (23 RT 4311.) Defense counsel thought there may have been confusion between Rodriguez's conversations with Navarro five years ago, and the more recent conversations when defense counsel was present. He gave the prosecutor all the information he received from Rodriguez regarding the conversations that occurred five years ago, and he just received the new information in the hallway. (23 RT 4311.)

The trial court wanted to know defense counsel's recollection of what Rodriguez said about his contact with Navarro five years ago. (23 RT 4312.) Defense counsel believed that Rodriguez would say that he was not sure when he got the information, whether it was in July or later, but he spoke with Navarro in July, and then in October at the jail, Navarro reminded him of the conversations from July. (23 RT 4312.) According to defense counsel, when Navarro reminded him of what was said in July, Rodriguez did not feel at that time he was being told anything new. (23 RT 4312.) The trial court said they needed to have a 402 hearing with Rodriguez to see what exactly was his recollection. (23 RT 4312.) The trial court told defense counsel to ask about of other areas on redirect, and they would then have a 402 hearing and decide whether Rodriguez should come back for further testimony. (23 RT 4313.)

After defense counsel finished redirect examination of Rodriguez, the trial court held another hearing on the matter. First, the court asked the court reporter to read back the court's inquiry of Rodriguez regarding his best recollection of the nature and contents of Navarro's statement to him at the jail. (23 RT 4337.) The court reporter did so. (23 RT 4337-4340.) The trial court asked Rodriguez if, before the discussions with the court outside the presence of the jury, Rodriguez's testimony on direct and cross-examination regarding what Navarro told him about a kidnap for ransom or

murder for hire was his best recollection of the conversations. Rodriguez confirmed that was correct. (23 RT 4340.)

The trial court verified that Rodriguez could recall two conversations with Navarro on this subject before Navarro's arrest, and then a third conversation occurred after Navarro's arrest. (23 RT 4340-4341.) The trial court wanted to know if there was a third contact with Navarro when Navarro gave him some information regarding a kidnap for ransom or a murder for hire. (23 RT 4341.) Rodriguez could only remember two contacts before the arrest, and then the third when Navarro was in custody. But he could not say with certainty that there was not a third contact before the arrest. (23 RT 4341.) Rodriguez said if there was a third contact, he had no recollection of what was said. (23 RT 4341.)

The trial court then continued the discussion with only counsel present. (23 RT 4342.) The prosecutor said he gave defense counsel a copy of *People v. Hitchings*, and also a copy of *People v. Smith* (2003) 30 Cal.4th 581. (23 RT 4342-4343.) The trial court said it also wanted defense counsel to look at the use notes for Evidence Code sections 791 and 1236. The court noted that after reviewing Rodriguez's testimony, defense counsel's alternative basis for admitting the statement, i.e. that Navarro said it in July 2002, was not a viable alternative. (23 RT 4343.)

Defense counsel clarified what he was seeking to elicit from Rodriguez. (23 RT 4345.) Counsel wanted to ask Rodriguez that when he spoke with Navarro in the county jail, did Navarro tell him or remind him of something Navarro said in July. Counsel asserted that Rodriguez remembered that when Navarro gave him the information at the jail, Rodriguez did not feel at that time that Navarro was telling him anything that was not true, i.e., that it was something he had heard before. Specifically, that when Navarro told Rodriguez about the woman in Orange County getting him involved and the Big Homies, Rodriguez did not think

Navarro was lying or that he did not tell Rodriguez this before. (23 RT 4345.) Counsel claimed that Rodriguez said he could not recall if Navarro told him this in July, but he does remember that when Navarro said these things in October 2002, he thought it was true that Navarro had told him this back in July 2002. (23 RT 4345-4346.) Five years later, Rodriguez could not remember exactly what Navarro said in July 2002, but he could remember his feeling that the statements that Navarro made in county jail were correct as to what was said in July. (23 RT 4346.)

After conferring with co-counsel, defense counsel added that one of the reasons that Rodriguez believed Navarro had told him earlier what he said after his arrest, i.e. that a woman had given him an order from a shot-caller, was because it was unusual for the Mexican Mafia to use a woman to give orders. (23 RT 4346.) Thus, when Navarro gave him this information at the county jail, Rodriguez felt at that time like Navarro must have told him this information earlier. (23 RT 4346-4347.) Defense counsel repeated that in the county jail when Navarro told Rodriguez about a woman transmitting orders from the Big Homies to have somebody killed in Orange County, Rodriguez felt certain Navarro had told him the same thing at an earlier time, which had to have been in July. (23 RT 4347.) Counsel added that for *Roland* purposes, his associate counsel, Ms. Halpern, gave him this information two minutes ago, based on her conversation with Rodriguez in the hallway. (23 RT 4347.)

Defense counsel's alternative theory for admitting this evidence was to ask Rodriguez if, after having a chance to refresh his memory, did he now remember more clearly that Navarro told him in July about a woman asking him to set up a hit in Orange County and this was based on orders from the Big Homies. (23 RT 4348.) The trial court wanted defense counsel to look at the cases and the Evidence Code sections, and said they

would resume discussion on the matter the following court day. (23 RT 4347-4348.)

Later, the trial court revisited the issue. (25 RT 4550.) Defense counsel reiterated that he was not trying to elicit Navarro's statement "per se" at the county jail; he wanted Rodriguez to testify regarding what he said to Navarro at the jail on October 18, 2002. (25 RT 4551.) At that time, Navarro reminded Rodriguez about an earlier conversation when Navarro said something about a woman. Rodriguez could not recall if Navarro mentioned the name of the woman, but Navarro said that a woman from Orange County was acting on behalf of the Big Homies, i.e. the Mexican Mafia, and wanted Navarro to commit some type of robbery-murder or kidnapping-robbery-murder. (25 RT 4551-4552.) Defense counsel maintained that at the county jail, Rodriguez told Navarro, yes, I do remember you telling me this earlier. Counsel believed that Rodriguez would testify that he recalled the conversation at the county jail, and his impression was that what Navarro told him, i.e. reminding Rodriguez that he had previously mentioned a woman and Big Homies, was accurate. (25 RT 4551.)

Defense counsel said this proposed testimony was inconsistent with Rodriguez's testimony on cross-examination, i.e. that he was not told this in July. (25 RT 4552.) Counsel offered that Rodriguez would testify that when he said "no," he meant that he could not recall Navarro saying that in July. However, Rodriguez could recall Navarro saying it in October in the jail, and at that time, Rodriguez believed it was true. (25 RT 4552.)

The trial court confirmed with defense counsel that this alleged conversation between Rodriguez and Navarro occurred on October 18, 2002, after Navarro was arrested. (25 RT 4552.) The court pointed out that at a prior hearing, defense counsel offered this statement as a prior consistent statement. (25 RT 4552-4553.) Now, he was offering it as a

prior inconsistent statement. (25 RT 4553.) Defense counsel explained that after the last hearing, he spoke with counsel and rethought about it, and it occurred to him that they did not need to introduce Navarro's statement. Instead, they wanted to elicit Rodriguez's statement, i.e. ask Rodriguez if he told Navarro that he agreed with what Navarro had told him, said to Navarro, yes, that is true that you told me this before. (25 RT 4553.) Thus, it was Rodriguez's statement, not Navarro's, and it was a refreshed recollection. They were offering Rodriguez's statement adopting Navarro's statement, and Rodriguez's statement that was inconsistent with what he testified to on cross-examination. (25 RT 4553.) In answering the trial court's question, defense counsel confirmed that Rodriguez did not take notes or put anything in writing regarding the October 18th conversation with Navarro. (25 RT 4554.)

Defense counsel said he reported this information on the record either to the prosecutor or the court as soon as he received it from Rodriguez, which was after cross-examination when he and co-counsel interviewed Rodriguez in the hallway. (25 RT 4554-4555.) Because he knew Rodriguez had spoken to Navarro at the jail, he asked Rodriguez if he could remember exactly what Navarro said, what his reaction was, and what he said to Navarro in his reaction. (25 RT 4555.)

The trial court asked defense counsel if at some point, he went with Rodriguez to speak with Navarro. Counsel said yes, about two months ago. (25 RT 4555.) The reason for the visit was because of a letter concerning Navarro's status as an informant that Navarro believed had been given to Rodriguez. (25 RT 4555-4556.) Defense counsel said that nothing occurred during that conversation that he planned to use at trial. (25 RT 4556-4557.)

The trial court noted that another factor it was considering was Navarro's testimony, and his repeated assertions that he had very little

recollection of what took place five years ago (in contrast to his claim that remembered what he told Rodriguez at the jail). (25 RT 4557.) One of the things the trial court had to evaluate was the trustworthiness of the out-of-court statements. The court did not find the proposed statements to be trustworthy. Therefore, the trial court denied the request to recall Rodriguez to testify on this matter. (25 RT 4557.)

Defense counsel wanted to point out that the statements were made five years ago, and not by Navarro, but by Rodriguez. (25 RT 4557.) The trial court replied that defense counsel was offering, as the foundation, that Navarro was claiming to recall what he told Rodriguez in 2002, but there were no notes and it was unrecorded. (25 RT 4558.) Defense counsel said that Rodriguez was permitted to talk about conversations he had in July 2002, and there were no notes taken. Now, the defense wanted Rodriguez to testify about a conversation he had with Navarro, without saying what Navarro said, but that he recalled a conversation with Navarro where he agreed that Navarro had told him about a hit in Orange County that was ordered or sanctioned by the Mexican Mafia. (25 RT 4558.)

If counsel re-called Rodriguez to testify, he believed Rodriguez would also say that his memory was refreshed regarding his July 2002 conversation with Navarro, and he may change his testimony. (25 RT 4558.) According to defense counsel, a key issue in the defense case was what Navarro told the officers in July 2002. (25 RT 4558-4559.) Defense counsel said that Rodriguez was not claiming that he was recently told about a conversation from July 2002, and it now sounded true. He was saying that he was reminded of the conversation that occurred at the jail five years ago. (25 RT 4559.) Rodriguez told defense counsel that when he went to talk to Navarro in jail, Navarro said something about the Big Homies being involved. This was included in the discovery given to the prosecution. (25 RT 4559.) Rodriguez remembered Navarro giving him

this information at the county jail; he could not remember whether it was said in July 2002. However, according to defense counsel, Rodriguez said when he heard it from Navarro at the jail, it rang true. (25 RT 4559.)

Defense co-counsel further argued to the court that normally any witness could return to the stand and testify that upon further reflection, they wanted to correct their testimony. (25 RT 4560.) The other side would then have an opportunity to cross-examine that witness regarding what caused the change in testimony. Counsel added that the defense was not scripting or generating the testimony. (25 RT 4561.) It was a sworn police officer who had thought about his testimony and thought he may have made a mistake and wanted to correct the record. (25 RT 4561.)

The trial court again denied the request to recall Rodriguez. (25 RT 4561.) The court found that the proposed question and answer on this subject matter was untrustworthy for reasons already stated. (25 RT 4561.) Defense counsel questioned the trial court's ruling that someone recalling statements from five years ago was untrustworthy. (25 RT 4562.) The court said there were several factors that it considered and it identified those factors during their discussion. One of the big factors was that a percipient witness was allowed to talk to Navarro. There was no way to get to Rodriguez's testimony without stating what Navarro allegedly said to him. (25 RT 4562.)

Later, defense counsel filed a motion to reconsider the trial court's ruling denying the request to recall Rodriguez. (7 CT 1766-1773.) The prosecutor filed an opposition to the motion and attached a declaration of District Attorney's Investigator Ernie Gomez based on his conversation with Rodriguez after Rodriguez had spoke with defense co-counsel in the hallway. (7 CT 1775- 1776.) Gomez stated,

> I told Rodriguez that the defense was now saying that Rodriguez wanted to change his testimony. Rodriguez rolled his

> eyes and said that all that had happened in the hallway was that Ms. Halpern had asked him whether he remembered Navarro telling him, during the pre-October conversations, that a woman was trying to drag him into a crime that had been set up by the big homies. Rodriguez said that he told Ms. Halpern 'no,' he did not remember that. Rodriguez said Ms. Halpern then asked him 'if it was *possible*' that Navarro had said that to him sometime prior to October. Rodriguez said he told Ms. Halpern that he supposed it was literally possible that Navarro told him that, but that he had no such recollection.

(7 CT 1776.)

Without hearing argument, the trial court denied the motion. (26 RT 4601-4602.)

B. The Trial Court Properly Precluded Rodriguez from Testifying Regarding His Allegedly "Refreshed" Memory and Navarro's Alleged Statements to Him

First, this Court should reject as forfeited appellant's contention that the trial court's ruling violated his federal constitutional rights because he makes the contention for the first time in this Court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Geier* (2007) 41 Cal.4th 555, 609.) The contention is in any event meritless because the Federal constitution does not bar a state court from applying ordinary rules of evidence to determine whether evidence proffered by the defense is admissible. (*People v. Watson* (2008) 43 Cal.4th 652, 693; *People v. Smithey* (1999) 20 Cal.4th 936, 995.) Defendant does not have an unfettered right to offer evidence otherwise inadmissible under standard rules of evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013, 135 L.Ed.2d 361].)

Furthermore, the trial court did not abuse its discretion in limiting Rodriguez's testimony or disallowing defense counsel to recall Rodriguez regarding his allegedly "refreshed" memory. In addition, to the extent the trial court's ruling was based on inadmissible hearsay, it properly found

that Rodriguez's alleged adoption of Navarro's statement was untrustworthy.

Penal Code section 1054.3, the section governing a defendant's obligation to provide discovery in a criminal case, states the following:

> The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case.

A trial court has the discretion to limit the scope of a witness's testimony under Penal Code sections 1054.5 and 1054.7. Section 1054.5 states,

> Upon a showing that a party has not complied with section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.

Section 1054.7 requires disclosure of discoverable items be made 30 days prior to trial, or "immediately" if the party comes into possession of the information after that time, unless "good cause" is shown. "Good cause," however, is "limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (§ 1054.7.)

Although outright preclusion of a witness under section 1054.5 for a discovery violation is considered an "extreme" sanction and warranted "only if all other sanctions have been exhausted" (§ 1054.5, subd. (c)), the

mere limitation on the scope of a witness's testimony does not necessarily require the exhaustion of all other options. (See *People v. Lamb* (2006) 136 Cal.App.4th 575, 581 [trial court properly precluded surrebuttal testimony from defense expert due to counsel's failure to comply with discovery].)

For example, in *People v. Lamb*, *supra*, 136 Cal.App.4th at page 582, the defendant failed to reduce the oral statements of its accident reconstruction expert to writing, and thus claimed there was no discovery to provide under section 1054.3. The court upheld a preclusion sanction under Penal Code section 1054.5, as well as under Evidence Code section 352, denying the defendant the right to present surrebuttal testimony from the expert. As the court noted, "this type of gamesmanship constitutes a discovery violation." (*Id.* at pp. 581-582.) "The purpose of the discovery rules under Proposition ... 115 as specified in Section 1054 is to promote the ascertaining of truth in trial by requiring timely pretrial discovery and also to save the Court time in trial and avoid the necessity for frequent interruptions and postponements." (*Id.* at p. 581.) Furthermore, although section 1054.5, subdivision (c), cautions against prohibiting the testimony of a witness unless "all other sanctions have been exhausted," the witness was not precluded from testifying. Instead, the court's sanction only limited the scope of the witness's testimony and thus was proper. (*Id.* at pp. 581-582.)

Courts have interpreted the discovery provisions liberally to accord the electorate's expressed intent of furthering the ascertainment of truth in criminal trials. (See *In re Littlefield* (1993) 5 Cal.4th 122, 133.) In *Roland*, the court of appeal interpreted the phrase "written or recorded statements ... or reports of those statements" to include oral representations made to the defense. (*Roland v. Superior Court, supra,* 124 Cal.App.4th at p. 166.) Employment of the phrase "reports of the statements of those persons" expected to be called as witnesses by the defense imposes upon counsel "an

obligation to report *any* relevant statements made by those intended witnesses, including oral statements made directly to defense counsel" (*Roland, supra*, 124 Cal.App.4th at p. 166 [emphasis in original]), or at the very least provide an oral summary of the witnesses' statements to the prosecutor. (*Id.* at p. 161.) A contrary interpretation, as the *Roland* court suggested, would "permit defense attorneys and prosecutors to avoid disclosing relevant information by simply conducting their own interviews of critical witnesses, instead of writing down or recording any of those witnesses' statements." (*Id.* at p. 167.)

Furthermore, when counsel is aware of information received from a witness, but has not reduced it to a writing, counsel's obligations as an officer of the court require that the information be disclosed. (See *Roland, supra*, 124 Cal.App.4th at p. 165.) Thus, "[w]hile the defense does not have a duty to obtain written statements from witnesses ..., counsel is not entitled to withhold any relevant witness statements from the prosecution by the simple expedient of not writing them down." (*Id.* at p. 165.) "[S]uch gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (*Id.* at p. 165, quoting *Littlefield, supra*, at p. 136 [brackets in *Roland*].)

The *Roland* court further recognized that the intent of the electorate, in enacting the discovery provisions of section 1054, et seq., was "to 're-open the two-way street of reciprocal discovery' (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372), and 'restore balance and fairness to our criminal justice system.' (Prop. 115, § 1(a).)" (*Roland, supra*, 124 Cal.App.4th at p. 162.) The court observed that "Section 1054 expressly states that the discovery chapter 'shall be interpreted' to 'promote the ascertainment of truth in trials by requiring timely pretrial discovery' and 'save court time in trial and avoid the necessity for frequent interruptions and postponements.' (§ 1054, subds. (a), (c).)" (*Roland, supra*, at p. 162.)

"These objectives reflect, and are consistent with, the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts.' [Citations.]" (*Ibid.*)

In short, there is no balance in a system that allows one side to "sandbag" the other by producing evidence at the last minute and claiming, through a technicality, that admission of the evidence is mandatory.

The Supreme Court has also recognized the importance of reciprocal discovery to the ascertainment of truth in our justice system, observing:

> One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.
>
> We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.

(*Taylor v. Illinois* (1987) 484 U.S. 400, 413-414 [108 S.Ct. 646, 98 L.Ed.2d 798] [upholding preclusion sanction for willful discovery violation], quoted in *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1623-1624; see also *Michigan v. Lucas* (1991) 500 U.S. 145, 150-151 [111 S.Ct. 1743, 114 L.Ed.2d 205] [preclusion of evidence as discovery sanction under rape-shield law does not per se violate Constitution].)

Taylor v. Illinois found preclusion of witnesses appropriate in a case involving a "willful violation" of state discovery rules. In *Taylor*, defense

counsel asked, on the second day of trial, to add two names to the list of witnesses he had provided prior to trial. (*Taylor v. Illinois*, *supra*, 484 U.S. at p. 403.) Illinois procedure required the defense to provide reasonable pretrial notice of defense witnesses. (*Id.* at p. 403, fn. 3.) Contrary to the attorney's contention that he had "just been informed about" the identity of one of the witnesses, the trial court concluded, after a hearing, that defense counsel was aware of these witnesses four months before trial and had met with the witness again two days before the trial began. (*Id.* at p. 405.) The trial court found this to be "a blatent [sic] violation of the discovery rules, willful violation of the rules." (*Ibid.*) The trial court also did not find the witness to be particularly reliable. (*Ibid.*)

The only issue before the Court in *Taylor* was whether the Sixth Amendment's Compulsory Process Clause absolutely precluded a witness from testifying, under any circumstances, as a sanction for the discovery violation. (*Id.* at p. 402.) Under the extreme circumstances of that case, the Court held that preclusion of the witness was appropriate despite a defendant's fundamental right to present witnesses in his defense. (*Id.* at p. 415.) The Court's opinion was quite narrow:

> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purpose of the Compulsory Process Clause simply to exclude the witness' testimony.

(*Ibid.*)

The *Taylor* Court found that "the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable" and concluded that "it is plain that this case fits into the category of willful misconduct for which the severest sanction is appropriate." (*Id.* at p. 417.) The *Taylor*

Court did not sanction preclusion as a sanction for every discovery violation, but did not delineate those cases for which preclusion was appropriate from those cases for which it was not. The majority's opinion observed that "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases." (*Taylor* at 413.) The Court concluded, however, "it is neither necessary nor appropriate for us to attempt to guide the exercise of discretion in every possible case." (*Id.* at 414.)

Accordingly, in certain circumstances, exclusion of evidence for violating discovery obligations is an appropriate remedy and does not violate the constitution. The trial court's decision as to the appropriate remedy for a discovery violation is reviewed for an abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1232; *People v. Edwards* (1993) 17 Cal.App.4th 1248, 1263.) A trial court will only be found to have abused its discretion when its "'decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.' [Citation.]" (*People v. Lamb*, *supra*, 136 Cal.App.4th at p. 581.) Review of the trial court's exercise of discretion is conducted under the circumstances existing at the time of the ruling. (*People v. Lewis* (2008) 43 Cal.4th 415, 455.)

Here, the trial court did not abuse its discretion by limiting Rodriguez's testimony. Similar to *People v. Lamb*, *supra*, 136 Cal.App.4th 575, Rodriguez was not precluded from testifying; the court's sanction merely limited the scope of his testimony. In fact, the trial court allowed Rodriguez to present the overwhelming majority of his proffered testimony. The fact that during pretrial hearings, the trial court had extensively advised defense counsel on his obligations under *Roland* further supported its ruling finding a discovery violation. Also, as defense counsel's offer of proof evolved, it was unclear as to what Rodriguez would testify, and whether he really had the recollection of the conversations alleged by defense counsel.

First, defense counsel's representation of Rodriguez's proposed testimony was suspect. According to defense counsel, Rodriguez would testify that when he met Navarro at the jail after his arrest, Navarro said there was a woman who involved him in a deal in Orange County and it involved the "Big Homies" or Mexican Mafia. Defense counsel said this "triggered" Rodriguez's memory of what Navarro told him in July, and that when Navarro was telling Rodriguez this story in October 2002, Rodriguez did not think it was untrue or that it was the first time he had heard this information. (23 RT 4302-4304, 4306-4307, 4312, 4345-4347; 25 RT 4551-4552, 4559.) However, this was contradicted by what Rodriguez told Investigator Gomez. (7 CT 1776.)

In addition, at the 402 hearing, Rodriguez said his prior testimony was accurate regarding his lack of memory of any specific facts provided by Navarro such as a "girl" or "Big Homies" during his July 2002 contacts with Navarro. (23 RT 4340-4341.) Rodriguez's testimony during the 402 hearings showed that he had already testified regarding his complete recollection of Navarro's pre-arrest statements to him. Therefore, defense counsel's representations of what he believed Rodriguez would say were speculative and inaccurate. Additionally, defense counsel's offer of proof changed over time and at one point, counsel acknowledged that he was not really sure what Rodriguez told him. (23 RT 4236-4237.)

Moreover, defense counsel acknowledged that he did not disclose this information to the prosecution. Initially, counsel said he learned of this information three years before, and that he took notes. (23 RT 4224-4225.) After the prosecutor said he never received any discovery regarding these statements, defense counsel said he may have inadvertently left this information out of the reports. (23 RT 4225.) Defense counsel then back-pedaled and said that Rodriguez gave this information to defense co-counsel the day before. (23 RT 4226-4227, 4231-4232.) Counsel added

that he heard this information before, but could not remember when, but he had a feeling he had heard it before but did not write it down. (23 RT 4233.) Later, defense counsel said he had just received this new information in the hallway. (23 RT 4311, 4347; 25 RT 4554-4555.)

Notwithstanding when defense counsel obtained this information, once he became aware of it, he was under an affirmative obligation as the attorney specified in section 1054.3 to reduce the statements to writing, or to otherwise inform the prosecutor of their content in order to permit the prosecution to investigate the circumstances under which the statements were made and to thoroughly prepare for cross-examination and rebuttal testimony. (*Roland v. Superior Court*, *supra*, 124 Cal.App.4th at p. 166.)

In addition, because this was not the first time the trial court found defense counsel had failed to comply with *Roland*, the trial court imposed the correct remedy of not allowing defense counsel to inquire on this limited subject. As the trial court pointed out, they had had prior discussions about *Roland*, and defense counsel had expressed his dissatisfaction that he had to disclose the contents of a proposed defense witness's testimony. (23 RT 4227-4228.) For example, in a pretrial hearing, defense counsel claimed the prosecutor was complaining because the defense has not provided any details regarding their witnesses' testimony. Defense counsel said he did not believe the prosecution was entitled to that. (4 RT 626.) The trial court then advised defense counsel of his obligations under *Roland*. (4 RT 626-629.)

At the next pretrial hearing, the trial court asked the prosecutor if defense counsel had satisfied the requirements under the discovery statute. The prosecutor said no, and that he was intending to file a renewed motion for discovery. (4 RT 661.) Another discussion ensued regarding the defense discovery obligations. (4 RT 661-676.) As part of that discussion, the trial court told defense counsel if he had a critical, material witness,

then he needed to reduce that witness's statement to writing and disclose it to the prosecutor, or that witness would not be able to testify. (4 RT 667-668.)

The trial court revisited the issue at a subsequent pretrial hearing, and the prosecutor again informed the court that there were people on the defense witness list about whom the prosecutor had not received witness statements. (4 RT 778.) Another lengthy discussion ensued and the trial court again expressed its concern with defense counsel complying with the discovery statute and *Roland*. (4 RT 778-801.) After jury selection but before testimony began, the subject came up again because the prosecutor still had not received statements from some of the proposed witnesses. (9 RT 1789.) The trial court told defense counsel that it had advised him of his discovery obligations at least twice before. The court again reminded defense counsel of the *Roland* case and his obligations. (9 RT 1793-1800.)

Therefore, defense counsel was well aware of his discovery obligations. The trial court was justified in finding that defense counsel violated the discovery rules because he failed to disclose to the prosecutor any statements he received from Rodriguez regarding the "Big Homies" and a woman trying to get Navarro involved in the murder.

Furthermore, the trial court correctly found that to admit Rodriguez's refreshed recollection would require admission of Navarro's out-of-court statements, and such statements were hearsay that were untrustworthy and inadmissible. Evidence Code section 1200 provides that hearsay evidence is evidence of a statement someone other than the declarant offered to prove the truth of the matter asserted. Such evidence is inadmissible.

Here, defense counsel wanted to ask Rodriguez if he agreed with what Navarro told him at the county jail, i.e. that Navarro told him that a woman from Orange County was acting on behalf of the Mexican Mafia and wanted Navarro to commit a murder. (See 25 RT 4551-4552.) Counsel

said he was seeking to admit Rodriguez's statement adopting Navarro's statement, i.e., believing the truth of Navarro's statement. (25 RT 4553.) However, as the trial court properly found, there was no way to introduce Rodriguez's statements without admitting Navarro's statements. (25 RT 4562.)

To the extent defense counsel sought to admit Rodriguez's response to Navarro's alleged statements as an adoptive admission, Navarro's statements did not qualify as such. "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Thus, "[w]hen a *defendant* remains silent after a statement alleging the defendant's participation in a crime, under circumstances that fairly afford the *defendant* an opportunity to hear, understand, and reply, the statement is admissible as an adoptive admission, unless the circumstances support an inference that the defendant was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution." (*People v. Jurado* (2006) 38 Cal.4th 72, 116, emphasis added.) The statement need not be a direct accusation, just a statement that would normally call for a response if it were untrue. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Here, Rodriguez's response or failure to respond to Navarro's alleged statements was not an adoptive admission because the statements were not the type of accusatory statement that would normally call for a response. In addition, they were not being offered against Navarro. Thus, the adoptive admissions exception to the hearsay rule did not apply.

Navarro claims that *Roland* violated section 1054, subdivision (e), which provides that "no discovery shall occur in criminal cases except as provided by this chapter." (AOB 149.) However, *Roland* did not enact a

new discovery rule; it interpreted the language already contained in section 1054.3. *Roland's* statutory interpretation of section 1054.3 was accurate and compelling, and Navarro offers no authority to the contrary.

Also, contrary to Navarro's assertion, *Roland* was not wrongly decided and did not improperly expand the requirements of section 1054.3. (AOB 147-149.) As set forth above, *Roland* interpreted the phrase "written or recorded statements . . . or reports of those statements" in section 1054.3 to include oral representations made to the defense. (*Roland v. Superior Court*, *supra*, 124 Cal.App.4th at p. 166.) The *Roland* court looked at the "plain meaning and grammatical structure of the language of section 1054.3" to conclude that "reports of the statements of those persons" encompassed "oral statements of witnesses that are communicated orally to defense counsel by third parties." (*Id.* at p. 165.) The court then went a step further and found that it also applied to oral reports made directly by a witness to defense counsel or the prosecutor because excluding such statements "would undermine the voters' intent" by permitting counsel "to avoid disclosing relevant information by simply conducting their own interviews of critical witnesses." (*Id.* at p. 167.)

The cases cited by Navarro all dealt with a witness being precluded from testifying, and are therefore distinguishable. (AOB 151-155.) For example, as stated above, in *Taylor v. Illinois*, *supra*, 484 U.S. 400, the trial court excluded a defense witness who was not disclosed to the prosecution before trial, even though defense counsel had met with this witness a week before trial. (*Id.* at pp. 403-405.) In *United States v. Davis* (5th Cir. 1981) 639 F.2d 239, the trial court excluded two witnesses because their names were not on the witness list provided to the prosecution as required by a pretrial discovery order. The Fifth Circuit reversed finding that the defendant's violation of the pretrial discovery order alone was an insufficient reason to exclude the witnesses. (*Id.* at pp. 243-245; see also

Escalera v. Coombe (2d Cir. 1988) 852 F.2d 45 [error to preclude alibi witness for discovery violation, but remanded to address willfulness of the defendant's violation]; *Fendler v. Goldsmith* (9th Cir.1983) 728 F.2d 1181, 1188 [preclusion of expert witness deprived the defendant of his Sixth Amendment right to present a defense]; *People v. Edwards, supra,* 17 Cal.App.4th at p. 1263 [error, though harmless, to preclude a propria persona defendant from all testimony regarding a partnership agreement since there was no showing of willful and deliberate discovery abuse].)

Thus, *Taylor* and the other cases cited by Navarro demonstrate that preclusion of a witness due to a discovery violation should only be used in the extreme cases and where the conduct has found to be willful. However, that was not the situation here because Rodriguez was not precluded from testifying entirely, only as to one discreet aspect of a conversation for which he had already accurately testified regarding his recollection of the conversation.

In sum, the trial court properly prevented defense counsel from inquiring about Navarro's alleged post-arrest statements to Rodriguez because defense counsel violated the discovery rules by failing to disclose the proposed statements to the prosecutor. Additionally, the trial court correctly found Navarro's alleged post-arrest statements were untrustworthy and inadmissible hearsay. (See *People v. Jurado, supra,* 38 Cal.4th at pp. 128-130 [upholding preclusion of post-arrest statements and conduct made "when [the defendant] ha[d] a compelling motive to minimize his culpability for the murder and to play on the sympathies of his investigators, indicating] a lack of trustworthiness"].) Accordingly, the trial court did not abuse its discretion by precluding Rodriguez from testifying regarding what Navarro allegedly told him at the jail.

C. Harmless Error

Even if the trial court erred in limiting Rodriguez's testimony, any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Epps* (2001) 25 Cal.4th 19, 29 [errors of state law require reversal only upon a finding of a reasonable probability of a result more favorable to the defendant in the absence of the error].) Navarro urges application of the federal harmless beyond a reasonable doubt standard based on his claim the trial court's ruling denied his constitutional right to present a defense but, as noted herein, application of ordinary rules of procedure and evidence, which is what occurred in this case, do not generally implicate the federal constitution. (AOB 164-165.) Regardless, under either standard, any error in precluding the additional line of questioning of Rodriguez as to Navarro's post-arrest statements is harmless.

First, as stated above, defense counsel's representation of Rodriguez's proposed testimony was suspect. Defense counsel's representations as to the conversation with Rodriguez and his recollection were contradicted by Rodriguez's statements to DA Investigator Gomez. (7 CT 1776.) In contrast to defense counsel's representation, Rodriguez said he did not recall Navarro telling him in pre-October 2002 conversations that a woman was trying to drag him into a crime being set up by the Big Homies. (7 CT 1776.)

In addition, Rodriguez's testimony during the 402 hearings showed that he had already testified regarding his complete recollection of Navarro's pre-arrest statements to him. Therefore, defense counsel's representations of what he believed Rodriguez would say were speculative and inaccurate. The significance of this evidence is also little to none because it does not show what defense counsel suggested it shows, i.e., that he was attempting to thwart the conspiracy. As explained in Argument I, the more reasonable interpretation was that Navarro provided some vague

information of little to no value, despite having personal knowledge of critical and helpful facts, so he could later claim this defense if something went awry and he was caught.

Contrary to Navarro's contention (AOB 165), this was not a close case. As noted throughout, tremendous reliable evidence tied Navarro to the murder and robbery regardless of the fact that he delegated the actual commission of the crimes to his gang subordinates. Navarro had extensive contacts with Corona, and Corona's testimony established that Navarro and Perna were part of the plot to kill Montemayor. (13 RT 244-2445; 14 RT 2660-2671, 2675-2693, 2705-2707, 2719; 15 RT 2849; 17 RT 3086-3087; 18 RT 3341, 3356-3357; 19 RT 3512-3513; 9 CT 2332-2334, 2339-2340, 2342, 2345; Exh. Nos. 100 & 102 [evidencing phone calls between the two].) The note handwritten by Perna with Montemayor's home address and telephone number was found in Navarro's glovebox. (13 RT 2391-2393, 2440-2444; 14 RT 2643, 2654-2658, 2674-2675, 2698-2704, 2708; 15 RT 2817-2820, 2825; 18 RT 3366; 19 RT 3519; 9 CT 2331-2332; Exh. No.3.) In addition, Navarro knew where Montemayor worked. (9 CT 2331, 2335-2338.)

Navarro was connected to the killers through their gang, Pacoima Flats, and the evidence established several contacts between Navarro and his fellow junior gang members. (13 RT 2447; 16 RT 2980-2982, 2984, 2986-2988, 2998-2999, 3057-3060; 17 RT 3106-3107, 3111-3112, 3124, 3173, 3179-3180, 3200-3206, 3211; 18 RT 3253, 3509-3510; 20 RT 3814-3819.) The Chevrolet Blazer used during the crime was registered to Navarro's address, Navarro's moniker was spray-painted on a speaker box in the vehicle, and shortly after the murder, Navarro's wife tried to report the vehicle stolen. (13 RT 2465, 2523; 15 RT 2961-2966; 16 RT 2940-2942, 2948-2949, 2981, 3061-3062; 17 RT 3090-3091; 18 RT 3371; 21 RT 3959-3960.) In the minutes before and after the murder, numerous phone

calls were made between Navarro's cell phone and the cell phone Macias was using, which was registered to Navarro's girlfriend. (17 RT 3084-3086; 18 RT 3483-3484; 9 CT 2315; Exh. Nos. 100 & 113.)

Furthermore, the defense presented extensive evidence in support of Navarro's theory that his status as an informant meant he was not part of the conspiracy. In addition to Navarro's testimony, four law enforcement officers testified regarding their interactions with Navarro.

Given the overwhelming evidence of guilt, the extensive defense evidence admitted and the utter weakness of the excluded "evidence," any error is necessarily harmless under both state and federal standards. Accordingly, based on the overwhelming circumstantial evidence of Navarro's guilt, even if defense counsel had questioned Rodriguez regarding Navarro's post-arrest statements, it is not reasonably probable that a more favorable result would have been reached.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS GENERAL EVIDENTIARY RULINGS AND, THUS, COULD NOT HAVE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR

Navarro contends the trial court made a series of improper hearsay rulings and other evidentiary errors, which violated his constitutional rights and rendered his trial unfair. Specifically, Navarro that claims the trial court erroneously excluded as inadmissible hearsay statements that were not offered for their truth. Next, Navarro asserts that the trial court prejudicially erred by admitting unnecessary and inflammatory gang evidence. Lastly, he argues that the trial court hampered defense counsel's effective examination of Agent Thomerson and improperly excluded the defense exhibit containing the FBI reports. (AOB 170-204.)

To the extent Navarro failed to object on the grounds he now asserts, these claims are forfeited. In any event, the trial court properly exercised

its discretion in making the challenged rulings. Any error, singly or cumulatively, is harmless.

A. The Trial Court Properly Excluded Inadmissible Hearsay

Navarro claims that the trial court abused its discretion by excluding the following testimony on the ground it was hearsay: (1) what he told Detective Rodriguez when Rodriguez visited him in jail after his arrest (AOB 172-173); (2) Rodriguez's testimony regarding what Bridgette told him during a telephone conversation (AOB 173-177); and (3) his mother's testimony regarding why Bridgette called her near the time of the murder (AOB 178). As explained below, the trial court properly excluded the challenged testimony as inadmissible hearsay for which no exception applied and under section 352.

As a general rule, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).) Hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing and which is offered to prove the truth of the matter stated. (*People v. Alvarez* (1996) 14 Cal.4th 155, 185; Evid. Code, § 1200, subd. (a).) The reason for the hearsay rule is that these statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. (*People v. Duarte* (2000) 24 Cal.4th 603, 610.) In that regard, it is considered too unreliable for the trier of fact to use as proof or disproof of disputed issues of fact. (1 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar 3d ed. 2004) Hearsay and Nonhearsay Evidence, § 1.4, p. 5.) As Jefferson explains:

> When the declarant's statement is offered to prove the truth of the matter stated in the statement, the declarant's veracity is involved, as well as the accuracy of the declarant's perception, recollection, and communication of the facts perceived. The lack of trustworthiness of hearsay evidence comes from the fact that the veracity and accuracy cannot be tested through (a) the

> presence of the declarant under oath when the *current* trier of fact can observe the declarant's demeanor, and (b) cross-examination of the declarant by the adverse party.

(*Ibid.*; emphasis in original.)

A trial court's decision whether to admit evidence is reviewed for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

1. Navarro's post-arrest statement to Rodriguez

During direct examination of Detective Rodriguez, defense counsel asked him about when he and Starkey went to see Navarro at the Orange County jail. Counsel first asked Rodriguez if he told Detective Pelton that Navarro had said there was going to be a robbery and murder in Orange County. Rodriguez replied no, he did not tell Pelton this because at that moment, he did not know why the police arrested Navarro. (23 RT 4245-4247.) Defense counsel then asked, "And Mr. Navarro, did he tell you anything about why he was arrested?" (23 RT 4248.) The prosecutor objected on hearsay grounds, and the trial court said to defense counsel, "Perhaps you can rephrase the question." Defense counsel then asked, "Did Mr. Navarro confirm that he was here for this robbery-murder that he was trying to tell you about in July?" (23 RT 4248.) The prosecutor again objected on hearsay grounds, and the trial court sustained the objection. (23 RT 4248.)

The trial court's finding that Navarro's post-arrest statements to Rodriguez were inadmissible did not constitute an abuse of discretion. Contrary to Navarro's argument, his confirmation to Rodriguez that "he was here for this robbery-murder that he was trying to tell [him] about in July" was inadmissible hearsay because the only relevance of the statement was based on its truth. Although Navarro claims this statement was offered only to show the statement was made, elsewhere he recognizes, as he should, that the significance of this evidence was to show that Navarro had

mentioned the potential crime to his handlers at an earlier time. (Compare AOB 172 and 121-122.) Thus, it is apparent that the content of the statement, i.e. that Navarro had told his handlers of this impending crime, had to be true to prove this point and that is therefore hearsay.

In addition, this Court has long held that post-crime statements made by a defendant are inadmissible at trial when the statements were made at a time the defendant had a compelling motive to deceive and seek to exonerate or minimize his responsibility for a crime. (E.g., *People v. Edwards* (1991) 54 Cal.3d 787; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.) Assuming Navarro actually told Rodriguez that he was in jail for the "robbery-murder that he was trying to tell [him] about in July," Navarro already had a compelling motive to lie—his arrest for Montemayor's murder.

Accordingly, Navarro's post-arrest out-of-court statement to Rodriguez was properly excluded as it was utterly untrustworthy. A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 820.) Here, there is no basis for concluding that the trial court abused its discretion by excluding this statement.

Even assuming there was error, it was harmless given the lack of relevance and reliability and, as set forth repeatedly herein, the very strong case of guilt against Navarro.

2. Bridgette Navarro's statement to Detective Rodriguez

During redirect of Detective Rodriguez, defense counsel asked him if Navarro's wife Bridgette called him, and whether she asked him questions. (23 RT 4326.) When counsel asked what Bridgette was trying to find out, the prosecutor objected on hearsay grounds. The trial court sustained the objection. (23 RT 4326.) Defense counsel then asked, "What did she ask

you about?" The prosecutor again objected on hearsay grounds, and the trial court sustained the objection. Defense counsel offered that it was not being asked for the truth of the matter asserted. (23 RT 4326.) Counsel then asked, "Did she say anything to indicate to you that she was suspicious that the defendant was messing around with other girls?" (23 RT 4326-4327.) After the prosecutor objected on hearsay grounds, the trial court told defense counsel, "A couple of the objections seem to be well-founded to the court. That's why I sustained them." (23 RT 4327.)

Trying a different approach, defense counsel asked Rodriguez if Bridgette appeared to be jealous. (23 RT 4327.) The trial court said, "Any statements made by Bridgette to this witness is not admissible at this stage. Do you have another question?" (23 RT 4327.) Defense counsel asked the court if he could ask if Bridgette appeared to be jealous, and then he asked this question to Rodriguez. Rodriguez said, "yes," and after being asked to characterize her jealously, he said it was "probably extremely." (23 RT 4327.)

Defense counsel asked if Bridgette appeared to be looking for Navarro, and the prosecutor again objected on hearsay grounds. (23 RT 4327.) The trial court wanted to know if defense counsel was talking about Rodriguez being a percipient witness, or was he asking about something Bridgette said to him. Defense counsel responded that he was asking if Bridgette had asked Rodriguez if he knew where Navarro was, and counsel claimed this was not seeking hearsay. (23 RT 4327.) The court replied that they had had a long discussion of what was or was not hearsay, and that counsel needed to clarify that he was asking about Rodriguez's observation of the demeanor of Bridgette. (23 RT 4328.) Defense counsel told the court he would move on. (23 RT 4328.)

Navarro now contends the evidence regarding what Bridgette told Rodriguez was not hearsay, and was admissible under the state-of-mind

exception to the hearsay rule (Evid. Code, § 1250). (AOB 173-177.) He did not assert the state of mind exception below, and the claim is therefore forfeited. (*People v. Edwards* (2013) 57 Cal.4th 658, 727.) In any event, Bridgette's statements to Rodriguez constituted inadmissible hearsay that did not fall within the state of mind exception.

Contrary to Navarro's contention, defense counsel's questions were seeking the truth of the matters asserted by Bridgette. Defense counsel specifically asked what Bridgette said to Rodriguez, i.e. questions regarding whether Bridgette said she was looking for Navarro, or whether Bridgette said she was suspicious that Navarro was "messing around." (23 RT 4326-4327.) This evidence would have only been relevant if the statements were admitted for their truth. For example, if Rodriguez testified that Bridgette was looking for Navarro, that statement would have had to have been admitted for its truth in order to establish that Navarro was no longer living regularly at the Sunrose address when the murder occurred. Additionally, any statements Bridgette made regarding being suspicious of Navarro's activities would have had to have been admitted for their truth, to establish her jealousy. Accordingly, these statements were not "simply verbal conduct," that were "neither inherently true nor false." (See AOB 176; *People v. Cowan* (2010) 50 Cal.4th 401, 472.)

Moreover, the evidence was not admissible under the state of mind exception. Evidence Code section 1250, allows evidence "of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" when offered to prove the declarant's state of mind or emotion at any relevant time, or to prove or explain the declarant's acts or conduct. (Evid. Code, § 1250, subds. (a)(1)-(a)(2).) A prerequisite to the state of mind exception to the hearsay rule is that the declarant's mental state or conduct be factually relevant. (*People v. Geier, supra,* 41 Cal.4th

at p. 586, overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314].) As explained in *People v. Noguera* (1992) 4 Cal.4th 599, for such a statement to be admitted under Evidence Code section 1250, subdivision (a)(1), the declarant's state of mind must be at issue in the action; the statements may not be admitted if their only relevance is to prove conduct of the defendant that might be inferred from the declarant's state of mind. (*Noguera, supra,* at pp. 621–622.)

Bridgette's state of mind when she made the alleged statements to Rodriguez was not at issue. State of mind evidence is admissible under section 1250 only to prove the declarant's conduct in conformity with the statement. The prior state of mind declaration cannot be offered to prove any fact other than the declarant's state of mind to which it refers. (Evid. Code, § 1251.) Here, Navarro sought to use this evidence to establish that Navarro was no longer living regularly at the Sunrose residence. However, Bridgette's state of mind was not relevant to prove Navarro's conduct.

To the extent Navarro wanted to use this evidence to prove Bridgette's jealously and a motive to implicate Navarro in the murder, the statements also were not admissible under the state of mind exception. The statements do not reflect jealousy. Also, the theory that Bridgette's jealousy made her frame Navarro for this was based on speculation and there was no evidence that Bridgette and Corona staged the crime to implicate Navarro. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1116 [state of mind exception did not apply when no evidence of third party culpability].) Furthermore, Bridgette was not available for cross-examination, so the prosecutor had no way of exploring the context underlying the alleged statements of jealousy.

Finally, exclusion of these statements did not cause prejudice to Navarro. Bridgette's alleged statements to Rodriguez, that she was looking

for Navarro, were not necessary to establish that Navarro was not regularly living at the Sunrose address when the crime occurred. Other properly admitted evidence showed that Navarro often moved around and was in the process of moving to Las Vegas. (See 16 RT 2950-2952, 2960-2962, 2985-2991, 3010; 18 RT 3344-3345, 3371-3372; 20 RT 3777-3779, 3831; 22 RT 4138-4139; 26 RT 4688, 4690.) Additionally, as shown below, the trial court did not strike Navarro's mother's testimony that Bridgette called her looking for Navarro. (26 RT 4692-4693.) The jury also heard Rodriguez testify that Bridgette appeared to be jealous, and it was probably extreme. (23 RT 4327.) And Navarro testified that Bridgette was jealous, bitter, and very angry. (20 RT 4074-4076.) Thus, it is not reasonably probable Navarro would have received a more favorable verdict had Bridgette's out-of-court statements to Rodriguez been admitted. (*People v. Guerra, supra*, 37 Cal.4th at p. 1116.)

3. Bridgette Navarro's statements to Rosalinda Razo, Navarro's mother

Lastly, Navarro claims that the trial court erroneously sustained a hearsay objection when defense counsel asked Rosalinda Razo about the nature of Bridgette's phone calls to her. (AOB 178.) The offered testimony, that Bridgette called because she was looking for Navarro, was hearsay and because it did not fall within an exception to the hearsay rule, it was properly excluded by the trial court. In any event, any error in sustaining the objection was harmless, not only because of the strong evidence of guilt but also because Razo ended up testifying that Bridgette called looking for Navarro.

During direct examination of Razo, defense counsel asked if Bridgette Navarro called her regularly in Las Vegas. Razo answered, "a lot of times." (26 RT 4692.) Counsel then asked, "What were the nature of the phone calls when she would call you?" The prosecutor objected, stating

that the question called for hearsay. (26 RT 4692.) Defense counsel said he was not asking for what Bridgette said, just the character or nature of the calls. The trial court sustained the objection. Defense counsel added that he was not asking for the truth of the matter asserted. The trial court noted that it had heard him. (26 RT 4692.)

Defense counsel continued by asking, "Did she ask where he was?" (26 RT 4692.) The prosecutor again objected on hearsay grounds. Defense counsel claimed it was not hearsay because it was not being offered to prove where he was, but rather for "her" state of mind. (26 RT 4692.) The court sustained the objection. (26 RT 4692.) Defense counsel then elicited testimony that Bridgette called often, and that she called all day and part of the night, "looking for my son." (26 RT 4692-4693.) The prosecutor objected that her answer was nonresponsive, and he moved to strike the answer. The trial court said it would let the answer stand. (26 RT 4693.)

As stated above, hearsay "is evidence of an out-of-court statement offered by its proponent to prove what it states. [Citation.] Unless it comes within an exception, it is inadmissible. [Citation .]" (*People v. Alvarez, supra,* 14 Cal.4th at p. 185; Evid. Code, § 1200.) By asking the "nature of" the phone calls or "did she ask where [Navarro] was," defense counsel was trying to find out if Bridgette was looking for Navarro when she called Razo. The only relevance of the statement was to prove the truth of the matter asserted therein—that Bridgette was calling looking for Navarro, meaning he was not with her in California. Thus, the statement was hearsay and the trial court properly ruled it should be excluded.

Even assuming that the trial court's ruling was erroneous, any error was harmless. To this point, Navarro claims the trial court's ruling violated his right to present a complete defense. (AOB 178.) As for Navarro's federal constitutional claim, at no point in the trial court did Navarro assert that the court's ruling deprived him of his right to present a defense.

Accordingly, he cannot legitimately raise the claim for the first time on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn.3; *People v. Crittenden* (1994) 9 Cal.4th 83, 135, fn. 10.)

Moreover, the trial court's evidentiary ruling as to Bridgette's statement did not prevent Navarro from presenting a defense or violate his due process rights. Rather, it merely prevented Navarro from admitting a statement attributed to what Bridgette told his mother. While a refusal to allow a defendant to present a defense infringes upon the defendant's constitutional rights and is subject to the stricter beyond a reasonable doubt standard set forth in *Chapman*, a rejection of only some evidence concerning the defense is reviewed under the *Watson* standard. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, even if the trial court erred in excluding evidence, the alleged error did not rise to the level of constitutional error because Navarro was not denied the ability to present a defense. As stated above, Razo did testify that Bridgette called her looking for Navarro. (26 RT 4692-4693.) Navarro also presented evidence that he was in Las Vegas when the murder occurred. (18 RT 3371; 19 RT 3586; 20 RT 3770, 3777-3779; 21 RT 4139; 26 RT 4688.) In addition, the jury heard evidence that Bridgette was jealous and bitter. (20 RT 4074-4076; 23 RT 4327.) Furthermore, Navarro presented abundant evidence to try to establish his defense that he was a paid informant who tried to stop the murder. (18 RT 3323, 3329-3330, 3413, 3340, 3346-3348, 3361-3362, 3445-3446; 19 RT 3526-3528, 3540, 3543-3544, 3557-3558, 3622-3635; 20 RT 3680-3683, 3710, 3722-3723, 3741, 3740, 3759-3761, 3790-3791, 3793-3794, 3800-3803; 21 RT 3873-3875-3876, 3879-3881, 3891-3892, 3904, 3912; 23 RT 4205-4207, 4220-4221, 4243, 4249-4250, 4263-4265, 4280-4281, 4284-4286, 4289, 4326.)

Accordingly, having otherwise presented his defense in full, there was no constitutional error, and it was not reasonably probable Navarro would

have obtained a more favorable result had the challenged statements been admitted. Regardless, given the overwhelming evidence of guilt, the insignificance of the alleged error, any error is harmless under either standard.

B. The Trial Court Properly Admitted Gang Evidence

Navarro raises several challenges to the expert testimony of Detective regarding the Pacoima Flats gang, claiming it was so inflammatory that it deprived him of due process and his right to a fair trial. First, he claims Detective Booth testified regarding gang customs and habits that were not relevant to this case. Next, Navarro argues the trial court erroneously admitted photographs and a telephone book reflecting gang ties from Martinez's residence that were not connected to Navarro or the crime. Finally, Navarro asserts that the prosecutor was improperly allowed to introduce unnecessary predicate-crime evidence involving other gang members. (AOB 179-193.) The trial court, however, properly admitted the challenged evidence in support of the charged substantive gang crime and gang enhancements. It also evidence Navarro's and his co-conspirators' motives for committing the crimes.

During direct examination of Detective Booth, as Booth was testifying regarding general characteristics of Hispanic gangs, defense counsel objected on Evidence Code section 352 grounds. (17 RT 3161.) Defense counsel said that this was not a "typical gang case," and therefore the expert did not need to testify regarding earning respect, or what a gang member did or did not do. (17 RT 3161.) Counsel thought that allowing the gang expert to spend time discussing gangs in general would inflame the jurors' passions about gang members and was extraneous to the issue at hand. (17 RT 3162.) The trial court disagreed, and did not see anything unduly inflammatory about the present testimony. (17 RT 3162.)

The prosecutor noted that this line of questioning was in the outline previously provided to the defense, and already discussed with the court several times.[24] (17 RT 3162.) In addition, the prosecution had to prove that Navarro knew the gang had engaged in a pattern of criminal activity. Thus, explaining to the jury that gang members glorify violence and brag about their own crimes was part of the foundation for proving that element, i.e. that Navarro knew his gang had committed a pattern of criminal activity. (17 RT 3162.)

Defense counsel argued that gang expert testimony such as that offered by Booth was relevant in a typical gang case where there was a gang fight, but here the issue was whether the robbery was for the benefit of the gang, and that spoke for itself. (17 RT 3163.) He did not have a problem with Booth testifying that gang members commit robberies and share their proceeds with other gang members, but he did not think the expert should testify about shooting someone and shouting out the gang name in rival territory. (17 RT 3163.) The trial court said it would allow the line of questioning. (17 RT 3163.)

A few minutes later, when Booth was testifying about the rules of falsely claiming a gang and the consequences of a gang member denying gang membership, defense counsel again objected based on relevance. (17 RT 3170.) The trial court reminded counsel that before trial, he had the opportunity to object to the prosecutor's proposed line of questioning of the gang expert, and counsel did not object. In addition, the trial court said it had given latitude to both sides to try the case as the attorneys deemed was in the best interest of their respective sides. (17 RT 3170.) Thus, the trial

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[24] During the pretrial discussion of Booth's proposed testimony, defense counsel did not object to testimony regarding the general characteristics of a Hispanic street gang, nor to Booth's proposed testimony regarding the predicate crimes. (12 RT 2236-2249.)

court said it would allow the prosecutor to ask the gang expert his opinion about the traits, characteristics, and culture of a Hispanic gang. (17 RT 3170-3171.) This was correct.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (Evid. Code, §§ 400, 402.) Evidence Code section 352 provides that a trial court has discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice...." The requisite prejudicial effect is not simply any "damaging" effect. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Rather, it is an effect that "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Smithey, supra,* 20 Cal.4th at p. 974.)

The trial court properly admits gang evidence when it is relevant to a material issue at trial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413.) Accordingly, evidence of gang affiliation and activity is admissible when it is relevant to an issue such as motive, intent, or the truth of a gang enhancement allegation. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gardeley* (1996) 14 Cal.4th 605, 619-620.) It is not admissible, however, when its only purpose is to prove defendant's criminal disposition or bad character in order to create an inference defendant committed the charged offenses. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; accord, Evid.Code, § 1101, subd. (a).)

As with any other evidence, a trial court's decision to admit evidence pertaining to gangs and gang membership is reviewed for an abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Gang evidence clearly has a potential for prejudice. (*Carter*, *supra*, at p. 1194; *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 223.) When it meets the test of relevancy, however, it is admissible unless its prejudicial effect clearly outweighs its probative value. (*Carter*, *supra*, at p. 1194; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.)

Here, the gang evidence was relevant to central issues in the case. First, over defense counsel's objection, the trial court properly allowed Detective Booth to testify regarding Hispanic gang customs and habits. Contrary to Navarro's assertion (AOB 182-183), evidence of other gang activity was relevant to explain to the jury the hierarchy of Hispanic gangs and it helped the jury understand the relationship between Navarro and his junior gang members. A gang expert may testify on matters that are sufficiently beyond common experience, such as gang territories, culture, practices, and habits, if such testimony would assist the trier of fact. (See Evid. Code, § 801, subd. (a); *People v. Gardeley*, *supra*, 14 Cal.4th at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) "We have observed the culture and habits of criminal street gangs are not matters within common knowledge for Evidence Code section 801 purposes." (*People v. Ochoa* (2001) 26 Cal.4th 398, 438 citing *People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.)

The prosecution's theory was that Navarro was a shot-caller in the gang, and Martinez, Macias, and Lopez were his "soldiers" who carried out Navarro's orders. To understand why the three younger gang members would commit a murder based on Navarro's orders, the jury needed to comprehend the relationship between older and younger gang members, and the motivation to commit violent acts in order to gain respect. This

was a subject beyond the common knowledge and experience of the jurors, and a proper subject for expert testimony.

In addition, the prosecutor was required to prove that Navarro knew the gang engaged in a pattern of criminal activity. (§ 186.22, subd. (a); see *People v. Lamas* (2007) 42 Cal.4th 516, 523.) Expert testimony about the customs and habits of gangs helped the jury understand why Navarro would know of crimes committed by fellow gang members even when he was not present. As the prosecutor pointed out in response to defense counsel's objection (17 RT 3162), explaining to the jury that gang members glorify violence and brag about their crimes helped prove the element that Navarro knew that members of the Pacoima Flats gang had engaged in a pattern of criminal activity. In addition, Booth's testimony about the customs and habits of Hispanic street gangs was brief and unlikely to significantly affect the jurors' views of Navarro.

Navarro further contends the gang-related photographs and a phone book found in Martinez's residence were irrelevant because they were not connected to him or the crime, and therefore should not have been admitted at trial. (AOB 183-185.) However, photographs and a telephone book seized from Martinez's residence were relevant and properly admitted to establish the connection between the four Pacoima Flats gang members involved in the conspiracy. A disputed issue at trial was whether the murder was gang-related. The photographs and phone book tended to prove that Martinez, Macias, and Lopez were all members of the same gang as Navarro, Pacoima Flats, and that each, at the behest of Navarro, acted in association with, for the benefit of, and to further the activities of the gang. This evidence was probative to the gang allegations, and thus, the trial court properly exercised its discretion by admitting it.

Navarro also complains that the trial court erred by allowing the prosecution to introduce evidence of four so-called "predicate" gang

offenses because it exceeded the number of predicate offenses required to prove a pattern of criminal activity. (AOB 185-191.) The trial court did not abuse its discretion in allowing prosecution gang expert Booth to describe four predicate offenses committed by Pacoima Flats gang members.

Evidence of predicate offenses to prove a gang enhancement is admissible if the evidence is "not more prejudicial than probative and is not cumulative." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223, citing Evid. Code, § 352.) In *People v. Hill* (2011) 191 Cal.App.4th 1104, 1137-1139, the Court of Appeal expressly found that a gang expert's testimony about eight predicate offenses was reasonable. Moreover, appellate courts can be particularly strict in requiring evidence of multiple predicate offenses to support a gang enhancement. So it is reasonable to allow the prosecution to put on a solid, thorough case with more than three proffered predicate offenses. In *People v. Perez* (2004) 118 Cal.App.4th 151, the prosecution charged a gang enhancement when a Hispanic youth asked an Asian youth where he was from, and then shot him. The Court of Appeal summarized—and found inadequate—the prosecution evidence supporting the gang enhancement as follows:

> Even if we assume that the [defendant's] gang was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of Siuva C., such evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that "the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324, 109 Cal.Rptr.2d 851, 27 P.3d 739.) In the absence of proof

> of this element of the criminal street gang allegation, the finding on the allegation must be stricken.

(*Perez,* at p. 160.)

Similarly, in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611, the Court of Appeal criticized a gang expert's blanket assertion, "'I know [the alleged gang members have] committed quite a few [crimes].'" (*Id.* at p. 611.) The court specifically condemned the lack of a stated evidentiary basis for the expert's conclusions:

> Even if we could reasonably infer that Lang meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. . . . "Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] . . . 'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 618 [59 Cal.Rptr.2d 356, 927 P.2d 713].)
>
> We cannot know whether the basis of Lang's testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.

(*Id.* at p. 612; see also *In re Leland D.* (1990) 223 Cal.App.3d 251, 259 [insufficient evidence of a pattern of criminal activity where the only evidence was an expert's opinion "based on nonspecific hearsay and arrest information"].)

In short, a prosecutor's *failure* to adequately prove a pattern of gang activity through predicate offenses is error. Under the circumstances, the prosecutor here should not be faulted for having presented four prior Pacoima Flats convictions to prove "a pattern of criminal gang activity" beyond a reasonable doubt.

Navarro's primary authority, *People v. Williams* (2009) 170 Cal.App.4th 587, is inapposite. (AOB 190-191.) There, the defendant was charged with possession of a firearm and ammunition by an ex-felon, drug offenses, gang enhancement allegations, and a substantive gang offense. (*Id.* at p. 595.) The trial court admitted evidence of three prior crimes involving the defendant under Evidence Code section 1101, 15 other crimes and contacts with law enforcement involving the defendant, and six predicate offenses, one of which involved the defendant. (*Id.* at pp. 598-599, 601-602.) Although the defendant had conceded that the evidence of the predicate offenses was relevant, the Court of Appeal found that the trial court had committed "plain error in the admission of such unnecessary quantities of evidence, which turned the trial of this routine drug and weapons possession case into a weeks-long marathon." (*Id.* at pp. 595, 609.) The Court of Appeal further found that the trial court had abused its discretion in admitting cumulative evidence concerning issues not reasonably subject to dispute: "The sheer volume of evidence extended the trial—and the burden on the judicial system and the jurors—beyond reasonable limits, and the endless discussions among the trial court and counsel concerning the admissibility of such evidence amounted to a virtual street brawl." (*Id.* at p. 611.) Notwithstanding these findings of error, the Court of Appeal found no basis for reversal because the gang evidence had been relevant, and there was no prejudice from the inflammatory nature of the offenses. (*Id.* at pp. 612-613.)

For several reasons, *Williams* is readily distinguishable and does not compel reversal here. First, *Williams* did not expressly disapprove the substantive admission of more than three predicate offenses but only found in that case that 15 predicate gang crimes was too excessive because it was cumulative of other evidence. (*Williams*, *supra*, 170 Cal.App.4th at p. 610.) Second, the jury in *Williams* had been subjected to an extremely

lengthy delay, both because of the arguments of counsel and the repetition of the evidence. Here, in contrast, the evidence of the Pacoima Flats predicate crimes was not overly cumulative of other evidence, and the nature of the crimes was explained in a matter of minutes by the gang expert Booth. Additionally, none of the predicate crimes involved Navarro or were more egregious than the charged crimes, so the crimes could not be considered unduly inflammatory. (17 RT 3184-3194.) Finally, *Williams* held that the admission of cumulative evidence, even if improper under state law, did not violate due process because all of the evidence was relevant. (*Williams, supra,* 170 Cal.App.4th at pp. 612-613.)

In short, the prosecutor here was required to prove that the murder of Montemayor was committed for the benefit of a criminal street gang, an association whose members had engaged in a pattern of criminal gang activity. Case law establishes that evidence of four predicate offenses is permissible to prove such an allegation, and that too little evidence might require dismissal of the allegation. Thus, there was no error here.

Lastly, even if the trial court erred by admitting the challenged gang evidence, any error was harmless. Navarro claims the alleged evidentiary error rendered the trial fundamentally unfair and violated his constitutional rights. (AOB 191-193.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439, emphasis in original.) However, a trial court's ruling related to the admissibility of evidence, and the application of state evidentiary law rarely implicates a defendant's constitutional rights. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010.) Thus, "[a]bsent 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, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Navarro fails to make a showing of prejudice here under either the *Watson* or *Chapman* standards. As set forth above in Arguments I through III, the evidence of Navarro's guilt was abundant. The evidence that Corona and Perna enlisted Navarro to rob and kill Montemayor and that Navarro, in turn, enlisted his soldiers to execute the conspiracy, was overwhelming. Navarro was tied to each conspirator and to the crime by notes, telephone records, the getaway car, gang ties, and his role as a shot-caller in the gang. Navarro's defense, that he withdrew from the conspiracy, was incredulous and belied by his principle role in directing and coordinating the murder and robbery and by his and his wife's efforts to distance himself when it went awry. Indeed, even the set up calls to law enforcement—laying the groundwork for a possible defense—do more to establish his guilt than exonerate Navarro in any way. It confirms his sophistication and deliberation in his conduct that reinforces his leadership role. In addition, Navarro's prior arrests and the fact he carried a gun showed he was an active gang member committing crimes on behalf of his gang. (18 RT 3321, 3383, 3393, 3403-3404, 3419-3420, 3424-3426, 3439, 3441-3442, 3447-3450, 3454-3455; 21 RT 3884-3885, 3898; 23 RT 4217, . 4263.)

Accordingly, even under the more stringent *Chapman* standard, this Court can find beyond a reasonable doubt that the challenged gang evidence did not contribute to the verdict.

C. The Trial Court Did Not Hamper Defense Counsel's Examination of Agent Thomerson; the Trial Court Properly Excluded Exhibit I

Navarro contends the trial court hampered defense counsel's effective examination of FBI Agent Thomerson because the court "cut short" his

interview with Thomerson before the agent testified, and later would not allow defense counsel a recess to discuss some reports with Thomerson before conducting redirect. (AOB 194-198.) Navarro further claims the trial court improperly excluded defense Exhibit I, the logs of the FBI interactions with Navarro. (AOB 198-202.) The trial court properly exercised its discretion by not recessing to allow defense counsel additional time to confer with Thomerson because defense counsel already knew the essence of Thomerson's testimony. In addition, the trial court correctly excluded Exhibit I because it contained greatly irrelevant information, and reviewing this exhibit would necessitate an undue consumption of time.

1. Relevant background

Before trial, while discussing the proposed questions and area of inquiry for the FBI agents, defense counsel told the court that Agent Thomerson, through his attorney, had refused to speak with defense counsel or the prosecutor, but agreed to appear in court and testify. (11 RT 1999.) Defense counsel did not know what Thomerson was going to say, except that his name appeared on most of the FBI reports, and Thomerson's attorney said he was aware of and could testify to everything contained in the reports. (11 RT 1999-2000.) Defense counsel later again said he believed Thomerson would be available to testify; according to the FBI attorney, Thomerson or somebody in his position would be available to testify. (11 RT 2004.) However, counsel added that "they are very secretive down there at the FBI for some reason. So they wouldn't even let me know exactly who they are going to send." (11 RT 2004.) The prosecutor said he was informed that Agent Thomerson would be available to testify. (11 RT 2004.)

The evening before Agent Thomerson was scheduled to testify, the prosecutor confirmed that Thomerson would appear the following morning. (19 RT 3673.) The trial court told the parties to be there at 9:15 a.m. "just

to make sure that we can discuss any issues that might be lingering for that witness." (19 RT 3673.) Defense counsel asked if the clerk had the FBI records that the defense had subpoenaed. (19 RT 3673-3674.) After privately conferring with the court clerk, defense counsel remarked that he would get copies. (19 RT 3674.)

The next morning, the court asked defense counsel if the next witness scheduled to testify was ready. (20 RT 3676.) Defense counsel said that yes, Thomerson was there; however, as the trial court was aware, defense counsel never had the chance to personally speak to Thomerson, so before taking testimony from him, counsel wanted an opportunity to briefly talk to him about the areas upon which they planned to concentrate. (20 RT 3676.) The trial court said that counsel already knew that the testimony he would be eliciting from Thomerson concerned Navarro's relationship with the FBI, and defense counsel provided adequate discovery regarding the proposed testimony. The court pointed out that it had asked defense counsel to arrive by 9:15 that morning to do what he needed to do to be ready to start on time. Therefore, the court was going to bring in the jury. (20 RT 3676.) Defense counsel asked for 15 minutes, and the trial court denied his request. (20 RT 3676-3677.)

Later, towards the end of the prosecutor's cross-examination, the trial court took counsel into chambers and admonished defense counsel because Navarro was talking to him during the prosecutor's questioning of Thomerson. (20 RT 3727.) The court said they would soon take a break, and Navarro would have the chance to talk to defense counsel at that time. (20 RT 3727.) The prosecutor asked to take the morning break at that time, and defense co-counsel said he wanted to object to the question that was pending before they went back to chambers. (20 RT 3728.) The trial court sent the jury on its break, and advised Navarro not to talk to his attorney

during questioning. (20 RT 3728-3729.) The trial court dealt with defense counsel's objection, and then took a 15 minute recess. (20 RT 3729-3730.)

After the recess, the court asked defense counsel if he had the chance to talk to Navarro during the break. (20 RT 3730.) Defense counsel confirmed that they had a satisfactory discussion. (20 RT 3730.) The trial court then commented that at 9:30 that morning, defense counsel had asked for another 15 minutes to talk to Thomerson, and the court denied that request. The trial court wanted to know if, after the prosecutor finished cross-examination of Thomerson, there were any areas defense counsel had not had the chance to inquire of Thomerson. (20 RT 3730.) Defense counsel said he would like to go over the FBI reports with Thomerson in further detail because Thomerson wrote some of the information contained in the reports, but some if it he did not write and he needed his memory refreshed. (20 RT 3730-3731.) Defense counsel said he talked to Thomerson for a few minutes, but there were some things that were not contained in the reports, such as the FBI giving Navarro money to purchase cars that were rigged for sound and given to Mexican Mafia members. (20 RT 3731.)

After the trial court asked if he spoke with Thomerson, defense counsel then said he talked to him for a few seconds, but he wanted to sit down with Thomerson to go over the report. Counsel said he had not been able to talk to Thomerson for three years because the FBI would not allow it, but now, Thomerson was there and willing to talk. (20 RT 3731.) The trial court said it would not engage in discovery, but it wanted to make a record of what was provided to defense counsel. Defense counsel said that the FBI provided him with numerous reports. Thomerson's name was on some, but not others. Some reports were not clear as to who authored them, and counsel did not know what information Thomerson was privy to or actually observed. (20 RT 3731.) Defense counsel wanted to go over with

Thomerson more detail of what happened in those reports, so he asked the court if they could break after cross-examination to do so. (20 RT 3731-3732.)

The prosecutor noted that he had asked his last question before the break, and was just waiting for an answer. (20 RT 3732.) The trial court suggested that defense counsel just ask Thomerson the questions about the report while Thomerson was on the stand. Counsel answered that he could, but the reports were about three inches thick, and counsel was just reading through them. (20 RT 3732.) Defense counsel did not think he could go through the "tremendous amount" of information in the reports and ask Thomerson about every entry. (20 RT 3732.) The trial court agreed that the FBI reports were voluminous, but assumed that defense counsel had read all of the reports, and said that he should have indexed them so he could direct the witness to certain pages of inquiry. (20 RT 3732-3733.) The court reminded defense counsel of prior discussions, and what he needed to do to be ready, and found that defense counsel's representation that he had not looked at the voluminous reports or indexed them, was not acceptable. (20 RT 3733-3734.)

Defense counsel explained that he had read over the reports, but was not aware of what Thomerson knew or did not know. (20 RT 3734.) With another witness, defense counsel would have gone over the reports before that witness testified, but with Thomerson, counsel had only ten minutes before he took the stand. (20 RT 3734.) Defense counsel added that he wanted to go over the reports with Thomerson to see what he may have left out. (20 RT 3735.) Counsel did not want to ask Thomerson what he did nor did not remember while he was on the stand, and counsel did not like asking a witness a question when counsel did not know the answer. (20 RT 3735.) Defense counsel said he had read the 50, 60 pages of reports, and prepared a brief summary for each entry. Counsel did not think it was

"extremely important" to go over every detail with Thomerson. He just wanted the jury to get the "gist" of what Navarro was doing for the FBI, so the jury did not need to know everything Navarro did. (20 RT 3735.)

The trial court said,

> Noting your examination and what the court allowed over the objection of the prosecution, the jury knows he was an informant, the nature of his activities, the quality if the work, and all of the other matters that you put into your opening statement. So I don't feel that you're being foreclosed from presenting material evidence for your client.

(20 RT 3736-3737.)

Defense counsel said he wanted to find out if there was something more than what was contained in the reports. (20 RT 3737.) Thomerson was being very cooperative and did not know that the FBI had prevented counsel from talking to him. (20 RT 3737.) Defense co-counsel then asked if they could break for lunch early so that defense counsel could speak with Thomerson. (20 RT 3738.) The trial court said no, but it would allow defense counsel a few minutes to talk to Thomerson to see if he knew anything about Navarro's dealings with cars. (20 RT 3739.) Defense counsel could then decide what questions to ask on that subject. As to defense counsel's request to recess to go over the reports in detail with Thomerson, the trial court denied that request because everything defense counsel wanted to present to the jury in the guilt phase as far as Navarro's relationship with the FBI had been fully presented. (20 RT 3739.)

2. The trial court properly exercised its discretion to control the proceedings

Navarro claims the trial court did not allow him sufficient time to interview Thomerson, yet he cites no authority or legal reasoning providing for such accommodation. (AOB 194-198.) An appellant has the burden of presenting legal argument and authority on each point raised. When an

appellant asserts a point, but fails to support it with legal argument and citations to authority, the reviewing court may treat it as waived and reject it without consideration. (*People v Stanley* (1995) 10 Cal. 4th 764, 793.)

In any event, the trial court properly exercised its discretion to control the proceedings during trial. The trial court's statutory duty is to control the trial and ancillary proceedings "with a view of the expeditious and effective ascertainment of the truth." (Pen. Code, § 1044.) Thus, "[a] trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951 quoting *People v. Cox* (1991) 53 Cal.3d 618, 700.) Furthermore, "[t]he determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." (*People v. Gurule* (2002) 28 Cal.4th 557, 618; *People v. Sakarias* (2000) 22 Cal.4th 596, 646.) Absent a showing of an abuse of discretion, a reviewing court will uphold a lower court's actions. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

First, although it may not have been as long as he wanted, defense counsel did have about 10 minutes to speak with Thomerson that morning before he took the stand. (See 20 RT 3680, 3689.) In addition, the trial court's denial of defense counsel's request to recess before redirect of Thomerson was within the discretion of the court. Defense counsel had already provided an offer of proof of what he expected from Thomerson's testimony; thus, he knew generally as to what Thomerson would testify. A few years before the trial commenced, defense counsel reviewed the documents produced by the FBI and had the opportunity to submit questions to the FBI agents. (See 12 RT 2197.)

In a pretrial hearing, the trial court advised defense counsel that during the guilt phase, the court would not be allowing a "detailed

recitation of every single activity and every single event" Navarro was involved in as an informant. (12 RT 2196.) The prosecutor noted that both sides were informed approximately a year and a half before this pretrial hearing, that the FBI's grant of authority to their agents was that they could testify to items that were in the records, but not beyond that. (12 RT 2198.) Thus, defense counsel knew that Thomerson would be limited to testifying regarding what was contained in the FBI records. (12 RT 2198.)

In addition, defense counsel acknowledged that he did not need to go through every entry in the reports with Thomerson, and that he had presented to the jury the relevant evidence of Navarro's involvement with the FBI. (See 20 RT 3735.) Therefore, the trial court did not abuse its discretion in refusing defense counsel's request for a recess to further interview Thomerson.

3. The trial court properly excluded Exhibit I

Navarro also claims that the trial court undermined the defense by excluding the exhibit that contained the FBI logs of the interactions with Navarro. (AOB 198-202.) The trial court properly exercised its discretion when it excluded Exhibit I, the FBI logs, as irrelevant and time consuming. Moreover, the exclusion of this evidence did not deprive appellant of his right to present a defense, and any error was harmless.

Before trial, the court discussed what, at that time was, court's Exhibit 71, which was the log of FBI activity engaged in by Navarro. (11 RT 2002.) The defense hoped to establish that Navarro was not just an occasional informant, but one that was in consistent contact with the FBI and gave them corroborated information about the Mexican Mafia. (11 RT 2000.) The court noted the log was quite extensive, and looking at all the listed items, it appeared to be unduly time consuming and not everything in it was relevant. (11 RT 2002.) The court said it would allow the FBI handler or agent to testify in a succinct manner to the relevant items in this

log, but the court did not think it was necessary or relevant to go through every particular item to establish what the defense was hoping to establish. (11 RT 2002.)

A little later, the trial court repeated that all of the information in this document was "too lengthy, unnecessary, some of it is not relevant, at least on direct examination." (11 RT 2004.) The trial court thought defense counsel should go through the document to highlight the relevant portions. (11 RT 2005.) Defense counsel agreed with the trial court, noting there were 60 different contacts. (11 RT 2005.) The trial court advised counsel that he would not be allowed to cover all of the enumerated events during his direct examination. (11 RT 2005.)

After the close of evidence, defense counsel moved for the admission of defense Exhibit I which were the approximately 150 pages of FBI records. Counsel said it was relevant because witnesses referred to it during their testimony, and based upon it their opinions regarding Navarro and his FBI and ATF activities. (27 RT 4797-4798.) Defense counsel noted that per the court's request, it had redacted some portions that may have been objectionable, including information about arrests that did not result in convictions, and information about some other attorneys. (27 RT 4798.)

The trial court said this exhibit contained many entries that were extraneous to this case, and that it had cautioned defense counsel at the beginning of trial that it was not likely the court would admit this document. The trial court pointed out that based on its admonishment, defense counsel had elicited the pertinent portions of the document through testimony. (27 RT 4798.) The trial court then denied the request to admit Exhibit I. (27 RT 4798.)

As stated above, relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to

the determination of the action." (Evid. Code, § 210.) But even if relevant, evidence is still subject to section 352, permitting exclusion of evidence that is more prejudicial than probative.

> 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.

(Evid. Code, § 352.)

The trial court need not expressly weigh prejudice against probative value or even expressly state that it has done so. (*People v. Crittenden, supra,* 9 Cal.4th at p. 135.) "No 'magic words' are necessary to show an appropriate exercise of discretion under Evidence Code section 352. [Citation.] What is important is that the record manifest the trial court's exercise of discretion available under Evidence Code section 352. [Citations.]" (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1845.)

A decision to exclude or admit evidence under this section is one which is addressed to the discretion of the trial court, and will not be reversed on appeal absent a clear showing of abuse of discretion. (*People v. Mincey* (1992) 2 Cal.4th 408, 439.)

Here, the trial court did not abuse its discretion when it excluded Exhibit I. The trial court explicitly stated that much of the information contained in Exhibit I was not relevant, unnecessary, and extraneous to this case. It would have taken an undue consumption of time to go through the logs and sanitize them of irrelevant information before presenting them to the jury. Further, the fact that Navarro served as an informant, was sometimes compensated, and provided some useful information was more than amply covered by Thomerson's testimony. (20 RT 3690-3693, 3696-3698, 3700-3705, 3710, 3726-3727, 3742-3745, 3750-3751, 3782.) Also, the jury's review of the approximately 150 pages of FBI logs, which

documented over 60 contacts with Navarro, would necessitate an undue consumption of time and likely confuse the jury. (11 RT 2002, 2004; 27 RT 4798.) As defense counsel acknowledged during a pretrial hearing, the log was "quite voluminous." (11 RT 1997.)

Furthermore, contrary to Navarro's claim, exclusion of Exhibit I did not prevent him from presenting a complete defense. (AOB 200-201.) A defendant has a fundamental right under the United States Constitution to present a defense and all pertinent evidence significant to that defense. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099, citing *Davis v. Alaska* (1974) 415 U.S. 308, 317 [94 S.Ct. 1105, 39 L.Ed.2d 347].) Although Navarro attempts to portray the instant evidentiary ruling excluding Exhibit I as involving errors of federal constitutional dimension, "[a]s a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense." (*People v. Frye* (1998) 18 Cal.4th 894, 945, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge, supra,* 7 Cal.4th at p. 1103, quoting *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)

Here, Navarro presented abundant evidence of his involvement as an informant for the FBI and other law enforcement agencies. Thomerson testified regarding the pertinent contacts with Navarro. During direct examination of Agent Thomerson, defense counsel showed him Exhibit I, and asked him about several of the entries. (20 RT 3782.)

Thomerson testified regarding an accounting of monies the FBI gave Navarro, about a document noting Navarro gave the FBI information about San Fernando street gang members who were involved in narcotics, entries regarding Navarro providing information on the Mexican Mafia planning

an attack on "Blinky Rodriguez," an entry regarding John Garcia aka Nemo having a green light on him, and an entry regarding three tape recorded meetings with Frank Rodriguez and other Mexican Mafia members, (20 RT 3690-3693, 3696-3698, 3703-3705, 3726-3727.) Thomerson also testified about Navarro supplying information on the Pacoima Brownstone gang, information about Tony Rivera, a main drug supplier in the San Fernando Valley, and information regarding a "Billy" who produced methamphetamine. (20 RT 3742-3745.) On redirect, Thomerson testified regarding a car purchased by the FBI and equipped with a recording device, and provided to the Mexican Mafia through Navarro. (20 RT 3750-3751.)

Thomerson also testified that Navarro gave the FBI information on various members of Pacoima Flats street gang, and information on the Israel Mafia. (20 RT 3700-3701.) Thomerson said that Exhibit I contained about 64 entries between April 2000 and sometime in 2001, and it appeared that Navarro was a relatively active informant for the FBI. (20 RT 3710.) According to Thomerson, at some point, Navarro started giving the FBI more information on the Arellano-Felix cartel, and that was one of the reasons he started working with the San Diego FBI office. (20 RT 3711-3714.)

Thus, the evidence the defense sought to introduce, i.e. that Navarro was more than the occasional informant but was in constant contact with the FBI and gave them corroborated information regarding the Mexican Mafia (see 11 RT 1999-2000), was presented to the jury. The jury did not need to read 150 pages of FBI logs in order to understand Navarro's role with the FBI.

Moreover, any error in excluding Exhibit I was harmless. The erroneous exclusion of evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the

evidence been allowed. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Here, Navarro would not have.

In addition to Thomerson's testimony, Agent Starkey and Detective Rodriguez testified regarding the work Navarro did for their respective agencies as an informant. For example, Detective Rodriguez detailed the information Navarro that provided such as information that led to three arrests. (23 RT 4218-4220, 4268-4270, 4273.) Agent Starkey said Navarro called him frequently and put him in touch with a gun dealer. (21 RT 3876, 3883-3884.) Special Agent Jason Hammond also testified regarding information Navarro provided to him after Navarro was arrested. (21 RT 4086-4092.)

In sum, Navarro presented abundant evidence regarding his work as an informant for the FBI along with the other agencies. Thus, it is not reasonably probable Navarro would have obtained a more favorable result had Exhibit I been admitted into evidence.

D. The Trial Court's Combined Evidentiary Rulings Were Not Prejudicial and Did Not Implicate Navarro's Constitutional Rights

Navarro asserts that the pattern of the trial court's rulings, "which consistently allowed in prosecution evidence and consistently excluded evidence favorable to the defense," violated his rights to due process and to present a defense in violation of his state and federal constitutional rights. (AOB 203-204.) There was no constitutional violation by the court's proper application of state law rules of evidence.

A criminal defendant has a right under the federal constitution to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038, 35 L.Ed.2d 297].) However, this right does not preclude a trial judge from excluding evidence which is repetitive, marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues.

(*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [106 S.Ct. 2142, 90 L.Ed.2d 636].) State and federal rule makers have broad latitude to exclude evidence from criminal trials. (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1261, 140 L.Ed.2d 413].) These rules do not infringe upon the right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve. (*Rock v. Arkansas* (1987) 483 U.S. 44, 54-55 [107 S.Ct. 2704, 97 L.Ed.2d 37].)

Application of the ordinary rules of evidence does not impede a defendant's right to present a defense. (*People v. Mincey, supra,* 2 Cal.4th at p. 440.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]" (*People v. Fudge, supra,* 7 Cal.4th at p. 1103.) "[R]ejection of some evidence concerning a defense," if error at all, is not of constitutional magnitude. (*Ibid.*, citing *In re Wells* (1950) 35 Cal.2d 889, 894.)

Here, the trial court's rulings were neither arbitrary nor disproportionate. For example, when excluding the out-of-court statements made by Bridgette to Rodriguez, the trial court considered the prosecutor's objections and found them to be "well-founded." (23 RT 4326-4328.) Also, when excluding Bridgette's statements to Navarro's mother, the court listened to defense counsel's offers of proof before sustaining the prosecutor's objections. (26 RT 4692-4693.) In addition, when ruling on the prosecution's gang evidence, the court made reasoned decisions after listening to argument from both sides. (17 RT 3161-3163, 3170-3171.)

Moreover, Navarro was not precluded from presenting his defense that he was an informant who tried to stop the murder. Navarro testified and called four law enforcement officers regarding his work as an informant. Navarro's testimony included the same information he

improperly sought to elicit from Rodriguez. (See 19 RT 3631-3632, 3636; 20 RT 3799-3802.)

In addition, Navarro called an expert on the Mexican Mafia to explain common practices of an informant and what it meant to have a "green light" on an individual. Retired Los Angeles County Sheriff's Sergeant Richard Valdemar interpreted a letter from Felipe Vivar to Corona as a warning to not trust or get involved with Navarro. (25 RT 4441-4443.) Valdemar explained it was consistent for an informant to associate with and conduct himself as a gang member to obtain information. It was also common for an informant to provide cell phones to other gang members to integrate themselves into the gang. (25 RT 4443-4445.) Valdemar opined that the jailhouse stabbing of Navarro was consistent with someone carrying out a green light. (25 RT 4452-4453.)

Accordingly, the trial court's rulings did not implicate Navarro's constitutional rights, and his claim should be rejected.

V. NAVARRO FORFEITED SOME OF HIS PROSECUTORIAL MISCONDUCT CLAIMS AND IN ANY EVENT, THE CLAIMS LACK MERIT

Navarro contends that the prosecutor committed misconduct on several instances, including preventing Navarro from completing his answers during cross-examination; improperly conducting cross-examination of Navarro in an argumentative, sarcastic, and otherwise improper manner; and improperly asking Navarro about matters that were not in evidence or had been precluded *in limine*. Navarro claims that the combined effect of these errors prejudicially distorted the trial. (AOB 205-237.) By failing to raise objections to some of the conduct below and request an admonition, Navarro has waived those claims. In any event, the prosecutor did not commit misconduct, and even if he had, no prejudice ensued.

A. Applicable Law

The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.]' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) "[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.'" (*Gionis*, *supra*, at p. 1215.) "[I]n cases where jurors are improperly exposed to certain factual matters, the error is usually tested under the standard set out in *People* [*v.*] *Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243." (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323-1324.) Thus, reversal of a judgment of conviction based on prosecutorial misconduct is called for only when, after reviewing the totality of the evidence, the reviewing court can determine it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct. (*People v. Bell* (1989) 49 Cal.3d 502, 534; *People v. Watson, supra,* 46 Cal.2d at p. 836.) The *Chapman* standard of harmless error applies when the prosecutor's misconduct rendered the trial fundamentally unfair. (*People v. Bordelon*, *supra*, 162 Cal.App.4th at p. 1323.)

B. The Prosecutor Properly Objected to Unresponsive Answers

Navarro contends that the prosecutor committed several instances of misconduct during cross-examination of him. First, Navarro claims that the prosecutor continually objected during his answers to the prosecutor's questions. (AOB 207-215.) Navarro waived this prosecutorial misconduct claim by failing to raise it below and by failing to ask the court to admonish

the jury. (See 18 RT 3412-3413, 3453; 19 RT 3529, 3533-3535, 3558-3559; 22 RT 4152-4153, 4176-4177.) A contemporaneous objection is required to preserve a claim of error based on prosecutorial misconduct, unless the misconduct is so egregious that it could not be cured by a timely objection and appropriate admonition by the court. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Thus, an objection and a request for a curative admonition must be made in order to preserve the claim for appeal. (*People v. Montiel* (1993) 5 Cal.4th 877, 914.) Because Navarro did not object and request appropriate admonitions, he has forfeited any contention that the prosecutor's conduct constituted misconduct. (*People v. Silva* (2001) 25 Cal.4th 345, 373; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

In any event, the prosecutor did not commit misconduct by objecting to some of Navarro's answers since they were nonresponsive to the questions posed. "A prosecutor is permitted wide scope in the cross-examination of a criminal defendant who elects to take the stand." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147.) "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." (Evid. Code, § 766; see *People v. Bell* (2007) 40 Cal.4th 582, 611, fn. 11.) For example, "[a] general question alluding to a meeting at another 'time' at a given place does not invite the witness to include that which happened on the occasion in his answer." (*People v. Davis* (1963) 217 Cal.App.2d 595, 598.) Thus, when a witness properly answers a yes or no question, and then tries to offer an explanation, upon motion by the questioning attorney, a trial court may properly strike the nonresponsive portion because "any explanation would be no more nor less than a volunteer statement." (See *People v. Sliscovich* (1924) 193 Cal. 544, 556.)

Here, this is exactly what happened. Every challenged remarked resulted from Navarro trying to explain or offer more than what was called

for by the pending question. For example, the prosecutor asked Navarro, "Is that how you view this, I'll trade my friends in so I can have a few dollars for myself?" (18 RT 3412.) This question called for a yes or no answer, but Navarro responded, "No. Philip Sanchez was doing things - -." The prosecutor objected to any response after no. (18 RT 3412.) After defense counsel said that Navarro should have been allowed to explain his answer, the trial court advised him to make a note of it as an area to revisit during redirect. (18 RT 3412.) Similarly, while asking Navarro about his trip to Crescent City with Corona, the prosecutor asked, "She came back with more information and talked to you more about this hit, correct?" (19 RT 3529.) Navarro answered, "No. On the way back when we drove on the way back she was - -." Again, the prosecutor properly objected that anything after "no" was nonresponsive because the question called only for a yes or no answer. (19 RT 3529.)

Every time Navarro either did not answer the question, or tried to explain his answer, the prosecutor properly objected and asked the court to strike the unresponsive answer. (See also 18 RT 3454; 19 RT 3533-3535, 3558-3559; 22 RT 4152-4153, 4176-4177.) The prosecutor's conduct was in accordance with the law and did not constitute misconduct.

C. The Nature of the Prosecutor's Questioning of Navarro Did Not Constitute Misconduct

Navarro further claims the prosecutor improperly and repeatedly asked argumentative questions, made sarcastic remarks, and denigrated Navarro's testimony and character. (AOB 215-228.) Navarro failed to object to the majority of the challenged comments on the grounds of misconduct. (See 18 RT 3425; 19 RT 3492; 20 RT 3806-3808, 3857.) Accordingly, he has forfeited his claims as to those comments. (*People v. Silva, supra*, 25 Cal.4th at p. 373.)

In any event, viewing the prosecutor's questions in context, no misconduct occurred. Generally,

> [a]lthough a defendant cannot be compelled to be a witness against himself, if he takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is 'very wide.' [Citation.]

(*People v. Harris* (1981) 28 Cal.3d 935, 953.)

Accordingly,

> [w]hen a defendant voluntarily testifies, the district attorney may 'fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.'

(*Ibid.*)

Navarro claims the prosecutor committed misconduct by asking certain questions based on speculation or based on facts not in evidence. (AOB 216-217, 225-227.) To the contrary, the prosecutor's questions were based on inferences from the evidence and aimed at testing the veracity of Navarro's testimony regarding his work as an informant. For example, while the prosecutor was trying to flesh out whether Corona asked Navarro to personally "touch up" Chispa, or to have someone else do it, Navarro first said she asked him to get someone else to do it, and then he said while they were at McDonald's, she first asked him to personally do it. (19 RT 3531.) The prosecutor made a comment about adding that to the note, and the court overruled defense counsel's objection that the prosecutor was narrating for the jury. (19 RT 3531.) Corona had given Navarro the note at McDonald's, and that was where he said he wrote "manitas" on it. According to Navarro, he wrote "manitas" to remind himself to tell his handlers everything. Thus, the prosecutor fairly commented on the fact that he did not include information about doing it himself on the note, i.e. he

failed to include a reminder to tell his handlers that Corona asked him to personally touch up this person.

Another challenged remark occurred when the prosecutor was asking Navarro when he met Rodriguez, and whether it was the day Navarro was arrested for having a gun in a secret compartment in his car. (20 RT 3804.) During this testimony, Navarro acknowledged that he told the police it was not his gun and he did not know about the secret compartment. (20 RT 3805.) Navarro also admitted at trial that it really was his gun. (20 RT 3805-3806.) The prosecutor was trying to establish that Navarro began informing for Rodriguez to work off a felon in possession charge. (20 RT 3806-3807.) Navarro's story was that they randomly approached Navarro about being an informant, and it was not in exchange for making his firearm possession charge go away because he never had to go to court. (20 RT 3807.)

The prosecutor asked Navarro if the reason he did not get charged for having the gun was because someone may have believed his lie that it was not his gun. (20 RT 3807.) Navarro replied that he did not understand, and defense counsel objected based on speculation as to why charges were not filed. (20 RT 3807.) The trial court said the answer would stand. (20 RT 3808.) The prosecutor's question was based on Navarro's testimony that he did not become an informant to work of a felon in possession of a firearm charge, and designed to refute Navarro's testimony that the timing of becoming an informant for Rodriguez had nothing to do with being caught with a firearm in his car.

Navarro also claims that the prosecutor committed misconduct by making several argumentative or sarcastic remarks. (AOB 217-224.) A review of the challenged remarks shows that the prosecutor's cross-examination of Navarro was understandably rigorous in view of Navarro's testimony that he was no longer an active gang member but instead was

working with law enforcement and tried to prevent the murder. The alleged sarcastic or argumentative remarks made by the prosecutor in various contexts did not rise to the level of misconduct. As stated above, when a defendant testifies, the permissible scope of cross-examination is very wide and even a certain amount of sarcasm is permissible. (See *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1657.) In *Jacobs*, after the defendant gave a response that implied he would be acquitted, the prosecutor commented, "[i]t assumes that you will be in a position to do that, doesn't it?" (*Ibid.*) The court of appeal noted that although the remark was sarcastic, "[i]t surely does not rise (or sink) to the level of conduct condemned by the misconduct cases." (*Ibid.*)

Navarro's defense was based on his assertion that he was an informant who was pretending to still be a gang member. Through cross-examination, the prosecutor was trying to reveal holes in Navarro's story and address his selective memory. For example, the prosecutor was trying to show Navarro's letter to Casper, which was written shortly before the murder, demonstrated Navarro was still a shot-caller in the gang. In that letter, Navarro wrote, "Now I got five signatures. Shoot, Doggie, we are gonna be unstoppable." (20 RT 3854.) After Navarro claimed he could not remember what this meant, and denied that it took five signatures to become a member of the Mexican Mafia, the prosecutor tried to help Navarro remember what this reference could have meant. (20 RT 3854-3855.) Navarro said he did not know how many signatures were required because he had "never actually seen somebody get made." (20 RT 3855.)

Navarro testified that he did not have five signatures when he wrote this letter to Casper. (20 RT 3855.) He explained that Casper was jail in "super max," and Navarro was trying to find out everything that was going on. (20 RT 3855-3856.) Navarro then said that he could not remember what he meant when he said he had five signatures. (20 RT 3856.) The

prosecutor asked if he meant that he went to Dodger Stadium and got the autograph of five ballplayers. (20 RT 3856.) Navarro answered that he had never been there, and he again said he had no idea what he meant by the reference to signatures. (20 RT 3856.) After the prosecutor said, "If the author doesn't know, how are we to know," defense counsel objected to the question as argumentative, and the trial court overruled the objection. (20 RT 3856.)

The prosecutor continued his questions to Navarro regarding the letter to Casper, and asked about his reference to the "Big Señores." (20 RT 3856-3857.) Navarro said he wanted Casper to think that "everything was cool," and Casper would believe him because "they" thought Navarro was still the Llavero (key holder). (20 RT 3857.) The prosecutor asked Navarro if his whole life was about keeping up appearances. Navarro replied that he was trying to find out information. (20 RT 3857.) The prosecutor remarked, "You were very, very motivated to stop crime, weren't you?" The trial court overruled defense counsel's objection, and Navarro said that he tried. (20 RT 3857.)

In sum, a review of the challenged questions and comments by the prosecutor demonstrate that the prosecutor was trying to poke holes in Navarro's story and expose the fact that he was really playing both sides. Accordingly, the prosecutor properly questioned Navarro.

Further, Navarro fails to demonstrate that any prejudice occurred from the prosecutor's occasional "editorializing" or commenting on Navarro's answers. In context of the full examination of Navarro, any sarcastic or argumentative remarks were minor. Navarro's testimony consisted of approximately 617 pages, with cross-examination taking up 468 pages. The challenged remarks consisted of about 14 colloquies, a small part of Navarro's testimony. Moreover, Navarro's answers to the questions were not damaging to his defense. To the contrary, his responses were short,

direct, and consistent with his claim of innocence. Moreover, the prosecutor's comments did not infect the trial with unfairness or cause Navarro any prejudice. (See *People v. Gionis, supra,* 9 Cal.4th at pp. 1214-1216.) Finally, the strong sense of incredulity surrounding Navarro's testimony stems not from the prosecutor's conduct but from the incredulity of the testimony itself. His claim of non-involvement or withdrawal from the murder- and robbery-for-hire scheme is inherently implausible in the face of the overwhelming evidence that he is a shot-caller for a criminal street gang, who regularly plays both sides—gang and law enforcement—to garner personal advantage, his soldiers committed the crimes and he served as the orchestrator.

D. The Prosecutor 's Question Regarding Summer Was Asked in Good Faith and Necessarily Harmless Given There Was No Answer and the Court's Instructions

Navarro also claims the prosecutor committed misconduct by asking Navarro if the girl named Summer was "the girl who went upstate for threatening Mira Corona?" (AOB 228-231.) No misconduct occurred. Navarro never answered the question, and the line of questioning was not pursued.

During cross-examination of Navarro, defense witness Deborah Almodovar was taken out of order. (19 RT 3645.) Almodovar testified that she spoke with Navarro through the bathroom pipes in jail. (19 RT 3648-3649.) Almodovar then changed her testimony and said she did not really speak with Navarro, but that Navarro spoke with her friend Corona who would tell her that Navarro said "hi." (19 RT 3649.) Navarro was in jail with Almodovar's boyfriend. (19 RT 3652-3653.) Almodovar said she had spoken with Navarro on the phone a few times through three-way calls set up by Navarro's girlfriend Sarah. (19 RT 3657-3658.)

When cross-examination of Navarro resumed, Navarro said he spoke with Almodovar maybe twice on the telephone. (20 RT 3823.) Based on Almodovar's testimony, the prosecutor asked Navarro about speaking with female prisoners through the pipes. (20 RT 3823.) Navarro testified that he no longer talked to female prisoners through the pipes because he got tired of doing so after talking to a girl named "Summer." (20 RT 3823-3824.) The prosecutor then asked, "Oh, the girl who went upstate for threatening Mira Corona?" (20 RT 3824.) Defense counsel objected and said that he wanted to make a motion. (20 RT 3824.) After the court excused the jury, defense counsel moved for a mistrial based on intentional prosecutorial misconduct by stating that Navarro was talking to a woman who had threatened a prosecution witness. (20 RT 3824-3825.) Defense counsel added that there was no such evidence presented; thus, the question was not asked in good faith but rather "blurt out in front of the jury to poison the jury." (20 RT 3825.)

The prosecutor responded that it was in the discovery and was an open court record that Summer Star Sherwood was serving a two year sentence after being convicted for threatening Corona. (20 RT 3825.) Defense counsel agreed that he had discovery concerning this witness, but said she was not going to be called as a witness, and Corona was not questioned about her. There was no connection between Navarro and Sherwood, and defense counsel asserted that the prosecutor knew that no evidence of any connection would be presented. (20 RT 3825.) Therefore, to ask Navarro this question without any evidence of a connection between Navarro or any intention to bring such evidence before the jury was misconduct. (20 RT 3825-3826.)

The trial court asked the prosecutor if he was going to attempt to introduce evidence of Sherwood's case. The prosecutor said that he did not intend to until Navarro volunteered his connection to Sherwood by stating

he had talked to her through the pipes in jail. (20 RT 3826.) The court asked when he would decide whether he would offer this evidence. The prosecutor said he would decide before the close of Navarro's cross-examination, but for now he would back off the subject. (20 RT 3826.) The trial court took the motion for mistrial under submission. The court denied defense counsel's request to strike the question and any response because it wanted to wait until the prosecutor determined whether he would pursue this line of questioning. (20 RT 3826.) The prosecutor said he would not question Navarro further about this subject without first approaching the court. (20 RT 3826.) The subject was not brought up again.

It is true that "a prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed." (*People v. Visciotti* (1992) 2 Cal.4th 1, 52, citing *People v. Wagner* (1975) 13 Cal.3d 612, 619.) Furthermore, "[i]t is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist." (*People v. Friend* (2009) 47 Cal.4th 1, 80, citations omitted.) When, as here, the claim focuses on a question posed by the prosecutor before the jury, the analysis is whether there is a reasonable likelihood that the jury construed or applied the complained-of remark in an objectionable fashion. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) Here, the record establishes that the prosecutor had a good faith basis for asking the question at issue and that there is no reasonable likelihood that the jury construed the questioning in an objectionable fashion.

Regarding the prosecutor's good faith, as acknowledged by the defense, the question was based on facts provided to the defense in discovery. There was also no order prohibiting the question. And, while the prosecutor had not originally planned on asking Navarro about Sherwood, he reasonably decided to do so after Navarro opened the door

during his testimony. Navarro volunteered the name "Summer" when he answered the prosecutor's question about talking through the jailhouse pipes. (20 RT 3823-3824.) He provided the link between the threat to Corona and Navarro to warrant the question and further inquiry, even though the prosecutor did not ultimately pursue it. Thus, the prosecutor did nothing wrong in asking the question when he did.

Moreover, the question in no way prejudiced Navarro. Navarro did not answer the prosecutor's question, any connection was not obvious in the exchange and the matter was never raised or referred to again. Thus it was not reasonably likely the jury inferred it was the person to whom the prosecutor was referring. The court also instructed the jury that questions by counsel were not evidence, and to not assume something was true based on a question by one of the attorneys. (CALJIC No. 1.02; 7 CT 1836; 28 RT 4906-4907.) It is presumed the jury followed the court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Thus, there was no misconduct nor was it reasonably likely the jury would have misconstrued the prosecutor's question in an objectionable fashion.

E. The Prosecutor Properly Impeached Navarro Regarding His Speculative Reason for the Jailhouse Stabbing

Lastly, Navarro contends the prosecutor committed misconduct when he asked about the 2003 jailhouse stabbing by Martinez, Macias, and Lopez because, before trial, the trial court had excluded questions suggesting that the reason for the stabbing was not a Mexican Mafia green light, but rather because the fellow gang members had learned Navarro was an informant. (AOB 231-235.) No misconduct occurred.

Before trial, defense counsel said he wanted to call Darren Scott Johns as a defense witness because he was a witness to the February 2003

stabbing at the holding cell. (11 RT 2093.) Defense counsel said that the prosecution's theory was that Martinez, Macias, and Lopez were working at the behest of Navarro and that Navarro was their boss. (11 RT 2093-2094.) The defense theory was that these three gang members had known for a while that Navarro was an informant and not in good graces with the Mexican Mafia. Thus, at their first opportunity, they tried to end Navarro's life by trying to stab him to death in the holding cell at jail. (11 RT 2094.) The proffered testimony from Johns was that he was watching the cell, and saw Macias and Lopez start stabbing Navarro with homemade shanks. (11 RT 2094.) The trial court's tentative ruling was that it would allow the evidence, in the form of what Johns actually saw, and the date of the incident. (11 RT 2095.)

The prosecutor then asked, if, in rebuttal, he could introduce evidence that in January 2003, Macias, Martinez, and Lopez were given discovery of Navarro's interview with Buena Park police where, several times throughout the interview, Navarro talked about being an informant for other agencies. (11 RT 2095.) The prosecutor sought to establish that this was an alternate reason for the three gang members to stab Navarro as opposed to the defense proffered reason of a longstanding green light on Navarro. In other words, the prosecutor wanted to show a post-murder reason for the stabbing. (11 RT 2095.)

Defense counsel objected claiming that it was speculation that the attorneys shared discovery with their clients, and there was no way to verify with either whether this was true. (11 RT 2096.) Counsel said he tried to talk to the other attorneys, but they would not answer questions about whether the discovery was given to their clients, and would not allow defense counsel to talk to their clients about the stabbing. (11 RT 2096.) Counsel added that this evidence also violated Navarro's right to due

process and confrontation because there was no way to cross-examine on this information. (11 RT 2096-2097.)

The trial court said at that point, it would allow Johns only to testify regarding the incident. (11 RT 2097.) The court would not rule on the prosecutor's proposed rebuttal evidence until it was before the court. Accordingly, the prosecutor should not mention it in his opening statement. (11 RT 2097.)

Later, during more pretrial discussions, the prosecutor objected to the proposed testimony of defense gang expert, Valdemar, that the jailhouse stabbing indicated that Macias, Martinez, and Lopez knew of a green light on Navarro because such testimony invaded the state of mind of these individuals. (12 RT 2200.) The prosecutor said the defense could ask a hypothetical based on similar facts, but the expert could not opine as to what Macias, Martinez, and Lopez were thinking. (12 RT 2200-2201.) In addition, if Valdemar testified based on such a hypothetical, it would open the door in the rebuttal for the prosecutor to introduce evidence of an alternative motive for the stabbing, i.e., that the three co-defendants had received copies of discovery and the stabbing was consistent with what they learned in the discovery. (12 RT 2201.)

Defense counsel agreed that he should be allowed to ask Valdemar a hypothetical, i.e., that if gang members attacked a paid police informant in a jail holding cell, would that be consistent with a green light issued by the Mexican Mafia on that individual. (12 RT 2201.) Defense counsel opposed any evidence that speculated that the other defense attorneys shared discovery with their clients that indicated Navarro was an informant. (12 RT 2201-2202.) The problem with this evidence was that any communications between the co-defendants and their respective attorneys was privileged, and there was no way to find out if this information was actually disclosed. (12 RT 2202.)

The trial court ruled that Valdemar could refer to the stabbing incident, including the date and nature of the act. However, he could not testify that the stabbing meant that the co-defendants were aware of a green light because that would require testimony regarding their state of mind. (12 RT 2203.) The court added that defense counsel could not pose the question in a form of a hypothetical because at that point, the court did not want any evidence as to the state of mind of the three co-defendants. The trial court advised the prosecutor that he could not introduce in rebuttal evidence referring to the stabbing incident without a hearing outside the presence of the jury. (12 RT 2203.)

Defense counsel wanted to know the limits of what he could ask Valdemar. The court advised that Valdemar could refer to the incident, but that was about it because he could not opine about the state of mind of Macias, Martinez, and Lopez. (12 RT 2204.) Defense counsel asked if it was permissible to ask Valdemar, if, in his opinion as an expert witness on the Mexican Mafia and a street gang in San Fernando Valley, whether it was common for these groups to attack individuals who were perceived to be informants. The court said that question would be allowed. (12 RT 2204.)

Navarro testified that after he was arrested, he tried to stay friendly with Macias, Martinez and Lopez because he was afraid that they would find out he was a confidential informant. (18 RT 3374.) Navarro said that he was worried because bad news traveled fast in the jail, so he had his girlfriend put money on their books. (18 RT 3375.) Although Navarro tried to keep it friendly with his co-defendants, it did not work and they stabbed him in February 2003 in a holding cell. (18 RT 3375-3377.) Navarro said that they called him a "fucking rat" when they stabbed him. (18 RT 3377.)

During cross-examination of Navarro, he confirmed that his testimony was that he wrote letters to his co-defendants and put money on their books to stay in good graces with them. (20 RT 3812.) The prosecutor asked if it was also so they would not find out that he was an informant in the past, and Navarro answered yes. (20 RT 3812-3813.) The prosecutor then asked, "So you knew that in October of 2002 Macias and Martinez and Lopez didn't know that you had been an informant, didn't you?" (20 RT 3813.) Navarro said, "I don't know. Most a lot of people knew, they were already thinking about it." (20 RT 3813.) The prosecutor again asked if he was giving the co-defendants money and writing to them so they would never find out. Navarro responded yes, because he was trying to get by in jail. (20 RT 3813.) The prosecutor said, "and they, implicit in that, that they would never find out, is that they had never found out yet." After the trial court overruled defense counsel's objection based on speculation, Navarro said no. (20 RT 3813.) The prosecutor asked Navarro if he knew whether or not his co-defendants knew that he worked for law enforcement. Navarro said he did not know. (20 RT 3813.)

On redirect, Navarro testified that he was stabbed 11 times by his co-defendants while in the holding tank, and he interpreted the stabbing as a green light. (20 RT 4057-4058.) On re-cross examination, the prosecutor asked Navarro if he recalled testifying that he interpreted the stabbing at the jail by his co-defendants as meaning he had a green light on him. (22 RT 4163.) Defense counsel objected, stating he believed they had a 402 on this and that he would like a hearing before an improper question was asked. (22 RT 4163-4164.) The court asked counsel to defer on that and allow Navarro to answer. (22 RT 4164.) Defense counsel said if the improper question was asked, it would be grounds for a mistrial. The court said it would allow the prosecutor to proceed. (22 RT 4164.)

The prosecutor then asked, "Do you recall testifying yesterday when [defense counsel] asked you questions concerning the February of 2003 stabbing at North Court, that your interpretation of that act was that there was a green light on you? Was that your testimony yesterday?" (22 RT 4164.) Navarro said that he knew there was a green light on him, and that was his testimony. The prosecutor asked, "Did you consider an alternative explanation that might have been their motive for doing that?" (22 RT 4164.) Navarro replied, "Once the Mexican Mafia puts a green light on you, you have a green light." The prosecutor began to ask if he considered "the possibility that they had learned - -" and defense counsel objected and reminded the court of its prior ruling. (22 RT 4164-4165.)

After the court excused the jury, defense counsel reminded the court that before trial, there was a 402 hearing regarding whether the prosecution could mention that Navarro said during a recorded interview that he was an informant and that this information was given to his co-defendants. (22 RT 4165.) Defense counsel had objected to this line of questioning because he could not question the co-defendants as to whether they received this information, so admission of this evidence would violate Navarro's Sixth Amendment and due process rights. (22 RT 4165.) Defense counsel had informed the court that he tried to speak with one of the co-defendant's attorneys and he said he would not discuss any conversations had with his client because it was privileged. (22 RT 4165-4166.) Thus, defense counsel did not think the prosecutor should be allowed to ask Navarro if his co-defendants found out from their attorneys that he was an informant. (22 RT 4166.)

The trial court wanted to hear the prosecutor's proposed question. (22 RT 4166.) The prosecutor explained that after Navarro acknowledged that he had testified that he interpreted the stabbing as indicating there was a green light on him, the prosecutor wanted to ask whether Navarro

considered the alternative explanation, that his co-defendants received paperwork through discovery that showed Navarro had worked as an informant and therefore the co-defendants acted on their own. (22 RT 4166.) The trial court said it would sustain the objection because it "assumes a catalog of items." (22 RT 4166-4167.) The trial court said the prosecutor could ask Navarro whether he considered the fact that his co-defendants could have had other reasons to attack him. (22 RT 4167.)

The prosecutor asked the court if he could inquire into whether Navarro considered the possibility that his co-defendants found out that Navarro lied about the reason for the murder, i.e. it did not come from someone higher up at Pelican Bay but rather as a personal favor to Corona. (22 RT 4167.) The trial court said it was concerned the prosecutor would be putting evidence in front of the jury that it otherwise would not hear. However, the prosecutor could ask the limited question of whether Navarro considered that his co-defendants felt he had lied to them. (22 RT 4167.) The trial court added that if the prosecutor was going to get into that area, he could ask two simple questions without going into any of the historical basis of how that information may have been conveyed to the co-defendants. (22 RT 4168.)

When they resumed before the jury, the prosecutor asked Navarro if his testimony was that he interpreted the 2003 stabbing as a green light issued by the Mexican Mafia. (22 RT 4171.) Navarro said he knew he had a green light. (22 RT 4171.) The following colloquy occurred:

> THE PROSECUTOR: Wasn't it the case that the reason your co-defendants stabbed you is that you had given them this job to do and told them this comes from way up above from Pelican Bay?
>
> DEFENSE COUNSEL: Objection, your Honor. That was the same objection as before.

THE COURT: Same ruling to the form of the question.

THE PROSECUTOR: Did you consider that the - - your co-defendants had realized you had lied to them about the reason for this murder going down?

NAVARRO: No.

THE PROSECUTOR: And when they discovered there is a sister and not Pelican Bay behind this - -

DEFENSE COUNSEL: Objection, your Honor. Once again, objection.

THE COURT: It will be sustained.

THE PROSECUTOR: You told Macias, Martinez and Lopez to go out and do this job, here is a car, here is a phone, here is your AAA note, here is the victim's workplace, pick him up, take him home, there is coffee cans in the garage, and the reason for doing this, gentlemen, is this comes from way up above, my - - the Big Homies, the Senores are calling this hit, didn't you?

NAVARRO: I did not.

THE PROSECUTOR: When they found out that was not true, they turned on you, didn't they?

NAVARRO: No.

THE PROSECUTOR: They didn't want to, they probably wouldn't have done this job if you had come to them and said there is some girl named Mira, her boss is jealous, the boss is jealous of the boss's brother, and this has nothing to do with us, guys, but Mira has some connections, and I need to use her connections, so won't you please go out and do this job?

DEFENSE COUNSEL: Your Honor, there is an objection. It's not a good faith question.

THE COURT: Overruled. You can answer that.

NAVARRO: No.

THE PROSECUTOR: If you had put it to them that way, they never would have gone and done that job so you could curry favor with some secretary, right?

NAVARRO: I didn't put it no way.

THE PROSECUTOR: So you had to present it to them, this comes from way up above.

NAVARRO: No.

(22 RT 4171-4173.)

During direct examination of Valdemar, defense counsel asked him if attacks on people targeted with a green light occur in jail facilities or holding cells. Valdemar said that they do. (25 RT 4451.) Valdemar proceeded to testify that it was common for the Mexican Mafia to use a three-man hit team in a holding cell—one is lookout, one, usually a younger gang member, does the hit, and the third who is usually a more seasoned gang member is not directly involved unless needed. (25 RT 4451.) Defense counsel then gave Valdemar a hypothetical based on the facts of the 2003 stabbing that occurred in the holding cell, and asked if it was consistent with carrying out a green light. (25 RT 4452.) Valdemar said that it was because he had seen that pattern many, many times. (25 RT 4452-4453.)

On cross-examination, the prosecutor asked Valdemar if every act of violence against a Sureno gang member was a Mexican Mafia-sanctioned hit, and Valdemar said no. (25 RT 4480.) The prosecutor then asked if a gang member would ever commit violence against a gang member of their own gang without a formal green light, and Valdemar said yes. (25 RT 4480.) The prosecutor asked if one such instance would be would a gang member came across paperwork showing the fellow gang member was an informant. Valdemar said if that occurred it would mean that that person should be killed. (25 RT 4480.)

Defense counsel objected and asked for an in camera hearing. The trial court denied his request but said it would allow a supplemental discussion at the appropriate time. (25 RT 4480.) Defense counsel said they were getting into an are that the court had previously ruled upon. (25 RT 4480-4481.) The trial court agreed but denied counsel's request for a hearing and said it would allow examination in this area. (25 RT 4481.) The prosecutor then asked if a gang member received paperwork showing that a fellow gang member was informing to law enforcement, was that paperwork tantamount to permission to attack the person named as an informant. (25 RT 4481.) Valdemar said yes, and it would not require approval from the Mexican Mafia at that point. (25 RT 4481.)

Navarro claims the prosecutor committed misconduct by going beyond what the trial court approved and impermissibly asked Navarro about the subjective knowledge of other gang members. (AOB 231-235.) Navarro did not object at trial on the ground that the prosecutor's questions were misconduct that required reversal of the judgment and therefore he forfeited this claim. (*People v. Thomas* (2011) 51 Cal.4th 449, 491.) Rather, defense counsel objected to the questions on the basis of speculation and a violation of Navarro's constitutional rights. (11 RT 2096-2097; 12 RT 2201-2202; 22 RT 4165-4166.) He did not argue that the prosecutor had committed misconduct or that an admonition was required. Accordingly, there was nothing to alert the trial court that the objections were anything other than routine evidentiary objections. (See *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [purpose of requiring objections is to alert trial court to basis for objection].)

In any event, contrary to Navarro's assertion, this was not the same as asking one gang member about the subjective intent of another gang member, as discussed in *People v. Killebrew* (2002) 103 Cal.App.4th 644, 652 and *People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046. Both of those

cases dealt with expert testimony. In *Killebrew*, the court of appeal found it was improper for an expert to offer an opinion on the defendant's state of mind. (*Killebrew*, *supra*, at pp. 651-659.) In *Vang*, this Court concluded that an expert on criminal street gangs may testify that a charged gang crime was gang related, as long as the testimony was based on assumed hypothetical facts rooted in the evidence. (*Vang*, *supra*, at p. 1045.)

Here, the prosecutor's questions were aimed at impeaching Navarro's testimony that the jailhouse stabbing occurred because his co-defendants knew there was a green light on him. The questions were not akin to eliciting testimony regarding Navarro's specific intent or evidence of an ultimate issue in the case. Rather, the prosecutor's point was a legitimate one of impeachment. On direct examination, Navarro explained that he wrote letters to his co-defendants and put money on their books because he did not want them to find out he was an informant. (18 RT 3374-3375; see also 20 RT 3812-3813 (confirming this reason on cross-examination).)

On redirect, Navarro testified that he interpreted the jailhouse stabbing as indicating there was a green light on him. (20 RT 4057-4058.) On recross-examination, Navarro said that he knew there was a green light on him. (22 RT 4164-4165, 4171.) By asking follow-up questions regarding whether Navarro had considered other motives for the stabbing such as Navarro lying to them about the reason for the hit (22 RT 4171-4173), the prosecutor was simply trying to establish that it was possible Navarro's co-defendants did not stab him because of a green light. This was proper.

The prosecutor's questioning was also not prejudicial. Evidence of a longstanding green light was weak and speculative. Navarro's relationship with his co-conspirators before the murder, and his testimony about writing letters to and putting money on the books of his co-conspirators so they would not find out he was an informant belies the inference that they knew

he had a green light on him for being an informant. The fact that Navarro's soldiers carried out his orders in committing the crimes refutes any inference that they knew about a green light. The fact that they called Navarro a "fucking rat" when they stabbed him was more consistent with his co-defendants finding out that he was an informant, and not that they knew about a green light.

In addition, based on a hypothetical, defense gang expert Valdemar testified that gang member could commit violence against a fellow gang member without a formal green light. (25 RT 4480.) One such instance could be if the fellow gang members found out that targeted gang member was an informant. (25 RT 4480-4481.)

Finally, as set forth above, the evidence of guilt was strong. The evidence that Corona and Perna enlisted Navarro to rob and kill Montemayor and that Navarro, in turn, enlisted his soldiers to execute the conspiracy, was overwhelming. Navarro was tied to each conspirator and to the crime by notes, telephone records, the getaway car, gang ties, and his role as a shot-caller in the gang. Navarro's defense, that he withdrew from the conspiracy, was incredulous and belied by his principle role in directing and coordinating the murder and robbery and by his and his wife's efforts to distance himself when it went awry. Indeed, even the set up calls to law enforcement—laying the groundwork for a possible defense—do more to establish his guilt than exonerate Navarro in any way. It confirms his sophistication and deliberation in his conduct that reinforces his leadership role. In addition, Navarro's prior arrests and the fact he carried a gun showed he was an active gang member committing crimes on behalf of his gang.

In light of the strong evidence of guilt, and the instructions given by the trial court, there is no reasonable probability that Navarro would have gotten a better result if the prosecutor's questions had not been asked.

Therefore, if any error occurred, no prejudice ensued, and Navarro's claim should be rejected.

VI. NAVARRO'S CUMULATIVE-ERROR CLAIM FAILS

Navarro contends that any combined prejudice from the alleged errors raised on appeal warrants reversal of the guilt and penalty phase and death judgment. (AOB 238-244.) No error occurred, and even if error is assumed to have occurred, Navarro has failed to show any prejudice resulted. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 143; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472, 523.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in the absence of the asserted errors. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying that analysis to the instant case, this contention should be rejected. Notwithstanding Navarro's arguments to the contrary, he received a fair and untainted trial. The Constitution requires no more. And even when considered together, it is not reasonably probable that, absent the alleged errors, Navarro would have received a more favorable result, and any errors were harmless. Thus, even cumulatively,

any errors are insufficient to justify a reversal of the verdict and death sentence.

VII. IN THE PENALTY PHASE, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EVIDENCE OF THE BEATING AT LAURIE FADNESS'S HOUSE, THE SHOOTING OF PAUL PARENT, AND THE SOLICITATION LETTER AS FACTOR (B) EVIDENCE PURSUANT TO SECTION 190.3

Navarro contends that the trial court abused its discretion by allowing certain factor (b) evidence to go to jury for which there was insufficient evidence. (AOB 280-308.) Specifically, Navarro claims there was a lack of foundation and insufficient evidence of Navarro's involvement in the beating at Laurie Fadness's house to allow this evidence to go to the jury. (AOB 288-290.) Next, Navarro asserts there was insufficient evidence that he was involved in the shooting of Paul Parent. (AOB 291-294.) Finally, Navarro claims there was insufficient evidence that the letter to Nino, Exhibit 151, was a solicitation to commit violence. (AOB 294-305.) As shown below, the trial court did not abuse its discretion in admitting any of this challenged evidence as factor (b) evidence. Navarro's claims must be rejected.

A. Standard of Review

The questions of whether the trial court erred in admitting factor (b) evidence and whether evidence was more prejudicial than probative are reviewed for an abuse of discretion. (*People v. Jones* (2011) 51 Cal.4th 346, 380.) This includes the question of whether "there was insufficient evidence to allow the jurors to conclude beyond a reasonable doubt that" the defendant was one of the persons involved in the factor (b) offense. (*Ibid.*)

As this Court has noted,

> "Factor (b) of section 190.3 permits the introduction of evidence of '[t]he presence or absence of criminal activity by the

> defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (*People v. Michaels* (2002) 28 Cal.4th 486, 535.)

(*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.)

Additionally, "because evidence of violent crimes is expressly made admissible by factor (b) of section 190.3, the court has no discretion under Evidence Code section 352 to weigh the prejudicial impact of such evidence against its probative value when it is offered at the penalty phase." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1205; citing, *People v. Karis* (1988) 46 Cal.3d 612, 641.)

Finally, as noted by this court in *People v. Yeoman, supra,* 31 Cal.4th at pp. 132-133, this type of evidence, even though it may entail "a risk that the evidence may not be sufficient to convince all jurors of the defendant's guilt . . . is acceptable." This Court explained that it was acceptable "in view of the need to place before the jury all evidence properly bearing on its capital sentencing decision, and in view of the rule that no juror may consider such evidence unless first convinced of its truth beyond a reasonable doubt. [Citation.]." (*Id.*) Further, the trial court must give such an instruction sua sponte whenever it admits evidence under factor (b). (*Id.*) The court in *Yeoman* also observed that foundational hearings can also help to mitigate the risk, and "may be advisable" but are not required. (*Id.*)

In this case, Navarro has failed to show either an abuse of discretion or any possibility of prejudice.

B. There Was Sufficient Evidence to Allow the Jury to Conclude Navarro Was Involved in the Three Challenged Violent Criminal Acts

Navarro contends that three of the fourteen acts of prior violent conduct introduced by the prosecution under section 190.3, subdivision (b), should have been excluded because the evidence presented was insufficient

to allow the jury to find he was involved in the crime beyond a reasonable doubt. (AOB 280-308.) The trial court did not abuse its discretion when it admitted evidence of the three events now challenged by Navarro because each of the incidents contained sufficient evidence of criminal activity.

Section 190.3, subdivision (b), allows proof of criminal activity which involved the use or attempted use of force of violence or the express or implied threat to use force or violence. (§ 190.3, subd. (b); *People v. Lewis* (2006) 39 Cal.4th 970, 1052.) "Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. [Citation.]" (*Lewis*, at p. 1052.) In admitting this type of evidence, "[t]he penalty instructions must make clear that an individual juror may consider other violent crimes in aggravation only if he or she is satisfied beyond a reasonable doubt that the defendant committed them. [Citations.]" (*Id.*) A trial court's ruling on the admissibility of evidence generally is reviewed for abuse of discretion, and this standard applies to evidence of other violent criminal activity. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 449.)

1. The February 2, 2002, beating at Laurie Fadness's house

Navarro claims that there was a lack of foundation and insufficient evidence of his involvement in the beating at Laurie Fadness's house to allow the evidence to go to the jury. (AOB 285-290.) First, Navarro did not object below to admission of this evidence on the grounds now asserted on appeal. (See 30 RT 5352-5354; 31 RT 5489-5495.) Accordingly, his challenge to the admission of this evidence is forfeited because he failed to object at trial on the same grounds he now raises on appeal. (*People v. Catlin* (2001) 26 Cal.4th 81, 172; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1140.)

In any event, the trial court properly allowed the prosecution to introduce evidence of the incident that occurred at Fadness's house. At the penalty phase, the evidence established that on February 2, 2002, David Gallegos-Estrada and his cousin, Juan Bermudez-Lopez, aka Blackie[25], were at Laurie Fadness's house when a group of about 10 gang members entered the house. Included in this group were Fila, Capone, Casper and Primo.[26] (32 RT 5633-5635.) Juan Mendez, aka Primo, said to Blackie, "Droopy wants to talk to you." (32 RT 5636-5637.) After Blackie said he had nothing to talk to Droopy about, the group started hitting Gallegos and Blackie. (32 RT 5637.) On cross-examination, Gallegos said he told Detective Edwards that he heard the name "Droopy" mentioned during the incident at Fadness's house. He knew Droopy to be Anthony Navarro. (32 RT 5721.) He did not see Droopy during the assault. (32 RT 572.)

Fadness testified regarding her recollection of the event. When Fadness returned to her home, she saw several vehicles including a black "dually" truck parked on her property. (31 RT 5504.) As Fadness entered her house, the men were leaving. She recognized Primo and Capone or Lil Capone. She only saw the back of the heads of the men who ran out her front door. (31 RT 5509-5510, 5524.) She heard Primo say, "Droopy, Jesse, let's go." (31 RT 5510-5512.)

Accordingly, the totality of the circumstantial evidence established that Navarro was either inside Fadness's house during the assault, or he took part in orchestrating the assault.

A comparison with *People v. Jones, supra,* 51 Cal.4th 346, shows that the evidence was sufficient to allow the jury to find Navarro's involvement

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[25] Blackie was a Pacoima Flats gang member. (32 RT 5711.)

[26] A few weeks after the assault, when Gallegos was at Navarro's house, Primo and Fila were in his garage. (32 RT 5654-5662.)

beyond a reasonable doubt. In *Jones*, the defendant similarly argued that the evidence was insufficient to show that he was one of two persons involved in a robbery offered as factor (b) evidence. (*Id.* at p. 378.)

There, the prosecution's offer of proof showed,

> that one of the three eyewitnesses to the robbery had selected defendant's photograph out of a lineup, although with only about 50 percent certainty. There were no other eyewitness identifications. However, defendant and a second person were apprehended from a nearby residence within a 'very, very short period of time' of the robbery. Property 'with names on it that was stolen shortly beforehand' was found inside that residence.

(*Id.* at pp. 378-379.) The trial court found the offer of proof sufficient and admitted the evidence. (*Id.* at p. 379.) On appeal, this Court held that the trial court properly exercised its discretion when it admitted evidence of the prior robbery. (*Id.* at p. 380 ["evidence was sufficient to allow a rational trier of fact to determine beyond a reasonable doubt that defendant was one of the Delano robbers"].)

Similarly in *People v. Hart* (1999) 20 Cal.4th 546, evidence of the murder of a child was admitted during the penalty phase under Penal Code section 190.3, subdivision (b), despite the defendant's claim that the evidence that he committed the murder was insufficient to present to the jury. This Court found no error, ruling that the evidence "was sufficient to allow a rational trier of fact to determine beyond a reasonable doubt that defendant murdered [the victim]." (*People v. Hart, supra*, 20 Cal.4th at p. 650.)

Likewise here, the evidence of Navarro's participation in the incident at Fadness's house was more than sufficient to allow the jury to determine whether it was convinced beyond a reasonable doubt that Navarro committed the assaults on Gallegos-Estrada and Bermudez-Lopez. Thus, viewing the evidence in the light most favorable to the judgment, there was substantial evidence that would permit a rational jury to find beyond a

reasonable doubt that Navarro was involved in the beating that occurred at Fadness's house. (See, i.e., *People v. Jones*, *supra*, 51 Cal.4th at p. 380 [section 190.3, factor (b), evidence properly admitted where there was "very strong circumstantial evidence of defendant's identity as one of the robbers"].)

2. The April 18, 2002, shooting of Paul Parent

Defense counsel moved to exclude evidence of Navarro's involvement in the April 18, 2002, shooting of Paul Parent. He claimed the evidence was not sufficient for a trier of fact to conclude that Navarro was involved in the incident beyond a reasonable doubt because it consisted only of opinion evidence that was not credible. (31 RT 5562-5563.) Defense counsel said he was not contesting the fact that Navarro called Parent and warned him of a shooting. Counsel, however, did think this was enough evidence to conclude that Navarro was somehow involved in the shooting. (31 RT 5564.) Counsel added that Navarro called Parent to warn him to take cover and not to mock him, as Parent believed. Counsel argued that Parent's opinion of Navarro's intention in making the telephone call was inadmissible opinion evidence. (31 RT 5565-5566.)

The trial court said the issue of the credibility or stability of any percipient witness's testimony, including Parent, was up to the jury. Thus, the court's tentative ruling was to allow the testimony. (31 RT 5567.)

The next day, defense counsel informed the court that during an interview with Investigator Gomez that occurred about two years after the event, Parent told Gomez that Rudy shot him about five minutes after Navarro called him. This was contrary to the prosecutor's offer of proof that Parent would testify the shooting occurred within 30 seconds of the telephone call. (32 RT 5599.) Counsel reiterated that Parent's opinion regarding Navarro's involvement in the shooting was speculative at best.

(32 RT 5599-5600.) The trial court said it would defer ruling on the issue until Parent testified. (32 RT 5600.)

Before Parent testified, defense counsel again objected to Parent testifying regarding Navarro's telephone call before the shooting. First, counsel claimed it was unclear what the exact time frame was between the phone call and shooting, and second, without Parent's opinion that Navarro called to mock him, there was no evidence linking Navarro to the shooting. (33 RT 5831-5832.) The trial court said defense counsel was asking the court to decide what weight the trier of fact would give to this evidence, and that was something the court would not do. However, the court would not allow Parent to testify regarding his opinion that Navarro was involved in the shooting. Parent would be limited to testifying that he received the phone call, when he received the call, and the time between the phone call and being shot. (33 RT 5832.) Defense counsel would then have the opportunity to impeach his testimony. (33 RT 5832.)

Defense counsel repeated that there was no evidence that Navarro committed the act, threatened the act, or was involved in the act and therefore, Parent's testimony should not go before the jury. (33 RT 5832.) The trial court disagreed, said it would allow the evidence and that defense counsel could argue to the jury that the evidence did not establish Navarro's involvement beyond a reasonable doubt. (33 RT 5832-5833.)

Parent testified that he was shot on April 18, 2002. (33 RT 5844-5845, 5908.) Shortly before the shooting, Navarro told Parent that if Parent helped him move, Navarro would give him a mechanic's van and allow him to leave. (33 RT 5857, 5894.) Parent helped Navarro move, and Navarro gave him the van. Parent went to a friend's house a few houses down from Navarro's Remick house and began sorting out his belongings in the van. (33 RT 5899-5903.) Navarro called Parent and said, "Rudy is going to shoot you." (33 RT 5903-5904.) A minute or two later, Rudy shot Parent

in the back. (33 RT 5904-5906.) At trial, Parent testified that Navarro was the boss of Rudy, as well as the boss of everyone who hung out at his house. (33 RT 5906.)

Parent's testimony as a whole was sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that Navarro was involved in the shooting. First, the evidence established that Parent had a history with Navarro that began with Parent working as a mechanic for Navarro. (33 RT 5836-5841.) After Parent began to see things that he did not like and was scared for his life, he tried to leave. (33 RT 5845.) However, Navarro found Parent and brought him back to the house on Remick. Soon thereafter, Navarro and his crew beat up Parent. Parent went to the hospital and sustained injuries including a head laceration and finger fracture. (33 RT 5845-5847.) Parent was forced to return to Navarro's home. (33 RT 5849-5850.) About a month later, Parent again tried to leave Navarro's sphere of influence. Once again, Navarro found him and another group beating ensued. Navarro told Parent that he better return to Navarro's house to work as a mechanic or else there would be problems. (33 RT 5851-5856.)

Around March 1, 2002, Parent went to dinner with Navarro's wife, Bridgette, and told her that if Navarro did not have a gun in his hand, he would fight him. (33 RT 5887-5888.) The next day, Navarro pistol-whipped and beat up Parent in the front yard. (33 RT 5888-5889.) Around April 1st, Valles gave Parent a gun and Navarro found out about it. (33 RT 5890-5891.) Rudy, a member of Navarro's crew, hit Parent over the head with a baseball bat. (33 RT 5892.) A couple of weeks later, within minutes of Navarro calling Parent and telling him that Rudy was going to shoot him, Rudy drove by and did just that.

Thus, the evidence showed that every time Parent tried to leave Navarro, Navarro and his crew beat up Parent. When Navarro and his crew

were moving out of the Remick house, Navarro acted like he suddenly had a change of heart and bought Parent a mechanic's van. Navarro told Parent that if he helped Navarro move, Parent could then go his own way. Parent fell into this trap, let down his guard, and thought he finally had his freedom. The reasonable inference from the totality of the evidence was that Navarro then ambushed Parent by having his crew member Rudy shoot Parent.

In sum, the evidence of Navarro's involvement in the shooting was sufficient for a rational trier of fact to find beyond a reasonable doubt that Navarro played some part in the shooting. Accordingly, the trial court did not abuse its discretion by allowing this evidence to go before the jury.

3. The December 11, 2002, solicitation letter to Nino

Lastly, Navarro claims there was insufficient evidence that the letter to Nino constituted a solicitation to commit violence because there was no evidence that Nino actually received the letter. (AOB 294-305.) The evidence, however, was sufficient for a rational trier of fact to find beyond a reasonable doubt that Navarro wrote the letter to solicit an act of violence upon Nino.

Here, the evidence was more than sufficient to constitute solicitation of a violent offense, and therefore, to constitute criminal activity as defined under section 190.3, subdivision (b).

> Solicitation is defined as an offer or invitation to another to commit a crime, with the intent that the crime be committed. The crime of solicitation, which is restricted to the solicitation of particular serious felony offenses, is complete once the verbal request is made with the requisite criminal intent; the harm is in asking, and it is punishable irrespective of the reaction of the person solicited. Thus, solicitation does not require the defendant to undertake any direct, unequivocal act towards committing the target crime; it is completed by the solicitation itself, whether or not the object of the solicitation is ever

> achieved, any steps are even taken towards accomplishing it, or the person solicited immediately rejects it. [Citations.]

(*People v. Wilson* (2005) 36 Cal.4th 309, 328.)

The evidence showed that Navarro wrote a letter to Nino where he talked about Nemo and Chino. This letter was discussed in the guilt phase. During the guilt phase, the evidence established that in December 2002, Navarro included with a letter he sent to Bridgette a letter addressed to "Nino." The letter was dated December 11, 2002. (21 RT 4032-4033; Exh. No. 151, page N-376.) Navarro told Bridgette to pass the letter to Nino but not the envelope, because Navarro did not want Nino to know where Navarro was incarcerated. (21 RT 4032-4033, 4036-4037, 4133-4134.)

In the letter to Nino, Navarro wrote that "Chino" was false because he was telling people that Navarro was an informant and could not be trusted. (21 RT 4035-4036.) Navarro said that in the letter, he told Nino "to send Chino to go to hell right here," and that he was "a hype and he's false." (21 RT 4039.) Navarro wrote that he was there with "four senores," meaning four members of the Mexican Mafia, but this was not true. (21 RT 4039-4040.) Navarro wanted to give Nino the impression that he was still connected to the Mexican Mafia. (22 RT 4133-4134.)

The letter contained the phrase, "Mandalo ala verga." Navarro claimed this simply meant to forgot about him, and not "this guy Chino, fuck him" or beat him up. (22 RT 4136-4137.) However, Rodriguez testified that it meant you are getting rid of that person. (23 RT 4211.) Kraiem, a certified Spanish language interpreter, translated a part of the letter as saying, "Send that Chinese dude to hell, he is false and an addict. I'm here with four men that will support you to fuck them up. Don't let them go. Okay? I send you my support as well. And send the names of those that do not listen to you. Okay?" (26 RT 4655-4656.)

Valdemar, the defense Mexican Mafia expert, interpreted part of the letter. The prosecutor showed Valdemar a phrase that said there are four men here who give their approval to "des en la madre." (25 RT 4515.) Valdemar interpreted the phrase as street slang for "rough 'em up real good." (25 RT 4517.) "Todo madre" literally translated meant everything mother, but in the context of the letter means all the way fully, give it to him real good. It could even mean to kill him. (25 RT 4517.)

In the penalty phase, the parties stipulated that Exhibit Number 212 was the four-page letter sent from Orange County jail on November 22, 2002. The jury was given the letter for their review. (37 RT 6554.) The court instructed the jury that it could consider this letter under factor (b) as evidence that Navarro committed the crime of "attempted solicitation to commit assault by means of force likely to cause great bodily injury." (38 RT 6698; 8 CT 2096; CALJIC No. 8.87.) The trial court also instructed the jury on the crime of soliciting another to commit an assault by means of force likely to cause great bodily injury.[27] (38 RT 6700-6701; 8 CT 2098-2099; CALJIC No. 6.35.)

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[27] The jury was instructed:

Every person who, with the specific intent that the crime be committed, solicits another person to commit or join in the commission of a crime, namely Penal Code section 245(A)(1), assault by means of force likely to cause great bodily injury, is guilty of violating Penal Code section 635F(A), a crime.

In order to prove this crime, each of the following elements must be proved:

1. A person solicited Nino to commit a crime, namely, assault by means of force likely to cause great bodily injury.

2. At the time of the solicitation, the person who solicited had the specific intent that the crime of assault by means of force likely to cause great bodily injury be committed; and

3. The soliciting message was received by the intended recipient.

(continued...)

Navarro contends the evidence was insufficient to present the letter to the jury as factor (b) evidence because there was no evidence that the letter was ever received. (AOB 295-296.) The evidence showed that the letter was included with a letter to Bridgette sent from the jail in the ordinary course of mail. (35 RT 6244-6245.) The reasonable presumption was that Bridgette received the letter, followed Navarro's instructions, and gave Nino the letter. Moreover, this was an issue for the jury to decide, and it was properly instructed as to such. (See *People v. Mills* (2010) 48 Cal.4th 158, 208-209 & fn. 20 [finding weapons found in the defendant's cell were admissible as factor (b) evidence, but the weight given to the evidence. i.e. whether possession of these items constituted criminal activity, was up to the jury to decide].)

To the extent Navarro claims that attempted solicitation for an assault does not fall within the statutory definition of factor (b) evidence because it is not a violent criminal act (AOB 296), this contention should be rejected. Section 190.3, factor (b), includes more than offenses that are defined in

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(...continued)

The crime is complete when the solicitation is made with the required specific intent, and the soliciting message is received by the intended recipient. It is not necessary that the crime solicited be committed, or that any other overt act be taken toward its commission.

Guilt of the crime of soliciting another to commit a crime must be proved by the direct testimony of two witnesses or by the direct testimony of one witness and corroborating circumstances.

Direct testimony means testimony that directly proves a fact without an inference and which in itself, if true, conclusively establishes that fact.

Corroborating circumstances may be shown by acts, declarations, or conduct of the defendant, or by any evidence independent of the testimony of the one witness who has testified as to the solicitation, and which in and of itself tends to connect the defendant with the commission of the crime of soliciting. To be sufficient, the corroborating circumstances, by themselves, must create more than a suspicion of guilt. However, they need only be slight, and by themselves need not be sufficient to prove guilt.

violent terms; specifically, it includes all "crimes that were perpetrated in a violent or threatening manner." (*People v. Grant* (1988) 45 Cal.3d 829, 851.) For example, as this Court noted in *People v. Cowan, supra,* 50 Cal.4th 401, although "force or violence against a person [ ] is not an essential element of residential burglary . . . a burglary perpetrated in a violent or threatening manner may be considered under section 190.3, factor (b)." (*Id.* at p. 496.) Here, Navarro's letter to Nino contained at least the threat of force or violence, and this was sufficient for the jury to consider this evidence under factor (b).

Navarro cites *People v. Phillips* (1985) 41 Cal.3d 29 in support of his argument that without evidence of delivery of the letter, no actual crime was committed and the letter should not have been admitted. (AOB 302-305.) But *Phillips* actually supports the admission of the letter in this case. In *Phillips*, during the penalty phase, the prosecution introduced a letter the defendant sent to another person while awaiting trial, soliciting the murders of several people who were potential witnesses against the defendant. (*Id.* at p. 66.) The prosecutor also introduced "another letter written by defendant while in the Utah jail awaiting extradition to California, in which defendant asked Bill Moyes to abduct, beat, and threaten 'the accountant' to obtain $15,000." (*Ibid.*)

The defendant challenged admission of this evidence, claiming "it did not demonstrate the commission of actual crimes." (*People v. Phillips, supra,* 41 Cal.3d at p. 66.) The court found the first letter properly admitted but not the second one. In analyzing his claim, this Court concluded,

> that evidence of other criminal activity introduced in the penalty phase pursuant to former section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute.

(*Id.* at p. 72.)

As relevant to the letters that were admitted during the penalty phase, the solicitation statute requires "'at least one witness who gives "positive" or "direct" evidence of facts that are incompatible with innocence, and corroborating evidence of circumstances which, independent of the direct evidence, tend to show guilt. [Citations.]' [Citation.]" (*People v. Phillips, supra,* 41 Cal.3d at pp. 75-76.) After first noting that the prosecution only characterized the letter soliciting the murder of four witnesses as evidence of other criminal activity under former section 190.3, subdivision (b), this Court held that the corroboration requirement was satisfied by the letter itself. (*Id.* at p. 75-76.)

> The introduction of defendant's jailhouse letter (exhibit 20) effectively rendered defendant "a witness" within the meaning of the provision, who provided direct "testimony" about the crime of solicitation. The purpose of section 653f, subdivision (d) is to guard against convictions for solicitation based on the testimony of one person who may have suspect motives. The danger that the statute guards against is not present, however, when the accused himself provides evidence of the alleged crime and independent circumstances corroborate this evidence.

(*Id.* at p. 76.)

Although this Court found that on its face, the defendant's letter was "somewhat ambiguous as to the conduct it solicits," there were sufficient external factors "from which the jury could have found that the letter constituted a solicitation of murder." (*People v. Phillips, supra*, 41 Cal.3d at pp. 76-77.) In contrast, with respect to the letter soliciting extortion of the "accountant," this Court found there was not sufficient corroborating evidence because other than the defendant's statements in the letter, there was no independent evidence that tended to show guilt. (*Id.* at p. 82.)

Here, contrary to appellant's assertion, the letter to Nino was more akin to the first solicitation letter in *Phillips*. The introduction of the letter "effectively rendered" Navarro a witness "who provided direct 'testimony'

about the crime of solicitation." The circumstances surrounding the letter revealed that Navarro believed that Chino was telling people Navarro was an informant, and Navarro needed to put a stop to this. After telling Nino that he had four Mexican Mafia members behind him, Navarro asked Nino to, at the least, beat up Chino. As in *Phillips*, the accused, i.e. Navarro, provided the needed corroboration. This was sufficient for the jury to find that the letter constituted a solicitation of assault by means of force likely to cause great bodily injury. Therefore, the solicitation letter and testimony related to it were properly admitted during the penalty phase as factor (b) evidence.

C. Any Error in Admitting Evidence of These Three Unadjudicated Criminal Acts Was Harmless

Any error in admitting the evidence of the three challenged unadjudicated criminal acts was harmless. When a trial court erroneously admits section 190.3, factor (b), evidence under state law, the penalty phase judgment will be reversed only if there is a reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gonzalez, supra,* 38 Cal.4th at p. 961.) Even where substantial evidence of other violent crimes is admitted, the focus of the penalty phase is the defendant and his capital crime and the evidence of other crimes is "of marginal significance to the picture presented of the murder and the murderer." (*People v. Clair, supra,* 2 Cal.4th at pp. 678, fn. 11, 681.) Consequently, given the court's instructions to find the other crimes existed beyond a reasonable doubt and the wealth of other evidence in aggravation, any error is necessarily harmless.

Where, as here, the jury is instructed not to consider the prior crimes evidence unless it found beyond a reasonable doubt that the defendant had committed the alleged offenses, absent evidence to the contrary, it is presumed the jury used the evidence appropriately. (*People v. Koontz*

(2002) 27 Cal.4th 1041, 1089; *People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) Thus, to the extent this court could find the evidence insufficient, it is reasonable to conclude the jury did as well and followed the court's instructions not to consider in deciding the appropriate penalty.

Moreover, exclusive of the challenged evidence, the evidence in aggravation, and supporting the imposition of death, overwhelmingly outweighed any possible mitigating evidence. Properly admitted factor (b) evidence showed Navarro, as a member of Pacoima Flats criminal street gang, engaged in random violence against innocent people, both personally and by using his authority as a shot-caller in the gang. (See, i.e., 32 RT 5658-5672 [attack on Gallegos in garage], 32 RT 5685-5690 [shooting of Gallegos]; 33 RT 5845-5847, 5853-5856 [other attacks on Parent].) In addition to Navarro's prior convictions, the circumstances of the murder, how cavalierly Navarro and his soldiers took the life of a father, husband and son, as well as the compelling victim impact evidence also weighed in favor of the death penalty.

In light of the evidence of the brutal murder of Montemayor, the impact on the victim's family and the other evidence of Navarro's criminal behavior, admission of the challenged evidence, even if erroneous, did not prejudice Navarro.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE FACTS UNDERLYING TWO PRIOR CONVICTIONS COULD BE USED IN AGGRAVATION AS FACTOR (B) EVIDENCE WITHOUT FINDING THE FACTS WERE TRUE BEYOND A REASONABLE DOUBT

Navarro claims the trial court erred by instructing the jury that the facts underlying two of the factor (c) prior convictions could be considered by the jury under factor (b) without finding them true beyond a reasonable doubt. (AOB 309-315.) Navarro's failure to object to the instruction forfeits his claim on appeal. In any event, the trial court properly instructed

the jury on the burden of proof regarding factor (c) evidence and error is necessarily harmless.

A. Relevant Background

Before the penalty phase, Navarro admitted three prior conviction allegations. (30 RT 5300-5304.) The parties agreed to present a stipulation to the jury indicating that Navarro admitted he sustained the three prior felony convictions for consideration under factor (c). (30 RT 5304-5305.) Accordingly, during the penalty phase, the parties stipulated that Navarro had three prior felony convictions that were set forth in a table on page 2 of the stipulation, which was marked as exhibit number 214. (37 RT 6553.) The table listed the following prior felony convictions:

> (1) Crime: Penal Code section 192.1 (voluntary manslaughter), victim: Reynaldo Meza, date of offense: 10-14-83, date of conviction: 12-5-84 in Los Angeles Superior Court;
>
> (2) Crime: Vehicle Code section 10851(a) (unlawful vehicle taking); victim: George B.; date of offense: 7-20-95; date of conviction: 11-08-95 in Los Angeles Superior Court;
>
> (3) Crime: Penal Code section 211, 12022(b) (2nd degree robbery with use of weapon), victim: Francisco Chavez; date of offense: 11-18-95; date of conviction 5-21-96 in Los Angeles Superior Court.

(9 CT 2375.)

The prosecution also presented evidence of some of the facts and circumstances underlying the convictions for voluntary manslaughter and second degree robbery. With respect to the voluntary manslaughter conviction, the prosecution introduced evidence that the crime involved a gang retaliatory shooting. Navarro was with his fellow Pacoima Flats gang members, but he was not the shooter. (31 RT 5479-5481; 34 RT 6079, 6081-6087.) Two San Fer gang members were shot; one died and the other

was paralyzed as a result of the shooting. (31 RT 5478, 5480-5482; 34 RT 6079-6080.)

The facts underlying the second degree robbery conviction involved Navarro and his cohort targeting a couple, Francisco and Yanira Chavez, who were selling clothing out of their vehicle. (31 RT 5422-5428, 5443-5444, 5447.) Navarro's companion took the couple's Pomeranian dog. (31 RT 5428-5429, 5447, 5470-5472.) Navarro and his cohort then robbed the couple at knifepoint of about $475 cash and the clothing Francisco was trying to sell. (31 RT 5430-5434, 5437, 5448-5449, 5473-5475.) Navarro showed Francisco a gun, and threatened to kill him if he called the police. (31 RT 5438-5440.)

While discussing jury instructions, the parties discussed the proposed CALJIC No. 8.87 regarding factor (b) evidence. (35 RT 6228.) The trial court noted that where there was an overlap between factor (c) and (b) evidence, the jury needed to be told that that evidence was not subject to the beyond a reasonable doubt standard. (35 RT 6229.) The trial court told counsel it needed some "special language concerning those circumstances that overlap between factor (c) and (b), so if you have any proposed instruction in that area, please have that prepared so we can consider that." (35 RT 6246-6247.)

The prosecutor subsequently submitted another modified version of CALJIC No. 8.87, which the trial court marked as exhibit number 158.[28] Before instructing the jury, the trial court discussed the instructions, and noted that CALJIC No. 8.87 regarding factor (b) evidence had been

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[28] This modified version of CALJIC No. 8.87 was part of the packet of proposed penalty phase jury instructions that the court marked as exhibit 157. While slightly different from the final version, this draft contained the same language regarding the two prior convictions not being subject to the beyond a reasonable doubt standard. (11 CT 2835-2836.)

modified extensively. (38 RT 6569-6570.) The court asked defense counsel if he was satisfied with the modification. (38 RT 6570.) Defense counsel replied that it was consistent with that upon which the court had been ruling, and that based upon the court's prior ruling, he expected that was what the court would be giving. (38 RT 6570.)

At the conclusion of the penalty phase, the trial court instructed the jury with, among other instructions, CALJIC No. 8.85, which generally explained to the jury the circumstances in aggravation and mitigation it could consider in its penalty determination. (8 CT 2092; 38 RT 6694-6695.) The court next instructed with a modified version of CALJIC No. 8.86 that told the jury,

> As indicated by the Stipulation of the Parties, the defendant, Anthony Navarro, has been convicted of the crimes of Penal Code section 192 (Voluntary Manslaughter), Vehicle Code section 10851(a) (Unlawful Vehicle Taking), and Penal Code section 211 (Robbery in the Second Degree), prior to the offense of Murder in the First Degree of which he has been found guilty in this case.
>
> The existence of these prior convictions is presented to you for your consideration under Factor (c), as defined in Instruction 8.85. You, as the jury, shall consider what weight, if any, to give to the existence of these convictions.
>
> You may not consider any evidence of any other crime as an aggravating circumstance under Factor (c).

(9 CT 2093; 38 RT 6695-6696.)

Then, the trial court instructed the jury with a modified CALJIC No. 8.87 regarding other criminal activity and proof beyond a reasonable doubt. (8 CT 2094-2097; 38 RT 6696-6700.) The instruction listed 14 factor (b) incidents, and told the jury,

> The People have the burden to prove the commission of these alleged factor (b) incidents beyond a reasonable doubt. This means that before a juror may consider any criminal activity as

an aggravating circumstance in this case under Factor (b), a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the activity listed above as a "Factor (b) Incident."

(CALJIC No. 8.87 (modified); 8 CT 2094-2097; 38 RT 6699.)

The court further instructed,

Nevertheless, the following "Factor (b) Incidents" listed above are not subject to the requirements that the commissions of the criminal activity must be proved beyond a reasonable doubt:

- Incident number 1a (Voluntary Manslaughter);
- Incident number 2a (Robbery of Francisco Chavez with use of a knife).

The reason for this exception to the "beyond the reasonable doubt" standard is that the defendant has previously been convicted of these crimes.

(CALJIC No. 8.87 (modified); 8 CT 2097; 38 RT 6699-6700.)

First, when reviewing the modified CALJIC No. 8.87, defense counsel did not object to the modified instruction. (38 RT 6569-6571.) A party who fails to press an objection and secure a ruling fails to preserve the point and forfeits any claim of error on appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

In any event, the trial court properly instructed the jury regarding the burden of proof as it related to Navarro's prior convictions. Instructional error occurs only when, in light of all the instructions the jury received (*Francis v. Franklin* (1985) 471 U.S. 307, 315 [105 S.Ct. 1965, 85 L.Ed.2d 344]; *People v. Moore* (1988) 47 Cal.3d 63, 87), there is a reasonable likelihood that the jury either did not understand, or misinterpreted the law (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526).

Where criminal activity of a defendant results in a prior conviction for a violent felony, it may be admissible under both subdivision (c), concerning prior convictions, and subdivision (b), concerning prior uncharged criminal activity. (Pen. Code, § 190.3.) "If violent 'criminal activity' by the defendant *did* also result in a 'prior felony conviction,' there seems no statutory reason why the prosecutor must elect between subdivisions (b) and (c) when presenting the incident for purposes of aggravation." (*People v. Melton* (1988) 44 Cal.3d 713, 764, original italics.)

Given the conviction there is no need to instruct the jury considering it as factor (b) evidence that it must be proven beyond a reasonable doubt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 1000-1001.) This is because the conviction establishes the elements beyond a reasonable doubt.

Contrary to Navarro's contention, there is also no need to instruct the jury that it is required to find the existence of the facts underlying the conviction true beyond a reasonable doubt. In *People v. Bacon, supra*, 50 Cal.4th 1082, the defendant claimed the trial court erroneously failed to instruct the jury that before it could consider the evidence underlying his prior Arizona robbery and second degree murder convictions as factor (b) aggravation it had to find beyond a reasonable doubt that the defendant committed the acts. (*Id.* at p. 1122.) This Court noted that the *Ashmus* Court, in dicta, cited *People v. Kaurish* (1990) 52 Cal.3d 648, 707, and *People v. Morales* (1989) 48 Cal.3d 527, 566, for the proposition that a reasonable doubt instruction would be required when the prosecution seeks to prove conduct that was different from or separate from the conduct underlying the prior conviction. (*Id.* at pp. 1123-1124.) In *Bacon*, this Court distinguished *Kaurish* and *Morales*, and found that because "the conduct described was precisely the basis for defendant's Arizona prior conviction for second degree murder, . . . [t]he trial court therefore was not

required to give an additional reasonable-doubt instruction concerning this conduct as factor (b) evidence." (*Bacon* at p. 1124.)

Here, the conduct that supported the underlying the October 14, 1983, gang shooting described the basis for Navarro's voluntary manslaughter conviction. To the extent the conduct described the attempted murder on the second victim, and was therefore a separate unadjudicated criminal act, the jury was instructed it had to find beyond a reasonable doubt that Navarro committed this activity. Similarly, the facts describing the November 18, 1995, robbery provided the basis for the second degree robbery conviction. To the extent the description of the robbery applied to Yanira Chavez, the second victim, the court instructed the jury it had to be satisfied beyond a reasonable doubt that Navarro committed this activity. Accordingly, the jury was properly instructed regarding the conduct underlying the factor (c) convictions as well as the conduct that went beyond the convictions and was considered under factor (b) evidence.

Navarro claims that *People v. Phillips, supra,* 41 Cal.3d 29, compels reversal in this case. (AOB 311-314.) Again *Phillips* does not aid Navarro. It is readily distinguishable. In *People v. Phillips*, the trial court did not instruct the jury that it had to find evidence of other criminal activity (factor (b) evidence) had been proven beyond a reasonable doubt before considering it during the penalty phase. (*Id.* at p. 83.) This Court found such failure to instruct was prejudicial error because the failure "tainted *all* of the other crimes that could properly have been considered by the jury as aggravating factors under section 190.3, subdivision (b)." (*Ibid.*, original italics.) Here, no such error occurred. With the exception of the evidence that formed the basis for two of Navarro's prior convictions, the trial court did instruct the jury it had to find the factor (b) evidence beyond a reasonable doubt.

Lastly, even if error occurred, it is not reasonably possible that such error affected the penalty jury's death verdict, and accordingly, any error was harmless. State law error at the penalty phase is reviewed under a "reasonable possibility" standard. This Court examines whether there is a reasonable possibility that a sentence of life without possibility of parole would have been returned absent the error. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) California's reasonable possibility standard for assessing penalty phase error is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Ochoa, supra,* 19 Cal.4th at p. 479.) Here, any error in instructing the jury was harmless.

First, during closing argument, the prosecutor reminded the jury it had to find true beyond a reasonable doubt the factor (b) incidents. (38 RT 6597.) In addition, the record overwhelmingly reflects that the jury, had it been instructed to do so, would have found beyond a reasonable doubt that Navarro did in fact commit the acts underlying his voluntary manslaughter and second degree robbery convictions. Both of these crimes necessarily involve the express or implied use of force or violence. (Pen. Code, § 190.3, factor (b).) Accordingly, the only question before the jury would have been whether Navarro did in fact commit the criminal acts. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720; *People v. Monterroso* (2004) 34 Cal.4th 743, 792-793; *People v. Gray* (2005) 37 Cal.4th 168, 235.) Since the jury had before it the undisputed proof that Navarro had in fact been convicted of the 1983 voluntary manslaughter and the 1995 second degree robbery—he pleaded guilty to these crimes—and given that in penalty closing argument defense counsel basically conceded Navarro's commission of those crimes (38 RT 6664-6665), it is inconceivable that had the jury been given a beyond-a-reasonable-doubt instruction regarding the

commission of the acts, that the jury would have returned a more favorable verdict for Navarro.

In any event, the evidence of Navarro's participation in the crimes that took place at the park on October 14, 1983, was established beyond a reasonable doubt. Navarro did not dispute that he was there that night; he told the investigating officer that he was not the shooter, and although he knew the gang members were going to the park to retaliate for a shooting and assault, Navarro said he thought they were just going to engage in a fistfight with the rival gang. (34 RT 6081-6087, 6093.) During closing argument, defense counsel told the jury they were not contesting Navarro's participation in the events that night. (38 RT 6664-6665.)

Similarly, regarding the robbery, it was established beyond a reasonable doubt. Furthermore, the evidence substantially established that Navarro robbed not only Francisco Chavez but also Yanira Chavez on November 18, 1995. Francisco and Yanira were in the car together when Navarro's cohort reached into the car and stole their Pomeranian dog. (31 RT 5428-5429, 5447, 5470-5472.) As Navarro got into the car and put a knife to Francisco's throat, Navarro's cohort pulled Yanira out of the front seat so he could get in the car and put a knife to Francisco's stomach. (31 RT 5430-5432, 5434, 5448-5449, 5473-5475.) Navarro then stole cash and clothing from Francisco. (31 RT 5434, 5437.)

Independent of the facts underlying Navarro's conviction, there is no dispute that the jury properly had the convictions to consider. The prosecution also presented a very strong case in aggravation apart from the evidence underlying the 1983 voluntary manslaughter and the 1995 robbery. There existed the convictions for those offenses; a prior conviction for unlawfully taking a vehicle; evidence of several unadjudicated violent acts; and the facts and circumstances of the capital crime. The jury also had before it Navarro's mitigation evidence regarding

his work as an informant and attempts to overcome the gang lifestyle. The jury nevertheless returned a death verdict, and there exists no reasonable possibility that it would have returned a more favorable verdict for Navarro had it been instructed that it could only consider the evidence underlying the voluntary manslaughter and second degree robbery convictions as factor (b) aggravation if it found the facts of that conduct (as apart from the fact of the convictions) proved beyond a reasonable doubt. Consequently, Navarro cannot establish that the instructions given violated his right to a reliable penalty verdict. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22.)

IX. THIS COURT SHOULD REJECT NAVARRO'S ROUTINE CHALLENGES TO THE CALIFORNIA DEATH PENALTY STATUTE

In his final claim, Navarro raises several routine challenges to California's capital-sentencing scheme that he acknowledges this Court has repeatedly rejected. While noting this Court's decision in *People v. Schmeck* (2005) 37 Cal.4th 240, 304, addressing the presentation of these routine and generic claims, Navarro "briefly" presents the challenges to urge their reconsideration and to preserve them for federal review. (AOB 316-318.) As these challenges have repeatedly been rejected by this Court, they require little discussion.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Contrary to Navarro's assertion (AOB 319- 321), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People*

v. Schmeck, *supra*, 37 Cal.4th at p. 304; *People v. Wilson, supra,* 36 Cal.4th at pp. 361-362; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Navarro's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

B. Penal Code Section 190.3 Does Not Allow for Arbitrary and Capricious Imposition of Death

Equally unavailing is Navarro's claim the application of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 321-324.) Allowing a jury to find aggravation based on the "circumstances of the crime" under Penal Code section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1288.) As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Id.* at p. 976.)

Nor is section 190.3, factor (a), applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a). (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401, alteration in original.)

C. California's Death Penalty Scheme Provides Adequate Safeguards Against the Arbitrary Imposition of Death

1. Navarro's burden of proof argument should be rejected

Navarro also contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 326-337.) However, this Court has determined on many occasions that Penal Code section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

> "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." [Citation].

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa v. California*, *supra*, 512 U.S. at p. 972; accord *People v. Virgil*, *supra*, 51 Cal.4th at pp. 1278-1279.) Navarro gives this Court no reason to reconsider its previous holdings.

2. Unanimity for aggravating factors not required

Navarro contends that before choosing to impose death, jurors needed to unanimously find each aggravating factor true beyond a reasonable doubt and that they outweighed mitigating factors. (AOB 338-344.) This Court has consistently rejected these claims. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Russell, supra,* 50 Cal.4th at pp. 1271-1272; *People v. Bramit, supra,* 46 Cal.4th at pp. 1249-1250; *People v. Burney, supra,* 47 Cal.4th at pp. 267-268.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney*, *supra*, 47 Cal.4th at p. 268.) The Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors. (*People v. Nelson*, *supra*, 51 Cal.4th at p. 225; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 926.) Nor does the failure to require jury unanimity as to aggravating factors violate Navarro's right to Equal Protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

3. Written findings regarding aggravating factors are not required

Navarro claims the California death penalty law violates his federal due process and Eighth Amendment rights because it does not require that

the jury base a death sentence on "written findings regarding aggravating factors." (AOB 344-347.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; accord *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gamache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2009) 46 Cal.4th 680, 724.) "Nothing in the [F]ederal [C]onstitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v. Nelson, supra,* 51 Cal.4th at p. 225.) Navarro offers no justification for this Court to reconsider its earlier rulings.

4. There is no need for inter-case proportionality

Navarro claims that the failure to conduct intercase proportionality review violates the Eighth Amendment. (AOB 347-349.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Hoyas, supra,* 41 Cal.4th at p. 927; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

5. The use of restrictive adjectives in sentencing factors is proper

Navarro urges this Court to reconsider its earlier holdings and find the use of restrictive adjectives such as "extreme" and "substantial" in the list of potential mitigating factors act as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments. (AOB 350.) This argument has been consistently rejected by this Court. (*People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068; *People v. Avila, supra,* 38 Cal.4th at pp. 614-615; *People v. Schmeck, supra*, 37 Cal.4th at p. 305; *People v. Morrison* (2004) 34 Cal.4th 698, 729–730.) Navarro has offered no basis to reconsider these rulings.

6. Failure to instruct the jury that statutory mitigating factors were relevant solely as potential mitigating factors is not error

Navarro argues the trial court's failure to advise the jury that mitigating factors could only be considered mitigating violated state law and his constitutional rights. (AOB 350-654.) This Court has repeatedly found no error in this regard:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.

(*People v. Morrison*, *supra*, 34 Cal.4th at p. 730; see also *People v. Jurado*, *supra*, 38 Cal.4th at p. 143; *People v. Moon* (2005) 37 Cal.4th 1, 42.)

Navarro offers no basis for this Court to reconsider its earlier rulings.

D. California's Death Penalty Scheme Comports with Equal Protection in That It Provides Adequate Procedural Safeguards to Capital Defendants When Compared to Non-Capital Defendants

Navarro contends the capital sentencing scheme violates equal protection because it provides fewer procedural protections to death eligible defendants than for those in non-capital cases. (AOB 354-357.) Again, this Court has ruled otherwise:

> The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are

> afforded to noncapital defendants because the two categories of defendants are not similarly situated. (*People v. Redd* (2010) 48 Cal.4th 691, 758, 108 Cal.Rptr.3d 192, 229 P.3d 101; *People v. Martinez* (2010) 47 Cal.4th 911, 968, 105 Cal.Rptr.3d 131, 224 P.3d 877.)

(*People v. Lee* (2011) 51 Cal.4th 620, 653.)

Navarro does not present any reason to revisit this conclusion.

E. California's Death Penalty Scheme Does Not Violate International Law

Navarro contends the California death penalty scheme violates international law. (AOB 358-361.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and Federal Constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Ward*, *supra*, 36 Cal.4th at p. 222; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) Navarro does not present any reason to revisit these holdings.

Navarro also contends that the use of the death penalty is contrary to prevailing civilized norms. But international law does not require California to eliminate capital punishment. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin*, *supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Doolin*, *supra*, at pp. 456-457.) Instead,

> [t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by

> constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)

(*People v. Doolin*, *supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.)

Navarro gives this Court no reason to reconsider its previous holdings.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: April 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 68,130 words.

Dated: April 6, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Anthony Navarro** No.: **S165195**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 7, 2015, I served the attached ***RESPONDENT'S BRIEF*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 7, 2015, at San Diego, California.

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