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 Related Case No. S242538

Orange County Superior Court Case No. 02NF3143

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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INTRODUCTION

On September 11, 2020, Navarro filed a Second Supplemental Brief raising three issues: (1) that "recent communications-theory" research confirms that Navarro's inability to present an opening statement at the start of trial was prejudicial; (2) pursuant to *People v. Banks*[1] and its progeny, the two felony-murder special circumstance findings—robbery and kidnapping—should be reversed; and (3) that the evidence was insufficient to prove the pattern of criminal gang activity necessary for the street terrorism charge, the criminal gang special circumstance, and the gang enhancements. On that same date, this Court ordered respondent to file a second supplemental respondent's brief to address these claims.

First, as set out in respondent's brief, the trial court acted well within its discretion in requiring defense counsel to make a sufficient showing of admissibility concerning certain proposed factual statements during his opening statement before permitting the statements. The "recent communications-theory" research that Navarro describes in his second supplemental brief does not establish that he was prejudiced by waiting to give his opening statement at the close of the prosecution's case.

In addition, sufficient evidence supported the jury's findings on the kidnapping and attempted robbery special circumstances. By convicting Navarro of conspiracy to commit murder, the jury necessarily found that Navarro had the intent to kill. Furthermore, even if Navarro did not have the intent to kill,

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[1] *People v. Banks* (2015) 61 Cal.4th 788.

there was substantial evidence that he was a major participant in the kidnapping, attempted robbery and killing of Montemayor, and he acted with reckless indifference to human life.

Finally, sufficient evidence supported the street terrorism conviction, gang enhancements and gang special circumstance finding. Even if some of the gang expert's opinion regarding the predicate offenses was erroneously admitted because it was based on inadmissible hearsay, there was other admissible evidence establishing that Pacoima Flats gang members committed two or more of the enumerated predicate offenses.

ARGUMENT

I. RECENT "COMMUNICATIONS-THEORY RESEARCH" DOES NOT ALTER THE PROPRIETY OF THE TRIAL COURT'S RULING REGARDING THE DEFENSE OPENING STATEMENT, NOR DOES IT ESTABLISH PREJUDICE

In his opening brief, Navarro claimed 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.) Now, in his second supplemental brief, Navarro adds that "recent communications-theory research" supports his argument that he was prejudiced by the trial court's ruling because the jury did not have the benefit of hearing his opening statement when defense counsel was cross-examining Edelmira Corona. (SSAOB 6-17.)

As set forth in respondent's brief (RB 80-94), the trial court acted well within its discretion by precluding defense counsel

from mentioning possible inadmissible hearsay or evidence potentially lacking foundation during his opening statement because the relevance and admissibility of such evidence would not be known until after the prosecution's case or until after a full hearing with both sides present. Furthermore, as also detailed in the respondent's brief, even if the trial court's ruling influenced defense counsel to defer his opening statement, Navarro was not prejudiced. The "Truth-Default Theory" cited by Navarro in his second supplemental brief does not change this analysis.

According to Navarro, the Truth-Default Theory, written by Timothy R. Levine, Ph.D., in the Journal of Language and Social Psychology, shows that after hearing opening statements, the jury will reject any witness's testimony that differs from what was heard. Thus, as applied here, Navarro contends that because the jury only heard the prosecutor's opening statement before defense counsel cross-examined Edelmira Corona, the jurors had no context for judging Corona's answers. (SSAOB 7-17.)

As Navarro notes, the crux of the Truth-Default Theory is that the default is for people to believe that others are telling the truth, and in order for individuals to leave the "truth-default" state, there needs to be some signal or indication that deception is occurring. (See SSAOB 7-9.) According to the theory, the accuracy of lie detection is improved by contextualizing the communication content. (SSAOB 10-11.) However, this theory does not establish that the jury would judge a witness's testimony

solely based on what was said during opening statements and disregard cross-examination.

"Cross-examination—described by Wigmore as the greatest legal engine ever invented for the discovery of truth—has two purposes. Its chief purpose is to test the credibility, knowledge, and recollection of the witness. The other purpose is to elicit additional evidence." (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733, citations and quotation marks omitted.) "[F]acts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue." (*Id.* at p. 734, citations and quotation marks omitted.)

Navarro argues that "the importance of cross-examination is lost if there is no context for the questions defense counsel is asking, because there is no contextual basis on which to doubt the answers, while the witness is on the stand." (SSAOB 12.) But cross-examination itself can provide context for the testimony on direct that the defense seeks to challenge. Cross-examination can reveal the circumstances surrounding the witness's statement on direct (or prior statement) and can show motive to lie or inconsistencies between the statement and other evidence or testimony. Thus, contrary to Navarro's argument, cross-examination provided the defense with ample opportunity to contextualize Corona's testimony and challenge the truthfulness of her statements.

Furthermore, Navarro's argument ignores that fact that the jurors were instructed that an opening statement is not evidence nor argument, and that the jury could expect defense counsel's

opening statement at the conclusion of the prosecution's case. Specifically, at the beginning of trial, the trial court gave the jury a juror packet that contained CALJIC No. 0.50, which instructed the jurors regarding an opening statement. (10 CT 2590-2592.) Before the prosecutor gave his opening statement, the trial court told the jury:

> Both sides are given a chance to make an opening statement. This morning the People will make an opening statement. Counsel for defendant has elected to make their opening statement at the commencement of their case. They will call witnesses, they will present evidence, so I need to remind you that it's your obligation, the law requires that you keep an open mind until all evidence is presented. And the People have the burden of proof, so they go first.
>
> So this morning, what you will see is the People's opening statement. Please keep in mind that what counsel says during opening statement is not evidence and should not be considered by you to be evidence. Counsel will make their best efforts to be correct as to what they anticipate their witnesses will testify in trying to give you a general guideline as to what evidence they expect to be presented.
>
> It's not uncommon that witnesses sometimes testify at variance with the opening statement. So I need to stress to you that you need to rely on the testimony taken from the witnesses, from the evidence, from the witness stand, and that counsel's remarks are not the evidence at any stage in the proceedings.

(13 RT 2357-2358.)

Accordingly, the jury was instructed on the purpose of the opening statement, and to keep an open mind during the course of trial. The jurors are presumed to have performed their duty. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1213; see also

Evid. Code, § 664.) The jurors' duties include determining factual questions according to "the law as given to them by the court. They are not allowed either to determine what the law is or what the law should be." (*Noll v. Lee* (1963) 221 Cal.App.2d 81, 87-88.)

Thus, "it is of course presumed the jury meticulously followed the instructions given." (*People v. McNear* (1961) 190 Cal.App.2d 541, 547.) "This presumption can be overcome only by showing some act of misconduct." (*People v. Struve* (1961) 190 Cal.App.2d 358, 360.) Here, there is no evidence and no contention that the jury committed misconduct. Therefore, it must be presumed that the jury followed the instructions given.

In sum, the trial court's ruling regarding the defense opening statement was not an abuse of discretion. Even assuming that the trial court's ruling improperly pressured defense counsel to defer his opening statement, Navarro cannot establish prejudicial error.

II. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S KIDNAPPING AND ATTEMPTED ROBBERY SPECIAL CIRCUMSTANCES FINDINGS

Appellant states that since he filed his opening brief, this Court has decided three cases clarifying the standards for proving felony-murder special circumstances: *People v. Banks*, *supra*, 61 Cal.4th at p. 788, *People v. Clark* (2016) 63 Cal.4th 522, and *In re Scoggins* (2020) 9 Cal.5th 667. Based on these three cases, Navarro contends there was insufficient evidence to support the robbery and kidnapping special circumstance findings. (SSAOB 18-22.) To the contrary, the evidence was

sufficient to establish that Navarro either harbored the intent to kill, or that he was a major participant in the criminal enterprise before, during, and after Montemayor's murder and acted with reckless disregard for human life.

The familiar standard directs that in reviewing a challenge to the sufficiency of the evidence for a special circumstance, "the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'"" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

When applying the "deferential substantial evidence test" (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 37), the reviewing court must "presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence." (*Id.* at p. 27.) If the jury's finding is supported by substantial evidence, due deference must be accorded the trier of fact, and the reviewing court will not substitute its evaluation of a witness's credibility for that of the factfinder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "It is the jury, not the appellate court, that must be convinced beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

A. The Kidnapping and Robbery Special Circumstances and Accompanying Jury Instructions

Among the special circumstances enumerated in section 190.2 are murders "committed while the defendant was engaged

in, or was an accomplice in, the commission of" a robbery and kidnapping. (§ 190.2, subds. (a)(17)(A) & (a)(17)(B).) To prove the truth of these special circumstances against one who is not the actual killer, the prosecution must show *either* that the non-killing aider and abettor who counseled, induced, requested, or assisted in the robbery had the intent to kill (§ 190.2, subd. (c)) *or* that he acted with reckless indifference to human life while acting as a major participant in the underlying felony (§ 190.2, subd. (d)). (See *People v. Clark, supra,* 63 Cal.4th at p. 609; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 163, fn. 20; *People v. Estrada* (1995) 11 Cal.4th 568, 575.)

Accordingly, the jury was instructed that in order to find the kidnapping and robbery special circumstances true, it must find beyond a reasonable doubt the following:

> If you find that a defendant was not the actual killer of a human being, you cannot find either of the first two special circumstances to be true unless you are satisfied beyond a reasonable doubt that:
>
> Such defendant with the intent to kill counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, OR
>
> With reckless indifference to human life and as a major participant, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission or attempted commission of the crimes of kidnapping or robbery, which resulted in the death of a human being, namely David Montemayor.
>
> A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts

involve a grave risk of death to an innocent human being.

(28 RT 4933-4935; 7 CT 1884-1885 [CALJIC No. 8.80.1].)

The jury was further instructed:

> To find that the special circumstance referred to in these instructions as murder during the commission of a kidnapping is true, it must be proved:
>
> The murder was committed while the defendant was a co-conspirator and/or an aider and abettor in the commission of the kidnapping.
>
> To find that the special circumstance referred to in these instructions as murder during the attempted commission of a robbery is true, it must be proved:
>
> The murder was committed while the defendant was a co-conspirator and/or an aider and abettor in the attempted commission of a robbery.

(28 RT 4937-4938; 7 CT 1888 [CALJIC No. 8.81.17].)

B. There Was Substantial Evidence that Navarro Intended to Kill Montemayor

There was ample evidence that Navarro had the intent to kill Montemayor. Indeed, the whole purpose of the conspiracy was to kill Montemayor. The plan to kill Montemayor began with Perna asking Corona to find someone to kill her brother. (14 RT 2632-2637, 2650-2651.) Corona solicited Navarro, who Perna had met when he delivered methamphetamine to Corona at Interfreight. (14 RT 2654-2657, 2660-2670; 15 RT 2789, 2818, 2820, 2848-2849; 9 CT 2331-2338.)

Corona then acted as the intermediary between Perna and Navarro, assisting in arranging a plot for Navarro to kill Montemayor. (14 RT 2675, 2697.) Corona gave Navarro a piece

of paper with Montemayor's home address and telephone number on it, and said that Perna wanted Montemayor killed. (13 RT 2331-2332, 2391-2393; 14 RT 2643, 2654-2658, 2674-2675, 2698-2701, 2708; 15 RT 2817-2820, 2825; 17 RT 3129, 3131; 9 CT 2332, 2339-2340, 2342, 2345.) Corona told Navarro that in exchange for killing Montemayor, Navarro could steal a large sum of cash that Montemayor kept in coffee cans in his garage. (14 RT 2705-2707.)

Instead of personally killing Montemayor, Navarro, a shot-caller in the Pacoima Flats criminal street gang, directed junior gang members to carry out the killing. (13 RT 2515-2516; 16 RT 3057-3060; 17 RT 3173, 3179-3180, 3194-3198; 3200-3206; 20 RT 3814-3819.) Martinez, Macias, and Lopez, all armed with loaded firearms, waited for Montemayor to arrive at his business that morning. As instructed by Navarro, they forced Montemayor to drive back to his home, where he supposedly kept coffee cans of money in his garage. (13 RT 2465; 14 RT 2589-2591; 15 RT 2850; 16 RT 2961-2966, 2969; 17 RT 3091.) Although part of the plan went awry, the three gang members successfully completed the intended killing of Montemayor. (14 RT 2532-2538, 2594-2595; 17 RT 3089; 9 CT 2279-2287, 2290-2291, 2294-2296.)

By finding Navarro guilty of conspiracy to commit murder, the jury necessarily found beyond a reasonable doubt that Navarro had the specific intent to commit the elements of the underlying offense of murder. "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well

as the specific intent to commit the elements of the offense, together with proof of the commission of an overt act by one or more of the parties to such an agreement in furtherance of the conspiracy." (*People v. Johnson* (2013) 57 Cal.4th 250, 257, internal quotation marks omitted.) Thus, "a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice." (*People v. Swain* (1996) 12 Cal.4th 593, 607.)

In sum, 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 reached an agreement to commit the murder and shared an intent to kill. Thus, even though Navarro was not physically present when Montemayor was fatally shot, there was sufficient evidence from which the jury could have concluded that he harbored the intent to kill Montemayor.

C. Alternatively, There Was Substantial Evidence that Navarro Was a Major Participant Who Acted with Reckless Indifference to Human Life

Even if this Court determines that there was insufficient evidence Navarro intended to kill Montemayor, the jury's true findings as to the felony-murder special circumstances were supported by substantial evidence that Navarro was a major participant who acted with reckless indifference to human life.

In *People v. Banks, supra,* 61 Cal.4th 788, this Court reversed the robbery-murder special circumstance finding against

defendant Matthews, the getaway driver for three fellow gang members whose attempted robbery of a secured medical marijuana dispensary in Los Angeles resulted in the shooting death of the dispensary's security guard. (*Id*. at p. 794.) Matthews was parked a block away just before the crime, and was three blocks away for 45 minutes while the crime was occurring. Afterward, Matthews made a series of stops before he picked up two of the three perpetrators. (*Id*. at p. 796.)

In finding the robbery-murder special circumstance did not apply to the evidence presented against Matthews, this Court emphasized that "Matthews was absent from the scene, sitting in a car and waiting" and that "[t]here was no evidence [Matthews] saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it." (*Banks*, *supra*, 61 Cal.4th at p. 805.) In reaching its conclusion, this Court considered two United States Supreme Court cases—*Tison v. Arizona* (1987) 481 U.S. 137, and *Enmund v. Florida* (1982) 458 U.S. 782—which discuss the constitutional limitations of capital liability for accomplices. These cases precipitated the adoption of section 190.2, subdivision (d), by voter initiative in 1990.

In determining whether the Eighth Amendment permits a death sentence for an aider and abettor, *Tison* and *Edmund* require courts to examine "the defendant's personal role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." (*Banks*, *supra*,

61 Cal.4th at p. 801.) With respect to whether the defendant has the requisite intent, section 190.2, subdivision (d) looks "to whether a defendant has 'knowingly engage[ed] in criminal activities known to carry a grave risk of death.' [Citation.] The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Id*. at p. 801.) Further, the defendant must "'subjectively appreciate[ ] that [his] acts were likely to result in the taking of innocent life.'" (*Id*. at p. 802, quoting *Tison*, *supra*, 481 U.S. at p. 152.)

The *Banks* opinion articulates several factors that play a role in determining whether a defendant's degree of participation renders him sufficiently culpable to be eligible for the death penalty: (1) the role the defendant played planning the criminal enterprise leading to death; (2) the role the defendant had in supplying or using lethal weapons; (3) the awareness the defendant had of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants; (4) whether the defendant was present at the scene of the killing, in a position to facilitate or prevent the actual murder, and whether his or inaction played a particular role in the death; and (5) what the defendant did after lethal force was used. "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of

death' [citation] was sufficiently significant to be considered 'major' [citations]." (*Banks*, *supra*, 61 Cal.4th at p. 803.)

In *People v. Clark, supra,* 63 Cal.4th 522, this Court again addressed a claim of insufficient evidence to support robbery and burglary special circumstance allegations with respect to an accomplice. Clark was convicted of a robbery special-circumstance murder, although another man shot the victim to death. The court again pointed out that "[t]he mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life." (*Id*. at p. 618.) The court also made several observations about the kind of evidence a court should consider in determining whether this standard has been met.

First, it observed that "[a] defendant's use of a firearm ... can be significant to the analysis of reckless indifference to human life" because such an action could "'indicate a reasonable expectation that the death of the deceased or another would result.'" (*Clark*, *supra*, 63 Cal.4th at p. 618.) The court also discussed the importance of presence to culpability, explaining that "[p]roximity to the murder and the events leading up to it may be particularly significant where ... the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force." (*Clark*, *supra*, 63 Cal.4th at p. 619.) The court noted that a party present at the scene has an opportunity to restrain the

use of violence and is arguably more at fault for a murder if he or she does not. (*Ibid*.)

In addition, the court explained that "[a] defendant's knowledge of factors bearing on a cohorts' likelihood of killing are significant to the analysis of reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at p. 621.) With respect to this consideration, there was no evidence Clark knew the shooter had a propensity for violence or that Clark had the opportunity to observe anything in the shooter's actions prior to the shooting that indicated the shooter was likely to engage in lethal violence. (*Ibid*.) Also, Clark had planned the robbery so as to minimize the violence. (*Id*. at pp. 621-622.)

The *Clark* court concluded:

> [T]here is insufficient evidence to support the inference that defendant was recklessly indifferent to human life. Defendant's culpability for [the] murder resides in his role as planner and organizer, or as the one who set the crime in motion, rather than in his actions on the ground in the immediate events leading up to her murder.... Given defendant's apparent efforts to minimize violence and the relative paucity of other evidence to support a finding of reckless indifference to human life, we conclude that insufficient evidence supports the robbery-murder and burglary-murder special-circumstance findings, and we therefore vacate them.

(*Clark*, *supra*, 63 Cal.4th at p. 623.)

Most recently, in *In re Scoggins, supra,* 9 Cal.5th 667, this Court addressed the issue of whether an individual who planned an unarmed assault and robbery, and was not present during the crimes acted with reckless indifference to human life. There,

after the victim swindled Scoggins, he arranged for two of his cohorts to rob and beat up the victim. (*Id.* at p. 671.) During the confrontation, in which Scoggins was not present, one of the cohorts pulled out a semi-automatic handgun and fired several rounds. (*Id.* at p. 672.) The victim ran, and the shooter fired more shots, hitting the victim in the back and fatally injuring him. (*Ibid.*) Scoggins was convicted of first degree murder and attempted robbery, with a true finding that the murder was committed during an attempted robbery. (*Id.* at p. 671.)

This Court found that insufficient evidence supported the finding that Scoggins acted with reckless indifference to human life. (*Scoggins, supra*, 9 Cal.5th at p. 676.) First, Scoggins's plan for an unarmed assault and robbery specifically called for him not to be involved in the attack. (*Id.* at p. 671.) He did not use a gun or know that his cohorts were going to use one (*id.* at p. 677); he did not know of their propensity or likelihood to use lethal force (*id.* at p. 681); he was not physically present at the crime scene and thus not in a position to stop his cohorts (*id.* at p. 678); and he went to the victim after the shooting, checked whether the victim was still breathing, and gave a statement to officers at the scene (*id.* at p. 680).

Accordingly, because the evidence showed that "Scoggins planned an *unarmed* robbery and assault," and there was no evidence that he "knew his accomplices were likely to deviate from the plan and use lethal force," the "evidence [did] not suggest an elevated risk to human life beyond those risks

inherent in an unarmed beating and robbery." (*Scoggins, supra,* 9 Cal.5 at p. 682., original emphasis)

Navarro contends that under *Banks* and its progeny, the evidence presented at trial was insufficient to establish that he was a major participant in the crime and harbored reckless indifference to human life. (SSAOB 19-22.) Navarro is wrong.

The evidence showed that Navarro was a major participant in the plan to kidnap, rob, and kill Montemayor because he formed the plan, recruited others, and supplied the killers with critical information. Navarro was central to the criminal enterprise leading to Montemayor's death. As discussed above, Navarro enlisted his junior fellow Pacoima Flats gang members to perform the hit. Navarro, who thought he had lost the note with Montemayor's home address,[2] knew where Montemayor worked, and he provided this information to his cohorts so they could kidnap Montemayor and force him back to his house, where

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[2] In his second supplemental opening brief, Navarro asserts that because the note found in his glove-box contained Montemayor's home address and phone number, but Navarro's cohorts kidnapped Montemayor from his place of business, this "militates against the conclusion that (Navarro) participated in the conspiracy." (SSAOB 18-19.) As set forth in Respondent's Brief, Navarro told Corona that he lost the note, and he asked her to again get the address for him, which she never did. (See RB 5-6.) However, Navarro knew the address for Interfreight Transport because he had delivered drugs to Corona at that location. (14 RT 2654-2657, 2660-2670; 15 RT 2789, 2818, 2820, 2848-2849.) Thus, contrary to Navarro's argument, the fact that Navarro's junior gang members abducted Montemayor at his workplace actually corroborated Navarro's involvement in the conspiracy.

the money was believed to be hidden in his garage. (See 13 RT 2440-2444, 2465, 2475-2476, 2523; 14 RT 2712; 15 RT 2850; 16 RT 2961-2966, 2969; 17 RT 3090-3091.)

The flurry and timing of cellphone activity among Navarro and his co-conspirators showed Navarro's intimate role in the conspiracy to kill Montemayor. 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.) 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.)

In addition, when arrested, Macias had a business card in his wallet; handwritten on the back of the card was "Dropey," Navarro's gang 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 along with Navarro's auto club membership number. (17 RT 3111-3112, 3124; 18 RT 3253.)

Substantial evidence also supported the jury's finding that Navarro acted with reckless indifference to human life. As stated above, "the culpable mental state of 'reckless indifference to life' is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death." (*People v. Estrada*, *supra*, 11 Cal.4th at p. 577; see also CALJIC No. 8.80.1.) The evidence here established that Navarro, a "Veterano" or

seasoned Pacoima Flats gang member, was aware of the dangers posed by the nature of the crime, weapons used, and conduct of the other participants, his junior gang members. (17 RT 3173, 3198-3200, 3204-3206.) Violence and gangs go hand in hand. (17 RT 3160-3161, 3164-3165.) Navarro thus knew that the nature of a kidnapping and armed robbery posed a danger that the victim would be shot if something went wrong during the robbery. In fact, the end goal was to shoot and kill Montemayor.

Unlike the defendant in *Clark*, Navarro made no efforts to minimize the risk of violence. As a shot-caller, he would have controlled and known about the details of the plan, including the use of three loaded firearms and the kidnapping and robbery. This plan involved a heightened risk of violence and accomplished the intended result—Montemayor's death.

In sum, the jury's true findings on the attempted robbery and kidnapping special circumstances should be upheld as the evidence not only establishes that Navarro harbored the intent to kill Montemayor, but alternatively that he was a major participant in the crimes who acted with reckless indifference to human life.

III. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE MURDER WAS GANG-RELATED

Navarro contends there is insufficient evidence to support the jury's findings on the street terrorism charge, gang enhancements, and gang special circumstance. Specifically, he contends that there is insufficient evidence of the required pattern of criminal gang activity because Detective Booth's testimony regarding the predicate offenses was based on case-

specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, and the confrontation clause.[3] (SSAOB 23-30.) However, under a sufficiency review, this Court considers all of the evidence presented at trial, including inadmissible evidence. (*McDaniel v. Brown* (2010) 558 U.S. 120, 131; *People v. Story* (2009) 45 Cal.4th 1282, 1296.) Further, even setting aside the challenged testimony, the evidence sufficiently established that members of the Pacoima Flats criminal street gang engaged in a pattern of criminal activity.

A gang finding is reviewed under the same substantial evidence standard as a conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) To determine whether there is sufficient evidence to support a conviction, the reviewing court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime true beyond a reasonable doubt. (*People v. Johnson, supra,* 26 Cal.3d at pp. 576-577.)

To prove the existence of a "criminal street gang" within the meaning of the gang statutes, the prosecution must establish that the gang's members "individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subds. (e) & (f).) A "pattern of criminal gang activity" means "the

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[3] The issue of whether the gang expert's testimony regarding the predicate offenses was based on inadmissible hearsay is addressed in respondent's first supplemental brief. (SRB 20-21.) As explained in the brief, a gang's pattern of criminal activity does not involve case-specific facts and is akin to background information on which hearsay is permitted.

commission of, attempted commission of, conspiracy to commit, ... or conviction of two or more of the [enumerated] offenses, provided ... the offenses were committed on separate occasions, or by two or more persons" within a statutorily defined time period. (§ 186.22, subd. (e).) These are commonly referred to as "predicate offenses." Aside from the current conviction, the prosecution must only prove the commission of one additional predicate offense. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

Here, appellant challenges only the pattern-of-criminal-gang-activity element. (AOB 23-30.) To establish that Pacoima Flats engaged in a pattern of criminal gang activity the gang expert, Detective Booth described four felony predicate offenses committed by Pacoima Flats gang members. His testimony was based on research he performed into the background of each individual, including police reports, certified court documents, gang tattoos and in some instances, letters written to or from Navarro's cohorts Macias and Martinez. (17 RT 3185-3189, 3193-3194.)

Specifically, Booth testified that 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; Exh. No. 130 [certified document packet from Cocoran State Prison].) Victor Lopez Andrade aka "Gangster," a Pacoima Flats gang member, was convicted in 1994 of sale or transportation of cocaine, and was convicted in 2001 for possession for sale of cocaine base. (17 RT 3187-3188; Exh. No. 131 [certified document packet from

Department of Corrections].) 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; Exh. No. 132 [certified document packet from Department of Corrections].) Finally, Daniel Hueso, a Pacoima Flats gang member, was convicted in 2001 of second degree robbery. (17 RT 3193-3194; Exh. No. 133 [certified document packet from Department of Corrections].)

Navarro argues that Detective Booth's testimony was insufficient to prove the predicate offenses required to establish a pattern of criminal gang activity because although the certified court records satisfied the "crime" prong of the predicates, Detective Booth's testimony regarding each individual's gang membership was primarily based on hearsay that was not presented to the jury. (SSAOB 26-30.) Even if Detective Booth's testimony regarding the gang membership of Martinez, Lopez, Calzada, and Hueso was impermissibly based on hearsay, there was still sufficient evidence of the requisite pattern of criminal gang activity.

As stated above, for purposes of assessing the sufficiency of the evidence to support the jury's gang findings, the reviewing court considers all of the evidence presented at trial, including any evidence that should have been excluded. (See *People v. Story, supra,* 45 Cal.4th at p. 1296 ["when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider all of the evidence presented at trial, including evidence that should not

have been admitted"]; *People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17, 335–337 [appellate court must consider all evidence presented, including improperly admitted testimonial hearsay, in deciding whether evidence was sufficient to support gang enhancement findings].) Further, "incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding." (*People v. Panah* (2005) 35 Cal.4th 395, 476; see *People v. Bailey* (1991) 1 Cal.App.4th 459, 463; *McDaniel v. Brown, supra,* 558 U.S. at p. 131 [reviewing court assessing insufficient-evidence claim must consider all evidence admitted at trial, regardless of whether it was erroneously admitted].)

Here, the certified court records offered by the prosecution, along with Detective Booth's testimony, were sufficient to support a finding that members of the Pacoima Flats gang engaged in a pattern of criminal gang activity. As acknowledged by Navarro, the court records showed convictions for at least two statutorily enumerated offenses committed on separate occasions by two or more persons within a three-year period. (§ 186.22, subd. (e).)

In addition, Detective Booth opined that the individuals who committed the predicate offenses were members of the Pacoima Flats street gang at the time of their crimes. (17 RT 3186, 3188-3189, 3194.) Thus, the evidence presented at trial was sufficient to establish the predicate offenses necessary to prove the pattern of criminal gang activity element.

To the extent that Navarro claims that he was *prejudiced* by the erroneous admission of the testimony at issue because absent the testimony, there was insufficient evidence of a pattern of criminal gang activity (SSAOB 29), this claim fails as well. As discussed in Respondent's First Supplemental Brief, any *Sanchez* error with respect to Booth's testimony regarding the predicate offenses was harmless. (SRB 27-29.)

Even without considering any alleged hearsay, Navarro's commission of the instant conspiracy to commit murder and murder, along with his cohorts' commission of attempted robbery and kidnapping, established that Pacoima Flats gang members engaged in a pattern of criminal gang activity. As stated above, the "pattern of criminal activity" element of the gang enhancement may be established by evidence of a defendant's commission of a charged predicate offense and the contemporaneous commission of a second predicate offense by a fellow gang member. (*People v. Loeun, supra,* 17 Cal.4th at pp. 4-5, 9-10; *People v. Miranda* (2016) 2 Cal.App.5th 829, 841-82 [proof of defendants' contemporaneous commission of charged offenses sufficient to establish pattern]; *People v. Fiu* (2008) 165 Cal.App.4th 360, 389 ["charged offenses alone" committed by defendant and other gang members established pattern].) In 2002, the enumerated crimes included murder, kidnapping, and attempted robbery. (Pen. Code, § 186.22, subd. (e)(2), (e)(3) & (e)(15).)

Booth's opinion that Navarro, Macias, Martinez, and Lopez were Pacoima Flats gang members was supported by competent

evidence other than the hearsay at issue. Detective Pelton, the lead investigator in this case, testified regarding Navarro's October 17, 2002 admission to him that he was an elder member of the Pacoima Flats gang. (13 RT 2515-2516.) A CD case found inside of Navarro's car during that stop contained gang graffiti including Navarro's and Macias's monikers, and "Pacoima." (13 RT 2445-2447; 17 RT 3203.)

During a search of Navarro's residence, various documents and other items were found that referred to Navarro aka Droopy, and Pacoima Flats. (16 RT 2973-2982, 3064-3065.) The inside walls of Navarro's house and garage contained gang graffiti and roll calls for Pacoima Flats that included the monikers for Navarro, Martinez, and Macias. (16 RT 3056-3060; 17 RT 3200-3202.) A car parked inside of the garage had "Droops" written on the rear view mirror. (16 RT 3062-3063.)

A binder found in Navarro's Las Vegas residence had "Pacoima Flats" written on the outside and referred to various gang members including Navarro (aka Droopy) and Macias (aka Lil Pirate). (16 RT 2986-2987; 17 RT 3202-3203.) Writings found during a search of Martinez's residence included references to Pacoima Flats and Martinez (aka Crook), Navarro (aka Droopy), Macias (aka Lil Pirate), and Lopez (aka Sniper). (16 RT 2997-3000.) Similarly, a search of Lopez's residence revealed a notebook with roll calls for Pacoima Flats, and included the names Sniper, Crook, Pirate, and Droops. (17 RT 3106-3107.) A light switch inside of the residence had "Sniper" written on it,

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

Photographs that were shown to the jury showed Martinez, Macias and Lopez wearing clothing that represented Pacoima Flats and making hand signs for the gang. (17 RT 3211-3213.) Navarro, Martinez, Macias, and Lopez had gang tattoos, showing their allegiance to Pacoima Flats. Photographs of these tattoos were shown to the jury. (13 RT 2504-2505; 17 RT 3112-3114, 3194-3200, 3213, 3238-3239.)

When the crime was committed, Macias was wearing a blue baseball cap with a "P" on it, representing Pacoima Flats. (13 RT 2417; 14 RT 2536.) During the televised vehicle pursuit that followed the shooting, Lopez leaned out the window and flashed his gang sign—"P" for Pacoima. (13 RT 2423-2424.) The parties stipulated that a speaker box in the Chevrolet Blazer that was used to commit the crimes had "Droopy" written on it. (17 RT 3090.)

Additionally, although Navarro claimed that he no longer was an active Pacoima Flats gang member, he testified that he had been a long-standing member of the gang who continued to allow fellow gang-members to hang out at his house and write gang graffiti on his walls. (18 RT 3318-3319, 3370, 3410; 21 RT 4123.) He also testified that Martinez, Macias, and Lopez were fellow, junior members of the gang. (18 RT 3343-3344, 3370, 3405-3407.)

The evidence also established that in addition to Navarro's commission of the charged crimes (murder and conspiracy to

commit murder), Martinez, Macias, and Lopez committed kidnapping and attempted robbery. Martinez, Macias, and Lopez waited outside of Montemayor's business in the early morning hours, and when he arrived, they kidnapped him, forcing him to drive back to his home where they believed he kept several coffee cans containing money in his garage. (13 RT 2465; 14 RT 2532, 2585-2592, 2594; 15 RT 2850; 16 RT 2961-2966, 2969; 17 RT 3091.) Rather than stopping at his house, Montemayor drove past it, stopping about a mile down the street. (14 RT 2532, 2588-2589, 2594.) When Montemayor tried to escape, Macias and Lopez confronted him with guns while yelling, "Where's the money? Where's the money?" (9 CT 2279-2287, 2291.) Macias and Lopez then shot Montemayor as he tried to run away. (14 RT 2532-2538, 2594-2595; 17 RT 3089; 9 CT 2279-2287, 2290, 2294-2296.)

Thus, the evidence of Navarro's commission of murder and conspiracy to commit murder, plus evidence that his cohorts committed kidnapping and attempted robbery was sufficient to establish the requisite pattern of criminal gang activity of Pacoima Flats.[4] Accordingly, even if this Court finds that Booth's testimony regarding the predicate offenses was excludable under *Sanchez,* there was still sufficient evidence to support the street terrorism conviction, gang special circumstance, and gang enhancements. Therefore, Navarro suffered no prejudice.

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[4] The prosecutor pointed out during closing argument that the jury could consider the murder as one of the crimes showing a pattern of criminal gang activity. (29 RT 5096.)

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent's Brief and Respondent's First Supplemental Brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: October 14, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** uses a 13 point Century Schoolbook font and contains 6,869 words.

Dated: October 14, 2020

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PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S165195**
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