IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LAM THANH NGUYEN, Defendant and Appellant.	)	**S076340** (Orange County Superior Court No. 95WF0682) **DEATH PENALTY CASE**

APPELLANT'S OPENING BRIEF

Richard C. Neuhoff, No. 54215
Attorney at Law
11 Franklin Square
New Britain, CT 06051
tel.: (860) 229-0433
fax: (860) 348-1942
Attorney for Appellant
Lam Thanh Nguyen

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

II.

COUNTS 13 & 14

(Relating to the May 6, 1995 shooting death of Tuan Pham)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

THE ATTEMPTED MURDER COUNTS
(Counts 2-3, 4-5, 9-10)

III.
COUNTS 2-3
(relating to the July 21, 1994 shooting of Tony Nguyen)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

VI.

GANG CONVICTIONS AND ENHANCEMENTS

(Counts 3, 5, 7, 10, 14, , plus ten § 186.22(b) enhancements)

OVERALL GUILT-PHASE ISSUES

VII.

CLAIMS RELATED TO THE ARREST AND PROSECUTION OF THE DEFENSE INVESTIGATOR

TABLE OF CONTENTS (continued)

X.

OTHER ISSUES ARISING FROM THE USE OF THE DEATH PENALTY

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES

People v. Farley
(2009) 46 Cal.4th 1053 406

TABLE OF AUTHORITIES (continued)

STATUTES AND RULES

TABLE OF AUTHORITIES (continued)

MISCELLANEOUS

STATEMENT OF THE CASE

On March 31, 1995, a five-count complaint was filed in the West Orange County Municipal Court, alleging that appellant, Lam T. Nguyen, had committed attempted premeditated murder and conspiracy to commit murder on July 21, 1994 and March 11, 1995, and that he conspired to commit murder between those two dates.[1] (1 CT 1-3; 1 Muni.CT 17-19.) The complaint also alleged various enhancements, including personal use of a firearm, personal infliction of great bodily injury, and gang-benefit felony. (*Ibid.*) A warrant issued for appellant's arrest. (1 Muni.CT 17.)

Appellant was arrested on May 25, about two months later.

On May 30, an amended 11-count complaint was filed, adding allegations of murder and active gang participation on both February 5 and May 6, 1995, and possession and possession for sale of cocaine base on May 25, 1995. (1 CT 4-7; 1 Muni.CT 22-25.) A multiple-murder special circumstance was also added. (*Ibid.*) Appellant made his first court appearance that same day, represented by the public defender. (1 Muni.RT 1-3, 1 Muni.CT 2-3.)

On July 7, attorney Gregory Parkin substituted in as retained counsel. (1 Muni.RT 10-12, 1 Muni.CT 4, 35.)

On July 21, 1995, a second amended complaint was filed, adding charges of attempted premeditated murder on November 24, 1994. (1 CT 8-11, 1 Muni.CT 5, 37-40.) Appellant was arraigned on the second amended complaint on August 25. (1 Muni.RT 13-15, 1 Muni.CT 5.)

---

[1] For most of the Statement of the Case, the charges and enhancement are identified by an informal, shorthand description. Formal specification of the charges and enhancements is provided later, when the final charges are outlined.

Preliminary hearing was held on six days from September 22 through October 2, 1995. (1-2 Muni.RT 22-593, 1 Muni.CT 6-13, 61-62, 65.) Appellant was held to answer on all the charged offenses, plus an additional set of murder and active-gang-participation charges relating to a shooting on May 3, 1995. Appellant was also held to answer on all of the enhancements except the gang-benefit allegations associated with the drug offenses. (1 Muni.RT 588, 1 Muni.CT 70.)

On October 16, 1995, a 16-count information was filed in the superior court, alleging that appellant committed the offenses on which he had been held to answer. (1 CT 12-17.) A multiple-murder special circumstance was again alleged, as were various enhancements.

On October 30, the case was assigned to Judge Francisco Briseño for trial, and it remained with Judge Briseño until the conclusion of the proceedings. (1 RT 15-16, 1 CT 32.)

Defense motions to dismiss certain counts under section 995 and to suppress evidence were denied on May 10 and June 6, 1996, respectively. (1 RT 51-52, 1 CT 164; 1 RT 115-124, 1 CT 193.) In addition, at the May 10 hearing, Count 3 of the information was amended in a minor respect. (1 CT 164.)

On November 4, 1996, attorney Robison Harley made his first appearance in the case as *Keenan* counsel for the defense. (1 CT 199; see also 1 CT 195-197.)

During the next 16 months, there was litigation over legal matters, particularly relating to discovery sought by the defense.

On March 13, 1998, the prosecution filed a notice of the aggravating evidence it intended to present at the penalty phase. (1 CT 389-390.)

On April 20, the drug offenses (then, Counts 15-16) were severed for purposes of trial, but a defense motion for a separate trial on each of the

murder charges was denied. (2 RT 331-336, 2 CT 658.) Other pretrial and in limine matters were addressed on that same date and the next two days (2 CT 658 [Apr. 20], 698 & 703 [Apr. 21], 704 [Apr. 22].)

Jury selection commenced on April 27, 1998, and concluded on May 5 with the swearing of the jury and four alternates (2 CT 735 [Apr. 27], 736-738 [Apr. 28], 744 [Apr. 29]. 755-756 [May 4], 757-758 [May 5].)

On May 4 (during jury selection), an amended information was filed, correcting typographical errors. (2 CT 750-754, 5 RT 1012.) Appellant was arraigned on the amended information on May 7. (2 CT 759.)

The prosecution's case in chief began on May 18 (see 2 CT 763-765) and concluded on June 10 (3 CT 895-897). The court dismissed the two conspiracy charges (Counts 1 and 8) on a defense motion under section 1118.1 and, on the prosecution's motion, struck great-bodily-injury enhancements as to Counts 3 and 5. (3 CT 895-897, 17 RT 3387 [Count 1], 3388 [GBI], 23 RT 4336-4438 [Count 8].)

The defense began its presentation of evidence on June 11 (3 CT 909-910) and rested on June 23 (3 CT 934). One defense witness, Trieu Hai Nguyen, had testified out of order during the prosecution's case. (17 RT 3278-3299.)

On June 24, the prosecution presented most of its rebuttal witnesses and rested.[2] (3 CT 938-939.) There was no surrebuttal from the defense.

The jury heard the guilt-phase arguments and instructions on June 29 and 30. (3 CT 947, 1100-1101; 26 RT 4943-5007 [DA argument], 5007-5040 [attorney Parkin argument], 5046-5125 [attorney Harley

---

[2] One prosecution rebuttal witness had testified during the defense case. (22 RT 4288-4292.)

argument], 27 RT 5145-5216 [DA rebuttal], 5231-5319 [instructions]; see also 3 CT 961-1099 [instructions].)

As the case went to the jury, appellant stood accused of having committed the following twelve offenses in six separate incidents:

July 21, 1994:	Count 2: attempted premeditated and deliberate murder of ***Tony Nguyen*** (Pen. Code, § 664/187);[3]
	Count 3: willful, unlawful, and active participation in the Nip Family criminal street gang (Pen. Code, § 186.22, subd. (a)[4]);
Nov. 24, 1994:	Count 4: attempted premeditated and deliberate murder of ***Huy Nguyen*** (§ 664/187);
	Count 5: willful, unlawful, and active participation in the Nip Family criminal street gang (§ 186.22, subd. (a));
Feb. 5, 1995:	Count 6: murder of ***Sang Duc Nguyen*** (§ 187);
	Count 7: willful, unlawful, and active participation in the Nip Family criminal street gang (§ 186.22, subd. (a));

---

[3] Although Tony Nguyen shares appellant's last name, as do two other named victims and several witnesses at trial, none are related to appellant nor, as far as the record indicates, to each other.

Where there are multiple persons with the same last name, this brief will often refer to an individual by his or her first name or, in the case of some Vietnamese witnesses, by his or her "American" first name. For this reason, we will only rarely identify a witness by "Mr." or "Ms." No disrespect is intended.

[4] Unless indicated otherwise, all further references to sections or statutes in this brief are to the Penal Code, and all references to the Constitution or to constitutional provisions or principles are to the federal Constitution.

March 11, 1995:	Count 9: attempted premeditated and deliberate murder of ***Khoi Huynh*** (§ 664/187);
	Count 10: willful, unlawful, and active participation in the Nip Family criminal street gang (§ 186.22, subd. (a));
May 3, 1995:	Count 11: murder of ***Duy Vu*** (§ 187);
	Count 12: willful, unlawful, and active participation in the Nip Family criminal street gang (§ 186.22, subd. (a));
May 6, 1995:	Count 13: murder of ***Tuan Pham*** (§ 187);
	Count 14: willful, unlawful, and active participation in the Nip Family criminal street gang (§ 186.22, subd. (a)).

A multiple murder special circumstance was alleged in connection with Counts 6, 11, 13. In addition, the following enhancements were also alleged:

§ 12022.7:	infliction of great bodily injury (Counts 4, 9);
§ 12022.5:	personal use of firearm (Counts 4, 6, 9, 11, 13);
§ 12022, subd. (a):	vicariously armed with firearm (Count 2);
§ 186.22, subd. (b):	offenses committed for benefit of, at the direction of, and in association with Nip Family criminal street gang, with specific intent to promote, further and assist in criminal conduct by gang members (all counts).

In connection with the murder charges (Counts 6, 11, and 13), the jury was instructed on first-degree premeditated and deliberate murder, second-degree intentional murder, and, as to Counts 6 and 13 only, voluntary manslaughter due to sudden quarrel or heat of passion. (27 RT 5260-5268, 5296; 3 CT 1005-1023, 1076).

As to the attempted murder charges in Counts 4 and 9 (but not Count 2), the jury was instructed on the lesser offense of attempted voluntary manslaughter due to sudden quarrel or heat of passion. (27 RT 5272-5273, 5296.) As to Count 4, the jury was also instructed on the lesser offense of assault with a firearm (§ 245). (27 RT 5278-5280, 5296.)

The jury was also given instructions on self-defense. (27 RT 5281-5286.) Instructions on imperfect self-defense were refused. (25 RT 4860-4861, 4863, 4903; 27 RT 5263-5264.)

Jury deliberations began on June 30, continued on July 1 and July 2, and concluded with verdicts on July 6. (3 CT 1100-1102, 1106-1107, 4 CT 1192.) The jury found appellant not guilty of both of the May 3, 1995 charges (Counts 11-12: murder of Duy Vu, and active gang participation), but it returned verdicts convicting him of the remaining ten offenses as charged, finding all the associated enhancements to be true, and also finding the multiple-murder special circumstance to be true. (28 RT 5454-5471, 4 CT 1108-1144, 1195-1231.)

Shortly before the penalty phase began, two regular jurors and one alternate were dismissed; the regular jurors were replaced by alternates. (4 CT 1236-1237.)

Both sides presented their penalty-phase evidence on July 8, 1998, and then rested. (4 CT 1245-1246.) On July 13, counsel made their penalty arguments, instructions were delivered, and the jury's penalty deliberations began. (4 CT 1295; 30 RT 5773-5808 [DA argument], 5808-5838 [defense attorney argument], 5838-5854 & 4 CT 1268-1294 [instructions].) The jury returned a verdict of death on July 14. (30 RT 5860, 4 CT 1306, 1364A.) Formal sentencing was set for September 18.

On July 27, less than two weeks after the death verdict, Daniel Watkins, the sole defense investigator in this case, was arrested on a federal

charge of conspiracy to commit murder, and his office was searched and his files seized. (30 RT 5899, 5 CT 1586, 1696-1702.) On August 6, Watkins was indicted by a federal grand jury on charges that (1) from an unknown date until about July 6, 1998, he and three other persons (including one Hung Mai, a capital defendant in an unrelated death penalty case) conspired to commit murder and (2) on April 9, 1998, Watkins and two others aided and abetted Mr. Mai in using the mail with intent that a murder be committed. (5 CT 1696-1701.)

On October 5 — eight weeks after Watkins' arrest on the federal indictment — the state brought its own criminal action against Watkins, accusing him of having conspired with Hung Mai to commit an act injurious to the public on or about May 13, 1998. (5/4/06 Supp.CT 460-461.) These charges arose out of an effort by Watkins and Mai to silence a victim/witness in appellant's case (Khoi Huynh).[5] (5 CT 1586.)

From November 1998 until the end of January 1999, there were several court hearings in appellant Nguyen's case relating to the Watkins situation, primarily discovery proceedings and hearings on a defense motion for a new trial based upon Watkins' misconduct. Defense counsel also filed a motion to reduce the jury's verdicts. (5 CT 1599-1739.)

---

[5] According to transcripts of a recorded telephone call between Mai and Watkins on May 13, 1998 — transcripts attached to affidavits in support of the federal search warrant and the state arrest warrant — Mai discussed Watkins' desire for Mai "to put a shut on Khoi [Huynh]," and Mai gave Watkins directions as to what was needed to accomplish the task. (5 CT 1726.) Two weeks later, Khoi was called as a prosecution witness in appellant's trial and offered the incredible testimony that he recalled nothing about his shooting, a position that surprised the prosecutor and created serious difficulties for appellant's defense, given Khoi's remarkable and antagonistic role in the case, a matter that is the subject of Argument VIII.1, *post.*

On January 25, 1999, most of the defense motions were denied. (6 CT 1779-1780.)

On January 26, the personal-use-of-firearm enhancements as to Counts 2, 5, 7, 10, and 14 were stricken. (6 CT 1783; 31 RT 5999.)

The next day, January 27, the firearm-use enhancement in Count 3 was stricken. (31 RT 6079.) The motion for reduction of the death sentence under section 190.4, subdivision (e), was denied, as was the motion for new trial. (6 CT 1784-1786.) The court denied the section 190.4 motion despite finding that "in the case of Count 13 [the Tuan Pham murder] the victim was actively seeking to kill the defendant." (31 RT 6082.)

On January 28, 1999, the court formally sentenced appellant to death. The court also imposed three consecutive life sentences for the attempted murder convictions and additional consecutive prison terms totaling 15 years.[6] (6 CT 1821-1824.)

This appeal is automatic.

GUILT PHASE STATEMENT OF FACTS

As this case was presented to the jury, appellant was accused of crimes arising from six shootings in Orange County in 1994 and 1995. All six of the shooting victims were members of Vietnamese street gangs, mostly a gang known as the Cheap Boys. It was the prosecution's theory that the victims were shot as part of a war between the Cheap Boys and another Vietnamese gang, the Nip Family. Under the prosecution's theory,

---

[6] In addition, the severed drug charges were resolved: Count 15 was amended to charge possession of cocaine (Health & Saf. Code, § 11350), appellant pleaded guilty to the amended charge, a concurrent term of two years in prison was imposed, and Count 16 was dismissed. (31 RT 6086-6090.)

appellant was a member of the Nip Family gang, and he aided and abetted the first shooting and personally committed the other five.

For its part, the defense admitted that appellant had associated with some Nip Family members since childhood but denied he was an active member of the gang. It was the defense position that appellant was not on the scene of any of the first five shootings, and the defense sought to establish that the Cheap Boys had intentionally framed him to remove him from the streets. As for the sixth shooting, the defense admitted appellant was present but contended that he did not participate in the shooting and that in any event the shooting was permissible self-defense.

In the remainder of this Statement of Facts, we will first summarize the evidence regarding each of the shooting incidents and then, at the end, will outline the evidence introduced by the prosecution related to the gang-participation offenses. Because it may be difficult to keep in mind the testimony as to each incident if not presented in a single place, we have included within the summary of each incident the testimony of percipient witnesses regardless of whether they were called by the prosecution or the defense. (See also List of Witnesses by Count/Subject, at end of this brief.)

Counts 2 & 3
The July 21, 1994, Shooting of Tony Nguyen

A. The Shooting

In the early afternoon of July 21, 1994, Tony Nguyen was driving a Toyota automobile containing two to four gang members, depending upon whose testimony is credited. Thoa Vu ("Chynna") and her boyfriend Tinh Dam ("Little Elvis") were in the back seat, with Dam on the driver's side and Chynna in the middle. (6 RT 1124-1125 & 1128; 8 RT 1512; 9 RT 1620 & 1663, 21 RT 3957-3958; 25 RT 4710-4711.) According to some witnesses, Kevin Lac ("Doughboy") and Truong Nguyen ("Trippy") were

also in the car. (9 RT 1619 & 1663-1664, 21 RT 3966-3967; 25 RT 4711.) Kevin Lac testified he was in the front passenger's seat. (9 RT 1620.)[7]

Accompanying Tony's Toyota was a second vehicle — an Oldsmobile — containing more Cheap Boys gang members. (6 RT 1115-1116, 1126, 9 RT 1667.) The Oldsmobile belonged to Viet Tran, who was driving Linda Vu (Chynna's sister) and other persons whose names were not revealed in the testimony.[8] (9 RT 1665, 1667, 21 RT 3961.)

As Tony Nguyen's Toyota neared Garden Grove Boulevard on Harbor Boulevard in Garden Grove, Tony and Kevin Lac noticed a car leaving a Mexican restaurant on the right. (8 RT 1514-1515, 9 RT 1622-1623.) Tony told Tinh Dam that he recognized the girl driving the car. (8 RT 1516.) There appeared to be three to five persons in the car. (8 RT 1518, 9 RT 1677-1678.)

Tony turned right (eastbound) on Garden Grove Boulevard and stopped at a red light at Palm Street. (8 RT 1513-1514.) The girl's car

---

[7] Tin Dam believed the only passengers in the car were Dam himself and Chynna Vu. (6 RT 1125-1126.) Tony Nguyen thought there were four passengers in his car and did not recall telling the police there were just two. (8 RT 1511.)

Chynna Vu, the only female in the car, was a member of Southside Scissors girl gang, and she associated with members of the Cheap Boys gang. (6 RT 1110, 11 RT 2196.) Tinh Dam and Kevin Lac were Cheap Boys. (6 RT 1110, 17 RT 3308.) Truong Nguyen belonged to either the Cheap Boys or the Lonely Viets. (27 RT 4735, 9 RT 1664.)

Tony Nguyen said that he knew two or three members of the Orange Boys gang but that he associated with the Orange Boys for "not very long." (8 RT 1535-1536.) Kevin Lac and Tinh Dam had conflicting beliefs about whether Tony belonged to a gang. (9 RT 1664, 6 RT 1127.)

[8] Linda Vu, like her sister Chynna, was a member of the Southside Scissors gang. (10 RT 1971, 11 RT 2108.)

stopped on Tony's left. (8 RT 1517, 9 RT 1673.) Tony and the girl exchanged smiles, and the male front passenger in the girl's car also smiled, as if to say hello. (8 RT 1519, 9 RT 1626.) The rear window of the girl's car was cloudy or dirty, and Tony could not tell how many persons were in the back seat, nor if they were male or female. (8 RT 1518-1519, 1538.) Tinh Dam, the rear passenger on the driver's side of Tony's car, was also unable to see into the back seat.[9] (6 RT 1133.)

Suddenly, as the traffic light turned green, the front passenger in the girl's car fired several shots into Tony's Toyota and hit Tony once in the neck. (6 RT 1127, 8 RT 1520, 1522, 1525-1526, 1532, 9 RT 1626.) The Toyota lurched ahead and bounced along the curb until one of the passengers pulled the emergency brake or removed the key from the ignition. (8 RT 1526-1527, 9 RT 1627.) As soon as the car came to a stop, Kevin Lac and Truong Nguyen got out and ran away.[10] (25 RT 4716.) In the meantime, the car with the shooter sped off, as did the car containing Linda Vu and Viet Tran. (6 RT 1129-1130, 9 RT 1681.)

Tony Nguyen was hospitalized for two months. (8 RT 1530.) As of the time of trial, Tony remained paralyzed from the neck to his feet, with some ability to move his arms but not his fingers. (16 RT 3149.)

---

[9] Tinh Dam died in an automobile accident in May 1996, and his testimony from the preliminary hearing was read to the jury. (3 CT 799, 6 RT 1124-1134.)

[10] At least one of these two men was seen by two nearby witnesses to be carrying a gun in his hand as he ran off. (19 RT 3662-3663, 3707.)

B. Identification Evidence

The male shooter and the female driver of the shooter's car were subsequently identified by Tony Nguyen as Nghia Phan and My Tran, respectively. (25 RT 4694-4696.)

No physical evidence tied appellant to the shooting, and neither Tony Nguyen nor Tinh Dam nor Chynna Vu identified any of the rear passengers in the shooter's car. Indeed, as noted, both Tony and Tinh Dam testified they were unable to see into the back seat of the shooter's car, presumably due to the dirty or cloudy conditions of that car's rear window. (8 RT 1518-1519, 1538; 6 RT 1133.) Nevertheless, Kevin Lac — the front seat passenger in Tony's car and thus the occupant who was the farthest from the rear of the shooter's car and who had Tinh Dam between him and those passengers[11] and who testified on at least two occasions he had not paid attention to the persons in the other car[12] — came to identify appellant as a rear passenger in the shooter's car. Eventually.

When first interviewed by police about the shooting, Lac said he did not know anyone in the shooter's car; according to Lac's trial testimony, he "didn't really remember [at] that time." (9 RT 1628, 1639.) Lac simply figured that the occupants must have been from the Nip Family gang because the Nip Family was "our rival," being at war with the Cheap Boys.[13] (9 RT 1628-1629.) Later on, Lac decided he did recognize

---

[11] Not to mention that the front seats of Tony Nguyen's car were high-backed bucket seats. (See Trial Exhs. 3, 8.)

[12] 9 RT 1628, 1679.

[13] The date of the first interview is not entirely clear but appears to have been on November 24, 1994. (See 9 RT 1695-1696, 1697-1698, 1702.) Lac testified at one point that he talked to investigator Bruce Davis about a month after the shooting and told Davis that appellant had been in

(continued...)

appellant as "the person" in the back seat of the shooter's car because appellant "was my downstairs neighbor." (9 RT 1629.) Although appellant had been Lac's neighbor since before the shooting (9 RT 1633-1634), Lac's "recognition" did not occur until 13 months afterwards. But before the "recognition," there was a second interview with police.

On May 25, 1995 — ten months after the shooting — Garden Grove Police Officer Danny Mihalik went to Kevin Lac's residence and showed him several photo lineups. Appellant's photograph was in Position No. 6 in the third lineup, but Lac made no identification. (See 9 RT 1709, 19RT 3628-3629.) Quite the contrary. "Who are these guys?" he demanded of Officer Mihalik. "Are they N.F. [Nip Family]? They look pretty old. I don't know who they are. No, I don't know." (19 RT 3629.) "No," Lac also said, "I don't recognize any of them." (9 RT 1719.) Lac requested to see the lineups a second time, and when he re-reviewed the lineup containing appellant's photograph, he said, "No, there's nobody in photographic display number three." (9 RT 1721-1722.) Mihalik asked Lac if he would be able to recognize the male in the front or in back of the shooter's car, and Lac said, "Probably the guy in the front seat, if I saw him." (9 RT 1731.)

Officer Mihalik then showed Lac a single booking photograph of appellant, taken earlier that same day. (19 RT 3631.) Lac said he recognized the photograph because appellant had lived in the same

---

[13](...continued)
the shooter's car (9 RT 1639-1640), but it subsequently became clear that the conversation with Davis took place in August 1995, more than a year after the shooting (see 9 RT 1723, 1726-1727). Given the evidence from Lac and Garden Grove Police Officer Mihalik (discussed below) as to what Lac said and did in interviews prior to August 1995, no other sequence would make sense.

apartment complex as Lac and was from the Nip Family. (19 RT 3631-3633.) Lac told Mihalik that after he and appellant discovered they were from rival gangs, they had "talked shit." (19 RT 3634.) Lac did not, however, even hint to Officer Mihalik that appellant was in any way connected to the shooting on July 21, 1994: Lac did not say that appellant had been in the back seat of the shooter's car, nor that he had seen appellant on that date. (19 RT 3632, 3636-3637.)

At trial, Lac testified that in the May 25th interview, he was being honest with Mihalik as to his knowledge of the persons in the car and was trying to help the police and be cooperative. (9 RT 1700.)

All this changed on August 24, 1995 — 13 months after the shooting, 3 months after Lac's contact with Officer Mihalik, and one month before appellant's preliminary hearing. (See 9 RT 1723, 1726-1727, 1729.) On this occasion, Lac told Officer Bruce Davis that appellant had been in the back seat of the shooter's car. (9 RT 1726-1727.) Lac was shown the same photo lineup containing appellant's picture that he had been shown by Officer Mihalik. (9 RT 1724-1725.) Lac pointed to Position No. 6 (appellant's photograph) and said, "I think that's Lam, but I'm not sure." (9 RT 1726.) Lac asked, "is it Lam? Yeah, I know him because I . . . seen him three or four times. So is that Lam? If it is, I know him." (9 RT 1728.) Lac said, "I think I know for sure" that appellant was in the back seat. (9 RT 1737.)

Lac related to Officer Davis that he had seen appellant three or four times "like a year ago when I moved into my house." (9 RT 1728.) Lac apparently went on to assert that a few days after the shooting, appellant had come to Lac's apartment and asked Lac, "What's up with the cops?," which Lac took to mean something like, "Have you talked to them?" Lac

testified that he replied, "No, nothing," and that appellant returned to his apartment. (9 RT 1635, 1640.)

At appellant's preliminary hearing a month after his interview with Officer Davis, and again at trial, Lac testified that appellant was in the rear seat of the shooter's car. (9 RT 1643-1644.) Lac testified, "Yeah, I think so, yeah," appellant had been in the back seat. (9 RT 1644-1645.) At trial, Lac indicated on cross-examination that this testimony meant he was not positive of his identification and that he was still uncertain at trial, but on re-direct, Lac stated he was certain. (9 RT 1732-1735.) In fact, Lac's story at trial was that he realized the person in the back was appellant "a few days after the shooting." (9 RT 1634.)

Thus, the sole evidence tying appellant to the shooting of Tony Nguyen came from a Cheap Boys gang member who was in the least favorable position to see persons seated in the rear of the shooter's car and who only identified appellant 13 months after the shooting, after having previously been shown at least two photo displays with appellant's photograph without making an identification and despite knowing appellant during the entire time.

Counts 4 & 5
The November 24, 1994, Shooting of Huy ("PeeWee") Nguyen

A. The Shooting

At approximately 8:30 p.m. on November 24, 1994, Huy ("PeeWee") Nguyen was shot multiple times by a lone gunman after a fight at the Mission Control video game arcade in Garden Grove. Four bullets entered the right side of the front of PeeWee's torso, and two hit his right leg. (8 RT 1580, 16 RT 3148-3149.) At the time of trial, PeeWee was

paralyzed from his neck to his feet, with some ability to move his arms. (*Ibid.*)

Three 13-to-15-year-old girls — Channthai ("Cindy") Pin, Chamreoun ("Shannon") Choeun, and Me Kim — were together outside Mission Control when the incident began about 15 feet away from them.[14] (7 RT 1356, 1362, 8 RT 1410-1411, 1448, 1482, 18 RT 3447.)

PeeWee, whom the girls knew and who had told Cindy earlier that night that he was a member of "TRG" or "Tiny Rascals Gang," was about 15 feet from the girls, with a couple of friends.[15] (8 RT 1410, 1412, 1445, 1449.)

At some point, PeeWee yelled out something to a male walking into Mission Control, about 30 feet away from PeeWee.[16] (8 RT 1409, 1412-1413, 1451-1453, 1551.) The male looked back but said nothing. (8 RT 1413, 1422.) PeeWee then walked up to the male, said something, and started hitting the male in the face with his fist. (8 RT 1422.) PeeWee punched three or four times before the male, who had been covering his face, threw a punch back. (8 RT 1454-1455, 1492.) In a couple of seconds, about seven of PeeWee's friends jumped into the fight, kicking and punching the male. (8 RT 1424-1425, 1455-1456, 18 RT 3448-3449.)

---

[14] Cindy, Kim, and possibly Shannon were runaways. (8 RT 1464-1465, 18 RT 3461, 3482.) Shannon was with the Asian Player Lady Gang, and Kim was associating with unspecified gang members. (8 RT 1446-1447, 18 RT 3490.)

[15] In his trial testimony, PeeWee denied he had ever been in TRG. (7 RT 1303, 1312.) However, witness Phuc Lu corroborated PeeWee's association with the gang. (8 RT 1582.)

[16] PeeWee was speaking Vietnamese, which neither Cindy nor Shannon understood. (7 RT 1355, 8 RT 1409-1410, 1451.)

PeeWee pushed the male backwards, knocking his head against a pillar and causing him to fall to the ground. (8 RT 1430, 1457, 18 RT 3449.) When the male tried to get up, one of PeeWee's friends jumped on him, grabbing him by the hair to hold him down, and PeeWee grabbed him by the neck, as PeeWee's other friends continued to beat and kick him. (8 RT 1431, 1433, 1458-1459.) The male was getting beaten up "pretty bad." (8 RT 1457, 1501.) He tried to hit back, but there were too many people on top of him. (8 RT 1431.) At some point, the male succeeded in knocking PeeWee and the hair-puller down, though others were still punching him. (8 RT 1434.) A smaller number of people tried to help the male. (8 RT 1486, 1500-1501, 18 RT 3465.)

After one or two minutes, the male pulled a gun from his waistband with his right hand. (8 RT 1430, 1435, 1459, 18 RT 3450.) At first, he tried to scare off his assailants, but they kept coming after him. (8 RT 1436, 1550-1551.) The male fired his gun several times at PeeWee, who was on the ground. (8 RT 1438-1439, 18 RT 3450, 3473.) PeeWee got up and stumbled into Mission Control, where he fell down. (7 RT 1392, 8 RT 1439, 1561.) The male followed PeeWee inside. (7 RT 1393, 8 RT 1440, 1561, 14 RT 2769-2770.) The girls ran away to a nearby coffee shop. (7 RT 1358, 8 RT 1440, 1462-1463, 18 RT 3450-3451.)

According to other witnesses, the male fired more shots at PeeWee inside Mission Control. (8 RT 1561, 1561, 1565, 14 RT 2769-2770.) As he came outside again, the male said in Vietnamese, "If anyone is against me, I'll shoot them, too." (8 RT 1585.) He then ran to a white 1991 or

1992 Toyota in the parking lot and drove off.[17] (6 RT 1155-1156, 8 RT 1581.)

B. Identification Evidence

As with the charges related to Tony Nguyen, no physical evidence connected appellant to PeeWee's shooting. What evidence there was tying him to the offense came from mostly "unsure" identifications, made at least six months after the event, by Shannon Choeun and Cindy Pin, two of the three young teenagers who saw the fight outside Mission Control. At trial, Cindy was unable to make even an "unsure" identification, and other witnesses provided testimony indicating that appellant was not the shooter.

1. Shannon Choeun's Testimony

Shannon Choeun testified that she did not notice anything unusual until she heard PeeWee arguing with someone in Vietnamese, a language she did not understand, and then saw fighting. (7 RT 1355, 1356.) She did not see the start of the fight. (7 RT 1357.) She "started noticing it" when "all of a sudden there was other people involved with it." (7 RT 1357.) When Shannon heard a gunshot, she immediately ran toward a café that was across the street. (7 RT 1358, 1377, 1378-1379, 1387.) After she had gone at least a couple of steps beyond two stores, she looked back and, still running away, saw the shooter for "a glimpse." (7 RT 1358, 1378, 1379-

---

[17] PeeWee testified at trial that he had been smoking a cigarette outside Mission Control when an unidentified male approached him and asked him if he belonged to "T.R." (7 RT 1302.) PeeWee understood "T.R." to mean "Tiny Rascals." (7 RT 1311.) PeeWee told the male that he only had friends in Tiny Rascals, and the male hit PeeWee once in the face. (7 RT 1303-1304.) PeeWee recalled nothing thereafter except that at some point later on, he heard gunshots and ran into Mission Control and he saw blood while he was lying down and asked for an ambulance. (7 RT 1305-1307.) PeeWee did not know who had hit him or who had shot him, nor did he know whether these were the same person. (7 RT 1310-1311.)

1380, 1385.) She "really didn't get a good look at" him. (7 RT 1379.) She only looked back the one time. (7 RT 1358.) It was dark out, but "there was light surrounding." (7 RT 1380.)

On some unspecified later date, Shannon concluded, based on her "glimpse," that the shooter was someone she had seen a couple of days before the shooting, at a motel room that she and other witnesses referred to as "the Mo." According to Shannon, about two days or a week prior to the shooting, Cindy Pin had invited Shannon to go visiting at the motel. (7 RT 1362-1363.) The girls went there for a couple of hours, during which time Shannon was introduced to a male whom she would later come to believe was the person who shot PeeWee. (7 RT 1363.) Shannon testified that while she was at the motel, someone showed her two guns. (7 RT 1364.) At trial, she first indicated that it was one of Cindy's friends who showed her the guns and not the man who shot PeeWee, but later she said it was PeeWee's shooter. (7 RT 1364, 1373.)

On May 31, 1995 (six months after the shooting), Shannon attended a live lineup, and she selected appellant as the person she had glimpsed shooting PeeWee. (7 RT 1361.) On the form provided to her by police, she wrote "he was the one who I saw who shot the guy." (7 RT 1384.) In court at the preliminary hearing in September 1995, she identified appellant as the shooter but stated several times she was not sure. (7 RT 1381-1382.) At trial, Shannon again identified appellant but again indicated she was not sure. (7 RT 1361-1362, 1382.) At some point, Shannon had been shown photographs of suspects (7 RT 1380, 1386) but apparently had made no identification.

On the night that PeeWee was shot, Shannon told police that the shooter was between 5 feet 6 inches and 5 feet 7 inches tall. (7 RT 1395.) At the preliminary hearing, she estimated the shooter's height as being

between 5 feet 4 inches and 5 feet 6 inches but characterized him as "tall." (7 RT 1380-1381, 1383.)

Shannon gave confusing testimony when asked about the male with whom PeeWee had been fighting prior to the shooting On the one hand, Shannon testified initially that the fighting was between PeeWee and the man he had been arguing with. (7 RT 1356.) She went on to state that she did *not* recognize the man and had never seen him before or did not recall seeing him before. (7 RT 1357.) She had previously told the police — consistent with her initial trial testimony — that the person fighting PeeWee had *not* been at the motel. (7 RT 1376-1377, 1388.) And when she had been asked at the preliminary hearing if she knew either of the combatants, Shannon had said that she knew only one of them, namely, PeeWee (again, consistent with her initial trial testimony and her statement to police). (7 RT 1390; see 1 Muni.RT 183.)

As her trial testimony progressed, however, Shannon refused to say that appellant or the male at the motel was the person with whom PeeWee had been arguing with just prior to the shooting. For the first time (and contrary to her initial trial testimony and what she had told police and had said at the preliminary hearing), Shannon asserted that she either had not seen the person PeeWee was arguing with at all or had not paid any attention to him. (7 RT 1364, 1377, 1388-1389.)

2. Cindy Pin's Testimony

Cindy Pin testified that she, Shannon Choeun, and Me Kim were at the motel room a day or so before PeeWee was shot. In the room were some males, including persons named Jimmy, White Boy, Mexican Andy, and a second male named Andy. (8 RT 1417-1418, 1472-1473.) Another male whose name Cindy did not know was there as well and was openly showing everyone two guns, a semi-automatic and a revolver. (8 RT 1414-

1415, 1420-1421, 1460, 1466-1467.) Cindy said this person was in her presence twice that day, for one or two hours each time. (8 RT 1437.)

On the night of PeeWee's shooting (one or two days after being at the motel), Cindy was interviewed by the police and told them that she had never seen the shooter before. (8 RT 1444, 1467-1469, 1547.) She described the shooter as 5 feet 7 inches tall and weighing 130 to 140 pounds. (8 RT 1466.)

At some point — Cindy was unable to say when, but it appears to have been in December 1994 (see 8 RT 1487) — Cindy realized that the shooter had been the unnamed male she had met at the motel a day or so before PeeWee was shot. (8 RT 1470, 1472.) In the interim between the shooting and Cindy's "realization," she and Shannon Choeun had talked about the shooting more than once, trying to figure out who the shooter was; Shannon had not known, either. (8 RT 1472, 1473, 1479.)

On January 11, 1995 (about seven weeks after the shooting), Cindy was shown a photo lineup containing appellant's picture, but she made no identification. (8 RT 1475-1476.)

On May 16, 1995 (six months after the shooting), Cindy was shown the photo lineup containing appellant's picture for a second time and again made no identification.[18] (8 RT 1475-1476.)

At the live lineup on May 31, 1995 (the same one that Shannon participated in), Cindy selected appellant as the person who had shot PeeWee. She wrote "the number five shot the guy," but she was not certain of her identification. (8 RT 1441-1443, 1478.) She recalled talking "a

---

[18] Although counsel's initial question indicated the date of this lineup was *March* 16, two subsequent questions made clear the date was *May* 16. (8 RT 1475:9, 1475:19-24, 1476:20.)

little bit" to Shannon "trying to figure out who the shooter might be." (8 RT 1479.)

At the preliminary hearing four months thereafter, Cindy identified appellant as the shooter, although she was again uncertain of her identification. She also admitted that appellant was the only Vietnamese male in the courtroom and that it was "kind of" clear to her who was being charged with the crime. (8 RT 1487-1488, 1496-1497, 1548-1549.)

At trial, Cindy testified that the person she had seen at the motel was the person whom PeeWee was yelling at and who shot PeeWee. (8 RT 1413, 1415, 1430, 1552.) However, Cindy could not say that this person was appellant. (8 RT 1443-1444, 1488.) She did not recognize appellant's face, though she had remembered how he looked at the preliminary hearing and at the lineup. (8 RT 1488-1489.)

3. Me Kim's Testimony

Me Kim, the third young girl near PeeWee at the time of the shooting, recalled being at the motel with Cindy and Shannon a day beforehand. (18 RT 3452.) Also present in the motel room were males named Andy Ja, Mexican Andy (also called Andy May), Jimmy, and a male the girls called White Boy. (18 RT 3462, 3467, 3469, 3487.)

Kim saw the fight between PeeWee and the male at Mission Control on November 24. (18 RT 3446, 3448.) At trial, Kim testified variously that she did not know whether the person who shot PeeWee had been at the motel (18 RT 3464, 3470-3471), that she had told a police officer the shooter had been at the motel (18 RT 3465, 3468), and that she could not recall what she had told the police about having seen the shooter at the motel (18 RT 3468, 3487). Kim testified that Cindy and Shannon told her that White Boy had told them that the shooter was a friend of his. (18 RT 3452, 3459, 3467, 3483-3484, 3489.)

On May 17, 1995, Kim was shown the same photo lineup containing appellant's picture as had been shown to Cindy and Shannon. Kim indicated that none of the persons in the lineup looked close to the shooter. (18 RT 3453-3455.)

Kim attended one of the May 31 live lineups to see if she could identify the shooter. From the lineup she viewed, Kim selected two participants as looking closest to the shooter, neither of whom was appellant. (18 RT 3455-3458; see Exhibits Y, AA.) At trial, Kim was shown a photograph of the other lineup conducted on that date, wherein appellant was in position #5,[19] and she saw no one who was involved in PeeWee's shooting. (18 RT 3485.) When her attention was directed to appellant in court, Kim testified she did not recognize him as having been at Mission Control that night. (18 RT 3485.)

4. Other Testimony

The defense called three of the males from the motel, Hung Van Pham ("Mexican Andy" or "Andy May"), Khanh Troung Nguyen ("Andy" or "Andy Ja"), and Phung Le ("Jimmy"). All three testified, in essence, that appellant was not in the motel room on the occasion when the girls were there. (18 RT 3496, 19 RT 3551, 3607.) In addition, Andy Ja, who knew appellant and who saw PeeWee fighting at Mission Control on November 24, testified that he was positive appellant was not the person PeeWee was fighting with. (19 RT 3550, 3566, 3568.)

---

[19] Exhibit I. (See 17 RT 3336, 3 CT 893-894, 945-946.)

Counts 6 & 7
The February 5, 1995, Killing of Sang Nguyen

A. The Shooting

At about 9:15 p.m. on February 5, 1995, Sang Nguyen, a member of the Cheap Boys street gang who went by the name Mousey,[20] was shot and killed outside of the Dong Khanh Restaurant in Westminster. (See 11 RT 2088-2089.) He was hit by a single bullet that entered the left side of the back of his head and exited above the right ear and then lodged in his neck. (13 RT 2558-2559, 2562.) There was some black powder inside the entrance wound, but no sooting, scorching, or stippling at the surface. (13 RT 2563, 2567-2568.) One or two .380 bullet casings were found near Sang's body.[21]

Sang's car was parked nearby, and written in the dust on the hood was the Vietnamese word meaning "rat" or "mouse." (10 RT 2074, 2076, 2080, 7 RT 1243.)

Sang had been seated in the restaurant with a number of people (mostly gang members or associates) and a few children. Among them were

- Linda Vu (the same woman who had been in the car accompanying Tony Nguyen, the victim in Counts 2 and 3),

---

[20] 7 RT 1206-1207, 10 RT 1884, 2079, 11 RT 2108, 17 RT 3313.

[21] There is some conflict in the evidence as to the number of bullet casings. One officer indicated that only one casing was found. (10 RT 2072, 2076, 2078.). A second officer testified that two .380 casings were located in the area. (11 RT 2105.) There was no evidence indicating the shell casings had been fired by the same weapon, nor was any weapon ever tied to either casing, and, as noted earlier, Sang Nguyen had only one bullet wound in him. (13 RT 2558, 2562.)

- Trieu Binh Nguyen (hereafter, "Trieu Binh," a.k.a. "Temper"[22]),
- Trieu Hai Nguyen (hereafter, "Trieu Hai," younger brother of Trieu Binh),
- Binh Tran,
- Bich To (or "Michelle," Trieu Binh's girlfriend[23]), and
- Malay Amy Pech ("Amy").[24]

These are the uncontested facts. There was considerable dispute about other facts, especially those relating to testimony from two gang members (Trieu Binh Nguyen and Linda Vu) that appellant was the

---

[22] 7 RT 1207, 1260.

[23] Michelle's Vietnamese name "Bich" is pronounced "Bick." (7 RT 1211-1212.)

[24] Trieu Binh and Binh Tran were Cheap Boys. (10 RT 1973 & 11 RT 2198 [Trieu Binh]; 10 RT 1942 & 17 RT 3312-3313 [Binh Tran].) Linda Vu was, as noted earlier, a member of the Southside Scissors Gang, which was primarily associated with the Cheap Boys. (10 RT 1971, 11 RT 2108, 2196.) There was no gang membership testimony one way or the other as to Trieu Hai (Trieu Binh's brother) or Michelle To (Trieu Binh's girlfriend). Amy Pech told a detective she was not a gang member. (15 CT 4862.)

Trieu Binh and Michelle had come to Orange County from Texas, where they had been living for about two years, for the Tet celebrations. (7 RT 1207-1209, 19 RT 3570, 3573.)

At trial, Trieu Binh admitted having been in the Cheap Boys gang from 1990 until 1995 but denied being a member on February 5, 1995, the day of Sang Nguyen's killing. (7 RT 1270.) No other witness put any time limits on Trieu Binh's gang membership, and as will be seen, in the months after Sang's death, Trieu Binh talked weekly (from Texas) with Khoi Huynh, one of the Cheap Boys' "shot callers" and "core members," about the gang's doings.

shooter. As with the previous charges, no physical evidence tied appellant to Sang's death.

We start with the testimony of the one witness who had no connection to Sang Nguyen — and who identified someone other than appellant as the shooter — and then summarize the evolution of the stories of Sang's dinner companions.[25]

B. The Testimony of Charles Hall

Charles Hall was at a public telephone outside of the Dong Khanh Restaurant, waiting for a call. (11 RT 2088-2090.) The restaurant was crowded, and there was a line of people waiting to get in. (11 RT 2090-2091.) Hall heard a shot, turned toward the sound, and saw a male fall on his face. (11 RT 2091.) The male appeared to have been by himself. (11 RT 2098.) Another male stepped over the man on the ground, held a gun down, said a couple of words followed by "mother fucker," and shot the prone man a "second" time. (11 RT 2093-2094.) The shooter then walked casually toward a car in the parking lot but stopped abruptly upon reaching the corner of the car and walked away. (11 RT 2095-2097.) The car then backed out and drove in the direction the shooter had gone. (11 RT 2095, 2097.) The shooter was alone the entire time. (11 RT 2098.)

In court, Hall described the shooter as Asian-American, in his early or mid-twenties, and about 5 feet, 10 inches tall, or maybe an inch or two shorter.[26] (11 RT 2093-2094, 2100.)

---

[25] All of the dinner companions mentioned in the text testified except for Binh Tran.

[26] Appellant was about five feet, two inches tall and weighed between 110 and 120 pounds. (See Muni.Ct. 17, 15 CT 4825, RT 4279.)

On February 15 (10 days after the killing), Hall was shown a photo lineup containing six photographs; he quickly pointed to the person in Position #3 and said he "looks like the guy who did the shooting." (23 RT 4458, 4460; Exh. RR.) The person Hall pointed to was one Bao Quoc Tran. (23 RT 4460.) Appellant's photograph was not in the display. (See Exh. QQ.)

On June 2, 1995 (four months after the killing), Hall was shown a second six-photo lineup. (23 RT 4462-4463; Exh. UU.) Appellant's photograph was in Position #1. (See Exh. TT.) Hall did not identify anyone in this array but said he could recognize the shooter if he was to see a side profile. (23 RT 4461, Exh. TT.)

At trial, Hall did not recognize anyone as the shooter. (11 RT 2103.)

C. Sang Nguyen's Dinner Companions: The Initial Statements

Sang Nguyen's restaurant companions — Trieu Binh (Temper), Trieu Hai, Linda Vu, Michelle To, and Amy Pech — were interviewed separately on the night of Sang Nguyen's death, and they all indicated that neither they nor their companions had seen the shooting. Specifically:

Trieu Binh Nguyen: Trieu Binh (Temper) told Westminster Detective Mark Nye that he had heard two shots as he was returning to the table from the restaurant's bathroom and that he did not see who shot Sang or who was involved. (7 RT 1228, 1248-1249, 16 RT 3233-3235.) Trieu told another officer, "I just hear gunshot and ran out, but I couldn't get out" and "I don't know why or who or what caused it. I just don't know." (7 RT 1254-1255.) Trieu Binh assured the officers that he was telling the truth and that "I would if I could" help find the shooter and that, "Nah," he was not afraid to help. (7 RT 1251, 1256-1257.)

Linda Vu: Linda told officers that she did not know what had happened outside the restaurant, she did not see the shooting, and she had no idea who shot Sang. (11 RT 2208-2209, 16 RT 3239.) She also said that Trieu Binh Nguyen (Temper) and Binh Tran were in the bathroom when the shots were fired. (16 RT 3239.) Linda gave her word that she was telling the truth, and when she was asked if she was intimidated by gangs, she said she was not, and she started laughing. (11 RT 2209, 2235-2236.) The detective asked Linda if she was willing to tell the truth if she knew it, and she replied, "Yeah, I would if I knew it." (11 RT 2236.)

Trieu Hai Nguyen: Trieu Binh's brother Trieu Hai told police that he had gone to the bathroom and that when he returned to the table, Trieu Binh (Temper) and Binh Tran then went to the bathroom and that they were in the bathroom when Sang was killed. (17 RT 3283-3284, 3289; 20 RT 3785-3786.) Trieu Hai also indicated that when Trieu Binh and Binh Tran went to the bathroom, he (Trieu Hai) did not know where Sang was. (20 RT 3787.)

Michelle To: Trieu Binh's girlfriend Michelle similarly told the police that Trieu Binh and Binh Tran were in the bathroom when the shots were fired. (19 RT 3576.)

Amy Pech: Amy — who specifically testified at trial that she was trying to be honest with the police, that she was not trying to hide anything, and that she was telling the police everything she knew — also said that Trieu Binh and Binh Tran were in the bathroom. (19 RT 3673; 20 RT 3815.) Amy saw Sang walk outside to smoke, with no one accompanying him. (20 RT 3815, 3819-3820; 15 CT 4865.) She said that after the shooting, Linda Vu was yelling, "Where's Sang? Where's Sang?" and that her other dinner companions were at the table. (20 RT 3820-3822; 15 CT 4868.)

D. Sang Nguyen's Dinner Companions: The Stories Change

As late as April 27, 1998 — three-plus years after Sang's shooting — Michelle To (girlfriend of Trieu Binh "Temper" Nguyen) reaffirmed that the statement she had given the police on the night of Sang Nguyen's shooting was true, and she confirmed that Binh Tran and Trieu Binh had been in the bathroom when the shooting took place. (19 RT 3581-3583.) However, except for Amy Pech, the other dinner-companion witnesses had changed their stories, and Michelle would do so as well in the seven weeks before she testified. All retracted their statements, made independently and without mutual consultations on the night of Sang's death, that Binh Tran and Trieu Binh had been in the bathroom when the shooting occurred. Trieu Binh and Linda Vu now claimed to have witnessed the shooting, and they identified appellant as the shooter. These new stories emerged after Trieu Binh had had repeated conversations with a leader of the Cheap Boys gang to which Sang, Trieu Binh, and Binh Tran all belonged.

1. Trieu Binh Nguyen's New Story

The changed stories began with Trieu Binh ("Temper") Nguyen a few months after Sang's killing. Trieu Binh had returned to Texas about two days after Sang's death (7 RT 1262), and in the interval between then and the emergence of his new story, Trieu Binh talked every week or so by telephone with Khoi Huynh, whom the prosecution's gang expert described as one of the "shot-callers" and "core members" of the Cheap Boys gang and who was also the victim of a shooting on March 11, which became the basis for the offenses charged against appellant in Counts 9 and 10. (7 RT 1262-1263, 17 RT 3316-3317.) In their weekly talks, Trieu Binh and Khoi discussed "things that pertain[ed] to Cheap Boy matters," including the May 3rd shooting death of gang member Duy Vu (the victim in Counts 11

and 12, of which appellant was acquitted), the May 6th shooting death of gang member Tuan Pham (the victim in Counts 13 and 14), and the death of gang member Dai Hong.[27] (7 RT 1263-1264.)

At some point after these discussions, Khoi and Trieu Binh initiated a three-way telephone conversation with Westminster Detective Mark Nye. (7 RT 1238, 1258-1259.) At trial, Trieu Binh first testified he thought that Khoi had called him (Trieu Binh) and then they had called Nye together. (7 RT 1259.) Later, Trieu Binh asserted he could not recall how Khoi became involved in the conversation. (7 RT 1269.) Trieu Binh claimed that Khoi did not influence him to undertake the call.[28] (7 RT 1268.)

In the three-way telephone conversation, Trieu Binh said that he saw three suspects, including appellant, walk into the Dong Khanh restaurant and that appellant hit Sang and said, "Let's go outside," where appellant shot him. (7 RT 1228-1229, 1317-1319.)

On May 23 (not long after the three-way call), Texas police showed Trieu Binh a six-photograph photo lineup provided by Detective Nye, and Trieu selected appellant's picture. (7 RT 1238-1239, 11 RT 2261-2262, 2264-2266.)

---

[27] The date and circumstances of Dai Hong's death were not disclosed to the jury, but in the course of arguments to the court, it was indicated that Hong had been killed on March 2, 1995, and that a suspect was a member of the Nip Family gang. (5 RT 1020; see also 1 Muni.CT 67 [preliminary hearing stipulation].)

[28] When Khoi Huynh testified at trial, he was asked whether he had called Detective Nye on May 18, 1995, and had told Nye that he had "good news" and that he (Khoi) had someone on the other line who wanted to talk to him. Khoi claimed he did not remember making these statements. (10 RT 1975-1976.) Khoi claimed that he did not remember ever talking to Trieu Binh in March, April, or May of 1995. (10 RT 1974.) Both sides agreed Khoi's lack of recall was feigned. (26 RT 4995 & 4998, 5054.)

At trial, Trieu Binh testified to the following version of events. He had gone outside the restaurant to smoke a cigarette and asked Binh Tran to accompany him. (7 RT 1212-1213, 1283.) While outside, Trieu saw three Asian males walking "pretty aggressively" in single file toward the restaurant. (7 RT 1214-1216.) Trieu recognized the trio as Nip Family (7 RT 1217), and when they were about 10 feet away, Trieu saw that the middle man had a gun in his waistband. (7 RT 1215-1216, 1287.) Trieu became worried and asked Binh Tran, "Do we have problems with Nip Family now?" (7 RT 1217-1218.) Binh replied, "Hey, Trieu, let's go in and see what shit gonna happen," and Binh tried to go inside to get Sang Nguyen but became stuck in the crowd. (7 RT 1218-1219, 1292-1293.)

Sang, however, walked outside, apparently on his own. (7 RT 1219.) Sang put out his hand to one of the three men, and Trieu heard a shot. (7 RT 1220, 1223.) Sang grabbed his stomach and fell down. (7 RT 1223.) The other man pointed the gun at Sang's head and fired from a couple of inches away. (7 RT 1225.) Everyone, including the shooter, started running. (7 RT 1225-1226.) Trieu did not see what the shooter's two companions did.[29] (7 RT 1226.)

In court, Trieu identified appellant as the shooter and said he had no doubts. (7 RT 1229, 1244-1245.) Trieu admitted he had told the police on the night of the killing that he had been walking back from the bathroom at

---

[29] Contrary to what Trieu Binh's testimony would suggest, Sang, as noted earlier, was shot only once, in the head. The only other signs of injury on his body were abrasions by his eyebrows and on his nose, consistent with falling down. (13 RT 2558.) Trieu Binh testified that Sang was shot on the right side of his head, though in fact, he was shot on the left side. (Compare 7 RT 1327-1328, with 13 RT 2558.) And Trieu claimed Sang was shot at a distance of one or two inches from his head, whereas the autopsy physician saw no sooting or stippling at the site of the entry wound. (Compare 7 RT 1225, 1328 with 13 RT 2563, 2567.)

the time the shots were fired and had not seen the shooting (7 RT 1227-1228, 1249) and that "I don't know why or who or what caused it. I just don't know" (7 RT 1255). This was a lie, Trieu maintained, but his "lie" was not due to a fear of telling the truth to the police. (7 RT 1257.) To the contrary, he was affirmatively "interested in getting the person who shot Sang." (7 RT 1255.) Rather, his explanation for lying to the police was that he was "confused," "didn't have a brain to think at that time," did not have a chance to think, and was "depressed" and it "happen[ed] so fast." (7 RT 1228, 1236, 1248-1249.)

The prosecutor then led Trieu to agree that he (Trieu) was "also still within the gang subculture, in other words did . . . not want to rat." (7 RT 1236.) But Trieu did not stay with the "no ratting" explanation for long. After agreeing two more times that he had lied because he was "confused" (7 RT 1250-1251), Trieu then offered that he had lied because he was "frustrated," "confused and frustrated," and then "frustrated" but "*not* confused." (7 RT 1253-1255, emphasis added.[30])

It took Trieu Binh three or four months to become "unconfused and unfrustrated" and to tell Detective Nye, in the three-way telephone call, that the shooter was appellant. (7 RT 1258.) It was during this three-or-four-month period that Trieu had his weekly telephone calls with Cheap Boys "shot-caller" and "core member" Khoi Huyhn. "It get to a point that I heard lot of my friend went down from what happened, the same guy killed my friend, get to a certain point I can't stand it anymore," Trieu testified. (7 RT 1237.) Trieu "just couldn't stand it any more that he was killing [my] friends." (7 RT 1238.)

---

[30] Hereafter in this brief, all emphases are added unless specified otherwise.

At trial, Trieu Binh admitted that he had told Detective Nye during the three-way telephone call that he had seen appellant walk inside the restaurant, hit Sang, and say "Let's go outside," but at trial Trieu admitted "that didn't happen like that." (7 RT 1318-1319.)

Trieu testified that appellant was wearing a white T-shirt. (7 RT 1286.) Charles Hall and Linda Vu, the only other witnesses to describe the shooter's attire, said the shooter wore a plaid shirt. (11 RT 2094, 2100; 2221-2222.)

2. Linda Vu's New Story

Having told officers on the day of Sang Nguyen's killing that she had not seen the shooting or the shooter, Linda Vu came to testify at trial that she saw the encounter through the crowd, that appellant was the shooter, and that she had recognized him from prior encounters. Her version of events at trial was as follows.

Linda had been seated at a table in the Dong Khanh Restaurant, about ten feet from the front window, with her back to the window. (11 RT 2154, 2132.) She was attending to her daughter or doing homework. (11 RT 2120, 2253.) Binh Tran removed a cigarette from a pack and left the table, but Linda paid no attention to where he went. (11 RT 2217-2218.)

At some point, Linda saw a male outside the restaurant looking in through the front window. (11 RT 2133.) Linda had seen the male maybe five times before; she believed his name was Chinh, but she was later told that was not his name. (11 RT 2133-2134, 2157-2159.) He was from Nip Family (11 RT 2212, 2215), and he had not been friendly to Linda in their prior encounters but had "stare[d] [her] down" and given her dirty looks. (11 RT 2135.) Prior to trial, Linda told Detective Nye that the male was a

friend of Sang Nguyen's from CYA, but at trial, she asserted that this had simply been a guess on her part. (11 RT 2134, 2165.)

Linda testified she told Sang she thought she saw Nip Family outside. (11 RT 2134, 2157, 2165.) Sang asked where Binh Tran was, and Linda said Binh was outside smoking, which is what she assumed. (11 RT 2136, 2166-2167.) Sang told Linda to wait, he would be right back. (11 RT 2137, 2166.)

Linda watched as Sang went outside and turned right. (11 RT 2168-2169.) Sang and the man who had looked through the window shook hands. (11 RT 2138.) There was "a slight struggle" between Sang and the other man, and the man grabbed Sang's head in a headlock. (11 RT 2138-2139, 2220-2221, 2169.) Linda heard a gunshot. (11 RT 2138, 2169.) Everyone started to run. (11 RT 2139.)

Linda grabbed her daughter and ducked under the table. (11 RT 2140.) She heard two more shots, though she could see nothing. (11 RT 2175.) When she emerged, Linda asked Trieu Binh Nguyen, who was inside the restaurant by the cash register, where Sang was. (11 RT 2175-2176.) Trieu said he thought Sang had been shot. (11 RT 2141, 2176, 2242.)

Linda admitted at trial that, when interviewed on the night of the killing, she had told officers that she did not know what had happened outside the restaurant and had no idea who shot Sang. (11 RT 2208-2209.) Linda's explanation at trial for her "false" story was that she feared gang retaliation. (11 RT 2233-2234.) However, on the night of the shooting, she had been asked if she was intimidated by gangs, she said she was not, and she started laughing or chuckling. (11 RT 2209, 2235-2236.)

Linda apparently disclosed most of her new story to the police in a tape-recorded interview with Detectives Nye and Gardner on August 23,

1995, about six and one-half months after the shooting and about three months after Trieu Binh Nguyen had produced his new story. (11 RT 2138, 2190, 17 RT 3240.) Linda told officers that she had been asked to come forward by one Samantha Le "and other members of the Cheap Boys." (17 RT 3321.)

During the August 23rd interview, Linda was shown a photo lineup containing appellant's photograph. (11 RT 2123-2124, 16 RT 3240, 17 RT 3320.) Linda picked out appellant as the person who had been looking in the window. (11 RT 2141, 17 RT 3322.) At trial, Linda characterized her photo identification as a "positive" one. (11 RT 2201.) However, at the time she viewed the lineup, she had told the detectives, "That was the person. . . because none of the other guys looked familiar. . . . I don't know if I picked the right guy or not. . . . I don't know if I identified the right one, but that's the closest one out of the six, I think that's definitely him, if you put a light complexion on him." (11 RT 2202, 2231, 2238-2239, 17 RT 3332.) And after she selected appellant's photograph, she again said, "I don't know if I picked the right guy or not." (11 RT 2204-2205.)

Linda also asked the officers about a second set of photographs that she seemed to be expecting to look at, but no second set was shown to her, and at trial, Linda was unable to explain why she had asked the question. (11 RT 2202-2203.)

During the interview, Linda described the person who shot Sang as having "a kind of stocky build." (11 RT 2193, 17 RT 3315.) She said the shooter was taller than Sang (who was about her own height, 5'2" to 5'4") and she estimated the shooter to be between 5'5" and 5'7". (11 RT 2179-2180, 2193-2194, 2222, 2244, 17 RT 3315.) None of these characteristics fit appellant.

At the preliminary hearing a month after the August 23rd interview, Linda identified appellant as the person who had looked through the window and grabbed Sang, and she again identified him at trial. (11 RT 2142-2144.)

At the preliminary hearing, Linda testified that she had heard "rumors" that the person who shot Sang was not named Chinh but Lam. (11 RT 2206.) At trial, Linda said her testimony about "rumors" was only "half and half" true. (11 RT 2206.) She now claimed that it was Trieu Binh Nguyen (Temper) who told her that the shooter was named Lam rather than Chinh and that Trieu Binh had told her so at the restaurant on the very night of Sang's death.[31] (11 RT 2223, 2225.)

Linda testified initially that Trieu Binh was in the restroom at the time of the shooting, but when the prosecutor expressed skepticism, Linda testified, "Oh, no. He went to the rest room, but then after that I didn't know where he went." (11 RT 2224-2225.) Linda then claimed that Trieu Binh told her he saw Sang being shot (11 RT 2226), but upon further examination, (1) Linda said she did not recall whether Trieu Binh said this, (2) Linda placed Trieu Binh inside the restaurant by the cash register immediately after the shooting, and (3) Linda repeatedly testified Trieu Binh merely told her that he "thought" Sang had been shot (11 RT 2141, 2176, 2242, 2243).

3. Trieu Hai Nguyen's New Story

At trial, Trieu Hai testified that he had lied to the police on the night of Sang's death on February 5, 1995, and that his brother Trieu Binh and

---

[31] Coincidentally or not, the Nip Family gang did indeed have a member named Chinh. (17 RT 3240, 3307.) Chinh was about a year younger than appellant, and his picture was included in a photo lineup shown to some witnesses, although apparently not to Linda. (17 RT 3240-3241, 3307.)

Binh Tran had not gone to the bathroom just before the shooting. (17 RT 3283-3284, 3287.) Rather, Trieu Binh and Binh Tran had been to the bathroom earlier, and he (Trieu Hai) was himself returning to the table from the bathroom when the shooting occurred. (17 RT 3279, 3284, 3286.)

Trieu Hai testified that he had lied on February 5th because "they have the gang thing going on and I don't want to interfere with anything. So they want to — if they owe them anything, so I just say well, my brother's in the restroom so he won't go to court and all that stuff." (17 RT 3283-3284.)

And although, on the night of the shooting, Trieu Hai had placed Binh Tran and Trieu Binh in precisely the same location as had Trieu Binh, this was not due to any collaboration between the two. (17 RT 3289-3290.) "[W]e didn't plan the whole thing or anything," Trieu Hai testified. The police "get us right away to interview so we don't have any time to get together and do a little planning . . . ." (17 RT 3290; see also 17 RT 3293.)

Trieu Hai did not explain when or how he decided to come forward with his new story. He did admit that after February 5, he and Trieu Binh talked about whether Trieu Binh had been in the bathroom, but Trieu Hai did not "quite remember" when they first had such discussions. (17 RT 3292-3293.) It was some time in 1998, before Trieu Binh came to California from Texas to testify at appellant's trial.[32] (17 RT 3296-3298.)

4. Michelle To's New Story

Michelle To, who was the girlfriend of Trieu Binh Nguyen (Temper) on February 5, 1995, told police that night that Trieu and Binh Tran were in the bathroom when Sang was shot. (19 RT 3576.)

---

[32] Trieu Binh testified on May 19, 1998.

On April 27, 1998 (three weeks before Trieu Binh's testimony and seven weeks before her own), a defense investigator telephoned Michelle, and she reaffirmed that Trieu Binh and Binh Tran had been in the bathroom. (19 RT 3581-3582.) The investigator read Michelle the statement she had given on the night of the shooting, and she said it was true. (19 RT 3582.)

At trial on June 15th, however, Michelle told a different story. She testified that she had lied to the police on February 5. (19 RT 3576.) She claimed that Trieu Binh and Binh Tran told her they had to go outside to smoke and that after the shooting, they came into the restaurant from outside. (19 RT 3576-3577.)

Michelle testified that she lied to the police because "[w]e were here for vacation. If I was to tell the truth, then maybe Trieu is going to be kept back. And I didn't want that to happen." (19 RT 3583.) Like Trieu Hai Nguyen, Michelle conceded that she had had no opportunity to talk with Trieu Binh to make their stories consistent before she talked to the police. (19 RT 3586-3587.)

Michelle could not recall when she first disclosed to law enforcement that her February 5th statement was "untrue." (19 RT 3580-3581.) It was probably earlier in June, but it was after Trieu Binh had testified and told her he had "lied" earlier. (19 RT 3579-3580, 3588-3589.) Michelle initially indicated that she saw Trieu Binh only sporadically from 1995 through 1997 (19 RT 3585-3586, 3597), but then it turned out that they were married for seven or eight months in 1997, and she was seeing him on a daily basis (19 RT 3604-3605).

5. <u>Other Evidence</u>

Over defense objection, Westminster Detective Nye was permitted to testify that, based on his training and experience, people who do not

want to cooperate with police at a crime scene "usually say they didn't see anything" and that "in my experience with investigating gang crimes in the cafés and restaurants, the number one answer is 'I was in the bathroom at the time.'" (17 RT 3325; cf. AOB § I.1, pp. 82 et seq., *post.*)

Counts 9 & 10
The March 11, 1995, Shooting of Khoi Huynh

A. The Shooting

Khoi Huynh was an active member of the Cheap Boys gang in 1994 and 1995. (17 RT 3315-3316.) He was known to police as a "shot-caller" and "one of the core members, one of the leaders of the Cheap Boys gang."[33] (17 RT 3316-3317.)

At about 9:30 p.m. on March 11, 1995, as Khoi walked out of the Rack & Cue pool hall in Stanton, he encountered some Asian males who pursued him through the parking lot and shot at him multiple times. (9 RT 1755-1756 & 1764, 1801 & 1807, 10 RT 1868.) One of Khoi's companions inside the pool hall joined in the battle from inside and then ran outside shooting. (9 RT 1755, 1759, 1807-1809, 10 RT 1870-1871.) This person was identified as Huu Tran, a fellow Cheap Boy. (9 RT 1798-1799, 1820, 10 RT 1872, 1883-1884, 2059, 17 RT 3312.)

Khoi managed to run around the corner to a parking lot in front of a liquor store, where he collapsed. (9 RT 1608-1609, 10 RT 2063.) A man who had just driven up to the store pulled Khoi inside the store until help arrived in less than five minutes. (9 RT 1610, 1612 [Arnold].)

---

[33] Khoi was the Cheap Boys leader who spoke with Trieu Binh (Temper) Nguyen on a weekly basis in the first half of 1995. (See 7 RT 1262-1263.)

Khoi testified that he had been shot seven times. (10 RT 1902.) David Arnold, the man who pulled Khoi into the liquor store and looked Khoi over in order to make sure he could stop the bleeding, saw three bullet wounds. (9 RT 1611.)

B. Identification Evidence

As with the prior charges, no physical evidence tied appellant to Khoi's shooting. There was identification or description evidence from several pool hall customers and from Khoi Huynh himself. We begin with four customers: Jeremy Lenart, Ignacio Raygoza, Ignacio's wife Staci, and Michelle Bagstad. As will be seen:

- Ignacio and Staci Raygoza identified appellant as the shooter in a live lineup, but they had identified someone else in an earlier photo lineup that contained appellant's photograph, and they did not recognize appellant at trial.
- Bagstad selected the same individual from the photo lineup as the Raygozas had.
- Jeremy Lenart, a methamphetamine addict and a felon on probation, told police on the night of the shooting that he would be unable to identify the shooter, and he selected the same individual from the photo lineup as had Bagstad and the Raygozas had, but he subsequently identified appellant at the live lineup and in court.[34]

As for Khoi Huynh — the Cheap Boys leader — he feigned a loss of memory at trial. In pretrial statements, he initially insisted that he did not

---

[34] One other customer testified (Warren Fujinaka), but his testimony shed no light on the identification question.

know who shot him, but then later claimed he was shot by appellant, whom he had known for years.

1. The Customers

Ignacio and Staci Raygoza saw a man just outside the pool hall, shooting at another man (presumably Khoi Huynh). (9 RT 1804-1805, 10 RT 1869.) Ignacio described the shooter as a Vietnamese male in his 20's wearing a light shirt, probably a white shirt with stripes. (9 RT 1815-1816.) Staci described him as a male Asian but was unable to specify his age. (10 RT 1869-1870.)

Michelle Bagstad saw a Vietnamese male shoot into the pool hall. (21 RT 3934.) Bagstad, who was five feet, five inches tall, described the shooter as slighter taller than herself. (*Ibid.*)

Jeremy Lenart also saw a man shoot and chase Khoi just outside the pool hall. (9 RT 1756-1757.) The next day (March 12) Lenart described this shooter as tall, 5'7" to 5'10", and wearing a black shirt (9 RT 1780-1781) or, perhaps, a white shirt with stripes (9 RT 1794-1795, 1796). Lenart said he would not be able to identify the shooter. (9 RT 1780.) Lenart said he saw three people firing outside, but they were spread out, and he did not know exactly where the other two were. (9 RT 1756, 1797.)

All four customers were shown a six-person photo lineup containing a photograph of appellant in Position #6. The lineup was shown to Ignacio Raygoza on March 31, to Jeremy Lenart about the same time or perhaps shortly thereafter, to Staci Raygoza on May 3, and to Michelle Bagstad on May 4. (9 RT 1781, 13 RT 2539 & 2543-2544, Exh. I, 21 RT 3940-3941.) Although the photograph of appellant was an excellent likeness,[35] all four customers selected the person in Position #4 as involved in Khoi's shooting

---

[35] 9 RT 1784, 1817; see also 12 RT 2420.

(9 RT 1782, 1791-1792, 1817, 10 RT 1873, 13 RT 2539-2540, 21 RT 3941.) The person in Position #4 was one An Phung. (Exh. K.) Lenart told the officer, "That's definitely him." (9 RT 1792.) Phung did not resemble appellant. (10 RT 1878, 1881; see also 12 RT 2420.)

Lenart and the Raygozas attended the live lineup on May 31, 1995. Appellant was in Position #5. (17 RT 3336, 13 RT 2500, 3 CT 893-894, 945-946.) Neither An Phung nor anyone else from the photo lineup was in the live lineup except for appellant. (10 RT 1878, 13 RT 2542-2543, 3 CT 945-946.) Lenart selected Position #5 but wrote, "Hair is longer." (9 RT 1763, Exh. 84.) Ignacio Raygoza also selected #5, writing, "I recognized him when he made his 3rd quarter turn to the left." (9 RT 1811, Exh. 83.) Staci Raygoza failed to indicate whether she could or could not identify anyone and wrote, "Number five looked familiar, but I am not sure if it was from this case."[36] (10 RT 1875.)

At trial, Ignacio Raygoza testified that appellant "really doesn't look very familiar at this time." (9 RT 1813.) Staci Raygoza testified she would "probably not" recognize the shooter, and in fact she did not see him in court. (10 RT 1875.)

Lenart identified appellant in court as the first shooter (9 RT 1765) and said he had no doubt (9 RT 1791). Lenart admitted that he was on felony probation for drug possession (20 RT 3789-3791) and that he had a long history of amphetamine and marijuana addiction (20 RT 3791) and was under the influence of methamphetamine on the night Khoi was shot, though he claimed the drug did not influence his perceptions (20 RT 3792-3793, 3794, 3795-3796). Lenart also admitted that on the day after the shooting, he had given the police a very different version of events than he

---

[36] The lineup occurred before Staci and Ignacio were married, and she signed her lineup form under the name Staci Murray.

recited at trial: he had said the shooting began when a Vietnamese male entered the pool hall and one of Khoi's companions pulled out a gun and charged at him.[37] (9 RT 1775-1776, 1778.)

Michelle Bagstad did not attend the live lineup and, at trial, said she would "probably not" recognize any of the shooters. (21 RT 3942, 3949.)

2. Khoi Huynh

At trial, Khoi Huynh admitted that he had been with the Cheap Boys "group" (as he called it) for about seven years (10 RT 1882, 1883) and that he was "jumped in" by Sang Nguyen and Tuan Pham (the decedents in the murders charged against appellant in Counts 6 and 13). (10 RT 1886, 1922-1923).

Khoi admitted knowing Kevin Lac (the Cheap Boy who provided the sole identification evidence against appellant in connection with Counts 2 and 3), as well as Linda Vu and Trieu Binh Nguyen (who provided the identification evidence against appellant in Counts 6 and 7). (10 RT 1970-1971, 1973.) In fact, Khoi associated with Linda Vu after he was shot — "Just house visits" — and was continuing to associate with her "as we speak today." (10 RT 1971.) As to Trieu Binh, Khoi claimed an inability to recall whether he communicated with him in March, April, or May of 1995, or whether he put together the three-way telephone call with Detective Nye on May 18, 1995. (10 RT 1974-1975.)

With respect to the evening he was shot, Khoi testified that he had driven to the pool hall in his sister's black Cadillac and that he played pool there with a group of Cheap Boys that included Huu Tran and Tin Duc

---

[37] There was also testimony from Warren Fujinaka. Fujinaka apparently drove into the Rack 'n Cue parking lot after the shooting began and saw someone emerge from the pool hall and run away shooting. (20 RT 3799, 3803.) Fujinaka was unable to make any identifications at the lineup or in court. (20 RT 3800, 3802.)

Phan. (10 RT 1913, 1887-1888, 1987, 1984.) As he left the establishment and headed toward his car, he noticed a few males about 25 to 30 feet away. (10 RT 1890.) Khoi testified he was thereafter shot seven times in the arm, leg, and torso, but he claimed to recall nothing about the shooter or shooters and nothing about what happened except for being helped into the liquor store. (10 RT 1892, 1895, 1917.) In court, Khoi asserted he did not recall what "the" shooter looked like, did not recognize appellant, and did not remember ever knowing or associating with him. (10 RT 1897, 1900-1902.)

According to police witnesses, Khoi had made a number of pre-trial statements about his assailants.

First, on March 14 or 15 (three or four days after the shooting), Khoi told Sheriff's Investigator Janet Strong that on the evening in question, he was approached by two armed males whom he "suspected" were from the Nip Family. (13 RT 2469-2470, 2473, 2501-2502.) Khoi said he started to run and was chased through the parking lot and was hit by shots in his buttocks and back. (13 RT 2472, 2474.) Khoi described one assailant as wearing a white polo-type shirt or sweater and the other as wearing a black jacket. (13 RT 2476.) Khoi said he was not sure he could identify anyone. (13 RT 2476-2477.)

Investigator Strong interviewed Khoi a second and third time, on March 21 and 22. (13 RT 2477, 2495.) On March 21, Khoi asked if Strong had his assailant in custody, and Strong replied that she did not because she did not know who the assailant was. (13 RT 2483.) Strong showed Khoi a number of photographs of Nip Family members, including one of appellant. (13 RT 2496, 2404-2405.) Khoi said he did not see any suspect among the photographs. (13 RT 2505-2506.)

On either March 21 or 22, Strong asked Khoi if he knew who shot him, and Khoi said he did. (13 RT 2484, 2508.) Khoi said that the shooter's name was "Lam" and that he had recognized Lam when he came out of the pool hall because he and Lam had once been friends. (13 RT 2484-2486.) Khoi told Strong he could not testify due to the stigma against gang members being a witness. (13 RT 2495.) Strong responded by telling Khoi that Nip Family members had testified in several cases against Cheap Boys, and Khoi replied that the Nip Family did not play fair.[38] (13 RT 2495.)

In the second or third interview, Khoi also changed his story about the events surrounding the shooting. Although he previously told Strong that he had run because he saw each assailant holding a gun, Khoi now said he ran because "Lam" was known to carry a weapon. (13 RT 2487.) And Khoi now claimed that there were four assailants, not two. (13 RT 2486, 2502, 2506.)

On March 22, Strong showed Khoi a photo lineup, apparently the same one that would be shown to Ignacio and Staci Raygoza, Jeremy Lenart, and Michelle Bagstad. (13 RT 2495, 2496-2497, 2533.) Khoi selected appellant's photograph, which was in Position #6, and said that appellant had shot him. (13 RT 2497-2498, 2515-2516.) Khoi added that he knew appellant because they had been friends. (13 RT 2516.) Investigator Strong testified that because of the war between the Cheap Boys and the Nip Family, it was likely that Khoi and appellant had not been friends for a few years. (13 RT 2518.)

---

[38] On cross-examination, Investigator Strong testified her statement to Khoi was true, but then under pointed re-direct examination by the prosecutor, she retracted this testimony. (Compare 13 RT 2509, 2514 with 13 RT 2545-2546.)

Strong then showed Khoi the same photograph of appellant as she had shown him the day before, and she asked Khoi if he recognized it. (13 RT 2517.) Khoi said he had not recognized appellant because the photograph appeared to be a few years old (which, of course, would have been much closer to the time when Khoi and appellant were friends). (13 RT 2517.)

Strong had contact with Khoi for a fourth time on March 31, about 10 days later, and Khoi told Strong he would testify in court if necessary. (13 RT 2511, 2515.)

On May 3, 1995 — five weeks later — Duy Vu, a Cheap Boy, was shot and killed at a coin laundry in Westminster (the homicide would become the basis for Counts 11 and 12 against appellant, charges of which appellant was acquitted; see AOB 48-51, *post*). While police were at the crime scene, Khoi showed up, uninvited, and contacted Detective Michael Proctor, who took Khoi to the police station and tape recorded a statement from him. (23 RT 4467-4468.) In the taped conversation, Proctor asked Khoi if there was "any specific group of Nip Family that you're having problems with, any specific people," and Khoi replied, "Yes, sir. It's just a gang, the whole gang." (23 RT 4469.) Proctor then said, "I know, but I mean any specific persons in that gang?," to which Khoi replied, "Not really, not that I know of. I don't even know the guy that shot me."[39] (23 RT 4469-4470.)

On May 6 — three days after the killing of Duy Vu — Tuan Pham, another Cheap Boy, was killed in an exchange of gunfire that he initiated in Garden Grove (this homicide became the basis for Counts 13 and 14

---

[39] Proctor had occasion to talk with Khoi at some later, unspecified time, and Khoi stated it was Nip Family who shot him but again did not say who specifically the shooter was. (23 RT 4470-4471.)

against appellant, see AOB 51-61, *post*). Again, Khoi Huynh showed up uninvited at the crime scene, claiming to the police that "instinct" had told him Tuan had been shot. (15 RT 2894, 2915.) Khoi was interviewed by Garden Grove Officer Robert Donahue and said that he had been shot at a billiard parlor on March 11 by Lam Nguyen. (15 RT 2895, 2915.)

3. Other Evidence

Among Khoi Huynh's companions at the pool hall on March 3 was Tin Duc Phan, a fellow Cheap Boy. (10 RT 1987, 20 RT 3832, 3838.) Tin testified at the trial, although not about the events of March 3. Rather, Tin was asked whether he had told a defense investigator in September 1997 that the Cheap Boys were setting up Nip Family because "it's okay to rat on them, since they're ratting on us." (20 RT 3833.) Tin was also asked whether he had further said, on the same occasion, that the motivation for the Cheap Boys getting appellant was "to teach Nip Family that Cheap Boys will rat off Nip Family gang members in retaliation for any Nip Family ratting on them." (20 RT 3834.) To both questions, Tin answered, "I don't remember." (20 RT 3833, 3834.)

Thereafter, defense investigator Daniel Watkins testified that Tin had made both statements. (21 RT 3975-3976.)

On rebuttal, District Attorney Investigator Jeff McLaughlin testified that, shortly before Tin testified, members of the prosecution showed Tin a copy of Watkins' report of the interview and directed Tin's attention to the particular quotation concerning whether the Cheap Boys would set up members of Nip Family as a form of getting back at them. Tin insisted he had not made the statement. (25 RT 4687.)

Counts 11 & 12
The May 3, 1995, Killing
of Duy Vu (*Found Not Guilty*)

A. The Shooting

In the evening of May 3, 1995, Duy Vu, a member of the Cheap Boys gang, was shot and killed in a coin laundry on Trask Street in Westminster. (See 12 RT 2313, 2314-2315, 2324-25.) According to Jeanette Mandy, the only eyewitness to the shooting, Duy had entered the coin laundry and sat down, and later, two young Asian men entered, stood in front of Duy, and began talking to him. (12 RT 2357, 2360-2361, 2363.) At some point, the shorter and stockier of the men slapped Duy, and then both this man and his taller companion departed. (12 RT 2363, 2366.) The stockier man entered a car and started it up, while the taller man rested his arms on the passenger window, as if he were conversing with the stockier man. (12 RT 2367, 2369-2370.) After one or two minutes, the taller man returned to the coin laundry, drew a gun, and shot Duy Vu. (12 RT 2371-2372.) Duy was hit with five or six bullets, including on the left side of his chest and back. (12 RT 2321, 13 RT 2453, 2455.)

As noted earlier, Khoi Huynh appeared at the crime scene not long after the shooting and was brought to the police station, where he told a detective about his own shooting on March 3 and said that "I don't even know the guy that shot me." (23 RT 4469-4470.)

B. Identification Evidence

As with the previous crimes, no physical evidence tied appellant to the shooting. There was identification evidence from Jeannette Mandy and several persons outside the coin laundry.

Mandy described the shooter as between 5'10" and 6' tall. (12 RT 2391.) Other persons who saw the shooter immediately after he left the coin laundry after the shooting estimated his height as about 5'10" and "tall" (Juan Hernandez), about 6' (Scott Dalton), between 5'5" and 5'9" and "tall"(Mary Martina), about 5'6" (Sally White), 5'6" to 5'7" (Johnny Gammoh), 6' (Susan White), and 5'9" to 6' (Sara Benigno). (11 RT 2279, 12 RT 2420-2421 & 2423, 2384-2385; 13 RT 2448, 20 RT 3767, 3862, 21 RT 3920-3921.)

On the night of Duy Vu's killing, Mandy looked through 98 photographs and picked out two as looking most like the shooter. (12 RT 2332 & 2335, 2389.) One of the photos was of appellant, but Mandy was not positive he was the man. (12 RT 2335-2336, 2400.) Mandy was also shown two photo lineups, including one containing appellant's photograph, but she apparently did not identify anyone. (12 RT 2338) Mandy attended the live lineup on May 31 and picked out someone other than appellant. (12 RT 2409-2410.)

At the preliminary hearing, Mandy identified appellant as the shooter but was not positive. (12 RT 2390, 2399-2400.) At trial, Mandy initially responded the same as at the preliminary hearing. (12 RT 2373-2374, 2401.) However, when appellant stood up (appellant being about 5'2" tall[40]) and Mandy was asked if he was the 5'9" to 6' person she saw, Mandy testified, "Judging from where I'm sitting now, the angle I'm sitting at, I would say no." (12 RT 2373-2374, 2401.) On re-direct examination, Mandy testified, "I would say yes," appellant was the shooter, but she was uncertain. (12 RT 2411.)

---

[40] See Muni.Ct. 17, Supp.MuniCT 19, 15 CT 4825.

Juan Hernandez indicated at trial that appellant was "definitely not" the shooter. (11 RT 2285, 2287.) Scott Dalton — who had been shown the same photo lineup as had been shown to Jeremy Lenart, the Raygozas, and Michelle Bagstad and who, like them, had selected An Phung's photograph rather than appellant's — testified that appellant "might have been [the shooter], but I doubt it." (12 RT 2348-2349, 2419-2421.)

None of the other witnesses attempted an in-court identification. Two of them (Johnny Gammoh and Mary Martina) had attended the May 31st live lineup and identified someone other than appellant. (20 RT 3770-3771 & 3776-3777, 21 RT 3924-3925.)

The prosecution also produced evidence attributed to Hang Thi Tran ("Monica"). Monica testified that as of May 1995, when she was 14 or 15 years old, she had been associating with Nip Family for about six months, (10 RT 2010, 2038.) On May 9 (about a week after Duy Vu's death), Monica was arrested for a probation violation and, worried that she would be sent to C.Y.A. or jail, she agreed to speak to police officers about recent Nip Family activities. (10 RT 2024, 2028, 2029-2030.) One of the officers Monica talked to was Detective Nye. (10 RT 2028, 16 RT 3158.) According to Nye, Monica told him that she had been with appellant and some of his friends about two weeks earlier (i.e., in late April), that they had seen Duy Vu, and that appellant had said, "Wait and see, one day we're going to get him." (16 RT 3160, 3163-3165.) At trial, Monica denied making these statements. (10 RT 2012-2013.)

As noted earlier, appellant was found not guilty of crimes alleged in connection with Duy Vu's death, undoubtedly because of the large discrepancy between appellant's height and that of the shooter.

Counts 13 & 14
The May 6, 1995, Killing of Tuan Pham

A. Overview

At dusk on May 6, 1995 (three days after the shooting of Duy Vu), Minh Ngoc Vo and Tuan Pham were in a Buick that stopped for a traffic light at an intersection in Garden Grove. Tuan (the driver) jumped out of the car carrying a long-barreled pistol and moved quickly toward a white Honda ahead of him in the next lane. Appellant and two others were in the Honda. When Tuan reached the Honda and started to raise his arm with the pistol, gun shots began. Witnesses saw shots come from the driver and front passenger of the Honda, and also from Minh Vo, Tuan's companion in the Buick, who fired a shotgun that (at the least) shattered the Honda's rear window. Tuan was killed, Minh fled on foot, and the Honda drove off erratically.

Appellant's presence in the Honda was not disputed. What was disputed was appellant's role in the exchange of gunfire and whether the shooting of Tuan Pham was done in self-defense. It was the prosecution's contention that appellant was the driver of the Honda and that he fired one of the guns that killed Tuan. The defense's position was that appellant was unarmed in the back seat and did not participate in the shooting. The defense also argued that, in any event, Tuan's killing was committed in self-defense since Tuan was about to open fire on the occupants of the Honda; in response, the prosecution relied upon the testimony of a gang expert opining about general gang behavior during an on-going "war" like the one between the Cheap Boys gang and the Nip Family gang of which appellant was (allegedly) a member.

In the summary of facts that follows, we focus on the evidence relating to appellant's location in the Honda and thus his role in the

incident and to the claim of self-defense. The evidence regarding appellant's gang ties (and regarding the hostilities between the Cheap Boys and Nip Family) is discussed later, in the summaries of the evidence concerning the gang charges.

B. The Shooting

The shooting incident occurred at about 9:00 p.m. — dusk — on May 6, 1995, at the intersection of Brookhurst and Westminster in Garden Grove. (13 RT 2572, 2588 & 2597.) A brown 1983 Buick Regal stopped suddenly in the left-turn lane of Eastbound Westminster and began to back up rapidly, almost colliding with the car behind. (13 RT 2581, 2591 & 2593-2594.) The driver — subsequently identified as Tuan Pham, a "very active" Cheap Boy[41] — was acting "real jittery;" and he turned his wheel to the left, as if he was going to leave in a hurry. (14 RT 2710-2711.) He got out of his car, glared angrily at the driver of the car behind him, retrieved something from inside the Buick, and then moved forward quickly. In his right hand, Tuan was carrying a pistol with a six-inch barrel, and he left his car's door open, the engine running, and the lights on and the turn indicator flashing. (13 RT 2573, 2594-2597, 2598.) One eyewitness described him as "tattooed and buffed and looking mean." (14 RT 2724; see also 13 RT 2595 ["real angry look on his face"].)

As Tuan neared the front of his Buick, he began to trot; he seemed to be in a hurry. (13 RT 2598 & 2626, 14 RT 2733.) There was a white Honda ahead of the Buick, in the fast lane to the Buick's right, with a driver, a front passenger, and one or more rear passengers. (14 RT 2714-2715, 2738.) As Tuan cut across the front of his car and moved toward the

---

[41] 10 RT 1970.

Honda, the Honda's occupants began to fidget, their bodies moving as if nervous. (13 RT 2596, 14 RT 2715-2716.)

Robert Murray was the driver of a Ford Astro van in front of Tuan Pham's Buick and to the left of the white Honda. (14 RT 2710, 2714.) Shawn Burchell was on the sidewalk on the north side of Westminster, just across the oncoming lanes, waiting for a bus. (13 RT 2588-2590.) Both watched as Tuan approached the Honda. "Oh, my God," Burchell said to her companion, "he's going to kill somebody." (13 RT 2598.)

No more than a second before Tuan arrived at the driver's door of the Honda, the Honda's driver smiled in Murray's direction, and then the driver placed a gun on the left side of his chest with his right hand. (14 RT 2715, 2717, 2736.) Within a second, Tuan stopped just to the rear of the Honda driver ("like when you get pulled over by a policeman . . . he's a little off to the side . . . so you couldn't shoot him"), turned toward him, and moved his right arm as if raising it. (13 RT 2602-2603, 14 RT 2715 & 2736.) "[A]t that point," Murray testified, "it was survival." (14 RT 2718.)

Gunfire erupted immediately. (13 RT 2626.) There was a shot from the Honda driver toward Tuan. (14 RT 2718.) This was followed by more shots from the Honda driver, soon joined by shots from another gun in the Honda, fired by the front passenger leaning over the top of the car, and then from a shotgun. (14 RT 2719-2721, 2604, 2609, 2620-2621.) The shotgun was fired at the Honda by a man standing in front of Tuan Pham's Buick. (14 RT 2703 & 2706-2707, 15 RT 2926, 16 RT 3147-3148.) This man was subsequently identified as Minh Ngoc Vo, a.k.a. Khai Vo, another Cheap Boy. (13 RT 2619, 16 RT 3150, 10 RT 1977.)

It is unclear how many shots, if any, Tuan Pham fired, since he was facing away from the two witnesses who saw the outbreak of shooting, Robert Murray and Shawn Burchell. (13 RT 2605 & 2608, 14 RT 2715-

2716.) What is clear is that Tuan was fatally shot and fell in the street; death was caused by a large caliber bullet that penetrated the left side of his skull. (14 RT 2774-2776.) Two other bullets, possibly from a different weapon, hit his back. (14 RT 2774-2775, 15 RT 2894.) No shotgun pellets hit him. (3 CT 930-931.)

The white Honda left the scene slowly, swerving from side to side, with at least its rear window shot out. (16 RT 3148, 13 RT 2654 & 2656.)

Although the order of events is not entirely clear, witnesses agreed that Khai Vo, the man who fired the shotgun at the Honda, returned thereafter to the Buick, retrieved something, and then went to Tuan Pham's body and bent down and made motions as if he were picking up or dropping something. (13 RT 2613, 2645-2648 & 2652, 14 RT 2671-2672, 2701-2702.) For reasons that will become clear, it appears that Vo picked up Tuan's gun.

Vo then walked to Westminster's south side carrying at least two weapons, cut through the bushes between a gas station and a restaurant, and disappeared behind the restaurant, where he may have entered a car and been driven away. (13 RT 2614-2618, 2649-2650, 14 RT 2671-2672, 2701 & 2704.) Later that evening, the police found a pistol with a six-inch barrel and a sawed-off shotgun in the bushes between the gas station and restaurant. (14 RT 2682-2685 & 2686, Exh. 102.) Khai Vo's fingerprints were on the pistol, as well as on the front hood and on the outside of the passenger door of the Buick that Vo and Tuan Pham had been riding in.[42] (16 RT 3150.)

---

[42] The Buick that Tuan Pham had been driving was registered to Huu Tran, the Cheap Boy who had returned fire from inside the pool hall in the March 11th incident in which Khoi Huyhn was shot. (13 RT 2581-2582, 16 RT 3150.) Tran was in custody at the time that Tuan Pham was shot. (16 RT 3150.)

C. Evidence re Identity of Honda Driver

The only identification testimony as to the Honda driver came from Robert Murray. On May 17 (11 days after the shooting), Murray was shown photo lineups, including one containing appellant's photograph in Position #6. (14 RT 2723, 2753 & 2756.) After viewing the lineup, Murray signed a form stating that "I cannot make any identification" and adding that "#6 is close. He is clean complextion [sic], young looking, dark hair ... w[ith] a short combacked [sic] look, but cannot be sure even if I saw him in person." (Exh. V; see 14 RT 2744.) At trial, Murray explained that initially he had not pointed out anyone in the lineups, but

> "then, you know, the talking and the talking back and forth, and are you sure nobody looks like this or that. And, you know, I said it's possible. I mean, if you were to say the likeliness and the cleanliness and the clean and the good looks of the person, it's possible, sure. That was basically what I had said right there. But, I wasn't going to initially say anybody, because I don't know. I really do not know."

(14 RT 2723.)

Murray also attended the May 31st live lineup but saw no one he recognized from the shooting. (14 RT 2750.)

At trial, Murray was shown the photo lineup again. He thought it might involve "the person who was shot," but he testified he had not been sure on May 17th and was not sure now. (14 RT 2724.) He testified that he did not think he would recognize the Honda driver, although he could visualize him, and he insisted that he had never been able to make an identification. (14 RT 2723, 2737, 2748.)

D. Crime Scene Evidence

The police found no weapons in the immediate vicinity of Tuan Pham's body, but they observed that Tuan wore a white cotton glove on his

right hand (the hand in which he had been holding the pistol as he hurried to the Honda). (14 RT 2679-2680, Exh. 99.) A matching left-hand glove was subsequently located behind the restaurant, in the area where Minh Vo was last seen. (14 RT 2686-2687, 2689.)

In the lane where the Honda had been, there were two areas where particles of automobile glass had fallen. (13 RT 2574-2578, Exhs. 88-90.) According to measurements made by a crime scene investigator, one cluster of particles was about two feet north and 10 feet east of the other, and 10 and 20 feet, respectively, from the crosswalk.[43] (Exhs. 90, 91, 15 RT 2695.)

Five expended yellow shotgun shells were found close together near the passenger (south) side of Tuan Pham's Buick, in the next lane. (13 RT 2576, 2578, & 2582, 15 RT 2870, Exhs. 88-90.) A Garden Grove detective testified that in his experience, such shells contained skeet or birdshot. (15 RT 2911-2912.) No actual shotgun pellets, however, were found at the scene,[44] suggesting that all five blasts penetrated the Honda.

---

[43] There is a discrepancy between the relative locations of the areas of broken glass as depicted on Exhibits 88, 89, and 90 and as measured by the crime scene investigator (see 15 RT 2863 & Exh. 90). Whereas the diagrammatic portion of the exhibits indicate that area "2" is north and west of area "1," the investigator's measurements (as recorded at the bottom of Exh. 90) place location "2" *south* and west of location "1." Moreover, the measurements indicate the both clusters of glass are close to the south side (passenger's side) of the lane in which the Honda had stopped. Because none of the diagrams are to scale but the investigator testified her measurements were accurate, we have relied on the measurements rather than the diagrams.

[44] 15 RT 2911.

Three shotgun waddings were located not far from the broken glass.[45] (13 RT 2577 [Martin], Exh. 88.)

Several bullets or bullet fragments were recovered. Of most significance for the issues at trial was one bullet that had penetrated the front of Tuan Pham's Buick above the left headlamp, coming to rest inside engine compartment. (15 RT 2866-2867, 2884 & 2904.)

As noted earlier, Khoi Huynh showed up uninvited at the crime scene while the police were investigating, drawn by "instinct, you know." (15 RT 2894, 2915.)

E. Someone Flees from a Car Stop

On May 23, 1995 (17 days after the Tuan Pham shooting), a police officers saw three Asian men leaving the front yard of a residence at 13401 Amarillo Street in Westminster. The three men entered a silver Ford Escort and proceeded south and then west toward Hoover Street. (15 RT 2828-2829, 2831.) One man, subsequently identified as Cuong Le, drove. (15 RT 2829-2830, 2833.) The tallest man, Tuan Nguyen, sat in the rear. (15 RT 2829-2830, 2833.) The third man — the shortest of the three, at about 5'2" or 5'5" — sat in the front passenger seat. (15 RT 2829, 2834.) Both Cuong Le and Tuan Nguyen were members of the Nip Family gang. (16 RT 3206.)

The Escort proceeded north on Hoover and was pulled over by Officer Vincent On. (15 RT 2839-2840.) The front passenger opened his

---

[45] Again, the diagrams presented to the jury (Exhs. 88-90) placed these items in locations that did not match the measurements made by the crime scene investigator. Whereas the diagrams put the three waddings slightly to the west of the two glass clusters, the measurements indicate that the glass lay more or less inside a triangle that the waddings created.

door, raced across the front of car, and headed toward railroad tracks on the west side of the road. (15 RT 2841-2842.) Officer On saw the passenger, a Vietnamese male, for a "couple seconds." (15 RT 2849, 2851.) Another officer pursued the passenger but without success. (15 RT 2842.) Apparently, the passenger fled into the area of a nursery. (15 RT 2855.)

About 15 or 20 minutes before the car stop, Officer On had been shown a photograph of the face of "somebody" with the name Lam Thanh Nguyen and had been given a body description. (15 RT 2849, 2851.) Officer On had never seen the person before. (15 RT 2851.) At trial, Officer On testified that the passenger who fled from the car stop was a Vietnamese male and looked "similar" to — and "possibly" was — the person in the photograph. (15 RT 2849, 2851.) Officer On never saw the passenger again and would not recognize him if he saw him in court. (15 RT 2852.)

Considerable additional officers were called to the scene to look for the fleeing passenger, but he was not found. However, a police dog alerted his handler to some bushes on the western edge of the nursery, and a Colt .380 revolver was found there. (15 RT 2857-2858.)

The revolver was held for fingerprints, but no evidence was presented that appellant's prints were on it. (15 RT 2859.) A criminalist compared test bullets from the Colt with the bullet that had been recovered from the engine compartment of the Buick that Tuan Pham had been driving on the evening of the shooting. She concluded that the Colt had fired that bullet. (16 RT 3101-3102, 3104.)

F. Appellant's Medical Treatment and Arrest

On May 11 (five days after the shooting), appellant, using the name "John Nguyen," sought treatment from Dr. Dinh Van Dinh for pains in his

hands and arms. (15 RT 2967-2968.) Appellant told Dr. Dinh that five days earlier, he had been cleaning his shotgun for hunting and that a friend played with it and accidentally hit the trigger. (15 RT 2968-2969, Exh. 130.) Dinh had X-rays taken, which revealed metallic foreign bodies in both of appellant's hands. (15 RT 2969, 2970-2971, Exhs. 128, 129.) Dinh prescribed an antibiotic to prevent infection; the prescription was made out to "John Nguyen." (15 RT 2971, 2972.)

Dr. Dinh saw appellant again on May 17 and May 24, taking more hand X-rays on the latter date. (15 RT2972, 2973, Exh. 127.) Dr. Dinh's X-rays show two or three small, roundish metallic objects lodged in the fingers of each hand. (Exhs. 127-128.)

On May 23, following the car stop in which a passenger had fled from Officer On, police executed a search warrant at 13401 Amarillo Street, Westminster, the house in front of which the three Asian males had first been seen. (15 RT 2931.) The location searched was a separate living area attached to a main house. (15 RT 2932.) It was "a studio type" or "an apartment type setup" with its own entrance. (15 RT 2932.) The main house had four bedrooms; the separate unit had one. (15 RT 2871-2872.)

In the closet of the bedroom of the separate unit, officers found an ampicillin prescription for one Huy Pham and an unloaded AK-47-type rifle. (15 RT 2932-2933, 2936-2937, 2966, 16 RT 3168.) There were also two loaded .357 pistols on top of the bed. (15 RT 2932, 16 RT 3168.) The weapons were all fingerprinted, but no prints were linked to appellant. (15 RT 2965.) Nor were the weapons connected to any of the crimes with which appellant was charged.

On top of the television in the room that served as the living room of the separate unit, police found the bottle of medication that Dr. Dinh had

prescribed for "John Nguyen." (15 RT 2933, 16 RT 3168-3169.) There were no guns in this room. (15 RT 2937, 2966.)[46]

Two days later (May 25), officers went to Dr. Dinh's office, where Dinh identified John Nguyen as appellant. (16 RT 3169-3170.) Dinh informed the officers that appellant had an appointment for later that day, and appellant was arrested when he arrived. (15 RT 3170, 3172-3173.)

Accompanying appellant on his doctor's visit was Huy Pham, a Nip Family member, who was also taken into custody. (15 RT 3172-3173, 16 RT 3205-3206.) Upon being arrested, appellant said, "Let Huy go, he didn't do anything, you got me." (17 RT 3327.) Appellant stated that Huy had driven him to the doctor's office. (17 RT 3327.) At the police station, appellant inquired whether Huy was going to be booked, adding that "Huy didn't do anything, and the gun is mine." (17 RT 3328.) Asked what gun he was referring to, appellant said it was a black gun with seven bullets in the glove box of Huy Pham's car. (17 RT 3328.) The gun was seized by the police and was determined to be unconnected to any of the crimes with which appellant was subsequently charged. (21 RT 4007.)

Later on the day of appellant's arrest, officers saw and photographed circular marks or injuries on the palm side of the thumb and middle finger of appellant's left hand, on the inside of his right forearm, and on the left side of his back from below his shoulder blade to above his waist, and there

---

[46] The entire house was rented by a Tam Nguyen, who slept in one bedroom of the main residence and who tried to rent out the four remaining bedrooms to others, sometimes to as many as eight or ten individuals. (15 RT 2871, 2875.) Tam testified that the renter of the separate unit was a thin small male whom the police told him was named Lem or Lam Van Thanh. (15 RT 2872-2873, 2875.) At trial, Tam did not recognize appellant as one of his subtenants from May 1995, and he testified he would not recognize the subtenant if he saw him again, as he had only had two or three contacts with him. (15 RT 2873, 2874, 2879.)

was also an injury near the top of the left index finger. (15 RT 2896 & 2898, 3177, Exhs. 113-115; 23 RT 4473, Exh. 140.) A detective testified that the forearm injuries were consistent with birdshot. (15 RT 2899.)

Counts 3, 5, 7, 10, 12, & 14
Active Criminal Street Gang Participation
and
Gang-Benefit Enhancement (All Counts)

To support the gang charges and enhancements, the prosecution presented the testimony of Westminster Detective Mark Nye, who in 1994 and 1995 was an Asian gang specialist on the Westminster Police Department Tri-Agency Resource Gang Enforcement Team, apparently also called the Target Gang Unit. (16 RT 3152.) According to Nye, the Nip Family gang (or "NF") was formed after 1989 as an offshoot of a gang called the Natoma Boys. (16 RT 3196.) There were nine original NF members, who marked themselves with nine cigarette burns on their forearms; they were mostly younger relatives of Natoma Boys members who wanted their own status in the gang community. (16 RT 3178, 3196.) By 1994 and 1995, the Nip Family had approximately 50 members. (16 RT 3178, 3217-3218.)

Nye testified that until 1994 and 1995, some of the primary activities of the Nip Family gang were homicides, attempted homicides, assaults, assaults with deadly weapons, home invasion robberies, burglaries, auto theft, and narcotics sales.[47] (16 RT 3178-3179.)

---

[47] Similarly, Nye described the Natoma Boys "to this day" as a "still very active Asian street gang involved in automatic weapon sales, narcotics sales, home invasion robberies, extortion . . . credit card fraud, check fraud. Pretty much every crime under the umbrella you could imagine." (16 RT 3196.)

Nye further testified that unlike Hispanic gangs, Asian gangs are not territorial and do not have "turf" but "seek out and go to other jurisdictions to commit crimes;" they "may go to Fountain Valley to do a home invasion robbery, or they may go to San Gabriel or may go to Seattle, Washington, may go to Denver, or they may go to Texas to commit a crime." (16 RT 3180, 3181.) Asian gangs are also "a lot more intelligent, more sophisticated" than Hispanic gangs. (16 RT 3181.) They have "much more resources available to them" and, in addition to the usual offenses "from vandalism to homicide," are involved in "more sophisticated crimes" than Hispanic gangs. (16 RT 3181-3182.)

In 1994 and 1995, the main rivals of the Nip Family were the Cheap Boys and the Tiny Rascals Gang (or "T.R.G."), with each of whom the Nip Family had a "deadly war." (16 RT 3196-3197.) The war between the Cheap Boys and Nip Family had begun in about April 1993. (13 RT 2516.)

According to Nye, this state of war meant several things. It meant, for example, that gang members commonly had a gun nearby. (16 RT 3201.) Guns were "not always that easy to come by," so "they may have gang guns they share among the group." (16 RT 3202.) Such a gun could be "pass[ed] through a number of hands before it's used in another offense." (16 RT 3220.) There would usually be one or two "good guns" in a car with five occupants. (16 RT 3202.)

The state of "war" between the gangs also meant that gang members would "get involved in street warfare wherever they happened to be." (16 RT 3181.) "[A]ny time they have the opportunity," Nye testified, "gangs [at war] would be trying to kill whoever was in the other gang." (16 RT 3195.) Indeed, "hunting rivals" is "one of the main things they do." (16 RT 3199-3200.) They "actually seek rivals each time they go out."

(16 RT 3212-3213.) "Every time they go in the car, they're ready for engagement with another gang. They're ready, and they anticipate confronting rivals." (16 RT 3201.) Thus, "any time either one of those two gangs saw somebody from the rival gang, they would attempt to kill that other person." (16 RT 3211.)

Moreover, unarmed passengers in a gang car are always acting as "backup" to the shooter. Although one person may shoot from a car, "[b]asically they're acting in concert as a group. [¶] If something were to happen and they would have to bail out of the car, that member would be expected to back that person up. Be it assault somebody, be it shoot somebody, be it take over the driving of the vehicle, whatever it may be. [The non-shooter] is going to be expected to back up the individuals." (16 RT 3185.) The backup is "expected to do everything that that other person is going to do. They're expected to be there to assist in overcoming a rival. . . . [T]hat backup person needs to be there and needs to be just as aggressive as the other person in the car." (16 RT 3215-3216.)

Once a gang member is killed, it is necessary for the gang to retaliate, both because of gang culture and to keep respect and gain prestige in the gang community. (16 RT 3182-3183.) Retaliation does not have to be against the exact person who offended against the gang. (16 RT 3188-3189.) But, Nye stated, testifying in court against a rival gang member would not count as retaliation. (16 RT 3199.)

And, Nye added, it increases status if a killing is done with a lot of civilians around. (16 RT 3208-3209.)

Nye further testified that there is an unwritten rule in gang subculture that members do not cooperate with the police and do not testify in court. They take care of things on their own, by retaliation. They do not expect the police to do anything for them, and they cannot regain face

except by committing another act of violence against the other gang. (16 RT 3187-3188, 3199.)

Nye testified that in contacts he had had with appellant prior to May 25, 1995, appellant had claimed membership in the Nip Family gang. (16 RT 3202.) Nye further testified that he had talked to other people about appellant's membership in the gang — members of the Nip Family and their rivals, confidential informants, and other police investigators — and the "information" imparted to Nye was that appellant was with Nip Family. (16 RT 3202.)

Nye was then asked hypothetical questions that were apparently intended to be based upon the prosecutor's view of appellant's role in the killings or attempted killings of Sang Nguyen (Count 6), Khoi Huynh (Count 9), Duy Vu (Count 11), and Tuan Pham (Count 13). (16 RT 3207, 3209-3210, 3212, 3215.) In each instance, Nye indicated that the actions of the hypothetical shooter (appellant) was "consistent with current membership and active participation in Nip Family gang." (16 RT 3207; see also 16 RT 3210, 3212, 3216.) Nye was also asked a hypothetical question that seemed to track the facts of the attempted murder of Tony Nguyen (Count 2), and he testified that in that situation, he would expect both sides to open fire on one another. (16 RT 3214-3215.) No hypothetical question was asked that related to the shooting of Huy Nguyen (Count 4).

Another Westminster officer, Detective Marcus Frank, testified that in 1992, appellant had said he had been a Nip Family member for about two months. (16 RT 3143-3144.) Monica Tran, who testified in connection with Counts 11 and 12 (involving the death of Duy Vu),

testified that friends told her that appellant was from Nip Family. (10 RT 2028.)[48]

Appellant's Testimony About the Shootings

Appellant was a witness in his own defense. (21 RT 4009-4077, 22 RT 4135-4284.)

A. Up To and Including the July 21, 1994 Shooting of Tony Nguyen (Counts 2-3) and the November 24, 1994 Shooting of Huy (PeeWee) Nguyen (Counts 4-5)

Appellant testified that in 1994 and 1995, he was on probation with "gang conditions" as the result of pleading guilty to assault in 1992 and admitting that the crime had been done to assist criminal conduct of gang members. (21 RT 4012, 4068.) Appellant testified that he was 16 or 17 years old at the time and and that he had been in the middle rear seat of a car, unarmed, when another occupant had shot someone. (21 RT 4013, 4067-4068, 22 RT 4162.) Appellant said he had not done anything (22 RT 4161) but was young and made the mistake of failing to ask whether his companions had a gun. (22 RT 4206.) "So, I was in trouble, so, and I couldn't complain."[49] (22 RT 4206.)

---

[48] Appellant's testimony about his alleged gang membership is discussed below, as is the prosecution's evidence admitted to rebut that testimony.

[49] The court file for appellant's 1992 conviction appears in various forms in the record. The entire court file was designated as Court Exhibit 23. This exhibit was not given to the jury, but most of its contents (though not all) are in the first Supplemental Clerk's Transcript. (See Supp.CT 1-75, 90-93.) A portion of the court file, with one page edited, was presented to the jury as Exhibit 132, which can be found at 15 CT 4839-4851. (See 17 RT 3366-3368 [editing the complaint].)

In pages not given to the jury, the court file indicates that Khoi

(continued...)

In October or November 1993, appellant traveled to visit his parents in Vietnam, returning to the California in February or March 1994. (22 RT 4174, 4177.) Not long after his return, appellant went to Alabama, where his sister Phuong lived and where he had previously worked in seafood processing shops. (22 RT 4168, 4172, 4184, 4281.) He returned to southern California after only about ten days because a sister there told him his probation officer wanted to see him.[50] (22 RT 4268.) Not long thereafter, he enrolled in a manicure training school and completed 100 to 200 hours of training there.[51] (22 RT 4187-4189.)

Around July 4, 1994, appellant moved back to Alabama, where he lived with his sister Phuong and with another couple and worked part time in seafood companies, as before. (21 RT 4016-4019, 22 RT 4179-4181.) In September, appellant went to New Orleans, where he lived and worked

---

[49](...continued)
Nguyen, Ky Nguyen, and appellant were charged in adult court with a January 1992 assault with a deadly weapon and that Khoi Nguyen was also charged by himself with four additional offenses, including two counts of attempted murder and one count of active criminal street gang participation. (Supp.CT 13-14.) In the guilty plea form that appellant signed (which the jury did have before it as part of Exhibit 132), the factual basis for the guilty plea was described as follows: "In Orange County on or about 1-10-92, Khoi Nguyen, Ky Nguyen, Phong Doun, Tam Nguyen and I assaulted Judex Rudy Magana with a firearm. The offense was committed in association with a criminal street gang with the specific intent to assist criminal conduct by gang members." (Supp.CT 19.) This description, plus appellant's testimony as outlined in the text, was the only evidence of the underlying facts of the 1992 offense that was produced at trial.

[50] Appellant had two sisters in Orange County, Nen and Le. (See 24 RT 4626, 4727.) By the time of trial, Le had moved to Delaware.

[51] Minh Nguyen, the owner of Tam Beauty College, confirmed that appellant had signed up and paid for 350 hours of instruction on April 4, 1994. (23 RT 4475-4477.) Minh was unable to tell from the documents he brought to court how many classes appellant attended. (23 RT 4476.)

with a man who owned a shrimp boat. (21 RT 4018-4109, 4021.) Appellant left when the shrimping season concluded, returning to California at the end of November or early December, 1994. (21 RT 4023.) Appellant lived with a sister in Westminster for approximately one month, and then rented a room in a pool hall near Garden Grove Boulevard and Dale Street, in Garden Grove, where he stayed until he was arrested a few months later, on May 25, 1995. (21 RT 4023-4025, 22 RT 4209.)

Appellant's testimony thus placed him in Alabama on the dates that Tony Nguyen (July 21, 1994) and Huy "PeeWee" Nguyen (November 24, 1994) were shot.[52] (See 21 RT 4027.)

Appellant corroborated that he and Kevin Lac had lived in the same apartment building in 1994. (21 RT 4014.) Appellant testified that there had been no trouble between them and that the two had not conversed. (21 RT 4014-4015.)

---

[52] The defense produced two W-2 tax forms that appellant received in the course of his employment in the seafood industry in Alabama in 1993 and 1994. One showed that appellant had been paid $1,240 by Bryant Products in 1993. (Exh. MM.) The other showed that he had been paid $90 by T&W Seafood in 1994. (Exh. KK.) An employee of the latter firm brought in records indicating that appellant had earned his $90 on one day in March 1994. (25 RT 4675-4676.) Thus, neither form proves appellant's presence on the date of any of the offenses charged in this case.

Appellant testified that he worked for various seafood firms in Alabama, because there were many small companies in close proximity, and workers would go from company to company, often during the course of a day, depending upon who had seafood. (22 RT 4171.) The employee who testified about T&W's records corroborated appellant's description of the work life in Bayou La Batre. She testified that seafood workers, who were mostly from the large Vietnamese community there, were paid by how much seafood they processed and that they worked at other companies "all the time," shucking oysters, picking crabs, peeling shrimp, cutting fish, "whatever they can find to do." (25 RT 4680, 4684.)

B. Re the February 5, 1995 Killing of Sang Nguyen (Counts 6-7)

Appellant testified that on February 5, 1995 — which was the Vietnamese New Year and the day that Sang Nguyen was killed — he had visited his sister Nen in Westminster, then gone to a nearby Catholic church by himself and to a Buddhist temple with a female friend, and was dropped off at a pool hall near his home, where he stayed until he went home. (21 RT 4027-4032, 22 RT 4216.) He did not go to Dong Khanh Restaurant and did not shoot Sang Nguyen. (21 RT 4033.) Appellant also denied that he had ever used the name "Chinh." (21 RT 4052.)

C. Re the March 11, 1995 Shooting of Khoi Huynh (Counts 6-7)

Appellant testified that he did not know where he was on March 11, 1995, the night that Khoi Huynh was shot, but he was not at the Rack & Cue pool hall and did not shoot Khoi. (21 RT 4033, 4035-4036.) Appellant knew Khoi from Westminster High School; they had been friendly towards each other but not good friends, and they had not kept in contact. (21 RT 4033-4035.)

D. Re the May 3, 1995 Killing of Duy Vu (Counts 11-12, of Which Appellant Was Acquitted)

Appellant testified that at the time of the shooting of Duy Vu on the evening of May 3, 1995, he (appellant) might have been in a coffee shop, looking for a part-time job in the newspaper, because that is what he did for much of the month. (21 RT 4036-4037.)

E. Re the May 6 1995 Killing of Tuan Pham (Counts 13-14)

As for the May 6th shooting that led to the death of Tuan Pham (Counts 13-14), appellant admitted being in the white Honda that Tuan had

approached with a gun, but appellant denied that he was the driver or had a gun. Appellant testified that he had been playing pool in Garden Grove with a man named Hong and that he had asked Hong for a ride to the coffee shop. (21 RT 4041-4042.) Hong's brother had Hong's car, and he picked them up after 8:00 p.m. in a white car that he thought was something like a Camry. (21 RT 4042.) The brother drove. (21 RT 4043.) Appellant rode in the back, on the passenger side, unarmed. (21 RT 4044, 22 RT 4228.) At the time, appellant did not know that either Hong or his brother had a gun. (22 RT 4228.)

While the car was stopped at the traffic light at Westminster and Brookhurst, the brother indicated that something was wrong. (21 RT 4043.) He looked in his mirror and said, "Look in the back." (22 RT 4228.) Appellant turned around to his left and saw a person behind the car with a shotgun or a rifle pointing in appellant's direction. (21 RT 4044, 22 RT 4228, 4230.) Appellant ducked and put his hands up, and he heard a shot. (21 RT 4044, 22 RT 4229.) Then he heard more shots from very close by. (21 RT 4044.) Appellant's hand went numb; he thought it had been hit by glass from the rear window. (21 RT 4044-4045.) He crouched down on the back seat, with his head toward the driver's side and feet toward the passenger side. (21 RT 4045, 22 RT 4231-4232.) He heard more shots and felt like someone had kicked him in the back, and he ended up on the car's carpet. (21 RT 4045, 22 RT .)

At some point, the car appellant was in began to move forward very slowly. (21 RT 4047-4048.) The driver was bleeding badly and drove with one hand. (21 RT 4048.) Appellant's hand was bleeding. (21 RT 4047.) Appellant was dropped off by the nearby freeway, and Hong took over the driving. (21 RT 4048-4049.) Appellant paged a friend named

Tiny, who came and drove him to his room in Garden Grove. (21 RT 4049-4050.)

Appellant's hand started hurting a few hours later, and he could barely move two fingers, so a few days thereafter, he made an appointment with Dr. Dinh. (21 RT 4050-4051.) Appellant gave Dinh the false name of John Nguyen and a false story about how he had been shot. (21 RT 4051-4052.) He did this because he did not want have his probation violated or his injuries reported to the police. (21 RT 4051, 4052.) To appellant, it seemed like a repeat of 1992, when "I was in the car and I got in trouble," and he feared "this going to be the same thing again." (22 RT 4236.) Dr. Dinh prescribed medication, but appellant lost the bottle somewhere. (21 RT 4052-4053.) When arrested at Dinh's office on May 25, appellant was trying to replace the lost medication. (21 RT 4054.)

After the incident, appellant became afraid for his life, and when he was offered a gun for protection by Tiny, he accepted. (22 RT 4207-4208.) This was the gun that was recovered from Huy Pham's car when appellant was arrested on May 25, 1995. (See 22 RT 4247.) By the time of trial, Tiny was dead, apparently as the result of a shooting. (22 RT 4210, 4239-4240.) Tiny had been a member of the Nip Family gang. (21 RT 4056.)

Appellant testified he had never lived on Amarillo Street (the location of the house where on May 23, 1995, appellant's medicine bottle and a number of weapons had been found, and from which the three Asian males, including the one who fled, had begun their short drive in the Ford Escort that same day). (21 RT 4032.) Appellant did not believe he had ever been in that house, although he was not certain of this. (21 RT 4032, 22 RT 4248.) Appellant testified further that he was not the man who ran from the police and dropped the .380 pistol near the nursery. (21 RT 4054.)

Corroborating Testimony Concerning Appellant's Presence in Alabama

Appellant's sisters Phuong (from Alabama) and Nen (Westminster) testified for the defense, corroborating the timing of appellant's stays in Alabama.

Phuong had moved with her husband and four children to Bayou La Batre, Alabama, near Mobile, in September 1991. (23 RT 4407-4408.) Appellant first arrived in Alabama in April 1993 and returned to California in September or so. (23 RT 4408-4409, 24 RT 4627 & 4629.) While in Alabama, he worked in the seafood industry and stayed with Phuong and then with two married friends. (23 RT 4409, 4431.)

In October 1993, appellant flew to Vietnam, returning in late February or early March of 1994.[53] (23 RT 4434, 24 RT 4630.) Not long thereafter, appellant went to Alabama and stayed for a short while but returned to California, saying he had to speak with some police officers. (23 RT 4411, 4412, 4435, & 4437, 24 RT 4630-4631.)

In June 1994, appellant told Nen he was going to return to Bayou La Batre in Alabama because fishing season was starting, and Phuong saw appellant in Alabama in late June or early July; they celebrated July 4th together. (24 RT 4632-4633, 23 RT 4413 & 4642.) Appellant worked in the seafood industry again. (23 RT 4440.) Appellant stayed until August or September, when he told his sisters he was going to work on a fishing boat in New Orleans. (23 RT 4413-4414, see 24 RT 4634-4635.) Neither sister had contact with appellant thereafter until mid-December, when

---

[53] An I.N.S. employee, testifying on rebuttal, produced records indicating that the date of appellant's return to the United States was March 1, 1994. (25 RT 4706.)

appellant came to stay with Nen for a few weeks in Westminister. (24 RT 4635, see also 23 RT 4448.)

The Testimony of an Eyewitness Identification Expert

The defense called an eyewitness identification expert, Dr. Kathy Pezdek, to testify as to potential pitfalls of eyewitness identification evidence in general. (23 RT 4344-4393, 24 RT 4572-4622.) Among other things, Dr. Pezdek testified that identifications of a stranger are more likely to be correct if made within a day of the encounter than much later (24 RT 4600), that an identification process becomes increasingly suggestive when a witness becomes familiar with a face due to repeated attempts at identification (23 RT 4380-4382, 24 RT 4603-4604), that a live lineup is a better vehicle for making an accurate identification than a photograph but that delay in viewing the lineup can eliminate that advantage (24 RT 4595-4596, 4615-4615), and that the suggestibility of an identification increases when witnesses get together to comment about the person or talk about whether they had known him (24 RT 4618-4619).

Appellant's Testimony About Gang Membership

Appellant testified at considerable length about the extent to which he was or was not a member of the Nip Family gang. In fact, fully half of the 150 pages of the prosecutor's cross-examination of appellant focused on his gang connections.

Appellant testified that he was friends with or knew many Nip Family gang members (21 RT 4066); including his two best friends, whom he had known since childhood (Huy Pham and John Cho) and who had become Nip Family members (21 RT 4057-4058, 22 RT 4151, 4153, 4155, 4193-4194), as had other friends and acquaintances from elementary and

high school (21 RT 4011, 4059-4060, 22 RT 4143-4144, 4145). Until his arrest in 1992, appellant hung around with Nip Family members and engaged in social activities with them, such as picnicking and partying (21 RT 4011-4012, 4056, 4066-67, 22 RT 4198). However, appellant did not consider himself a member of the gang. (21 RT 4067.) He had never joined the gang or been "jumped into" or initiated into it (21 RT 4011, 22 RT 4140, 4158), he had no gang tatoos, he had no gang nickname, he was never in a gang photograph (21 RT 4071, 22 RT 4140).

Appellant acknowledged he had told law enforcement officers that he had been with Nip Family, but he did this because the police insisted he was a member and told him that if he hung out with the gang, he was a gang member. (21 RT 4071, 22 RT 4142, 4157, 4195-4198).

> "I say I kick back with them in sophomore year, and I did get arrested with them and I was in the group with them. So, they did put me down I was a member, and I do admit like I am a member at that time because I was hanging with them. But they never jumped me in. I never walk in. I don't have no tattoo of Nip Family. And I don't represent myself as a gang member. And I don't have in that picture, two pictures you show me in the gang picture group [Exhs. 135, 136] there was no — none of my picture in it. And if you could find out, I know you could, that you could never find a picture like with me in a group like that throwing sign[54] or anything like that."

(22 RT 4140.)

Appellant also acknowledged that when he pleaded guilty to assault in 1992, he had admitted the offense was done in association with a criminal street gang and with specific intent to assist criminal conduct by

---

[54] "Throwing signs" means that gang members are using their hands to represent letters of the alphabet in ways related to the gang. (See 22 RT 4139.)

gang members. (21 RT 4068.) "I admit I was a gang member, but I don't go around like in group and make trouble." (21 RT 4070-4071.)

Prosecution's Rebuttal Evidence

A. Appellant's Taped Statement

In rebuttal, the prosecution played a tape of an edited version of a videotaped interview of appellant conducted by Detective Nye on May 25, 1995, the day of appellant's arrest. (Exh. 139.) There is some dispute as to what words are spoken by appellant on the videotape.

According to a transcript given to the jury, Nye asked appellant "Your [sic] a member of NIP family, right? You've been member ***," to which appellant responded, "Yeah, and, and NIP family ***." (Exh. 139A, see 15 CT 4853.) Asked how long he had been a member, appellant replied, "When I was, um, sophomore." (*Ibid.*)[55]

However, when a transcript of the entire interview was prepared during the record correction process for this appeal, the parties agreed to a somewhat different version of the portion of the interview covered by Exhibit 139A. (See Court Exh. 48 at 9/29/06 Supp.CT 1250-1251.) With respect to the language quoted in the preceding paragraph, there was disagreement about what appellant responded during the first quoted exchange. There was agreement that the detective had asked "You're a member of Nip Family, right? You've been a member of Nip Family," but the parties differed as to appellant's answer. No one could hear all the words, but counsel for the prosecution thought appellant responded, "Yes. *** Nip Family," and counsel for appellant thought the response was "Yes. I met, I meet them in ***." (*Ibid.*) The trial court did not resolve the

---

[55] The three asterisks denote "unintelligible conversation." (See *ibid.*)

disagreement, reasoning that the videotape was itself the controlling evidence.[56] (RecordCorrRT 127-128, 145, 154.)

B. Probation Officer's Testimony

In addition, the prosecution called Deputy Orange County Probation Officer Steven Sentman, who was a partner of Detective Nye in the Target Gang Unit. (25 RT 4809.) Sentman had been appellant's probation officer in 1994 and 1995, but his testimony was most directly relevant to the two attempted murder offenses that occurred in 1994, i.e., the July 21st shooting of Tony Nguyen (Counts 2 & 3) and the November 24th shooting of Huy "PeeWee" Nguyen (Counts 4 & 5). Sentman's testimony is difficult to encapsulate, partly because there were inconsistencies within his testimony and between his testimony and statements he had made or written before trial, and partly because he "corrected" both his testimony and certain probation department records as his testimony progressed.

With respect to the July 21, 1994 shooting of Tony Nguyen, the gist of Sentman's final version of events (at least from the prosecution's point of view) was that he saw appellant in his office or at the Westminster Police Department on July 13 and 19, 1994 (after the July 4th date that appellant and his sister Phuong had testified he was in Alabama and eight and two days, respectively, before the shooting of Tony Nguyen) and that he received a telephone call from appellant on August 2, in which appellant said he had moved to Louisiana and would provide a telephone number, which he did a week later. (25 RT 4740-4741, 4742.) In July, Sentman had given appellant permission to move. (25 RT 4743.)

---

[56] The parties did agree to language changes in the remainder of the portion of the videotape that was played for the jury (see 9/29/06 Supp.CT 1251), but since this brief does not quote that part of the interrogation, those changes need not be discussed further here.

With respect to the November 24th shooting of PeeWee Nguyen, Sentman testified that, although probation records he had prepared indicated he had out-of-state "telephonic contacts 12-94" with appellant and then "[n]o contact January '95," he (Sentman) had not actually spoken to appellant in December but to his brother-in-law. (25 RT 4802.) Sentman's claim at trial was that on none of the occasions on which he called appellant out of state between August and November did he actually speak with appellant, only with his family.[57] (25 RT 4802-4803.)

PENALTY PHASE STATEMENT OF FACTS

A. Prosecution Penalty-Phase Evidence

The prosecution's case in aggravation consisted of (1) a stipulation as to the existence of appellant's 1992 conviction and (2) the testimony of Cai Thi Tran, the mother of Sang Nguyen, the victim in Counts 6 and 7.

The stipulation referred the jury to Exhibit 132, admitted at the guilt phase, which (as previously noted) contained excerpts from the court file relating to the prior conviction.

Cai Tran testified about Sang, about the last time she saw Sang, about how she learned of Sang's death, about the cost of Sang's funeral, and about the impact of his death upon her and Sang's father. (29 RT 5653-5659.) Sang was a good kid around the time he was killed, and both Ms. Tran and her husband had been very sad since then. (29 RT 5653-

---

[57] This trial testimony is to be contrasted to what Sentman had said at a motion to suppress evidence two years earlier, when he had testified that "minimally I talked to [appellant] at least once a month, if not more" between August and November 1994 and that "[e]very time that I had talked to him, he was still unclear whether he was going to stay there or not. He was looking for work." (1 RT 65; see also 1 RT 66.)

5654, 5656.) Tran was so distraught that she could no longer walk around, and her husband developed headaches. (29 RT 5656.)

Tran also testified that she did not want appellant to be executed because his parents would go through the same pain as she had, because she felt for him, and because he realized his mistakes. (29 RT 5659, 5661.) She thought appellant had become involved with bad persons, and she asked for a life sentence, but she would not object to a death sentence. (29 RT 5660.)[58]

B. Defense Penalty-Phase Evidence

For its part, the defense presented further testimony from appellant's sister Nen and testimony from psychologist Francis Crinella.

1. Nen Nguyen's Testimony

Nen testified that appellant was the eighth of nine children born to a family living on an island off mainland Vietnam. (29 RT 5664-5666.) In late 1980, a few years after the Vietnam War ended, with freedom and living conditions poor, the family decided that most of the children would try to escape to the United States. (29 RT 5669.) Nen (then about 20 years old), appellant (6 years old), and the six children in between fled on a small fishing boat to Thailand, a stormy trip that took three days. (29 RT 5669-5671.) After the siblings landed, Thai police held them for about 20 days before taking them to a crowded, undersupplied refugee camp at Song La, where they remained for about two months, until their application to emigrate to the United States was approved. (29 RT 5674-5675.) Thereafter, the children were transported to refugee camps near Bangkok,

---

[58] Two additional items of evidence were admitted relating to Sang Nguyen, a photograph and a stipulation that he had stolen two cars in 1989 and 1991 and had twice left a juvenile custodial facility "without permission." (29 RT 5663, 5735, Exh. 143.)

and about a month later, traveled by airplane and ship to Indonesia, where they were put in another refugee camp for three to four months. (29 RT 5676-5678.)

Eventually, they arrived in Los Angeles, staying for more than a year until they moved to Orange County near the end of 1981. (29 RT 5682-5683.) Appellant continued to live with Nen until 1986, when Nen started her own family and appellant, at approximately age 10, moved in with his sister Le and brother Tan. (29 RT 5688-5689.) Two years later, appellant was sent to live with another sister in Minnesota but returned after five or six months to live again with Le and Tan. (29 RT 5688, 5690.) While living with his sisters and brothers, appellant created no problems for them. (29 RT 5699.) The parents remained in Vietnam and had not been told of appellant's arrest because Nen feared it would affect their health. (29 RT 5688, 5693.)

2. Psychologist Francis Crinella's Testimony

Psychologist Francis Crinella interviewed appellant on one occasion and administered various psychological tests on another. (29 RT 5702, 5704.) He found that appellant was intelligent and had no signs of brain damage, psychopathology, psychiatric illness, or psychological disorder. (29 RT 5706-5707-5708.) What Crinella did find was that appellant was "somewhat compromised in his use of the English language." (29 RT 5704-5705.) He read and spelled at a fourth- or fifth-grade level, and he spoke English "rather poorly." (29 RT 5707-5708.) In addition, his math skills were those of an eighth grader. (29 RT 5707.) Both the reading and math results were "significant departures" from what would be expected of a person of appellant's age and intelligence and indicated that appellant had failed to acculturate himself to the United States. (29 RT 5707-5708.)

Crinella opined that the reason for appellant's acculturation failure was that appellant had immersed himself in Vietnamese culture and did not take advantage of educational opportunities. (29 RT 5709.) Appellant told Crinella he spoke Vietnamese whenever he could and spoke English only when a teacher called on him. (29 RT 5717.) Speculating as to possible causes of appellant's failure to acculturate, Crinella offered such matters as the absence of parents, a non-urban early childhood, poverty. (29 RT 5709-5710.) Crinella also opined that the reason why appellant gravitated toward gang culture was that he felt far from the mainstream of this country's culture, he "probably" viewed himself as a foreigner who was looked down on by others, and he saw gang members as sources of power, support, and nurturing that he did not have from his parents or the siblings who tried to raise him. (20 RT 5710-5711.) No mental defect or disease predisposed appellant toward gangs, it was a sociological situation. (20 RT 5710.)

GUILT-PHASE ISSUES AND ARGUMENTS

An Overview

In an attempt to make the guilt-phase claims and their context as comprehensible as possible, appellant has organized the presentation of those issues in the following manner:

Initially, appellant presents the guilt-phase issues relating to each individual set of convictions, with the murder convictions addressed first and the attempted-murder convictions second, so that:

- Sections I and II (AOB 82-229, *post*) raise those claims that affect the two murder convictions (and associated gang convictions and enhancements). These claims are addressed in chronological order by incident. Thus:

  Section I: deals with Counts 6/7 (killing of Sang Nguyen on Feb. 5, 1995), and

  Section II: relates to Counts 13/14 (killing of Tuan Pham on May 6, 1995).

- Sections III through V (AOB 230-288, *post*) discuss claims that affect the three attempted-murder convictions (and associated gang crimes and enhancements). As before, the claims are addressed in chronological order by incident, i.e.,

  Section III: deals with Counts 2/3 (attempted murder of Tony Nguyen on July 21, 1994),

  Section IV: relates to Counts 4/5 (attempted murder of Huy "PeeWee" Nguyen on November 24, 1994), and

  Section V: addresses Counts 9/10 (attempted murder of Khoi Huynh on March 11, 1995).

Next, appellant raises claims specific to the gang-participation convictions and the gang enhancements. (Section VI, AOB 289-296, *post.*)

Sections VII and VIII (AOB 297-349, *post*) contain the final guilt-phase claims, raising overarching issues that affect the guilt-phase judgment as a whole, or close to it. Appellant believes that a full understanding of such claims can best be achieved after understanding the issues relating to the individual incidents. Thus,

Section VII: raises claims related to the arrest and prosecution of the sole defense investigator in the case, and

Section VIII: raises other overall issues.

The issues arising from the death penalty aspect of this case are presented in Sections IX and X (AOB 350 et seq.), as follows:

Section IX: raises claims that flow from the jury-selection process, and

Section X: raises other death-penalty-related claims.

THE MURDER COUNTS
(Counts 6-7 and Counts 13-14)

II.
COUNTS 6 AND 7
(relating to the February 5, 1995 shooting death of Sang Nguyen)

1. COUNTS 6 & 7 MUST BE REVERSED BECAUSE OF THE IMPROPER ADMISSION OF ALLEGED EXPERT TESTIMONY AS TO WHAT STATEMENTS ARE MOST COMMONLY MADE BY PURPORTEDLY RELUCTANT WITNESSES AT GANG CRIMES COMMITTED AT RESTAURANTS

In Counts 6 and 7, appellant was convicted of murder and active gang participation based upon the shooting death of Sang Nguyen on February 5, 1995, outside the Dong Khanh Restaurant, where Sang had been dining with friends. Sang was a member of the Cheap Boys gang, and appellant's convictions were premised entirely upon an eventual identification of him by two gang members who had been among Sang's dinner companions that evening: Trieu Binh "Temper" Nguyen (a fellow Cheap Boy), and Linda Vu (a member of a female Asian gang that frequently associated with the Cheap Boys).

In addition to Sang Nguyen, the dinner party had consisted of three men ("Temper" Nguyen, his younger brother Trieu Hai Nguyen, and Binh Tran), three women (Amy Pech and Temper's girlfriend Michelle To, in addition to Linda Vu), and one or more children. Two of the men (Temper and Trieu Hai) and all three women testified at appellant's trial. All five also talked to police on the night of Sang's killing. In their statements to the police, each independently told police that Temper and Binh Tran were in the bathroom at the time of the shooting, and each also told the police that they had not seen the shooting.

By the time of trial, though, four of the five had substantially changed their stories. First, Temper (Trieu Binh) claimed to have seen the shooting, and then Linda Vu did, as well. Both now said the shooter was appellant. Moreover, all four now claimed that what they had told the police on the night of the killing — that Temper and Binh Tran had been in the bathroom at the time of the shooting — was untrue. One of them claimed that he had just been "confused" and/or "frustrated" when he talked to the police on the night of the shooting (Temper), another said that she had feared gang retaliation (Linda Vu), a third claimed that he had not wanted anyone to become involved (Trieu Hai), and the fourth said that she had not wanted her boyfriend prevented from returning to Texas with her (Michelle To).

Obviously, the witnesses' new stories had credibility problems. Not only were the newly proclaimed eye witnesses — Temper and Linda Vu — members of the Cheap Boys gang or a female gang associated with it, and not only were their newly proclaimed identifications inconsistent with their statements on the night of the shooting, but these new identifications came after they had assured police that their initial stories were true (and after Linda Vu had actually laughed at the suggestion she might be afraid of gang retaliation) and after Temper (the first one to change his story) had had weekly discussions with Khoi Huynh, one of the "shot callers" of the Cheap Boys gang. And the other two dinner companions with new stories were Temper's girlfriend/wife (Michelle To) and his younger brother (Trieu Hai).

In an effort to address the credibility problems, the prosecution called upon Detective Mark Nye, who served as the gang expert. The prosecutor first asked whether, when Nye went to the scene of a gang crime, there was "one common thing that people seem to say when they

don't want to cooperate with you." (17 RT 3324.) Over defense objection, Nye responded, "Usually say they didn't see anything." (17 RT 3325.)

The prosecutor then asked Detective Nye about what was "the most common excuse" used by such people when the crime occurs at "a public place like [a] restaurant or café." (*Ibid.*) Again over defense objection, Nye testified that, "[i]n my experience with investigating gang crimes in the cafes and restaurants, the number one answer is 'I was in the bathroom at the time.'" (*Ibid.*)[59]

So, through Detective Nye's testimony, the prosecution was able to make it appear as if the original stories that the prosecution's witnesses had given were normal and expected evasions and should thus be disregarded. However, Nye's testimony was inadmissible. It was premised on unsubstantiated mind-reading and was impermissible in other ways, as well. And under the circumstances presented here, where the evidence presented a close case as to appellant's guilt and the credibility of the

---

[59] Defense counsel's objection to the initial "one common thing" inquiry was based on Evidence Code section 352. (17 RT 3324)

When counsel objected to the ensuing question asking for "the most common excuse," counsel stated it was a "continuing objection, for the same reasons previously mentioned." (17 RT 3325.) In overruling the objection, the court responded, "I understand, that's fine." (*Ibid.*) Counsel renewed his objection to this testimony outside the presence of the jury, arguing that the testimony was an impermissible "comment on credibility," that it "goes outside the scope of permissible expert opinion, as developed in Evidence Code section 801 through 805," that it "doesn't do anything to assist a trier of fact," and that it was an improper "opinion about which version is true." (17 RT 3350, 3357-3358, 3363.) The objections were again overruled. (17 RT 3363.) As the trial court recognized (*ibid.*), these objections were made "in time to allow the trial court to consider the issues and to admonish the jury if necessary." (*People v. Melton* (1988) 44 Cal.3d 713, 743.)

dinner-companion witnesses was the crucial issue, the admission of this testimony was clearly prejudicial.

A. The Relevant Law

By statute, expert testimony may be admitted if it satisfies three conditions: (1) it must be related to a subject that is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," (2) the testimony must be based on matter (including the expert's "special . . . experience") that is "perceived by or personally known to the witness or made known to him at or before the hearing," and (3) the matter upon which the testimony is based must generally be "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.)[60] A trial court's decision to admit expert testimony is reviewed for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

Embedded within these general requirements for admissibility is an overarching concern for reliability. Expert testimony must be "'not only

---

[60] In full, section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

> "(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> "(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.".

relevant, but reliable.'" (*Kumho Tire v. Carmichael* (1999) 526 U.S. 137, 147, quoting *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 589.)[61]

This concern for reliability is reflected in, among other places, the second condition for admissibility of expert testimony, namely, the requirement that the expert's testimony be based on matter that is "*perceived by or personally known* to the witness or *made known* to him at or before the hearing." (Evid. Code, § 801,subd. (b).) The insistence upon either first-hand perception or upon what is "known" or made "known" implies a need for reliability. (See *Kumho Tire v. Carmichael*, *supra*, 526 U.S. at p. 590 ["the word 'knowledge' connotes more than subjective belief or unsupported speculation."].) So, too, does the third condition for admissibility, i.e., that the opinion be based upon matter "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."

Of particular relevance to this case — and a further reflection of the concern for reliability — is the fact that, in applying the rules concerning

---

[61] This Court has ruled that, at least as to the admissibility of scientific expertise, the federal standard does not apply in California and that this State retains "the more 'conservative' *Frye* approach." (*People v. Leahy* (1994) 8 Cal.4th 587, 604, referring to *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 as adopted by this Court in *People v. Kelly* (1976) 17 Cal.3d 24.) Since California's approach to admission of expert testimony is "more conservative" than that of the federal courts, it follows that California must place at least as strong an emphasis on reliability as does the *Daubert-Kumho Tire* approach. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1225 fn. 8 ["We do not mean to imply that expert testimony based upon experience rather than technical expertise is not subject to scrutiny for *reliability*."]; 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 30, p. 560 ["The opinion of an expert must not only be on a proper subject but must be based on reliable matter."], internal cross-reference and quotation marks omitted.)

expert testimony, courts have been extremely averse to allowing an expert to assess the credibility of statements by others. For example, *People v. Sergill* (1982) 138 Cal.App.3d 34 held that reversible error occurred when two investigating police officers were allowed to testify to their opinions as to the truthfulness of pre-trial statements made to them by the purported victim of the charged offense.

> "[W]e find no basis for admitting this opinion evidence as expert testimony. We find no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require the testimony of an expert. Moreover, even if this were a proper subject for expert testimony, nothing in this record establishes the qualifications of these officers as experts. *The mere fact that they had taken numerous reports during their careers does not qualify them as experts in judging truthfulness*."

(*Id.* at p. 39, internal citations omitted. See also *People v. Melton*, *supra*, 44 Cal.3d 713, 744 [holding that a defense investigator was not "an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations;" "a lay opinion about the veracity of particular statements . . . has no 'tendency in reason' to disprove the veracity of the statements"]; *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1087 [law enforcement expert in area of persons who commit sexual assaults was not "qualified to testify about the motivations or cognitive processes of those whose behavior she observes"].)

In a similar vein is *People v. Johnson* (1993) 19 Cal.App.4th 778. The defendants in *Johnson* were accused of murdering a prison guard, and the prosecution sought to establish their involvement in the offense through the testimony of fellow inmates who claimed to have been part of the planning of the offense. At trial, the defense sought to call two individuals — a sociology professor who had studied prisons, and an

inmate with experience in fabricating stories to curry favor with the prosecution — to testify as experts about the propensity of prison inmates to lie. The trial court refused to admit the testimony, and on appeal, the court of appeal affirmed, reasoning

> "Defense attacks on the credibility of inmate witnesses testifying for the prosecution are doubtless proper, but they should be the subject of impeaching evidence relating to the specific witness in question, and arguments of counsel. *Evidence of a generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses in issue, is irrelevant and not the subject of legitimate scientific evidence from expert witnesses*

(*Id.* at p. 785.)

With this background, we can now turn to the testimony at issue in the present case.

B. Detective Nye's "Expert" Testimony Was Inadmissible

At appellant's trial, Detective Nye was allowed to testify as an expert that in his experience, a claim of being in the bathroom was "the most common excuse" given by witnesses who "don't want to cooperate" with police officers who are "investigating gang crimes in the cafes and restaurants." (17 RT 3324-3325.) Obviously, the prosecution intended for this testimony to explain away the statements to police made by Sang Nguyen's dinner companions on the night of his death. But informed consideration of Nye's testimony and its underpinnings reveals (1) that the testimony Nye gave here was outside the scope of permissible expert testimony and also (2) that if the testimony had any probative value at all, that value was vastly outweighed by its undue prejudicial effect. Thus, the admission of the testimony violated not only Evidence Code sections 352 and 801 et sequitur but also appellant's Sixth and Fourteenth Amendment rights to due process of law, to confrontation of witnesses, and to a fair trial

by unbiased jury, as well as his Eighth Amendment right to freedom from cruel and unusual punishment and to a reliable determination of guilt and penalty in a capital case.

Detective Nye's testimony was premised upon two implicit propositions: first, that certain persons at the scene of a gang crime who claimed to have been in the bathroom were actually lying, and second, that the reason they were lying was because they did not want to cooperate with the police. The failure of either proposition would undermine the admissibility of Nye's testimony, but here both of these propositions were flawed, because (1) each involved an untenable claim of the ability to assess credibility and/or to read minds, (2) neither involved matters "perceived by or personally known [Nye] or made known to him at or before [his testimony]," and (3) both were unreliable, too unreliable to "reasonably . . . be relied upon" as the basis for an expert opinion.

Consider the first of Detective Nye's propositions, i.e., that persons who claimed to have been in the bathroom were actually lying. This was outside the ambit of proper expert testimony for at least three reasons. For one thing, determining credibility is beyond the scope of permissible expert opinion. Certainly, Detective Nye was not shown to have any special expertise in making such determinations. "The mere fact that [police officers] had taken numerous reports during their careers does not qualify them as experts in judging truthfulness." (*People v. Sergill*, *supra*, 138 Cal.App.3d at p. 39; see also *People v. Melton*, *supra*, 44 Cal.3d 713, 744 [investigator is not "an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations"].) As this Court has held, "a lay opinion about the veracity of particular statements . . . has no 'tendency in reason' to disprove the veracity of the statements." (*Melton*, *ibid.*)

Beyond that, "[e]vidence of a generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses in issue, is irrelevant and not the subject of legitimate scientific evidence from expert witnesses." (*People v. Johnson, supra*, 19 Cal.App.3d at p. 785.) Since Detective Nye's testimony was based on his assessment of the credibility of a group of witnesses other than the specific witnesses who testified at trial, the testimony was also inadmissible under *Johnson.*

Moreover, Detective Nye provided no explanation for how he concluded that the claims of the persons with whom he had had contact in prior cases were untrue. There was not the slightest indication that this conclusion was based upon matters "perceived by or personally known to [Nye] or made known to him." (Evid. Code, § 801, subd. (b).) Was he simply assuming that the persons must have seen something? Or was he basing his conclusion on instances in which witnesses later came forward with different stories? If the latter, how did Nye know that the later statements were the true ones, rather than being a subsequent decision by the witness to link some enemy or disfavored person to the crime? Whichever thought process underlay Nye's testimony, it failed to comport with the requirement of Evidence Code section 801 that his testimony be based upon matters "perceived by or personally known to [Nye] or made known to him."

Next, consider the second of Detective Nye's implicit propositions, namely, that he knew the *reason* the witnesses in the prior cases were lying, namely, that they did not want to cooperate with the police. But again, this involved mind reading on Nye's part. What gave Nye the expertise — what matter "perceived by or personally known to or made known to" Nye gave him a basis — for knowing the internal motivations of those witnesses whose claims of being in the bathroom were false? Witnesses may have

falsely claimed they were in the bathroom because, for example, although they really did not see anything, they figured that the police were not going to believe them unless they put themselves impossibly far away from the action. Nye's claim to be able to read the "true" motivations of reluctant witnesses is not the kind of expertise that the law contemplates admitting into our courts of law. (Cf. *People v. Robbie*, *supra*, 92 Cal.App.4th at p. 1087 [law enforcement expert not "qualified to testify about the motivations or cognitive processes of those whose behavior she observes"].)

It has been recognized that "extensive experience and demonstrable skill do not guarantee knowledge of validly established facts related to that experience and skill." (Kaye, et al., New Wigmore Treatise on Evidence (2004), Expert Evidence § 9.4, p. 327.) What Detective Nye was called upon to do here was to peer into the minds of potential witnesses he had encountered at some crime scenes and render a judgment as to those witnesses' lack of credibility and the reasons for their lack of credibility. Such credibility-determining and mind-reading "expertise" is outside the scope of permissible expert evidence. Certainly, no basis was shown for Nye to make such "expert" assessments. Moreover, Nye's testimony was not based on matters "perceived by or personally known to the witness or made known to him." (Evid. Code, § 801, subd. (b).) And it was "not the subject of legitimate scientific evidence from expert witnesses" because it simply portrayed the supposed generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses at trial. (See *Johnson*, *supra*, 19 Cal.App.4th at p.785.)

For each of these reasons, Nye's testimony was improper and unreliable expert testimony. If such "expert" testimony is allowed here, then in the next case, a long-time detective will be allowed to testify that, in

his experience, the most common thing defendants do when they testify or when they are questioned by police is lie about their guilt.

C. Under The Facts Of This Case, The Error In Admitting Detective Nye's "Expert" Testimony Requires Reversal of Counts 6 and 7

The remaining question is whether the erroneous admission of Detective Nye's "most common response" testimony requires reversal of Counts 6 and 7. The answer surely is in the affirmative, under both the federal *Chapman* test and California's *Watson* standard. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.)

The key point in the prejudice analysis is that the evidence against appellant was extremely close. There was no physical evidence whatsoever tying appellant to the Sang Nguyen shooting, and Charles Hall — the sole independent eyewitness, the only one with no ties to the Cheap Boys — identified someone other than appellant as the shooter and described the shooter as considerably taller than appellant.[62]

Moreover, on the night Sang Nguyen was killed, all five of Sang's dinner-companion witnesses not only denied seeing the shooting, but they

---

[62] Mr. Hall, who had been at a public telephone outside the Dong Khan Restaurant when the shooting occurred, testified that the shooter was about 5 feet, 10 inches tall, or maybe an inch or two shorter. (11 RT 2093-2094, 2100.) Appellant, by contrast, was about five feet, two inches tall. (See Muni.Ct. 17, 15 CT 4825, RT 4279.) Ten days after the shooting, Hall was shown a six-person photo lineup and quickly selected the photo of one Bao Quoc Tran as "look[ing] like the guy who did the shooting." (23 RT 4458, 4460; Exh. RR.) Three and one-half months later, when shown a second six-photo lineup, this one containing appellant's photo (but not Bao Quoc Tran's), Hall did not identify anyone in the array but said he could recognize the shooter if shown a side profile. (23 RT 4461-4463; Exh. TT.) At trial, Hall did not recognize anyone in the courtroom as the shooter. (11 RT 2103.)

each told the same basic story. They all placed Trieu Binh Nguyen (Temper) in the bathroom, nearly all also put Binh Tran there,[63] and none placed Trieu Hai Nguyen there. And they told these consistent stories without having the opportunity to consult one another.[64] On top of this, while four of the dinner companions later changed their stories, one of them (Amy Pech) did not, and those who did alter their stories did so after only one of them (Temper) had had weekly discussions with one of the leaders of the Cheap Boys gang.[65]

---

[63] Trieu Binh did not say one way or the other whether anyone else was with him when he went to the bathroom.

[64] See 17 RT 3290, 3293; 19 RT 3586-3587.

[65] There were still further problems with the new stories, particularly with those of the two purported eye witnesses Trieu Binh (Temper) Nguyen and Linda Vu. For example, Trieu Binh's explanation for why he lied to the police on the night of Sang Nguyen's death was inconsistent and implausible: he had lied, he testified, because he had been "frustrated," "confused and frustrated," and "frustrated" but "*not* confused." (See 7 RT 1253-1255.) Moreover, Trieu Binh admitted that on the first occasion when he told Detective Nye his new story, he gave a different account of how the shooting came about than in the story he recited at trial. (7 RT 1318-1319.)

As for Linda Vu, she insisted at trial that she had positively chosen appellant's photograph from a pre-trial photo lineup, but actually she had not been positive at all. (11 RT 2201-2205, 2231, 2238-2239; 17 RT 3332.) She gave police a description of the shooter that did not fit appellant, and she told them that the shooter was named "Chinh," although at trial she claimed that on the very night of Sang's death, she had been told the shooter's name was "Lam." (11 RT 2193, 2223, 2225; 17 RT 3315.) Moreover, Linda's new story contradicted Trieu Binh's new story by placing Trieu Binh inside the jammed restaurant immediately after the shooting (which occurred outside) and by attributing to him the statement that he merely "thought" Sang had been shot. (11 RT 2141, 2176, 2242-2243.)

Under any reasonable view of the evidence, then, the case against appellant with respect to the shooting of Sang Nguyen has to be considered a close one. In such a situation, "any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial." (*People v. Gonzales* (1967) 66 Cal.2d 482, 494; see also, e.g., *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249 [reversal required for error occurring in "a close case turning on witness credibility"]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 626 [in close case where credibility was key issue, error requires reversal]; *People v. St. Andrew* (1985) 101 Cal.App.3d 450, 465 [same as *Gonzalez*].)

And the error here certainly qualifies as substantial. For Detective Nye's testimony provided key objective-sounding support for the prosecution's contention that the "bathroom" stories told by the dinner-companion witnesses on the night of the shooting were untrue. Nye's testimony portrayed those stories as nothing more than common-place evasions, entitled to no weight, which was, of course, an essential conclusion for the jury to reach if it was going to convict appellant. Moreover, Nye's testimony would have been perceived by the jury as undermining the most significant factor favorable to the defense on this credibility question, namely, that all five dinner-companion witnesses had independently told the same story on the night of the shooting. If, as Nye's testimony indicated, false "bathroom" excuses were commonly given at the scenes of crimes that were unrelated to each other, then the prosecution had an explanation as to how Sang Nguyen's five dinner companions would, independently of each other, tell similar-appearing "bathroom" stories on the night of Sang's shooting.

Even when the *Watson* test for prejudice is applicable, a reversal is required if there is at least "a *reasonable chance*, more than an *abstract*

possibility" that a different outcome would have occurred in the absence of the error. (See *College Hospital, Inc. v. Superior Court* (1994) 6 Cal.4th 704, 715, original emphases.) Under the circumstances here, where the credibility of the key prosecution witnesses was so deeply suspect, there is at least "a reasonable chance" and "more than an abstract possibility" that appellant would have been acquitted of Counts 6 and 7 in the absence of Detective Nye's improper testimony. And when the federal *Chapman* test is applied, the same conclusion is reached. The Constitution "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) Respondent cannot meet that test.[66]

---

[66] Detective Nye initially testified that "a common thing that people seem to say when they don't want to cooperate [at a] crime scene where a gang crime is involved" is that "they didn't see anything." (17 RT 3324-3325.) This testimony was plainly inadmissible because, among other things, it did not involve a subject "beyond common experience." (Evid. Code, § 801, subd. (a).) For that same reason, though, any error in permitting the testimony was harmless.

Furthermore, this improper testimony did not bear upon an issue of comparable evidentiary significance as the testimony discussed in the text. The fact that one person at the scene of a crime initially denies seeing anything has little bearing upon whether other individuals making similar denials were being truthful. By contrast, the fact that each of five individuals, without the opportunity for consultation, initially states that A and B were in the bathroom would strongly indicate that A and B were in fact in the bathroom and that any subsequent change of story on that point would (in the absence of "expert" testimony of the sort at issue here) be false.

2. APPELLANT WAS UNCONSTITUTIONALLY BARRED FROM PRESENTING EVIDENCE THAT THE CHEAP BOYS GANG HAD A PLAN, MOTIVE, AND/OR OPPORTUNITY TO FRAME APPELLANT, THUS REQUIRING REVERSAL OF COUNTS 6 AND 7 AS WELL AS THE OTHER COUNTS INVOLVING IDENTIFICATION EVIDENCE FROM CHEAP BOYS OR THEIR ASSOCIATES

The evidence linking appellant to the killing of Sang Nguyen all came from Cheap Boys gang members or close female associates of the gang. It would thus have been very helpful to appellant's defense if he could show that the Cheap Boys had the motive and/or opportunity to frame him and/or had actually agreed to do so. And the defense sought to do exactly this, by two primary routes.

One route was via testimony from Tin Duc Phan, a Cheap Boy. (20 RT 3831 et seq.) The purpose of Tin's testimony was to show that, in order to retaliate for a Nip Family member having "ratted" on a Cheap Boy, the Cheap Boys had in fact concocted a plan to falsely accuse appellant of crimes. The defense sought to show this agreement both by direct evidence in the form of Tin's own prior admissions to a defense investigator and by corroborating circumstantial evidence, namely, that Tin was aware — and thus by obvious inference, other Cheap Boys gang members were aware — of the "ratting" by the Nip Family member.

The second route by which the defense attempted to show the Cheap Boys' motive and opportunity to frame appellant was to show that Linda Vu and Cheap Boys leader Khoi Huynh were arrested, along with other gang members, at a Cheap Boys "crash pad," a location at which gangs commonly "plan criminal activity" and at which the Cheap Boys in particular would discuss gang affairs and plan their next target.

Both these efforts by appellant were precluded or significantly curtailed by the trial court, resulting in the exclusion of important defense-favorable evidence in violation of statutory law and appellant's constitutional rights to due process, to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses (5th, 6th, 14th Amends.; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14), as well as additional constitutional rights to be discussed hereafter.

A. The Exclusion Of Evidence From Tin Duc Phan

i. The Factual Background

As noted, Tin Duc Phan was a Cheap Boys gang member and (as may be recalled from the Statement of Facts concerning Counts 9 and 10) an associate of Cheap Boys leader Khoi Huynh. Tin was called as a defense witness at trial, and he was asked whether he had told the defense investigator (Daniel Watkins) that the Cheap Boys were setting up members of the Nip Family by "ratting" on them and that this was "okay" with the gang because Nip Family members had been "ratting" on some Cheap Boys. Tin testified that he remembered being interviewed by Watkins but that he did not recall making such a statement. (20 RT 3833.)

Tin was also asked if he remembered telling Watkins that the motivation for the Cheap Boys to finger appellant was to teach the Nip Family that the Cheap Boys would "rat off" Nip Family gang members in retaliation for any Nip Family "ratting on" them. Tin claimed he did not recall this statement, either. (20 RT 3834.)

Tin was shown Watkins' report containing these statements, but Tin asserted that the report did not refresh his recollection and that nothing

could assist him to recall. (20 RT 3835-3836.) Thereafter, investigator Watkins testified that Tin had indeed made the two statements about "ratting" retaliation that Tin had claimed he could not recall. (21 RT 3975-3976.)

Not surprisingly, the prosecution did not accept any of this. On cross-examination of Tin, the prosecutor asked whether, in a conversation with her and her investigator just before he testified, Tin had denied making the statement, attributed to him in the Watkins report, to the effect that ratting on the Nip Family was okay as retaliation because they were ratting on the Cheap Boys. Tin again claimed a lack of recall. (20 RT 3836-3837.) The prosecutor then had Tin agree that as far as he knew, he and his fellow Cheap Boys had never gotten together and decided to make up stories to "get" appellant.[67] (20 RT 3837-3838.)

The defense sought to corroborate the "framed" or "retaliation" version of Tin's story by showing that Tin was aware (and thus that other members of the Cheap Boys gang would also have been aware) of an incident that had started the retaliation. The defense wanted to show that Tin was aware that a Cheap Boy named Lap Nguyen had been charged with shooting Nip Family member Ky Nguyen in early January 1996, and that Ky's cooperation with the police in identifying Lap as the shooter was what had triggered the Cheap Boys to retaliate by ratting on the Nip Family. The defense was not allowed to get far in this endeavor, however, because after Tin admitted that he knew Cheap Boy Lap Nguyen, the

---

[67] Later, a prosecution investigator (Jeff McLaughlin) testified that Tin had been shown "a particular quote" in Watkins' report — the quotation about "whether or not Cheap Boys would set up members of Nip Family as a form of getting back at them" — and that Tin was asked whether or not he made "that particular statement." (25 RT 4686-4687.) Tin was "pretty insistent that he didn't make the statement." (25 RT 4687.)

prosecutor objected to further testimony in this line. Although the prosecutor stated no ground for her objection, the court sustained it. (20 RT 3834-3835.)

After Tin's testimony ended, the court brought up the matter again. Defense counsel explained to the court that he had learned from his investigator (Watkins) that Lap Nguyen's shooting of Ky Nguyen was the incident that had led the Cheap Boys to think the Nip Family was ratting on them, and counsel further explained that he wanted to explore this with the witness, Tin Phan. (20 RT 3841-3842.) Watkins had not asked Tin about this, counsel indicated, but "[t]here's got to be a reason why [Tin] feels that way" about retaliation. (20 RT 3844.)

The trial court reaffirmed that the defense would not be allowed to make the inquiry. The court based its decision on the fact that Watkins had not "talk[ed] to [Tin] about that question" and thus had not put Tin's evidence on the point into the report that had been turned over to the prosecution. (20 RT 3842-3843.) After ascertaining that the interview with Tin had occurred nine months earlier, the court stated, "I think that you've had adequate time to explore all the parameters that this witness can give to you. And if you don't have it in a statement that you've given to opposing counsel during your interviews, I'm not going to permit counsel to pursue that. Especially when you don't know what the answer is going to be." (20 RT 3843-3844.)

ii. The Trial Court Erred When It Precluded The Defense Inquiry

The trial court's ruling was doubly wrong. First, the court was wrong to conclude that the defense had failed in its discovery obligations by failing to "explore all the parameters that this witness can give to you" and by failing to put those parameters "in a statement that you've given to

opposing counsel." Then, the court compounded its error by using preclusion of testimony as the sanction for the alleged discovery violation. Neither ruling was remotely justifiable.

a. The Defense Committed No Violation Of Discovery Law

It is the statutory law of this State that "no discovery shall occur in criminal cases except as provided by this chapter [§§ 1054 et seq.], other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e); see *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1103.) This "statutory exclusivity" is "especially true of prosecutorial discovery." (*Verdin, ibid.*) The prosecution's right to discovery "'is governed exclusively by — and is barred except as provided by — the discovery chapter . . . enacted by Proposition 115'" in 1990.[68] (*Ibid.*, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 129.)

In the present case, the defense's duty to provide discovery to the prosecution with respect to the witness Tin Phan was governed entirely by section 1054.3. That section requires the defense to disclose "[t]he 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* . . . ." (§ 1054.3, subd. (a).) This language has been interpreted to cover actual witness utterances to defense investigators that have not been reduced to writing,[69] but by no stretch of the imagination can it be extended to cover the present situation, where the "discovery" that the defense failed

---

[68] None of the discovery statutes relevant to the current claim — sections 1054, 1054.1, 1054.3, 1054.5 — have been amended since their enactment in 1990.

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

to provide was information that the defense had *never* asked the witness about and thus had never obtained in the first place.

Nor does the statute impose any duty on any party in a criminal case — the defense or the prosecution — to affirmatively obtain information from witnesses before asking about it at trial. All that the discovery statutes require is that a party turn over whatever has been obtained.

The case law confirms these points beyond any doubt. As this Court has held, a party in a criminal case "need not extract all possible information from a private citizen who is a potential [favorable] witness in order to disclose it to the [other side]." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1163.) Or, as another court has put it, a party "ha[s] no duty to discover the existence of, or to seek or obtain, additional [information] not provided to the [party] by the [witness]." (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 474.)

In both *Zambrano* and *Sanchez*, the positions of the defense and prosecution were the reverse of the current case, for in those cases, it was the defense claiming that the prosecution had violated its discovery duties by failing to provide discovery as to evidence the prosecution had not obtained from witnesses it intended to call. But this difference is irrelevant here. The duty of the prosecution to provide witness-related discovery to the defense is at least "functionally identical" to the defense's duty to provide witness-related discovery to the prosecution. (*People v. Tillis* (1998) 18 Cal.4th 284, 289.) Indeed, if anything, "any imbalance favor[s] the defendant . . . ." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 374.) Thus, *Zambrano* and *Sanchez* are controlling of the instant situation despite the differing posture of the parties.

It is worth considering the two decisions in slightly more detail. In *Zambrano*, immediately before a "Factor (b)" witness was called at the penalty phase of a capital trial, the prosecution learned that the witness would testify to more forms of sexual assault than the witness had previously disclosed and than the defense had been told about. On appeal, the defendant claimed that the prosecution violated its discovery duties by not learning of this additional information sooner and providing it to the defense. "Not so," held this Court. "Under section 1054.1, evidence is subject to disclosure, if at all, only to the extent it is 'in the possession of the prosecuting attorney or [known by him] to be in the actual possession of the investigating agencies.' . . . . The prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense" and "need not extract all possible information from a private citizen who is a potential prosecution witness in order to disclose it to the defense." (*Zambrano*, 41 Cal.4th at p. 1163, original italics, some internal quotation marks omitted.)

Similarly, in *People v. Sanchez*, the victims of an "endless chain" scheme provided the prosecution during trial with additional documents (charts) relating to the scheme that they claimed to have received from the defendants. Just as in *Zambrano*, the court of appeal held that prosecution violated no discovery duty by failing to turn over these documents earlier because it "had no duty to discover the existence of, or to seek or obtain, additional charts not provided to the police by the victims." (*Sanchez*, 62 Cal.App.4th at p. 474.)

Given the "functional equivalency" of each side's duty to provide discovery in criminal cases, the *Zambrano* and *Sanchez* decisions confirm what the language of section 1054.3 should itself make clear. A defendant violates no duty of discovery by failing to disclose evidence he has not

discovered. No party has a legal duty, under discovery law or any other, to find out everything a witness might say or know before calling the witness to the stand. The trial court in appellant's case plainly erred by concluding to the contrary.

Furthermore as will be explained in more depth in subsection A.iii, pp. 105 et seq., *post*, the prosecution presented its own testimony that tried to exclude the possibility of "ratting retaliation" in this case, the very topic that the trial court prevented appellant from exploring with Tin Phan. This exclusion of defense evidence when the admission of prosecution-favorable evidence was allowed constituted a further, independent violation of due process. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474 ["Due Process Clause . . . speak[s] to the balance of forces between the accused and his accuser"]; *Washington v. Texas* (1967) 388 U.S. 14, 24-25 [barring defense evidence that prosecution could elicit violates due process] (Harlan, J., concurring).)

b. <u>It Was Also Improper For The Trial Court To Preclude The Admission of Defense Evidence As A Sanction For The Alleged Discovery Violation</u>

Even if the defense had violated a duty of discovery (which it hadn't), that would not have justified the trial court in precluding the defense from questioning Tin Phan about the Cheap Boys' motive, opportunity, and plan for framing appellant.

While state law alone normally governs the availability of discovery by the prosecution from the defense, the same is not true of the sanctions that may be imposed for a discovery violation by the defense. In that context, both state law and the federal Constitution come into play, limiting the degree to which a trial court may use a discovery violation by the defense as a basis for precluding defense-favorable evidence. (See, e.g.,

Michigan v. Lucas (1991) 500 U.S. 145; *Taylor v. Illinois* (1988) 484 U.S. 400; *People v. Edwards* (1993) 17 Cal.App.4th 1248.)

Under the Constitution, "preclusion sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse," i.e., "those cases in which the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial such as the plan to present fabricated testimony . . . ." (*Edwards*, *id.* at p. 1263.) And under California law, "there is an additional statutory requirement," namely, that "a trial court [may] preclude the testimony of a witness "'*only* if all other sanctions have been exhausted.'" (*Edwards*, *id.* at p. 1264, quoting § 1054.5, subd. (c), italics added in *Edwards*.) Thus, preclusion of defense evidence "is not an appropriate discovery sanction in a criminal case absent a showing of significant prejudice and of willful conduct." (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1747.)

In appellant's case, none of the prerequisites to the preclusion of the defense evidence was present. There is nothing in the record to suggest that defense investigator Watkins' failure to ask Tin Phan about the incident that triggered the "ratting retaliation" was "a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial." (*Edwards*, *supra*, 17 Cal.App.4th at p. 1263.) Certainly, the trial court in appellant's case never hinted that such was the case. Indeed, it acted in apparent ignorance of this prerequisite.

Nor did the trial court make any effort to exhaust other possible sanctions, the most obvious of which would have been to allow the prosecution a continuance to meet the evidence the defense sought to elicit. And the prosecutor, in turn, never claimed she would have been prejudiced in any way by the admission of the testimony. Nor could she in good faith have done so, since there was no possibility of any cognizable prejudice.

The witness (Tin Phan) was still available to testify, as were all the other Cheap Boys witnesses she had produced.[70]

In sum, then, not only did the trial court err by finding the defense violated its discovery duties with respect to Tin Phan, but it compounded the error by deciding to choose evidence-preclusion as the sanction for the alleged violation. Both errors were of constitutional dimension. Moreover, as discussed at more length in AOB section III.5, pp. 253 et seq., *post*, the court also violated due process by its double-standard treatment of (supposed) discovery violations by the two parties.

iii. The Errors Require Reversal Of Counts 6 And 7, As Well As Counts 2, 3, 9, And 10, The Other Counts That Depended Upon Identification Testimony From Cheap Boys

Because, for the reasons mentioned, the errors in precluding the defense inquiry violated the federal Constitution, appellant's convictions on Counts 6 and 7 must be reversed unless the respondent, as "the beneficiary of a constitutional error," can prove the errors were "harmless beyond a reasonable doubt." (*Chapman v. California*, 386 U.S. at p. 24.) That is a burden that cannot be met here.

For one thing, as already pointed out, the case for conviction was close. This was a case where, plainly, "honest, fair-minded jurors might very well have brought in not-guilty verdicts" even in the absence of the errors. (*Chapman*, *id.* at p. 26.)

---

[70] While it was only the Cheap Boys' *beliefs* about whether Nip Family gang members were "ratting" on them that ultimately matters, and not the truth of those beliefs, still it bears noting that the prosecutor had ready access to police officers and court records if it had been untrue that Nip Family gang member Ky Nguyen had cooperated in the prosecution of Cheap Boy Lap Nguyen.

Second, what the court excluded here was important evidence that was not provided in any other testimony in the case. The evidence was important because it went directly to the fundamental credibility of the prosecution identification witnesses, all of whom were Cheap Boys or their associates. And the evidence would have given specific and concrete substance to what otherwise was speculation as to whether the Cheap Boys had conspired to frame appellant.

What makes the exclusion even more prejudicial is that the prosecution had been allowed to introduce evidence on the other side of the "ratting retaliation" question. In fact, the prosecution had done this at least twice.

The first occurred during the testimony of Sheriff's Investigator Janet Strong. On direct examination by the prosecutor, Strong talked about the efforts she had made to get Cheap Boys leader Khoi Huynh to cooperate with law enforcement, testifying that one of the things she did to influence Khoi was to tell him that Nip Family members had testified in several cases against Cheap Boys. Khoi had responded that the Nip Family did "just didn't play fair." (13 RT 2495.) On cross-examination, Investigator Strong testified that what she had told Khoi about Nip Family testifying against Cheap Boys was true and that she was familiar with several such cases. (13 RT 2509.) She also testified that it had happened that a gang retaliates by testifying against a gang that has testified against them. (13 RT 2514.)

Following a lunch break, however, and on re-direct examination by the prosecutor, Investigator Strong reversed herself. No, she now testified, she knew of no cases where gang members retaliated against another gang by testifying, and she had never heard of or worked on such a case in her career. (13 RT 2545-2546.) In fact, she continued, if they do testify, they

are "looked down on" by other gang members as a snitch or a rat and "can be murdered" or subjected to "severe assaults or assaults by deadly weapons, up to homicide." (13 RT 2548, 2549.)

And then, to confirm the point, the prosecution later had Detective Nye, the gang expert, testify flatly that no "Asian gang member" would "ever regain face . . . by testifying against the other gang" because "this is against their rules of engagement. They're not supposed to testify." (16 RT 3199.) The "only way" to regain face is "by committing another act of violence, by killing another gang member, from that gang." (*Ibid.*)

The prosecution obviously saw the question of "ratting retaliation" as very important to the credibility of its Cheap Boys witnesses, and it took pains to try to snuff out any hint that that was what was happening here. These efforts confirm that the exclusion of contradictory defense-favorable evidence on this very point here cannot be deemed to be harmless.

And the prejudicial effect of the errors was not limited just to Counts 6 and 7. For the very same reasons, the errors also undermined the other counts that depended upon identification evidence from Cheap Boys, namely, Counts 2, 3, 9, and 10 (the attempted murders of Tony Nguyen and Khoi Huynh).[71]

---

[71] It is conceivable that respondent will argue that the substance of what Tin Phan would have testified to was not sufficiently made known to the trial court. (Evid. Code, § 354.) But neither the court nor the prosecutor expressed the slightest problem on this score. Defense counsel made very clear to the court, both in his questions of Tin and in his discussion of the issue with the court, that he was referring to the January 5, 1995 incident in which Cheap Boy Lap Nguyen had shot Nip Family member Ky Nguyen and then Ky had cooperated in the prosecution of Lap. In addition, as we have pointed out, Tin admitted that he knew Lap Nguyen, a fellow Cheap Boy. Thus (and especially given the testimony of gang experts concerning gang members' knowledge of gang events), it

(continued...)

B. The Exclusion Of Evidence Relating To The Cheap Boys' "Crash Pad"

The second way in which the defense sought to prove the existence of a Cheap Boys agreement to frame appellant was to show that the Cheap Boys had a gang "crash pad" where they would meet to discuss the gang's situation and make nefarious plans and that those attending these meetings included Linda Vu, Kevin Lac, and the Cheap Boys leader, Khoi Huynh — i.e., all of the Cheap Boys members or close associates who lived in California and provided identification evidence for the prosecution at appellant's trial. The defense theory was that it would have been at such a meeting that an agreement was reached to falsely point the finger at appellant.

The defense was allowed to elicit the generic definition of "crash pads." Crash pads, Detective Nye testified, were where "gang members congregate, plan criminal activity, hide out fugitives and other wanted persons, runaways, hold or stash weapons and other evidence from crimes." (17 RT 3310.) But the defense was not allowed to show that the Cheap

---

[71](...continued)
would have been quite reasonable for a jury to infer that Tin knew Lap had been arrested for Ky's shooting and that Lap knew or believed that Ky had cooperated with the police to finger Lap. While on re-direct examination Tin claimed to be unaware of any Cheap Boys agreement to frame appellant, neither the defense nor the jury was required to accept that belated claim, which the jury could have found was inconsistent with what he had told investigator Watkins.

Moreover, an admission by Tin that he was aware of Ky testifying against Lap could reasonably lead to the inference that other Cheap Boys were aware of Ky's "ratting" testimony, as well. Tin's admission thus would also provide a motive for Tin and the Cheap Boys to retaliate, thereby (1) tending to undermine Tin's denial that he helped frame appellant and (2) further tending to suggest that other Cheap Boys may have done so, with or without Tin's knowledge.

Boys themselves had such a crash pad or that Linda Vu, Kevin Lac, and Khoi Huynh themselves frequented the Cheap Boys' crash pad. The trial court repeatedly rejected defense efforts to present testimony about these subjects, either through law enforcement officers or via the Cheap Boys themselves. (10 RT 1946-47; 11 RT 2187; 16 RT 3005; 17 RT 3393, 3394-3395; 24 RT 4567.)

The defense proposed to show the existence of the Cheap Boys crash pad by proving that, on January 29, 1995, the police had raided such a crash pad in El Monte, finding — among guns, contraband, and other Cheap Boys — Linda Vu, Khoi Huynh, and Kevin Lac, and that at such a crash pad, the gang members would "talk about gang politics every time they're getting together" and would discuss "who their next target is going to be and things like that." (10 RT 1945, 16 RT 3003-3004; see also 10 RT 1965; 11 RT 2187; 15 RT 2948; 16 RT 3001-3002; 17 RT 3393-3394.) The purpose was to show that Khoi, Linda, and Kevin had "considerable opportunity" and "motive" to fabricate and to engage in acts of "testimonial" retaliation. (10 RT 1945, 16 RT 3004.) However, as we have said, the trial court allowed none of this.

The trial court's rulings were error. The excluded evidence was clearly relevant. (Evid. Code, §§ 210, 351.) It was relevant for the reasons defense counsel outlined. It would have showed that the very Cheap Boys who, directly or indirectly, came to provide the prosecution with the essential backbone of its case against appellant with respect to the killing of Sang Nguyen would congregate together at a crash pad where they would plan their ignoble activities. There had to be some opportunity for the Cheap Boys to have come up with their similarly changed stories, some mechanism by which that occurred. The January 1995 police raid that netted Linda, Khoi, and Kevin would have established the mechanism in

two crucial respects. It would have established as a fact, as opposed to speculation, the actual existence of a Cheap Boys crash pad of the kind that Detective Nye opined about. And it would have established the involvement, in the crash pad and thus its activities, of Linda Vu, one of the two identification witnesses on the Sang Nguyen murder, and of Khoi Huynh, the Cheap Boys leader who, after a series of phone conversations, procured the testimony of the other identification eyewitness, Trieu Binh (Temper) Nguyen, the Cheap Boy living in Texas. This was, then, highly important evidence that the jury heard nothing about.

It is of course true that the proffered defense concerning the Cheap Boys crash pad in El Monte was focused on a police raid occurring in January 1995, before the shooting of Cheap Boys Sang Nguyen, Khoi Huynh, Duy Vu, and Tuan Pham. (See Counts 6-7 [Sang], 9-10 [Khoi], 11-12 [Duy Vu], 13-14 [Tuan Pham].) But once the existence of the Cheap Boys crash pad and the participation of Khoi, Linda, and Kevin were firmly established, then Detective Nye's testimony about how a crash pad functioned and what it was used for would have led to the strong inference that these Cheap Boys would continue to carry on the activities of a crash pad. Nye's testimony plainly indicated that crash pads were an ongoing gang activity. There is no reason to think that the Cheap Boys gave up their meetings or their use of crash pads just because a crash pad had been raided once.

Thus, the excluded evidence concerning the existence of a Cheap Boys crash pad and the presence of Linda Vu and Khoi Huynh (among others) at that crash pad deprived the defense of crucial evidence tending to undermine the Cheap Boys' eyewitness testimony identifying appellant as the killer of Sang Nguyen. It is impossible to conclude that the exclusion of the evidence was harmless beyond a reasonable doubt.

Moreover, the error also plainly had the same adverse impact on the jury's verdicts as to the other two incidents in which Cheap Boys were key eyewitnesses, namely, the shooting of Tony Nguyen (Counts 2-3) — where the sole identification testimony came from Kevin Lac, one of those found at the Cheap Boys crash pad — and the shooting of Khoi Huynh himself (Counts 9-10), where Khoi provided essential identification evidence. (Cf. AOB, §§ III.3, p. 251, and V.1, pp. 284-285, *post.*)

C. Cumulative Prejudice From The Exclusion Of The Motive-Opportunity-Plan Evidence

Even if this Court were to conclude that neither error with respect to the exclusion of defense-favorable evidence regarding the Cheap Boys' motive, opportunity, and plan to frame appellant was by itself sufficiently prejudicial to warrant reversal of Counts 6 and 7, then plainly the cumulation of errors would. Together, the testimony concerning the Cheap Boys' awareness of the Nip Family cooperating in the prosecution of a Cheap Boy, plus the evidence that the very Cheap Boys witnesses against appellant actually met in a crash pad setting, would have cast an additional dark pall over the testimony of the Cheap Boys witnesses and their new stories regarding Sang Nguyen's death. Given the credibility problems already inherent in the Cheap Boys' belated identification of appellant, this Court cannot conclude that exclusion of this evidence was harmless beyond a reasonable doubt.

3. ADDITIONAL ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE

In addition to overruling appellant's objection to the purportedly expert testimony of Detective Nye and excluding the evidence concerning the Cheap Boys' motive and opportunity to frame appellant, the trial court made other improper evidentiary rulings that were prejudicial to the defense with respect to Counts 6 and 7. In particular, the court erroneously excluded evidence aimed at impeaching the changed story of witness Michelle To (Temper Nguyen's girlfriend/wife), and it improperly allowed the jury to use damaging hearsay evidence for the truth of the matter asserted. The first two subsections that follow (subsections A and B) address the validity of these rulings. Subsection C considers the question of prejudice.

A. Appellant Was Impermissibly Precluded From Impeaching Michelle To With Evidence That She Was Living With Trieu Hai Binh At The Time She Decided To Come Forward With Her New Story

Among Sang Nguyen's dinner companions on February 5, 1995, was Michelle To, the then-girlfriend of Trieu Binh Nguyen (Temper). Like the other dinner companions, Michelle told police on the night of the shooting that Trieu Binh and Binh Tran were in the bathroom at the time of the shooting, and as late as April 27, 1998 (three weeks before Trieu Binh's testimony at trial), Michelle confirmed this version of events to a defense investigator. (19 RT 3576, 3581-3582.) However, by the time she was called as a witness several weeks later, Michelle had, unbeknownst to the defense,[72] changed her story. She was now claiming that her story to the

---

[72] See 20 RT 3760-3764.

police in February 1995 and to the defense investigator in April 1998 had been a lie and that in fact Trieu Binh and Binh Tran had not been in the bathroom but had been outside smoking. (19 RT 3576-3577.)

The defense sought to explore how Michelle's1998 change of story came about. While Michelle admitted to having had discussions with Trieu Binh, she denied she ever discussed her testimony with him. (19 RT 3584-3586.) She claimed that after Trieu Binh had returned to Texas following his testimony at appellant's trial, he told her simply that he had told "the truth" at trial and had said he had not been in the bathroom.[73] (19 RT 3589, 3591.) According to Michelle, there was no other discussion about Trieu Binh's testimony or hers.

Michelle denied that she even had an opportunity to discuss any changes in her testimony with him. (19 RT 3586.) She claimed they had broken up, though she did not remember when. (19 RT 3595.) According to Michelle, she never saw Trieu Binh on a regular basis after the night of the shooting in 1995. (19 RT 3585.) She claimed to be unable to recall how often they had seen each other in 1995, 1996, or 1997. (19 RT 3596-3597.) Asked about 1997 in particular, she denied that they saw each other weekly or annually. (19 RT 3597.)

Later, however, it turned out that Michelle and Trieu Binh had been married in 1997 for (in Michelle's words) "a couple of months. A few months. About seven or eight." (19 RT 3605.)

In the midst of Michelle's testimony as to her discussions and relationship with Trieu Binh, defense counsel approached the bench and sought permission to ask Michelle whether she and Trieu Binh were "living

---

[73] Trieu Binh testified on May 19, 1998. (2 CT 766-767; see 7 RT 1333.) Michelle To testified on June 15, 1998. (2 CT 215-216; see 19 RT 3569-3605.)

at the same address," referring obviously to the time after Trieu Binh came back from testifying at trial. (19 RT 3596.) "No," the court responded, before the prosecutor articulated any basis for an objection. "The answer is no." (*Ibid.*)

The trial court's ruling was error. The only possible basis for the ruling that appellant perceives was that defense counsel's question called for irrelevant evidence, but it seems quite clear that what the defense sought to show was highly relevant. In fact, it was relevant for multiple reasons. It was relevant to show Michelle's bias in favor of Trieu Binh and her motive for corroborating his new story.[74] It was relevant to impeach her testimony about the extent of her relationship with him and her claim that they had broken up. And, perhaps most significantly, it was relevant to impeach her testimony that she had not had any opportunity to discuss any changes in her testimony with him. (Cf. 19 RT 3586; see, e.g., *People v. Quitiquit* (2007) 155 Cal.App.4th 1, 12 [the fact that witnesses spent substantial time together "provid[ed] an opportunity for them to contrive a story" and "rendered the accuracy of [one witness's] belatedly disclosed description of events to be inherently suspect"].)

Thus, the trial court's ruling was error as a matter of well established evidentiary law. The exclusion of the evidence also violated the Truth-in-Evidence provision of the California Constitution. (Art. I, former § 28(d), now § 28(f)(2).) And it prejudicially denied appellant his Sixth and Fourteenth Amendment rights to due process and confrontation, to present

---

[74] *People v. Sweeney* (1960) 55 Cal.2d 27, 41 (prosecution allowed to ask defense witness whether she lived with defendant); *People v. Payton* (1939) 36 Cal.App.2d 41, 54-55 (similar); *People v. James* (1976) 56 Cal.App.3d 876, 886 (trial court erred by refusing to allow defense to examine prosecution witness on, inter alia, fact that he was living with complaining witness).

a defense, to compulsory process, and to a fair trial, his Eighth Amendment right to freedom from cruel and unusual punishment and to a reliable determination of guilt and penalty in a capital case, and his Sixth Amendment right to a jury trial. (*Crane v. Kentucky* (1986) 476 US 683 [14th Amendment Due Process clause, Sixth Amendment Compulsory Process and Confrontation clauses]; see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Olden v. Kentucky* (1998) 488 U.S. 227; *Rock v. Arkansas* (1987) 483 US 44; *California v. Trombetta* (1984) 467 U.S. 479 *Davis v. Alaska*, *supra*, 415 U.S. 308; *Chambers v. Mississippi*, *supra*, 410 U.S. 284; *Washington v. Texas*, *supra*, 388 U.S. 14.)

B. The Trial Court Erred By Refusing To Give A Limiting Instruction As To Prejudicial Hearsay Evidence Relayed By Trieu Binh Nguyen

Trieu Binh Nguyen (Temper) testified at trial both about his statement to the police on the night of Sang Nguyen's death and about his changed statement to Detective Nye several months later. In the course of Trieu Binh's testimony, the prosecutor asked him why he went to the police with his new story, and he replied, "It get to a point that *I heard lot of my friend went down from what happened, the same guy killed my friend*, get to a certain point I can't stand it anymore." Defense counsel objected to the testimony as hearsay "unless the court instructs that that's not coming in for the truth of the matter asserted therein." (7 RT 1237.) The court overruled the objection. (7 RT 1238.)

The prosecutor immediately repeated the point, again over defense objection. "So when you felt that you just couldn't stand it anymore that *he was killing your friends*, that's when you told the detective?" the prosecutor asked. "Correct," Trieu Binh answered. (7 RT 1238.)

At the very end of re-direct examination, the prosecutor returned to the subject for a third time. "At some point in time did you just decide, regardless of all of those [gang] rules, that because *your friends were dying from a rival gang, and largely from one person*, that you were going to stand up and break all those rules and come forward?" she asked. "Yes," Trieu Binh replied. (7 RT 1348.) Defense counsel objected based on Evidence Code section 352, moved to strike the answer, and asked that the jury be admonished. The court sustained the object to "the form of the question" but, as before, neither struck the answer nor admonished the jury. (*Ibid.*) The prosecutor re-phrased her question, and Trieu Binh said that he went to the police because "it gets to a point that you can't stand it no more." With this, the prosecutor then ended her questioning of Trieu Binh. (*Ibid.*)

Defense counsel's repeated objections should have been sustained. The testimony that the prosecutor elicited — that Trieu Binh went to the police because he had heard from others that "the same guy" was killing his friends — may have been admissible for the non-hearsay purpose of showing why Trieu Binh came forward with a new story, but the testimony was clearly inadmissible to prove the truth of the matter asserted, namely that "the same guy" was responsible for the shootings of Trieu Binh's friends. In this regard, Trieu Binh's testimony was rank hearsay.

It is well established that, where evidence is admitted for one purpose but is inadmissible for another, a defendant is entitled to have the jury informed as to the limited purpose for which the evidence was admissible. (Evid. Code, § 355, *People v. Sweeney* (1960) 55 Cal.2d 27, 41, *People v. Miranda* (1987) 44 Cal.3d 57, 83; see also CALJIC No. 2.09, CALCRIM 303.) The failure to so instruct the jury here thus violated these principles and also resulted in violations of appellant's Fifth, Sixth, and

Fourteenth Amendment rights to due process of law, to freedom from the arbitrary denial of a state law entitlement,[75] to a fair trial, to a trial by jury, to confrontation of witnesses, and to reliable determinations of guilt and penalty in a capital case.

C. The Errors, Considered Individually Or Cumulatively, Were Prejudicial With Respect to Counts 6 and 7

Whether considered individually or cumulatively, the evidentiary errors discussed in the preceding two subsections (§§ I.3.A, I.3.B) require reversal of Counts 6 and 7. While it is the federal test for harmlessness that applies here — requiring the State to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California, supra,* 386 U.S. at p. 24) — the same result would obtain even under California's "reasonable probability" test, which requires that appellant show there is "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the error. (See *College Hospital, Inc. v. Superior Court , supra,* 6 Cal.4th at p. 715.)

First of all, it is important to recognize that the question of appellant's guilt or innocence as to the Sang Nguyen killing was a close one, as discussed in connection with Claim I.1.C, AOB 92 et seq., *ante.*

Second, the errors here affected both sides' cases at trial. The defense case was improperly weakened by the exclusion of the testimony about Michelle To's relationship with Trieu Binh Nguyen, and the prosecution's case was improperly enhanced by the hearsay from a "lot" of Trieu Binh's friends indicating "the same guy" was responsible for all of

---

[75] *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.

the shootings. And the prosecutor clearly exploited the trial court's ruling, because she elicited the "same guy" testimony from Trieu Binh on three separate occasions, and even made it the very last point she made in her questioning of him. (See *People v. Sweeney*, *supra*, 55 Cal.2d at pp. 42-43 [it "would emphatically be true" that even probative evidence should be excluded "where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent" and where the proponent has "introduc[ed] repeated declarations, when once the point for which they are competent has been amply shown."].)

Under these circumstances, the errors were plainly prejudicial as to Counts 6 and 7.

4. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

As to each of the claims raised in Sections I.1, I.2, and I.3, *ante*, appellant's trial counsel acted sufficiently to preserve the claim. However, if this Court were to conclude otherwise, or if it were to conclude that counsel's actions were somehow insufficient to allow one or more of the claims to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington* (1984) 466 U.S. 668.)

Although an ineffective assistance claim should normally be raised in a habeas petition when the record sheds no light on the reasons for counsel's inactions, such a claim is appropriate on appeal when there simply could be no satisfactory explanation for the inactions. (*People v. Pope* (1979) 23 Cal.3d 412, 426). That would be the situation here. There clearly was no tactical reason for any allegedly inadequate action or failure to act by trial counsel. This is demonstrated by defense counsel's own behavior, for counsel attempted — repeatedly, and on multiple grounds — to exclude the evidence discussed in Claims I.1 and I.3.B, and he did attempt to introduce the evidence discussed in Claims I.2.A, I.2.B, and I.3.A. Nor could there be any satisfactory explanation for counsel's alleged omissions. Under these circumstances, any failure to preserve any of the issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton* (1998) 205 Cal.App.3d 87, 93

[Sixth Amendment violated by failing to preserve meritorious claim for review].)

Moreover, to the extent constitutional issues are raised in this appeal, they are not waived by inadequate objection. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Coddington* (2000) 23 Cal.4th 529, 632.)

5. IF REVERSAL OF COUNTS 6 AND 7 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS, REVERSAL OF THOSE COUNTS, AND MORE, WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

Each of the errors described above requires a new trial for the reasons discussed. However, the Court may, if it prefers, decline to decide which issues would require reversal by themselves. That is because the cumulation of errors was surely prejudicial under the federal constitutional standards that we have discussed. (See *Chapman v. California*, 386 U.S. 18.)[76] In this close case as to guilt or innocence, the prosecution was improperly permitted to grossly inflate the credibility of its key witnesses through the "expert" testimony of Detective Nye and by the hearsay from Trieu Binh Nguyen, and the defense case was drastically undercut by the exclusion of the evidence relating to the Cheap Boys' efforts to frame appellant and by the exclusion of other evidence that would have impeached the prosecution's witnesses. The seriousness of the errors together compels the conclusion that the errors contributed to the verdict.

The same result would obtain even if the errors were all viewed purely as matters of state law and even if the inquiry were whether it is reasonably likely that a different outcome would have occurred in the absence of the errors. (See *People v. Watson*, *supra*, 46 Cal.2d 818; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; see *United States v. McAlister* (9th Cir. 1979) 608 F.2d 785.)

---

[76] When errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; see also *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.)

Moreover, state law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."[77] In appellant's case, the cumulation of errors did just that. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643; *Greer v. Miller*, *supra*, 483 U.S. at p. 764.)

Finally, it bears noting that the errors with respect to the improperly admitted testimony of Trieu Binh Nguyen (§ 3.B, pp. 115 et seq., *ante*) had a prejudicial effect not only on Counts 6 and 7 but also on all the other counts as to which identity was an issue, namely, the attempted murder incidents charged in Counts 2, 3, 4, 5, 9, 10, 13, and 14. This is because the inadmissible testimony would have been understood by the jury as relevant to the identity of the shooter in each incident, and it bolstered the prosecution's claim that appellant was the "master assassin of [the] Nip Family gang." (26 RT 4943; see AOB, §§ III.2.C, pp. 249 et seq.; IV.3, p. 279; V.1, pp. 284-285, *post.*)

And, as previously noted, the errors in excluding evidence concerning the Cheap Boys' motive, opportunity, and plan for "ratting retaliation" (§§ 2.B & 2.C, pp. 108 et seq., *ante*), had a similar effect on the other counts as to which the Cheap Boys provided eyewitness testimony, i.e., Counts 2-3 and 9-10 (shootings of Tony Nguyen and Khoi Huynh, respectively). (AOB, §§ III.3, pp. 251 et seq., and V.1, pp. 284-285, *post.*)

---

[77] *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-88; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814 footnote 6; *Menzies v. Procunier* (5th Cir. 1984) 743 F.2d 281, 288-289; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Rose v. Lundy* (1982) 455 U.S. 509, 531 footnote 8, concurring opinion; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.

SECTION II.
COUNTS 13 AND 14
(relating to the May 6, 1995 shooting death of Tuan Pham)

1. COUNTS 13 & 14 MUST BE REVERSED BECAUSE SELF-DEFENSE WAS ESTABLISHED AS A MATTER OF LAW; BUT IF A VALID LEGAL THEORY DOES EXIST UNDER WHICH SELF-DEFENSE COULD PROPERLY HAVE BEEN REJECTED, REVERSAL OF COUNTS 13 AND 14 WOULD STILL BE REQUIRED BECAUSE IT IS IMPOSSIBLE TO CONCLUDE BEYOND A REASONABLE DOUBT THAT NO JUROR RELIED UPON AN INVALID LEGAL THEORY IN VOTING TO REJECT SELF-DEFENSE

In Counts 13 and 14, appellant was accused of murder and active street gang participation based upon the shooting death of Tuan Pham on May 6, 1995. In the prosecution's view, which the jury evidently accepted, appellant was seated in the driver's seat of the Honda Accord and fired one or more of the shots that killed Tuan.

The circumstances of the killing, however, strongly pointed to self-defense. After all, in the words of the trial judge at sentencing, Tuan "was actively seeking to kill the defendant." (31 RT 6082.) This fact had been established with unmistakable clarity through the testimony of the two witnesses who saw the outbreak of the shooting. "Oh, my God," Shawn Burchell had exclaimed as she watched Tuan Pham approach the Honda with gun in hand, "he's going to kill somebody." (13 RT 2598.) And when Tuan arrived at the side of the Honda slightly behind appellant and started to raise his gun, it was — as witness Robert Murray assessed the situation — a matter of "survival." (14 RT 2718.)

Notwithstanding that appellant's life was in actual, immediate, and unavoidable lethal peril from Tuan Pham, and notwithstanding that any

reasonable person would have understood the actuality and immediacy of the danger (and that the two witnesses did independently and contemporaneously perceive the danger), and notwithstanding that appellant refrained from acting as long as he possibly could and did not fire his weapon until Tuan actually started to raise his gun hand (13 RT 2602-2603), appellant was convicted of first-degree murder and the associated gang-participation charge.

These convictions cannot be sustained on appeal. The evidence points unerringly to self-defense.

However, there is an explanation for the convictions. In fact, there are as many as six explanations. For the jury was given a grab bag of six legal theories that, supposedly, authorized the rejection of self-defense and the return of guilty verdicts. But in fact, none of the six theories actually justified the guilty verdicts. Three of the theories are genuine legal doctrines but, contrary to the prosecutor's claims below (and contrary to what the jury was given to understand), these theories were inapplicable to this case as a matter of law. The other theories were entirely non-existent legal doctrines, most of them manufactured ad hoc by the prosecutor, who exploited ambiguous language in the instructions. (See Subsections D.i - D.vi, AOB 134-193, *post.*)

With all six of the theories being legally invalid and/or inapplicable, there is no legal support for the jury's verdicts in Counts 13 and 14, and the convictions must be reversed for insufficiency of evidence as a matter of Due Process under the Fifth and Fourteenth Amendments. (*Jackson v. Virginia* (1979) 443 U.S. 307; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) (See Subsection E, AOB 193 et seq., *post.*)

But even if this Court were to conclude somehow that one or more of the legal theories could validly have been invoked here, a reversal for a

new trial would still be required. When multiple legal theories are presented to a jury and one theory is legally inadequate, "the jury cannot reasonably be expected to divine [the] legal inadequacy" of the legally invalid theory. (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.) Consequently, reversal is required "unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory'"[78] or unless there is some other way to "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory."[79] In the present case, the jury rendered only general verdicts with respect to Counts 13 and 14. There are no "portions of the verdict" that "necessarily" show which theory the jury relied on, and no other way to conclude the errors were harmless beyond a reasonable doubt. Thus, reversal of Counts 13 and 14 is required if *any* of the six theories presented to appellant's jury was legally invalid. (Subsection F, *post.*)

In Subsection D, we will address the six self-defense-negating theories that were offered as a basis for rejecting self-defense. For convenience, we will refer to the six theories as (1) the "mutual combat" theory, (2) the "initial aggressor"theory, (3) the "seeks a quarrel" theory, (4) the "decent person" theory, (5) the "emotional reaction" theory, and (6) the "multiple motivation" theory. We will show that none of the six theories had any valid application to this case.

Before reaching the six theories, however, Subsections A through C address three preliminary matters.

---

[78] *Ibid.*, quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1130. See also *Griffin v. United States* (1991) 502 U.S. 46, 59; *Stromberg v. California* (1931) 283 U.S. 359, 368.

[79] *People v. Chun* (2009) 45 Cal.4th 1172, 1203.

Initially, Subsection A will put the self-defense issues in a constitutional context. It will demonstrate that the right to self-defense under circumstances such as those indisputably present here is protected by the federal and state Constitutions. As a result, affirming the convictions in Counts 13 and 14 would violate both Constitutions. At the very least, the serious question of constitutional infringement invokes the "canon of constitutional avoidance"[80] and compels this Court to reject the anti-self-defense theories that have been offered to justify the verdicts in this case.

Then, Subsection B will briefly outline certain basic tenets of self-defense.

Finally, Subsection C will lay the groundwork for showing (in Subsection F) the likelihood that at least some jurors believed that the prosecution's legal theories were embodied in the instructions given by the court.[81]

---

[80] *Harris v. United States* (2002) 536 U.S. 545, 555. See also *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 685 ("constitutional avoidance doctrine").

[81] For purposes of the arguments here in Section 1 and those that follow in Sections 2 and 3, appellant assumes the accuracy and validity of the jury's apparent findings that appellant was the Honda's driver and fatally wounded Tuan Pham. In Section 4, appellant demonstrates that the jury's conclusion that appellant killed Tuan was tainted by an erroneous evidentiary ruling that would independently require reversal of appellant's convictions on Counts 13 and 14. Appellant notes that claims of insufficient evidence must be addressed on appeal even when the judgment is reversed for other reasons. (See, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 613 ["Although we have concluded that the kidnapping conviction must be reversed because it was presented to the jury on both a legally adequate and a legally inadequate theory, we must nonetheless assess the sufficiency of the evidence to determine whether defendant may again be tried for the kidnapping offense."]; *People v. Hayes* (1990) 52 Cal.3d 577, 631 [similar]; *People v. Memro* (1985) 38 Cal.3d 658, 690

(continued...)

A. The State and Federal Constitutions Both Embody a Right to Self-Defense

The California Constitution contains an explicit provision guaranteeing a right to self-defense. Article I, section 1, provides that all people have "inalienable rights," among which are "defending life" and "obtaining safety."[82]

The federal Constitution does not contain these same words, but a right to self-defense is included within the concept of Due Process. While the Constitution generally leaves states free to define and punish crimes as they see fit (*Missouri v. Hunter* (1983) 459 U.S. 359, 370), Due Process invalidates any state's criminal law provision that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Speiser v. Randall* (1958) 357 U.S. 513, 523. Accord *Montana v. Egelhoff* (1996) 518 U.S. 37, 43; *Leland v. Oregon* (1952) 343 U.S. 790, 798; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105). In determining whether a particular principle is "fundamental," the Court looks to "historical practice" (*Herrera v. Collins* (1993) 506 U.S. 390, 407) and examines whether the practice has a "lengthy common-law tradition" (*Egelhoff*, 518 U.S. at p. 59; *In re Winship* (1970) 397 U.S. 358, 361-364; *Patterson v. New York* (1977) 432 U.S. 197, 202).

---

[81](...continued)
[similar].)

[82] In full, the constitutional provision reads, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

In the present case, the Due Process inquiry leads ineluctably to the conclusion that there is a constitutionally protected right to self-defense. Certainly, self-defense has a "lengthy common-law tradition." More than 200 years ago, Sir William Blackstone wrote that self-defense "is justly called the primary law of nature so *it is not, neither can it be, in fact, taken away by the law of society*." (3 Blackstone's Commentaries 4.) Blackstone explained as follows:

> "the law, in this case, respects the passions of the human mind; and, (when external violence is offered to a man himself . . .) makes it lawful in him, to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers, that the future process of law, is by no means, an adequate remedy for injuries, accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort, might be carried, unless it were permitted a man immediately to oppose one violence with another."

(*Id.* at pp. 3-4.)

More than a century before Blackstone, Sir Matthew Hale had made the same point, using some of the very same words. The right of self-defense, he wrote, "is founded in the law of nature, and is not, nor can be, superceded by the law of society." (2 Hale, Pleas of the Crown, 478 fn. 1.)

This Court has acknowledged both the common law heritage and the long historical practice related to self defense. Thus, more than 125 years ago, this Court wrote that the right of self-defense "is a law of nature" and "antedates all written enactments, and is fully recognized in the laws and regulations of all civilized people." (*People v. Iams* (1880) 57 Cal.115, 118.)

While few courts have expressly found a constitutional right to self-defense, this is surely because it is one of those rules "so deeply embedded in the fabric of due process that everyone takes it for granted." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 984.) It is "so unexceptional that it [has] never been drawn into question" in a Supreme Court case. (*Taylor v Withrow* (6th Cir. 2002) 288 F.3d 846, 853, quoting *Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 440.)

Though there is not much direct authority, there is at least some. For the federal Sixth Circuit Court of Appeals has recently concluded, after reviewing the historical background, that the right to claim self-defense is "deeply rooted in our traditions" and thus is a "fundamental right"embodied by the Constitution. (*Taylor v. Withrow*, *supra*, 288 F.3d at pp. 851-852.)

The very wording of the constitutional Due Process clause reinforces the conclusion, for the Fourteenth Amendment provides that no state shall "deprive any person of life . . . without due process of law." A state that would forbid an individual from exercising self-defense when there is actual and immediate peril to his life would be depriving that individual of his life without due process.

In addition, given its "deeply rooted" background in both common law and historical practice, the right to self-defense must also be considered to be among those rights "retained by the people" under the Ninth Amendment, and it is also a component of the Second Amendment's "right of the people to keep and bear arms."[83]

---

[83] *District of Columbia v. Heller* (2008) ___ U.S. ___, 128 S.Ct. 2783 at pages 2797 (Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."), 2801 (self-defense characterized as "the *central component* of the right [to keep and (continued...)

Thus, under both the state and federal Constitutions, there is a right to self-defense. In the present case, appellant — who had committed no aggressive, threatening, or provocative act whatsoever toward Tuan Pham, and no such act toward anyone else for two months (according to the jury's verdicts) — had a constitutional right to defend himself when faced with the actual and immediate peril to his existence. As Blackstone said, self-preservation is a "primary law of nature" that "is not, neither can it be, in fact, taken away by the law of society." Appellant's convictions under these circumstances violate both constitutions.

At the very least, the convictions in Counts 13 and 14 raise "'serious and doubtful constitutional questions'"[84] and thus invoke the "canon of constitutional avoidance."[85] Consequently, this Court must adopt the construction of the self-defense doctrine that, "'without doing violence to the reasonable meaning of the language used, will render it . . . free from doubt as to its constitutionality, even though [some] other construction is equally reasonable.'" (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 509, 513, quoting *Miller v. Municipal Court*, *supra*, 22 Cal.2d at p. 828.) This principle affects the Court's assessment of all six of the anti-self-defense theories provided to the jury as justifications for rejecting self-defense in this case.

Moreover, the canon of constitutional avoidance is supplemented and enhanced in this case by this State's policy that a penal statute "must be

---

[83](...continued)
bear arms] itself") (emphasis in original), 2817 ("the inherent right of self-defense has been central to the Second Amendment right").

[84] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, 513, quoting *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.

[85] *Harris v. United States*, *supra*, 536 U.S. at page 555.

construed as favorably to the defendant as its language and the circumstances of its application reasonably may permit." (*People v. Franklin* (1999) 20 Cal.4th 249, 253. Accord, *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.)

B. The Basics of Self-Defense

The doctrine of self-defense can be simply stated. In order for the doctrine to apply, "one must actually and reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury." (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Thus, the jury in appellant's case was correctly instructed that self-defense was available if appellant actually and reasonably believed that he was in imminent danger of death or great bodily injury and that it was necessary to use deadly force to avoid those consequences. (27 RT 5281.)

As noted earlier, there can be no doubt but that appellant was in actual and imminent danger of death, that the perception of lethal danger was reasonable, and that it was necessary to use deadly force when Tuan Pham arrived at appellant's side and began to raise his gun.[86]

Some limits exist on the right to use self-defense, and at trial the prosecution exploited some of those limits, and others that do not actually exist, to justify the rejection of self-defense in this case. Subsection D discusses the relevant limitations, i.e., the six legal theories mentioned earlier. As will be shown, not a single one of the six theories was validly

---

[86] As one respected commentator has written, "drawing or attempting to draw a gun is sufficiently proximate to be deemed imminent. A defendant is not required to wait until an assailant 'gets the drop on him.'" (Wharton's Criminal Law (15th Ed. 1994) § 127, p. 184, fns. omitted.)

applied to this case, so reversal and dismissal of Counts 13 and 14 are required. But even if the Court were to conclude that there was one or more valid and applicable theories, a reversal for a new trial would be required here unless *all six* of the self-defense-negating theories were valid and applicable.

C. The Jury Was Led to Understand That the Prosecutor's Legal Arguments Accurately Reflected Legal Principles in the Instructions

In the ensuing subsections, this brief will often quote from arguments that the prosecutor made to the jury. Our purpose in doing so is two-fold. First, the prosecutor's arguments serve to identify legal theories that respondent will presumably rely on in its efforts to justify the guilty verdicts as to Counts 13 and 14. And second, the prosecutor's arguments also serve to show legal theories that one or more jurors may have relied upon as the basis for rejecting self-defense as to those counts. For here, even more than in the usual case, it is likely that some jurors' understanding of the law was shaped by those arguments. Not only were the prosecutor's arguments facially consistent with the instructions, but the prosecutor prefaced her discussion of the instructions with an express assurance that "I also know the law." (26 RT 4943-4944.) The prosecutor went on to explain that she had studied the law "anywhere from 40 to 60 hours a week" for three years in law school and thus would "take time to go through the law with you." (26 RT 4944.)[87]

---

[87] By contrast, the lead defense counsel told the jury he was "not going to talk very much about the law." (26 RT 5047.) "I wasn't one of those students studying morning, afternoon, evening," he said. "I don't know an hour and a half worth of law to be telling you. So you're not going to hear too much of the law from me." (*Ibid.*) With one exception to (continued...)

Moreover, the trial court essentially confirmed the (supposed) correctness of the prosecutor's arguments about the law. For, just as the court was about to deliver the guilt-phase instructions, it told the jury that the attorneys had "made good efforts when they have paraphrased the legal instructions to be accurate" and that "I haven't heard of anything that constitutes a major difference from what I'm about to read to you." (27 RT 5231.)

Thus, insofar as the prosecutor made plausible legal arguments based on the instructions, it is likely that one or more jurors accepted them as correct. (*People v. Piazza* (1927) 85 Cal.App. 58, 85-86 ["The court's statement in its instruction . . . that the district attorney's argument in the respect mentioned was legally proper may well be assumed to have exerted no little influence upon the minds of the jury in the connection with which the statement was made [and] must have exercised a potent influence on the jury"].)

D. The Six Legal Theories Offered as Bases for Convicting Appellant of Counts 13 and 14 and Their Legal Invalidity

This section of our brief will discuss each of the six legal theories that were offered to the jury to justify the convictions in Counts 13 and 14 and will show their invalidity, at least as applied to this case. Before we get to that discussion, however, three elemental points concerning self-defense are worth highlighting.

First, even if appellant believed that members of the Cheap Boys gang would be out looking to kill him, he had a right to be in a car on a

---

[87](...continued)
be mentioned later (see Subsection 3.A, pp. 202 et seq., *post*), defense counsel did not contradict anything the prosecutor said regarding the law.

public street on the day Tuan Pham attacked him. "For one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack." (*People v. Gonzales* (1887) 71 Cal. 569, 578. See also *Thompson v. United States* (1894) 155 U.S. 271, 278 [similar].)

Second, self-defense is not ruled out by the fact that appellant may have formed his intent to kill before firing the fatal shot. "If the accused was defending himself from an attack of the deceased that rendered it necessary for the protection of his own life that he should kill him, though he resolved to kill him before the fatal blow was given, the killing was not murder. In cases of necessary self defense, the act done in such defense is justified on the ground that it was necessary for the preservation of the life of the slayer, and the intent to take the life of the assailant as a necessity may precede the act which results in his death." (*People v. Barry* (1866) 31 Cal. 357, 358.)

Third, it is well established that "where the peril is swift and imminent and the necessity of action immediate[,] the law does not weigh in too nice scales the conduct of the assailed, and say he shall not be justified because he might have resorted to other means to secure his safety. The suddenness of the attack puts him to the wall." (*People v. Hecker* (1895) 109 Cal. 451, 467.) Or, put in pithier terms, "Detached reflection cannot be demanded in the presence of an uplifted knife." (*Brown v. United States* (1921) 256 U.S. 335, 343.)

i. <u>Theory #1: The "Mutual Combat" Theory</u>

It is established that a person who engages in mutual combat with another individual has only a limited right to use self-defense against his

opponent. Where combat is mutual and involves the use of deadly force, a combatant may use lethal force in self-defense only if he has tried in good faith to withdraw from the combat first. (See Pen. Code, § 197, subd. 3.)

Respondent may argue here on appeal that the "mutual combat" exception to the doctrine of self-defense justifies the jury's verdicts on Counts 13 and 14. The prosecutor below advanced that position. But it is plain beyond any conceivable dispute that the events of May 6, 1995 — viewed by themselves — did not amount to "mutual combat." Rather, what occurred on May 6 was an attempt by Tuan Pham to conduct a surprise attack on appellant, who was compelled, at the last second, to shoot in response in order to preserve his life. It was classic self-defense.

Nevertheless, the jury in appellant's case was instructed on the mutual-combat exception to the doctrine of self-defense. The only conceivable theory as to why this might have been mutual combat came from the prosecutor in her argument to the jury. She indicated that the mutual-combat doctrine called upon the jurors to look to events that had happened at separate times and separate places from the May 6, 1995 shooting. Her claim was that the encounter on May 6 was part of an ongoing gang war, and more to the point, a very specific type of ongoing gang war. According to the prosecution, it was a gang war in which all members of both the Nip Family and the Cheap Boys gangs were actively seeking to kill members of the other gang every time they stepped outside. Since appellant was a member of the Nip Family — the theory went — he was already actively seeking to kill a Cheap Boy when he was driving down Westminster Street on May 6, and since Tuan Pham was actively seeking to kill appellant at the same time, the ensuing exchange of gunfire was mutual combat.

This theory was based upon the testimony of Detective Mark Nye, who testified as a gang expert. Nye's testimony was that there was a war between the two Vietnamese gangs and that in that gang war, all members of each gang would "actually seek rivals each time they go out" and that "any time either one of those two gangs saw somebody from the rival gang, they would attempt to kill that other person." (16 RT 3212-3213, 3211.)[88]

Based on this evidence, the prosecutor argued to the jury that the "two gangs were mutually at war," that the warring gang members "think about killing the rivals all the time," that "they were all engaged in combat on May 6th, 1995," and that there was "no right to self-defense" in this "mutual combat situation." (26 RT 4972, 4979, 5002; see also 26 RT 4977 [self-defense is "not available in the gang situation where both sides . . . are actively seeking out the other to fight"].)

For multiple reasons, neither Detective Nye's testimony nor the prosecutor's argument justifies the application of the "mutual combat" exception to this case.

a. First Fallacy: Detective Nye's Testimony Did Not Provide Substantial Evidence in Support of the Mutual-Combat Theory, i.e., Evidence That Was "Reasonable, Credible, and of Solid Value"

For purposes of the prosecutor's mutual-combat theory, the key aspects of Detective Nye's testimony were his assertions that members of

---

[88] See also 16 RT 3181 ("If they encounter their rivals, they're going to have a shooting right there); 3195 ("any time they have the opportunity then, both of those two gangs would be trying to kill whoever was in the other gang"); 3197 ("both sides would try to kill the other side, if they saw them"); 3198-3199 (when gang members go out with another member, "they actively look for rival gang members . . . It's one of the main things they do. They actually go out and hunt for rivals").

the Nip Family and Cheap Boys gangs would "actually seek rivals each time they go out" and that "any time either one of those two gangs saw somebody from the rival gang, they would attempt to kill that other person." (16 RT 3212-3213, 3211.) This testimony was essential to the mutual-combat theory because without it, the trial evidence merely showed appellant to be driving down a public road, doing nothing threatening and having done nothing threatening for two months. In order to turn the attack by Tuan Pham into mutual combat, the prosecution had to establish that appellant was out looking for a Cheap Boy to shoot on May 6. And given appellant's otherwise benign behavior on that date, the only evidence the prosecution was able to offer to establish that appellant was out looking for a Cheap Boy to shoot on May 6 was Nye's testimony that *all* members of both gangs were *always* looking to shoot rivals, *whenever* they were out in public. Without such evidence, appellant's act of shooting would be perceived by any rational person as a justifiable act of self-defense.

However, there is a fatal problem with Detective Nye's testimony. It defies all human experience and common sense.

Appellant recognizes that the credibility of a witness's testimony is nearly always a matter for the trier of fact to determine. The testimony of a witness supporting a judgment can be rejected on appeal only in the very limited situation where "it is inherently improbable or incredible, i.e., 'unbelievable per se,' physically impossible, or "'wholly unacceptable to reasonable minds."'" (*Kolender v. San Diego County Civil Service Comn* (2005) 132 Cal.App.4th 1150, 1155, quoting *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)[89] "To be improbable on its face the evidence

---

[89] See also, e.g, *People v. Reyes* (1974) 12 Cal.3d 486, 499 ("inherently insubstantial testimony"); *Kircher v. Atchison, T. & S.F. Ry.* (continued...)

must assert that something has occurred that it [sic] does not seem possible" and the falsity "must be apparent without resorting to inferences or deductions." (*People v. Mayberry* (1975) 15 Cal.3d 143, 150; see also *People v. Headlee* (1951) 18 Cal.2d 266, 267-268.) Detective Nye's testimony is that extremely rare evidence that meets this test. It cannot support the use of the mutual-combat theory here.

Detective Nye's testimony actually contains two relevant propositions: (1) that all members of each gang subscribed to a common gang belief that every member of the opposing gang is to be shot upon sight and (2) that each member was "seek[ing] rivals each time they go out." Both propositions are "inherently improbable or incredible" and "wholly unacceptable to reasonable minds" and do "not seem possible." They are "so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe [either] beyond a reasonable doubt." (*United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, 546, cited in *People v. Mayfield* (1997) 14 Cal.4th 668, 735.)

To begin with, even if we assume arguendo that it was Nip Family policy that every Cheap Boy was to be shot upon sight, no reasonable mind would accept the proposition that every Nip Family member would subscribe or adhere to that policy. The idea that all 50 of the Nip Family members would subscribe to such a purported policy is at odds with ordinary common sense. This is so well understood that it has been recognized in opinions of the United States Supreme Court. "[M]en in

---

[89](...continued)
Co. (1948) 32 Cal.2d 176, 183 ("evidence inherently improbable" and "wholly unacceptable to reasonable minds"); *People v. Huston* (1943) 21 Cal.2d 690, 693 (same).

adhering to [an] organization notoriously do not subscribe unqualifiedly to all of its . . . asserted principles." (*United States v. Brown* (1965) 381 U.S. 437, 455-456, internal quotation marks omitted; see also *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342 ["gang members do not move in lock-step formation"]; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1130 (conc. & dis. opn. of Chin, J.) ["The fact that many . . . gang members commit crimes . . . does not establish that the gangs have crime as a universal purpose, primary activity, or condition of membership. The . . . gangs might have some subdivisions that are criminally inclined and others that are not. . . . [A] person who merely claims membership in one of the . . . gangs may not fully share that gang's aims."].)[90]

Equally beyond the pale is the proposition that whenever a member of the Nip Family or Cheap Boys gang went out, he was seeking rivals to shoot. Even the briefest of consideration shows the bankruptcy of the proposition. Gang members have other objectives and needs in life besides seeking a rival to shoot. They go out to visit family or friends, to have

---

[90] See also *People v. Perez* (1981) 114 Cal.App.3d 470, 477 ("Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion."); *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344 (similar); *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79 (same as *Perez*).

It bears noting that neither of the Cheap Boy shootings of which appellant was convicted had the markings of victims who were come upon by chance. Khoi Huynh was a leader of the rival Cheap Boys, and his distinctive Cadillac was parked out front of the pool hall from which he emerged. Sang Nguyen was singled out from among the Cheap Boys at the Dong Khan Restaurant, his killer called him a "motherfucker" after shooting him, and the symbol for "rat" had been written in the dust on his car. Neither offense bears any sign they occurred because Nip Family members were out looking for Cheap Boys to shoot and chanced upon random members of that gang.

dinner, to purchase groceries, to visit the doctor, to go to a movie or a dance or a sporting event or the beach, to play pool, to do laundry, etc. The list of non-rival-seeking activities is endless. Detective Nye's testimony describes programmed robots, not human beings.

But it is not merely common sense that refutes Detective Nye's testimony. So does the evidence in this very case. Kevin Lac (a Cheap Boy) testified that he had "bumped into" appellant at least five or six times (9 RT 1630), and on none of those occasions did appellant make any effort to shoot him. Nor did either man attempt to shoot the other when appellant (allegedly) came to Lac's apartment after the shooting of Tony Nguyen. (9 RT 1634.)[91]

Similarly, neither Sang Nguyen nor his fellow Cheap Boys were "seeking rivals" on the day that Sang was shot outside the Dong Khanh Restaurant. Rather, as the prosecutor would tell the jury at the penalty phase, "all [Sang] was doing February 5th, 1995 was taking his friends, after going to mass, after going to church, taking his friends out to dinner to celebrate the new year. . . . Was he looking for trouble? . . . They were in the restaurant just to relax and enjoy the friendship of a good meal." (30 RT 5800-5801.) Significantly, even when they saw rival gang members approaching, the Cheap Boys did not take steps to try to shoot them. The prosecutor's penalty-phase argument tacitly concedes that Detective Nye's guilt-phase testimony was wrong.

The "mutual combat" instruction thus cannot be justified by Detective Nye's testimony indicating that appellant, as a Nip Family

---

[91] These encounters were non-violent despite the fact that, according to Detective Nye, an assailant in a Vietnamese gang does not need to conceal his identity from witnesses and in fact would actually "gain face" if he shot a rival with witnesses around. (16 RT 3208-3209.)

member, was out seeking to engage Cheap Boys in a gun battle on the day that Tuan was killed because that was what all gang members did whenever they were out. And without this testimony, there was no evidence that the attack by Tuan Pham was mutual combat, even under the prosecutor's theory. The mutual-combat theory fails for this reason alone.

b. Second Fallacy: The "Mutual Combat" Doctrine Does Not Apply to a Surprise Attack Such As Tuan Pham Was Attempting to Perpetrate on Appellant

The "mutual combat" exception to the right of self-defense is rooted in statute, specifically, section 197, which was enacted as part of the initial codification of the Penal Code in 1872. At all times germane to appellant's case, section 197 has provided, in relevant part:

> "Homicide is . . . justifiable when committed by any person in any of the following cases: . . . 3. *When committed in the lawful defense of such person*, . . . when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; *but such person, . . . if he was . . . engaged in mutual combat*, must really and in good faith have endeavored to decline any further struggle before the homicide was committed . . . ."[92]

---

[92] When originally enacted in 1872, the statute used the phrase "mortal" combat instead of "mutual" combat. This Court long ago indicated that "mortal" was "probably a misprint" (*People v. Fowler* (1918) 178 Cal. 657, 671), and the Legislature eventually corrected the error. (Stats.1931, c. 697, p. 1439, § 1.)

It should also be noted that, although the statute allows lethal force to be used to resist any "felony," this Court has rejected the "literal reading of the section" and concluded it allows such force to be used only against a "forcible and atrocious" felony, which obviously includes murder. (*People v. Ceballos* (1974) 12 Cal.3d 470, 477-478.)

It has been acknowledged that, in everyday speech, the phrase "engaged in mutual combat" might describe "any combat . . . so long as it [is] seen to possess a quality of reciprocity or exchange." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1044.) It thus may appear to cover "any violent struggle between two or more people, however it came into being," including "situations in which the law plainly grants one of the combatants a right of self-defense." (*Ibid.*)

But, in fact, that is not what "mutual combat" meant in the common law, nor what it means in section 197, certainly not when it was enacted in 1872 or amended in 1931.[93] Rather, "as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities.*" (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1045, original emphasis. Accord, e.g., *People v. Fowler* (1918) 178 Cal. 657, 671 ["duel or other fight begun or continued by mutual consent or agreement, express or implied."]; *People v. Hecker* (1895) 109 Cal. 451, 462 ["prearranged duel, or by consent"]; *People v. Rogers* (1958) 164 Cal.App.2d 555, 558 [no mutual combat because there was no "prearrangement to fight anybody" and no "gangs agree[ing] to meet for combat"].)

Assuming for present purposes that Detective Nye's testimony was creditworthy (but see preceding subsection) and that the gang war he described would in fact amount to mutual combat in general (a matter we will address in the next subsection), nevertheless under no proper

---

[93] It has been repeatedly acknowledged that this state's law of self-defense was intended to codify the common law. (See, e.g. *People v. Ceballos* (1974) 12 Cal.3d 470, 477-478; *People v. Button* (1895) 106 Cal. 628, 631; *People v. Jones* (1961) 191 Cal.App.2d 478, 481.)

understanding of the legal definition of "mutual combat" could the specific encounter between Tuan Pham and appellant be deemed to be "mutual combat." Rather, what happened on May 6, 1995, was that Tuan Pham attempted a surprise attack on appellant, an ambush from which appellant had no ready escape. A surprise attack is the very antithesis of "mutual combat." (*Gilbert v. State* (Ga. Ct. Apps. 1956) 94 S.E.2d 109, 110 ["fighting to repel an unprovoked attack . . . is self-defense and is authorized by the law, and should not be confused with mutual combat"]; *Schauer v. State* (Tex. 1900) 60 S.W. 249, 252-253 [lying in wait is not mutual combat].)

That a surprise attack cannot be viewed as mutual combat can also be seen from another perspective. Recall that the mutual combat doctrine does not absolutely and forever prohibit a mutual combatant from employing self-defense. Rather, a mutual combatant can regain his right to self-defense if he "really and in good faith ha[s] endeavored to decline any further struggle before the homicide was committed." (§ 197.) Specifically, as CALJIC put it,

> "The right of self-defense is only available to a person who engages in mutual combat if he has done all the following:
>
> "1. He has actually tried, in good faith, to refuse to continue fighting;
>
> "2. He has clearly informed his opponent that he wants to stop fighting;
>
> "3. He has clearly informed his opponent that he has stopped fighting; and
>
> "4. He has given his opponent the opportunity to stop fighting.

> "After he has done these four things, he has the right to self-defense if his opponent continues to fight."

(CALJIC No. 5.56. See 3 CT 1059, 27 RT 5286.)

Even with respect to a person who begins a fight, "the law will always leave the original aggressor an opportunity to repent." (*Rowe v. United States* (1896) 164 U.S. 546, 556.) The same principle necessarily applies to a mutual combatant. (*People v. Claborn* (1964) 224 Cal.App.2d 38, 41-42 ["There is in every design or plan to commit a crime a place of repentance or locus penitentiae whereby the one planning to commit it may abandon the idea and thus avoid criminal liability."], internal quotation marks omitted; *State v. Denson* (Mo. App. 1978) 574 S.W.2d 445, 448 ["space for repentance is always open"]; *State v. Shockley* (Utah 1905) 80 P. 865, 886 [same]; *Aikin v. State* (Ark. 1894) 25 S.W. 840, 841 [similar].)

But in a surprise attack such as occurred in the instant case, the assailed person has no opportunity to decline further struggle or to withdraw (as the modern cases put it). Before the targeted person can complete "all . . . these four things" required for withdrawal, he is almost certainly going to be dead. It would be nonsensical to deem such a situation to be "mutual combat." The person has no alternative but to protect his life or be killed.

As has been discussed earlier, a penal statute "must be construed as favorably to the defendant as its language and the circumstances of its application reasonably may permit."[94] At a minimum, the language and circumstances permit the phrase "mutual combat" to be interpreted so as to

---

[94] *People v. Franklin, supra*, 20 Cal.4th at page 253. Accord, *Keeler v. Superior Court, supra*, 2 Cal.3d at page 631.

exclude a deadly surprise attack. Thus, this Court is obligated to so interpret it.

Moreover, as also pointed out earlier, self-defense is "the primary law of nature"[95] that "is not, neither can it be, in fact, taken away by the law of society."[96] Precluding an individual, even a gang member, from defending himself when subjected to a deadly surprise attack from which there is no escape would violate the constitutional right to self-defense. At the very least, there are serious and doubtful constitutional questions as to whether it would be permissible to require an individual to forfeit his life when subjected to a surprise attack. Thus, the "canon of constitutional avoidance"[97] comes into play, under which a statute must be construed to avoid the constitutional issue even if a contrary construction were equally reasonable. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 509, 513, quoting *Miller v. Municipal Court*, *supra*, 22 Cal.2d at p. 828.). In line with this principle, the mutual combat exception to the right of self-defense must be held to be inapplicable to appellant's shooting of Tuan Pham on May 6, 1995.

Thus, plain English, logic, and established principles of statutory construction and constitutional avoidance compel this Court to exclude a deadly surprise attack from the definition of "mutual combat."[98]

---

[95] 3 Blackstone's Commentaries 4. Accord, 2 Hale, Pleas of the Crown 479 footnote 1, *People v. Iams*, *supra*, 57 Cal. at page 118.

[96] 3 Blackstone's Commentaries 4. Accord, 2 Hale, Pleas of the Crown 479 footnote 1.

[97] *Harris v. United States*, *supra*, 536 U.S. at page 555.

[98] The fundamental error in the attempted use of the "mutual (continued...)

c. Third Fallacy: The "Mutual Combat" Exception to the Self-defense Doctrine Is Not Applicable to the Type of Gang War That Detective Nye Described

Independent of the fact that a surprise attack is not mutual combat, the mutual combat doctrine is inapplicable here for another, more overarching reason. The prosecution's evidence, with Detective Nye's testimony, failed to show there was "mutual combat" between the Nip Family and the Cheap Boys gang at all.

(1) This Gang War Was Not "Mutual" Combat

The evidence did show there was a *war* between the gangs, but a war is not necessarily mutual combat. To the contrary, a war is rarely combat "pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities." (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1045.) For example, when the United States went to war in World War II, it was not engaged in mutual combat. It was responding to a need to defend itself. There was no "mutual" intent, consent, or agreement to engage the other side. We were fighting out of necessity, and we hoped that there would *not* be mutuality on the part of the Axis countries. The fact that the war lasted several years did not convert it into "mutual combat," undermining our claim to self-defense.

In the gang context, "mutual combat" would plainly occur in "the situation where two gangs agree to meet for combat." (*People v. Rogers*

---

[98](...continued)
combat" exception here is that it ignores the actual circumstances of the May 6th encounter and is based upon what had occurred elsewhere and on other occasions. Certainly, there is nothing in the common law or in the case law prior to May 6, 1995, to support such an approach.

(1958) 164 Cal.App.2d 555, 558.) Such mutual combat has been depicted in popular culture by the conflict between the Sharks and the Jets in *West Side Story*. But this was not the type of conflict that existed between the Nip Family and the Cheap Boys. These Vietnamese gangs had no "agreement to meet for combat." Neither side sought to have the other side engage them. Rather, the war between the Nip Family and Cheap Boys was just a terrible instance of serial retaliations for insults or offenses, perceived or real. But serial retaliations do not amount to "mutual" combat as that term has been understood.

Not only does it require a linguistic distortion to make "mutual combat" cover serial retaliations, but it also leads to irrational results. Recall that in order for a mutual combatant to regain the right to self-defense, he must (among other things) have "clearly informed his opponent that he wants to stop fighting" and "clearly informed his opponent that he has stopped fighting." (CALJIC No. 5.56.) In the Jets-versus-Sharks setting "where two gangs agree to meet for combat," it is possible for a gang member to convey a change of heart. The opponents are those rival gang members who are present at the agreed upon encounter, and any member who wishes to withdraw can simply leave. Such behavior notifies the opponent that the former or would-be combatant has withdrawn, and the right of self-defense is restored. (See, e.g., *Rowe v. United States*, *supra*, 164 U.S. at pp. 554-555 [jury could find that merely "stepping back and leaning against the counter, not in an attitude for personal conflict" was a withdrawal by the accused in good faith from further controversy with the deceased]; *People v. Button* (1895) 106 Cal. 628, 633-634 [retreat is normally enough for withdrawal]; *Fraguglia v. Sala* (1926) 17 Cal.App.2d

738, 742 [stepping down from truck bed where confrontation occurred was withdrawal].)

But in the gang war between the Nip Family and the Cheap Boys as described by Detective Nye, there was no express or implied agreement to meet for combat. Rather, there was a series of sporadic assaults by a small fraction of one gang against one or more members of the other. An individual gang member who has not participated in the violence, or is no longer participating, or is drifting away from the gang or rejects the gang's asserted policies,[99] cannot convey withdrawal by being absent from one of the assaults. In fact, there is no behavior by which such a gang member can express withdrawal. If he approaches a rival member with the good faith intent of expressing his desire to withdraw, he would be taking his life in his hands because (according to Detective Nye's testimony) the rival would try to shoot him on sight.

Moreover, even if he could communicate his withdrawal to one rival gang member, that would not be sufficient. For, under the prosecutor's mutual combat theory, ***every*** member of the rival gang is deemed to be the individual's "mutual combatant." And those rivals are far too numerous and far too geographically scattered to be notified.[100]

---

[99] As noted earlier, "men in adhering to [an] organization notoriously do not subscribe unqualifiedly to all of its . . . asserted principles." (*United States v. Brown*, *supra*, 381 U.S. at pp. 455-456.)

[100] The Nip Family and Cheap Boys each had approximately 50 members living across a wide area. (See 16 RT 3178, 3218, 3180-3181.) Other gangs, of course, are bigger, sometimes considerably so. (See, e.g., *In re Jaime P.* (2006) 40 Cal.4th 128, 131 [150-200 gang members]; *People v. Jones* (2007) 157 Cal.App.4th 580, 585 [200 members], *People v. Rocquemore* (2005) 131 Cal.App.4th 11, 17 [800-1,000 members],

(continued...)

The upshot is that it is impossible for a member of one gang who no longer wishes to participate in the war, or who never sought to participate in the first place, to withdraw from the combat. If there is no way to withdraw, then the combat cannot be deemed to be "mutual" combat in any meaningful sense of the term.[101]

There is further absurdity. A rule that a gang war forfeits each side's right to self-defense vis a vis the other would plainly not deprive a gang member of the right to use self-defense against a deadly aggressor who is not a member of the rival gang. A prohibition against self-defense in a gang war would mean, then, that members of a rival warring gang are given a legal advantage that non-rivals would not be: the force of law would require submission to death at their hands. That cannot be the case.[102]

---

[100](...continued)
People ex rel. Totten v. Colonia Chiques (2007) 156 Cal.App.4th 31, 36 [1,000 members].) This problem is compounded by the fact that, as "[l]eading gang researchers have repeatedly stressed," gangs have "especially fluid membership." (Wright, *The Constitutional Failure of Gang Databases* (2004), 2 Stan. J. Civ. Rts. & Civ. Liberties 115, 127.)

[101] The fact that a gang member did not participate in the attack for which the rival gang seeks to retaliate is irrelevant in the type of gang war described by the evidence. As Detective Nye testified, gang retaliation did not focus on the person who had aggressed against them. Any member of the opposing gang was a proper target for retaliation. (16 RT 3188-3189.)

[102] "[T]he law can not for a moment tolerate the execution of vengeance by private parties. If this were allowed, such passions might be as effectually aroused by words as blows; and, instead of the principle, so vital to the peace of society, that the law alone must be relied upon for the redress of all injuries, we should have avengers of injuries, real or supposed, executing their punishments upon victims stripped of all legal
(continued...)

The fact is that the "mutual combat" doctrine is an ill fit for the type of gang war that Detective Nye described and that is shown by the other evidence in this case. It not only distorts the meaning of the words "mutual" combat, but it deprives even the unwilling or repentant gang members of their right to preserve their lives. The mutual combat doctrine cannot be applied to a gang war of the sort portrayed by the evidence here.

(2) Uncertainty, Vagueness, And Overbreadth

But this is not the end of the problems with the prosecutor's gang-war theory of mutual combat. That theory is also utterly indeterminate on key elements.

Consider, for example, the fact that, as Detective Nye admitted, gang members sometimes commit crimes for reasons unrelated to their gang membership. (17 RT 3218.) Presumably, under the prosecution's theory, when one gang member assaults a member of a rival gang for purely personal reasons, that would not be classified as "mutual combat," and the assailed person would be entitled to use self-defense. But as the aggressor is coming toward him, how is the intended victim to know whether the would-be assailant is acting for personal reasons (and thus, that he — the victim — may defend himself) or for gang-related reasons (and thus that self-defense is forbidden)? And is it the deceased aggressor's *actual* motivation that is determinative, or does the intended target's *belief* control? And if the latter, is the target's belief subjected to a test for

---

[102](...continued)
power, whatever might be the necessity of defending their own lives. It is needless to say, that such a course would be alike destructive to public order and private security, and would be substituting for the empire of the laws, a system of force and violence." (*Stoffer v. State* (Oh. 1864) 15 Ohio St. 47, 52-53 1864 WL 6.)

reasonableness, or is it sufficient that he harbors the belief in good faith? Nothing in the law begins to answer these questions.

Or, what if the would-be victim did not recognize his assailant, either because he did not know him, or because he could not see his face due to poor lighting or a mask, or because he was focusing on the gun aimed at him? Is he deprived of his right to self-defense if it later turns out the assailant was in fact a member of a rival gang, but not deprived if the assailant wasn't? Is it a matter of strict liability? (Cf. 22 RT 4246 [appellant testifies that he did not recognize his assailant].)

Or, what if the endangered person believed the assailant was ***not*** a member of a rival gang? Would he go free if his belief is later found to have been correct but go to prison or death row if he is found to have been wrong?

Conversely, what if the intended victim thought the assailant ***was*** a member of a rival gang, but the assailant actually did ***not*** belong to the gang? Justifiable homicide?

Tellingly, when the defense sought to be provided with photographs of the members of the Cheap Boys and Southside Scissors gangs, the prosecutor strenuously (and successfully) opposed that request on the ground that it was "impossible to determine specifically what definition of gang members they want the court to order us to provide." (See 2 RT 298; 1 CT 378.) If it is "impossible" to define a Cheap Boy "gang member" so that a prosecutor's office can comply with discovery during relatively unhurried court proceedings, then it must also be "impossible" for a legally untrained individual acting under the stress of impending death to make that determination.

Or, what if the targeted individual did not know which gang the assailant was from? Is he entitled to defend himself, or does it depend upon facts unknown to him, namely, the actual gang membership of the assailant? (Cf. RT 4246 [appellant testifies he did not know what gang the unknown armed man approaching his car belonged to].)[103]

As can be seen, the entire concept of using a pre-existing gang war to substitute for mutuality in the actual fatal encounter raises many unanswered and unanswerable questions. Given such critical uncertainties, it is inconceivable that this type of gang war was incorporated into the mutual combat doctrine when it was enacted by the Legislature.

Moreover, any other conclusion would render the "mutual combat" exception unconstitutionally vague. It is established that a law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.) The prosecutor's

---

[103] Or, what if the assailed person did not believe the gangs were actually at war? Would his right to self-defense depend upon whether there actually was a war when attacked by a rival? What if the gang war had started just a short time earlier, and the intended victim had not yet learned of its outbreak?

And just what is a gang war? Does one shooting by each side make a gang war, such that every encounter thereafter is mutual combat and all right to self-defense is lost by all members of both gangs? Two shootings by each side? Are beatings the same as shootings? Would conflicts begun by reciprocal beatings deprive a gang member of the right to defend himself when attacked by a rival who is using a gun? And when would the gang war be over? If two months had gone by with no attempt by either side to attack the other, would the "gang war" theory of mutual combat still apply to an assault by one gang member against a rival? What if four months had gone by? Six months? Nine months? A year?

interpretation of mutual combat is vague both on its face and as applied to appellant. It is not sufficiently definite to provide either adequate notice of the conduct proscribed or adequate guidelines so as to prevent arbitrary and discriminatory enforcement. (*Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, *Bouie v. City of Columbia* (1964) 378 U.S. 347; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, *Hale v. Morgan* (1978) 22 Cal.3d 388.) It does not give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) It also "encourage[s] arbitrary and discriminatory enforcement" by local prosecuting officials, against particular groups deemed to merit their displeasure. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357, 360.)[104]

At a minimum, there is a sufficient specter of constitutional problem as to reinforce the application of the canon of constitutional avoidance. This Court must render the mutual conduct statute "free from doubt as to its constitutionality, even [if] [some] other construction [were] equally reasonable." (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 513.)

Moreover, inasmuch as this gang-war theory infringes upon the constitutional right to self-defense and to equal protection, this gang-war theory of mutual combat is unconstitutionally overbroad. (*Simon &*

---

[104] It is noteworthy that "where a statute imposes criminal penalties, the standard of certainty is higher" than in other situations. (*Kohlender*, *id.*, at p. 358 fn. 8.) Here, the standard of certainty should be at its most strict because the decision whether self-defense is allowed must be made instantly, without warning, and at peril of immediate death or severe criminal sanction.

Schuster v. Members of the New York State Crime Victims Board (1991) 502 U.S. 105, *Village of Hoffman Estates v. Flipside*, *supra*, 455 U.S. 489, *Grayned v. City of Rockford* (1972) 408 U.S. 104, *NAACP v. Alabama* (1964) 377 U.S. 288.)[105]

Finally, extending the "mutual combat" doctrine to appellant's case would also violate Due Process because it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in question." (*Bouie v. City of Columbia*, *supra*, 378 U.S. at p. 354, internal quotation marks omitted.)

If our society is to undertake the task of redefining mutual combat to encompass gang wars of this type, with nothing in the case law or common law to serve as guideposts, it must be the Legislature that does so, not a court or an individual prosecutor acting ad hoc. (Cf. *People v. Chun*, *supra*, 45 Cal.4th at p. 1183 ["there are no nonstatutory crimes in this state"].)

d. <u>In Sum</u>

There are, then, four separate and independent reasons why the "mutual combat" doctrine cannot be used to defeat appellant's right to

---

[105] In *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th 1069, this Court "assume[d] arguendo that the overbreadth doctrine may be applied outside the First Amendment context." (*Id.* at p. 1095 fn. 15.) It contrasted one United States Supreme Court decision that stated that "'outside the limited First Amendment context, a criminal statute may not be attacked as overbroad'" with a second decision that "suggest[ed] that this limitation is not invariably observed." (*Ibid.*, quoting *Schall v. Martin* (1984) 467 U.S. 253, 268 fn. 18 and citing *Kolender v. Lawson*, *supra*, 461 U.S. at pp. 358-359, fn. 8.) While most overbreadth cases do involve First Amendment rights, the *Schall* quotation was obvious dictum, since the case involved only First Amendment overbreadth.

defend his life at the last moment against the immediate, lethal, matter-of-survival threat that Tuan Pham posed:

- the crucial testimony from Detective Nye that underlies the mutual-combat exception was "inherently improbable or incredible," "wholly unacceptable to reasonable minds," and "so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe [it] beyond a reasonable doubt" (Subsection a, AOB 136 et seq., *ante*);
- even if that testimony were credited, appellant's act of responding at the last possible moment to Tuan Pham's surprise attack does not fit the definition of "mutual combat," however that term may apply to gang warfare in general or to the type of gang war depicted by the evidence in this case (Subsection b, AOB 141 et seq., *ante*);
- the theory of mutual combat applied to the gang war shown by the evidence here does not accord with the concept of "mutual combat" as enacted into the statute and is also of such uncertain scope and is so overbroad as to violate Due Process (Subsection c, AOB 146 et seq., *ante*); and
- at the very least, the second and third reasons just mentioned raise "'serious and doubtful constitutional questions'"[106] and thus invoke the "canon of constitutional avoidance,"[107] and the language and circumstances of section 197 permit the

---

[106] *People v. Superior Court*, *supra*, 13 Cal.4th at pages 509, 513, quoting *Miller v. Municipal Court*, *supra*, 22 Cal.2d at page 828.

[107] *Harris v. United States*, *supra*, 536 U.S. at page 555.

phrase "mutual combat" to be interpreted so as to exclude a deadly surprise attack penal statute and/or a gang war of the sort shown here.[108]

For each of these reasons, the "mutual combat" doctrine cannot justify the jury's rejection of self-defense in this case.

ii. Legal Theory #2: The "Initial Aggressor" Theory

A second legal theory that may be proposed as a basis for rejecting self-defense was the theory that appellant was the "initial aggressor." As the jury was instructed at appellant's trial, the law of California provides that

> "The right of self-defense is only available to a person who initiated an assault if he has done all of the following: one, he has tried in good faith to refuse to continue fighting; two he has clearly informed his opponent that he wants to stop fighting; and, three, he has clearly informed his opponent that he has stopped fighting. After he has done these three things he has the right to self-defense if his opponent continues to fight."

(27 RT 5285, 3 CT 1057. See former CALJIC No. 5.54.)

The purported applicability of this theory to Counts 13 and 14 was urged by the prosecutor in her argument to the jury. Appellant was an initial aggressor, she said, because he "actually initiated the war" between the Nip Family and Cheap Boys gangs. (26 RT 4978.) "He has done the killings," she continued, and "[a]nybody in that gang world knows that there's going to be retaliations." (*Ibid.*)

---

[108] *People v. Franklin, supra*, 20 Cal.4th at page 253. Accord, *Keeler v. Superior Court, supra*, 2 Cal.3d at page 631.

Contrary to the prosecutor's contention, the "initial aggressor" principles are inapplicable to Counts 13 and 14. This is so for at least two separate reasons.

a. Appellant Did Not "Actually Initiate the War"

The prosecutor's claim that appellant was an "initial aggressor" because he "actually initiated the war" between the Nip Family and Cheap Boys gangs was simply wrong. Appellant did not start the gang war. That war had begun in April 1993. (13 RT 2516.) It had involved a shooting in front of an establishment known as the Can Restaurant. (10 RT 1906.) Appellant's first offense against a Cheap Boy gang member occurred (if at all) nearly two years later, on February 5, 1995, with the killing of Sang Nguyen. Appellant did not "actually initiate the war."[109]

---

[109] Appellant was convicted of having participated in two shootings prior to the killing of Sang Nguyen, namely, the attempted murders of Tony Nguyen on July 21, 1994, and of Huy (PeeWee) Nguyen on November 24, 1994. Both shootings occurred well after the gang war had begun, and neither Tony nor PeeWee were Cheap Boys, so these shootings could not have "actually initiated the war" between the Nip Family and the Cheap Boys. Furthermore (and assuming for current purposes that appellant was correctly identified as the person involved in each incident), appellant was merely the back seat passenger in the car from which the shots that hit Tony were fired, and PeeWee was himself the initial aggressor in the incident in which he ended up being shot. Neither incident shows appellant starting a gang war of any sort, let alone the gang war with Tuan Pham's gang, the Cheap Boys. (See summary of each incident in our Statement of Facts, *ante*, pp. 9-15 [Tony Nguyen] and 15-23 [Huy Nguyen].)

b. The Shootings of Sang Nguyen and Khoi Huynh in February and March of 1995 Did Not Make Appellant an "Initial Aggressor" with Respect to the Shooting of Tuan Pham in May of That Same Year

The prosecutor alternatively argued to the jury, and respondent may contend here on appeal, that even if appellant did not start the gang war, his (alleged) actions in shooting Cheap Boys gang members Sang Nguyen on February 5, 1995, and Khoi Huynh on March 11, 1995, gave appellant an "initial aggressor" status that remained in effect two to three months later, when Tuan Pham was killed (May 6, 1995). (26 RT 4978 [prosecutor states that appellant "can't claim self-defense" because he "initiated the war," he "has done the killings," and "[a]nybody in that gang world knows that there's going to be retaliations."].)

But it would be — and was — a plain distortion of the "initial aggressor" doctrine to apply it to the shooting of Tuan Pham. Under both case law and common sense, the doctrine is inapplicable to aggression that occurred in the distinct past and that is creating no immediate danger to the person who seeks to retaliate. Nor does the doctrine apply to a clash that does not involve the victim of the "initial" aggression, i.e., where the "initial" victim is neither present nor in immediate danger at the time of the clash.

An examination of the case law over the last 120 years shows these points with unmistakable clarity. Consider, for example, *People v. Robertson* (1885) 67 Cal. 646, 650-651. There, the defendant had become embroiled in a heated argument with a store owner, who knocked the defendant down with an iron stick but did not pursue the assault further. The defendant then arose and turned upon the store owner, who again used

the iron stick on the defendant, in response to which the defendant stabbed him. At the defendant's trial for murder, the jury was instructed that self-defense was not available if, after the owner's initial use of the stick, "the affray then ceased for a sufficient length of time for reason to have resumed its sway, and the defendant had sufficient time to realize the situation." (*Ibid.*) On appeal, this Court held the instruction was proper because "it does appear that when the defendant fell on the porch [the store owner] did not continue the assault upon him [and] there was therefore a pause in the combat." (*Id.* at p. 651.) In short, the "pause in the combat" caused the store owner to lose his status as initial aggressor.

Even more on point is *People v. Baldocchi* (1909) 10 Cal.App. 42, 46. In *Baldocchi*, the defendant was a boarder in a home belonging to a Mr. and Mrs. Gonelli. One night, Mrs. Gonelli brought something to the defendant's room, and he hit her. Thereafter, another boarder went into defendant's room and hit him. The two men were separated, but the defendant shortly retrieved a gun and pursued and killed his assailant. Convicted of murder, the defendant argued on appeal that the instructions erroneously eliminated his right to self-defense again the man who had hit him and who had been the initial aggressor. The Court rejected the argument.

> "To hold that the deceased was in any sense an aggressor would be a gross distortion of the facts. It is true that in the first altercation, when deceased assaulted defendant to avenge the insult to Mrs. [Gonelli], deceased was the aggressor. But *that affair had ended*, deceased was *no longer an aggressor*, and defendant had ample time to cool his blood. If it can be brought into the question at all, it tends to furnish the probable motive of the killing as having been in retaliation for the assault by deceased, who had *ceased to be the aggressor.*"

(*Ibid.*)

Finally, consider *People v. Randle*, *supra*, 35 Cal.4th 987, 1002. There, the defendant and a companion were burglarizing a car when they were interrupted by one Robinson, who apparently was a friend of the car's owner. The defendant fired a shot at Robinson, and then defendant and his companion fled. Not long thereafter, Robinson and the car's owner caught the companion and began to beat him. Defendant came upon the scene and told Robinson and the owner to stop the beating, and then the defendant fired a shot, killing Robinson.

At defendant's subsequent trial for murder, the defense requested that the jury be instructed on voluntary manslaughter based on imperfect defense of others (i.e., defense of defendant's accomplice), but the instruction was refused. On appeal, this Court held that the failure to give the instruction on imperfect defense of others amounted to reversible error.

In support of the refusal of the instruction, the Attorney General argued that the defendant was not entitled to invoke imperfect defense of others because he had created the circumstances leading to the killing by initiating an assault on Robinson and committing a felony. This Court rejected the argument. "[A]lthough defendant's criminal conduct [including firing the first shot] certainly set in motion the series of events that led to the fatal shooting of Robinson, the retreat of defendant and [his accomplice] and the subsequent recovery of the stolen equipment from [the accomplice] extinguished the legal justification for Robinson's attack on [the accomplice]." (35 Cal.4th at p. 1002.) Again, although an individual had been the initial aggressor, his retreat from the scene of the aggression effectively extinguished his status as an initial aggressor, and his right to exercise defensive force was restored.

If initial aggressor status is lost by a "pause" by the initial aggressor (*Robertson*), by the separating of the initial aggressor from the assailed person (*Baldocchi*), and by initial aggressor's retreat from the scene of the initial aggression (*Randle*), then appellant in the present case cannot be deemed to have been an initial aggressor on May 6, 1995, based on the (alleged) fact that he had been an initial aggressor on *separate days as many as three months* earlier, against entirely *different persons* and at entirely *different locations*.

The fact is that the "initial aggressor" doctrine "appl[ies] to the circumstances and situation of *the deceased* and defendant *at the time the killing occurred*, and under which he asserts that he was justified in taking the life of deceased." (*People v. Glover* (1903) 141 Cal. 233, 242.) Such circumstances did not exist here. What we have instead is a situation in which Tuan Pham was attempting to "tak[e] the law into his own hands, meting out the punishment he thought [appellant] deserved" (*Randle*, *supra*, 35 Cal.4th at p. 1002.) But, as one court wrote nearly 150 years ago, "the law can not for a moment tolerate the execution of vengeance by private parties." (*Stoffer v. State*, *supra*, 15 Ohio St. at p. 52.)

Even a victim of an initial assault "must not continue the combat for the purpose of wreaking vengeance." (*People v. Button*, *supra*, 106 Cal. at p. 634. See also *People v. Conkling* (1896) 111 Cal. 616, 626-627 [where initial aggressor "has desisted from his attempt and taken to flight, the right to pursue for the purpose of private defense ceases, as soon as, in the reasonable belief of the assailed, the danger has ceased to be immediate and impending."].) Certainly, then, someone who was *not* the victim of the initial assault and who acts long after that assault cannot "take the law into his own hands." And if he cannot take the law into his own hands, then the

target of his unjustifiable assault cannot be deemed to be required to forfeit his life to that assault by virtue of the "initial aggressor" doctrine.[110]

iii. Legal Theory #3: The "Seeks A Quarrel" Theory

A third theory that respondent may offer as a basis for rejecting self-defense was the "seeks a quarrel" theory embodied in former CALJIC No. 5.55, sometimes referred to as the "contrived self-defense" theory. As the jury was instructed in appellant's case, "The right of self-defense is not available to a person who seeks a quarrel with intent to create a real or apparent necessity of exercising self-defense." (27 RT 5285-5286.) The prosecutor expressly urged that this doctrine barred appellant's reliance on self-defense.[111] However, under no proper view of the "seeks a quarrel" doctrine did appellant "seek a quarrel" with Tuan Pham.

---

[110] Should there be any doubt about the matter, they must be resolved in appellant's favor under the doctrine of lenity in construing criminal statutes and the canon of constitutional avoidance, discussed earlier. In addition, extension of the "initial aggressor" doctrine to appellant's case would also violate Due Process. (*Bouie v. City of Columbia*, *supra*, 378 U.S. 347.)

[111] In her argument to the jury, the prosecutor said, "Another important issue on self-defense in a gang case is, the right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense. In other words, it's not available in the gang situation where both sides are actively at war, both sides are actively seeking out the other to fight, to go into battle. [¶] Neither side, for instance, the May 6th, 1995 incident at Brookhurst and Westminster [Tuan Phan shooting], neither side can step back and say 'self-defense.'" (26 RT 4977-4978.)

As noted earlier, the prosecution adduced opinion testimony from its gang expert, Detective Nye, that implied that appellant must have been on the hunt for Cheap Boys on May 6, 1995, because every member of the Nip Family and Cheap Boys gangs was always hunting for rivals to shoot whenever he went out. But this testimony fails to justify the use of the "seeks a quarrel" doctrine for several independent reasons.

First, that testimony was simply not credit-worthy, as we have discussed. (See Subsection D.i.a, AOB 136 et seq., *ante*.)

Second, and in any event, the concept of (supposed) hunting for rivals to shoot does not equate with "seeking a quarrel with intent to create a real or apparent necessity of exercising self-defense." Even accepting Detective Nye's testimony at face value, appellant was not seeking any "quarrel" in any recognized sense of the term, let alone was he seeking a quarrel contrived with the intent to create an opportunity to use self-defense. It is true that, according to Detective Nye's testimony, Nip Family members were seeking an *opportunity* to shoot Cheap Boys on sight, but seeking an *opportunity* to shoot someone is not the same thing as seeking a *quarrel* with the person, and certainly not a quarrel *with the ulterior motive of creating a need for self-defense*. Quite the contrary, with the decision to shoot having already been made (according to Nye), it would be counterproductive to "seek a quarrel" with "intent to create a real or apparent necessity of exercising self-defense" since the very act of seeking such a quarrel would, by definition, cause the intended victim to believe his life was in danger and thus would give him an increased chance of defending himself and of thwarting the planned killing. Thus, Nye's very description of the gang war undermines the "seeks a quarrel" theory.

Finally, and independent of the preceding two points, this Court explained more than 100 years ago that the principles of the "seek a quarrel" doctrine "apply to the circumstances and situation of *the deceased* and defendant *at the time the killing occurred*, and under which he asserts that he was justified in taking the life of deceased." (*People v. Glover*, *supra*, 141 Cal. at p. 242.) Thus, in all of the "seeks a quarrel" case law of which appellant is aware, there was at least some evidence that the killer actually quarreled or sought a quarrel with the person who ended up being shot, and virtually always on the same occasion as the shooting. The doctrine certainly has never been applied against the victim of a surprise attack that was initiated by a person he had never met before, let alone by a person he had never actually "quarreled" with. A quarrel may arise quickly, or on the spur of the moment, but it has to actually occur at some point.

In short, then, any attempt to fit the facts of this case within the "seeks a quarrel" theory is (and was) unsupported by credible evidence, was a distortion of the doctrine's very words, and is contradicted by the case law. The theory did not forbid appellant from using self-defense to preserve his life when Tuan Pham came gunning for him.[112]

---

[112] As before, any doubt about the matter must be resolved in appellant's favor under the doctrine of lenity in construing criminal statutes and the canon of constitutional avoidance, and the extension of the "seeks a quarrel" doctrine to appellant's case would also violate Due Process under *Bouie v. City of Columbia*, *supra*, 378 U.S. 347.

iv. Legal Theory #4: The "Decent Person" Theory

It is well understood that "California maintains a single standard for all defendants who claim they acted in self-defense." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1100 (conc. opn. of Brown, J.)[113] Accord, *People v. Romero* (1999) 69 Cal.App.4th 846, 854 ["No authority or case law has been cited which supports a separate [self-defense] standard" for specific groups].)

Notwithstanding the clarity of the law, the prosecutor exploited language in the jury instructions so as to suggest that self-defense principles applies only to "decent," "reasonable," and "basically good" people and not to gang members. In fact, this was a permeating theme of her argument to the jury.

The "decent person" theme first appeared when the prosecutor was discussing voluntary manslaughter, an included offense of the murder charge in Count 13. The jury instructions stated that voluntary manslaughter was an intentional killing upon sudden quarrel or heat of passion. (27 RT 5263, 3 CT 1014; CALJIC No. 8.40.) The instructions further explained that to reduce an intentional killing from murder to manslaughter, the heat of passion "must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances" and that a defendant "is not permitted to set up his

---

[113] Justice Brown's opinion, although not the opinion of the Court, did garner four votes on this point: hers, those of two justices who signed onto her opinion (Chief Justice George and Justice Baxter), and that of Justice Werdegar, who filed her own concurring opinion explaining that she joined the reasoning of Justice Brown's opinion except on one point not relevant to the present citation. (See *Humphrey*, 13 Cal.4th at p. 1092 (conc. opn. of Werdegar, J.).)

own standard of conduct" in this regard. (27 RT 5265, 3 CT 1016; CALJIC No. 8.42.) Thereafter, the voluntary manslaughter instructions continued to emphasize the standard of "the ordinarily reasonable person," "the ordinarily reasonable person of average disposition," and "the average or ordinarily reasonable person." (27 RT 5265, 5267, 3 CT 1017, 1019.)

Leveraging off these instructions, the prosecutor argued that voluntary manslaughter was a "specific" and "very limited" "exception" for "good, decent people" as opposed to "an ordinary or reasonable gang member." Her argument went on in this vein at some length.

> "Now, there are some situations that the Legislature said that *an ordinary, decent, reasonable person, basically a good person*, could want to kill, and actually kill. Those are situations where there is so much feeling in the person, that they're overwhelmed, their head is overwhelmed for a few minutes and they decide to kill. But the Legislature says you know what, in those circumstances, *a good, decent person* would intend to kill. And we're not going to put those people in the same category as somebody of first degree murder.
>
> "An example would be [if a neighbor molested one's child]. The rage within you and the shock and the feelings could overwhelm *a decent, ordinary person* in that unique situation to want to for a few minutes, kill. [¶] And the instructions limit it very specifically. If you've had a cooling off period or time to cool off, the law does not permit you to fall into this lower category. The law also does not permit somebody to set up their own standards, or their own feelings. Like it's *not an ordinary or reasonable gang member*, in that situation, would be overwhelmed by feelings. Because it's *a specific exception for good, decent people* that would be overwhelmed at that particular moment. [¶] And even though they're *good, decent people*, at that moment they would kill and try to kill, and actually succeed in killing – or nearly succeed. So, attempted voluntary manslaughter would be the same as attempted manslaughter, only, of course, the victim survives. But it's *very limited situations*."

(26 RT 4961-4962.)

The prosecutor made these same points again, later on. Still speaking of voluntary manslaughter, she hypothesized a husband finding his wife in bed with his best friend.

> "That, again, is a situation that could be so overwhelming to just overcome your rational thought with passion. Even for *a decent, ordinary person*. That at that moment there could be a desire to kill, an actual intent to kill. [¶] And the Legislature says that when *a decent, ordinary person* is put in a position like that, whereas a group of 12 of you would agree together that a reasonable person would respond in that way, killing somebody with the intent to kill, but *an ordinary person* would respond that way in that particular situation, then again we would come down and give the benefit of that exception to the person, and that would be voluntary manslaughter. [¶] When you look at that instruction you'll see it specifically says an '*ordinary and reasonable person.*'"

(26 RT 4966.)[114]

When she later discussed the attempted murder charges, the prosecutor again contrasted gang members with "decent persons." She

---

[114] The prosecutor continued with a further example, positing a situation in which someone insults a bully's mother to the bully's face, and the bully is "overwhelmed by passion" and kills:

> "A *decent, reasonable, ordinary person* would not kill based on that statement. He might be angry, he might be upset, but he wouldn't kill, based on that statement. And that example would not fit into a voluntary manslaughter. [¶] A gang member comes in and says well, I saw my enemy standing there, and they mad-dogged me, stared at me, so I pulled the gun and shot him and killed him. Again, gang members can't set up their own standard here. Somebody stares at *the average, decent, reasonable person*, you're not going to respond by shooting and killing that person."

(26 RT 4966-4967.)

referred to Detective Nye's testimony that gang members "think about killing the rivals all the time" and argued that the decision to kill would a "quicker decision for them that it would be for a decent person." (26 RT 4972.) And, she would later add, "it is hard for us, as decent people" and "ordinary people" to understand this gang attitude. (27 RT 5169.)

The prosecutor's claimed distinction between gang members and "ordinary and reasonable," "decent" persons was directly carried over to the self-defense issues. The self-defense instructions contained numerous references to a "reasonable person," but, the prosecutor told the jury, it was the same "reasonable person" concept that she had already discussed: "Again it's the reasonable person standard." (26 RT 2475.) The reference was, of course, to her earlier discussions of the "reasonable person" standard in the context of voluntary manslaughter and attempted murder, where she had indicated that the standard applied to "decent," "reasonable," and "basically good" persons and not to gang members.

And the self-defense instructions seemed to corroborate the prosecutor on this point. For, some of the instructions were worded so as to indicate that a defendant must himself be a reasonable person in order to invoke self-defense. Thus, one instruction told the jury that the imminence of the danger must "appear at the time *to the slayer as a reasonable person.*" (27 RT 5281-5282, 3 CT 1048; CALJIC No. 5.12.) Another instruction explained that a person may defend himself "if, *as a reasonable person,* he has grounds" for believing himself in danger. (27 RT 5282-5283, 3 CT 1051; CALJIC No. 5.30.) And perhaps the most explicit instruction on the point was this one: "If one is confronted by the appearance of danger which arouses *in his mind as a reasonable person an actual belief* and fear that he is about to suffer bodily injury *and if a*

reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger," then self-defense would be available if he acted on the basis of those fears. (27 RT 5284, 3 CT 1054, CALJIC No. 5.51.) This instruction indicated *both* that the defendant had to be "a reasonable person" *and* that his fears had be those that a "reasonable person" would share.

Together, the prosecutor's argument and the instructions authorized the jury to reject appellant's claim of self-defense on the impermissible basis that appellant was a gang member and was not the type of decent, reasonable person to whom the doctrine of self-defense was applicable on May 6, 1995. This was not the law, and would in fact violate the constitutional right to self-defense, and is not a valid basis for upholding the jury's verdicts here.[115]

v. Legal Theory #5: The "Emotional Reaction" Theory

a. The Law Does Not Require a Fearful Emotional Reaction in Order to Lawfully Defend Oneself

Another non-existent theory that the prosecutor proffered below as a basis for rejecting appellant's claim of self-defense was what could be called the "emotional reaction" theory. According to this purported theory, self-defense was not available unless the defendant not only reasonably

---

[115] As we will discuss later (see Section 3.A, pp. 202 et seq., *post*), these problems might have been alleviated if the trial court had not rejected a defense request that the jury be instructed that "[t]he law of self defense applies equally to all persons, regardless of whether he or she is a member of a criminal street gang." (See 3 CT 954, 25 RT 4872.)

believed he was in imminent danger but also *had an emotional reaction of fear to* the danger. The latter half of this understanding, which has no basis in law, was suggested by the instructions and explicitly relied on by the prosecutor.

Again, as with the "decent person" theory, the instructions were worded so as to be capable of being understood that a defendant must have an emotional reaction of "fear" in addition to a "belief" in imminent danger. One instruction explained that self-defense required circumstances "such as would *excite the fears* of a reasonable person." (27 RT 5281, 3 CT 1047.) Subsequently, another instruction told the jury that self-defense applies if (among other things) the appearance of danger "arouses in [a defendant's] mind as a reasonable person an actual belief *and fear* that he is about to suffer bodily injury" and if the defendant "acts in self-defense upon these appearances and from *that fear and* actual beliefs." (27 RT 5284, 3 CT 1054.) Thus, the instructions indicated that a defendant had to have his fear "excited" and that such a fearful state of excitement was different from, and had to exist in addition to, "an actual belief" in imminent danger ("an actual belief *and* fear" and "fear *and* actual beliefs").

The instructions' language about a fearful emotional reaction was exploited by the prosecutor in her argument to the jury. She quoted the "excite the fears" language and then told the jury that the issue was whether a "reasonable person in this situation would react *so overcome with emotion*, that they may kill." (26 RT 4875.) She thereafter discussed how, based on appellant's purported act of smiling at witness Robert Murray just before Tuan Pham arrived at his car,[116] appellant acted without fearful

---

[116] As previously noted, for purposes of the present argument (continued...)

emotion but with "self-confidence." "That's not a person acting in self-defense," she said. (26 RT 4978.)

There is no requirement in the law that, in order to invoke self-defense, the endangered person must have an emotionally fearful reaction, or that he may not defend himself calmly and without panic or a display of terror. Quite the contrary, "if [a defendant] acts in proper self-defense, he does not lose the defense [even if] he enjoys using force upon his adversary because he hates him." (2 LaFave, Substantive Criminal Law (2d ed. 2003) § 10.4(c), pp. 149-150.) The prosecutor's theory that appellant was not acting in self-defense because he was not "so overcome with emotion" but acted with "self-confidence" was flat wrong. To accept that theory would also violate the constitutional right to self-defense.

b. Even If the "Emotional Reaction" Theory Existed, There Was No Valid Factual Support For It in This Case

Not only was the prosecutor's "emotional reaction" theory legally invalid, it was also flawed as a matter of fact. It is true that witness Murray testified that the Honda's driver[117] smiled in Murray's direction when he placed a gun on his chest (14 RT 2715), but the prosecutor's claim that the smile represented "self-confidence" and a lack of emotion (26 RT 4978)

---

[116](...continued)
appellant is assuming the accuracy and validity of the jury's apparent finding that appellant was the driver of the Honda and shot Tuan Pham.

[117] Mr. Murray did not identify appellant as the Honda driver, but as just noted, the jury concluded that appellant was the driver, and, for purposes of the present issue, appellant assumes that conclusion was accurate and valid.

was, at best, a culturally ignorant conclusion and cannot be used to support the verdicts here.[118]

Among Vietnamese, "[s]miling is a common facial expression, and guessing the meaning of the smile is almost impossible even for Vietnamese people."[119] For non-Vietnamese persons, "a smile [of a Vietnamese person] means little and cannot be read."[120] It "has been aptly described as the 'regional mask' worn to disguise the degree and nature of a problem, or even the fact that one exists."[121] "In contrast to the West, where a smile usually indicates happiness or amusement, in Vietnam it can mask embarrassment, anger, fear, anxiety or disagreement."[122] "Thus, contrary to the saying that the whole world smiles in the same language, the Vietnamese smile can convey a number of meanings and may conceal a variety of emotions."[123]

> "Smiling at all times and places are common characteristics of all Vietnamese. Vietnamese smile about almost everything and anything. It can be used as a polite screen to hide

---

[118] See also 27 RT 5183 (prosecutor asserts that the smile showed appellant was "looking forward to" killing Tuan Pham), 5215 (smile showed "pleasure" and "joy" and "look[ing] forward to killing again").

[119] Multicultural Disability Advocacy Association of NSW, Some Vietnamese Cultural Practices and their Implications for Service Providers, viewable on line at <http://www.mdaa.org.au/publications/ethnicity/vietnamese/culture.html> (as of Mar. 20, 2008).

[120] *Ibid.*

[121] Ashwill & Diep, Vietnam Today: A Guide to a Nation at a Crossroads (2005) Chapter 5 ("Core Cultural Dimensions"), pages 89-90.

[122] *Id.* at page 90.

[123] *Ibid.*

> confusion, ignorance, fea[r], contrition, shyness, bitterness, disappointment or anger. There are no guidelines to tell the meaning of each smile in each situation."[124]

As the United States Navy warned its chaplains working in Vietnam, "Do be prepared for the Vietnamese to smile or laugh at unexpected times. . . . The Vietnamese often smile when in doubt, confusion or embarrassment . . . ."[125] Or, as a Vietnamese company that offers assistance and training for foreign business travelers advises, "the smile often seems contextually inappropriate . . . . Remember that the Vietnamese smile may mean almost everything."[126]

In the present case, the prosecutor offered a Western interpretation of a behavior engaged in by a decidedly non-Westernized individual, a person who had not acculturated to the United States. (See, e.g., 29 RT 5707-5709 [testimony of Dr. Crinella].) In fact, the prosecutor would use appellant's failure to acculturate as a factor against him at the penalty phase of trial. (30 RT 5782-5784.) Nevertheless, at the guilt phase, the prosecutor tendered a plausible-sounding interpretation of appellant's act of smiling, but it was an interpretation that required, and would require of

---

[124] Workshop Report, The Vietnamese Community in South West Sydney (April 2003), citing Dept of Education & Youth Affairs, Cultural Background Paper - Vietnam, p. 14, and viewable at <http://www.mdaa.org.au/publications/ethnicity/vietnamese/project.html> (as of Mar. 20, 3008). Accord Vietnam First Expat Service <http://vnexpat.info/Experience-3.fes> (as of Mar. 29, 2007).

[125] U.S. Navy, The Religions of South Vietnam in Faith and Fact, US Navy, Bureau of Naval Personnel, Chaplains Division (1967) Appendix B ("Guidelines for Understanding") (capitalization omitted), viewable at <http://www.sacred-texts.com/asia/rsv/rsv40.htm> (as of Mar. 20, 2008).

[126] Vietnam First Expat Service, *ibid.*

this Court, utter cultural blindness. This Court cannot rely on it to sustain the verdicts in Counts 13 and 14.[127]

vi. Legal Theory #6: The "Multiple Motivation" Theory

The sixth and final theory that might be offered to support the rejection of self-defense in this case can reasonably be called the "multiple motivation" theory. This theory is premised upon certain language in Penal Code section 198, which was presented to the jury at appellant's trial via CALJIC No. 5.12. (See 27 RT 5281.)

Section 198 provides that a "bare fear" of death or great bodily injury "is not sufficient to justify [a killing as self-defense,] [b]ut the circumstances must be *sufficient to excite the fears of a reasonable person*, and the party killing must have acted under the influence of *such fears alone*." One possible reading of this language is that self-defense is available only if the defendant ("the party killing") acts *only* out of a reasonable fear of imminent deadly peril and that therefore the defendant loses his or her entitlement to invoke self-defense if he acts out of both a reasonable fear of imminent peril and some other motivation, such as anger, hostility, or hatred. A number of courts have assumed that this was the meaning of the statute, most notably and most recently *People v. Trevino* (1988) 200 Cal.App.3d 874.

---

[127] During voir dire, the prosecutor had herself noted that Vietnamese have interpersonal mannerisms that are culturally quite different in meaning from those of persons born and acculturated in this country, urging a prospective juror not to discount the credibility of a Vietnamese witness because he or she did not "look[] someone in the eye" the way a westernized witness might. (4 RT 651-652.)

However, there is another reasonable interpretation of section 198, and, as we will demonstrate, the legislative history of section 198 shows overwhelmingly that this other interpretation was the one that was intended by the Legislature when it enacted section 198 in 1872. None of the courts to have read section 198 as embodying the "dual motivation" bar to self-defense have been presented with or considered this legislative history. "An opinion is not authority for a point not raised, considered, or resolved therein." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57.)

As will be shown, the "such fears alone" clause of the statute was actually intended simply to make clear that self-defense is limited to those individuals whose fears of death or great bodily injury are objectively reasonable, i.e., "would excite the fears of a reasonable person". The language was meant to preclude a defense based on a purely personal, subjective "bare fear" of death or great bodily injury. It was not intended to enact an unprecedented and irrational "multiple motivation" bar to self-defense.[128]

a. Statutory History

California's first enactment concerning self-defense appeared in the Crimes and Punishment Act of 1850. (Stats. 1850, ch. 99.) Section 29 of the 1850 Act classified as "justifiable homicide" those killings "*in necessary self-defence, or in defence of* habitation, property, or *person*, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony . . . ." (Stats. 1850, ch. 99, p. 232, § 29.) The immediately following section (§ 30) then provided:

---

[128] Hereafter, to avoid excess verbiage, this brief will usually refer only to a fear or fears of "death," but such references should be understood to include fear of "great bodily injury," as well.

> "A bare fear of any of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, *and that the party killing really acted under the influence of those fears, and not in a spirit of revenge*."

(Stats.1850, c. 99, p. 232, § 30.)

The language of section 30 appears to have been taken nearly verbatim from a Georgia statute. (See *Howell v. State* (Ga. 1848) 5 Ga. 48, 1848 WL 1531 *4 [quoting Ga. statute].) By its plain terms, section 30 did not forbid an individual from claiming self-defense merely because he might have harbored other motivations in addition to a reasonable fear of death. Rather, it was sufficient that he "really acted under the influence of" a reasonable fear, regardless of any other motivation, so long as he did not act "in a spirit of revenge."

When the criminal laws of this State were codified in 1872, section 29 of the 1850 Act became a part of Penal Code section 197, and section 30 was the basis for Penal Code section 198 (the statute now at issue). As enacted, section 197 provided:

> "Homicide is also justifiable when committed by any person in either of the following cases:
>
> "1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
>
> "2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of

another for the purpose of offering violence to any person therein; or,

"3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

"4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace."

In turn, section 198 provided: "A bare fear of the commission of any of the offenses mentioned in Subdivisions 2 and 3 of the preceding section [§ 197] to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, *and the party killing must have acted under the influence of such fears alone*."

As a moment's reflection will show, these statutes were not carefully and artfully worded. As one example, consider that, as mentioned earlier, section 197 used the phrase "mortal" combat instead of "mutual" combat, an error that this Court noted in 1918 and that the Legislature thereafter corrected. (See *People v. Fowler*, *supra*, 178 Cal. at p. 671; Stats.1931, c. 697, p. 1439, § 1. See also *People v. Hatchett* (1944) 63 Cal.App.2d 144, 163 ["In the original code section the word 'mortal' was used, but, as stated

in *People v. Fowler*, 1918, 178 Cal. 657, 671, the word 'mutual' was no doubt intended, since it is mutual combat or combat entered into voluntarily, and not mortal combat, from which one must endeavor to withdraw before taking the life of his adversary. The section was amended in 1931 to state the true rule."].)

Or, as a further example, consider that, although section 197 allows lethal force to be used to resist *any* felony, this Court has rejected the "literal reading of the section" and concluded the statute allows such force to be used only against a "forcible and atrocious" felony. (*People v. Ceballos*, *supra*, 12 Cal.3d at pp. 477-478.)

Or consider that section 198 — which embodies the requirements that self-defense encompass both a good faith belief in the need to use lethal force and an objectively reasonable basis for that belief — makes these requirements applicable only to the "offenses mentioned in Subdivisions 2 and 3" of section 197. Thus, if section 198 were read literally, these requirements would be inapplicable to the situations that *Subdivision 1* purports to deal with, i.e., those where an individual is "resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person." Of course, no court has read section 198 in this literal way, nor should any do so. The point for present purposes is that "in a world of silk purses and pigs' ears" — to borrow from former Supreme Court Justice David Souter — sections 197 and 198 were most definitely "not a silk purse of the art of statutory drafting." (See *Lindh v. Murphy* (1997) 521 U.S. 320, 336.)[129]

---

[129] Other than the change from "mortal" combat to "mutual" combat in section 197, the two statutes have been amended only in minor, entirely non-substantive ways since 1872. (See Stats.1963, ch. 372, p.

(continued...)

b. Legislative Intent

For current purposes, the language at issue in section 198 is the final clause of the second sentence: ". . . and the party killing *must have acted under the influence of such fears alone*." This language represented a change from the wording of section 30 of the 1850 Act, the final clause of which had read: ". . . and that the party killing *really acted under the influence of those fears, and not in a spirit of revenge*."

The words "fears alone" or "such fears alone" in the 1872 statute were entirely new. They had not previously appeared in any state statute in the nation, nor in any court decision, at least not in the self-defense context. Nor had the words appeared in any of the well-known criminal law treatises, such as those of Blackstone, Hale, or Wharton. Neither had a court criticized the language of former section 30. Quite the contrary, as we will show, the commission that proposed the new language specified that the basis for the new language was former section 30 itself and a decision from this Court that applied section 30. And these citations provide a strong clue, along with others, as to what the intent was behind the new language: it was intended to restate existing law in language that some thought was more precise than that used in section 30. It was not intended to change the law of self-defense in any way, and certainly not to limit the availability of self-defense when invoked by a person who genuinely and reasonably believed his life was in danger. To help understand this, a little background is in order.

---

[129](...continued)
1159, § 2 [§ 197 is amended to substitute "in any" for "in either" in opening clause]; Stats.1987, ch. 828, § 8 [§ 198 is amended to substitute "Section 197" for "the preceding section"].)

For the first 20 years following statehood and the adoption of the 1850 Act that contained former section 30, California did not codify its statutory enactments. Thus, by the end of the 1860's, "those required to use the statutes of California were compelled to make their way among the eighteen volumes of session laws or to rely on Hittell's *General Laws* (through the 1863-64 session), together with the succeeding three volumes of sessions laws." (Kleps, *The Revision and Codification of California Statutes 1849-1953* (1954) 42 Cal. L.Rev. 766, 771 [hereafter, "Kleps"].) This state of affairs led to "continuous and mounting dissatisfaction." (*Ibid.*)

In 1870, the Legislature created the Code Commission to codify all the various statutory laws, including those related to criminal law.[130] The Commission's charge was substantively limited. It was directed to "correct verbal errors and omissions, and to suggest such improvements as will introduce precision and clearness into the wording of the statutes," and "to recommend all such enactments as shall, in the judgment of the Commission, be necessary to supply the defects of, and give completeness to, the existing legislation of the State." (Report of the Advisory Committee on the Penal Code (1872), 1st pg.) The Commission adhered assiduously to the limits imposed upon it, particularly with regard to the Penal Code. As the Legislature was advised prior to enactment of the

---

[130] According to Kleps, "[t]he commissioners appear to have referred to themselves as a 'Revision Commission' until after the adoption of the 1872 codes. Thereafter, their reports carry the 'Code Comission' title." (Kleps, *supra*, 42 Cal. L.Rev. at p. 772, fn. 23.) The term "Code Commissioners" is used in the modern cases. (See, e.g., *Casey v. Proctor* (1963) 59 Cal.2d 97, 108; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 817, fn. 10; *People v. Williams* (2001) 26 Cal.4th 779, 791.)

codifications, and as the Code Commissioners themselves acknowledged afterwards,

> "In the preparation of the Penal Code, the Commissioners have strictly followed the direction of the law. While many sections of existing laws have been redrawn to correct verbal errors and to give them precision and clearness, *their spirit and substance have in all cases been preserved.*"

(Report of the Advisory Committee on the Penal Code, *ibid*; Haymond & Burch, The Penal Code of California, Annotated (1872) p. vi.)

The assurance to the Legislature that existing law was not being changed substantively is reiterated throughout the legislative history of the new codes.

- "We *do not claim to have originated any general laws*, either defining or punishing crimes, but only to have collated from our own statutes, and from the most approved works of other states, the better portions thereof, and to have so systematized and arranged them as to accord and work well with each other." (Code Comm., (draft) Revised Laws of the State of California; in Four Codes: Political, Civil, Civil Procedure and Penal — Penal Code (1871) p. iv [hereafter, "Draft 2"].)[131]

- In the "Homicide" title of the proposed new Penal Code, "conciseness and conspicuity has been aimed at *rather than any change of the law* as it now exists." (First Report of the

---

131 The Code Commission lasted until 1874, past the initial codification of the Penal Code. (Kleps, 42 Cal. L.Rev. at pp. 772-779.) According to Kleps, "the 1870-74 Code Commission may have filed a formal report in 1871, but no copy has been found." (*Id.* at p. 774.) However, the Commission did issue two pre-1872 editions or drafts of the proposed Penal Code, one in 1870 and the second in 1871. "In the forewords and annotations to these proposed codes are to be found many comments by the commissioners which may well have served in lieu of any more extensive report. (*Id.* at pp. 774-775.) The reference to "Draft 2" in the text accompanying this footnote is to the 1871 draft of the Penal Code.

[Legislature's] Joint Committee to Examine the Code prepared by the Revision Commission (undated), p. 9.)

- "It must be borne in mind that *this Act does not provide for adoption of any new system of law, but simply reenacts the existing law*, with some few modifications, amendments, and additions." (*Id.* at p. 12, original emphasis.)

- "It [has] been the avowed object of the Commissioners when compiling the Codes *not to alter the existing laws*, except where apparent conflicts existed in, hardships were worked by, or serious inconvenience resulted from the workings of the old law." (Rep. of Code Comm. (Nov. 15, 1873) pp. 6-7, in 6 Appen. to Sen. & Assem. J. (20th Session 1874).)

These general assurances that "the spirit and substance have in all cases been preserved" were specifically echoed in connection with proposed Penal Code section 198. As mentioned in the preceding footnote, the Code Commissioners published two pre-1872 editions or drafts of their proposed Penal Code, and the language of section 198 was identical in both drafts and precisely reflected the language that was ultimately adopted.

In the first draft, the proposed statute — then designated Penal Code section 139 — was accompanied by an explanatory note that referred simply to "Statutes of 1850, p. 229. 32 Cal. 280." (See Code Comm., (draft) Revised Laws of the State of California in Three Codes: Political, Civil, and Penal — Penal Code (1870), § 139, p. 46.) The reference to "Statutes of 1850, p. 229" was to the initial page of the entire Crimes and Punishment Act of 1850. (See Stats. 1850, ch. 99, pp. 229 et seq.) The reference to "32 Cal. 280" was to *People v. Williams* (1867) 32 Cal. 280, which had upheld a trial court's decision to refuse to give a self-defense instruction proposed by the defendant. In toto, the *Williams* court said of the trial court's ruling:

> "This instruction was properly refused for two reasons — first, the rule upon the subject to which it was addressed *had already been stated by the Court in the precise language of the statute*, which it is difficult to improve (Act concerning crimes, Secs. 30 and 31); and second, because it misrepresents the law. It makes the bare fear of the defendant and not *the fears of a reasonable person*, under circumstances sufficient to excite them, the test of justification, and that, too, unaccompanied by the further and indispensable qualifications that *he acted under the influence of such fears and not in a spirit of revenge*."

(32 Cal. at pp. 285-286.)

Plainly, the Code Commission would not have cited the 1850 Act and a case reciting and praising the language of that Act if a substantive change in meaning had been intended by the change in wording.

This conclusion is confirmed by the Code Commissioners' note in the second draft, in which the "such fears alone" language was moved into proposed Penal Code section 198. (Draft 2, § 198, p. 51.) In this second draft, the Commissioners specifically cited section 30 of the 1850 Act (the section with the "not in a spirit of revenge" language) as the basis for the proposed new language. And this reference to former section 30 remained attached to section 198 when the Penal Code was first published later in 1872. (See Haymond, et al, Code Commissioners, Penal Code of California, Published under Authority of Law (1872) § 198, p. 56.)

Given the general assurances made to the Legislature that "the spirit and substance have in all cases been preserved" and the specific references to preexisting law as the basis for the proposed language that became Penal Code section 198, the legislative history shows very clearly that the change in wording in section 198 was not intended to work any substantive change in the law. (See *People v. Chun*, *supra*, 45 Cal.4th at p. 1187 [Code Commissioners' statements that the 1872 Penal Code "embodies the

material portions" of prior law "strongly indicates that the language change [in the 1872 Code] was not intended to change the law . . . ."].)

Then, what was the reason for the language change? A close consideration of the statute in light of the legislative history shows that the change was made simply to ensure that a defendant's subjective fear would not by itself be sufficient to justify a killing in self-defense and that the defendant's fear *also had to be a reasonable one.*

Recall that as enacted (and as it exists today), Penal Code section 198 provided (and still provides):

> "A bare fear [of great bodily injury], to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be *sufficient to excite the fears of a reasonable person*, and the party killing must have acted under the influence of *such fears alone.*"

In the statute, the phrase "such fears alone" plainly refers to "the fears of a reasonable person." Thus, the concluding clause of the statute provides that "the party killing must have acted under the influence of the fears of a reasonable person alone." And since we know from the legislative history that the 1872 change in wording was not intended to work any substantive change in the pre-existing law of self-defense, the true meaning of section 198 becomes apparent. The new wording was meant to make clear that only "fears" that meet the "reasonable person" test — i.e., "such fears alone" — are sufficient to justify a killing as self-defense. The statutory language was changed in 1872 to make crystal clear that an objective reasonable-person test must be satisfied and that a purely subjective "bare fear" of harm was insufficient. The Commissioners obviously felt that the objective requirement was not well stated in the 1850 statute, given section 30's concluding language "and not in a spirit of

revenge," which focused on the defendant's *subjective* state of mind and which the Commissioners eliminated from section 198.[132]

If further confirmation of this conclusion were necessary, it could be found in two separate places in the 1872 codification of this State's laws. For, at the same time as it enacted sections 197 and 198, the Legislature also enacted two other self-defense statutes, neither of which even arguably prevented an individual who has an actual and reasonable apprehension of grave danger from defending himself just because he might also harbor other motivations. Specifically, the Legislature enacted Penal Code section 693, which broadly provided that "[r]esistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his person . . . ." The Legislature also enacted Civil Code section 50, which similarly provided in broad terms that "[a]ny necessary force may be used to protect from wrongful injury the person or property of oneself . . . ." By their plain terms, neither section 693 nor Civil Code section 50 limited the use of "resistance" or "necessary force" to those who acted *only* out of self-defense.

It is a well-established principle of statutory construction that "provisions relating to the same subject matter must be harmonized to the extent possible." (See *Copley Press v. Superior Court* (2006) 39 Cal.4th 1272, 1299 fn. 22, internal quotation marks and citations omitted.) That principle is even more compelling when, as here, the various "provisions relating to the same subject matter" were all enacted at the same time.

---

[132] The new language of the statute was still somewhat awkward, but as we have seen in the preceding subsection of this brief, awkwardness in language appears in multiple respects in the self-defense provisions of sections 197 and 198.

Finally, it bears noting that appellant's reading of section 198 is consistent with how the law of self-defense is generally understood. As Professor LaFave states, "if [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself, as where he enjoys using force upon his adversary because he hates him." (2 LaFave, Substantive Criminal Law, *supra*, § 10.4(c), pp. 149-150.) Or, as one court put more than 100 years ago, "One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account. This principle is too plain to need amplification." (*Golden v. State* (1858) 25 Ga. 527, 1858 WL 1991 *5. Accord *Shafer v. State* (Ga. 1942) 20 S.Ed.2d 34, 39 [quoting *Golden*].)

In sum, then, the language of section 198, the legislative history, the simultaneous enactment of the self-defense provisions of Penal Code section 693 and Civil Code 50, and a "leading criminal law treatise"[133] all point in the same direction: self-defense is not limited to individuals who act *only* out of a need to defend their lives. So long as the defendant *does in fact* act out of an actual and reasonable fear for his life, self-defense is allowed.

And even if there were some doubt upon this score, the doubt would have to be resolved in favor of the defense. (*People v. Franklin*, *supra*, 20 Cal.4th at p. 253; *Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 631.)

---

[133] *In re Jorge M.* (2000) 23 Cal.4th 866, 873.

Moreover, appellant's interpretation of section 198 is also compelled by the Constitution. It would violate the previously mentioned state and federal constitutional rights to self-defense if this State were to have required appellant to surrender his life when in actual mortal and imminent peril from which he had no ready escape, simply because he might (purportedly) have harbored other motivations for shooting Tuan Pham. At an absolute minimum, there is enough of a constitutional question here that the doctrine of constitutional avoidance comes into play, requiring this Court to adopt the interpretation of section 198 that appellant tenders. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 509 ["'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'"], quoting *Crowell v. Benson* (1932) 285 U.S. 22, 62; *Harris v. United States*, *supra*, 536 U.S. at p. 555.)

c. *People v. Trevino* and Related Case Law

No decision in California has specifically considered whether or not the 1872 change in language was intended to represent a substantive change in the law of self-defense Some cases seem to have assumed no change was intended.[134] On the other hand, some cases seem to have

---

[134] See, e.g., *People v. Herbert* (1882) 61 Cal. 544, 546 (instructions containing language of § 198 mean that "there must be a necessity, either actual or apparent, for the killing, or it can not be justified, and this we understand to be true under our statute as well as at the common law."); *People v. Westlake* (1882) 62 Cal. 303, 306-307 (fear of great harm "must be actual — really entertained, and the homicidal act must have been done under the controlling influence of that fear, or, in other words, under the honest and well-founded belief that it was

(continued...)

assumed, without analysis, that the "such fears alone" language of section 198 precludes the use of self-defense by someone who acts based on some motivation in addition to a fear of death or great bodily harm.[135] The only case in the latter vein to have discussed the matter in more than passing depth is *People v. Trevino*, *supra*, 200 Cal.App.3d 874. The *Trevino* court, however, was not faced either with the arguments that are made in the instant brief or with any evidence of the Legislature's intent when enacting section 198 in 1872. *Trevino* faced a very different argument, and in dictum, it created a doctrine that is incapable of being enforced.

The defendant in *Trevino* had been convicted of murder following a trial at which he claimed he had killed in self-defense. (The facts of the case are skimpily laid out in the decision.) On appeal, the defendant challenged the jury instruction that contained the "such fears alone" language of section 198. In his appellate argument, the defendant assumed that section 198 — when applicable — forbids self-defense when a defendant acts with multiple motivations, but he argued that the jury should have been advised that the multiple-motivation bar was applicable only

---

[134](...continued)
absolutely necessary to kill at that moment, to save from the imminent danger that menaced life or limb"), disapproved on another point in *People v. Conkling*, *supra*, 111 Cal. at pages 626-627; *People v. Emrick* (1918) 38 Cal.App. 36, 39 (instruction using "not in spirit of revenge" language of former section 30 was proper); *People v. Hatchett*, *supra*, 63 Cal.App.2d at page 158 (same); *People v. Toledo* (1948) 85 Cal.App.2d 577, 582 (conviction reversed because no evidence the killing was perpetrated "in a spirit of revenge").

[135] See, e.g., *People v. Ye Park* (1882) 62 Cal. 204, 207-208; *People v. Vernon* (1925) 71 Cal.App. 628, 629; *People v. Levitt* (1984) 156 Cal.App.3d 500, 509-510; *People v. Shade* (1986) 185 Cal.App.3d 711, 716.

when the defendant killed out of the *appearance* of danger and that the bar was *not* applicable when the danger to which he was responding was real. The defendant purported to find this distinction between real and apparent necessity for self-defense in the language in section 198 that seemed to limit section 198 to the situations "mentioned in Subdivisions 2 and 3 of the preceding section [§ 197]." (*Trevino*, 200 Cal.App.3d at pp. 877-878. See Subsection a of the current argument, AOB 175 et seq., *ante*.)

The *Trevino* court quite properly rejected the defendant's argument, finding no distinction in the law such as the defendant was proposing between real and apparent necessity. (200 Cal.App.3d at pp. 878-879.) The Court then proceeded to offer its view as to what the "such fears alone" language allows and disallows.

> "[W]e do not mean to imply that a person who feels anger or even hatred toward the person killed, may never justifiably use deadly force in self-defense. . . . [I]t would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiable. Such a requirement is not a part of the law, nor is it a part of CALJIC No. 5.12. Instead, the law requires that the party killing *act* out of fear alone. . . . [T]he party killing may justifiably use deadly force in self-defense as long as the use of such force is motivated *only* by a reasonable fear and the belief that it is necessary to prevent his death or great bodily injury. The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of deadly force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling, but not acting upon."

(*Id.* at p. 879, original emphases.)

This quotation from *Trevino* was dictum. It was not necessary to the decision. In fact, the defendant in the case did not raise any challenge to the notion that the "such fears alone" clause of section 198 precluded self-defense from being raised by someone who acted with multiple motivations. Rather, he *assumed* that section 198 did embody a multiple-motivation limitation on self-defense; he simply argued that the limitation only applied to *apparent* dangers and not to *real* ones. Thus, he did not marshal any of the evidence of legislative intent that is presented in the present brief. With the current arguments and evidence not having been raised or considered, *Trevino* does not undermine them in any way. After all, "it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)[136]

There are, in fact, two fatal fallacies with the *Trevino* dictum. First, the *Trevino* court failed to recognize that there is another reasonable interpretation of the "such fears alone" language of section 198 and that this other interpretation is in fact the one that the Legislature intended when it enacted the Penal Code in 1872. This should be, by itself, dispositive of the issue before this Court.

---

[136] It is interesting that the *Trevino* court appears to have eventually backtracked on its statements about multiple-motive killings in self-defense. For it proceeded to criticize the defendant in that case for not having "requested additional instructions . . . with regard to a situation where anger and fear were both causal factors" and for failing to "argue to the jury the presence of such dual motivation or feeling." (200 Cal.App.3d at p. 880.) But if, as the quotation in text would seem to indicate, a dual motivation would preclude self-defense, why would the defense want to seek a dual causation instruction or make a dual motivation argument? These actions would only negate the very self-defense claim he was trying to prevail on.

Second, *Trevino*'s perceived distinction between additional emotions that are merely "felt" and those that are "acted on" is utterly incapable of being implemented in the real world, if not illusory altogether. How is a defendant who is faced with imminent and deadly peril supposed to be able to decide whether or not he is entitled to use self-defense? "Detached reflection cannot be demanded in the presence of an uplifted knife." (*Brown v. United States*, *supra*, 256 U.S. at p. 343.) Yet the *Trevino* rule would require an imminently imperiled individual to ponder on whether he harbors emotions in addition to a fear of death and, if he does, to try to set those emotions aside before defending himself. This is neither rational nor practicable.

In addition, how is a jury to rationally determine whether a defendant who harbored multiple emotions, or might have harbored multiple emotions, acted purely on the basis of self-defense? Virtually anyone faced with an imminent deadly assault is likely to feel anger, hatred, hostility, or resentment toward the assailant. How does a jury determine whether those normal feelings actually contributed to the decision to use self-defense? The defendant's self-defending act of killing the assailant would have happened with or without the contribution of such feelings. How, then, does the jury decide if those feelings did in fact contribute?

And why should those extra motivations matter? They do not make the individual's life any less endangered. They do not mitigate the would-be killer's actions or intent or ability to carry out his deadly goal. The threatened individual is still compelled by "the great universal principle of self-preservation" to do that "to which he is prompted by nature, and which no prudential motives are strong enough to restrain"and which "is not,

neither can it be, in fact, taken away by the law of society." (3 Blackstone's Commentaries 3-4, 186.)

Moreover, giving controlling effect to the extra motivations would lead to absurd results, as a simple example shows. Assume that two persons, A and B, are sitting peaceably together. Mr. X arrives, points a gun at A and B, and announces "I'm going to kill both of you." Mr. A does not know Mr. X, but Mr. B does know him and is jealous and resentful of him because X is living with B's former wife. Under the *Trevino* interpretation, A would be justified in defending himself, but B would not unless he was able to cleanse himself of his ill feelings toward X before undertaking his self-defense. That is irrational in itself, but the irrationality actually is even deeper when one considers that the difference between having and not having concurrent jealousy at the time that the need for self-preservation arises is the difference between complete freedom, on the one hand, and life in prison for murder, or possibly execution by the State, on the other.

These impracticalities and absurdities make it even less likely that the Legislature enacted the dual-motivation rule that *Trevino* attributed to section 198.

There is only one practical, sensible, and constitutional answer here, the one outlined by Professor LaFave. "[I]f [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself, as where he enjoys using force upon his adversary because he hates him." (2 LaFave, Substantive Criminal Law, *supra*, § 10.4(c), pp. 149-150.) So long as the defendant does in fact act out of an actual *and objectively reasonable* fear for his life, self-defense is allowed. Properly construed, that is what section

198 means, and that is also what the United States and California Constitutions require.

Obviously, the jurors at appellant's trial were unaware of section 198's legislative history and the statutory construction and constitutional principles governing its interpretation. And, of course, they were unaware of section 198's role as the source of the "such fears alone" language presented to them via CALJIC No. 5.12. (See 27 RT 5281.) That language — though expressly appearing in the instructions — was, as we have seen, misleadingly ambiguous. There is at least a reasonable likelihood, based on the words themselves, that lay jurors would have interpreted that language in the simplistic way that the court and parties did in *Trevino*. And that likelihood was enhanced in this case, because here the prosecutor told the jurors that appellant's act of smiling shortly before the shooting was significant precisely because it reflected motivations other than self-protective ones. (See 27 RT 5183 [prosecutor asserts that the smile showed appellant was "looking forward to" killing Tuan Pham], and RT 5215 [smile showed "pleasure" and "joy" and "look[ing] forward to killing again"].) Accordingly, there is at least a reasonable likelihood that one or more jurors at appellant's trial were misled into relying upon the legally invalid multiple-motivations theory as the basis for rejecting self-defense.

E. Dismissal of Counts 13 and 14 Is Required

The evidence in this case shows appellant was in actual and imminent lethal peril when he shot Tuan Pham. Tuan "was actively seeking to kill the defendant" and was "going to kill." (31 RT 6082 [trial court statement]; 13 RT 2598 [witness Burchell's testimony].) It was a matter of "survival." (14 RT 2718 [witness Murray's testimony].)

Appellant waited until the last possible second to shoot. (13 RT 2602-2603.) The evidence shows self-defense as a matter of law.

The only theories on which the guilty verdicts in Counts 13 and 14 might be premised are those six self-defense-negating theories that were outlined in subdivision D. However, as we have shown, the verdicts cannot validly be based on any of those theories. With no valid legal basis to support them, the convictions in Counts 13 and 14 must be reversed, and the charges ordered dismissed for insufficient evidence.

F. Even If This Court Were to Conclude That There Exists One or More Legally Valid Theories upon Which the Rejection of Self-Defense Might Be Based, Counts 13 and 14 Would Have to Be Reversed

Even if this Court were to conclude somehow that one or more of the legal theories discussed earlier could validly support the judgment in Counts 13 and 14, a reversal of those counts would still be required. As the discussion in Subsection D indicated, the jury was presented with all six of these legal theories for defeating self-defense in this case. These theories were presented not only by the instructions but also by the prosecutor's explanatory arguments, which were effectively ratified by the trial court's statement that the attorneys' discussions of the law amounted to "good efforts . . . to be accurate" and did not contain any "major difference" from the instructions. (27 RT 5231.) Thus, if *any* of the legal theories was invalid, error occurred, even assuming one or more of the theories was valid.

Where a jury has been presented with both a valid and an invalid theory, the nature of the harmless error analysis depends upon whether the

invalid theory is *legally* invalid or *factually* invalid. (*People v. Perez*, *supra*, 35 Cal.4th at p. 1233.) "When one of the theories presented to a jury is *legally* inadequate, such as a theory which fails to come within the statutory definition of the crime, the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." (*Ibid.*, internal quotation marks and citations omitted.) The question is whether the reviewing court can "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory." (*People v. Chun*, *supra*, 45 Cal.4th at p. 1203.)

On the other hand, "when one of the theories presented to a jury is *factually* inadequate, such as a theory that, while legally correct, has no application to the facts of the case, [this Court] must assess the entire record, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [The Court] will affirm unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Perez*, 35 Cal.4th at p. 1233, internal quotation marks and citations omitted.)

It may sometimes be difficult to determine whether a theory is legally or factually invalid, but as to nearly all of the defects in the theories presented to the jury in the present case, the invalidity was a legal one. The touchstone distinction between legal and factual invalidity is whether the

jury could "reasonably be expected to divine [the theory's] inadequacy," and while a jury is fully equipped to discern *factual* inadequacies, it cannot be expected to know that a legal theory that the prosecutor has argued — especially one that the judge has effectively ratified — is in fact legally invalid or inapplicable to the case as a matter of law, regardless of the jury's interpretation of the facts.

In appellant's case, the jury could not possibly have divined that the "mutual combat" theory had no valid application to Tuan Pham's surprise attack or to the type of gang war that the evidence showed existed; or that neither the "initial aggressor" theory nor the "seeks a quarrel" theory could validly be based upon the (alleged) prior shootings of Cheap Boys by appellant; or that the "decent person" theory and the "emotional reaction" theory were legally non-existent; nor can the jury be counted upon to have understood that the "such fears alone" language did not in fact preclude appellant from invoking self-defense even if he acted with multiple motivations. These were all purely legal defects in the theories that no juror could possibly have ascertained for himself or herself.

Thus, if even one of those legal theories was improper, reversal is required "unless it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory" or unless there were some other way to "conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory." (*People v. Perez*, 35 Cal.4th at p. 1233; *People v. Chun*, *supra*, 45 Cal.4th at p. 1203.) Since the jury returned only general verdicts in this case, there is no possibility of determining from other portions of the verdict that the jury "necessarily" relied on a proper theory (assuming any proper theory existed). Nor is there any other basis on which a conclusion might be

reached that, beyond all reasonable doubt, none of the jurors relied upon an improper theory. If a proper theory of conviction does exist in this case, reversal of Counts 13 and 14 would still be mandated.[137]

---

[137] A few of the defects in the six theories offered to support the verdicts in Counts 13 and 14 were factual inadequacies: (1) the inherent incredibility of Detective Nye's testimony in support of the "mutual combat" theory (see Section D.i.a, *ante*) and the "seeks a quarrel" theory (see Section D.iii [3rd par.], *ante)*, and (2) the prosecutor's inaccurate claim that the "initial aggressor" doctrine applied because appellant started the gang war (see Section D.ii.a, *ante*). Under this Court's case law, such factual defects will not compel a reversal "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Perez*, 35 Cal.4th at p. 1234.) Appellant does not agree that this is the correct standard of prejudice here. The error, involving insufficiency of the evidence (a violation of Due Process), should at least be judged under the familiar *Chapman* standard, and even under the state Constitution, the question should be whether there is a reasonable probability that at least some jurors relied on the factually inadequate theories.

But in the end, the prejudice standard as to these matters is of no import. All of the many other inadequacies we have raised with respect to the theories presented to the jury are purely *legal* inadequacies that the jury had no way of recognizing as inadequate. (See Sections D.i.b, i.c(1), i.c(2), ii.b, iii [4th & 5th pars.], iv, v.a, vi, *ante*.) Thus, reversal is required for the reasons outlined in the accompanying text, regardless of whether reversal would be called for as a result of the factual inaccuracies alone. (The prosecutor's culturally ignorant assertion that appellant's smile showed he did not have a sufficiently emotional type of fearful reaction (see Section D.v.b, *ante*) is something of a hybrid. At first glance it might seem to be a purely factual inadequacy, but it is highly unlikely that the jury understood its inadequacy. Thus, this impropriety is most reasonably analyzed in the same terms as a purely legal inadequacy.)

2. IF COUNTS 13 AND 14 ARE NOT ORDERED DISMISSED FOR THE REASONS SET FORTH IN THE PRECEDING SECTION, COUNT 13 WOULD NONETHELESS HAVE TO BE SET ASIDE BECAUSE EVEN IF SELF-DEFENSE COULD BE REJECTED ON A MUTUAL-COMBAT OR MULTIPLE-MOTIVATION THEORY, SUCH A HOMICIDE WOULD BE NO MORE THAN MANSLAUGHTER

Assuming arguendo this Court were to find that the jury could validly have returned guilty verdicts in connection with Counts 13 and 14 on the basis of either mutual combat or multiple motivations (but see §§ 1.D.i & 1.D.vi, *ante*), the most that appellant could have been convicted of was manslaughter. Thus, the conviction in Count 13 must either be reduced to manslaughter or, since the instructions did not inform the jury that a finding of mutual combat or multiple motivation required a manslaughter conviction, the convictions must be reversed altogether, since the jury's verdicts may have been based on the legally invalid theory that a killing in mutual combat or with multiple motivations was murder.

A. A Killing in Mutual Combat Would Be, If Anything, Manslaughter, At Most

If this Court were to decide that the "mutual combat" exception to the doctrine of self-defense, could, under the law and the state and federal Constitutions, justify the rejection of self-defense in this case (but see § 1.D.i, *ante*), then the offense in Count 13 could be nothing greater than voluntary manslaughter.

It has long been the law that mutual combat "reduce[s] the offence from murder to manslaughter" as long as "the contest was waged upon equal terms, and no undue advantage was sought or taken by either side." (*People v. Sanchez* (1864) 24 Cal. 17, 27. Accord *People v. Lee* (1999) 20

Cal.4th 47, 60 fn. 6; *People v. Whitfield* (1968) 259 Cal.App.2d 605, 609.) This appears to have been the rule at common law, for as Blackstone has stated, "When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter." (3 Blackstone's Commentaries 184.) This Court has recognized that section 197, which codified the "mutual combat" exception, "'does no more than codify the common law and should be read in the light of it.'" (*People v. Ceballos*, *supra*, 12 Cal.3d at p. 478, quoting *People v. Jones*, *supra*, 191 Cal.App.2d at p. 481. Accord, *People v. Button*, *supra*, 106 Cal. at p. 631.)

And whatever else might be said of the (assumed) "mutual combat" between appellant and Tuan Pham on May 6, 1995, appellant plainly did not seek or take undue advantage. To the contrary, he waited until the last conceivable moment to fire his weapon. Thus, if the dilemma confronting appellant can be deemed to be mutual combat, the resulting killing can be no more than manslaughter.[138]

---

[138] There is language in *People v. Bush* (1884) 65 Cal. 129 that conflicts with that of *Sanchez*, et al. The relevant part of *Bush* involved an instruction that indicated that a defendant would be guilty of murder if the killing occurred following a sudden quarrel but where sufficient time has elapsed for passions to cool. The defendant claimed that in that situation, the crime would be dueling and not murder. *Bush* rejected the claim, stating that "[i]ndependent of the statute concerning dueling, it has been held that 'when parties by mutual understanding engage in a conflict with deadly weapons and death ensues to either, the slayer is guilty of murder' . . . ." (*Id.* at p. 129.) However, this Court has recently cited *Sanchez* with approval on the point mentioned in text (*People v. Lee*, *supra*, 20 Cal.4th at p. 60 fn. 6), and the only case to have mentioned *Bush* in connection with mutual combat has viewed it as embodying the same principle as *Sanchez*. (See *People v. Ross*, *supra*, 155 Cal.App.4th at p. 1043 fn. 11 [citing *Bush* for proposition that "the victim's participation

(continued...)

B. A Killing with Multiple Motivations Would Be, If Anything, Manslaughter, At Most

If this Court were to conclude that the rejection of self-defense can be sustained on the basis that appellant acted with multiple motivations (but see § 1.D.vi, *ante*), then, again, the offense in Count 13 could be no greater than voluntary manslaughter on retrial. As one court has held, "if the degree of force used [is] influenced by any motivations aside from a belief in the necessity to act in self-defense, then manslaughter [is] an appropriate verdict on that ground alone." (*People v. Levitt*, *supra*, 156 Cal.App.3d at p. 509. See also *id.* at p. 510 [voluntary manslaughter verdict support by fact that jury could have found that defendant's lethal response to the danger he faced "was attributable more to a preconceived intent to kill than to the actual danger."].)

Appellant acknowledges that this conclusion is inconsistent with the results of a number of the cases that have interpreted section 198 to preclude use of self-defense when the defendant acted with multiple motivations. (See, e.g., *People v. Trevino*, *supra*, 200 Cal.App.3d 874 [upholding conviction for second-degree murder]; *People v. Shade*, *supra*, 185 Cal.App.3d 711 [same]; *People v. Vernon*, *supra*, 71 Cal.App. 628 [same].). But none of these cases has considered the issue now being presented, and they pre-dated the holding by this Court that"a defendant's actual belief in the need for self-defense against imminent peril would negate a finding of implied as well as express malice." (*In re Christian S.* (1994) 7 Cal.4th 768, 781.) Those decisions are, therefore, neither

---

[138](...continued)
in mutual combat with the defendant may mitigate the latter's offense from murder to manslaughter"].)

dispositive nor persuasive on the issue here before this Court. Further, if the multiple motivation theory has any merit at all (but see § 1.D.vi, *ante*), *Levitt*'s holding, as opposed to the results in *Trevino*, *Shade*, and *Vernon*, at least implicitly recognizes that someone who kills to save his own life, even if other less honorable reasons are also at play, (1) is in a different moral posture than someone who simply kills for such other reasons and (2) is also acting in accordance with what has long been recognized as "the law of nature."

3. REVERSAL OF COUNTS 13 AND 14 IS REQUIRED BECAUSE OF SEVERAL INSTRUCTIONAL ERRORS REGARDING SELF-DEFENSE

Assuming, arguendo, that a valid legal theory would justify the rejection of self-defense here (but see § 1, *ante*), and regardless of whether or not the homicide conviction is manslaughter at most (see § 2, *ante*), the convictions in Counts 13 and 14 would still have to be reversed because of errors in the instructions relating to the defense of self-defense. As we will explain, each of the errors independently requires reversal of those counts. A fortiorari, the cumulation of errors so requires.

A. The Trial Court Committed Reversible Error by Refusing to Instruct the Jury That There Is But One Standard for Self-Defense, Applicable to All Persons

Appellant requested that the jury be instructed that "[t]he law of self defense applies equally to all persons, regardless of whether he or she is a member of a criminal street gang." (3 CT 954.) The trial court denied the request. (25 RT 4872.) That refusal was error.

The proposed instruction was plainly accurate as a matter of law. As is well established, "California maintains a single standard for all defendants who claim they acted in self-defense." (*People v. Humphrey*, *supra*, 13 Cal.4th at p. 1100 (conc. opn. of Brown, J.)[139] Accord, *People v.*

---

[139] As noted earlier, Justice Brown's opinion, although not the opinion of the Court, did garner four votes on this point: hers, those of two justices who signed onto her opinion (Chief Justice George and Justice Baxter), and that of Justice Werdegar, who filed her own concurring opinion explaining that she joined the reasoning of Justice Brown's

(continued...)

Romero, *supra*, 69 Cal.App.4th at p. 854 ["No authority or case law has been cited which supports a separate [self-defense] standard" for specific groups].)

Moreover, the subject covered by the proposed instruction was relevant to appellant's defense. Indeed, it was crucial. A major prong of the defense to the charges in Counts 13 and 14 was that the killing of Tuan Pham was done in self-defense, and obviously this defense required the jury to understand that the principles of self-defense applied to appellant, even if he were found to be a gang member.

Nor did any other instruction cover the subject. In fact, as pointed out earlier in this brief's discussion of the "decent person" theory for rejecting self-defense (§ 1.D.iv, pp. 165 et seq., *ante*), the instructions given to the jury indicated that the defendant had to be "a reasonable person" himself before he could justify the killing of Tuan Pham as self-defense. (27 RT 5281-5284; 3 CT 1048, 1051, 1054; CALJIC Nos. 5.12, 5.30, 5.51.)

Thus, the proffered defense instruction should have been given.

Moreover, as also pointed out in that same earlier discussion, the prosecutor took full advantage of the instructions' language. She argued at length that the "reasonable person" standards in the instructions regarding self-defense (and manslaughter and attempted murder) were applicable to "decent," "reasonable," and "basically good" persons and not to gang members. (E.g., 26 RT 4961-4962, 4966-4967, 4972, 4975.) This was a constant theme of her argument, and it had been preceded by the

---

[139](...continued)
opinion except on one point not relevant to the present citation. (See *Humphrey*, 13 Cal.4th at p. 1092 (conc. opn. of Werdegar, J.).)

prosecutor's declaration that, having studied the law "anywhere from 40 to 60 hours a week" for three years in law school, "I also know the law." (26 RT 4943-4944.)

It is true that defense counsel argued that the law of self-defense was applicable to gang members. (26 RT 5091, 5095–5096.) However, it is simply not plausible that these arguments cured the error because (1) counsel downplayed his own credibility on legal issues by telling the jurors that he, unlike the prosecutor, had not studied much in law school and did not know a lot of law (26 RT 5047), and (2) the prestige of the prosecutor's governmental position gave her more credibility in the jurors' eyes than defense counsel in any event, especially where (3) the instructions appeared to support the prosecutor's arguments much more than defense counsel's.[140]

The result is that the denial of the defense instruction prejudicially denied appellant his Sixth and Fourteenth Amendment rights to due process of law, to present a defense, and to a fair trial, his Eighth Amendment right to freedom from cruel and unusual punishment and to a reliable determination of guilt and penalty in a capital case, and his Sixth Amendment right to a jury trial. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *California v. Trombetta* (1984) 467 U.S. 479, *Rock v. Arkansas* (1987) 483 US 44, *Crane v. Kentucky* (1986) 476 U.S. 683, *Chambers v. Mississippi* (1973) 410 U.S. 284; *People v. Rivera* (1984) 157

---

[140] See *People v. Brophy* (1954) 122 Cal.App.2d 638, 652 ("Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige.").

Cal.App.3d 736, 744 [without "legal framework against which it could apply" defendant's arguments and evidence, defendant "was denied the right to have the jury determine every material issue"]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [federal Due Process]; *Tyson v. Trigg, supra*, 50 F.3d at p. 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense."]; *U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal."].)

Because the refusal to instruct resulted in the denial of a defense, the error requires reversal per se.

But even if a prejudicial error test were applied, it would not matter. The error did plainly "contribute to the verdict," and there is at least "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the error. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *College Hospital, Inc. v. Superior Court* (1994) 6 Cal.4th 704, 715, original emphases.) For, as we have pointed out, the prosecutor thoroughly exploited the error by repeatedly advising the jury that the "reasonable person" standard applied only to "decent," "reasonable," and "basically good" persons and not to gang members, and she informed the jury that this reasonable person standard was to be applied in the self-defense context. (E.g., 26 RT 4961-4962, 4966-4967, 4972, 4975.) The error cannot be found to be harmless under either the state or federal constitutional test.

Because of this error with respect to the manner in which the doctrine of self-defense was presented to the jury, reversal is required even if this Court were to determine that the convictions would otherwise have been permissible under some proper legal theory.

B. If This Court Rejects Appellant's Contention That Appellant's Belief That His Life Was in Imminent Danger Was Reasonable as a Matter of Law, the Trial Court Committed Reversible Error by Refusing to Instruct the Jury on Imperfect Self-Defense

The jury was instructed on full self-defense, as discussed extensively earlier. (See § 1, AOB 123 et seq., *ante*.) Appellant requested that the jury also be instructed on imperfect self-defense, but the trial court refused to do so, concluding that "there's insufficient evidence to justify either a sua sponte instruction, or one at the request of counsel for defendant." (25 RT 4861. See also 25 RT 4863, 4903; 27 RT 5263-5264; 3 CT 1014.) This was reversible error unless the Court agrees that there was simply no basis for doubting the reasonableness of appellant's fear of imminent peril.

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on "perfect" self-defense. These courts reason that if there is substantial evidence of a defendant's actual belief in the need for self-defense, there will always be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85-86; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824. See also, e.g., *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.) These cases would compel the conclusion that,

given the appropriateness of the instructions on self-defense in the present case, the failure to instruct on imperfect self-defense here was error.

However, this Court need not endorse the holdings in their entirety in order for appellant to prevail here. If this Court were to reject the contention that appellant's belief that his life was in imminent and lethal danger was reasonable as a matter of law, then it necessarily follows that the failure to instruct on imperfect self-defense constituted error, regardless of whether or not such a failure instruct would be error in every situation.

The remaining question would be one of prejudice. Since the refusal of the instruction would, under the postulated ruling by this Court, have prevented appellant from having the jury consider his defense of imperfect self-defense, it violated the federal constitutional rights to due process, to present a defense, to trial by jury, and, in this capital case, to a reliable guilt and penalty decision and freedom from cruel and unusual punishments. (See Subsection 3.A, pp. 206 et seq., *ante*.) But it does not matter what standard is used. If there was any substantial evidence to support a finding that appellant's belief in imminent peril was unreasonable, the jury should have been entitled to act on that evidence and return a manslaughter verdict. The fact that complete self-defense was rejected would not make the error harmless if the jury might have based its verdict on a conclusion that appellant's fear of death was unreasonable.

C. The Trial Court Committed Reversible Error by Failing to Instruct the Jury Sua Sponte on the Legal Meaning of "Mutual Combat"

Assuming arguendo the verdicts in Counts 13 and 14 could be upheld on a "mutual combat" theory (which they can't be, see § 1.D.i,

AOB 134 et seq., *ante*), the trial court committed reversible error by failing to instruct the jury sua sponte on the legal meaning of "mutual combat."

The rules governing a trial court's obligation to give jury instructions without request by either party are well established. "Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury's understanding of the case." (*People v. Roberge* (2003) 29 Cal.4th 979, 988, citations omitted.) "That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citation]." (*Ibid.*) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning." (*People v. Estrada* (1995) 11 Cal.4th 568, 574. Accord, *Roberge*, 29 Cal.4th at p. 988 [trial court has sua sponte duty to instruct on meaning of word "likely" as used in Sexually Violent Predator Act]; *People v. Bland* (2002) 28 Cal.4th 313, 334 [trial court has sua sponte duty to instruct on meaning of ""proximate causation" as used in § 12022.53, subd. (d)].)

The term "mutual combat" meets these requirements. As one court has recently noted, the term "has a dangerously vivid quality," with the danger lying "in the power of vivid language to mask ambiguity and even inaccuracy." (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1043.) In common parlance,

> "any combat may be correctly described as 'mutual' so long as it [is] seen to possess a quality of reciprocity or exchange. In ordinary speech, then, "mutual combat" might properly describe any violent struggle between two or more people, however it came into being. If A walks up to B and punches

> him without warning, and a fight ensues, the fight may be characterized as 'mutual combat' in the ordinary sense of those words. But as this example demonstrates, the phrase so understood may readily describe situations in which the law plainly grants one of the combatants a right of self-defense. In the case above, B would be entitled under the law of this state to punch A immediately, without further ado, provided he acted out of an actual and reasonable belief that such action was necessary to avert imminent harm , and he used no more than reasonable force. That right cannot be forfeited or suspended by its very exercise. Yet that is the effect of relying on the everyday meaning of 'mutual combat.' B's entitlement to strike back in self-defense would then be conditioned, absurdly, on his first refusing to fight, communicating his peaceable intentions to his assailant, and giving his assailant an opportunity to desist. By then, of course, his assailant might have beaten him senseless."

(*Ross*, 155 Cal.App.4th at p. 1044, citations and fn. omitted.)

But, in fact, "mutual combat" has a specific and limited legal meaning, covering only a subcategory of what is understood in ordinary speech. "[A]s used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*." (*People v. Ross*, *id.* at p. 1045, original emphasis. Accord, e.g., *People v. Fowler*, *supra*, 178 Cal. at p. 671 ["duel or other fight begun or continued by mutual consent or agreement, express or implied."]; *People v. Hecker*, *supra*, 109 Cal. at p. 462 ["prearranged duel, or by consent"]; *People v. Rogers*, *supra*, 164 Cal.App.2d at p. 558 [no mutual combat because there was no "prearrangement to fight anybody" and no "gangs agree[ing] to meet for combat"].)

Thus, the phrase "mutual combat" clearly "does not have a plain, unambiguous meaning," but has a "particular and restricted meaning" or "a

technical, legal meaning . . . that differs from its nonlegal meaning." It was thus error under the principles laid out in *Roberge* for the trial court to have failed to instruct on that meaning sua sponte and to have conveyed to the jury that any exchange of gunfire between Tuan Pham and appellant could be deemed to be "mutual combat" only if the jury found, beyond a reasonable doubt, that before Tuan began his attack, there was a "mutual intention, consent, or agreement" that a gunfight take place. That error also resulted in violations of appellant's aforementioned constitutional rights to due process of law, to present a defense, to a jury trial on all elements of the charges against him, to freedom from cruel and unusual punishment, and to a reliable determination of guilt and penalty in a capital case. (See Subsection 3.A, pp. 202 et seq., *ante*.)

The remaining question is one of prejudice, and that question can be answered in short order, regardless of whether the state or federal test is used. For if there is a view of the evidence under which appellant can be viewed as being engaged in mutual combat with Tuan Pham at the time of the shooting (but see § 1.D.i, *ante*), surely the least that can be said is that that conclusion was a close question. After all, as we have repeatedly pointed out, appellant engaged in no aggressive, threatening, or provocative act whatsoever toward Tuan Pham, and no such act toward anyone else for two months (according to the jury's verdicts), and he refrained from using defensive force against Tuan Pham for as long as he possibly could, refraining from firing his weapon until Tuan actually started to raise his gun hand. Under these circumstances, the failure to instruct on the narrower legal definition of "mutual combat," combined with the prosecutor's reliance on "mutual combat" in her arguments to the jury, makes it impossible for respondent to establish that the error did not

contribute to the verdict, and also demonstrates that there is at least "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the error.

D. The Verdicts on Counts 13 and 14 Must Be Reversed Because the Jury Was Not Instructed on the Impossibility of Withdrawal with Respect to the Mutual-Combat and Initial-Aggressor Doctrines

Assuming arguendo the verdicts in Counts 13 and 14 could be upheld on either a "mutual combat" theory or an "initial aggressor" theory (but see §§ 1.D.i -ii, *ante*), the trial court committed reversible error by failing to instruct the jury sua sponte on the legal concept of impossibility of withdrawal with respect to those theories. Should this Court conclude that the giving of such instructions would only have been required if requested by defense counsel, then appellant's trial counsel provided ineffective assistance of counsel by failing to request them. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

It is established that even mutual combatants and initial aggressors can claim a right of self-defense in certain situations. One situation, discussed earlier, occurs if the mutual combatant or initial aggressor withdraws from the fray, with withdrawal having a specific four-part legal meaning. Once such an individual has withdrawn, he or she is entitled to use deadly force in self-defense to the same extent as a person would be who had not been a mutual combatant or initial aggressor. (See §§ 1.D.i.b, pp. 141 et seq., & 1.D.ii, pp. 156 et seq., *ante*; CALJIC Nos. 5.56 & 5.54; 3 CT 1059, 1057; 27 RT 5286, 5285.)

The other situation in which a mutual combatant or initial aggressor may lawfully resort to self-defense occurs where withdrawal is impossible. The situation that has come up in the reported cases involves an individual who has instigated a fray using *non-lethal* force but whose opponent responds with *deadly* force. "'If . . . the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense.'" (*People v. Quach* (2004) 116 Cal.App.4th 294, 301-302, quoting *People v. Hecker, supra*, 109 Cal. at pp. 463-464; accord *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201, *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75.)

Normally, absent withdrawal, an individual cannot regain the right to use self-defense if he or she uses lethal force in the initial aggression or in agreed upon mutual combat. The suddenness and dangerousness of the other person's response do not, in the view of the law, transform the initial felonious decision to use deadly force into an excusable use. (See esp. *People v. Gleghorn, supra*, 193 Cal.App.3d at p. 201.) After all, at least when the individual is the initial aggressor, the opponent's deadly response to the initial aggressor's use or threat of deadly force is lawful.

However, all of the cases to address the issue have been confronted with a situation in which the defendant used or threatened deadly force on the very occasion in which the other person responds with deadly force. There are no reported cases dealing with the alleged long-term, different-occasion varieties of mutual combat and initial aggression that have been proposed in the present case . If these anti-self-defense theories are indeed valid ones (but see §§ 1.D.i-ii), then it follows that they must be mitigated

in much the same way as when the initial aggressor or mutual combatant uses non-lethal force. That is, a mutual combatant who has not himself launched a lethal attack on the present occasion must have an opportunity to withdraw before being faced with the choice of either using lethal force or risking death, and if there is no opportunity to withdraw — as there is none in a surprise attack — then the defendant must be allowed to use self-defense to the extent reasonably necessary to preserve his life.

Any other holding would require every attacked individual deemed to have be involved in mutual combat or initial aggression on the basis of distinct, past acts — and, as we have noted, this would apply to every alleged gang member — to submit to his death at the hands of street justice or vigilantism, regardless of whether he participated in prior violence, or is no longer participating, or is drifting away from the gang or rejects the gang's asserted policies, or is otherwise not presently engaging in threatening behavior. "[T]he law will always leave the original aggressor an opportunity to repent." (*Rowe v. United States*, *supra*, 164 U.S. at p. 556; accord *People v. Claborn*, *supra*, 224 Cal.App.2d at pp. 41-42.) Moreover, without such mitigation of the mutual-combat and initial-aggressor doctrines, the constitutional rights to self-defense would be violated.[141]

Thus, if the mutual-combat and initial-aggressor doctrines were indeed applicable to this case, it was error for the trial court to have failed to instruct the jury that these doctrines do not apply where a defendant, who might otherwise be deemed a mutual combatant based solely upon

---

[141] As before, any doubt about the matter must be resolved in appellant's favor under the doctrine of lenity in construing criminal statutes and the canon of constitutional avoidance.

conduct occurring on an earlier occasion, is the victim of an attack that is so sudden and perilous that no opportunity exists to decline or to make known to his adversary his willingness to decline the strife.

And if this Court were to determine that the trial court had no duty to so instruct in the absence of a specific request from defense counsel, then appellant's trial counsel provided ineffective assistance of counsel by failing to request such an instruction. While ineffective-assistance claims normally must be brought in a petition for writ of habeas corpus so that counsel can give reasons for the challenged action or inaction (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558), an exception to this general rule comes into play in situations where there can be no adequate explanation for the claimed deficiency. (See *People v. Pope* (1979) 23 Cal.3d 412, 426). The issue here fits the *Pope* exception. There can be no adequate explanation for counsel's failure to request an instruction that could well have led to his client's acquittal of a murder charge and exclusion of the death penalty.

Whichever way the error here is viewed, and whatever test is employed, the error here plainly was prejudicial. If the jury had been instructed on the no-opportunity-to-withdraw exception to the mutual-combat and initial-aggressor doctrines, there is more than a reasonable probability that the outcome of Counts 13 and 14 would have been different, for there was ample evidence from which the jury could have concluded that appellant had no opportunity to withdraw.

E. The Verdicts on Counts 13 and 14 Must Be Reversed Because the Jury Was Not Instructed on Ignorance or Mistake of Fact

Assuming arguendo the verdicts in Counts 13 and 14 could be upheld on a mutual-combat, initial-aggressor, seeks-a-quarrel, and/or multiple-motivation theory (which they should not be, see §§ 1.D, *ante*), the trial court committed reversible error by failing to instruct the jury on ignorance or mistake of fact, namely, that these theories were inapplicable if appellant did not know his assailants were Cheap Boys.

If applicable to this case at all, each of the identified anti-self-defense theories was premised on an extension of traditional doctrine so that it would encompass long-term, different-occasion combat, aggression, quarrels, or motives. That is, each theory required the jury to find, as an essential component, that appellant killed Tuan Pham as a part of a pre-existing gang war between the Cheap Boys and Nip Family. However, none of these theories would logically apply unless appellant recognized that his assailants were from the Cheap Boys gang. Appellant testified he did not recognize his assailant (22 RT 4246), and so the jury could have found that appellant did not know that the persons he was defending himself against were in fact Cheap Boys.

It is established that an individual is not criminally liable for an act that he or she committed "under an ignorance or mistake of fact, which disproves any criminal intent." (§ 26.) "[A]n honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense," this Court has held. "[I]t has never been suggested that these exceptions do not equally apply to the case of statutory offenses

unless they are excluded expressly or by necessary implication." (*In re Jennings* (2004) 34 Cal.4th 254, 279, internal quotation marks and citation omitted.) Under these principles, then, if the jury had a reasonable doubt as to whether appellant knew that his assailants on May 5, 1995 were Cheap Boys would be a "good defense," the jury would be required to reject the anti-self-defense theories that were based on the pre-existing gang war between the Nip Family and the Cheap Boys. The jury, however, was not given any instructions on this "good defense."

A trial court has a duty to instruct, sua sponte, on particular defenses if but only if "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Maury* (2003) 30 Cal.4th 342, 424; see also *People v. Russell* (2006) 144 Cal.App.4th 1415, 1427 [this test applies to mistake of fact].) Here, both conditions are met. The defense relied on self-defense (see, e.g., 26 RT 5091, 5095-5096), and as noted earlier, appellant's own testimony provided the substantial evidence to support it (22 RT 4246). Moreover, the failure to instruct on this basic defense violated Due Process and the Sixth Amendment and undermined the reliability of the capital guilt and sentencing verdicts under the Eighth Amendment.

Should this Court conclude that the giving of such instructions would only have been required if requested by defense counsel, then appellant's trial counsel provided ineffective assistance of counsel by failing to request them. (See *Strickland v. Washington*, *supra*, 466 U.S. 668.) Under the principles first laid down in *People v. Pope*, *supra*, 23 Cal.3d 412, and discussed in the preceding subsection, there can be no adequate explanation for a failure by counsel to request an instruction that

could well have led to his client's acquittal of a murder charge and exclusion of the death penalty.

The error here plainly was prejudicial under any conceivable test. If the jury had been instructed that ignorance or mistake by appellant as to the gang membership of this assailants would have defeated most of the anti-self-defense theories upon which the prosecution relied, there is more than a reasonable probability that the outcome of Counts 13 and 14 would have been different, for there was ample evidence from which the jury could have drawn that conclusion.

4. REVERSAL OF COUNTS 13 AND 14 IS REQUIRED BECAUSE OF THE PREJUDICIALLY ERRONEOUS ADMISSION OF EVIDENCE REGARDING APPELLANT'S ROLE IN THE SHOOTING

In his testimony at trial, appellant denied that he had been the driver of the white Honda. He testified that he was an unarmed passenger in the back seat of the car and that he did not participate in the shooting. (21 RT 4041-4049, 22 RT 4225-4232.)

The prosecution had no direct evidence contradicting appellant's testimony. Robert Murray, the only eyewitness who saw the Honda driver, could never make any identification of him, although on one occasion, he thought that appellant's photograph in a photo lineup was not inconsistent with the driver. (14 RT 2723-2724, 2737, 2744, 2748, 2750.)

In order to establish that appellant was the driver of the Honda, the prosecution relied on circumstantial evidence: appellant's shotgun pellet injuries, and evidence suggesting that, 17 days after the shooting, appellant possessed one of the weapons that had been fired at the scene where Tuan Pham was killed. However, a serious evidentiary error was committed by the trial court in connection with the latter evidence (the evidence allegedly connecting appellant to a crime scene weapon). And since the remaining evidence was far from persuasive as proof that appellant was the driver, the error was prejudicial with respect to the verdicts in Counts 13 and 14.

A. The Trial Court Erred by Overruling the Defense's Objection to Testimony by Officer Vincent On Indicating That Appellant Was the Vietnamese Male Who, on May 23, 1995, Possessed One of the Weapons That Had Been Fired at the Scene

As just indicated, the prosecution sought to place appellant in the driver's seat of the Honda by, in part, attempting to show that on May 23, 1995 — 17 days after the shooting of Tuan Pham — appellant possessed one of the weapons that had been fired at the scene where Tuan Pham died. Of most significance for this effort, the prosecution elicited evidence that, on May 23, three men left a house on Amarillo Street and drove away and that, when the car was stopped by Garden Grove Officer Vincent On a short distance away, the front passenger fled and, while fleeing, abandoned a weapon that was later matched to a bullet found in Tuan Pham's car at the scene where he died.

It was the prosecution's position that appellant was the passenger who fled from the Amarillo Street vehicle, and it offered two types evidence to support that position. By far the most significant evidence was identification testimony from Officer On. (The prosecution also produced rather weak evidence — to be discussed later — suggesting that appellant lived in the Amarillo Street residence from which the three occupants of the car had left.)

As we will now demonstrate, the trial court's admission of Officer On's identification testimony was fundamentally flawed. No proper foundation was laid for that testimony, and without that testimony, the evidence suggesting appellant was the driver was flimsy. Reversal of Counts 13 and 14 is thus required.

i. Background

Officer On saw the passenger for a couple of seconds and concluded that he was a Vietnamese male. (15 RT 2849, 2851.) About 15 or 20 minutes before the car stop, Officer On had been shown a photograph of the face of "somebody named Lam Thanh Nguyen." (15 RT 2849.) Officer On had never seen the person shown in the photograph before. (15 RT 2851.) Officer On testified that the passenger who fled from the car stop looked "similar" to the person in the photograph and that therefore the passenger "could be" the "Lam Thanh Nguyen" (purportedly) depicted by the photo. (15 RT 2849.) .

The defense objected that Officer's On's testimony about the photo match "lack[ed] foundation, as to whether or not this picture he [Officer On] is relying upon is in fact Mr. Lam Nguyen." The court overruled the objection without explanation. (15 RT 2850.) The photograph was never marked in evidence, nor was it the subject of any further testimony.

The overruling of the objection was error. Officer On's testimony that the fleeing man looked like the male in the photograph Officer On had been shown was entirely inconsequential unless the photograph actually was of appellant, but that foundational necessity was missing. The photo itself was not admitted into evidence — indeed, it was not even shown to Officer On at the trial — and there was no further testimony about it from any other witness. The record does not reveal what person or agency took the photograph, nor when it was taken, nor who showed it to Officer On on May 23, 1995. And there was no evidence that the picture was an accurate representation of the person thought to be depicted.

In fact, the record fails to indicate why Officer On thought the photograph depicted someone with appellant's name. There is no

indication whether appellant's name was printed on the photo, or was written onto the photo by hand, or appeared in the scene captured by photograph,[142] or was simply communicated orally to Officer On at the time the photograph was shown to him.

There was no foundation for the admission of Officer On's testimony about the photograph, and the defense objection should have been sustained.

ii. Officer On's Testimony Was Inadmissible

A photograph is a "writing" within the meaning of the Evidence Code. (Evid. Code, § 250.) In this case, the prosecution did not produce the photograph itself but sought to establish its contents via secondary evidence, i.e., the testimony of Officer On. Secondary evidence of the content of a photograph is sometimes admissible, but *authentication* of the photograph "is required before secondary evidence of its content may be received in evidence." (Evid. Code, § 1401, subd. (b).)

Officer On's testimony in this case was inadmissible under this provision. The prosecution failed to produce any evidence to satisfy the foundational requirement that the photograph be authenticated. "'To authenticate a photograph a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal knowledge of the correctness of the representation.'" (*People v. O'Brien* (1976) 61 Cal.App.3d 766, 781, quoting Witkin, Cal. Evidence (2nd ed. 1966), § 636, p. 599. See also *Jones v. City of Los Angeles* (1993) 20

---

[142] Unlikely, since the photograph depicted "just a face." (15 RT 2851.)

Cal.App.4th 436, 440 fn. 5 ["a foundation must be laid, by someone having personal knowledge of the filmed object, that the [depiction] is an accurate portrayal of what it purports to show."].) A photograph is authenticated by evidence that it "'accurately depicts what it purports to show.'" (See *People v. Williams* (1997) 16 Cal.4th 635, 662, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 747

Because "[t]he establishment of such authentication is a preliminary fact within the meaning of Evidence Code, section 403" (*Fakhoury v. Magner* (1972) 25 Cal.App.3d 58, 65), the prosecution, as the proponent of Officer On's testimony, had the burden of producing evidence to establish the authenticity of the photograph. (Evid. Code, § 403, subd. (a).) Officer On's testimony was "inadmissible unless the court [found] that there [was] evidence sufficient to sustain a finding of . . . authenticity." (*Id.*, subd. (a)(1). See also Assem. Com. on Judiciary, com. to Evid. Code § 403 ["the judge must decide whether the evidence offered is sufficient to sustain a finding of the authenticity of the proffered writing . . . ." under Evid. Code §§ 1410-1421].)

In this case, there was no evidence that the photograph seen by Officer On was a "faithful representation" of appellant, or "accurately depicted" him, let alone was there evidence of such a showing based on personal knowledge. The entire foundation for the admission of Officer On's testimony was that some unknown person had showed him a photograph that some unknown entity or person apparently believed to be of "somebody named Lam Thanh Nguyen." There is not the slightest evidence that the photograph *accurately* depicted *appellant*, which of course would require some personal knowledge by someone of appellant's appearance. There was not even an indication as to how the name "Lam

Thanh Nguyen" was connected to the photograph that Officer On saw. Was it printed on the photo, as in a driver's license? Was it handwritten onto the photo's surface at some unknown point after the photograph had been printed? Did the name appear in the scene depicted by the photograph, as in some booking photos, where the subject often holds a board with his name on it? Or was the name simply told to Officer On in an oral statement made by some unknown person at the time the photograph was shown to him? The record is silent. There was no foundation laid for the admission of Officer On's testimony.

The prosecution has entirely failed to satisfy its burden to produce evidence to establish the authenticity of the photograph relied on by Officer On. (Evid. Code, § 403, subd. (a).)[143]

---

[143] Appellant is aware of case law that permits an inference of identity to be drawn from matching names if the names are "sufficiently uncommon." (See, e.g., *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 555; *People v. Brucker* (1983) 148 Cal.App.3d 230, 242 *People v. Sarnblad* (1972) 26 Cal.App.3d 801, 805-806. See also *People v. Hill* (1967) 67 Cal.2d 105, 121.) However, the "matching names" cases are irrelevant here. In all of those cases, there was a clear and definite connection between the matching name and an item of relevant evidence alleged to be associated with it (usually, the name had been put on a disputed writing at the time the writing was created). That is not the case here. Even if the *name* given to Officer On was intended to refer to appellant, there was no evidence to connect that name to the likeness in the photograph. That is the gap in the present case, and there is nothing remotely analogous to that gap in any of the "matching names" cases.

Quite apart from that gap, appellant's name is not truly uncommon. As this very case shows, the name "Nguyen" is extremely common among Vietnamese. Three of the alleged victims (Tony Nguyen, Huy Nguyen, Sang Nguyen) and, not counting appellant's sisters Nen and Phuong, at least eight witnesses (Truong Nguyen, Khanh Troung Nguyen, Trieu Binh

(continued...)

B. The Error Requires Reversal of Counts 13 and 14

The error in admitting Officer On's identification testimony was plainly prejudicial as to Counts 13 and 14. As mentioned earlier, the prosecution relied upon three items of circumstantial evidence to place appellant in the driver's seat of the Honda. One was the shotgun pellet injuries to appellant's fingers, right forearm, and back. A second was the evidence suggesting that appellant lived in the Amarillo Street residence that the fleeing passenger had been seen walking away from shortly before discarding a weapon that had been fired at the scene of Tuan Pham's death 17 days earlier. And the third was Officer On's identification testimony indicating that appellant was the fleeing passenger.

Of these items of evidence, Officer On's inadmissible testimony was by far the most favorable to the prosecution. The other two were weak, at best. In fact, the shotgun pellet evidence is most reasonably viewed as supporting appellant's version of events, not the prosecution's.

First, consider the shotgun pellet injuries. There were three sets of such injuries: (1) on the left side of appellant's back from the bottom of his shoulder blade to just above his waist (see Exh. 140); (2) on the inside of his right forearm (see Exh. 113); and (3) on the inside of appellant's left

---

[143](...continued)
Nguyen, Trieu Hai Nguyen, Hoang Nguyen, Hoang Viet Nguyen, Tam Nguyen, Minh Nguyen) shared appellant's surname. Insofar as the record reveals, except for brothers Trieu Hai and Trieu Binh Nguyen, and husband and wife Hoang and Hoang Viet Nguyen, none of these Nguyens are related to one another or to appellant Lam Thanh Nguyen. Further, a Google search for "Lam Thanh Nguyen" reveals approximately 2,400 hits, including generals, defendants, chemistry majors, physicists, film editors, transportation department officials, draftsmen, nurses, Internet message board posters, movie makers, and business owners.

thumb and forefinger and on the top of his left index finger (see Exhs. 114 & 115). (See 15 RT 2897-2899.) The injuries to the right forearm are inconclusive. They are as consistent with appellant's testimony as with the prosecutor's scenario. But the other sets of injuries are not. It is difficult to believe that any juror could look at the back injuries and conclude that they were sustained by the driver of a car being hit by pellets fired from beyond the rear of the car. The car door and the car's seat would have protected the driver's mid-back and lower back from pellets fired from behind, particularly since these pellets were merely birdshot. By contrast, given that the rear window of the Honda was shot out, the pellet wounds were consistent with appellant's story that he was hit in the back while crouched down on the back seat of the Honda with his head facing the driver's side.[144]

Similarly, it is difficult to understand how the driver of a car would have sustained injuries to the *inside* of the fingers of his *left* hand if he was shooting out the driver's window either to the side toward Tuan Pham or to

---

[144] The location from which the shotgun was fired was shown by the five expended shotgun shells located at the scene, all of which were found next to the passenger side of Tuan Pham's car, in the adjacent lane, which was the lane in which the white Honda was stopped a few yards ahead. (15 RT 2870, 2886-2887; see also Exh. 116.) Also, a witness saw that the rear window of the Honda had been shot out, and clusters of glass particles were found in the Honda's lane, close to the passenger side of the lane. (16 RT 3148; Exh. 90 [measurements].) Moreover, three shotgun waddings were also found, in the same area as the glass (i.e., around the passenger's side of the Honda's lane). (See Exh. 90 [measurements].) Inferentially, the other two waddings must have gone into the Honda through the shattered rear window. By contrast, although Tuan Pham had been standing by the driver's door of the Honda, no shotgun pellets were found in his body. (25 RT 4819.)

the rear toward the shotgun wielder. These injuries are, however, consistent with appellant's testimony that his initial reaction, upon seeing a man aiming a shotgun at him from behind the Honda, had been to put his hands up to protect himself, that he then heard a shot, and that his hand went numb. (21 RT 4044, 22 RT 4228-4230.)

The evidence of appellant's shotgun pellet injuries, then, did very little, if anything at all, to advance the prosecution's contention that appellant had been the driver of the Honda.

As for the evidence suggesting that appellant occupied the Amarillo Street residence from which the fleeing passenger had exited shortly before Officer On tried to detain him — which evidence the prosecutor sought to use as circumstantial proof that the fleeing passenger was appellant — this evidence was also extraordinarily weak. There was no evidence that the two companions of the fleeing passenger lived at that residence, so the mere fact that the passenger had also been seen walking away from the house did not show the passenger lived there. The evidence that appellant had been living at the house consisted solely of the discovery of appellant's prescription medication bottle on top of the television set in the living room of the separate apartment. (15 RT 2933 [Finley], 16 RT 3168-3169 [Nye].) But nothing else tied appellant to the apartment, no bills, no letters, no identification cards, no membership cards, no photographs. And, it bears noting, the *bedroom* of the apartment — the room most likely to have signs of who the resident is — contained a prescription bottle belonging to someone *other than* appellant. The evidence of occupancy, then, did very little, if anything, to connect appellant to the murder weapon that the fleeing man abandoned.

Thus, the only evidence of any remote substance connecting appellant to the murder weapon — and thus placing appellant in the driver's seat of the Honda at the scene of Tuan Pham's death — was Officer On's identification testimony. Under these circumstances, the error in admitting that evidence must be deemed to be prejudicial under the "reasonable probability" test of *People v. Watson* (1956) 46 Cal.2d 818, 836.

This Court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 6 Cal.4th 704, 715, original emphases. Accord, e.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *Ghilotti v. Superior Court* (2002) 27 Cal.4th 888, 918; *People v. Elize* (1999) 71 Cal.App.4th 605, 616; *In re Willon* (1996) 47 Cal.App.4th 1080, 1098.) Here, given the paucity of other evidence on the subject, there was "a reasonable chance, more than an abstract possibility" of a different outcome had Officer On's testimony been excluded. Without that evidence, the prosecution had virtually nothing to show appellant had been the driver of the Honda. A reversal is called for as a matter of state law.[145]

---

[145] Respondent may argue that appellant's false statements to Dr. Dinh about his name and how he incurred the shotgun injuries are some evidence suggesting that appellant had fired shots at the scene and that therefore he must have been the driver of the Honda. Such an argument would fail on several levels. First, false statements are "not affirmative evidence of a contrary conclusion." (See *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205 ; accord *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 512.) Second, there is no basis from which any reasonable factfinder could

(continued...)

Moreover, the admission of the evidence violated appellant's federal constitutional right to the due process of law, because, given the dominant role of that evidence on the question of appellant's guilt or innocence, its improper admission fatally infected the trial and rendered it fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62; *Lisenba v. California* (1941) 314 U.S. 219, 236; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d. 1378.) Reversal of Counts 13 and 14 is thus required as a matter of federal constitutional law.

In addition, the trial court's arbitrary refusal to adhere to the statutory foundational requirements set forth in Evidence Code sections 1401, 1521, and 1523 amounted to an additional violation of Fourteenth Amendment due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Ford v. Wainwright* (1986) 447 U.S. 399, 428 (conc. opn. of O'Connor, J.).) And here, under federal law,"[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Chapman v. California* (1967) 386 U.S. 18, 23, internal quotation marks omitted.) Or, put another way, the Constitution "requir[es] the beneficiary of a

---

[145](...continued)
possibly conclude that appellant's false statements to Dr. Dinh indicated that he had fired shots, as opposed to that he had been merely present during a gun battle (especially if, as Detective Nye testified, gang members do not want police involved in their disputes with rivals), or as opposed to that he knew the police were looking for him and wanted to minimize the likelihood that Dr. Dinh would contact the police in connection with his injuries. The false statements were insolubly ambiguous on these points. But even if all of these points were rejected, it cannot be denied, at the very least, that the statements were exceptionally weak evidence of appellant's role in the shooting of Tuan Pham.

constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) Given the circumstances of this case, respondent cannot prove beyond a reasonable doubt that the improperly admitted evidence did not contribute to the convictions in Claims 13 and 14. Reversal is called for.

THE ATTEMPTED MURDER COUNTS
(Counts 2-3, 4-5, 9-10)

III.
COUNTS 2 AND 3
(relating to the July 21, 1994 shooting of Tony Nguyen)

1. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT APPELLANT AIDED AND ABETTED THE CRIMES CHARGED IN COUNTS 2 & 3

In Counts 2 and 3, appellant was convicted of attempted murder and active street gang participation based upon the shooting and wounding of Tony Nguyen on July 21, 1994. At the time of the crime, Tony was the driver of a car that had stopped for a red light. His car contained two or three members of the Cheap Boys gang, and behind it was another car with more Cheap Boys.

Tony was shot by the front passenger of a third car, one that pulled up next to Tony. There were two people in the front of this third car and others in the back. The shooting came without warning. No words had been spoken, and no aggressive or hostile gestures made before the passenger produced a weapon and opened fire.

The driver and the front passenger (i.e., shooter) in the third car were identified as My Tran and Nghia Phan, respectively. (25 RT 4694-4696.) The prosecution's position at trial was that appellant was a passenger in the back seat of the third car and that he was guilty as an aider and abettor of Nghia Phan. (26 RT 4985 & 4986 [prosecutor tells jury Phan was the shooter and that appellant "did not pull the trigger"], 4989 [prosecutor tells jury that on "this particular count," aider and abettor principles apply]; 27 RT 4991 [similar, in rebuttal argument].)

That appellant was in the car at all was a matter of considerable dispute. The only evidence supporting such a conclusion came from Kevin Lac, a Cheap Boy, who testified he tried to be honest with the police but who, for at least 10 months after the shooting, did not identify appellant as being in the third car, even though he was shown two photographs of appellant and even though he had known appellant since before the shooting. After 13 months, however, Lac decided that appellant had been a rear passenger in the shooter's car.

Of course, proving that appellant was present in the shooter's car was insufficient to establish appellant's liability as an aider and abettor of Tony Nguyen's attempted murder or of active gang participation. It is a long settled principle of law that "mere presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting." (*People v. Richardson* (2008) 43 Cal.4th 959, 1024, internal quotation marks omitted.)

To convict appellant as an aider and abettor, the prosecution had to establish that appellant was "a person who, 'acting with (1) *knowledge* of the unlawful purpose of the perpetrator; and (2) the *intent or purpose* of committing, encouraging, or facilitating the commission of the offense, (3) by *act or advice* aid[ed], promote[d], encourage[d] or instigate[d], the commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 569.) But no evidence was presented below as to any of these three elements, let alone all of them. There was not an iota of evidence that appellant (or the person Kevin Lac eventually claimed was appellant) said or did anything at any time during or prior to the incident, nor that he had any advance knowledge of what Nghia Phan was about to do, nor that he supported Phan's actions. No words were spoken from within the shooter's car, no gestures or

movements were made by the rear seat passenger, no hostile or threatening movements were made by the shooter himself, nothing. All that the evidence even arguably showed was that appellant was present at the scene of the crime and failed to prevent its commission (which he could not have prevented anyway, as it happened suddenly and without warning).[146]

The only possible basis for the jury's finding that appellant was an aider and abettor was the prosecutor's claim below that appellant's liability was established by testimony defining what the prosecutor called "aiding and abetting backup." (27 RT 5194.) To establish "aiding and abetting backup," the prosecutor relied on testimony given by Detective Mark Nye in his capacity as gang expert. Specifically, the prosecutor had presented Nye with a hypothetical in which "a shooting occurs and somebody else is in the car," and she asked Nye "how would that person in the car be acting as backup if they're not the shooter?" Nye replied:

> "They may be acting as a driver. They may be acting as another person to intimidate witnesses or victims, in shear [sic] numbers. Basically they're acting in concert as a group. [¶] If something were to happen and they would have to bail out of the car, that member would be expected to back that person up. Be it assault somebody, be it shoot somebody, be it take over the driving of the vehicle, whatever it may be. He is going to be expected to back up the individuals."

(16 RT 3185.) In other words, Nye continued, the non-shooter is expected to "help the other individuals in the car." (16 RT 3185-3186.)

But all Detective Nye's testimony established was the existence of backup as a general characteristic of gangs. Without more, this testimony

---

[146] See also 27 RT 5194 (prosecutor tells jury, "We know that there was no prior altercation or problem between the cars. . . . No bad words, no argument, no fighting.").

did not show appellant was acting as backup at the time that Tony Nguyen was shot.

The leap from the general characteristic to this specific case is logically invalid for at least two reasons. First, just because "backup" is generally accepted in gangs, that does not mean that whenever a crime is committed by one gang member in the presence of other gang members, the other gang members are acting as backups. Gang crimes can be spontaneous; they are not always planned ahead of time by the perpetrator. And when a gang member does plan a crime, he does not necessarily disclose his plans to his gang companions. And if an instigator does disclose his criminal plans to his gang companions, the companions do not inevitably intend to facilitate the instigator's goal, nor do they inevitably perform an act that facilitates or encourages the instigator. The flaw in "reasoning" that must be relied on to make these findings is recognized as the fallacy of *dicto simpliciter* or "the sweeping generalization": It is "the fallacy of making a sweeping statement and expecting it to be true of every specific case — in other words, stereotyping." (Whitman, *Logical Fallacies and the Art of Debate* <http://www.csun.edu/~dgw61315/fallacies.-html#Dicto%20simpliciter> [as of Dec. 12, 2008].)

The second fallacy in making the leap from general characteristic to specific case is somewhat similar. Merely because "backup" is generally accepted in gangs, that does not mean that this specific defendant accepted it. As the Supreme Court has made clear, "men in adhering to [an] organization notoriously do not subscribe unqualifiedly to all of its . . . asserted principles." (*United States v. Brown*, *supra*, 381 U.S. at pp. 455-456.) Or, as Judge Alex Kozinski has written for a panel of the Ninth Circuit, "gang members do not move in lock-step formation." (*Mitchell v. Prunty*, *supra*, 107 F.3d at p. 1342.) This second flaw is an example of the

"division fallacy." "The fallacy of Division is committed when a person infers that what is true of a whole must also be true of its constituents and justification for that inference is not provided." (Labossiere, *Fallacy: Division* <http://www.nizkor.org/features/fallacies/division.html> [as of Dec. 12, 2008].)

To overcome these fallacies, the prosecution had to establish an evidentiary link between the concept of backup as an overall gang trait and the actual applicability of that concept to appellant at the time of Tony Nguyen's shooting. There had to be some basis to believe that appellant actually knew of Nghia Phan's intent to commit a crime *and* that appellant actually did engage in an "act or [render] advice [that] aid[ed], promote[d], encourage[d] or instigate[ed], the commission of the crime" *and* that appellant took this action with the actual intent to facilitate the crime. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259, internal quotation marks omitted.) This record is entirely devoid of such evidence.

Boiled down to its essence, the prosecution's position below was that because the concept of gang backup exists, every gang member is criminally responsible for whatever crimes are committed in his proximity by any other gang member. No proof of actual knowledge, actual intent to facilitate, or actual action in support of the other member's crime is required. But that is not the law, because "mere presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting." (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1024, internal quotation marks omitted.) Even if the shooter felt personally emboldened to commit his crime because of the unsuspecting presence of others in the car (and there was no evidence that Nghia Phan harbored such a feeling here), that would not by itself impose criminal liability on those others. "Culpability is not increased because, unwittingly, a person

provides additional security or support to the perpetrator." (*People v. Markus* (1978) 82 Cal.App.3d 477, 481, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027.)

Moreover, to affirm these convictions would be essentially to permit a finding of guilt by association. It would effectively criminalize mere membership in a gang. After all, one cannot be a member of any group without at some point being in the presence of other members, and if everything the other members might do in an individual's presence were attributed without more to that individual, then mere membership, mere association, would be the basis for imposing criminal liability. That would be inconsistent with the most fundamental principles of our law. (Cf. *People v. Gardeley* (1996) 14 Cal.4th 605, 623 [criminalizing mere gang membership would violate federal Constitution]; *Lanzetta v. New Jersey* (1939) 306 U.S. 451.) And it would be inconsistent with the firmly established rule that"mere presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting." (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1024, internal quotation marks omitted.)

Appellant has found no decision involving facts as skimpy as those in his case, but this Court's decision in *People v. Williams* (1997) 16 Cal.4th 153 is instructive. In *Williams*, one gang member, while driving a stolen van that had just been stolen by two males, shot a perceived rival gang member. The male gang-member driver (Barry Williams) had said, "Let's go f--k [the victim] up" immediately prior to the shooting, and about three minutes after the shooting, another male gang member (Mark Williams) was seen to be sitting in the front passenger seat of the van. This Court held that no jury could have concluded, on this evidence, that the male in the front (Mark Williams) was an aider and abettor in the shooting.

(*Id.* at pp. 225-226.) The Court found the evidence lacking for two or three independent reasons, the most relevant among them (for present purposes) being that there was no showing of "an 'intent to facilitate the crimes — an essential element of accomplice liability.'" (*Id.* at p. 225, quoting *People v. Stankewitz* (1990) 51 Cal.3d 72, 91.)

If, as this Court held, the evidence was insufficient to show that gang member Mark Williams had any "intent to facilitate the crime" when Williams was *the sole* passenger, only a few minutes after a shooting, in a vehicle that had just been stolen by *two men*, and when the gang-member driver (Barry Williams) had said "*Let's* go f–k him up" — as if talking to another person — just before doing the shooting, then surely the evidence must be insufficient when the prosecution shows merely that appellant was one of several passengers in a non-stolen car in which another passenger made no statement or gestures at all about his nefarious intentions before implementing them.

The evidence here was insufficient to support appellant's convictions under the First, Fifth, and Fourteenth Amendments. (*Jackson v. Virginia*, *supra*, 443 U.S. 307; *In re Winship* (1970) 397 U.S. 358; *Board of Directors v. Rotary Club* (1987) 481 U.S. 537; *Lanzetta v. New Jersey*, *supra*, 306 U.S. 451.)[147]

---

[147] In the course of arguing for convictions on the Tony Nguyen counts, the prosecutor talked about appellant's supposed "flight" after the shooting and about Kevin Lac's testimony that appellant approached him a few days after the shooting and asked, "What's up with the cops?" Neither adds anything to the prosecution's "aiding and abetting backup" case.

The "flight" proved nothing at all. For one thing, it wasn't even "flight." "Flight manifestly does require . . . a purpose to avoid being observed or arrested." (*People v. Abilez* (2007) 41 Cal.4th 472, 522, internal quotation marks omitted.) Here, no such purpose could have been

(continued...)

[147](...continued)
found. While appellant had indicated to his probation officer on July 19, 1994 (two days before the Tony Nguyen shooting) that he was not going to move *to Minnesota* (25 RT 4741), appellant later that month received permission from the probation officer to move *to Louisiana* (25 RT 4742-4744), and appellant did indeed check in from Louisiana on August 2, and he provided a telephone number a week after that (25 RT 4740-4742). Obviously, a defendant who obtains *permission from his probation officer* to move out of state and then checks in with him after he has done so lacks any arguable "purpose to avoid being observed or arrested."

It is "'a matter of common knowledge' that after a crime innocent persons may also flee 'through fear of being apprehended as the guilty parties . . . .'" (*People v. Green* (1980) 27 Cal.3d 1, 39, fn. 26, quoting *Wong Sun v. United States* (1963) 371 U.S. 471, 483 fn. 10 (further internal quotation marks omitted).) "'After all, innocent people caught in a web of circumstances frequently become terror-stricken.'" (*Wong Sun, ibid.*, quoting *Cooper v. United States* (1954) 218 F.2d 39, 41.) Flight is such "ambiguous conduct" that it is highly unlikely to make the difference between a verdict of guilty and one of not guilty. (See *People v. Marquez* (1968) 259 Cal.App.2d 593, 605 ["The effort of [defendant] to escape the police on this occasion does not add enough to make a circumstantial case against him here"; evidence found insufficient to support guilty verdict].)

Moreover, neither appellant's "flight" nor his supposed "What's up with the police" inquiry of Kevin Lac shows anything about what appellant knew, intended, or did at the time of Tony Nguyen's shooting. At the very most, they show that appellant was conscious of having been present at a compromising-seeming situation.

2. THE TRIAL COURT UNCONSTITUTIONALLY PREVENTED THE DEFENSE FROM FULLY IMPEACHING THE PROSECUTION'S KEY WITNESS AS TO COUNTS 2 AND 3

If the prosecution's case established that appellant was in fact in the back seat of the car from which Nghia Phan shot at Tony Nguyen, it did so based entirely upon the identification testimony of Kevin Lac. There was no physical evidence tying appellant to that shooting, and no eyewitness testimony other than that of Mr. Lac, who knew appellant all along but took 13 months to point the finger at him. Thus, Lac's testimony was the *sine qua non* of the convictions in Counts 2 and 3, and his credibility was key to the outcome of the trial on these counts.

For obvious reasons, then, the defense sought to undermine Lac's credibility. One vital prong of the defense effort was to show that Lac's testimony was untruthful. Much of what Lac testified to was not capable of independent verification, but on one or two important points, it was. Lac claimed that he did not have a weapon when he was in Tony Nguyen's car and that he did not know whether Truong Nguyen had one. (9 RT 1684.) There were a half dozen eyewitnesses whose testimony could have impeached Lac on one or the other of these points, but the trial court excluded all but two of them, including the most important and persuasive of them. This was fundamental error, and it requires reversal of the convictions in Counts 2 and 3 (assuming arguendo that the evidence can be found sufficient to support these convictions at all, see preceding claim).

A. The Facts

The preclusion of evidence began when, subsequent to Kevin Lac's testimony, the prosecutor moved to exclude "evidence that after the shooting somebody from the victim's group was seen running away from

the location with a gun." (18 RT 3404.) Defense counsel explained that the evidence would be "used for impeaching [Lac's] testimony" that he did not have a gun and did not see one. (18 RT 3405.) The prosecutor complained that the challenged evidence would not show that the gun was displayed at or prior to the shooting, and defense counsel responded that since witnesses saw the person with a gun already in his hand when he left the car, it could be inferred that the gun was drawn while inside the car. (18 RT 3406.) Counsel reiterated that the evidence was relevant to "impeach Kevin Lac" because "if the jury sees that he perjured himself in that regard, they may distrust his testimony in other aspects, which includes the identification of my client in the back seat." (18 RT 3406.)

In response, the court opined that although appellant's counsel believed the evidence would impeach Lac, "the defense is that the defendant was not there" and so "this [evidence] appears to be marginal at best." (18 RT 3408.) The court then called for a hearing to determine what the witnesses would say, and a series of such hearings ensued.

At the first hearing, the court heard from witnesses who were employees of a urology center located adjacent to where Tony Nguyen's car came to a stop. (See 18 RT 3405:6-7, 3407:25.) One of these witnesses (Alisa Trujillo) testified that she saw a young male running with a gun in his hand, outside the office window. (18 RT 3412.) He had come from the direction of Tony Nguyen's car. (18 RT 3412, 3413.) Another witness (Laura Hughey) testified she saw a young Vietnamese male in his late teens within 10 or 15 feet of Tony's car and running away from it while putting a large pistol in the front of his pants. (18 RT 3419-3421.)[148]

---

[148] A third witness to testify at the section 402 hearing (Carolyn Hunt) saw nothing relevant to the current issue. (18 RT 3415-3418.)

After hearing the testimony of Ms. Trujillo and Ms. Hughey, the court first seemed to express some concern about whether Trujillo and Hughey could "say the person they saw with a weapon was coming from [Tony Nguyen's] vehicle" but then immediately added that "[i]n this particular incident the only defense seems to be that the defendant was not there as opposed to self-defense." (18 RT 3423.) When defense counsel indicated again that the most important point was the impeachment of Lac, the court opined that "it would have to be a guess on anybody's part" whether the person with the gun had come from Tony Nguyen's car. (18 RT 3425.) Defense counsel argued that the testimony was susceptible of the reasonable inference that the man with the gun came from Tony Nguyen's car, but the court ruled it would "preclude any reference to seeing a person running with a weapon." (18 RT 3425-3426.)

The next court day, the prosecutor told the court that the defense was going to call Linda Vu, who had been in the Cheap Boys car behind Tony Nguyen's car, and that the defense wanted to ask Vu about a gun in Tony's car. The prosecutor said that she objected to such questioning. (19 RT 3651.) Defense counsel admitted he wanted to ask such questions but felt precluded from doing so in light of the court's earlier rulings concerning Ms. Trujillo and Ms. Hughey. (*Ibid.*)

Thereafter, the court held further section 402 hearings with respect to two other eyewitnesses proffered by the defense, and it concluded these two *could* testify in the trial. (19 RT 3652-58 [witness Melancon], 3701-3704 [witness Villanueva].) However, the court reaffirmed its earlier rulings excluding other witnesses on this subject, stating that any additional testimony would be "cumulative" and impermissible "because I feel that the primary defense, at least the one that's been presented, is one of identity." (19 RT 3736, 3737.)

Thereafter, in front of the jury, witness Melancon testified that he had been in a waiting room when he heard gunshots, that he looked out the window and saw one young Vietnamese male get out of Tony Nguyen's car with a revolver in his hand and run off. (19 RT 3659-3660, 3662-3665.)

The second witness to testify, Floriberto Villanueva, was a county jail inmate with pending charges and a prior conviction for possession for sale of cocaine, with an arming enhancement. (19 RT 3722.) Villanueva testified that he was working at a taco stand near the shooting and that when he heard a gunshot, he ran outside and saw a car with an injured man come to a stop against the curb. (19 RT 3706-3707, 3709-3710.) According to Villanueva, no one was in the front passenger seat, but a man in the rear pushed the front seat forward and started running away with a gun in his hand. (19 RT 3707-3708, 3710.) Thus, Villanueva's testimony indicated that Truong Nguyen (the right rear passenger in Tony Nguyen's car) also had a weapon while inside the vehicle.

Thereafter, the prosecutor sought to call Chynna Vu as a rebuttal witness. Chynna had actually been in Tony Nguyen's car at the time of the shooting, and the prosecutor called her on rebuttal to impeach Villanueva's testimony that only three people had been in Tony's car. (25 RT 4667.) Before Chynna testified, however, the prosecutor asked the judge to preclude the defense from cross-examining Chynna about whether there were any guns in the car. (25 RT 4668.) Defense counsel argued that "[c]redibility is still an issue," but the court sustained the prosecutor's objection. (25 RT 4668-4669.)

And when Chynna thereafter testified that Kevin Lac and Truong Nguyen ran away from the scene immediately following the shooting (25 RT 4716), the court would not allow defense counsel to ask whether Kevin

or Truong had anything in their hands or were carrying anything as they ran (25 RT 4719-4720.)

B. The Trial Court's Rulings Were Erroneous

The trial court's refusal to admit the evidence was error, and it denied appellant his constitutional rights to due process, to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses. (5th, 6th, 14th Amends.; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14.)

i. "Cumulative"

One reason the trial court gave for excluding the testimony of the four witnesses was that such testimony would be "cumulative." (19 RT 3736.) It is, of course, true that a trial court had considerable discretion to exclude evidence on the ground of cumulativeness. But that discretion is not unlimited, and trial courts have been found to have acted improperly in rejecting evidence as cumulative. (E.g., *People v. Carter* (1957) 48 Cal.2d 737, 748-749; *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 266-267; *People v. Rosson* (1962) 202 Cal.App.2d 480, 485-486.)

As this Court has said, "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value."[149] Thus, evidence is not cumulative where, for example, "[t]he jury would be more inclined to believe" it than already admitted evidence, or where it "repeats or fortifies a part of the [proponent's] case which had been attacked" by the other side,

---

[149] *People v. Mattson* (1990) 50 Cal.3d 826, 871, citing *People v. Carter*, *supra*, 48 Cal.2d at pages 748-749.

or where it is "the most effective way" to present a relevant matter.[150] Moreover, appellate courts have recognized that "[i]t is often invaluable to have evidence come from different sources."[151] All of these factors lead directly to the conclusion that the trial court should have admitted the evidence that the defense sought to present below.

First of all, it bears noting that the testimony that appellant was allowed to admit on the subject of whether Kevin Lac was armed was strongly contested by the prosecution. The prosecutor challenged whether Mr. Melancon had an unobstructed view of Tony Nguyen's car, and she also sought to discredit him by pointing out that he missed the fact that two of the car's occupants remained on the scene (Chynna Vu and Tin Dam). (19 RT 3667-3668.) As for Mr. Villanueva, the prosecutor spent considerable effort to establish that, as a jail inmate and criminal defendant himself, Villanueva was biased in favor of the defense and that, as a convicted felon, he lacked credibility. (19 RT 3713-3728.) Thus, the witnesses that the court allowed the defense to call did not present the defense position in the best possible light.

On the other hand, the witness who was in the best position to know that Kevin Lac was lying when he denied having or seeing a weapon in Tony Nguyen's car was Chynna Vu. After all, Chynna was a fellow

---

150 *People v. Carter*, *supra*, 48 Cal.2d at page 748; *People v. Graham* (1978) 83 Cal.App.3d 736, 741, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 446. See also *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294 (due process violated where exclusion of defense evidence made the defense case "far less persuasive than it might have been").

151 *Monroy v. City of Los Angeles*, *supra*, 164 Cal.App.4th at page 267.

passenger in the vehicle with Lac. Thus, Chynna's testimony would have had much "greater evidentiary weight" on the issue than Melancon's or Villanueva's and would have been "the most effective way" to present the point. And in light of the prosecution's challenges to the two witnesses' testimony, Chynna would also have "fortifie[d] a part of the [defense's] case which had been attacked." But the trial court flatly refused to allow the defense to ask her about such matters. Indeed, even after Chynna had testified for the prosecution that Kevin Lac fled from the scene, the court precluded the defense from asking her on cross-examination whether Kevin was carrying anything in his hands while he fled.[152] (25 RT 4716, 4719-4720.)

While Chynna was the most percipient of the rejected witnesses, she was not the only one. Her sister Linda was a passenger in the car that was traveling in tandem with Tony Nguyen's car, and it appears that Kevin Lac and/or Truong Nguyen got into Linda's car after the shooting. (See 18 RT 3412-3414 & 3419-3420 [§ 402 hearing testimony].) She, too, would have

---

[152] Respondent cannot complain that the record fails to affirmatively demonstrate that Chynna would have testified to seeing Kevin and Truong having a gun. For one thing, no such showing is required on cross-examination. (Evid. Code, § 354, subd. (c); *Tossman v. Newman* (1951) 37 Cal.2d 522, 525-526 ["no offer of proof is necessary in order to obtain a review of rulings on cross-examination"].) For another, the prosecution opposed the admission of the evidence below and did not deny the defense's claim as to what Chynna would testify to, and thus cannot now claim Chynna's testimony would not have supported the defense. "Had the testimony not done so, or had it been neutral in substance, the prosecution would have no purpose in objecting to the admission of the testimony." (*People v. Linder* (1971) 5 Cal.3d 342, 347 fn. 2.)

been able to discredit Kevin's claims, but she, too, was precluded from giving any testimony about this matter.[153] (19 RT 3651.)

Moreover, the two medical office employees, Alisa Trujillo and Laura Hughey, also had evidentiary weight to add to the testimony of Melancon and Villanueva, because they were witnesses who (unlike Melancon) the prosecutor did not contest had an unobstructed view of Tony Nguyen's car, who had no arguable defense-favorable bias (unlike Villanueva), and who also confirmed that the man running from the car had a gun in his hand and was putting it into his waistband (indicating he had the gun out earlier, while still in the car, and/or otherwise made the gun visible to Mr. Lac).

Thus, the exclusion of the defense evidence cannot be justified on the basis that it was "cumulative." It had "greater evidentiary weight or probative value" than the testimony of Melancon and Villanueva. The jury would have been more inclined to believe Chynna, Linda, Ms. Trujillo, and Ms. Hughey because of their close, first-hand knowledge and/or their unobstructed view of the scene and their lack of any arguable pro-defense bias. The omitted evidence would have "fortifie[d] a part of the [defense] case which had been attacked" by the prosecution. And it would have been "invaluable to have evidence come from different sources." The trial court plainly abused its discretion in excluding the evidence as cumulative. (See, e.g., *Chambers v. Mississippi., supra*, 410 U.S. 284 [due process violated where, although defense allowed to admit some favorable evidence,

---

[153] For the reasons discussed in the preceding footnote, respondent cannot now claim for the first time that Linda's testimony might not have supported the defense. (See *People v. Linder, supra*, 5 Cal.3d at p. 347 fn. 2.)

important and reliable evidence was excluded, rendering defense case "far less persuasive" than it would have been].)

ii. "Inconsistent With Identity Defense"

The second and most often articulated reason offered by the trial court for refusing to admit the guns-in-car testimony from the four witnesses was that "the primary defense, at least the one that's been presented, is one of identity." (19 RT 3737; see also 18 RT 3408, 3423, [both similar].) The implication was that the evidence had diminished probative value because its thrust was inconsistent with the "primary defense," which was that appellant was not in the shooter's car. This reasoning was fallacious on at least two levels.

First, the evidence *was* directly relevant to the defense's claim that appellant was not at the scene. As defense counsel explained when the issue initially arose, the evidence was relevant to "impeach Kevin Lac" because "if the jury sees that he perjured himself in that regard, they may distrust his testimony in other aspects, which includes the identification of my client in the back seat." (18 RT 3405, 3406.) Indeed, counsel made this point repeatedly. (See, e.g., 18 RT 3405, 3425, 25 RT 4668-4669.) This purpose for the evidence was more than sufficient to justify its admission.

Second, even if the evidence had been inconsistent with the defense of identity (which it was not), the trial court's reasoning was still wrong. For, it is firmly established that "inconsistent defenses may be offered." (*People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on other grounds by *People v. Breverman* (1998) 19 Cal.4th 142.) Indeed, the point was deemed to be "well settled" nearly a century ago. (*People v. Conte* (1912) 17 Cal.App. 771, 785 ["it is well settled, we think, that inconsistent

defenses or claims may be interposed in a criminal case . . . ."].[154]) It is also well settled that a trial court abuses its discretion when its ruling rests upon an erroneous legal basis. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 454; accord, e.g., *In re Charlisse C.* (2008) 45 Cal.4th 145, 150; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.)

Thus, the trial court's repeated reliance on the fact that the defense claimed that appellant was not at the scene of Tony Nguyen's shooting was doubly misguided as a basis for excluding the guns-in-Tony's-car evidence. It disregarded the impeachment value of the evidence, and it displayed a fundamental misperception of the law regarding inconsistent defenses. It cannot justify the exclusion of the evidence here.

iii. Cutting Off Defense Cross-Examination of Kevin Lac

The trial court's exclusion of defense evidence contradicting Kevin Lac's testimony about guns in Tony Nguyen's car was not the only way in which the court interfered with the defense's attack on Lac's credibility. The court also did this during Lac's testimony.

Lac was cross-examined at some length about his interview with police on May 25, 1995, ten months after Tony Nguyen's shooting. (See 9 RT 1738 et seq.) During that interview, Lac had been shown a photographic lineup with appellant's picture in it and was also shown a booking photograph of appellant by himself, but Lac never hinted that appellant (whom Lac told the interviewer was a neighbor) was in the shooter's car. (9 RT 1721-1723, 19 RT 3628-3637.) During cross-examination at trial, Lac claimed to have difficulty recalling all of what he

---

[154] Accord *In re Duncan* (1987) 189 Cal.App.3d 1348, 1363 ("It is well settled that it is proper" to present inconsistent defenses); *People v. West* (1956) 139 Cal.App.2dSupp. 923, 926 ("A defendant may present inconsistent defenses").

had said during the interview, and defense counsel repeatedly had to show him the transcript of the interview in order to refresh his recollection. (See 9 RT 1740-1742.)

Although Lac acknowledged he made the specific statements denying that he saw the passenger among the photographs he had been shown, Lac accused defense counsel of being selective in his use of the transcript of the interview or of taking words out of context. "You're just hitting the ones that you want to try to get me on," Lac said. "There's a lot of stuff in there that would help out the guys [referring to the prosecution]." (9 RT 1742.) Defense counsel immediately sought to refute Lac's accusation by asking him to point out where in the transcript Lac had made "any type of identification on May 25th." (*Ibid.*) At this point, the court interrupted sua sponte and called the attorneys into chambers. (9 RT 1742-1743.)

In chambers, the court forbade defense counsel from pursuing this line of questioning. (9 RT 1743.) Counsel tried to explain that he wanted to disprove Lac's claim that the transcript contained "a lot of stuff" unfavorable to the defense, but the court flatly refused to allow it. (9 RT 1743-1745.) The court felt counsel's question was "argumentative" and that the defense had already established that Lac had made no identification on May 25. (9 RT 1743-1744.) When thereafter counsel tried to Lac ask whether, in reading the transcript, he had "found anything interesting," the court sustained the prosecution's objection, telling counsel, "that's it. You're done." (9 RT 1744, 1746.)

The trial court's decision to preclude "this line of questioning" (9 RT 1743) was improper. For, while Lac had admitted he made no identification on May 25, still he did assert that defense counsel was selectively reviewing the interview transcript and that there was "a lot of

stuff in there" that was favorable to the prosecution. (9 RT 1742.) Defense counsel was entitled, as a matter of the constitutional law previously mentioned, to show that Lac's assertions were flat wrong. As the United States Supreme Court has stated in an analogous situation, "The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry . . . . It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 314.)

There was nothing argumentative about asking Lac to point out where in the transcript there was anything that supported his accusations, and in any event, the court precluded the entire "line of questioning" counsel was pursuing. The court acted beyond the bounds of reasonable discretion and the Constitution when it forbid such an inquiry.

C. The Erroneous Exclusion Of Evidence Compels The Reversal Of Counts 2 And 3

The exclusion of the defense evidence was clearly prejudicial as to Counts 2 and 3 under both the *Chapman* and *Watson* standards. It must be recognized that the case against appellant was extremely close. Appellant was tied to the murder only by the testimony of Kevin Lac, a member of a rival gang, and a man who first pointed a finger at appellant some 13 months after the shooting despite having known appellant throughout the entire period and despite the police having shown Lac two photographs of appellant (including one photograph in a photo lineup) in the interim. Lac's credibility was thus key to a conviction, and while there were other reasons to doubt his credibility, the excluded evidence showing that he was untruthful about having a gun and seeing Truong Nguyen with a gun would have exposed him as a liar in a direct way that no other evidence did.

The courts of this state have long recognized that errors of this nature require reversal in "a close case turning on witness credibility." (*People v. Lawson*, *supra*, 131 Cal.App.4th at p. 1249; accord, e.g., *People v. Taylor*, *supra*, 180 Cal.App.3d at p. 626 [in close case where credibility was key issue, error requires reversal].) The case against appellant on Counts 2 and 3 fits that description to a "T" — it was"a close case turning on witness credibility."

The jury, obviously, was aware of some implausibilities in Lac's story, but implausibilities do not necessarily mean a story is false. What was absent in this case was *direct* evidence that Lac was a liar, and the excluded evidence had a tendency in reason to directly show that Lac was a liar. And not merely a liar, but someone lying about the very core events of which he had been called to testify by the prosecution. In this context, the exclusion of the proffered evidence cannot reasonably be deemed to be harmless. It is impossible to conclude that, beyond any reasonable doubt, the errors did not contribute to the verdicts. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) It is also impossible to deny there is at least "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the errors. (See *College Hospital, Inc. v. Superior Court*, *supra*, 6 Cal.4th at p. 715, original emphases.)

These conclusions are only reinforced when one also adds to the mix the trial court's error in precluding the defense from discrediting Kevin Lac's claims that defense counsel had been selective when questioning Lac about his May 25, 1995, interview and that there was "a lot of stuff in there" that would "help out" the prosecution. This evidence would have further discredited Lac and his claim that appellant was a passenger in the car from which Tony Nguyen was shot.

3. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS IN EXCLUDING EVIDENCE OF THE CHEAP BOYS' PLAN, MOTIVE, AND OPPORTUNITY TO FRAME APPELLANT

Appellant has already discussed, in connection with the February 5, 1995 shooting death of Sang Nguyen (Counts 6-7), how the trial court improperly and unconstitutionally excluded defense-favorable evidence that had a tendency in reason to show the Cheap Boys had a plan, motive, and opportunity to frame appellant for Sang Nguyen's death. (See AOB, § I.2, pp. 96 et seq., *ante*.) The excluded matter consisted of evidence that would have indicated (1) that the Cheap Boys believed the Nip Family had begun "ratting" on the Cheap Boys (AOB, § I.2.A) and (2) that the Cheap Boys had a "crash pad" at which they would discuss the gang's situation and make their criminal plans (AOB, § I.2.B).

Appellant also pointed out at that time that the prejudice flowing from the trial court's errors was not limited to the Sang Nguyen counts but reached all the counts that depended upon identification testimony from one or more Cheap Boys witnesses. (AOB, §§ I.2.A, I.2.B, I.5, pp. 96 et seq., 121 et seq., *ante*.) The counts currently under discussion — Count 2 and 3, relating to the shooting of Tony Nguyen — are clearly among the affected counts, because appellant's convictions on these counts was based entirely upon the eyewitness testimony of Cheap Boy Kevin Lac. Indeed, Kevin was one of the very Cheap Boys who was arrested at the gang's crash pad. (16 RT 3004, 17 RT 3394.) Thus, given the closeness of the prosecution's case against appellant to begin with, it would be impossible to conclude that the improper exclusion of the defense-favorable evidence was harmless beyond all reasonable doubt.

4. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

In his earlier arguments concerning Counts 6 and 7, appellant has discussed how the trial court committed constitutional and statutory error by permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen to the effect that a single person was shooting Trieu Binh's friends and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, § I.3.B, pp. 115 et seq., *ante*.) In that earlier discussion, appellant also pointed out that these errors had a prejudicial effect on all the counts as to which identity was an issue, including Counts 2 and 3, the counts that are the subject of the current Section. (AOB, § I.5, pp. 121 et seq., *ante*.)

Now that the Court has a deeper appreciation of the closeness and flaws in the prosecution's case with respect to the current counts — Counts 2 and 3 — appellant reiterates those earlier points. Kevin Lac's credibility issues exclude the possibility that this Court can conclude that, beyond any reasonable doubt, the trial court's errors with respect to Trieu Binh Nguyen's hearsay identification testimony was harmless.

5. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF MULTIPLE CONSTITUTIONAL AND STATE LAW ERRORS COMMITTED IN CONNECTION WITH THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

Following defense testimony from appellant and his sisters Nen and Phuong indicating that appellant was in Alabama at the time of the shootings of Tony Nguyen (July 21, 1994) and Huy "PeeWee" Nguyen (November 24, 1994, see Counts 4 & 5), the prosecution was allowed to call as a witness appellant's former probation officer, Steven Sentman, to rebut their testimony. Not only did the trial court allow Mr. Sentman to testify despite the fact that Sentman was in violation of a court order excluding witnesses and despite the fact that Sentman came forward at the last minute with documents that caused him to drastically alter his testimony, but the court improperly refused to instruct the jury on the belated discovery and then refused to allow the defense to call a witness to impeach Sentman. These errors, and others, resulted in violations of state law and of appellant's federal constitutional rights to due process and equal protection, to a reliable guilt and penalty verdicts, to the effective assistance of counsel, to present a defense, to compel the testimony of witnesses, and to confront adverse witnesses. (5th, 6th, 8th, 14th Amends.; see, inter alia, *Davis v. Alaska*, 415 U.S. 308; *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14.)

A. Factual Background, Part One: Pre-Trial Events

Prior to trial, the defense had information from four sources as to contacts between appellant and Probation Officer Sentman in the period from July to December 1994.

First: on May 30, 1995 (five days after appellant's arrest), Probation Officer Sentman wrote a short report in support of a "Petition for Arraignment on Probation Violation" in which he stated that:

> "In July of '94 the probationer was allowed to move to the state of Louisiana with the expectations that the probationer contact the assigned probation officer via telephone updating him on his residency and if his plans were to move back to Orange County. [¶] As of December, '94, no telephone contacts were made by the probationer to the assigned probation officer. Therefore the assigned probation officer made several attempts to notify the family in Louisiana and made attempts to contact the probationer to find out the reason for his disappearance."

(25 RT 4768; see Supp.CT 51.)

Second: on or about November 17, 1995, Sentman wrote a pre-sentence report in connection with the probation violation, stating,

> "On or about August 19, '94, defendant was allowed to move to Louisiana to live with relatives. Phone contact was made monthly with the defendant until approximately December of '94. At this time several contacts were made with the defendant's family members with regards to the whereabouts of the defendant. After approximately two months of not hearing from the defendant a warrant package was being prepared to submit to court."

(See 25 RT 4766-4767; see Supp.CT 80-81.)

Third: on April 22, 1996 (more than two years before trial), the defense served a subpoena on the Orange County Probation Department, seeking "any and all probation records, reports, notes, memos, reports [sic], handwritten notes, and activity logs pertaining to the probation of and supervision of Lam Thanh Nguyen." (3 CT 937.) The Probation Department responded by delivering four pages of documents to the superior court, which, on May 10, provided copies to the parties. (1 RT 53, 55, 100-101.)

The four pages consisted of four single-page probation department forms or "chronos." All the chronos contained the same pre-printed items, including a chart for keeping track of client contacts, and there was space for handwritten entries to be made in relation to many of these items. Each of the four chronos covered a different time period, namely, "12-23-92 to 12-30-93," "12-31-93 to 6-21-94," "6-22-95 to 9-18-95," "9-19-95 to 12-6-95." (25 RT 4765, Exh. WW.)

The chrono for "6-22-95 to 9-18-95" would become the focus of dispute at trial. It had been filled out by Probation Officer Sentman. (25 RT 4751-4752.) Within the client contacts chart, in the row designated "Office," there appeared the handwritten dates "6/21, 6/28, 7/19, 8/2." (Commas added.) In the row entitled "Other," Sentman had written "7/13, 5/25." (Comma added.) The chrono also contained the following entry under "Progress under Supervision Since Last Chrono, Including Any Violation Information":

> "Defendant moved to Louisiana 8-94. Made telephone contacts 12-94. No contact 1-95. 2-95 returned to California but failed to report. Allegedly involved in several gang related shootings. Arrested 5-25-95. Three counts 187. In Orange County pending trial."

(25 RT 4765-4766; see also Exh. WW.)

Fourth: on May 10, 1996 (the same day as the court provided the parties with copies of the four chronos received from the Probation Department), Probation Officer Sentman testified at a motion to suppress evidence. (1 RT 58-72.) Among other things, Sentman testified that he had given appellant permission to move to Louisiana in July 1994. (1 RT

61, 62.) Sentman did not know precisely when in July he had given permission but speculated it was after the Fourth. (1 RT 62-63.)[155]

Sentman further testified at the motion that, based on a telephone call he received from appellant in Louisiana in August, he concluded appellant left California that month. (1 RT 61-62.) Between the time Sentman had given appellant permission to leave and the time appellant phoned Sentman in August, Sentman "did at least talk to [appellant] on the phone. [Appellant] was notifying me that he was leaving." (1 RT 66.) As far as Sentman knew, appellant did not come into the probation office during this period. (1 RT 67.)

Sentman further testified that "minimally I talked to [appellant] at least once a month, if not more" thereafter, between August and November 1994. (1 RT 65; see also 1 RT 66.) "Every time that I had talked to [appellant], he was still unclear whether he was going to stay there or not. He was looking for work." (1 RT 65.) Sentman last had contact with appellant some time in November 1994, when appellant said he was still living with family members in Louisiana. (1 RT 63.) Sentman had "at least one" telephone contact with appellant in November.[156] (1 RT 67.)

---

[155] The motion to suppress sought to suppress the gun found in Huy Pham's car at the time of appellant's arrest, and Sentman was called to testify on the question of whether the search could be justified as a probation search. The defense argument was that there had been "a de facto termination of probation" when the Probation Department allowed appellant to move out of state but did not move to transfer probation. (See 1 RT 53-54.)

[156] In his reports and testimony, Mr. Sentman kept talking about Louisiana as the place where appellant went to from California, but this was an obvious lapse of memory on his part. Appellant went to live with his sister, who lived in Alabama, and when appellant telephoned Sentman (continued...)

B. Factual Background, Part Two: Trial Events

1. Sentman's Field Notes and Testimony

At trial, the defense put on evidence — in the form of testimony from appellant and from his sisters Nen and Phuong — that appellant was in Bayou La Batre, Alabama, at the time of the shooting of Tony Nguyen (July 21, 1994), having left California very early that month. The defense evidence further indicated that in September, appellant left Alabama for work in New Orleans and that appellant remained in the South until the late November or early December, after the November 24, 1994 shooting of PeeWee Nguyen, which was the basis for Counts 4 and 5 (see AOB, § IV, pp. 272 et seq., *post*).

To rebut this testimony, the prosecution sought to call Probation Officer Sentman. (24 RT 4655.) The defense objected because Sentman had been in the courtroom during appellant's testimony and thus had violated the court's witness exclusion order. The court overruled the objection. (24 RT 4656-4657, 4663-4664.)

When Probation Officer Sentman came to court to testify, he brought with him his "field book notes" or "field notes," none of which had been provided by the Probation Department in response to the April 1996 subpoena duces tecum, although, as Sentman would admit, those notes were kept in the same probation file as the chronos. (See 25 RT 4669, 4725, 4739, 4791.) Despite repeated defense complaints about

---

[156](...continued)
on August 9, 1994, he told Sentman he was living with his family at 205-824-7515, an area code that is in Alabama. (25 RT 4742.) There is no evidence that appellant ever had family in Louisiana, though there is evidence that he later went from Alabama to Louisiana seeking work.

belated discovery, Sentman was allowed to testify (see 25 RT 4873), and based on the field notes, Sentman painted a very different picture from that which he had presented previously.

Sentman testified that, based on the field notes, the chrono for the period "6-22-***95*** to 9-18-95" actually covered the period starting June 22, ***1994***. (25 RT 4783-4784.) Sentman now believed all dates on the chrono were from 1994, not 1995, except that one date ("5/25") was for May 25, 1995, the date of appellant's arrest. (25 RT 4783, 4793-4794.)

Also based on the field notes, Sentman testified that he had actually seen appellant in person twice in July 1994, first on July 13 at Sentman's office at the Westminster Police Department and second on July 19 at his West County probation office. According to Sentman, at the July 13 meeting, appellant mentioned the possibility of moving to *Minnesota*, and then on July 19, appellant said he would *not* be moving there. Further according to Sentman, appellant was to report in person on August 2, but on that date, Sentman received a phone call from him, saying that he had moved to Louisiana (sic) and that he would provide a phone number shortly, which he did a week later. (25 RT 4740-4742.) Sentman testified that he had not given appellant specific permission to move out of state before August 2, 1994, because appellant had not told him he was intending to move. (25 RT 4802.) Appellant was expected to notify Sentman before moving, this being one of the conditions of his probation. (25 RT 4801-4802, 4811.)

Furthermore, Sentman now testified that although the "6-22-95 to 9-18-95"chrono indicated under "client contacts" that he "made telephone contacts 12/94," Sentman did not actually speak to appellant in December but only to his brother-in-law. (25 RT 4802.) In fact, Sentman now

claimed that on none of the occasions in which he called appellant out of state did he actually speak with appellant. "Usually his brother-in-law," Sentman said, "but not probationer." (25 RT 4802-4803.) "Most of the time they [family members] just said he's not here." (25 RT 4804.) The only telephone contact between appellant and Sentman was the one on August 2, and after that date, Sentman "had no personal contact with the defendant at all." (25 RT 4803.) The last time Sentman attempted to contact appellant was November 8, 1994, when relatives said appellant was out on a fishing boat.[157] (25 RT 4804, 4805.)

Then, over further defense objection, Sentman proceeded to testify that in February 1995, he was notified by the gang units of the Garden Grove and Westminster Police Departments that appellant may have returned to Orange County and that they had warrants for appellant's arrest and were looking for him. (25 RT 4794-4796.) Sentman began assisting the Westminster Police in looking for appellant but had no contact with appellant prior to his arrest on May 25, 1995. (25 RT 4795-4796.)

2. After Sentman's Testimony

To rebut Sentman, the defense sought to call Le Nguyen, appellant's third sister. (25 RT 4814.) In an offer of proof, defense counsel represented that Le was the sister in Westminster with whom appellant had been living from March until June 1994, when appellant told her he was leaving to work in the seafood industry in Alabama. According to Le,

---

[157] Recall that at the motion to suppress in May 1996, Sentman had testified that "minimally I talked to [appellant] at least once a month, if not more" thereafter, between August and November 1994. (1 RT 65; see also 1 RT 66.) "Every time that I had talked to [appellant], he was still unclear whether he was going to stay there or not. He was looking for work." (1 RT 65.)

appellant made a couple of unsuccessful attempts to contact Probation Officer Sentman before leaving around July 4, and then, between July 10 and 20, Le herself drove to Sentman's office to tell him that appellant had left and could be reached in Alabama. Le would further testify that Sentman indicated he had no problem with this. (3 CT 942; see also 25 RT 4854.) Defense counsel also represented that while Le did not actually take appellant to the airport, she did speak with him at Phuong's house in Bayou La Batre, Alabama, in July. (25 RT 4814-4815, 4856.)

The trial court refused to allow Le to testify, reasoning that since she did not see appellant out of state prior to July 19, she could not testify he actually left the area. (25 RT 4854-4855.) Thus, according to the court, Le's testimony did not have any probative value with respect to the 1994 offenses charged in this case. (25 RT 4856.)

Finally, the defense requested that the jury be given an instruction concerning the belated disclosure of Probation Officer Sentman's field notes. Specifically, the defense requested the jury be instructed as follows:

> "The probation officers [sic] field notes which he used to prepare his 6 month chronological report of contacts with the defendant were not disclosed to the defense until 24 JUNE 1998. [¶] The failure to disclose the notes before that date may be considered in the [sic] determining the accuracy of his notes and the credibility of the witness.

(3 CT 951.)

The trial court refused to give the requested instruction. Although the court found the field notes had been "properly subpoenaed" by the defense more than two years earlier (25 RT 4873), and although those notes had been in the same probation file as the chronos that were produced (25 RT 4791), the court said merely, "I did not find that the testimony

should be stricken or precluded, nor do I think I should give this special instruction." (25 RT 4873.)

C. Multiple Errors Arose from the Admission of Probation Officer Sentman's Testimony

The handling of Probation Officer Sentman's evidence was error on multiple levels.

To begin with, Mr. Sentman should not have testified at all, as he had violated a court order by attending court during appellant's testimony. While it is sometimes said that contempt of court is the only remedy when a witness has violated a court order excluding witnesses, this is "only a half truth." (*People v. Valdez* (1986) 177 Cal.App.3d 680, 691.) It is true "only when the violation of the order is not chargeable to the party or counsel" calling the witness. (*Ibid.*) It is "anticipated trial counsel will advise witnesses to remain outside until they have testified and are excused," and any party who "chooses to keep a potential witness present presumably does so knowing that except on good cause the witness will no longer be available for testimonial purposes." (*Id.* at p. 692.) "Later, if the party seeks to call the witness who remained in the courtroom, the prior knowledge of the court order and apparent election to keep the witness present will be deemed 'fault' as in 'you were responsible for keeping the witness present.'" (*Ibid.*)

In the present case, Mr. Sentman was the prosecution's witness, and thus the prosecution had a duty to advise him of the court's witness-exclusion order. (*People v. Valdez*, 177 Cal.App.3d at p. 692.) But neither the prosecutor nor Mr. Sentman himself offered any justification whatsoever for Sentman's violation of the order. Under these

circumstances, the trial court's refusal to exclude Sentman's testimony was an abuse of discretion and a violation of due process.

—

Second, if it was permissible for the trial court to permit Mr. Sentman to testify, the trial court should have imposed a strong sanction for the extremely belated disclosure of Sentman's field notes. As the trial court itself found, those notes had been "properly subpoenaed" by the defense more than two years earlier. (25 RT 4873.) The notes had been in the same probation file as the chronos (25 RT 4791), so there was not a shred of an excuse – and neither Sentman nor the prosecutor proffered any — as to why the notes had not been disclosed two years earlier, in response to the defense's 1996 subpoena duces tecum.

Moreover, the prosecution was independently required by statute to turn over "[r]elevant *written* or recorded *statements of witnesses* or reports of the statements of witnesses whom the prosecutor intends to call at the trial." (§ 1054.1, subd. (f).) That the prosecutor knew Sentman's field notes existed is apparent from the fact that she asked him to bring those notes to court (24 RT 4659), and in addition, Sentman was, during 1994 and 1995, a partner of Detective Nye in the Target Gang Unit and thus a member of the investigating agency. (16 RT 3152, 25 RT 4809.) The defense, of course, could not have even suspected that the field notes existed because, in response to the defense's subpoena duces tecum for "any and all probation records, reports, notes, memos, reports, handwritten notes, and activity logs" related to appellant, the Probation Department produced only the four chronos and represented that they were copies of "all records described in the Subpoena Duces Tecum" that the Department had. (3 CT 937; Exh. WW, 3rd page.)

Not only was there no justification for the withholding of the field notes, but those notes seemed to contradict — in a manner quite helpful to the prosecution and prejudicial to the defense — the crux of what Mr. Sentman had previously represented to the court in his probation reports and what he had testified to under penalty of perjury at the May 1996 motion to suppress. Prior to trial, Sentman, a law enforcement officer and an officer of the court on whose representations both the court and the defense had relied, had repeatedly vouched for such facts as that "[p]hone contact was made monthly with the defendant until approximately December of '94"[158] and that "minimally I talked to him at least once a month, if not more" between August and November 1994.[159] But the field notes caused Sentman now to claim, for example, that the only time he spoke with appellant was on August 2, 1994, after which he "had no personal contact with the defendant at all." (25 RT 4803.)

Under these circumstances — the misrepresentation of the Probation Department, upon which the defense relied, that the chronos were "all records" the Department possessed; the unjustifiably belated disclosure of the field notes; the purported contradictions between the field notes and what Sentman had previously represented to the court — the only effective sanction was to preclude Sentman from testifying with the field notes. No other sanction was remotely effective, and in fact, under these circumstances, due process of law demanded it. (See *Lindsey v. Smith* (11th Cir. 1987) 820 F.2d 1137, 1151 [late disclosure "even of inculpatory

---

158 25 RT 4766; see also, e.g., Supp.CT 51 (losing contact with appellant "[a]s of December, '94"), 25 RT 4766 ("[n]o contact 1-95").

159 1 RT 65; see also 1 RT 66.

evidence" can "render a trial so fundamentally unfair as to violate due process"].)

The trial court's decision to allow Mr. Sentman to testify and its refusal to exclude use of the field notes stands in stark and inexplicable contrast to what it had done, sua sponte, when it felt the defense had committed a discovery violation. Recall that when the court (mistakenly) concluded that *the defense* had violated discovery law with respect to undisclosed statements of Tin Duc Phan (see AOB, § I.2.A, *ante*), the trial court had, entirely on its own initiative, used the (improper) sanction of exclusion of evidence (see AOB, § I.2.A.ii.b, pp. 103 et seq., *ante*).

Yet here, where there could not have been a clearer case of a discovery violation by *the government*, the court refused to impose a similar sanction, even though here such a sanction was permissible and appropriate. Indeed, as we will discuss next, the court refused to impose any sanction at all, and it even precluded the defense from calling a witness to impeach the belated discovery. This plain double standard with respect to discovery violations constituted a further, independent violation of due process and of equal protection under the Fifth and Fourteenth Amendments. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474 ["Due Process Clause . . . speak[s] to the balance of forces between the accused and his accuser"]; *Washington v. Texas*, *supra*, 388 U.S. at pp. 24-25 [barring defense evidence that prosecution could elicit violates due process] (Harlan, J., concurring).)

—

Even assuming arguendo that the trial court properly allowed use of the field notes at trial, the court should not have refused to instruct the jury about the significance of the belated discovery. It should not have refused

to instruct the jury that "[t]he failure to disclose the notes before that date may be considered in the [sic] determining the accuracy of his [Sentman's] notes and the credibility of the witness." (3 CT 951.)

This Court has recognized that unjustifiably belated discovery does reflect on credibility. "The fact that [a party] failed to comply with his obligations under the discovery statutes" is "relevant evidence the jury could consider in assessing the credibility of [the witness'] testimony." (*People v. Riggs* (2008) 44 Cal.4th 248, 310.) There was no justification for the trial court to have refused a defense instruction that embodied this principle. The mere fact that the court had allowed the field notes to be testified to (the only reason the trial court gave for refusing the instruction) was not even arguably a valid reason why the proffered instruction should not be given. There is no inconsistency between allowing testimony and giving a cautionary instruction. By definition, whenever a cautionary instruction is given, the testimony to which it relates has to have been already admitted. The trial court's reasoning was an obvious non sequitur.

No rational basis exists as to why the government's blatant discovery violation should be subject to no sanction at all, certainly not when the defense had relied on what the government had previously represented. Rejecting the instruction was an abuse of discretion and a violation of due process.

—

Capping off the trial court's refusal to do anything about Mr. Sentman's testimony was its rejection of defense efforts to call appellant's sister Le Nguyen to testify in rebuttal to Sentman. The court found her testimony irrelevant, reasoning that "the critical part that is not there [in the defense offer of proof as to Le's testimony] is[,] did she see the

defendant . . . after the 4th of July, and prior to the 19th of July in Alabama, or Louisiana, or some out-of-state location. And she can't testify to that. And apparently she cannot testify that he actually left the area. She just didn't see him after he left her particular residence." (25 RT 4854-4855.) Thus, according to the court, Le's testimony did not even have "some probative value" with respect to the 1994 offenses charged in this case. (25 RT 4856.)

Evidence is relevant if it 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.) Relevant evidence "includ[es] evidence relevant to the credibility of a witness." (*Ibid.*) The evidence here was relevant for many reasons. For one thing, while it is true that Le could not testify to "see[ing] the defendant . . . in Alabama, or Louisiana, or some out-of-state location," that merely means her testimony was not *direct* evidence that appellant was in Alabama. It does not mean it was not *circumstantial* evidence of that fact. It is well established that circumstantial evidence is just as satisfactory as direct evidence in proving a fact.

The Evidence Code specifically allows the admission of an out-of-court "statement of intent [or] plan" when "offered to prove . . . acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a)(2).) Le's testimony that appellant told her he was leaving to work in the seafood industry in Alabama was relevant and admissible as circumstantial evidence to prove that appellant so acted.

Furthermore, Le's additional testimony that appellant engaged in behavior consistent with his statements — that he left her home and was not seen there again — was circumstantial evidence having a tendency in

reason to corroborate that appellant did in fact go to Alabama, as he had declared he was about to. And if there were any doubt on this score, there is an important additional fact that the trial court overlooked: Le would testify that she did have contact by telephone with appellant in Alabama thereafter in July. (25 RT 4856.) And she made this contact by dialing a phone number in Alabama. (25 RT 4815.)

And even beyond this, Le's testimony was relevant for the further reason that it impeached Mr. Sentman's claim that he saw appellant in person on July 13 and 19, since Le would have testified that "between July 10th and July 20th," she herself "drove down to Sentman's office" and told him "that Lam had left town and how Lam could be reached in Alabama." (3 CT 942.) Not only did this impeach Sentman's testimony, but it had a tendency in reason to give a defense-favorable explanation as to why Sentman had made the July 13th and 19th entries in the chronos: any actual in-person contact he had had on those dates was with Le rather than appellant, and Sentman had recorded those entries either in an inaccurate fashion (a very reasonable possibility, given all of the other errors that Sentman admitted to) or in such a cursory way that at trial, he merely assumed it was appellant, rather than Le, that he had had contact with (again, a reasonable possibility, given the changing nature of his testimony and given his testimony at the 1996 suppression motion in which he swore that appellant did not come into his office between July and August, see 1 RT 67).

As noted earlier, the refusal of the court to allow Le Nguyen's rebuttal violated appellant's federal constitutional rights, including the rights to present a defense, to compel the testimony of witnesses, and to

confront adverse witnesses. (*Davis v. Alaska*, 415 U.S. 308; *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14.)

D. Prejudice

The remaining question is whether the errors require reversal of Counts 2 and 3, i.e., whether respondent can show that, beyond any reasonable doubt, the errors did not contribute to the verdicts. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The evidence of appellant's guilt as to these counts was hardly overwhelming, and the improper admission of Sentman's testimony about his field notes was plainly key to the jury resolving its doubts in the prosecution's favor.

And even if that testimony were deemed properly admitted, the result would be the same, because the defense was prevented or substantially impaired from undermining that testimony because of the court's refusal of the cautionary instruction about belated discovery and the court's rejection of defense efforts to have Le Nguyen testify to rebut Mr. Sentman.

6. IF REVERSAL OF COUNTS 2 AND 3 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

Appellant has also previously discussed how both state and federal constitutional law require an appellate court to consider whether the cumulation of errors requires that a judgment of conviction be set aside, even if no individual error would compel that result. (AOB, § I.5, pp. 121 et seq., *ante*.) That discussion is equally applicable to the judgment against appellant with respect to Counts 2 and 3. In light of the undeniable closeness of the prosecution's case for guilty verdicts on these counts, certainly the cumulative prejudice from the multiple errors made below would entitle appellant to a new trial, even if the Court were to conclude that no single error did.

7. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

As to each of the claims raised in Sections 2, 3, 4, and 5, *ante*, defense counsel adequately preserved the claim. However, if this Court were to conclude otherwise, or if it were to conclude that counsel's actions were somehow insufficient to allow one or more of the claims to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington*, *supra*, 466 U.S. 668.) Appellate hereby incorporates his previous discussion of this issue. (AOB, § I.4, pp. 119 et seq., *ante*.)

There clearly was no tactical reason for any allegedly inadequate action or failure to act by trial counsel. This is demonstrated by defense counsel's own behavior, for counsel attempted to exclude the evidence discussed in Section 4, and he did attempt — repeatedly, and on multiple grounds — to introduce the evidence discussed in Sections 2 and 3. And, as discussed in Section 5, counsel attempted to exclude the probation officer's testimony, to obtain a cautionary instruction concerning that testimony after it was admitted, and to introduce the testimony of appellant's sister to rebut it. Nor could there be any satisfactory explanation for counsel's alleged omissions. Under these circumstances, any failure to preserve any of the issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis*, *supra*, 50 Cal.3d at p. 282 [this Court considers otherwise forfeited "claim on the merits to

forestall an effectiveness of counsel contention"]; *People v. Stratton*, *supra,* 205 Cal.App.3d at p. 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].)

Moreover, to the extent constitutional issues are raised in this appeal, they are not waived by inadequate objection. (See *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118; *People v. Coddington*, *supra*, 23 Cal.4th at p. 632.)

IV.
COUNTS 4 AND 5
(relating to the Nov. 24, 1994 shooting of Huy "PeeWee" Nguyen)

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT ON UNREASONABLE SELF-DEFENSE REQUIRES REVERSAL OF COUNTS 4 AND 5

In Counts 4 and 5, appellant was convicted of attempted murder and active street gang participation based upon the shooting and wounding of Huy "PeeWee" Nguyen on November 24, 1994. As will be recalled, the incident began when PeeWee initiated an assault with his fists upon a male outside the Mission Control video arcade. After PeeWee's friends joined in the assault, increasing the level of violence, the male drew a gun and shot PeeWee, and when PeeWee stumbled into the arcade, the man pursued, shooting him again. Under the prosecution's version of the case, the shooter was appellant, and for current purposes, we assume arguendo that this is so.[160]

The trial court properly instructed the jury on self-defense, but it repeatedly refused to instruct on imperfect self-defense. (See 25 RT 4860-4861, 4863, 4903; 27 RT 5263-5264.) This refusal constituted reversible error and deprived appellant of his constitutional rights to due process, to a jury trial, and to present a defense. (5th, 6th, 14th Amends.)

An individual acts in imperfect self-defense where he "actually, although unreasonably, believe[s] in the need for self-defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 778.) If the individual kills under the influence of such a belief, the killing is manslaughter rather than murder. (*Id.* at p. 776.) As with self-defense, the prosecution bears the burden of

---

[160] A detailed summary of the evidence regarding this incident appears in the Statement of Facts, *ante*, at pages 15 to 23.

proving beyond a reasonable doubt that the individual was not acting in imperfect self-defense. (See CALJIC No. 8.51, CALCRIM Nos. 571, 604.)

In the present case, it is at least reasonably likely that a jury would have concluded there was a genuinely felt (and indeed reasonable) need for the use of self-defense during the initial assault by PeeWee and his cohorts. While generally "an assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense," that limitation does not come into play if "that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him." (27 RT 5283-5284, 3 CT 1052, quoting CALJIC No. 5.31.) Given the evidence of the unprovoked, escalating, and unremitting assault on appellant — the evidence that PeeWee was joined by seven others, that appellant's head was smashed into a pillar, that he was kicked and punched and held down by his hair, and that the assault continued even after he managed to draw a weapon and tried to scare off his assailants[161] — a reasonable jury would certainly have found that appellant had an actual (and reasonable) belief in the need to defend himself when he fired the initial shots outside the arcade.

Thereafter, of course, PeeWee made his way back into Mission Control, and appellant followed him inside and shot him again. This further action does not negate the possibility that appellant still believed his actions were in self-defense. For the law provides that a defendant who believes in the need for self-defense "need not retreat." Rather, "[i]n the exercise of his right of self-defense . . . *a person may pursue his assailant until he has secured himself from danger if that course likewise appears*

---

[161] See 8 RT 1430, 1431, 1433-1434, 1436, 1457, 1501, 1550-1551, 18 RT 3449.

reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (27 RT 5283-5284, 3 CT 1053, quoting CALJIC No. 5.50; accord CALCRIM No. 3470.)

Here, it is reasonably likely that a jury would have found that appellant, in pursuing PeeWee into Mission Control, was still acting under the influence of the unrelenting attack that PeeWee had instigated against him and that therefore he believed that it was still necessary to secure himself from imminent lethal danger, to prevent PeeWee from obtaining a firearm or summoning one or more comrades who had a firearm before appellant could get away. While the jury may have found that PeeWee did not actually pose such a danger, there is a reasonable probability that the jury would have concluded that, under the excitement and urgency of the moment, the shooter *believed* he did. At the very least, it is reasonably likely the jury would have found that the prosecution had failed to prove beyond a reasonable doubt that the shooter did *not* act under such a belief. With such findings, a properly instructed jury would have concluded that appellant was acting in imperfect self-defense and was guilty of attempted voluntary manslaughter rather than attempted murder. This is the verdict of which appellant was deprived by the trial court's ruling.

It is true that the right of self-defense exists "only as long as the real or apparent threatened danger continues to exist" and that "where a person . . . uses enough force upon his attacker as to render the attacker apparently incapable of inflicting further injuries, the right to use force in self-defense ends." (27 RT 5284-5285, 3 CT 1055-1056, quoting CALJIC Nos. 5.52, 5.53.) But appellant could have believed that PeeWee, whether wounded or not, was still capable of inflicting further grievous injury by procuring a firearm or enlisting help from armed associates. Certainly,

there is a reasonable probability that the jury would have concluded the prosecution had failed to prove beyond all reasonable doubt that appellant acted for reasons other than fear for his life.[162]

Because appellant was denied his constitutional right to present a defense and to trial by jury on the issue of imperfect self-defense, a reversal is called for. (*United States v. Miguel* (9th Cir. 2003) 338 F.3d 995, 1003.) But even if a harmless error test were applied, the result would be the same. The very evidence that warranted the giving of the instructions on imperfect self-defense — evidence that no jury passed upon — means that it is impossible to conclude that, beyond any reasonable doubt, the error did not contribute to the verdict. (*Chapman v. California*, 386 U.S. at p. 24.)

---

[162] The fact that appellant did not himself testify to a belief in the need for self-defense does not preclude the need to instruct. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 51 [where defendant claimed accidental shooting, his "assertion of accident may be disregarded by the jury in an appropriate case, and will not foreclose jury instruction on self-defense when there exists substantial evidence that the shooting was intentional (and met the other requirements of self-defense."], italics omitted; *People v. Keel* (1928) 91 Cal.App. 599, 605 ["if the evidence tends to raise the issue of self-defense although the defendant denies the killing, it seems that an instruction based on the theory of self-defense is proper and should be given"]; see also *People v. Conte* (1912) 17 Cal.App.771, 784-785 [alibi defense does not rule out instructing jury on intoxication].) Further, here, the trial court did instruct on self-defense, refusing only to instruct on imperfect self-defense. (5 RT 4860-4861, 4863, 4903; 27 RT 5263-5264.)

It is also established, as was pointed out in section III.2.B.ii, pp. 246-247, *ante*, that "inconsistent defenses may be offered." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 720; *In re Duncan*, *supra*, 189 Cal.App.3d at p. 1363; *People v. Conte*, *supra*, 17 Cal.App. at p. 785; *People v. West*, *supra*, 139 Cal.App.2dSupp. at p. 926.) And, moreover, the jury was "not required to make a binary choice between the prosecution evidence and the defense evidence." (See *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589-590; accord *People v. Barton* (1995) 12 Cal.4th 186, 196.)

2. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS AS TO (1) THE CRIME OF ACTIVE GANG PARTICIPATION IN COUNT 5 AND (2) THE GANG-BENEFIT ENHANCEMENTS ATTACHED TO COUNTS 4 AND 5

To convict appellant of the charge of active gang participation in Count 5, the prosecution had to prove beyond a reasonable doubt that by his actions on November 24, 1994, appellant "actively participate[d] in" the Nip Family criminal street gang. (§ 186.22, subd. (a).) And similarly, to obtain a true finding on the gang-benefit enhancements attached to Counts 4 and 5, the prosecution had to establish (among other things) that the underlying crime was "committed for the benefit of, at the direction of, or in association with" the Nip Family gang. (§ 186.22, subd. (b)(1).) But there was no evidence to support either element. There was no substantial evidence from which a jury could reasonably have found that the shooting of PeeWee Nguyen was gang-related. Thus, the conviction in Count 5 and the true findings as to the gang-benefit enhancements associated with Counts 4 and 5 violated Due Process and must be set aside. (*Jackson v. Virginia, supra*, 443 U.S. 307; *In re Winship, supra*, 397 U.S. 358; *People v. Johnson, supra*, 26 Cal.3d 557.)

It is established that "crimes may not be found to be gang-related based solely upon a perpetrator's criminal history and gang affiliations." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195; accord *People v. Martinez* (2004) 116 Cal.App.4th 753.) "'The crime itself must have some connection with the activities of a gang.'" (*Frank S.*, 141 Cal.App.4th at p. 1199, quoting *Martinez*, 116 Cal.App.4th at p. 761.) But here in the present case, "nothing in the record connected defendant's conviction to gang activity." (*Id.* at p. 762.)

The evidence as to the shooting of PeeWee Nguyen shows, at most, a personal dispute of some sort between PeeWee and (allegedly) appellant, one moreover that was apparently initiated by PeeWee himself at a time when appellant was unaccompanied by any Nip Family member. Certainly, appellant had the right to defend himself from an attack, especially when PeeWee's friends joined in and escalated the violence, and even if appellant had no right to pursue PeeWee into the Mission Control arcade, there was not the slightest evidence that this pursuit was in any way gang related. To the contrary, when he emerged from Mission Control, the shooter uttered words of defiance that referred, *not* to any gang, but to his own individual safety. "If anyone is against *me*," he yelled, "I'll shoot them, too." (8 RT 1585.)

But perhaps the most telling confirmation that this shooting was not gang related comes from the deafening silence on the point by the otherwise omniscient gang expert, Detective Nye, and the prosecutor herself. For although the prosecutor elicited Nye's opinion as to the gang-related nature of every other incident for which appellant was charged,[163] no such testimony was ventured as to the shooting of PeeWee Nguyen. Nor did the prosecutor ever hazard an explanation to the jury as to how this shooting might have been gang related.

The upshot is that there is no evidence — and no substantial evidence, evidence of ponderable legal significance, reasonable in nature,

---

[163] 16 RT 3207, 3209-3210, 3212, 3214-3215, 3215.

credible and of solid value[164] — to support the verdicts as to Count 5 and the gang-benefit enhancements as to both Counts 4 and 5.[165]

---

[164] *People v. Johnson, supra*, 26 Cal.3d at page 571.

[165] The fact that the jury overreached here is confirmed by the fact that in order to convict appellant of the substantive crime under section 186.22(a), the jury had to ignore the instructions given by the trial court and redefine the crime itself. For the court had instructed the jury that, in order to convict appellant of this offense, the jury had to find that appellant "*aided and abetted* a member or members of [the] gang in committing" the assault on PeeWee Nguyen. (27 RT 5289.) Of course, the only evidence of appellant's guilt here in Counts 4 and 5 was that he was the sole perpetrator. There was no evidence that he "aided and abetted" anyone (let alone, Nip Family gang members) in committing the assault on PeeWee. Thus, the conviction of section 186.22(a) demonstrates the jury's willingness to disregard the law in order to return guilty verdicts.

Appellant notes that the version of section 186.22 that was in effect in 1994 (the dates of the incidents charged in Counts 4 and 5, as well as Counts 2 and 3 [the shooting of Tony Nguyen]) differed slightly from the version that was in effect in 1995 (the dates of the remaining incidents). (Compare Stats 1994, ch. 47, §1, eff. April 19, 1994, with Stats. 1994, ch. 451, §1.) However, the differences, involving the addition of subdivisions (e)(22) and (e)(23), are irrelevant to any of the issues in this appeal.

3. REVERSAL OF COUNTS 4 AND 5 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

In his earlier arguments concerning Counts 6 and 7, appellant discussed how the trial court committed constitutional and statutory error by permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen to the effect that a single person was shooting Trieu Binh's friends and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, § I.3.B, pp. 115 et seq., *ante*.) Appellant also pointed out there that these errors had a prejudicial effect on all the counts as to which identity was an issue, including Counts 4 and 5, the counts that are the subject of the current Section. (AOB, § I.5, pp. 121-122, *ante*.)

Appellant reiterates those points here. Appellant only wishes to add that the prosecution's case for establishing that appellant was PeeWee's shooter was, to put it mildly, far from overwhelming. The only evidence tying appellant to the offense came from mostly "unsure" identifications, made at least six months after the event, by Shannon Choeun and Cindy Pin, two of the three young teenagers who saw all or part of the fight outside Mission Control. At trial, Cindy was unable to make even an "unsure" identification, and other witnesses indicated that appellant was not the shooter. Given the lack of strength of the prosecution's case, the error with respect to Trieu Binh's hearsay evidence compels reversal under *Chapman*, though it would also warrant a reversal under *Watson*.

4. REVERSAL OF COUNTS 4 AND 5 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS ARISING FROM THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

In his earlier arguments concerning Counts 2 and 3, appellant discussed the multiple levels of constitutional and statutory errors that arose in connection with the prosecution's decision to call Probation Officer Steven Sentman as a rebuttal witness. (AOB, § III.5, pp. 121-122, *ante*.) As pointed out in that discussion, Sentman's testimony was rebuttal evidence as to both of the shootings that occurred in 1994, i.e., the July 21st shooting of Tony Nguyen (Counts 2 & 3) and the November 24th shooting of Huy "PeeWee" Nguyen that is the subject of the current section of the AOB (Counts 4 & 5). Thus, errors discussed earlier are equally relevant here and are incorporated by reference. And for similar reasons as those previously discussed, those errors would require reversal of the Counts 4 and 5 here, under the federal *Chapman* standard. The errors adversely affected the jury's assessment of the credibility of the defense evidence as to appellant's whereabouts at the time PeeWee was shot. The errors plainly contributed to the verdicts. Reversal would also be required even if this Court were to apply the *Watson* test.

5. IF REVERSAL OF COUNTS 4 AND 5 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

As mentioned earlier, appellant has previously discussed how both state and federal constitutional law require an appellate court to consider whether the cumulation of errors requires that a judgment of conviction be set aside, even if no individual error would compel that result. (AOB, § I.5, p. 121, *ante*.) That discussion is equally applicable to the judgment against appellant with respect to Counts 4 and 5. In light of the close case for the prosecution on these counts, certainly the cumulative prejudice from the errors made below would entitle appellant to a new trial, even if the Court were to conclude that no single error did.

6. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

As to each of the claims raised in Sections 1 and 3, *ante*, defense counsel adequately preserved the claim. (No objection is required to preserve the insufficient-evidence claim in § 2.) However, if this Court were to disagred, or if it were to conclude that counsel's actions were somehow insufficient to allow one or more of the claims to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington*, 466 U.S. 668.) Appellate hereby incorporates his previous discussion of this issue. (AOB, § I.4, pp. 119-120, *ante*.)

There clearly was no tactical reason for any allegedly inadequate action or failure to act by trial counsel. This is demonstrated by defense counsel's own behavior, for counsel requested the instruction discussed in Section 1, attempted to exclude the evidence discussed in Section 3, and, as to the errors addressed in Section 4, sought to exclude the challenged testimony, to obtain a cautionary instruction after it was admitted, and to introduce the testimony of appellant's sister in rebuttal . Under these circumstances, any failure to preserve any of the issues would amount to the ineffective assistance of counsel. (See *People v. Lewis*, 50 Cal.3d at p. 282; *People v. Stratton*, 205 Cal.App.3d at p. 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].) Moreover, to the extent constitutional issues are raised in this appeal, they are not waived by inadequate objection. (See *People v. Yeoman*, 31 Cal.4th at pp. 117-118; *People v. Coddington*, 23 Cal.4th at p. 632.)

V.
COUNTS 9 AND 10
(relating to the March 11, 1995 shooting of Khoi Huynh)

Introduction

In Counts 9 and 10, appellant was accused of shooting Khoi Huynh, one of the leaders of the Cheap Boys gang, outside a pool hall at about 9:30 p.m. on March 11, 1995. With no physical evidence connecting appellant to the shooting, the prosecution relied on identification evidence of varying degrees of confidence and consistency from five witnesses, four of whom were not gang members and the fifth of whom was Khoi Huynh himself. Whether that evidence is viewed individually or cumulatively, the prosecution's case was hardly airtight. (See AOB 39 et seq., *ante.)*

All four of the non-gang-member eyewitnesses viewed a lineup with appellant's photograph in it, and all four selected the photo of one An Phung as the shooter. (9 RT 1782, 1791-1792, 1817, 10 RT 1873, 13 RT 2539-2540, Exh. K.) While two of them thereafter selected appellant at a live lineup and a third was not sure, the lineup did not contain An Phung or anyone from the photographic display other than appellant.

Moreover, only one of the four identified appellant in court, and that individual, Jeremy Lenart, was a problematic witness for the prosecution because (1) he was an ex-felon on probation, (2) he admitted he was under the influence of methamphetamine at the time of the shooting, (3) he had given police a description of the shooter that did not match appellant and had told the officers that he would be unable to recognize the shooter if he saw him again, (4) he had also given the police a version of how the shooting transpired that was quite different from the version he testified to at trial, and (5) when viewing the photo lineup in which appellant's picture appeared, Lenart did not merely select An Phung as the shooter but he

affirmatively told the officer, "That's definitely him." (9 RT 1775-1776, 1778, 1780-1781, 1792, 20 RT 3789-3793.)

As for Khoi Huynh, the Cheap Boys leader, his identification evidence came in the form of five pretrial statements made to law enforcement officers. In the first and second such statements, Khoi told police he doubted he could identify anyone but he "suspected" the Nip Family, and he failed to select appellant's photograph when it was shown to him. (13 RT 2404-2406, 2469-2470, 2473, 2476-2477, 2496, 2501-2502.) The day after the second statement, Khoi told an officer that his former friend "Lam" was one of the shooters, and he selected appellant's photograph from a photo lineup. (13 RT 1484-1486, 2497-2498, 2515-2516.) About five weeks thereafter, Khoi told police, "I don't even know the guy who shot me." (13 RT 2404-2406, 2476-2477, 2496, 23 RT 4469-4470.) And three days after that, Khoi told a different officer that appellant had shot him. (15 RT 2895, 2915.)

1. REVERSAL OF COUNTS 2 AND 3 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS IN EXCLUDING EVIDENCE OF THE CHEAP BOYS' PLAN, MOTIVE, AND OPPORTUNITY TO FRAME APPELLANT

As previously noted, appellant has pointed out — in his earlier discussion of issues related to the charges arising out of the February 5, 1995 shooting death of Sang Nguyen (Counts 6-7) — that the trial court improperly and unconstitutionally excluded defense-favorable evidence that had a tendency in reason to show the Cheap Boys had a plan, motive, and opportunity to frame appellant for Sang's death. (See AOB, § I.2, pp. 96 et seq., *ante*.) The excluded matter consisted of evidence that would have indicated (1) that the Cheap Boys believed the Nip Family had begun "ratting" on the Cheap Boys (AOB, § I.2.A) and (2) that the Cheap Boys had a "crash pad" at which they would discuss the gang's situation and plan their criminal plans (AOB, § I.2.B).

The AOB's discussion of Counts 6 and 7 also pointed out that the prejudice flowing from the trial court's errors was not limited to the Sang Nguyen counts but reached all the counts that depended upon identification testimony from one or more Cheap Boys witnesses. (AOB, §§ I.2.B & I.5.) The counts currently under discussion — Count 9 and 10, relating to the shooting of Khoi Huynh — are clearly among the affected counts, because Khoi was a Cheap Boy "shot caller" and the only witness who had not affirmatively picked out someone other than appellant at some point. The excluded defense evidence went directly to explain why this was so.

Moreover, the prosecution's other evidence pointing to appellant as the shooter was less than overwhelming. All the non-gang witnesses had initially identified someone other than appellant as the shooter when shown a photo lineup. In fact, they had all identified the same other person, An

Phung, and Mr. Phung was not in the live lineup from which some of them selected appellant. Only one of the non-gang-member witnesses made an in-court identification of appellant, and that witness had plenty of problems of his own, not the least of which were that he was under the influence of methamphetamine at the time of the shooting incident and he gave changing stories about what he had seen and whether he could even make an identification.

On this record, it is impossible to conclude that the improper exclusion of the defense-favorable evidence was harmless beyond all reasonable doubt as to these counts. Further, even if viewed solely as a state law matter, there is at least "a *reasonable chance*, more than an *abstract possibility*," that a different outcome would have occurred in the absence of the errors.

2. REVERSAL OF COUNTS 9 AND 10 IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

Also in his earlier arguments concerning Counts 6 and 7, appellant discussed how the trial court committed constitutional and statutory error by permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen to the effect that a single person was shooting Trieu Binh's friends and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, § I.3.B, pp. 115 et seq., *ante*.) Appellant also pointed out there that these errors had a prejudicial effect on all the counts as to which identity was an issue, including Counts 9 and 10, the counts that are the subject of the current Section. (AOB, § I.5, pp. 121 et seq., *ante*.) Appellant reiterates those points here. Now, though, it should be clear that the prosecution's case for establishing that appellant was Khoi's shooter was far from overwhelming. In that context, the error with respect to Trieu Binh's testimony cannot be held to be harmless. Certainly, there is at least a reasonable doubt whether the error was prejudicial. Further, there is at least "a *reasonable chance*, more than an *abstract possibility*," that a different outcome would have occurred in the absence of the errors. Reversal is called for.

3. IF REVERSAL OF COUNTS 9 AND 10 IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS BY ITSELF, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

Appellant has previously discussed how both state and federal constitutional law require an appellate court to consider whether the cumulation of errors requires that a judgment of conviction be set aside, even if no individual error would compel that result. (AOB, § I.5, pp. 121-122, *ante*.) That discussion is equally applicable to the judgment against appellant with respect to Counts 9 and 10. In light of the undeniable closeness of the prosecution's case for guilty verdicts on these counts, the cumulative prejudice from the multiple errors made below would entitle appellant to a new trial, even if the Court were to conclude that no error alone did.

4. IF THIS COURT WERE TO CONCLUDE THAT DEFENSE COUNSEL FAILED TO PRESERVE ANY OF THE AFOREMENTIONED CLAIMS, THEN A NEW TRIAL WOULD BE REQUIRED ON THE GROUND THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

As to each of the claims raised in Sections 1 and 2, *ante*, defense counsel adequately preserved the claim. However, if this Court were to conclude otherwise, or if it were to conclude that counsel's actions were somehow insufficient to allow one or more of the claims to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington*, 466 U.S. 668.) Appellate hereby incorporates his previous discussions of this issue. (AOB, §§ I.4, pp. 119-120; III.6, p. 269; IV.5, p. 281, *ante*.)

VI.
GANG CONVICTIONS AND ENHANCEMENTS
(Counts 3, 5, 7, 10, 14, plus ten § 186.22(b) enhancements)

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE "PRIMARY ACTIVITIES" ELEMENT OF THE GANG CRIMES AND ENHANCEMENTS

The evidence was insufficient to support the jury's guilty verdicts as to the five active-gang-participation crimes and the true findings as to the ten gang-benefit enhancements. Specifically, the evidence was insufficient to show that commission of crimes enumerated in section 186.22, subdivision (e), was one of the *primary* activities of the Nip Family.[166]

Detective Nye was asked, "Until 1994 and 1995, could you tell us some of the primary activities of the Nip Family gang?" His answer was: "Homicides, attempted homicides, assaults, assault with deadly weapons, home invasion robberies, burglaries, auto theft, and narcotics sales." (16 RT 3178-3179.)

The case is like *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, in which the evidence of primary activities was insufficient:

> "At trial, Lang testified as a gang expert. . . . He also stated his opinion that Varrio Viejo was an active street gang as of the date of Alexander's arrest. When asked about the primary activities of the gang, he replied: 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I

---

[166] At the time of the crimes with which appellant was charged, the substantive gang offenses required, among other elements, that the defendant participate in a "criminal street gang," and the gang enhancement required, inter alia, that the defendant be convicted of a felony committed for the benefit of a "criminal street gang." (§ 186.22, subds. (a), (b)(1) [frequently hereafter referred to as "§ 186.22(a)" and "§186.22(b)," respectively].) The term "criminal street gang" was defined in subdivision (f) of section 186.22 and contained the "primary activities" element.

> know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' No further questions were asked about the gang's primary activities on direct or redirect examination.
>
> "Lang's entire testimony on this point is quoted above — he 'kn[e]w' that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how Lang had obtained the information. He did not directly testify that criminal activities constituted Varrio Viejo's primary activities. . . .
>
> "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. . . .
>
> "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. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003 ['While experts may offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence.'].) Lang's conclusory testimony cannot be considered substantial evidence as to the nature of the gang's primary activities.
>
> "Lang also testified about two specific crimes committed by gang members. . . ."

(Footnotes omitted.) The description just quoted also fits Detective Nye's testimony in appellant's case now before this Court. For here, as in *Alexander L.*, "[n]o specifics were elicited as to the circumstances of these crimes, or where, when, or how [Nye] had obtained the information." (See 149 Cal.App.4th at pp. 611-612.)

Furthermore, a determination of the *primary* activities of a group requires an understanding of *all* the activities of the group; an assessment of *primary* activities is possible only in that context. This Court has looked to a dictionary and concluded that, in order to satisfy this element, commission of crimes enumerated in the statute must be "one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323; see, e.g., *People v. Perez* (2004) 118 Cal.App.4th 151, 159-160.) A judgment concerning what is and is not a primary activity cannot be based on an assessment of the group's criminal activities alone. It demands familiarity with all the group's activities, criminal and otherwise, so that the number and nature of the enumerated crimes committed by its members on its behalf can be assessed in context. "Primary" is a term of comparison. Something must be secondary for something else to be primary. The same is true of the synonyms "chief" and "principal" used in *Sengpadychith* in expounding upon this element. The concept remains one of comparison even though it suffices that the enumerated forms of criminality are "one of [the group's] primary activities" (§ 186.22, subd. (f)) and need not be *the,* that is, the *sole,* "primary" activity of the group. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1040, 1130 (Chin, J. , conc. & dis. opn.) ["The fact that many . . . gang members commit crimes . . . does not establish that the gangs have crime as a universal purpose, primary activity, or condition of membership."].)

Perhaps Detective Nye misunderstood the question, or the statutory element, to refer to the primary types of *crimes* that a particular gang commits, whereas it actually addresses the question whether or not crimes of any of the enumerated types are among the primary activities of the gang at all. Alternatively, Nye may have fallen victim to the old adage that

where the only tool you have is a hammer, everything begins to look like a nail. When one investigates gangs for the purpose of prosecuting crimes, not in an attempt to discern their primary activities or to understand their social dynamics more generally, their criminal activities are likely to look primary simply because they are primary to the observer. This observation can say nothing about what is primary to the gang members themselves, or what is primary within the meaning of the statute.

Or perhaps Detective Nye or the prosecutor mistakenly equated the "primary activities" element with the distinct element of a "pattern of criminal gang activity." As few as two predicate offenses could suffice to establish a pattern under the definition in subsection (e) of section 186.22. The "primary" activities of a group of more than 50 people (16 RT 3178) over a period of years are quite another matter. A handful of crimes do not fit the latter description. This Court noted the difference in *Sengpadychith.* (26 Cal.4th at p. 323.)

No witness provided similar examples of any of the other activities of the Nip Family besides enumerated crimes (either specific acts or general categories), by which the jury could put Nye's testimony into perspective and make any judgment at all about whether or not, beyond a reasonable doubt, commission of enumerated crimes was "one of the primary activities" of the group.

For evidence to be sufficient, it must be "substantial . . . that is, evidence which is reasonable, credible, and of solid value." (*People* v. *Johnson, supra,* 26 Cal.3d at p. 578.) "A reasonable inference . . . may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People* v. *Morris* (1988) 46 Cal.3d 1, 21 (internal quotation marks and citations omitted), disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-545, fns. 5 & 6.) This

Court must examine the record de novo. (See *Johnson, supra*, 26 Cal.3d at pp. 576-578.)

No evidence shed sufficient light on the *entirety* of the activities of the Nip Family in a way which would substantially support the jury's verdict on this particular element.

The convictions on the gang-participation counts and the true findings on the gang-benefit enhancements were based on insufficient evidence and thus violated appellant's right to due process under the Fifth and Fourteenth Amendments. (*Jackson* v. *Virginia*, 443 U.S. 307.) The convictions and findings must be reversed.

2. IT IS IMPERMISSIBLE BOOTSTRAPPING TO ADD GANG ENHANCEMENTS TO SUBSTANTIVE GANG OFFENSES

The prosecutor in this case sought not only to add a gang enhancement (§ 186.22(b)) to each murder and attempted murder conviction, and she not only sought convictions of the substantive gang offense (§ 186.22(a)) in connection with each such conviction, but she also sought, and was allowed, to apply a gang *enhancement* to each of the substantive gang *offenses*. This latter use of the gang enhancement — attaching it to a gang *conviction* — was improper as a matter of law

Applying a gang enhancement to a gang crime amounts to impermissible bootstrapping under principles laid down in *People v. Briceno* (2004) 34 Cal.4th 451 and *People v. Arroyas* (2002) 96 Cal.App.4th 1439, principles that were reaffirmed less than a year ago in *People v. Jones* (2009) 47 Cal.4th 566, 572-575.

In *Briceno*, this Court construed the language of subdivision (c)(28) of section 1192.7, which provides that a conviction for "any felony offense [that] would also constitute a felony violation of Section 186.22" is a "serious felony," thus invoking various sentence enhancements. In *Briceno*, as in the present case, section 186.22(a) defined the substantive felony of street terrorism, while section 186.22(b)(1) provided for additional punishment when a defendant committed any felony for the benefit of a criminal street gang. At the relevant time for *Briceno*, the additional punishment was ordinarily a prison term of two, three, or four years (§ 186.22(b)(1)(A)) but was five years when the crime committed was a serious felony (§ 186.22(b)(1)(B)).

At issue in *Briceno* was whether section 1192.7(c)(28) applied only to the substantive offense described in section 186.22(a), or whether it also applied to any felony to which the additional punishment under section

186.22(b)(1) has been applied. This Court held that the statute applied in both instances. (*Briceno*, 34 Cal.4th at p. 456.) The Court cautioned, however:

> "[W]hile it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B) . . . . [¶] . . . [N]othing in [the voter initiative that enacted section 1192.7(c)(28)] . . . suggests an intention of the voters to bootstrap, in the same proceeding, any felony offense committed for the benefit of a criminal street gang into a section 186.22(b)(1)(B) offense 'as a means of applying a double dose of harsher punishment.'"

(*Briceno*, 34 Cal.4th at p. 465, quoting *People v. Arroyas*, 96 Cal.App.4th at p. 1445; see *People v. Jones*, 47 Cal.4th at pp. 573.)

Similarly, in *People v. Arroyas*, 96 Cal.App.4th 1439 — which *Briceno* cited with approval in both *Briceno* and *Robert L. v. Superior Court*[167] — the Court of Appeal addressed the interaction between section 186.22's subdivision (d), which provided that a misdemeanor committed to benefit a criminal street gang may, in the trial court's discretion, be punished as a felony, and section 186.22(b)(1), which provided that a felony committed to benefit a criminal street gang is subject to an additional prison term. *Arroyas* held that when a defendant commits a misdemeanor to benefit a criminal street gang, the offense may be punished as a felony under subdivision (d) of section 186.22, but the felony is not subject to the additional penalties of that subdivision (b)(1), which applies to felonies committed to benefit a criminal street gang. *Arroyas* held that the voters who added subdivision (d) to section 186.22 did not intend "to bootstrap subdivision (d) misdemeanors into subdivision (b)(1) felonies."

---

[167] *Briceno*, 34 Cal.4th at page 465; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907 footnote 18.

(*Arroyas*, 96 Cal.App.4th at p. 1445; accord *Robert L. v. Superior Court*, 30 Cal.4th at pp. 907-908 & fns. 18 & 20 [applying *Arroyas* holding to wobblers, requiring prosecution to "elect whether to prosecute the offense under section 186.22(d) (*and thus not have the option of charging the section 186.22, subdivision (b)(1) enhancement*), or charge the crime as a felony and allege the section 186.22, subdivision (b)(1) enhancement"]; see also *People v. Jones*, 47 Cal.4th at pp. 573-574.)

Similarly, in *Robert L. v. Superior Court*, 30 Cal.4th 894, this Court applied the *Arroyas* holding to wobblers, thus requiring the prosecution to "elect whether to *prosecute the offense under section 186.22(d) (and thus not have the option of charging the section 186.22, subdivision (b)(1) enhancement*), or charge the crime as a felony and allege the section 186.22, subdivision (b)(1) enhancement." (*Robert L.*, 30 Cal.4th at pp. 907-908 & fns. 18 & 20.)

The reasoning of *Briceno*, *Robert L.*, and *Arroyas* — reaffirmed in *Jones* — controls here. Both the substantive gang offense in section 186.22(a) and the gang enhancement in section 186.22(b) appear in the same statute and were enacted at the same time, and both pertain directly to criminal street gangs. Thus, just as in those cases, it is "improper to use the same gang-related conduct again to obtain an additional . . . sentence under section 186.22(b)(1)(B)." (*Briceno*, 34 Cal.4th at p. 465.) And "nothing in [the language or history of section 186.22] suggests an intention . . . to bootstrap, in the same proceeding, any felony offense committed for the benefit of a criminal street gang into a section 186.22(b)(1)(B) offense as a means of applying a double dose of harsher punishment." (*Ibid.*, internal quotation marks omitted.)

Thus, the five section 186.22(b) enhancements attached to the five section 186.22(a) convictions must be set aside.

OVERALL GUILT-PHASE ISSUES

VII.
CLAIMS RELATED TO THE ARREST AND PROSECUTION OF THE DEFENSE INVESTIGATOR

1. THE JUDGMENT MUST BE REVERSED FOR INEFFECTIVE ASSISTANCE OF COUNSEL ARISING FROM THE CRIMINAL DERELICTIONS OF THE DEFENSE INVESTIGATOR, DANIEL WATKINS

The jury returned with its penalty-phase verdict on July 14, 1998. (4 CT 1308-1309.) On July 27, less than two weeks later, Daniel Watkins, the sole defense investigator in this case, was arrested on a federal charge of conspiracy to commit murder. (30 RT 5899, 5 CT 1696-1702.) Search warrants for Watkins' office were executed on the day of Watkins' arrest, and an affidavit in support of the warrants, prepared by FBI Special Agent P. Michael Dunbar, indicated the conspiracy to murder had begun in October 1997 or shortly thereafter.[168] (5 CT 1711, ¶¶ 20-21.)

Subsequently, a federal indictment was issued, charging Watkins with conspiracy to murder and conspiracy to use the mail to commit murder and naming three co-conspirators: Hung "Henry" Mai (a county jail inmate facing capital murder charges in a case unrelated to appellant Nguyen's), Victoria Pham (Mai's girlfriend), and Huy Ha (a trusted associate of Mai).

---

[168] Apparently, both federal and state search warrants were obtained. (See 5 CT 1735.) The federal search warrant was based upon the affidavit by FBI Special Agent Dunbar mentioned in the text. (See *ibid.*) The state search warrant was supported by an affidavit or "Statement of Probable Cause" by District Attorney Investigator Joseph R. Huerth. (5 CT 1734-1739.) Huerth's affidavit attached and incorporated Dunbar's affidavit. (5 CT 1735.) In many respects, Huerth's affidavit tracks the language of Dunbar's affidavit verbatim, though the Dunbar affidavit is much longer.

(5 CT 1696.) The indictment alleged overt acts occurring from December 24, 1997, through May 29, 1998. (5 CT 1698-1700.)

On October 5, 1998 — ten weeks after Watkins' arrest on the federal charge — the state brought its own criminal action against him, accusing him of having conspired with Hung Mai to commit an act injurious to the public on or about May 13. (5/4/06 Supp.CT 460-461.)

The federal and state charges against Watkins were closely connected. It turns out that, while Watkins was supposedly working as the investigator for appellant Nguyen's attorneys, he was also engaged in various nefarious schemes with Hung Mai. Watkins was assisting Mai in a conspiracy to kill at least one witness in Mai's case (thus, the federal charge), and in the course of those efforts, Watkins was enlisting Mai to silence a central witness in appellant's case (thus, the state charge), an action that was contrary to what appellant's lawyers were instructing Watkins to do and that adversely affected appellant's defense. The result of Watkins' unauthorized, improper, and unreasonable actions was a denial of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process and a fair trial, the effective assistance of counsel, confrontation of witnesses, and a reliable determination of guilt and penalty.

A. The Facts

Daniel Watkins was appointed as investigator for appellant Nguyen's defense on March 11, 1996. (30 RT 5944-5945.) Watkins was appointed as investigator for Hung Mai on July 11, 1997. (30 RT 5945.)

Watkins had worked for one of appellant Nguyen's lawyers — attorney Robison Harley — for more than a decade. (31 RT 6037.)

1. Brief Background Concerning Watkins' Activities with Respect to the Federal Conspiracy[169]

While in jail on his capital murder charges, Hung Mai attempted to orchestrate other criminal activities, including counterfeiting and illegal firearms transactions, and the Santa Ana Police Department and the Bureau of Alcohol, Tobacco, and Firearms were investigating those activities. (5 CT 1710 ¶ 19.) In October 1997, an undercover agent contacted Mai, purporting to want to work with him. (5 CT 1711 ¶ 20, 1724-25 ¶¶ 66a-67.) During their first meetings, Mai indicated he also wanted to kill Alex Nguyen, a witness in Mai's pending capital murder charge.[170] (5 CT 1711 ¶ 21.) The undercover agent ("UCA" or "UCO" in the record) agreed to handle the murder for Mai. (5 CT 1711 ¶ 21.) Alex's brother may also have been targeted for killing. (5 CT 1715-1716 ¶¶ 37-38.)

Alex was living in Texas, and the UCA needed information about Alex's appearance, family, and work and residence addresses in order to "kill" him. (5 CT 1711 ¶ 21, 1714 ¶ 30.) Investigator Watkins used his investigative trips to Texas to obtain much of that information and provide it to Mai, Mai's girlfriend Victoria Pham, and/or Mai's cohort Huy Ha, and these persons passed the information along to the UCA. (5 CT 1714 ¶ 32, 1717 - 1720.) Watkins provided "information about the whereabouts of Alex Nguyen, which included the name, address and phone number of the

---

[169] Most of the facts in this subsection and the next one are taken from the affidavits of FBI Special Agent Dunbar (5 CT 1703-1731) and District Attorney Investigator Huerth (5 CT 1734-1739). (See preceding footnote.) In large part, these affidavits were based on transcripts of phone conversations that were recorded pursuant to federally authorized wiretaps.

[170] Hereafter, Alex Nguyen will generally be referred to by his first name.

gas station owned by Nguyen's family." (5 CT 1719 ¶ 50.) Watkins may also have provided a photograph of Alex that had been included in the discovery materials provided to the defense in Mai's case. (5 CT 1720-1721.)

In April 1998, the FBI faked Alex's murder and provided the UCA with two staged photographs of the "execution." (5 CT 1721 ¶ 54.) On April 14, the UCA gave the photographs to Huy Ha, who in turn told Mai about the supposed murder. (5 CT 1721 ¶ 55.) The next day, Mai left a telephone message with investigator Watkins, saying "I have something to tell you." (5 CT 1722 ¶ 56.)

On April 17, Watkins told Mai in a recorded telephone call that he was going to Dallas in a few weeks for appellant Nguyen's case, and he asked if he should also go to Houston (where Alex and his family lived). (5 CT 1722 ¶ 57.)[171]

At the end of May, Mai called the UCA and wondered why he had not been contacted by police about Alex's disappearance. The UCA responded that perhaps the police did not yet know Alex was missing, and he suggested checking for a missing persons report. (5 CT 1723 ¶ 64.) Mai thereupon telephoned Watkins, who was about to leave for Texas to do investigation for appellant Nguyen's case, and asked him to obtain a missing persons report for Alex. (5 CT 1723-1724 ¶65.) Watkins responded, "I don't think I can do . . . you know what I mean? That would be showing your hand. And what I'm thinking about doing is just calling from a pay phone and seeing what I can find out." Mai agreed with this approach. (5 CT 1724 ¶ 65.)

---

[171] The affidavit of Special Agent Dunbar does not reveal Mai's immediate response.

2. Watkins' Activities with Respect to the State Conspiracy

On Wednesday, May 13, 1998 — after the faked murder of Alex Nguyen but before the exchange between Mai and Watkins about the missing persons report — Mai had another telephone conversation with Watkins. (5 CT 1726 ¶67c.) By this date, a jury had been selected for appellant Nguyen's trial, and the prosecution's case-in-chief was set to begin the following Monday. In the May 13th phone call, Watkins told Mai that the prosecution was about to call witnesses, and the following colloquy ensued:

Hung Mai: "You want me to put a shut on Khoi [Huynh] what I really need is that portion you asked me to read, but without the name of whoever it is that wrote it. I just need that portion because I talked to Khai [Vo] and he said he, you know, believes what I'm saying and all the other stuff, but he needs that portion if something needs to be done. You know what I mean?"

Watkins: "Okay."

Hung Mai: "Because that's the paper that will keep that guy shut, you know."

Watkins: "Yeah, well, I don't want to know anything more about that."

Hung Mai: "But if you want . . . I need that soon if you want that taken . . .you know?"

Watkins: "Okay, I'll stop by the jail today. What you want me to do is take that page and to white out . . . ."

Hung Mai: "The name of . . . whoever it is that wrote it, or just cut it out. I just need the portion part of what I read."

Watkins: "Okay, and I'll just make it look like it's all blacked out. I'll drop that by."

(5 CT 1726 ¶ 67c, ellipses in original, indicating pauses or sentences not completed by the speaker.)

Khoi Huynh was called as a prosecution witness two weeks later, on Wednesday, May 27. (3 CT 820; 10 RT 1882-1994.) Khoi's testimony was most notable for the extent to which he claimed a lack of recall. Both the prosecutor and defense counsel believed Khoi was lying about his memory lapses. (See 26 RT 4995-4998 [prosecutor].) Defense counsel would call Khoi's claims of memory lapse "laughable." (30 RT 5899.) Khoi telephoned the district attorney's office after his testimony and stated that he did not identify appellant Nguyen as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶ 67d.)

On June 1, 1998, jail personnel searched the cell of Khai Vo, the inmate to whom Mai had referred in his "put a shut on Khoi" phone call with Watkins on May 13. (5 CT 1727 ¶ 67e.) In Vo's cell, jailers found a report by an investigator for Vo's attorney, memorializing the investigator's November 1995 interview of Khoi Huynh in which Khoi had purported to identify appellant Nguyen as the person who had shot him on March 11, 1995. (*Ibid.*) Consistent with what Watkins had told Mai he would do with the document they discussed in the May 13th phone call, the letterhead of the report was whited out.

After the discovery of the report, a jail inmate housed with Mai called Watkins, telling him "that something had happened and that it could come back to him (Watkins), so he should visit Mai soon." (5 CT 1728 ¶ 67f, capitalization in original omitted.)

On September 30, 1998 (two months after Watkins' arrest), FBI agent Dunbar and an investigator from the Orange County District

Attorney's Office interviewed appellant's lead counsel, Robison Harley, about Watkins' work for him. Harley had a copy of the same report as had been found in Khai Vo's cell, except that Harley's copy had no white-outs. Harley had obtained the report from Ernie Eaddy, Vo's attorney. Harley explained that Watkins had told him that he wanted to give a copy of the report to Mai, though Watkins said nothing about whiting out any portion of the document. Harley approved Watkins' request. (9/29/06 Supp.CT vol. 2 at pp. 591, 594.)

3. Court Proceedings Prior to Watkins' July 27, 1998 Arrest

On June 17, 1998 (35 days after Watkins' "put a shut on Khoi" conversation with Hung Mai, and 40 days before Watkins' arrest), Watkins testified for the defense to impeach Tin Duc Phan, a member of the Cheap Boys gang. In Phan's testimony, Phan had been asked whether it was true that he had told Watkins that it was "okay to rat on [the Nip Family], since they're ratting on us" and that the motivation for the Cheap Boys getting appellant was "to teach Nip Family that Cheap Boys will rat off Nip Family gang members in retaliation for any Nip Family ratting on them." As to both quoted statements, Phan claimed he did not remember. (20 RT 3833-3834.) The defense then called Watkins, who testified that Phan had made the statements. (21 RT 3975-3976.)

On cross-examination of Watkins, the prosecutor elicited that Watkins had asked Tin Phan if Tin was aware that Khoi Huynh was cooperating with the police. (21 RT 3978.) Then, the prosecutor asked Watkins whether he had talked to anyone else about Khoi Huynh's cooperation with law enforcement. Specifically, she inquired whether Watkins had discussed Khoi's cooperation with anyone who "would have had any direct or indirect contact [with Khoi] *in the sense of might*

intimidate or hinder his testimony." (21 RT 3982.) When the defense objected to the question, the prosecutor told the court, at the bench, that Khoi had been "cooperative for three years" but at trial, he had "come in and [could] not remember anything about being shot seven times." (*Ibid.*) The prosecutor "want[ed] to see if there is any other direct or indirect pressure put on Khoi Huynh." (*Ibid.*)

The court allowed the prosecutor to proceed with her questioning, and when she asked Watkins whether he "talk[ed] to anyone, intending or hoping that they would *put pressure on Khoi Huynh not to testify*," Watkins responded, "Not that I recollect." (21 RT 3983.) The prosecutor then asked whether Watkins "talked to *anyone outside of this case* intending or hoping that they would *put pressure on Khoi Huynh* not to testify," and again Watkins replied, "[N]o, not that I can recollect having talked to anybody to put pressure." (21 RT 3984.) The prosecutor persisted. "You can't remember if you talked to anyone to put pressure on him not to testify?" she asked. "No," Watkins responded, "I don't remember that." (*Ibid.*)

In addition to Watkins' testimony at trial, there were also two in camera hearings involving Watkins, one on May 22 (after four days of the prosecution's case-in-chief), and the other on June 17 (the same day as Watkins testified he did not recall putting pressure on Khoi Huynh). At both hearings, defense counsel expressed concern that Watkins would be pulled away from appellant's trial due to legal problems of his own. Counsel variously described Watkins' legal problems as "a hearing in family court" and "a divorce situation," involving "divorce court. (9 RT 1851-1852, 21 RT 3900-3904.) In fact, however, defense counsel were concealing the extent of Watkins' legal problems. For in addition to the divorce and family-court matters, Watkins was also a defendant in two

separate misdemeanor criminal cases: he was facing charges of child abuse/endangerment and of spousal battery. (5 CT 1688, 1690.) Counsel later admitted they were aware of these charges at the time they spoke about Watkins to the trial court. (31 RT 6013-6015.)

4. Court Proceedings After Watkins' July 27, 1998 Arrest

As noted earlier, Watkins was indicted by a federal grand jury on August 6, 1998, on charges of conspiracy to commit murder and conspiracy to use the mail to commit murder, with Hung Mai, Victoria Pham, and Huy Ha charged as co-conspirators. (5 CT 1696-1731.) In addition, on October 5, 1998, a felony complaint was filed against Watkins in Orange County Superior Court, accusing him of conspiracy to commit an act injurious to the public in connection with his May 13 "put a shut on Khoi Huynh" conversation with Mai. (5/4/06 CT 460-461.)

Thereafter, from November 1998 until the end of January 1999, there were several court hearings in appellant Nguyen's case related to the Watkins situation. These consisted primarily of discovery proceedings and hearings on a defense motion for a new trial based upon Watkins' misconduct. In the course of these proceedings, the various documents cited in the preceding subsections were admitted, and the court allowed narrowly limited testimony from Khoi Huynh, District Attorney Investigator Huerth (the affiant in support of the state search warrant for Watkins' office), and District Attorney Investigator Lyle Wilson (who apparently had been working on the Watkins prosecution). The most relevant items to emerge from these proceedings are as follows:

First: The court allowed Khoi Huynh to testify but only as to whether he had *direct* contacts with Watkins in which Watkins *personally* sought to dissuade him from testifying. (See 30 RT 5921-5924.) When the

defense sought to ask Khoi whether "anyone" suggested he claim a failure to recall, the court ended up refusing to allow the inquiry. (30 RT 5924-5925, 5929-5930.) The court did, however, ask District Attorney Investigator Wilson whether he himself had ever asked Khoi about threats or statements from others regarding his testimony in appellant's case, and Wilson stated that in June, Khoi had told him no such attempt at dissuasion occurred.[172] (30 RT 5931-5932.)

Second: Defense counsel represented to the trial court that they had instructed Watkins "on numerous occasions to seek an interview with [Khoi] Huynh, not to shut him up" and that "attempts by Watkins to silence Khoi Huynh were directly contrary to repeated requests by both attorneys." (5 CT 1681; 31 RT 6006, 6053-6054.)

Counsel also repeatedly told the court that Khoi's decision to feign a lack of recall was very harmful to the defense. (See, e.g., 5 CT 1684-1685, 31 RT 6008, 6026, 6029-6030, 6036-6037, 6076-6077.) For one thing, Khoi's faked memory lapse "sanitized"[173] his claim that appellant had shot him on March 11, 1995. It prevented the defense from impeaching Khoi himself as to that claim, and instead it allowed the prosecution to use polished and experienced police officers to testify to as to Khoi's prior inconsistent statements on the point.

And there was even more profound prejudice. The defense position was that Khoi was a major participant, if not the moving force, in a Cheap

---

[172] Of course, Khoi's statement to Investigator Wilson contradicted by the fact — set forth in the sworn affidavit of FBI Special Investigator Dunbar — that after testifying, Khoi had telephoned the District Attorney's Office and stated that he did not identify appellant as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶ 67d.)

[173] 5 CT 1684.

Boys scheme to frame appellant in retaliation for Nip Family members testifying against Cheap Boys. However, Khoi's faked claim of having no memory of who shot him and no recall of whom he had previously identified made Khoi appear to be trying to *help* appellant, or at least not harm him, which would have been perceived by the jury to be flatly inconsistent with an effort to frame him.

Third: The defense pointed out that District Attorney Investigator Huerth's affidavit in support of the July 27, 1998 search warrant showed that the District Attorney's Office knew about the ongoing investigation of Watkins. (31 RT 6008-6013.) That affidavit stated that Huerth had become aware during "the first week in March 1998" that the FBI was investigating Hung Mai's ongoing criminal activities, and it also stated that, during the FBI investigation and within no more than two weeks of Watkins' "put a shut on Khoi" conversation with Mai, Huerth had "assist[ed] in locating and verifying the location of Watkins' business office." (5 CT 1735, 1737-1738.) The only conceivable purpose for Huerth to have undertaken such an effort was to assist in the investigation of the May 13th "put a shut on Khoi" phone call.

On top of this, Huerth must have had discussions with the prosecutor handling appellant's trial, since he learned that "Khoi Huynh testified he could not recall who it was that had shot him seven times on March 11, 1994."[174] (5 CT 1736.)

Fourth: Two months after Watkins' arrest, the FBI interviewed attorney Harley, the lead counsel for appellant. In the interview, Harley

---

[174] And this is confirmed by the prosecutor's cross-examination of Watkins at trial, when she pointedly asked Watkins whether he had talked to "anyone" — including "anyone outside of this case" — intending or hoping to have them put pressure on Khoi not to testify. (21 RT 3983-3984.)

disclosed that Watkins had told him that Hung Mai could arrange an interview with Khoi Huynh. According to Harley, Watkins wanted to give Mai a copy of an interview report, and Harley told Watkins "it was okay to show it or provide it to him." Harley identified the report as the report of the November 1995 interview with Khoi Huynh — a copy of which had been found in Khai Vo's cell — except that when Harley saw it, nothing had been whited out. Harley told the FBI that the report had been obtained from Vo's attorney. (31 RT 6053; Mo. New Trial Exh. 1, 2nd page.)

Fifth: During the proceedings on the defense motion for a new trial, the deputy district attorney handling the motion (not the trial prosecutor herself) expressed concerns "as to whether this defense team is capable of bringing this type of motion as opposed to some independent counsel taking a look at it and presenting it." The trial court declined to appoint independent counsel. (31 RT 6049-6050, 6067.)

Sixth: The trial court denied the defense's motion for a new trial. It stated:

> "There's insufficient evidence for the Court to conclude that Watkins did, in fact, tell Khoi Huynh not to make any statements in the course of the trial of People v. Lam Nguyen. . . .
>
> "I cannot say that there's been a sufficient or adequate showing to determine that the defendant was denied a fair trial, that he was prejudiced by Watkins' involvement in this proceeding[], or that Watkins, to the detriment of the defendant, either did not willfully comply with the directions and guidance he received from his attorney or, through simple neglect, failed to comply with the full -- full directives given to him by his two attorneys. . . .
>
> "And so I listen to your representations and I'm looking for is there something that took place between counsel and the appointed investigator that is against the interest of the

> defendant and was prejudicial to him. [¶] And I can't find that. . . .

(31 RT 6066, 6068, 6072.)

The court further stated that the thrust of the defense motion was that "Lam Nguyen did not get a fair trial because you [defense counsel] did not know that Watkins was not giving full attention, full effort, and was not completely loyal to his interests and the interests of the attorneys appointed to represent him." (31 RT 6072.) According to the court, it was "not clear that Watkins is, quote-unquote, working now for someone who's trying to defeat the best interests of the defendant . . ." (31 RT 6074.) And the court even stated it was unable to conclude that Watkins was part of Mai's "operation" to preclude Khoi Huynh's testimony. (31 RT 6075.)

B. Ineffective Assistance by an Investigator Violates the Constitution

It is by now firmly established that "the [constitutional] right to counsel is the right to the effective assistance of counsel." (*Strickland v. Washington* (1984) 466 U.S. 668, 686, internal quotation marks omitted; accord, e.g., *Mickens v. Taylor* (2002) 535 U.S. 162, 166 ["assistance which is ineffective in preserving fairness does not meet the constitutional mandate."].)

Also firmly established is that counsel has a "duty to investigate." (*Strickland*, 466 U.S. at p. 690.) Specifically, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Id.* at p. 691; see also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ["ABA Guidelines"], Guideline 11.4.1.A ["Counsel

should conduct investigations relating to the guilt/innocence phase . . . of a capital trial."[175])

It is well understood that counsel need not — and often cannot or should not — personally conduct all investigations. Rather, counsel may — and usually should or must — use a trained investigator. Thus, it is an integral part of due process and the right to counsel that "[an] indigent defendant has a constitutional right to investigative services . . . when some need is demonstrated, which is invariably the case in complex capital cases." (*United States v. Mikhel* (9th Cir. 2009) 552 F.3d 961, 964, internal quotation marks omitted; see also *Ake v. Oklahoma* (1985) 470 U.S. 68; *Williams v. Stewart* (9th Cir.2006) 441 F.3d 1030, 1053; and see Commentary to ABA Guideline 8.1 ["quality representation cannot be rendered by assigned counsel unless the lawyers have available for their use adequate supporting services [including] trained investigators to interview witnesses and to assemble demonstrative evidence"].)

But regardless of the use of an investigator, the duty to investigate remains ultimately the lawyer's responsibility. The investigator is, after all, merely counsel's agent in carrying out the *Strickland* "duty to investigate." (See *Strickland v. Washington*, 466 U.S. at p. 690).

Therefore, it necessarily follows that ineffective assistance by an investigator amounts to ineffective assistance of counsel under the Sixth Amendment and to a violation of due process. As one court has put it, "although it was the investigator and not trial counsel who shirked his duties, the ultimate responsibility for ensuring a thorough investigation lies

---

[175] The 1989 ABA Guidelines were in effect at the time of appellant's 1998 trial but have since been superceded by a February 2003 version. (See now Guideline 10.7 ["Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."].)

with trial counsel." (*State v. Lamb* (Ga.Ct.App. 2007) 651 S.E.2d 504, 506, overruled on other grounds in *O'Neal v. State* (Ga. 2009) 677 S.E.2d 90; accord *Guy v. Cockrell* (5th Cir. 2003) 343 F.3d 348, 352-355 [recognizing Constitution would be violated by investigator's conflicted loyalties; court remands case for hearing into whether failure to investigate was caused by investigator's conflict]; *Rubin v. Gee* (D. Md. 2001)128 F.Supp.2d 848 [granting habeas relief because former attorneys serving in paralegal/investigator role for current counsel had ongoing conflict of interest]; *Stubbs v. Thomas* (S.D. N.Y. 1984) 590 F.Supp. 94, 100 ["the right to effective assistance of counsel encompasses the right to adequate investigation and preparation. That right may not be defeated by delegating investigative duties to someone other than counsel. Therefore, where an investigator is appointed, he has a duty to provide the defendant with reasonably competent investigative assistance."].)

C. Watkins' Derelictions Constituted Deficient Performance and Inappropriate Investigation

The question thus becomes whether appellant was denied the effective assistance of counsel or the other constitutional rights specified herein by the actions of defense investigator Watkins. The answer to this question is, yes. In proceedings in superior court, defense counsel outlined numerous ways in which Watkins performed in a deficient manner,[176] but clearly the most prejudicial — on this record — was Watkins' involvement with Hung Mai in the scheme to "put a shut" on Khoi Huynh. This conduct did not merely fail to constitute an "appropriate" investigation, it

---

[176] See, e.g. 5 CT 1678-1685, 31 RT 6000-6009, 6020-6025, 6039-6041.

was affirmatively criminal, and it thwarted rather than facilitated the investigations that defense counsel wanted and needed to do.

It is true that the trial court below stated it was unable to conclude that Watkins was part of Mai's "operation" to preclude Khoi Huynh's testimony (31 RT 6075), but, with due respect, the court must have overlooked or misunderstood the uncontested and incontestable evidence. Here again is the tape recorded colloquy between Watkins and Mai:

Hung Mai: "*You want me to put a shut on Khoi* [Huynh] what I really need is that portion you asked me to read, but without the name of whoever it is that wrote it. I just need that portion because I talked to Khai [Vo] and he said he, you know, believes what I'm saying and all the other stuff, but he needs that portion if something needs to be done. You know what I mean?"

Watkins: "Okay."

Hung Mai: "Because that's the paper that will keep that guy shut, you know."

Watkins: "Yeah, well, I don't want to know anything more about that."

Hung Mai: "But if you want . . . I need that soon *if you want that taken* . . .you know?"

Watkins: "Okay, I'll stop by the jail today. What you want me to do is *take that page and to white out* . . . ."

Hung Mai: "The name of . . . whoever it is that wrote it, or just cut it out. I just need the portion part of what I read."

Watkins: "Okay, and *I'll just make it look like it's all blacked out. I'll drop that by.*"

(5 CT 1726 ¶ 67c, emphases added.)

It is impossible to read this colloquy and conclude that Watkins was uninvolved in the effort to "put a shut" on Khoi Huynh. In a conversation thought to be private, Mai himself characterized Watkins as the moving force behind the effort, and Watkins not only failed in any way to deny Mai's characterization (an adoptive admission), but Watkins affirmatively explained how he would go about facilitating the goal of "putting a shut on Khoi" (by whiting out the report and dropping it off with Mai).

And if there were any conceivable doubt about the matter, those would be extinguished by (1) the fact that a whited-out version of the report in question was in fact found in Khai Vo's cell — the white-out being exactly what Watkins promised he would add to the document, and Khai Vo being the very person whom Mai said he needed to give the report to in order to "put a shut on Khoi" — and (2) the fact that Watkins had told attorney Harley he was going to give a copy of this exact report to Mai and (3) the fact that only Watkins, and not jail inmate Mai, would have had access to a bottle of white-out correction fluid.[177]

Watkins was plainly and incontrovertibly involved in a scheme to "put a shut on Khoi." In fact, the only reasonable conclusion from the evidence is that he was the instigator of the effort.

D. The Deficient Performance Requires Reversal of the Judgment

The remaining question is whether Watkins' investigatory misconduct — his deficient performance — prejudiced appellant, i.e.,

---

[177] And, moreover, after the discovery of the report in Khai Vo's cell, a jail inmate housed with Mai called Watkins, telling him "that something had happened and that it could come back to him (Watkins), so he should visit Mai soon." (5 CT 1728 ¶ 67f, capitalization in original omitted.)

"whether there is a reasonable probability that, absent [Watkins'] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland v. Washington*, 466 U.S. at p. 695.) Once again the answer is, yes.

For one thing, the effort to silence Khoi was successful. As the prosecutor herself noted, Khoi had been "cooperative for three years" but at trial, he had "come in and [could] not remember anything about being shot seven times." (21 RT 3982.) Moreover, after testifying, Khoi telephoned the District Attorney's Office and stated that he did not identify appellant as his assailant because he had received information that his life was in danger. (5 CT 1727 ¶ 67d.)

The damage to the defense from Khoi's faked memory loss was profound. As previously explained, the defense was unable to impeach Khoi himself as to his claim that appellant had shot him on March 11, 1995 (Counts 9 and 10), and instead the prosecution was able to use polished and experienced police officers to testify to as to Khoi's prior inconsistent statements on that point, meaning that the jury was unable to assess Khoi's demeanor and tone of voice when making his accusation.

But the immediate prejudice from shutting down Khoi Huynh went not only to Khoi's identification of appellant as the shooter in Counts 9 and 10 but to each of the counts where Cheap Boys and their associates were key witnesses, i.e., Counts 2 and 3 (attempted murder of Tony Nguyen) and Counts 6 and 7 (murder of Sang Nguyen). As to all of these charges, the defense position was that Khoi was a major participant in a Cheap Boys scheme to frame appellant in retaliation for Nip Family members testifying against Cheap Boys. However, this defense was undermined when Khoi uttered his faked claims of having no memory of who shot him and no recall of whom he had previously identified. Such claims made Khoi

appear to be trying to *help* appellant, or at least not harm him, and this would naturally have been interpreted by the jury to be flatly inconsistent with an effort by Khoi and the Cheap Boys to frame him.

Even this was not the extent of the damage from Watkins' criminal investigatory misdeeds. Watkins was a key witness in establishing the frame-up defense. The most direct evidence of the frame-up was to have come from Cheap Boy gang member Tin Duc Phan, who had told Watkins of the gang's scheme, but Phan testified that he did not remember making those statements to Watkins. So, Watkins was called as a witness to impeach Phan and thus prove the scheme. However, when cross-examined by the prosecutor, Watkins quickly found himself walking into a trap, a trap he had set himself by his earlier efforts to silence Khoi Huynh. For the prosecutor directly asked Watkins whether he had talked to anyone — including "anyone outside of this case" — with the aim of preventing Khoi Huynh from testifying. (21 RT 3983-3984.) Faced with these questions, Watkins had three unpalatable choices: (1) he could incriminate himself by admitting his involvement in the criminal scheme to "put a shut on Khoi," (2) he could commit perjury by denying involvement in that scheme, or (3) he could — like Khoi — feign a memory loss as to what he had done a month earlier.

Watkins chose the latter course. "Not that I can recollect," he said when the prosecutor first posed a question about pressuring Khoi not to testify. (21 RT 3983.) "[N]ot that I can recollect having talked to anybody to put pressure," he said when asked a second time. (21 RT 3984.) When the prosecutor followed up by asking incredulously, "You can't remember if you talked to anyone to put pressure on him not to testify?" Watkins responded, "No, I don't remember that." (*Ibid.*)

Obviously, it defies human experience and common sense that anyone — and especially a trained investigator — would pressure a key witness and then not remember having done so. Thus, any juror would have immediately seen Watkins' claim for what it was, a lie. And since the claim of lack of recall was an obvious falsehood, any juror would have drawn the logical (and correct) conclusion that Watkins had in fact engaged in that behavior.

These conclusions were devastating to the defense, and on several levels. First of all, with Watkins exposed as both a liar and a suppressor of evidence, his credibility as a witness was destroyed, and with it went the believability of his testimony as to what Tin Duc Phan had told him, which was the foundation for the frame-up defense to Counts 2, 3, 6, 7, 9, and 10. Add this to the fact that Watkins' prior scheming with Hung Mai had resulted in Khoi Huynh faking a lack of recall at trial and thus appearing to act inconsistently with the "framed by Cheap Boys" defense, and the prejudice from Watkins' deficient performance is overwhelming as to these six counts.

But the prejudice went beyond these counts. Watkins' deficient performance prejudicially affected the entire judgment, because it cast a pall of incredibility and deception over the entire defense team. When a central defense figure such as Watkins is exposed as resorting to unscrupulous means to obtain a favorable outcome and nothing is done to distance the rest of the defense team from his actions, jurors would naturally distrust everything else the defense says, does, and presents. Given the closeness of the evidence as to all of the counts, there is clearly "a reasonable probability that, absent [Watkins'] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland v. Washington*, 466 U.S. at p. 495.)

E. If the Judgment Is Not Reversed for Ineffective Assistance of Counsel Due to Watkins' Derelictions, the Case Must Be Remanded for a Renewed Motion for New Trial, with New Counsel Appointed to Represent Appellant

It is established that when a trial court knows or reasonably should know that defense counsel is operating under a conflict of interest, due process and the right to the effective assistance of counsel require the court to inquire into the conflict, even in the absence of an objection by the defendant or his counsel. (*Mickens v. Taylor*, 535 U.S. at p. 168, *Wood v. Georgia* (1981) 450 U.S. 261, 271-274, *Cuyler v. Sullivan* (1980) 446 U.S. 335, 347; *People v. Martinez* (2009) 47 Cal.4th 399, 422, *People v. Cornwell* (2005) 37 Cal.4th 50, 75, *People v. McDermott* (2002) 28 Cal.4th 946, 990.)

It is further established that in the absence of an inquiry by the court, the case must at least be remanded so that an appropriate inquiry may be undertaken. (*Wood v. Georgia*, 450 U.S. at pp. 273-274.)

Here in the present case, the record was jam-packed with red flags of conflict as appellant's defense lawyers were presenting their motion for new trial based upon the derelictions of defense investigator Watkins. Thus, if the judgment against appellant is not reversed because of the Watkins' ineffective assistance directly (or because of the other issue raised in this AOB), the judgment must still be set aside and the case remanded so that an appropriate inquiry may be undertaken into whether trial counsel had a conflict of interest in presenting the new trial motion, with appellant represented by new counsel at the inquiry.

The signs of potential conflict were everywhere. To begin with, it is axiomatic that counsel cannot be expected to urge his or her own ineffectiveness. Here in appellant's case, however, that is what occurred at

the new trial motion his lawyers presented. Their motion for new trial argued the incompetence of defense investigator Watkins, but since Watkins had been acting as an agent of those very lawyers, their complaint was a claim of ineffective assistance of counsel. This fact alone should have alerted the trial court that there were potential problems with allowing counsel to present the motion, especially when the court itself blamed some of Watkins' derelictions on counsel's failure to properly supervise him.[178]

But the ineffective assistance argument was just the tip of the iceberg. The record presented to the trial court also contained indications that counsel had a close personal and professional relationship with Watkins. Not only had Watkins worked for lead counsel Harley for 10 to 15 years (31 RT 6037), but Harley had told the FBI that he "frequently . . . would ask the court to appoint Watkins to a case he was working on" (9/29/06 Supp.CT vol. 2 at p. 590). Furthermore, Harley "considered Watkins a friend that he felt a certain amount of loyalty toward," and he and Watkins would sometimes socialize. (*Ibid.*) Moreover, after Watkins was arrested on the federal conspiracy charges, Harley was (according to a document written by Watkins' attorney) "willing to act as surety and post his partial interest in his office building" to obtain Watkins' release on bail, and Harley was also prepared to "vouch for [Watkins'] character . . . ." (9/29/06 Supp.CT vol. 3 at p. 747.)[179]

---

[178] See 31 RT 6020, 6034-6035.

[179] Further showing counsel's protective inclinations toward Watkins is the fact that during trial, when counsel discussed Watkins' pre-arrest legal problems with the court, they characterized them as merely involving "family court" and "a divorce situation" and omitted to mention that Watkins was the subject of two pending misdemeanor prosecutions. (5 CT 1688, 1690; 31 RT 6013-6015.)

And the warning signs went beyond the personal and professional relationship and beyond the legal conflict inherent in arguing ineffective assistance, for there were indications in the record that tied lead counsel Harley to both of the illegal conspiracies in which Watkins was involved. First, although Harley denied to the FBI that he had any knowledge of the conspiracy to kill Alex Nguyen (9/29/06 Supp.CT vol. 2 at pp. 592, 593), the record contained contrary evidence. Watkins' attorney James Waltz represented that Watkins had reported Mai's plan to kill Alex Nguyen to some of the attorneys Watkins was working for, including Mr. Harley, and Waltz also represented that Watkins "took their directions" and that "all [Watkins'] activities were blessed by [attorneys] Peters, Harley and O'Connel." (9/29/06 CT vol. 3 at p. 748.) This is not to say that Harley's denials to the FBI were false and the representations of Watkins' attorney true, but simply that the conflicting evidence in the record should have led the trial court to investigate the potential for conflict, by exploring whether the allegations about Harley were true and, even if Harley said they weren't, whether his need to distance himself from the allegations inhibited his vigorous prosecution of the motion for new trial. The court, however, did nothing.

Even more intimately related to the new trial motion were attorney Harley's connections to the scheme to "put a shut" on Khoi Huynh. While Harley denied to the FBI that he knew about that plot, he did admit authorizing Watkins to give to Hung Mai the November 1995 report that was later found (with white-out added) in Khai Vo's cell. (9/29/06 Supp.CT vol. 2 at pp. 591, 594.) As before, the record evidence did not compel the conclusion that Harley was conflicted or felt a need to protect himself against being ensnared in the "put the shut" conspiracy, but this

was yet another circumstance putting the court on notice of the possibility. Yet still, the court did nothing.

And finally there is the fact that, during the proceedings on the defense motion for a new trial, the deputy district attorney responsible for answering the motion expressed concerns "as to whether this defense team is capable of bringing this type of motion as opposed to some independent counsel taking a look at it and presenting it." (31 RT 6049-6050.) Such an expression of concern by a prosecutor has been held to be highly significant in determining whether a trial court has a duty to inquire. (See *Wood v. Georgia*, 450 U.S. at pp. 272-273 ["Any doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and requested that the court look into it."].) Yet again, the trial court declined to undertake any inquiry.

"On the record before us," to draw from a Supreme Court opinion in a conflict-of-interest case, "we cannot be sure whether counsel was influenced" in their presentation of the new trial motion by the legal conflict in arguing ineffective assistance, by their "loyalty" and long-standing relationship with Watkins, or by their own concerns about being tied to Watkins' criminal endeavors. (See *Wood v. Georgia*, 450 U.S. at p. 272.) But all of the warning signs were in plain view for the trial court to see, and if it hadn't seen them, the prosecutor directed the court to them. A duty to inquire was triggered. The trial court's failure to act deprived appellant of his constitutional rights to due process and the effective assistance of counsel, as well as to a reliable determination of guilt and penalty, and requires a remand for a renewed hearing on the new trial motion, with appellant represented by independent counsel.

VIII.
OTHER OVERALL ISSUES

1. THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF WEAPONS UNCONNECTED TO ANY OF THE CHARGED SHOOTINGS

It is well-established that "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056; see also *People v. Riser* (1956) 47 Cal.2d 566, 577.)

In the present case, over repeated defense objection,[180] the prosecution was allowed to introduce evidence of four weapons connected to appellant that were conceded not to have been used in any of the six charged shootings. Specifically, the prosecution admitted (1) a .38 caliber handgun that was removed from the glove box of Huy Pham's car, in which appellant had been riding just prior to his arrest and (2) two loaded .357 pistols and an unloaded AK-47-type weapon found in a bedroom and closet in the house on Amarillo Street, the one that the three Vietnamese males (allegedly including appellant) had exited shortly before police stopped their car on May 25, 1995. (15 RT 2932-2933, 2963, 21 RT 4007.)

The only justification offered for the admission of the evidence was that which the prosecutor set forth in her written opposition to appellant's motion to exclude the evidence:

---

[180] See 2 RT 336, 372-373, 15 RT 2821-2822, 2833, 1 CT 46-47, 2 CT 446-448.

> "The evidence shows that an ongoing war was in existence in 1994 and 1995 between the Nip Family and Cheap Boys gangs. [¶] In any type of war the jury would expect the soldiers and the respective 'forts' to be heavily armed. [¶] The gang expert explained that Asian gangs are non-territorial and may enter battle any time they locate their rivals. The evidence in this case is consistent with Lam Nguyen and Nip Family being armed and ready for battle whenever and wherever it should occur. It would be expected by any reasonable juror that Lam Nguyen and his associates would be carrying firearms and have others within ready access. [¶] The evidence of Lam Nguyen's home and car containing firearms *is probative evidence showing a readiness for battle and corroborates the expert's opinion* and establishes the People's theory of the case. [¶] Exclusion of the gun evidence would give the false impression to the jury that there were no armed soldiers ready to engage in battle at any time ensuring their own success in the ongoing street war."

(2 CT 656-657, citations to record omitted;[181] see also 15 RT 2822 [judge agrees with prosecutor's reasoning].)

First of all, the prosecutor's reasoning with respect to the weapons from the Amarillo Street house makes no sense. There was no evidence that any resident of that house other than (supposedly) appellant was a gang member, let alone that the house was a "fort." Not even the gang expert in this case so testified. There were three guns in a bedroom and closet of a five-bedroom house, nothing more. (See 15 RT 2871.) No loose or boxed ammunition, no gang paraphernalia, no other gang member residents, no evidence of gang meetings at the location.

---

[181] The prosecutor's citations were to the preliminary hearing transcript, apparently to pages now designated 2 Muni.RT 370 and 371, where gang expert Nye testified that Asian gangs do not have territory and that "any time [Nip Family and Cheap Boys] see each other each side will try to take the life of the other side."

Nor does having weapons at a house show a "readiness for battle." "Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) Rather, it "leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons — a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*Ibid.*, original emphasis.) Especially is this true where the supposed gang member has left the house without the weapons and there is no evidence he ever took them out. The evidence thus did not "corroborate[] the expert's opinion" regarding readiness for battle, as the prosecutor asserted.

Of course, having guns in a house is "consistent with" gang membership and harboring a constant desire to kill rivals. That is, it does not tend to rule out those possibilities; it is compatible with them. But also "consistent with" those possibilities are having food, clothing, and bills in the house, as well as a myriad of other factors. The "consistent with" rationale proves nothing.

Perhaps the prosecutor actually meant to say that possession of guns in a house "has a tendency in reason to prove"[182] gang membership and constant readiness to kill, but that argument, too, would carry no weight. Literally millions of Americans have guns in their homes. That is no evidence they are gang members or intent on killing their rivals when they go out. (*People v. Henderson*, 58 Cal.App.3d at p. 360.) Presumably this underlying illogic is why the prosecutor was unable to cite a single court

---

[182] Evidence Code section 210.

decision anywhere in her 15-page opposition to the defense motion to exclude the gun evidence.

An equally fundamental defect in the prosecutor's argument is that, at bottom, it was an obvious effort to admit "propensity" evidence. (See *People v. Barnwell*, 41 Cal.4th at p. 1056.) In fact, the prosecutor's proffer was even phrased as propensity evidence. "The evidence of Lam Nguyen's home and car containing firearms," the prosecutor wrote, "is probative evidence *showing a readiness for battle . . . .*" (2 CT 656-657.) This is evidence admitted to show propensity, a predisposition to engage in gun battles. Such evidence is generally inadmissible under Evidence Code section 1101. (*Barnwell, ibid.*)

Moreover, even assuming arguendo that evidence of the unused, unconnected weapons had some minimal probative value, that probative value was vastly outweighed by the evidence's prejudicial effect. The prejudicial effect is well recognized in the case law — the evidence portrays a defendant as "the kind of person who surrounds himself with deadly weapons"[183] — and the prejudice was enhanced here by the fact that one of the weapons found at the Amarillo Street residence was an assault rifle, a fact that could not but have produced a particularly inflammatory reaction in the jury.

Thus, the admission of the unused-guns evidence violated multiple principles of state law and was so fundamentally unfair as to result in a denial of due process and a fair trial under the Fifth and Sixth Amendments. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

---

[183] *People v. Henderson*, 58 Cal.App.3d at page 360, citing cases.

Independently problematic is that the trial court's decision to allow the prosecution to elicit this evidence stands in contrast to its reluctance to admit gun evidence to impeach Kevin Lac. (See AOB § III.2, pp. 238 et seq., *ante*.) The admission of prosecution-favorable gun evidence when defense-favorable evidence was drastically curtailed constituted a further, independent violation of due process. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Washington v. Texas* (1967) 388 U.S. 14, 24-25 (Harlan, J., concurring).)

The remaining question, then, is whether the error requires reversal of the judgment. Plainly, it does, regardless of whether the test applied is that of *Chapman* or *Watson*. The evidence connecting appellant to these four weapons, including an assault rifle, would have caused the jury to view appellant as the type of person who would undertake to use guns illegally and who was thus more likely to be the person responsible for the shootings charged in this case. The guns would also have made it easier for jurors to accept one or more of the prosecutor's improper theories for rejecting self-defense with respect to the shooting death of Tuan Pham. The improperly admitted evidence thus lightened the prosecution's burden of proof. On these facts, it is impossible to conclude that, beyond any reasonable doubt, the error did not contribute to the verdicts. (*Chapman v. California*, 386 U.S. at p. 24.) It is also impossible to deny there is at least "a *reasonable chance*, more than an *abstract possibility*" that a different outcome would have occurred in the absence of the errors. (See *College Hospital, Inc. v. Superior Court*, 6 Cal.4th at p. 715, original emphases.)

2. APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO INTRODUCE STATEMENTS APPELLANT MADE DURING HIS MAY 25, 1995, INTERROGATION AFTER HE HAD REPEATEDLY ASSERTED HIS RIGHT TO COUNSEL

Shortly after appellant was arrested on May 25, 1995, he was taken to the Westminster police station and placed in an interrogation room, where Detectives Nye and Proctor began to interrogate him. Despite repeated requests by appellant to speak to a lawyer and despite multiple efforts to remain silent, the detectives continued with their interrogation, extracting statements by appellant concerning his relationship with the Nip Family gang. At trial, the prosecution conceded the statements were obtained in violation of *Miranda* rules[184] and were inadmissible in the state's case-in-chief, but after appellant testified, the prosecution was allowed, over defense objection, to introduce the statements to impeach appellant's testimony denying Nip Family membership.

This Court has held that statements obtained by police in deliberate violation of *Miranda*, though inadmissible in the prosecution's case-in-chief, may generally be admitted as impeachment evidence if the defendant testifies inconsistently with those statements. (*People v. Peevy* (1998) 17 Cal.4th 1184.) However, *Peevy* left open the question whether such statements would be inadmissible even for impeachment if there was evidence of a widespread police department policy and training to ignore suspects' invocation of the right to counsel in order to obtain statements for impeachment purposes. (*Id.* at pp. 1205-1208; accord *People v. Neal*

---

[184] *Miranda v. Arizona* (1966) 384 U.S. 436.

(2003) 31 Cal.4th 63, 78 fn. 4.) In addition, *Peevy* made clear that statements taken in violation of *Miranda* would be inadmissible as impeachment if the statements were involuntary. (17 Cal.4th. at p. 1193.)

In the present case, appellant's statements were improperly admitted as impeachment evidence for both of these reasons, and for an additional reason as well. For here, the use of appellant's statements was not limited to impeachment. They were improperly allowed to be used for the truth of what appellant stated.

Each of these errors resulted in violations of appellant's Fifth Amendment right against self incrimination, his Sixth Amendment right to the presence of counsel during police questioning, and the Fourteenth Amendment ban on involuntary statements. Because of their impact on appellant's overall credibility, the errors cannot be found, beyond a reasonable doubt, not to have contributed to the verdicts in this case.

A. Background Facts

Following appellant's arrest on May 25, 1995, appellant was taken to the Westminister police station and placed in the North Interview Room, where Detectives Nye and Proctor began questioning him. (22 RT 4106-4107.) When appellant indicated he had problems understanding some words in English, a jail staff member read him his *Miranda* rights in Vietnamese. (22 RT 4107-4108; 9/29/06 Supp.CT 1245-1246, 1248-1249.) After appellant indicated he understood his rights, Proctor told him, "We wanna ask you a few questions." (9/29/06 Supp.CT 1249.) Appellant replied, "Think I got to talk to my attorney." (*Ibid.*) "You want to talk to your attorney?" the detective asked. "Yeah," appellant informed the detectives a second time. "If I have one. If they give me one." (*Ibid.*)

Thereupon, the detective responded, "That ends the interview . . . ," and appellant was removed from the room. (*Ibid.*; 22 RT 4110.)

The videotape, however, was left running. (22 RT 4116.) Four minutes later, appellant was brought back into the room and placed in the same chair as before. (22 RT 4116, 4119.) "Now, we're back on," Detective Proctor said. "We're back talking to you and stuff. I know you[] asked for an attorney and stuff like that. We just have to get some other things clear. Okay." (9/29/06 Supp.CT 1250.)

Detective Nye asked appellant to tell them about the buckshot in his hands, and appellant invoked his right to talk to an attorney for a third time. (9/29/06 Supp.CT 1250; 22 RT 4117.) Nye then asked, "You're a member of Nip Family, right? You've been a member of Nip Family." (9/29/06 Supp.CT 1250.) Appellant responded either "Yes. *** Nip Family" or "Yes. I met, I meet them in ***." (*Ibid.*) Asked how long he had been a member, appellant replied, "When I was a sophomore." (9/29/06 Supp.CT 1250-1251.)[185] Appellant denied that he was one of the original eleven gang members, but "I kick back with them for a while." (9/29/06 Supp.CT 1251.) He added that "when Westminister got all riot and stuff . . . I was there a lot of time. I help them back up [or back, uh] uh, whatever you know. And then when I locked up, they ask me to come in **." (*Ibid.*)

The interrogation continued, and appellant invoked his right to counsel and/or his right to remain silent at least eight more times. (9/29/06 Supp.CT 1252-1255.)

---

[185] The three asterisks denote "unintelligible conversation." (See 9/29/06 Supp.CT 1245.) The trial court did not resolve the disagreement between the parties as to which version of appellant's response was accurate, reasoning that the videotape was itself the controlling evidence. (RecordCorrRT 127-128, 145, 154.)

Repeatedly prior to and during trial, defense counsel objected to the admission of this evidence at any stage of the proceedings. (1 CT 42-43, 2 CT 587-594; 2 RT 339-341, 9 RT 1846-1848.) The prosecution conceded that appellant's statements were taken in violation of *Miranda* and that they would not be offered in its case-in-chief, but the question of whether the evidence was admissible in the prosecution's rebuttal case was deferred. (1 RT 81; 2 RT 379-380, 12 RT 2293.)

During the defense case, appellant testified that he knew or was friends with many Nip Family gang members but that he did not consider himself a gang member and had never joined the gang or been "jumped into" it. (21 RT 4066-4067, 4011.) Thereafter, the prosecution sought to have the May 25th statements admitted in rebuttal. A hearing was held outside the presence of the jury at which Detective Nye testified about the May 25th interrogation. (22 RT 4106-4125.)

Detective Nye's testimony was, with due respect, less than a paragon of consistency. Nye initially admitted that at least "part of" the reason he interrogated appellant about gang membership was "to get a statement for impeachment purposes" and that he and Detective Proctor had discussed the idea before bringing appellant back into the interrogation room for that purpose. (22 RT 4117-4118, 4119, 4120.) Shortly thereafter, however, Nye denied that his questions about gang affiliation were asked for impeachment purposes. (22 RT 4122.) Rather, he claimed that he made his inquiry for his own "personal knowledge" about the gang and appellant's involvement and for "the booking process," so that appellant would be separated from rival gangs in jail. (22 RT 4122-4123.) Nye admitted, however, that he was already convinced, long before this interrogation, that appellant was a member of Nip Family and that he would not have changed his opinion — and that appellant's housing in jail

would not have been changed — by appellant denying membership. (22 RT 4122-4123.)[186]

Detective Nye did admit that he had received training on the subject of impeachment evidence through the Westminster Police Department. He was taught that if he obtained statements after a suspect had invoked his right to an attorney, the statements could be used as impeachment. (22 RT 4112.) This training came from 24 training tapes and an oral presentation, all by a member of the Orange County District Attorney's Office. (22 RT 4112-4113.) Not all 24 tapes were about the same topic, but each time the issue arose concerning talking to a suspect after he had invoked his rights, the message communicated by the District Attorney was that this could be done for impeachment purposes. (22 RT 4115.)[187]

Following Detective Nye's testimony, the relevant portion of the videotape was played. (Court Exh. 1; see 22 RT 4125-4128.) Thereafter, the trial court ruled that the prosecution could use appellant's statements as impeachment. (RT 4128.) Incorrectly believing that appellant invoked his right to an attorney "in response to [Detective] Proctor's question" about appellant's "association with the Nip Family"[188] and that the detectives

---

[186] In the 11 pages of questioning by defense counsel that led up to this testimony by Detective Nye, the prosecutor had interposed no fewer than 20 objections to defense counsel's questions in this area, and it would appear that the prosecutor's flurry of concern had an effect upon Nye's responses.

[187] The court sustained repeated objections by the prosecutor that prevented further development of the record on the subject of Nye's training with respect to suspects who invoke their rights. (22 RT 4111-4116.) This matter is addressed further in Subsection F, *post*.

[188] Actually, appellant had invoked his right to counsel three times before Proctor asked about appellant's association with the Nip (continued...)

terminated the interview after appellant's third invocation of that right,[189] the court reasoned that appellant's statements were admissible on rebuttal because there was nothing "overbearing" in the way the detectives dealt with appellant, because the statements, though contrary to *Miranda*, were "not involuntary, per se." (22 RT 4129, 4133.) The court said nothing about the detectives' Police Department training via the District Attorney's Office.[190]

B. The Statements Were Inadmissible Because They Were a Product of Widespread Police Department Policy and Training to Ignore Suspects' Invocation of the Right to Counsel in Order to Obtain Statements for Impeachment Purposes

As the record amply shows, the detectives' tactic of deliberately ignoring appellant's requests for counsel during interrogation in order to

---

[188](...continued)
Family. (See 9/29/06 Supp.CT 1249-1250, 22 RT 4117.)

[189] Actually, the interview was terminated after appellant's *sixth* invocation of his right to an attorney (see also 9/29/06 CT 1252 [4th invocation], 1254 [5th invocation], 1255 [6th invocation]), and after he had invoked his right to remain silent five times (*id.* at pp. 1253-1255).

[190] Normally, whether a defendant's statement is obtained and admitted into evidence in violation of the defendant's constitutional rights is reviewed de novo based on the facts found by the trial court as long as those findings are supported by substantial evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 730-731; *People v. Neal*, 31 Cal.4th at p. 80.) Here, however, where the trial court misconstrued key facts, no deference is to be given to its factual findings. (*People v Cluff* (2001) 87 Cal.App.4th 991, 998 ["A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence"]; accord *Stack v. Stack* (1961) 189 Cal.App.2d 357, 368; *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983.) The burden of showing admissibility rests on the prosecution. (*Missouri v. Seibert* (2004) 542 U.S. 600, 609 fn.1.)

obtain impeachment evidence was a deliberate strategy that Westminster Police Officers were trained by the Orange County District Attorney's Office to employ. Such a tactic clearly undermines the constitutional protections provided by the *Miranda* warnings and distinguishes this case from *Harris* v. *New York* (1974) 401 U.S. 222, 224, where — based on its prediction that sufficient deterrent effect on police conduct would be obtained by limiting the exclusion of illegally obtained statements to the prosecution's case-in-chief — the Supreme Court held that such statements could be used as rebuttal to contrary testimony by the defendant.

—

To reduce the risk of a coerced confession and to implement the Fifth Amendment's right against self-incrimination clause, the Supreme Court held in *Miranda* that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." (384 U.S. at p. 467.) *Miranda* conditioned the admissibility at trial of any custodial statement on warning a suspect of his rights. (*Missouri v. Seibert* (2004) 542 U.S. 600, 608.) A failure both to give the prescribed warning to a defendant in custody and to obtain a waiver of those prescribed rights generally requires exclusion from the prosecution's case-in-chief of any statements obtained. (*Ibid.*) The requirements of *Miranda* warnings are of a constitutional character that prevail over any statutory attempt to abrogate the requirement or any training instructions that instruct police to ignore requirements. (*Dickerson v. United States* (2000) 530 U.S. 428, 435 [invalidating statutory attempt to undo *Miranda*]; *Missouri v. Seibert*, 542 U.S. at p. 617 ["Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."].)

An essential protection provided by the *Miranda* warning requirement is that once a suspect has asked for an attorney, the police must cease interrogation until counsel is provided or the suspect initiates further contact and makes it clear that he or she wishes to proceed with questioning without counsel. (*Edwards v. Arizona* (1981) 451 U.S. 477, 482, 484-485.) It is a violation of *Miranda* to re-interrogate an accused in custody if he has clearly asserted his right to counsel. (*Id.* at pp. 484-485.) The duty to cease questioning when counsel has been requested is an affirmative duty, and intentionally ignoring a suspect's request is illegal and unethical. (See *People v. Peevy*, 17 Cal.4th at pp. 1202-1203.)

While statements obtained without *Miranda* warnings are inadmissible for proving the elements of the prosecution's case-in-chief at trial, such statements are generally admissible to impeach a testifying defendant if there was no coercion in their acquisition. (*Harris* v. *New York*, 401 U.S. at p. 224.) The same is true when police fail to heed a suspect's request for counsel. (*Oregon v. Hass* (1975) 420 U.S. 714, 721-722.) Underlying *Harris* and *Hass* is the premise that excluding illegally acquired statements from the prosecution's case-in-chief will sufficiently deter law enforcement officers from obtaining statements in violation *Miranda* or *Edwards* and that the "shield" of *Miranda* should not be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris,* 401 U.S. at p. 225-226; see also *Hass*, 420 U.S. at p. 722 [similar].)

In *Missouri v. Seibert*, the High Court did note, with obvious disappointment, that "some training programs advise officers to omit *Miranda* warnings altogether or to continue questioning after the suspect invokes his rights" (542 U.S. at p. 610 fn. 2), but *Seibert* had no occasion to directly confront such practices. *Seibert* did, however, strike down

another then-widespread interrogation tactic, specifically the tactic of interrogating first without *Miranda* warnings for the purpose of obtaining a confession and then having the suspect repeat the confession after *Miranda* warning are belatedly given and a waiver of those rights obtained. In condemning this "question first" practice, *Seibert* concluded that the tactic was intended to undermine *Miranda* protections so that a suspect would not feel as though he had a right to choose not to talk since he already had given a incriminating statement before the warnings were given. (*Id.* at p. 611-612.)

The reasoning of *Seibert* applies equally to Detective Nye's use of the Police Department tactic of ignoring a suspect's request for counsel in order to obtain impeachment evidence. A suspect is told that he has a right to counsel, and yet, when he invokes that right and requests counsel, his request is ignored. As with the "question first" tactic in *Seibert*, the intentional disregard of a suspect's assertion of rights not only violates constitutional rights but "render[s] *Miranda* warnings ineffective." (*Seibert*, 542 U.S. at p. 611.) Moreover, here in the present case, appellant Nguyen was told that, despite his request for counsel, the police "just have to get some other things clear," as if he had no right to refuse to counsel in connection with the ensuing questions at all. (9/29/06 Supp.CT 1250.) Such an "explanation" for further questioning after an invocation of the right to counsel is "likely to mislead and 'depriv[e]a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." (*Seibert*, 542 U.S. at pp. 613-614, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 424.)

When officers are taught by their departments to ignore the holdings of this Court and the Supreme Court that require them to respect a suspect's constitutional rights during interrogation, the balance that existed in the

Harris and *Hass* cases and that allowed the use of illegally acquired statements for impeachment purposes has been fundamentally altered. There is no longer any deterrent effect on the police department's officers, and compliance with constitutional commands can no longer be expected. With the balance thus skewed, there is no longer any justification for permitting the police to make any use of what their intentional, department-instigated misconduct produced. The *Harris-Hass* exception is inapplicable.[191]

C. The Statements Were Also Inadmissible Because They Were Involuntary

In addition to violating *Miranda* and falling outside the *Harris-Hass* exception for rebuttal evidence, the admission of appellant's statements regarding his relationship with the Nip Family were also inadmissible because the statements were involuntary under the due process clause of the federal and state Constitutions. "[T]he Supreme Court has mandated

---

[191] Although the trial court in this case heard Detective Nye describe repeated violations of appellant's rights under *Miranda* and *Edwards*, it never expressed any disapproval of those actions, merely noting that "the statements . . . are contrary to the *Miranda* standard." (22 RT 4133.) However, this Court has "emphasized on more than one occasion [that such] misconduct . . . is unethical and must be strongly disapproved." (See *People v. Neal*, 31 Cal.4th at p. 81, quotation marks and citations omitted.) There is a troubling disconnect between this Court's words and the blasé, see-no-evil handling of the matter by the trial court, which expressed no disapproval at all of Detective Nye's actions.

Appellant has no wish to lengthen this brief by repeating arguments the Court has already rejected. For purposes of issue preservation, however, that portion of *People v. Peevy*, 17 Cal.4th 1184, that held that a deliberate violation of *Miranda* and *Edwards* is not itself sufficient reason to preclude the admission of illegally obtained statements as rebuttal is wrong and should be overruled. It is inconsistent with such Supreme Court decisions in *Harris*, *Hass*, *Dickerson*, and *Seibert*.

the exclusion of such evidence for *all* purposes, including impeachment." (*People v. Bey* (1993) 21 Cal.App.4th 1623, 1627-1628, original emphasis, citing *Michigan v. Harvey* (1990) 494 U.S. 344, 351.)

Here, involuntariness is shown by the detectives' refusal to honor appellant's invocations of his right to counsel combined with Detective Nye's additional statement that although the detectives "know you[] asked for an attorney," nevertheless "[w]e just have to get some other things clear." (9/29/06 Supp.CT 1250.) This gloss on the detectives' refusal to honor appellant's right to counsel had the obvious effect of communicating to appellant that his right to counsel did not apply to the questions they were about to ask. This misleading statement rendered appellant's responses to the ensuing questions involuntary.

Thus, the case is similar to *People v. Bey*, 21 Cal.App.4th 1623, a case that defense counsel relied on heavily below. (See 2 CT 588, 2 RT 340.) In *Bey*, an interrogating officer told a defendant who had invoked his right to counsel that they were going to continue to question him because, though he had not waived his rights, "That means we can't use 'em in court." (21 Cal.App.4th at p. 1627.) The *Bey* court held that the defendant's statements were inadmissible even as rebuttal evidence because, in light of the "deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation," the statements were "coerced and involuntary." (*Id.* at p. 1628.)[192]

Appellant's case is closely analogous to *Bey*. Here, as in *Bey*, the detectives deliberately violated *Miranda*, and they misrepresented the legal applicability of the constitutional rights *Miranda* was designed to protect.

---

[192] Appellant notes that *Bey* was cited with approval in *People v. Peevy*, 17 Cal.4th at page 1201.

Thus, here as in *Bey*, appellant's statements were involuntary and, consequently, inadmissible in rebuttal.

D. The Trial Court Violated *Miranda* By Failing To Limit The Jury's Use Of Appellant's Statements To Impeachment Purposes

Assuming arguendo that this Court were to determine that appellant's May 25, 1995 statements were admissible as rebuttal evidence for purposes of impeachment, appellant was still denied his rights under the Fifth, Sixth, and Fourteenth Amendments because the jury was not limited to using the statements as impeachment evidence. At no time before or after the playing of the videotape did the trial court instruct the jury that its use of the evidence was restricted to appellant's credibility. To the contrary, the jury was instructed that a witness' inconsistent statements could be used also "as evidence of the truth of the facts as stated by the witness on that former occasion." (27 RT 5246.) This instruction contravened the *Harris* and *Hess* decisions.

Consider *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021. There, the Ninth Circuit ruled that the *Harris* rule allowing admission of illegally obtained statements for impeachment purposes did not authorize the admission of incriminating statements made by a California defendant where (1) the police officers deliberately violated the defendant's *Miranda* rights and (2) the jury was instructed, in accordance with Evidence Code sections 1220 and 1235, that the inconsistent out-of-court statements could be considered for the truth of the matters stated. (*Id.* at pp. 1028-1029.)

In the instant case, the trial court never limited the jury's consideration of appellant Nguyen's statements, and the only instruction the court gave regarding impeachment authorized the jury to use the statements as evidence in support of the prosecution's case (27 RT 5246 -

48), which directly violated Supreme Court holdings. (*Harris v. New York,* 401 U.S. at p. 225; *Oregon v. Hass,* 420 U.S. at pp. 721-722.)

Appellant acknowledges that in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134, this Court has held that a trial judge has no sua sponte obligation to give an instruction limiting the use of statements obtained in violation of *Miranda.* But in so doing, this Court noted there was no substantive use for the illegally obtained statements in that case. (*Ibid.*) In the instant case, by contrast, the illegally obtained statements went directly to elements of the charged active-street-gang-participation crime and the gang-benefit enhancement. Thus, here, unlike in *Gutierrez*, the jury was authorized to use appellant's statements substantively, to prove these charges and enhancements.[193]

Further, appellant respectfully contends that *Gutierrez* is inconsistent with the Supreme Court's *Harris* decision. As *Harris* explicitly noted, the trial court there specifically instructed the jury that it could only use the illegally obtained statements for impeachment purposes. (401 U.S. at p. 223.) In *Richardson v. Marsh* (1987) 481 U.S. 200, 206-207, the Court described the *Harris* holding as allowing the admission of statements taken in violation of *Miranda* "even though they are inadmissible as evidence of his guilt, *so long as the jury is instructed accordingly.*" (*Id.* at pp. 206-207; see also *Hinman v. McCarthy* (9th Cir. 1982) 676 F.2d 343, 349; *U.S. ex rel. Cannon v. Montanye* (9th Cir.1973) 486 F.2d 263, 265; *Duran v. A.A. Stagner* (D.C. N.D. Cal. 1985) 620 F.Supp. 803, 804.) Not only did the trial court in the present case fail to

---

[193] In *People v. Coffman* (2004) 34 Cal.4th 1, 63, this Court again rejected a claim that the jury should have been instructed sua sponte on the limited purpose for which illegally obtained statements could be used, but *Coffman* simply cited to *Gutierrez* and added nothing to the analysis.

give such a limiting instruction, but it gave an instruction that directly conflicted with *Harris*. Appellant respectfully submits that once a trial court has made a determination that *Miranda* was violated but that the statements obtained may be used for the limited purpose of impeachment, the court has a corollary obligation to make sure the illegal evidence is properly limited, or at least not to give an instruction that authorizes its use as substantive evidence of guilt.

E. The Errors Require Reversal of All Counts; If Not, the Gang Crimes and Enhancements Must Be Reversed

The remaining question is whether the error may be deemed harmless. Because the error here was one of federal constitutional dimension, the *Chapman* test applies. (*People v. Neal*, 31 Cal.4th at p. 86.) On the facts of this case, it is impossible to conclude that, beyond any reasonable doubt, the error did not contribute to the verdicts. (*Chapman v. California*, 386 U.S. at p. 24.)

At the very least, it is not possible to find, beyond a reasonable doubt, that the evidence did not contribute to the jury's verdicts as to the gang crimes and enhancements. While the prosecution presented evidence that appellant had claimed membership in the Nip Family gang in 1992 and 1993, the illegally obtained statements were the only evidence he claimed such membership since then.

But the untoward effects of the improperly admitted evidence went well beyond the gang-related allegations. The evidence also had the effect of undercutting appellant's credibility as a witness, and thus it likely contributed to all of the jury's guilty verdicts and true findings. Especially is this likely, given the closeness of the evidence on these counts. Reversal is required.

F. Appellant Was Unconstitutionally Precluded from Fully Developing the Record on The Current Issue

The prosecutor furiously objected to further development of the record on the subject of Detective Nye's training with respect to suspects who invoke their rights, interposing 14 objections — mostly claiming vagueness or assuming facts not in evidence — during the five pages of transcript that covers defense counsel's efforts to further flesh out the facts. (22 RT 4111-4116.) As a result of these meritless objections, defense counsel was precluded from directly finding out, for example, what Nye had "been trained . . . to do when [suspects] say they want to talk to an attorney" or why the District Attorney's Office had said it was important to talk to a suspect after he invoked that right. (22 RT 4111-4112 [three times], 4116.) Should this Court conclude that the record in this case is insufficient to sustain appellant's claims raised herein, it would have to reverse and remand because the sustaining of the prosecutor's objections constituted an improper restriction of the development of the record, in violation of the Fifth, Sixth, and Fourteenth Amendment rights to due process, to present a defense, to confront witnesses, and to the effective assistance of counsel.

3. REVERSAL OF ALL COUNTS IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS ARISING FROM THE REBUTTAL TESTIMONY OF PROBATION OFFICER STEVEN SENTMAN

In his earlier arguments concerning Counts 2 and 3, appellant discussed the multiple levels of constitutional and statutory errors that arose in connection with the prosecution's decision to call Probation Officer Steven Sentman as a rebuttal witness. (AOB, § III.5, pp. 253 et seq, *ante*.) As pointed out in that discussion, Sentman's testimony was rebuttal evidence as to both of the shootings that occurred in 1994, i.e., the July 21st shooting of Tony Nguyen (Counts 2 & 3) and the November 24th shooting of Huy "PeeWee" Nguyen that is the subject of the current section of the AOB (Counts 4 & 5). Thus, the errors required reversal of those four counts. (See also AOB, § IV.4, p. 280, *ante*.)

But the prejudicial effect of the errors went further and touched all of the counts of which appellant was convicted, because the errors adversely affected the jury's assessment of appellant's credibility as a witness, and thus contributed to the jury's decision not to believe him. Consequently, those errors require reversal of all counts.

4. REVERSAL OF ALL COUNTS IS REQUIRED BECAUSE OF THE PREVIOUSLY DISCUSSED ERRORS RELATED TO THE ADMISSION OF THE PREJUDICIAL HEARSAY EVIDENCE RELAYED BY TRIEU BINH NGUYEN

In his arguments concerning Counts 6 and 7 (the killing of Sang Nguyen), appellant discussed how the trial court committed constitutional and statutory error by permitting the prosecution to elicit hearsay evidence from witness Trieu Binh Nguyen to the effect that a single person was shooting Trieu Binh's friends and by not giving a limiting instruction that such evidence was not to be considered for the truth of the matter asserted. (AOB, § I.3.B, pp. 115 et seq., *ante*.) Appellant also pointed out there and elsewhere that these errors had a prejudicial effect on other the counts as to which identity was an issue. (AOB, §§ I.5, pp. 121-122; III.4, p. 252; IV.3, p. 279; V.2, pp. 287, *ante*.) Appellant reiterates those points here, and adds that for the same reasons, the errors also had a prejudicial effect on Counts 13 and 14 (the killing of Tuan Pham) on the question of whether appellant was the driver of the Honda who shot Tuan. Thus, as to all counts, the error with respect to Trieu Binh's testimony cannot be held to be harmless. Certainly, there is at least a reasonable doubt whether the error was prejudicial. Further, there is at least "a reasonable chance, more than an abstract possibility," that a different outcome would have occurred in the absence of the errors. Reversal is called for.

5. SHOULD APPELLANT BE DEEMED TO HAVE FORFEITED ANY ARGUMENTS OR ISSUES SET FORTH IN THIS APPEAL AS A RESULT OF ACTS OR OMISSIONS BY HIS TRIAL COUNSEL, THEN APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The reasons why this Court must reverse the judgment, in whole and in part, have been set forth in this AOB. However, if this Court were to conclude the appellant's trial counsel failed to preserve any of appellant's arguments or issues for review on appeal, or if it were to conclude that one or more of the objections or arguments by counsel were insufficient to allow the claims to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington, supra*, 466 U.S. 668.)

Although an ineffective assistance claim should normally be raised in a habeas petition, an appellate claim is appropriate when there can be no satisfactory explanation for the challenged inactions. (*People v. Pope, supra*, 23 Cal.3d at p. 426). That would be the situation here. There clearly was no tactical reason for counsel to have failed to object or to have failed to make an adequate objections. Nor could there be any satisfactory explanation for counsel's inactions. Under these circumstances, any failure by trial counsel to object or to object adequately would amount to the ineffective assistance of counsel. (See *People v. Lewis, supra*, 50 Cal.3d 262, 282; *People v. Stratton, supra*, 205 Cal.App.3d 87, 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].) Moreover, the constitutional issues raised in this appeal are not waived by inadequate objection. (See *People v. Yeoman, supra*, 31 Cal.4th at pp. 117-118, 133; *People v. Coddington, supra*, 23 Cal.4th at p. 632.)

6. IF REVERSAL OF THE JUDGMENT OR ANY PARTS THEREOF IS NOT REQUIRED BY ANY OF THE PRECEDING CLAIMS INDIVIDUALLY, REVERSAL WOULD BE REQUIRED BECAUSE OF THE CUMULATIVE PREJUDICE OF THE ERRORS

Each of the errors described above requires a new trial for the reasons discussed. However, the cumulation of errors was surely prejudicial under both the federal and state tests.

As a starting point, this Court must consider that, in this highly unusual case, and despite the fact that appellant was convicted in connection with five separate incidents, the evidence as to guilt was close as to each incident.[194] Moreover, serious error permeated this trial, and on a grand scope. The prosecution's side of the scale of justice was repeatedly inflated with improper theories of guilt and improper evidence, while the defense was repeatedly hamstrung in what it was allowed to do. For example, (1) the prosecution was allowed to propound baseless theories as to why the jury could reject self-defense in connection with the killing of Tuan Pham,[195] and (2) it was permitted to improperly introduce (a) testimony from an "expert" about the "most common excuses" made by witnesses to gang crimes at restaurants, (b) testimony identifying appellant as a man fleeing from a car, based on an unauthenticated photograph,

---

[194] See, e.g, AOB §§ I.1.C, pp. 92 et seq. (Sang Nguyen killing); II.1, pp. 123-124, & II.4.B, pp. 224 et seq. (Tuan Pham killing); III.1 & III.2.C, pp. 230 et seq. & 249 et seq. (Tony Nguyen attempted murder); IV.1, IV.2, & IV.3, pp. 272 et seq. (Huy "PeeWee" Nguyen attempted murder); and V Introduction, pp. 283 et seq. (Khoi Huynh attempted murder), *ante*.

[195] See, e.g., §§ II.1, pp. 123 et seq. (regarding purported inapplicability of self-defense), II.3.A, pp. 202 et seq. (refusal to instruct that only one standard for self-defense exists].)

(c) evidence from Probation Officer Sentman that had inexcusably been withheld from the defense for two years, that was disclosed only at the very last moment, and that contradicted Sentman's prior statements and testimony to the court, (d) evidence of appellant's purported connection with weapons not used in any of the crimes alleged in this case, and (e) evidence of statements by appellant that were deliberately obtained in violation of law by officers trained to engage in such illegal tactics.[196] On the other hand, the defense was, inter alia, prevented from (1) introducing strong direct and circumstantial evidence of a Cheap Boy plan to frame appellant, (2) impeaching Cheap Boy Kevin Lac, sole eyewitness to the shooting of Tony Nguyen, and (3) impeaching the belated evidence from Probation Officer Sentman.[197]

And, of course, overlying such errors was the defense-subverting conduct of investigator Watkins. (AOB § VII.1, pp. 297 et seq., *ante*.)

The nature and number of the errors here would themselves demonstrate that this was not a fair trial, but after then adding in the closeness of the evidence as to each count, the conclusion is unavoidable that the errors cumulatively rendered the trial fundamentally unfair, violated federal due process, contributed to the verdicts, and did not comport with the reliability required of capital convictions by the Eighth and Fourteenth Amendments. (See *Chapman v. California*, 386 U.S. 18;

---

[196] See, e.g., §§ I.1, pp. 82 et seq. ("expert" testimony), II.4, pp. 218 et seq. (Officer Vincent On's testimony about man fleeing from stopped car); III.5, pp. 253 et seq. (Probation Officer evidence), VIII.1, pp. 321 et seq. (unrelated weapons), VIII.2, pp. 326 et seq. (illegally obtained statements)

[197] See, e.g., §§ I.2, pp. 96 et seq. (Cheap Boys plan), II.2, pp. 238 et seq. (impeaching Lac); III.5 at pp. 265 et seq. (impeaching Sentman)

Estelle v. McGuire, 502 U.S. 62; *Payne v. Tennessee* (1991) 501 U.S. 808.)[198] It is "completely impossible . . . to say that the State has demonstrated, beyond a reasonable doubt, that the [errors] did not contribute to [appellant's] convictions" as to each incident. (*Chapman*, 386 U.S. at p. 26.) Moreover, given the closeness of the evidence, it is virtually certain that convictions that were improperly obtained with respect to one incident were used by the jury to resolve the doubts against appellant as to other incidents. In short, without the cumulation of errors, "honest, fair-minded jurors might very well have brought in not-guilty verdicts" as to all charges. (*Ibid.*)

The same result would obtain even if the errors were all viewed purely as matters of state law and even if the inquiry were whether it is reasonably likely that a different outcome would have occurred in the absence of the errors. (See *People v. Watson*, 46 Cal.2d 818; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; see *United States v. McAlister* (9th Cir. 1979) 608 F.2d 785.)

Finally, considering just the individual incidents, we note that the errors affecting each incident include, but are not limited to, the following:

With regard to the convictions in Counts 6 and 7 (shooting death of Sang Nguyen outside the Dong Khanh Restaurant on 2/5/95): the convictions arising out of this incident were directly and prejudicially affected not only by the errors discussed in Section I of this brief (pp. 82 et seq.), but also, inter alia, by those discussed in AOB sections II.4 (pp. 218

---

[198] When errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; see also *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.)

et seq., inadmissible testimony tying appellant to discarded weapon), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

With regard to the convictions in Counts 13 and 14 (shooting death of Tuan Pham during attack on appellant on 5/6/95): the judgment as to these counts was directly and prejudicially affected not only by the errors discussed in Section II (pp. 123 et seq.), *ante*, but also, inter alia, by those discussed in Sections I.3.B (pp. 115 et seq., hearsay from Trieu Binh Nguyen), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

With regard to the convictions in Counts 2 and 3 (attempted murder of Tony Nguyen on 7/21/94): the judgment as to these counts was directly and prejudicially affected not only by the errors discussed in Section III (pp. 230 et seq.), *ante*, but also, inter alia, by those discussed in Sections I.2 (pp. 96 et seq., exclusion of frame-up evidence), I.3.B (pp. 115 et seq., hearsay from Trieu Binh Nguyen), II.4 (pp. 218 et seq., inadmissible testimony tying appellant to discarded weapon), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

With regard to the convictions in Counts 4 and 5 (attempted murder of Huy "PeeWee" Nguyen on 11/24/94): the convictions arising out of this incident were directly and prejudicially affected not only by the errors discussed in Section IV (pp. 272 et seq.), *ante*, but also, inter alia, by those

discussed in Sections I.3.B (pp. 115 et seq., hearsay from Trieu Binh Nguyen), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

With regard to the convictions in Counts 9 and 10 (attempted murder of Khoi Huynh on 3/11/95): the judgment as to these counts was directly and prejudicially affected not only by the errors discussed in Section V (pp. 283 et seq.), *ante*, but also, inter alia, by those discussed in Sections I.2 (pp. 96 et seq., exclusion of frame-up evidence), Sections I.3.B (pp. 115 et seq., hearsay from Trieu Binh Nguyen), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

With regard to the verdicts as to the gang charges and enhancements: the judgment as to these counts was directly and prejudicially affected not only by the errors discussed in Section VI (pp. 289 et seq.), *ante*, but also, inter alia, by those discussed in Sections I.3.B (pp. 115 et seq., hearsay from Trieu Binh Nguyen), VII.1 (pp. 297 et seq., ineffective assistance due to investigator Watkins), VIII.1 (pp. 321 et seq., admission of unrelated weapons in house), VIII.2 (pp. 326 et seq., statement admitted in violation of *Miranda*), *ante*.

Moreover, state law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."[199] In this

---

[199] *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-88; (continued...)

case, the cumulation of errors did just that. (*Donnelly v. DeChristoforo*, 416 U.S. at pp. 642-643; *Greer v. Miller*, 483 U.S. at p. 764.) The errors cross-contaminated the jury as to all counts, such that the overall effect of the accumulated errors — both those that amounted to violations of state law and those that implicated federal constitutional law — produced a fundamentally unfair trial, and one also incompatible with the reliability required of capital convictions by the Eighth and Fourteenth Amendments.

---

[199](...continued)
Lincoln v. Sunn (9th Cir. 1987) 807 F.2d 805, 814 footnote 6; *Menzies v. Procunier* (5th Cir. 1984) 743 F.2d 281, 288-289; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Rose v. Lundy* (1982) 455 U.S. 509, 531 footnote 8, concurring opinion; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.

7. CLAIMS OF INSUFFICIENT EVIDENCE MUST ADDRESSED ON APPEAL EVEN WHEN THE JUDGMENT IS REVERSED FOR OTHER REASONS

Appellant's claims of insufficient evidence must addressed on appeal even when the judgment is reversed for other reasons. (AOB §§ II.1 (pp. 123 et seq.), III.1 (pp. 230 et seq.), IV.2 (pp. 276 et seq.), VI.1 (pp. 289 et seq.); see, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 613 ["Although we have concluded that the kidnapping conviction must be reversed because it was presented to the jury on both a legally adequate and a legally inadequate theory, we must nonetheless assess the sufficiency of the evidence to determine whether defendant may again be tried for the kidnapping offense."]; *People v. Hayes* (1990) 52 Cal.3d 577, 631 ["Although we have concluded that the robbery conviction must be reversed for instructional error, we must nonetheless assess the sufficiency of the evidence to determine whether defendant may again be tried for this offense."]; *People v. Memro* (1985) 38 Cal.3d 658, 690 [Despite "judgment of reversal on other grounds, . . . double jeopardy principles require this court to address appellant's sufficiency claim to determine the propriety of murder charges in the event of a retrial."]. See also *Burks v. United States* (1978) 437 U.S. 1, 16-18 [double jeopardy bars retrial after appellate finding of insufficient evidence].)

ISSUES RELATED TO THE STATE'S INVOCATION OF THE DEATH PENALTY

IX. ISSUES ARISING DURING JURY SELECTION

Introduction and Overview

In three distinct respects, the trial court at appellant's trial improperly constrained the defense's efforts to determine if the prospective jurors would be fair and impartial at the penalty phase. The court categorically refused to allow adequate voir dire into whether the prospective jurors were prevented or substantially impaired from returning a verdict of life without parole as a result of their views regarding the multiple-murder nature of the case or as a result of their views concerning the alternative sentence of life without parole, and the court also improperly limited the defense to the written questionnaires with respect to these subjects.

Each of the trial court's challenged actions was improper and violated the federal and state constitutions. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16, 17.) They violated Due Process, the Sixth Amendment right to an impartial jury, and the Eighth Amendment right to a reliable penalty determination. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728-729; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340.) "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . . Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" (*Morgan*, 504 U.S. at pp. 729-730, citations omitted.) The need for an adequate voir dire is particularly "great" in capital cases given "the qualitative difference of

death from all other punishments." (*Turner v. Murray* (1986) 476 U.S. 28, 33 (lead opinion); accord, *id.* at pp. 38-45 (opns. of Brennan and Marshall, JJ., concurring in pertinent part).) A trial court's discretion to "restrict" capital voir dire is limited by the overriding "demands of fairness." (*Morgan*, 504 U.S. at p. 730.)

Moreover, appellant had a right both to present mitigating evidence (see, e.g., *Tennard v. Dretke* (2004) 542 U.S. 274, 285) and to have his jurors truly weigh and consider that evidence in determining which penalty was most appropriate. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to *consider* ***and*** *give effect to* that evidence in imposing sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319; emphasis added. Accord, *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246.) Jurors cannot comply with this mandate when they are prevented or substantially impaired by their views with respect to the matters at issue here.

These constitutional principles were violated by each of the trial court's challenged actions in appellant's case.

1. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM DETERMINING WHETHER JURORS WOULD BE PREVENTED FROM VOTING FOR LIFE WITHOUT PAROLE, OR SUBSTANTIALLY IMPAIRED IN THEIR ABILITY TO DO SO, IF THEY FOUND APPELLANT GUILTY OF TWO OR THREE MURDERS UNDER THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE

It is firmly established that "[a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is . . . subject to challenge for cause . . . ." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; accord, e.g., *People v. Butler* (2009) 46 Cal.4th 847, 860 [quoting additional authority].) The test is whether the juror's views with respect to the death penalty "would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*People v. Cash* (2002) 28 Cal.4th 703, 720.)

While a trial court has considerable discretion as to how to conduct voir dire, it must allow inquiry into those general facts or circumstances that are "likely to be of great significance to prospective jurors" or that "could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." (*Cash*, *id.* at p. 721.[200])

---

[200] Accord, e.g., *People v. Carasi* (2008) 44 Cal.4th 1263, 1286 (quoting *Cash*); *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120 (the death qualification process "must probe 'prospective jurors' death penalty views as applied to the general facts of the case . . . ."), quoting *People v. Earp* (1999) 20 Cal.4th 826, 853.

Moreover, and of particular significance for the present case, "either party is entitled to ask prospective jurors questions that are *specific enough to determine if those jurors harbor bias*, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*People v. Cash*, 28 Cal.4th at pp. 720-721.) The voir dire must not be "*so abstract that it fails to identify those jurors* whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried . . . ." (*People v. Zambrano*, 41 Cal.4th at p. 1121; accord *People v. Butler*, 46 Cal.4th at p. 860; *People v. Carasi*, 44 Cal.4th at p. 1286.)

In the present case, there was one and only one special circumstance alleged: multiple murder. (§ 190.2, subd. (a)(3).) This Court has made clear that "[m]ultiple murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 286, quoting *Cash*, 28 Cal.4th at 721; accord *People v. Carasi*, 44 Cal.4th at p. 1287 [recognizing that multiple murder "could transform an otherwise death-qualified juror into one who could not decide penalty fairly"].)

Thus, appellant was entitled to an inquiry into whether the prospective jurors would be prevented or substantially impaired from returning a sentence other than death should they find that appellant had committed multiple murders within the meaning of the death penalty statute. And that inquiry could not be "so abstract that it fail[ed] to identify those jurors whose . . . views would prevent or substantially impair the performance of their duties as jurors in the case." (*People v. Zambrano*, 41 Cal.4th at p. 1121.)

But the trial court categorically refused to allow a focused inquiry into this question. In fact, the court specifically forbade counsel from even mentioning at voir dire that the special circumstance in the case was a multiple-murder special circumstance. (5 RT 782.) All it would allow was a question of its own creation. "All I'll permit," the court said, "is 'ladies and gentlemen, you can't get to the penalty phase unless the jury first finds the defendant guilty of the homicides that have been charged and finds the special circumstance to be true. And recognizing that . . . will you be willing to look at evidence that may be forthcoming dealing with the defendant's background, his history, other factors other than what's considered factor (a) evidence.'" (5 RT 782-783, internal quotation marks added for clarity.)

Moreover, the court warned that if defense counsel tried to more precisely determine how significant the multiple-murder special circumstance would be to the jurors, "I will not permit that [and] I'm prepared to be very clear out there in front of everybody . . . ." (5 RT 784.)

The trial court's limitation on voir dire violated all of the constitutional principles discussed above and made it impossible to determine whether there was "a realistic, practical possibility" that the prospective jurors selected to determine appellant's fate could consider and vote for a sentence less than death after finding appellant guilty of multiple murders. (*People v. Martinez* (2009) 47 Cal.4th 399, 97 Cal.Rptr.3d 732, 762; *People v. Mason* (1991) 52 Cal.3d 909, 954.).

A. The Factual Background

1. The Hardship Voir Dire

Jury selection took place over five court days in late April and early May of 1998. The first three days (April 27 - 29) were devoted to "time qualification" (1 RT 312, 316), i.e., determining whether prospective jurors

would suffer hardship due to the length of the trial. (3 RT 398-465, 522-553.) In introductory remarks to each day's panel, the trial court stated that appellant was accused of 14 crimes, including 3 murder charges. (3 RT 411, 437, 527.) To the first two panels, the court further stated that if appellant were convicted of more than one first-degree murder, there would be a second or penalty phase to the trial. (3 RT 412, 435.) To the third panel, the court initially stated that if "one or more of those [murder] counts amounted to first-degree murder," then there was "the possibility" or "the potential" for a second part of trial. (3 RT 527.) Shortly thereafter, the court told the panel that if the jury determined that the three murder charges were determined to be first-degree murder, then the jury would proceed to the second part of trial to determine penalty.[201] (*Ibid.*)

2. The Questionnaires

Prospective jurors who were not excused for hardship were called upon to fill out a questionnaire with 78 numbered items seeking information or views on various matters, including matters relating to "Penalty Phase." The questionnaire also contained a section entitled "Attitudes Regarding the Death Penalty" that did not have any questions but presented some preliminary information about the capital trial process.[202]

---

[201] The Information itself was not read to the jury until after the jury was selected and sworn. (6 RT 1032-1040.)

[202] The completed questionnaires of the prospective jurors in this case (with names of sworn jurors and alternates redacted) appear at 7 CT 1834 to 15 CT 4823. The Clerk's Transcript also contains what purports to be a blank, finalized questionnaire at 2 CT 705 to 728. However, while the text of the blank questionnaire appears to be the same as the completed questionnaires (at least insofar as the current issue is concerned), the pagination is different. For this reason, when referencing language in the

(continued...)

The defense had proposed a questionnaire that covered penalty-related matters somewhat differently. (2 CT 521-527.) Of most significance for current purposes, the defense questionnaire would have given a context to the question about whether the prospective jurors would be willing to vote for a sentence of life without parole. Specifically, the defense-proposed questionnaire prefaced its question by telling the juror that "[i]f a penalty phase is required in this case it will be because the defendant has been found guilty beyond a reasonable doubt of more than one offense of murder in the first or second degree." (2 CT 525.)

However, at the outset of the hearing into the questionnaires, the trial court announced it had "made some changes or ha[d] deleted questions" from the defense questionnaire and that "the most drastic" changes were to the section intended to address the prospective jurors' ability to serve at the penalty phase. (2 RT 360.) As the final questionnaire shows, the court deleted the contextual information that the defense had requested. Indeed, the final questionnaire did not indicate that appellant was accused of more than one murder at all. To the contrary, it used wording such as "*the* unlawful killing," "*the* murder" or "*the* alleged murder," in the singular. (See, e.g., 7 CT 1854, 1855 [three times].) And the only question focusing on whether the prospective juror would always vote for death (Question 69) asked the juror to assume that the defendant was found "guilty of first degree murder," again in the singular. (E.g., 7 CT 1857.)

---

[202](...continued)
questionnaire, this brief cites to one of the completed questionnaires. Thus, as an example of the "Attitudes Regarding the Death Penalty" section of the questionnaires, see 7 CT 1852 to 1855. As an example of the "Penalty Phase" section, see 7 CT 1855 to 1861.

Nor did the questionnaire tell the prospective jurors what special circumstance was charged in the case. It purported to define the term, but it did so in very general and virtually incomprehensible language. "A special circumstance," the questionnaire read, "is an alleged description which relates to the alleged murder, upon which the jury is to make a finding." (See, e.g., 7 CT 1855.) The questionnaire gave examples of special circumstances, but none of the examples (several forms of felony-murder and the killing of a peace officer) were applicable to appellant's case. (*Ibid.*) And the questionnaire repeatedly suggested that more than one special circumstance was alleged in this case. (See, e.g., 7 CT 1853 [2nd full par.], 1854 [2nd & 3rd full pars.]; 1855 [last full par.], 1856-1857 [Item #67], 1857 [Items #68 & #69], 1860 [Item #76(1)].)[203]

Thus, without specifying that appellant was charged with more than one murder, or that the special circumstance alleged in this case was multiple murder, or that the penalty phase would take place only if there was a first-degree murder conviction and at least one other murder conviction, the court's questionnaire asked:

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

---

[203] By contrast, the questionnaire used "special circumstance" (singular) only once. (E.g., 7 CT 1853 [1st full par.].)

(E.g., 7 CT 1857-1858, original underscoring.) Note that here, in the only question focusing on whether the prospective juror would always vote for death, the juror was asked to assume that the defendant was found "guilty of first degree murder," again in the singular. (E.g., 7 CT 1857.)

One final point should be noted here, arising from the court's rejection of the defense's context-giving multiple-murder language in the questionnaire and the court's substitution of the language quoted above. During the voir dire, the court emphasized for counsel that "[w]hen we talked about what questions are put in the questionnaire and what not to, I was making certain rulings about the admissibility of asking questions of the jurors." (5 RT 626.)

3. The Substantive Oral Voir Dire: The Trial Court's Rulings

The final two days of jury selection (May 4-5) consisted of substantive, oral voir dire. (4 RT 554 - 5 RT 977.) At the outset of the May 4th proceedings, the trial court stated to the assembled jury pool that appellant stood accused of several violations of law, including three separate "homicides." (4 RT 563.) Then, after a 24-page talk on various aspects of trial procedure and other matters, the court turned to what it termed the "requests for special verdicts" in the case. (4 RT 587.) It first discussed the "special verdicts" for great bodily harm, use of a firearm, and being armed with a firearm, and then it spoke briefly about "the other special allegation," which "has to do with — and this applies only to the murder counts, only if you find the defendant guilty of more than two first-degree murders, and I'll give you some instructions about this in a great deal more definition — will you be asked to make the determination of do you find the special circumstances to be true." (4 RT 588.) "Only if the jury finds the homicides to be first-degree murder and you find the

special circumstances to be true will there be need to do a second part in the trial. And the second part is called a penalty phase." (4 RT 589.) The court then went on to discuss penalty phase procedures and other matters. (4 RT 589-603.)

Following the 50-page discourse, 12 prospective jurors were seated in the jury box, based on a previously generated random list. (4 RT 611-612.) Those in the box were then voir dired, mostly by the trial judge, although counsel were allowed to address the jury to a limited extent. The court did not ask any question designed to get at whether two or three murder convictions might prevent or substantially impair the prospective jurors' ability to return a verdict of life without parole. Defense counsel did, however. Counsel told Juror 305 that in order for a penalty phase to occur, the jury had to have convicted appellant of at least two murders, but when counsel tried to determine whether the two or three convictions would cause the juror to lean in favor of death, the court interrupted. (4 RT 729-731.) The court deemed the question to be asking the juror for "a prejudging" of Factor (a) — which the court characterized as "the circumstances of the crimes" — and directed counsel to "get into a different area." (4 RT 731-732.) When counsel made a similar inquiry of the next juror, the court again interrupted, saying "I have to ask the juror not no [sic] answer that question," and it directed counsel to "ask another one." (4 RT 733.)

At the outset of proceedings the next morning, the court met with counsel outside the presence of the jury, saying it "needed to go over some of the ground rules here." (5 RT 776.) The court expressed its concern that defense counsel had been "putting the jurors in the position where they are prejudging the penalty phase or some aspect of the case" because of counsel's statements to prospective jurors that "when you get to the penalty

phase, you've already found somebody guilty of at least two first-degree murders, maybe even three . . . ." (5 RT 776.) The court then reiterated what it had stated the previous day, i.e., that it felt counsel was trying to have the jurors "prejudg[e]" Factor (a). (5 RT 776-777.)

Counsel explained he was "trying to put [the prospective jurors] in that posture to see if their mind is open at the point in time." (5 RT 777.) The court said it understood that, but "when you put in that first component, sir, [i.e., that] 'you're not going to get there until beyond a reasonable doubt he's been convicted of two or three counts of first-degree murder,' well, that puts them in a position of having to make a quick judgment call about factor (a) without them even realizing that's what they're doing. [¶] And so that's a problem." (5 RT 778, internal quotation marks added.) Thereafter, the following colloquy occurred:

> "[The Court]: *[A]ll I'm going to allow you to ask is set out the procedure.* 'Only if the jury makes a determination that the special circumstances are true,' *without going into anything more*, 'will it trigger off a second part.' [¶] And if you are — if you point out to them that you're not asking them to prejudge factor (a), which is they don't understand what factor (a) is — So you say 'factor (a) is the circumstances of the homicides. You get a chance to look at that and you get a chance to determine if it's an aggravating or mitigating factor.'
>
> ". . . I do think it's fair for you to say, 'ladies and gentlemen, we don't get to the penalty phase unless the jury has made a determination adverse to the defendant in which he's been convicted of a homicide and the special circumstances has been found to be true.'
>
> "[Defense Counsel]: *And I should be able to define the special circs [sic] in this case.*
>
> "[The Court]: *No, that's what I don't want to do in this stage.*"

(5 RT 779, 781, internal quotation marks added.)

The court noted defense counsel's opposition to what it was doing, but " I want it clear to let you know [that] in this trial this is my ruling." (5 RT 782.) When counsel sought clarification as to the scope of the court's limitation, the following exchange took place:

> "[The Court]: All I'll permit is 'ladies and gentlemen, you can't get to the penalty phase unless the jury first finds the defendant guilty of the homicides that have been charged and finds the special circumstance to be true. And recognizing that' —
>
> "[Defense Counsel]: Without identifying the special circumstance.
>
> "[The Court]: Right. [¶] — 'will you be willing to look at evidence that may be forthcoming dealing with the defendant's background, his history, other factors other than what's considered factor (a) evidence.'"

(5 RT 782-783, internal quotation marks added.)

The discussion ended with a warning. If defense counsel tried to more precisely determine how significant the multiple-murder circumstance would be to the jurors, "I will not permit that [and] I'm prepared to be very clear out there in front of everybody . . . ." (5 RT 784.)

4. The Substantive Voir Dire: The Post-Ruling Voir Dire

As it had in the prior day's substantive voir dire, the court took the lead role in further juror questioning, this time apparently attempting to address defense counsel's multiple-murder concerns via the following statements to eleven prospective jurors:[204]

> "[asked of Juror 322]: Now, in the questionnaire we try to set out in detail what some of the factors are that you might be asked to consider should we get to that part. [¶] You probably don't recall that question or that outline, but I just simply need to point out, both sides want to be in a position so they can have you *consider*

---

[204] Four of the jurors (Jurors 322, 394, 175, and 55) were among the twelve jurors eventually empaneled.

whatever evidence is forthcoming before you render a judgment or decision. [¶] Could you do that?" (5 RT 799.)

"[asked of Juror 242]: Now, one of the things I was talking to the attorneys about, and it started to develop late yesterday afternoon is I think counsel is entitled to ask you — or any prospective juror do you *have the ability to look at all of the evidence that might come under the different factors* should we get to the penalty phase, okay. [¶] On the other hand, one of the factors that you'll be asked to look at is what's called factor (a), or the circumstances of the homicides and the special circumstances, and you decide how much weight to attach to that. [¶] And I don't want to put a juror in a position of prejudging that aspect of the proceeding. [¶] So all I want to know from you is can you promise the parties that if we get to that stage that you get to *hear evidence concerning the defendant's background, his history, his record, and any other factors that — any other evidence dealing with other factors that come with the penalty phase, and I take it you're saying you can do that*?" (5 RT 802-803.)

"[asked of Juror 62]: "And *we ask you to take a look at the crime*, because it may come out at the end of the case, you may say, well, factor (a), the circumstances of the crime, were so aggravating, so compelling, that the proper penalty is death, okay? That's one of the arguments, one of the choices that you'll be looking at. [¶] On the other hand, this particular defendant, the circumstances of this crime, plus the mitigating information that came out might warrant life without possibility of parole. [¶] That's the structure." (5 RT 811.)

"[asked of Juror 207]: If we get to the penalty phase, there are two choices in the penalty. *Could you fully consider both penalties before you decide which one is appropriate*? What's your feelings about that? . . . . We like to have somebody in the jury box who's *willing to listen to both of those arguments, look at the evidence, and then make a decision.* [¶] *What we're concerned about is a juror who knows I'm not going to really listen to a particular side, I already know I will always vote life without possibility of parole or I will always vote death.* [¶] And, again, I want to stress to you and to the people that are in the audience, there's nothing wrong about that kind of a feeling or attitude or philosophy. We need to know that." (5 RT 819-820.)

"[asked of Juror 58]: "If we get to the second part in the proceeding, do you think that you'd *give full consideration to both sides* in terms of which should be the appropriate penalty? . . . . And no matter what your inclinations are, whether you favor or don't favor a particular penalty, would you *be willing to look at each factor that evidence is presented before making a decision*? . . . . And you would be willing to discuss your feelings and opinions with the other eleven jurors during the course of deliberations?" (5 RT 855-856.)

"[asked of Juror 394]: And if we get to the second part in the trial, *no matter whether you're inclined to favor the death penalty or not*, are you able to promise both parties that you'll *give full consideration to any evidence that's presented* before making a decision as to which one of those two choices you should make?" (5 RT 861.)

"[asked of Juror 297]: If we get to the second part in the proceeding, is there anything there that would preclude you from *full consideration of both of those choices* before you render a decision?" (5 RT 874.)

"[asked of Juror 175]: If we get to the second part in the proceeding will you *give both sides a full hearing* before making a decision?" (5 RT 885.)

"[asked of Juror 72]: If we get to the second part will you be willing to *give full consideration to whatever evidence comes in and factors as set out* in the legal instructions before making a decision? . . . Are you inclined to favor one penalty choice as opposed to the other to such an extent that you will *foreclose consideration of evidence or giving one of those choices complete consideration*?" (5 RT 907-908.)

"[asked of Juror 30]: We'll get to the second part. Do you have any *preconceived basis as to what you would deem to be appropriate or not appropriate*? And, if you do, could you set that aside and *follow the factors in the structure that goes with this kind of a case*? . . . . *Give both sides a full and complete hearing* as if we get to that part?" (5 RT 912.)

"[asked of Juror 55]: When you look at deciding which penalty is appropriate we'll give you a number of factors to *look at. The first factor, which is called factor a, is the circumstances of the crime which the defendant stands convicted from the present offense, all right, and also the special circumstances.* [¶] So you get to look at that and decide is that an aggravating or a mitigating factor. Other factors are also allowed to be presented. And we need to know whether you will *look at those other factors other than the circumstances of the crime*?" (5 RT 919-920.)

B. As Implemented by the Trial Court, the Voir Dire on Multiple Murder Failed To "Identify Those Jurors Whose Views Would Prevent Or Impair the Performance of Their Duties"

As noted earlier, a trial court is required to allow inquiry into the multiple-murder nature of a capital trial — a matter "likely to be of great significance to prospective jurors"[205] — and the inquiry must be "specific enough to determine if those jurors harbor bias" as to that circumstance. (*People v. Cash*, 28 Cal.4th at p. 720.) The voir dire cannot be "so abstract that it fails to identify" those jurors whose views with respect to the charged murders would "prevent or substantially impair the performance of their duties in the case." (*People v. Zambrano*, 41 Cal.4th at p. 1121.) The voir dire allowed by the trial court in appellant's case — consisting of the juror questionnaire and the oral voir dire on May 4 and 5 — was woefully deficient under any reasonable application of these principles.

Even if the voir dire process had otherwise been a model of lucidity and accuracy — which it was not, as we will discuss — it was far too abstract and unspecific with respect to the jurors' view as to the multiple murder nature of the case. As edited by the court, the jury questionnaire did nothing to get at jurors' views on the subject. The questionnaire merely

---

[205] *People v. Vieira*, 35 Cal.4th at page 286, internal quotation marks omitted.

asked the extremely broad and unfocused question of whether, if the jury found appellant guilty of "first degree murder" and found "one or more special circumstances" to be true, the juror would "automatically refuse to vote in favor of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant." (E.g., 7 CT 1857-1858, emphasis in latter clause deleted.) As we have noted, this question not only failed to focus the juror's attention on multiple murder, but it omitted to mention that appellant was charged with more than one murder at all. Indeed, the questionnaire implied (contradicting what the judge had said at the time-qualification voir dire) that there was only one murder charge. (See 7 CT 1854, 1855 [three times].)

Furthermore, the questionnaire gave the jury an incomprehensible definition of "special circumstance" (7 CT 1855), and it failed to specify what the special circumstance in this case was, and it implied there was more than one (7 CT 1853-1857 [six times], 1860).

The questionnaire plainly did not serve to "identify those jurors whose [views with respect to the charged murders] would prevent or substantially impair the performance of their duties in the case . . ." with regard to the multiple-murder nature of the case. (*People v. Zambrano*, 41 Cal.4th at p. 1121.) It was not "specific enough to determine if th[e] jurors harbor[ed] bias . . . ." (*People v. Cash*, 28 Cal.4th at p. 720.)

On the first day of substantive oral voir dire (May 4), the trial court's 50-page introductory discourse did mention that three murders were charged and that if the jury convicted of "more than two first-degree murders" and found the "special allegation" or "special circumstances"

(plural) to be true, then there would be a penalty phase. (4 RT 588-589.) But the court did not ask then, or in any subsequent questioning that day, whether the multiple-murder nature of the case might prevent or substantially impair a juror from returning a verdict of life without parole.[206]

With the court having made no effort to determine whether two or three murder convictions might prevent or substantially impair the prospective jurors' ability to be fair, the defense made initial inquiries of two jurors to directly determine this question itself. The trial court, however, acting sua sponte, quickly cut off the questioning, telling counsel to "get into a different area." (4 RT 729-733.)

Plainly, then, the May 4th voir dire did not "identify those jurors whose [views with respect to multiple murder] would prevent or substantially impair the performance of their duties in the case . . ." and was not "specific enough to determine if th[e] jurors harbor bias . . . ." (*People v. Zambrano*, 41 Cal.4th at p. 1121; *People v. Cash*, 28 Cal.4th at p. 720.)

---

[206] The multiple-murder nature of the case was mentioned in the court's questioning of one juror, but only obliquely and in the entirely opposite context. When Juror 214 expressed doubts about whether she could *ever impose a death sentence*, the court responded that there were "three separate homicides" charged and that "one of the special circumstances" involved "more than one first-degree murder," and the court added that this "might" trigger a penalty phase. (4 RT 680.) But because the juror was suggesting a possible *anti*-death bias, the court did not ask her whether a guilt-phase finding of multiple murder might prevent or substantially impair her ability to return a sentence of life without parole. Rather, the court simply told the juror that at the penalty phase, the jury would be required to "look at the circumstances of the crime[,] the defendant's age at the time of the alleged offense[,] the defendant's background or record[,] anything that is of a sympathetic — or an item that might fall within that area. . . . And you decide how important any one of those factors is, what weight to give to it." (4 RT 680-681.)

On the following day, the trial court began by setting forth explicit "ground rules"[207] as to what further voir dire it would permit in this area. The court specifically forbade counsel from even mentioning that the special circumstance in the case was a multiple-murder special circumstance. (5 RT 782.) All it would allow was an inquiry of its own creation. "All I'll permit," the court said, "is 'ladies and gentlemen, you can't get to the penalty phase unless the jury first finds the defendant guilty of the homicides that have been charged and finds the special circumstance to be true. And recognizing that . . . will you be willing to look at evidence that may be forthcoming dealing with the defendant's background, his history, other factors other than what's considered factor (a) evidence.'" (5 RT 782-783, internal quotation marks added.)

Thereafter, the court largely took over the voir dire on what it deemed to be this "factor (a)" inquiry, raising it with the eleven prospective jurors discussed in the preceding subsection, never straying beyond the question it had specified for counsel and often saying less. None of the questions ferreted out those jurors whose views about the multiple-murder nature of the case "would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror."[208] As we have pointed out, the court asked whether, at the penalty phase, the juror

- could "consider" or "hear" or "listen to" all of the penalty-phase evidence and factors, and the two sides' arguments, and the two penalties (5 RT 799 [Juror 322], 802-803 [Juror 242], 819-820 [Juror 207]; 855 [Juror 58], 861 [Juror 394], 874 [Juror 297], 885 [Juror 175], 907 [Juror 72]);

---

207 5 RT 776.

208 *People v. Cash*, 28 Cal.4th at page 720.

- could "take a look at the crime" (singular) to see whether "the circumstances of the crime [singular] were so aggravating, so compelling, that the proper penalty is death" or whether "this particular defendant, the circumstances of this crime [singular], plus the mitigating information that came out might warrant life without possibility of parole" (5 RT 811 [Juror 62]; see also 5 RT 920 [Juror 55: similar]);

- was "inclined to favor one penalty choice as opposed to the other to such an extent that you will foreclose consideration of evidence or giving one of those choices complete consideration" (5 RT 908 [Juror 72]);

- had "any preconceived basis as to what you would deem to be appropriate or not appropriate" with respect to "the second part" of the trial (5 RT 912 [Juror 30]); and

- could "follow the factors in the structure that goes with this kind of a case" and "[g]ive both sides a full and complete hearing . . ." (5 RT 912 [Juror 30]).

As vehicles for determining whether the jurors' views about the multiple-murder nature of the case would prevent or impair their ability to return a verdict of life without parole in the case before them, these inquiries were inadequate. They were unspecific, indirect, and abstract. Even a legally trained individual would fail to extract a multiple-murder inquiry from the court's formulations, and these prospective jurors were, of course, not legally trained individuals. And not only were they unschooled in the law, but they were being questioned in an unfamiliar environment, the questions did not identify which of the welter of unfamiliar legal subjects and principles the court had talked about were the focus of the inquiry, and the language used by the court was diffuse and often technical or bureaucratic. In no way did the questioning "identify those jurors whose [views with respect to multiple murder] would prevent or substantially impair the performance of their duties in the case . . . ." (*People v.*

Zambrano, 41 Cal.4th at p. 1121.) It was not "specific enough to determine if th[e] jurors harbor[ed] bias . . . ." (*People v. Cash*, 28 Cal.4th at p. 720.)

And this conclusion is only confirmed if one considers the inconsistencies in the language that the trial court used in its voir dire, which made the questioning, if anything, even less conducive to being understood as an inquiry into multiple murder. For example, having earlier told the jurors that the charges involved three murders, the court's "factor (a)" questioning overwhelmingly referred to "the crime" (singular); only once did it refer to "homicides" (plural).[209] Similarly, although the case actually involved only one special circumstance, the court's "factor (a)" questioning uniformly characterized the case as involving "special circumstances" (plural). (5 RT 803, 819, 920.) And the court had told one of the panels that there was "the possibility" of a penalty phase with merely "one" first-degree murder conviction. (3 RT 527.) The confusion that these inconsistencies must have generated corroborates the conclusion that the imprecise voir dire that the court insisted upon did not meet the requirements of law.

Defense counsel could do nothing to press the multiple-murder inquiry further. Having been told that the court's rejection of the defense-proposed questionnaire language was a "ruling[] about the admissibility of asking questions of the jurors" (5 RT 626), having heard the court state, in no uncertain terms, that its specific "factor (a)" question was "[a]ll I'm going to allow you to ask" and "[a]ll I'll permit" (5 RT 779, 782), having heard the court also declare that "I want it clear to let you know [that] in this trial this is my ruling" (5 RT 782), having further heard the court

---

[209] Compare 5 RT 811 ("crime" three times), 920)"crime" twice) with 5 RT 803 ("homicides" once).

indicate that it was "prepared" to correct counsel "out there in front of everybody" if counsel went beyond the court's limits (5 RT 784), and having heard the court thereafter undertake the abstract and unspecific voir dire that it felt was appropriate on the subject, defense counsel had nothing else they could do. Near the end of the voir dire, counsel did mention that, to arrive at a penalty phase, there would have had to be a conviction of two or three murders, adding (in potential violation of the court's twice-articulated prohibition) that the jury would have had to find "the special circumstance multiple murder count" to be true. (5 RT 893.) But in light of what the court had so clear ruled and had so equally clearly warned, counsel could take this no further and wisely did not venture to do.

Thus, the voir dire at appellant's trial with respect to multiple murder was so "abstract" and unspecific that it "fail[ed] to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors" in appellant's case. *(People v. Zambrano*, 41 Cal.4th at p. 1121.) Consequently, it violated constitutional precepts.

The erroneous preclusion of adequate voir dire requires reversal of the penalty-phase judgment. As the preceding discussion makes clear, the defense was neither "permitted 'to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case,'" nor does the record "otherwise establish[] that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*People v. Cash*, 28 Cal.4th at p. 722, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 974.) In addition, the fact that the defense had peremptory challenges remaining does not cure the error. (*People v. Bolden* (2002) 29 Cal.4th 515, 537-538.) The death judgment must be set aside.

2. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM DETERMINING WHETHER JURORS WOULD BE PREVENTED FROM VOTING FOR LIFE WITHOUT PAROLE, OR SUBSTANTIALLY IMPAIRED IN THEIR ABILITY TO DO SO, AS A RESULT OF MISCONCEPTIONS ABOUT SUCH A SENTENCE

Since mid-1977, the alternative to a death sentence at the penalty phase of a capital trial has been life imprisonment without possibility of parole. However, it is not uncommon for members of the community to mistakenly believe that there is no such thing as life without parole and that persons with such sentences are frequently paroled. Prospective jurors have told judges that they would refuse to follow an instruction directing them to assume that life without parole meant the defendant would not be paroled (see, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 417), and one prospective juror in appellant's case volunteered on her questionnaire that the reason she supported the death penalty was "because: – Life imprisonment usually results in parole." (12 CT 3656.) As we will show, these attitudes reflect a common misunderstanding of life without parole.

Clearly, prospective jurors with such views, if unwilling or unable to set them aside, either are prevented from performing their duties as jurors in accordance with their instructions and their oaths (*Boyette*, 29 Cal.4th at p. 418) or are substantially impaired in their ability to do so. Consequently, some inquiry into the prospective jurors' views about the life-without-parole alternative was appropriate during jury selection at appellant's trial. The trial court, however, refused to allow the defense to conduct any such inquiry. "I'm not going to let you get into that," the court said flatly. (4 RT 628.)

As with the preclusion of voir dire into multiple murder, the court's limitation on voir dire was error under state and federal constitutional law.

A. The Factual Background

Approximately one month before trial, the defense filed a motion to have the prospective jurors fill out a questionnaire. (2 CT 504-528.) Among the questions that the defense proposed were two designated Nos. 77 and 78:

> "77. What are your general feelings regarding life imprisonment without the possibility of parole? Please explain:"
>
> "78. Do you believe that Life without the possibility of parole actually means a life sentence without the possibility of parole? Please explain:"

(2 CT 521-522.)

Two weeks later, in conjunction with the court's consideration of the questionnaire, the prosecutor proposed her own questions, one of which tracked defense No. 77 almost verbatim. (2 CT 665-666 [Question No. 26: "What are your general feelings about the punishment of life imprisonment without the possibility of parole?"].)

As we have noted, the trial court announced, at the outset of the hearing concerning the questionnaire, that it had "made some changes or ha[d] deleted questions" from the defense questionnaire and that "the most drastic" changes were to the section intended to address the prospective jurors' ability to serve at the penalty phase. (2 RT 360.) The court deleted both of the defense questions (Nos. 77 and 78) and the prosecutor's question No. 26. (2 CT 689, 696; 2 RT 363.) Nothing in the court's version of the questionnaire purported to address the topic touched on by these questions. (See, e.g., 7 CT 1852-1861.) Not surprisingly, then, none of the approximately one hundred prospective jurors who filled out questionnaires directly stated their views about life without parole.

However, in response to a question asking the prospective jurors to "list the reasons, if any, you either support the death penalty or are opposed to it," one juror wrote that she "support[s] it because: – Life imprisonment usually results in parole."[210] (12 CT 3656.)

Prior to trial, the court told counsel that it "infrequently granted the attorneys a chance to voir dire." (2 RT 377.) However, when both sides stated they wanted to question jurors, the court said that it would allow counsel to conduct voir dire for a short time during the substantive oral voir dire but that counsel had to submit a list of the topics they wanted to cover. (2 RT 377-378; see also 4 RT 616:11-13.) Among the questions that the defense subsequently submitted were two (Nos. 3 and 4) that were similar to the rejected Questions Nos. 77 and 78. The new questions were:

> "3. Do you think that a person sentenced to LWOP will someday be paroled?"
>
> "4. What are your impressions of life in prison w.o. parole?"

(5/4/06 Supp.CT 413.)

As noted previously, the substantive oral voir dire began on May 4, 1998. Early in the defense's questioning, counsel asked one prospective

---

[210] Two other prospective jurors expressed dislike for a sentence of life without parole, but neither of them explicitly tied their feelings to the availability of release. (See, e.g., 13 CT 4223 [supports death penalty because "I don't believe life in prison, being taken care of for the rest of your life [is] a punishment"]; 14 CT 4281 ["life in prison without parole waste[s] money"].)

None of the prospective jurors quoted herein ended up on appellant's jury, though this fact is irrelevant to the present issue because, as we will point out, the vice of the improper limitation on voir dire is that it prevents this Court and counsel alike from knowing whether the jurors who served harbored bias or disqualifying beliefs with respect to life without parole.

juror Question No. 3 from their list, "Do you think that if someone is sentenced to life without possibility of parole, that at some time they're going to get paroled?" (4 RT 625.) The prosecutor objected on the basis of "improper question," and the court sustained the objection. (*Ibid.*)

Defense counsel then asked Question No. 4, "What is your feeling about someone who is sentenced to life without possibility of parole? What is your view about that? Is that a harsh penalty in your view?" (*Ibid.*) Acting sua sponte, the court broke in. "Let me interrupt," the court said and called both sides to the bench. (*Ibid.*)

Out of the jury's hearing, the court told defense counsel that "these kinds of questions" were "inappropriate in view of the fact that we used the questionnaire." (4 RT 625.) "The questionnaire tells you what they feel about these particular topics," the court continued. "So that's what you have to rely on in your determination of whether there's legal cause or whether there's need for you to exercise one of your challenges." (4 RT 625.)

The court further stated that Question No. 3 was improper in light of a recent decision from this Court that "expressly said that it's wrong for the judge to tell the jury that life imprisonment without the possibility of parole means just that." (4 RT 625-626.) And the second question was asking "about things that are in the questionnaire and the reason I allowed the questionnaire was to save time." (4 RT 626.) When counsel pointed out that this was not correct, the court replied that "[w]hen we talked about what questions are put in the questionnaire and what not to, I was making certain rulings about the admissibility of asking questions of the jurors." (5 RT 626.)

"So," the court concluded, "I'm going to have you just rely on the questionnaires in this one area." (*Ibid.*) "Don't get into that area." (5 RT

627.) The court said that the questions counsel had asked were "subject to an objection" and "I need to caution you about that." (*Ibid.*) The court directed counsel to proceed to other topics on their list, adding, "I don't know how to say it in a nice way, but I'm not going to let you get into that, okay?" (5 RT 627-628.) In compliance with the court's directives, counsel did not pursue the topic further.[211]

B. Precluding Inquiry into the Prospective Jurors' Views Concerning Life Without Parole Prevented the Defense from Determining Whether Jurors Were Prevented from Performing Their Penalty-Phase Duties or Substantially Impaired in Their Ability to Do So

The trial court's statement that this Court had ruled that "it's wrong for the judge to tell the jury that life imprisonment without the possibility of parole means just that"[212] was partially correct, but it was *only* partially correct and was largely irrelevant. What this Court has consistently held is that it is "'incorrect to tell the jury the penalty of . . . life without possibility of parole will *inexorably be carried out*.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1277, further internal quotation marks omitted.) The inaccuracy is not that parole is available under a life-without-parole sentence. Rather, the

---

[211] Subsequently, one prospective juror, when asked by the court if she "could follow the instructions and the procedure that we've outlined" for the penalty phase, replied, "I don't believe in life without the possibility of parole, if that is the instructions. I'm really firm in that, and I felt that way for a very long time. . . . I've been very, very firm in this belief for many — and vocal, unfortunately, for many years [and] I don't see myself changing those views." (5 RT 928-929.) This juror did not otherwise explain what she meant by "don't believe in life without the possibility of parole." She was subsequently excused for cause.

[212] 4 RT 625-626.

inaccuracy is that it is possible in theory for such a sentence to be lifted or changed to an altogether different sentence by a future governor exercising the powers of commutation or pardon. (See *People v. Arias* (1996) 13 Cal.4th 92, 172; *People v. Thompson* (1988) 45 Cal.3d 86, 131.)

But this possibility is purely theoretical, vanishingly small in size. Undersigned counsel has been unable to locate a single instance of a release of — or a sentence commutation for — any California prisoner with a life-without-parole sentence since mid-1977, when such sentences were first authorized for murder. It seems safe to say that there has not been any.[213] So, the inaccuracy in any statement about the inexorability of completing a sentence of life without parole is theoretical only. Moreover, that theoretical inaccuracy did not authorize what the trial court did here, for several reasons.

First, despite the theoretical possibility of future commutation, this Court has also repeatedly indicated that it is "proper for the court to tell the jury '"to *assume* that whatever penalty it selects will be carried out"' or to give '"a comparable instruction."'" (*People v. Harris* (2008) 43 Cal.4th 1269, 1317-318, quoting *People v. Snow* (2003) 30 Cal.4th 43, 123, and *People v. Kipp* (1998) 18 Cal.4th 349, 378-379, original emphasis; accord, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 737, *People v. Thompson,* 45 Cal.3d at p. 131.) In fact, this Court has held it to be error to deny a challenge for cause to a pro-death juror who "admitted he would not follow

---

[213] Cf. Press Release, *New poll by UCSC professor reveals declining support for the death penalty* (Sep. 1, 2009), viewable on line at <http://www.ucsc.edu/news_events/press_releases/text.asp?pid=3168> (as of Sep. 3, 2009) ("no prisoner under that sentence [of life without parole] has ever been paroled or pardoned in California"); ACLU of No. Cal., *The Truth About Life Without Parole: Condemned to Die in Prison,* viewable on line at <http://tinyurl.com/kn2tcd> (as of Aug. 19, 2009) (similar).

an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released." (*People v. Boyette*, 29 Cal.4th at p. 418.) If such a prospective juror may be challenged for cause, then inquiry must be allowed into whether the prospective jurors harbor such a disqualifying bias. (Code Civ. Pro., § 223 [authorizing examination of prospective jurors "in aid of the exercise of challenges for cause"].)

Second, the choice that the black letter law of this State required the jurors to make at the penalty phase of appellant's trial was between death and life *without* the possibility of parole. (§§ 190.2, 190.3.) It was not between death and life *with* the possibility of parole. A juror has to be able to apply the law given him or her and not transform the sentencing choice into a different one, unauthorized by law. It scarcely requires a citation of authority to point out that a prospective juror who cannot or will not apply the law given by the court, or who is substantially impaired from doing so, is subject to a challenge for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [standard for removing a juror for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror *in accordance with his instructions and his oath.*"], internal quotation marks omitted; *Boyette*, 29 Cal.4th at p. 418 [same].)

Third, it is established that juror "consideration of the possibility of pardon, parole, or commutation is improper." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1077; accord *People v. Bramit* (2009) 46 Cal.4th 1221, 1246 ["jury must not consider the possibility of commutation in determining the appropriate sentence"].) Not only would such consideration detract from the juror's sense of responsibility (*Caldwell v. Mississippi* (1985) 472 U.S. 320), but it would require the juror to engage in "speculation as to whether unidentified officials will in the future perform their job in a specified way

and whether defendant will be unsuitable for any modification of his sentence" (*People v. Thompson*, 45 Cal.3d at pp. 130-131; accord *People v. Mitcham*, 1 Cal.4th at p. 1077). A prospective juror who cannot or will not adhere to this restriction, or is substantially impaired from doing do, is subject to exclusion for cause. Thus, a party has the right to have prospective jurors examined to determine whether they would be willing and able, without substantial impairment, to refrain from considering these improper factors.

These are not fanciful possibilities. We know this because of the juror in the *Boyette* case, who "admitted he would not follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released." (*People v. Boyette*, 29 Cal.4th at p. 418.) We know this from appellant's own case, because of the happenstance that, while not called upon to discuss her attitudes toward life without parole, one prospective juror volunteered on her questionnaire that the reason she supported the death penalty was "because: – Life imprisonment usually results in parole." (12 CT 3656.) And we know this because, as shown by the only surveys into the subject of which appellant is aware, a very substantial proportion of death-qualified adults in California believes that a sentence of life without parole does not mean what its words say.[214]

---

[214] See Haney et al., *"Modern" Death Qualification* (1994) 18 Law & Human Behavior 619, 629, Table 3 (only 22.6 percent of death-qualified Californians in 1989 believed life without parole meant life without parole); Press Release, *New poll by UCSC professor reveals declining support for the death penalty*, *supra*, 8th par. (indicating that, of all jury-eligible adults in California [not limited to those who are death-qualified], the proportion who did not believe life without parole meant life without parole was 66 percent in 1989 and 40 percent in 2009).

Appellant is *not* claiming that either the prospective juror who volunteered that "life imprisonment usually results in parole" nor the many prospective jurors who believed that life without parole does not mean life without parole would necessarily have been subject to challenge for cause. The problem here is that because the trial court categorically precluded appellant from making the inquiry, "[w]e simply do not know how these potential jurors would have responded to appropriate clarifying questions posed to them . . . ." (*People v. Stewart* (2004) 33 Cal.4th 425, 450-451.) That is precisely the error here: preclusion of voir dire into whether or not a juror had disqualifying views with respect to life without parole.

Thus, the trial court disregarded the fact that the life-without-parole question in the present case was not arising in the context of instructions from the judge, as in the *Musselwhite-Gordon-Arias-Thompson* line of decisions, but in the context of voir dire. That it would have been improper to tell jurors that life without parole inexorably precludes release does not mean it was also improper to determine whether or not the prospective jurors were prevented or substantially impaired from accepting the life-without-parole sentence that the law required them to consider as one of the alternative sentences in appellant's case.

The trial court also disregarded the concern for accuracy upon which the *Musselwhite-Gordon-Arias-Thompson* line of decisions was based. If it is inaccurate to allow the jury to believe that a sentence of life without parole inexorably precludes release, it is at least as inaccurate to allow them to believe that such a sentence "usually results in parole," as the prospective juror wrote in appellant's case (12 CT 3656), or that life without parole often or not uncommonly or easily results in parole or release. Indeed, the latter beliefs are, in the real world, far more misguided than the former. So, the concern for accuracy that motivated the decisions

relied on by the trial court should have caused the court to *allow* the inquiry that the defense sought to undertake, not preclude it.

Just as with the erroneous preclusion of voir dire into multiple murder, the erroneous preclusion of voir dire as to life without parole requires reversal of the penalty-phase judgment because the defense was not "permitted 'to use the general voir dire to explore further" the prospective jurors' views with respect to life without parole, nor does the record "otherwise establish[] that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*People v. Cash*, 28 Cal.4th at p. 722, quoting *People v. Cunningham*, 25 Cal.4th at p. 974.)

3. THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED THE DEFENSE FROM GOING BEYOND THE JUROR QUESTIONNAIRES IN DETERMINING WHETHER THE PROSPECTIVE JURORS MIGHT BE PREVENTED OR SUBSTANTIALLY IMPAIRED FROM RETURNING A NON-DEATH VERDICT AT THE PENALTY PHASE

Quite apart from the impropriety of refusing to allow voir dire into the juror's willingness and ability to follow the law with respect to life without parole, the trial court's actions in the present case were also improper, and violated the constitutional principles outlined at the outset of this Part, for the additional reason that the court improperly limited the defense to the jurors' questionnaire responses when those responses were ambiguous. (See *People v. Stewart*, 33 Cal.4th at pp. 440-455.)

A. The Factual Background

The use of a questionnaire at appellant's trial was the result of a request by the defense, one that the prosecution subsequently seconded. (2 CT 504-528, 659-675, 2 RT 339.) As previously pointed out, the court held a hearing into the use of questionnaires on April 21, 1998, six days before jury selection began. (2 RT 360-366.) At the hearing, the court announced that it had "approved" some defense-proposed questions and had "made some changes or ha[d] deleted questions" from the questionnaire proposed by the defense (2 RT 360), and it also approved and rejected questions proposed by the prosecution (2 RT 363-364.) It directed the parties to rewrite the questionnaire, using verbatim the language it had specified. (2 RT 362.)

The following day, the court deleted duplicate questions but otherwise declared that the retyped questionnaire was "what we'll be handing out" when jury selection started. (2 RT 367.) At the parties'

request, the court agreed that each side could conduct voir dire for a half hour on each of the two days of substantive, oral voir dire (May 4-5). (2 RT 377-378.) "Other than that," the court said, "if a prospective juror gets up in the box and has answered the questions in the questionnaire and they seem like they are — they have been listening to the questions that have been asked by the court and by counsel and they indicate that to you, I'm simply going to go to the challenges." (2 RT 378.)

The court stated that " the questionnaire covers a lot of this stuff" and "starts to give you an indication of which jurors are acceptable or not." (2 RT 378-379.) The court asked counsel to look over the questionnaire for things that may have been missed and then submit a list of the topics they wanted to cover when they questioned the jury. (2 RT 379.) The defense subsequently did so. (5/4/06 Supp.CT 413-415.)

At the April 21 hearing, the court acknowledged that "[t]he questionnaire itself can be difficult for prospective jurors." (2 RT 389.) "They just don't understand the law of homicide," it explained. "And so we put that into the questionnaire trying to help them, but I'm not sure that by the time they get to page [sic] 60 or 58 or 70, wherever it's at, people start to lose attention as to what's going on in that regard." (*Ibid.*) Subsequently, when the court distributed the questionnaires to the three groups of prospective jurors, it asked the jurors to fill out the questionnaires as completely as feasible but acknowledged they were "somewhat lengthy."[215] (3 RT 401, 428, 529.)

---

[215] The court's reference to "page" 60 or 58 or 70 was obviously a slip of the tongue, the questionnaire being only 29 pages long. The intended reference was doubtless to *question* 60 or 58 or 70, relating to the death penalty, which was covered by Questions 66 through 76.

As discussed in Subsection 2, *ante*, when defense counsel sought, during substantive oral voir dire, to ask questions regarding life without parole, the court forbid the inquiries. In the court's view, "these kinds of questions" were "inappropriate in view of the fact that we used the questionnaire." (4 RT 625.) "The questionnaire tells you what they feel about these particular topics," the court continued. "So that's what you have to rely on in your determination of whether there's legal cause or whether there's need for you to exercise one of your challenges." (4 RT 625; see also 4 RT 626 ["the reason I allowed the questionnaire was to save time"].) "So," the court concluded, "I'm going to have you just rely on the questionnaires in this one area." (*Ibid.*) "Don't get into that area." (5 RT 627.) "I don't know how to say it in a nice way, but I'm not going to let you get into that, okay?" (5 RT 627-628.)

B. Limiting the Defense to the Questionnaires Constituted Reversible Error

This case is controlled by the principles laid out in this Court's decision in *People v. Stewart*, 33 Cal.4th 425, 440-455. In *Stewart*, prospective jurors were given a questionnaire containing a three-part question designed to elicit the jurors' views with respect to the death penalty. Subsequently, the trial court granted the prosecution's challenges for cause against five prospective jurors, based solely upon their responses of "yes" to the question of whether their views about the death penalty would prevent or make it very difficult for them to "ever vote to impose the death penalty." (*Id.* at p. 445.) The court refused to allow the defense to go beyond what the jurors had written in their questionnaires.[216] (*Ibid.*)

---

[216] Insofar as is relevant, the *Stewart* questionnaire asked: "Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:

(continued...)

On appeal, this Court reversed, holding that the prospective jurors' questionnaire responses were ambiguous as to whether the jurors were truly impaired and thus that the trial court should thus have allowed the development of "sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath)." (*Stewart*, 33 Cal.4th at p. 445, quoting *Wainwright v. Witt*, 469 U.S. at p. 424.)

The Court acknowledged that it did not know whether the excluded jurors actually "would have withstood a properly adjudicated challenge for cause." (*Stewart*, 33 Cal.4th at p. 450.) But that was the very vice of

---

[216](...continued)
"(a) To find the defendant guilty of first degree murder regardless of what the evidence might prove? () Yes () No

"(b) To find a special circumstance to be true, regardless of what the evidence might prove? () Yes () No

"(c) To ever vote to impose the death penalty? regardless of what the evidence might prove? () Yes () No

"If your answer to (a), (b) or (c) is 'Yes,' please explain [in the space provided]."

(33 Cal.4th at p. 442.)

In addition to answering "yes" to (c), the excluded jurors also explained that "I do not believe a person should take a person's life. I do believe in life without parole" (Juror 8), "I am opposed to the death penalty" (Juror 53), "I do not believe in capit[al] punishment" (Juror 59), "In the past, I supported legislation banning the death penalty" (Juror 93), and "I don't believe in irrevers[i]ble penalties. A person can be released if new information is found" (Juror 122). (*Id.* at pp. 448-449.)

restricting oral voir dire when there were ambiguous questionnaire responses. "We simply do not know how these potential jurors would have responded to appropriate clarifying questions posed to them by the trial court." (*Id.* at pp. 450-451.)

The Court said "we need not and do not" hold that a trial court may never rule on a motion for excusal for cause base on a juror's questionnaire answers alone, but it added that "[w]e are, however, unaware of any authority upholding such a practice."[217] (33 Cal.4th at pp. 449-450.)

The facts of *Stewart* involve the flip side of the coin from those of appellant Nguyen's case here. *Stewart* involved a trial court that *excluded* prospective jurors by relying solely on questionnaire answers that did not unambiguously show they were prevented or substantially impaired from imposing *death*. The instant appeal, by contrast, involves a trial court that *prevented the exclusion* of prospective jurors by precluding the defense from going beyond juror questionnaire answers that were (at best) ambiguous as to whether the jurors were prevented or substantially impaired from imposing a sentence of *life without parole*. But these are distinctions without a difference. In both cases, the trial court refused to allow oral voir dire when the juror questionnaires did not provide an adequate basis for determining whether the jurors were able to serve without substantial impairment.

---

[217] Although the Court discussed the fact that the questionnaire in *Stewart* used language different from the applicable "prevent or substantially impair" standard — the questionnaire in *Stewart* talked in terms of "prevent or *make it very difficult*" — the Court also made clear that the same result would have been reached even had the correct wording been used. "[W]e still would find that the prospective jurors could not properly be excused for cause without any follow-up oral voir dire by the court." (33 Cal.4th at p. 452.)

In *Stewart*, because of ambiguity in the questionnaires, the prospective jurors' eligibility to serve was determined without "sufficient information regarding the prospective juror[s'] state of mind to permit a reliable determination" as to whether the jurors could return a verdict in favor of one party (there, the prosecution). Oral voir dire should have been allowed. The exact same fundamental defect exists in the present case. Because of ambiguity or silence in the questionnaires used at appellant's trial, the prospective jurors were found to be eligible to serve without "sufficient information regarding the prospective juror[s'] state of mind to permit a reliable determination" as to whether the jurors could return a verdict in favor of *the defense*. Indeed, if anything, the defect was greater in the present case because, while the *Stewart* jurors at least had answered "no" to the "ever return death" question, there was no comparable question in the questionnaire used in appellant's case that so squarely put the "life without parole" question before these jurors.[218]

The error requires reversal of the penalty-phase judgment because, just as was true for the previous two claims, the defense was not "permitted to use the general voir dire to explore further" the prospective jurors' views with respect to life without parole, and the record does not "otherwise establish[] that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*People v. Cash*, 28 Cal.4th at p. 722, internal quotation marks omitted.)

---

[218] The trial court's refusal to allow voir dire beyond the questionnaires is particularly perplexing, given that the court had acknowledged that "[t]he questionnaire itself can be difficult for prospective jurors" and that the court suspected that "by the time they get to [Question] 60 or 58 or 70, wherever it's at, people start to lose attention as to what's going on in that regard." (2 RT 389.)

X.
OTHER ISSUES ARISING FROM THE USE OF THE DEATH PENALTY

1. THE TRIAL COURT VIOLATED BOTH STATE LAW AND THE EIGHTH AMENDMENT IN PRECLUDING DEFENSE COUNSEL FROM INTRODUCING EVIDENCE ON WHAT A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE WOULD ENTAIL

A. The Relevant Facts

At the penalty phase of appellant's trial, the jury was deciding between two options: death and life without parole. The defense sought to call Norman M. Morein as a witness with respect to this decision. Mr. Morein was a sentencing consultant who had worked for the Department of Corrections for more than a quarter century. (Court Exh. 8, 2nd & 3rd pp.) In support of Morein's proffered testimony, the defense submitted two written offers of proof, and Morein himself testified at hearing held pursuant to Evidence Code section 402. (Court Exh. 8 [dated 7/1/98], 4 CT 1232-1233 [dated 7/6/98, filed 7/7/98], 28 RT 5535-5549.)

For purposes of the present argument, Mr. Morein's testimony was intended to cover three topic areas. First, he was to testify about the prison conditions to which life-without-parole inmates were subject. This included not only prison conditions in general, but also the types of institutions where LWOP prisoners were confined, the housing of LWOP inmates, the security used at these institutions, the dangerousness of the institutions, and the curtailment of activities in which LWOP inmates could participate. (Court Exh. 8, p. 1, items 6-9; 4 CT 1233; 28 RT 5538-5541, 5545-5547.)

Second, Morein was to present statistics regarding the unlikelihood that LWOP prisoners would ever be presented to the governor for parole consideration via commutation. (Court Exh. 8, p. 1, items 4 and 5; 28 RT 5427-5428.)

And third, Morein was to testify to the socially useful work that appellant could do while a prisoner serving an LWOP sentence. (Court Exh. 8, p. 1, item 10, 4 CT 1233, 28 RT 5541-5542.)

In the end, the trial court ruled that none of what the defense wished to elicit from Morein was admissible. (See, e.g., 28 RT 5427-5431, 5537, 5589-5590, 5613.) As more fully discussed in the ensuing subsections, this ruling was improper for reasons both statutory and constitutional.

First, in 1978 the electorate enacted Penal Code section 190.3 to govern admission of evidence at penalty phases in California capital cases. The critical language used in section 190.3 to describe the type of evidence admissible at capital penalty hearings was not pulled from thin air. Instead, the language had been used in the 1977 death penalty law and, in turn, other sentencing statutes as well, and had a well-recognized meaning that *permitted* consideration of the actual impact of a sentence on the defendant. Under well-established principles of statutory construction, there is a strong presumption that the electorate intended this language to have the same meaning in section 190.3. The defense was entitled to rely on that intent, and the trial judge had neither power nor discretion to act as a super-legislature and preclude consideration of this evidence in mitigation. (See Subsection B, *post.*)

Second, even if the electorate had not intended this kind of evidence to be admissible, developments in the Supreme Court's Eighth Amendment jurisprudence require that the evidence be admissible during the sentencing phase of a capital case. (See Subsection C, *post.*)

Here, the trial court erroneously precluded the defense from presenting the proffered evidence. The death sentence must be reversed.

B. The California Electorate Never Intended That a Jury Deciding Whether a Defendant Should Live or Die Should Be Shielded from Direct Evidence as to What a Sentence of Life Without Parole Means

The current law fixing the penalty for first degree murder — Penal Code section 190.3 — was enacted by voter initiative in November 1978. Once a defendant has been convicted of special circumstances murder, section 190.3 provides for a separate penalty phase to determine the appropriate penalty as between life without parole and death. Section 190.3 goes on to describe the evidence admissible at the penalty phase:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to *any matter relevant to* aggravation, *mitigation, and sentence including, but not limited to*, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Under the plain terms of this statute, the parties are permitted to introduce "any matter relevant" to three distinct areas: (1) aggravation, (2) mitigation, and (3) sentence. Under the equally express language of the statute, this "includ[es] but [is] not limited to" subjects such as "the defendant's character, background, history, mental condition and physical condition."

Under two independent but mutually reinforcing lines of reasoning, basic principles of statutory construction compel the conclusion that the

nature of a sentence of life without parole is admissible under this section of the Penal Code. First, section 190.3 permits defendants to introduce "any matter relevant to . . . mitigation . . . ." At the time the 1978 law was enacted, the term "mitigation" had been used in previous sentencing statutes and had been recognized to include the impact of a sentence on the defendant. Under well accepted principles of statutory construction, the electorate is deemed to have intended "mitigation" as used in section 190.3 to have the same meaning as it had in these other statutes.

Second, section 190.3 also permits introduction of "any matter relevant to . . . sentence." Even assuming the electorate's use of the phrase "any matter relevant to . . . mitigation" was insufficient to authorize evidence of how the actual sentence would be imposed on the defendant, such information was plainly admissible as a matter relevant to sentence.

Now to explain in more detail.

1. Because the Term "Mitigation" Used by the Electorate in Section 190.3 Had a Then-Recognized Meaning Permitting Consideration of the Impact of a Sentence on the Defendant, the Electorate Is Presumed to Have Intended the Same Meaning in Section 190.3

The primary goal of statutory construction is to determine the intent of the entity that enacted the statute and so effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) This principle applies to statutes passed by the electorate through the initiative process. (See, e.g., *People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.)

In determining the intent behind any particular statute, a court looks first to the words of the statute. (*DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal.4th at p. 387.) Where the language of a statute includes terms that

already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms have been used in the same way. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216. See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.) Again, this principle applies to legislation adopted through the initiative process. (*In re Jeanice D.*, 28 Cal.3d at p. 216.)

As we have noted, the statute governing admission of evidence at the penalty phase of appellant Nguyen's capital trial was passed by the electorate in 1978. It provides that the parties may introduce evidence "as to any matter relevant to aggravation, mitigation, and sentence . . . ." (§ 190.3.)

The term "mitigation" was not new to the 1978 statute. In fact, prior to the 1978 law, the same term had been used repeatedly in sentencing statutes and in court rules governing sentencing.[219]

For example, at the time the electorate voted on the 1978 law, Penal Code section 1203, subdivision (b) provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (c)(3) of that section went on to provide that a grant of probation was appropriate if the trial court found "circumstances in mitigation . . . ." Similarly, Penal Code section 1170, subdivision (b) — which governed a trial court's selection of sentence among upper, middle and lower terms of imprisonment when probation was denied — provided for a middle term of imprisonment unless there were circumstances in "aggravation or mitigation."

There is little dispute as to the meaning of the phrase "mitigation" in the context of these other statutes. At the time the electorate enacted section 190.3 in 1978, both section 1203 and 1170, subdivision (b) had

---

[219] The sentencing Rules of Court have the force of law. (*People v. Price* (1984) 151 Cal.App.3d 803, 816 fn. 8.)

court rules drafted to implement them. Former Rule of Court 414 set forth "criteria affecting probation," designed to implement the inquiry into aggravation and mitigation mandated by section 1203. Rule 414 provided that in deciding if there was mitigation for purposes of whether to grant probation, the court was required to consider a number of factors, including the actual impact of the sentence "on the defendant . . . ."

Similarly, former Rules of Court 421 and 423 set forth aggravating and mitigating factors designed to implement the inquiry into aggravation and mitigation mandated by section 1170. The advisory committee note to Rule 421 made clear that "the scope of 'circumstances in aggravation or mitigation' under section 1170(b) is . . . coextensive with the scope of inquiry under the similar phrase in section 1203." As this note shows, aggravation and mitigation have the same meaning under both section 1203 and 1170.

In describing the type of evidence admissible at a penalty phase trial, the 1978 electorate used the very same term used in sections 1203 and 1170. As noted above, at the sentencing phase of a capital trial, section 190.3 permits the admission of "any matter relevant to . . .mitigation . . . ." Pursuant to the principles of statutory construction discussed above, "the presumption is almost irresistible" the term "mitigation" as used in section 190.3 was intended to have the same meaning as the identical term had in sections 1203 and 1170. (See *In re Jeanice D.*, 28 Cal.3d at p. 216.) Indeed, at least one court has explicitly recognized "the mitigating and aggravating circumstances set forth in the determinate sentencing guidelines are also proper criteria" in selecting a sentence under section 190.3. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) Because the term "mitigation" in sections 1203 and 1170 included the actual impact of a

sentence "on the defendant," it should be given the same meaning in section 190.3.

In making this argument, appellant is aware that on a number of occasions this Court has held the specific evidence at issue here is inadmissible at a penalty phase because it does "not depict an aspect of [the defendant's] character or record." (*People v. Daniels* (1991) 52 Cal.3d 815, 877; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.) The factual premise of these cases is entirely correct. Evidence of the nature of a sentence of life without parole does not directly relate either to the background and character of the defendant or the nature of the crime. But for purposes of the statutory question at issue here, that is quite beside the point.

Indeed, the electorate could not have been clearer. Section 190.3 makes explicit that at a penalty phase, the parties may introduce "*any matter* relevant to aggravation, mitigation, and sentence including, *but not limited to* the nature and circumstances of the present offense . . . and the defendant's character, background, history, mental condition and physical condition." In other words, the electorate has specifically provided penalty phase evidence is *not* limited to evidence that relates to the defendant's character or the crime itself. To the extent this Court's precedents exclude evidence of the nature of a sentence of life without parole because irrelevant to these two areas, those precedents did not take into account the plainly expressed will of the electorate that penalty phase evidence is "*not* limited to" these two areas. (*People v. Williams* (2004) 34 Cal.4th 397, 405 ["cases are not authority for propositions not considered"]; *People v. Barragan* (2004) 32 Cal.4th 236, 243 [same].)

As discussed above, applying well-established principles of statutory construction to section 190.3 compels the conclusion that the electorate

intended to permit defendants in capital cases the same ability that defendants in non-capital cases had to introduce and rely on the actual impact of a particular sentence on the defendant. The trial court's contrary ruling in this case was error.

2. Section 190.3's Explicit Provision That a Defendant Can Introduce "Any Matter Relevant to . . . Sentence" Independently Permits a Defendant to Rely on the Harsh Nature of a Sentence of Life Without Parole

Even if the phrase "mitigation" did not have a well-recognized meaning at the time section 190.3 was passed by the electorate, or even if this Court were to hold the electorate intended the term "mitigation" in section 190.3 to mean something distinct from "mitigation" in sections 1203 and 1170, the trial court's ruling in this case would still be erroneous. That is because section 190.3 does not merely permit evidence as to "aggravation" and "mitigation." Instead, by its very terms, it broadly permits evidence "as to any matter relevant to aggravation, mitigation, *and sentence* . . . ."

In determining what the electorate intended by authorizing evidence "as to any matter relevant to aggravation, mitigation *and sentence*," it is important to note that the electorate must have intended the "sentence" component of the phrase to mean something different from evidence relating to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." (*State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1046. Accord *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)

It is also important to note the breadth of the statutory language. The statute does not purport to narrowly define the type of evidence which can be presented in connection with the sentence. Instead, the statute broadly permits "any matter" relevant to the sentence.

As discussed above, at the time section 190.3 was enacted, the law generally permitted a court to consider how a sentence would actually impact the defendant in selecting an appropriate sentence for that defendant. Assuming that use of the phrase "any matter relevant to. . . mitigation" was not intended to incorporate this same flexibility into section 190.3, such evidence would fall squarely within the phrase "any matter relevant to . . . sentence." After all, as the case law, statutes and court rules had recognized prior to 1978, the actual impact of a sentence on the defendant is not only relevant to the sentence, *it is a factor which court rules themselves specifically required the trial court to consider.* (See Rule 414.) And, as noted above, section 190.3 goes on to state the evidence admissible at a penalty phase is "*not* limited to [the capital offense, the defendant's prior criminality] and the defendant's character, background [and] history." (§ 190.3.)

Moreover, in deciding the intent behind this particular provision of section 190.3, there is another principle of construction that is relevant. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (See e.g., *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Here, given the background against which section 190.3 was enacted in 1978 (involving sentencing rules and case law that required consideration as to the impact of a sentence on the defendant) and the electorate's use of the extremely broad phrase "any matter relevant to . . . sentence," it is certainly reasonable to

conclude the electorate intended to permit defendants to rely on such evidence in capital cases as well as non-capital.[220]

C. The Eighth Amendment Requires That at the Penalty Phase of a Capital Trial, the State May Not Preclude the Defense from Introducing Accurate Information about Life Without Parole

Even if the electorate did not intend evidence of the nature of a sentence of life without parole to be a proper consideration in the capital sentencing process, there is an independent reason such information is properly considered by the

---

[220] Interpreting section 190.3 to permit sentence impact would also avoid a construction of the statute raising a serious constitutional question. When a statue is susceptible of two or more interpretations, one of which raises constitutional questions, the court should construe it in a manner that avoids any doubt regarding its validity. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.) Here, California law explicitly requires the sentencer, in selecting an appropriate and reliable sentence in the *non-capital* context, to consider the actual impact of a sentence on the defendant. (See former Rule 414.) Accepting the trial court's approach in this case would mean that only as to capital cases is consideration of this same information in fashioning an appropriate and reliable sentence precluded.

This approach is squarely contrary to the thrust of the Supreme Court's capital jurisprudence. Recognizing the qualitatively different punishment involved in a capital case, the Court has repeatedly concluded the protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants. (See *Ake v. Oklahoma* (1984) 470 U.S. 68, 87 [Burger, C.J., concurring]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18 [O'Connor, J., concurring]; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-06.) But allowing exclusion of the evidence proffered below would mean the current California scheme adopts precisely the opposite approach, singling out capital defendants for *less* protection. As such, embracing an interpretation of section 190.3 that preclude this evidence in capital cases would raise serious equal protection concerns. Such an interpretation of section 190.3 is to be avoided.

sentencer. The Eighth Amendment requirement of reliability in capital cases requires admission of such evidence.

To be sure, as appellant has noted, this Court rejected such an argument. (*People v. Thompson*, *supra*, 45 Cal.3d at pp.138-139.) Subsequent cases have reached the same result, often citing *Thompson*. (See, e.g., *People v. Daniels*, *supra*, 52 Cal.3d at p. 877, *People v. Fudge*, *supra*, 7 Cal.4th at p. 1117.)

Thompson, however, is inconsistent with decisions of the Supreme Court and should be reconsidered. First, the Supreme Court has held that at the sentencing phase of a capital trial, the state is permitted to introduce accurate information about the life-without-parole sentencing option that the jury is considering. (*California v. Ramos* (1983) 463 U.S. 992, 1009.) In *Ramos*, the Supreme Court addressed whether it was permissible for the state to instruct a capital jury about the Governor's power to commute a sentence of life without parole. The Court first noted that "the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition." (463 U.S. at p. 1006.)

The Court recognized the information conveyed by the challenged instruction was not directly relevant to the defendant's character. Thus, the Court noted the instruction "places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case." (*Id.* at p. 1006.) This "additional element" was one of the "myriad of factors" and "countless considerations" which the jury could weigh in determining whether a defendant should live or die. (*Id.* at p. 1008.) In holding the state was entitled to provide this information to the jury, the Court noted that the instruction at issue was "merely an accurate statement of a potential sentencing alternative" which "supplies the jury

with accurate information for its deliberation in selecting an appropriate sentence." (*Id.* at p. 1009.)

The position of appellant in the current case is simple. If the federal Constitution permits the state to introduce some accurate information about the non-death option the jury is considering, Due Process and the Eighth Amendment requirement of reliability require the defendant also be permitted to introduce accurate information about that option. (Cf. *Payne v. Tennessee* (1991) 501 U.S. 808, 820-826 [the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state] and 833 [Scalia, J., concurring] [holding that the Eighth Amendment could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors."]; *Simmons v. South Carolina* (1994) 512 U.S. 154 [accurate information about non-death option required by Due Process].)

Ironically, perhaps the most persuasive arguments for applying *Ramos* to the life-without-parole evidence in this case come from the California Attorney General in *Ramos* itself. In successfully urging the Supreme Court to approve provision of accurate information regarding the life without parole option, the state's thesis was that "[a] convicted murderer has no constitutional right to have accurate information regarding the effect of the alternative sentence concealed from the jury." (*California v. Ramos*, 81-1893, Brief for the State of California at p. 24.) As the state correctly noted, "[i]f jury sentencing is considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system . . . surely the Constitution does not require that the jury be kept in the dark regarding the possibility of parole." (*Id.* at p. 35.) The state recognized that in selecting between life and death, the reliability of the jury's decision was enhanced by accurate information regarding both punishments:

> "[I]t appears reasonable to postulate that when a choice between punishments is to be made, whether by a jury or a judge, that choice may be more rationally made if the alternatives are understood. Conversely, the risk of an erroneous decision may be increased if the sentencer's perception of either alternative punishment is distorted."

(*Id.* at p. 45.)

Every one of the state's points in *Ramos* is equally applicable to evidence about the nature of a life-without-parole sentence. If a convicted defendant has no right "to have accurate information regarding the effect of the [life-without-parole option] concealed from the jury," there is no logical reason why the state should have that right. If one purpose of jury sentencing is "to maintain a link between contemporary community values and the penal system" — and that purpose "does not require that the jury be kept in the dark regarding the possibility of parole" — that same purpose would apply equally regarding the nature of a life-without-parole sentence. And given the state's recognition that the choice between life and death would "be more rationally made if the alternatives are understood" — and that the risk of error is "increased if the sentencer's perception of either alternative punishment is distorted" — accurate information about how a life-without-parole sentence will be carried out will not only make the process more "rational" but will decrease the risk of error.

That such evidence should be admitted is all the more clear in light of a Supreme Court development since *Thompson*. *Thompson* pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment for mitigating evidence. (*Smith v. Texas* (2004) 543 U.S. 37, 44, internal quotation marks omitted; *Tennard v. Dretke* (2004)542 U.S. 274, 284-285.) As these subsequent cases recognize, the Eighth Amendment does not permit a state to exclude evidence that "might serve as a basis for a sentence less than death." (*Tennard*, *id.* at p. 287, internal quotation marks omitted.) So long as a "fact-finder could reasonably deem" the evidence to

have mitigating value, a state may not preclude the defendant from presenting it. (*Smith v. Texas*, 543 U.S. at p. 44.)

Evidence as to the nature of a life-without-parole sentence is plainly relevant under *Smith* and *Tennard*. As in *Ramos*, testimony about such a sentence is simply an "accurate statement of a potential sentencing alternative" that "supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." (*Ramos*, 463 U.S. at p. 1009.) Just as in *Ramos*, this evidence is an "additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case." (*Id.* at p. 1006.) This Court's decision in *Thompson* should be reconsidered.

D. The Trial Court's Exclusion of the Proffered Evidence Requires a New Penalty Phase

As we have shown, the exclusion of the testimony of Normal Morein violated the Eighth Amendment and due process. Moreover, since appellant had a state law right to introduce the evidence, the trial court's violation of that right also violated due process in a second way. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [state court's denial of state created right not only violated state law, but also violated defendant's federal constitutional due process rights as well].) Because of the federal dimensions to this error, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. at p. 24.)

The result is the same if the error is considered purely a matter of state law, since the prejudice test for state law error at the penalty phase is essentially equivalent to the *Chapman* standard. "[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v.*

Brown (1988) 46 Cal.3d 432, 448. See also *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11 ["Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman* . . . ."], *People v. Ochoa* (1998) 19 Cal.4th 353, 479 [similar]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [similar].)

Applying any standard of review requires a new penalty phase. For this was not a case bereft of mitigation. For one thing, as the trial court noted, a "vital aspect" of mitigation was that appellant had "not had the benefit and the advantages that some of the other people have in our society." (30 RT 5770.) In addition, appellant was young, only 19 years old at the time of the first offense of which he was convicted, 20 at the time of the last one. And perhaps even more salient was — or would, in the absence of error, have been — lingering doubt as to the guilt-phase verdicts. As should be apparent from the Statement of Facts and from many of the arguments challenging the guilt-phase verdicts, the evidence against appellant was far from overwhelming as to any of the convictions. Quite the contrary. For, with one exception, those convictions were based on witnesses who had motives to lie or whose identifications of appellant were inconsistent with prior statements and/or prior identifications, or who both had a motive to lie *and* had changed their stories over time. The lone exception is the shooting of Tuan Pham, and there, even assuming appellant was the driver (and there was no direct evidence on the point), surely it was highly mitigating that — as the trial court itself pointed out — Tuan Pham "was actively seeking to kill the defendant" at the time he was shot. (31 RT 6082.)

Under these unusual circumstances, a jury with a full and accurate understanding of a life-without parole sentence — that is, a jury knowing the answer to the question "how much punishment does LWOP really exact"[221] —

---

[221] 28 RT 5546 (Morein's testimony).

could (and most likely would) have concluded that a life-without-parole sentence was a severe enough punishment for crimes that were very morally blameworthy but about which there was a lingering doubt of guilt. Especially is this likely if the jury had appreciated the useful work that appellant could have contributed if sentenced to life without parole. Certainly, it cannot be concluded beyond all reasonable doubt that the errors in excluding this evidence that "would bear on . . . how much punishment does LWOP really exact" (28 RT 5546) did not contribute to the verdict. (*Chapman v. California*, 386 U.S. at p. 24.) There is at least "a reasonable possibility" that a different outcome would have occurred in the absence of the errors. (See *People v. Jones*, 29 Cal.4th at p. 1264, fn. 11.)

2. THE TRIAL COURT UNCONSTITUTIONALLY LIMITED DEFENSE COUNSEL'S ARGUMENT TO THE PENALTY JURY

Not only did the trial court preclude the defense from introducing evidence from Mr. Morein concerning the nature of a sentence of life without parole, but the court also precluded defense counsel from even arguing about the harshness of serving such a sentence. For, when it excluded Morein's testimony, the court warned counsel against arguing anything related to the type of life led by a prisoner serving life without parole, and later the court sustained a prosecution objection when defense counsel merely started to talk about how an LWOP sentence would confine appellant for the rest of his life to a small cell with a metal door. (28 RT 5613, 30 RT 5831.)

Nor did the court stop here. It also precluded the defense from discussing "any of the future possible impact prison may have on a person," and it forbade counsel from commenting on other well-known cases where life without parole was imposed. (28 RT 5613; 30 RT 5770-5771.)

All of these rulings were erroneous. Even the cases that have upheld the exclusion of evidence with respect to the nature of an LWOP sentence do explicitly authorize defense counsel to argue that matter to the jury. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159-1160 ["characterizing the full nature of a sentence of life in prison without the possibility" is "proper argument" by defense counsel and "permissible"]; *People v. Daniels* (1991) 52 Cal.3d 815, 877-878 [defense could point out to jury the "rigors of confinement"]; *People v. Thompson* (1988) 45 Cal.3d 86, 131 fn. 29 ["Defense counsel's remarks to the jury during closing argument as to what life without possibility of parole would really mean . . . were also within the scope of legitimate argument to the extent the remarks impressed on the jury the gravity of its task."].)

The situation is more complicated with respect to the trial court's decision to preclude defense counsel from commenting on other well-known cases where life

without parole was imposed. On the one hand, this Court has uniformly upheld such restrictions. (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1130-1131; *People v. Benavides* (2005) 35 Cal.4th 69, 110-111; *People v. Hughes* (2002) 27 Cal.4th 287, 400; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529.) On the other hand, the Court has permitted *prosecutors* to allude to well-known cases in their arguments. (*People v. Jablonski* (2006) 37 Cal.4th 774, 836-837; *People v. Jones* (1997) 15 Cal.4th 119, 179-180; *People v. Bloom* (1989) 48 Cal.3d 1194, 1213.) Appellant finds it difficult to reconcile the substance of these two lines of decisions. If it is permissible for a prosecutor to use "well-known examples of [other] murders to illustrate his point regarding the limits of the defense of insanity" in a capital case,[222] it would seem permissible for defense counsel to use well-known examples of other murders to show the limits of the death penalty.

Moreover, even if counsel's argument were viewed as an effort to inject a form of comparative proportionality review into the jury's decision-making process, that would not justify the trial court's actions here. For, accepting arguendo that proportionality review is not required by the Eighth Amendment or by California law, the fact that death sentences have been reduced in other states based on intercase proportionality review shows beyond dispute that such a comparison "might serve as a basis for a sentence less than death"and that "a fact-finder could reasonably deem" such a comparison to have mitigating value. (See *Tennard v. Dretke*, 542 U.S. at p. 287, internal quotation marks omitted; *Smith v. Texas*, 543 U.S. at p. 44.) Thus, even if a state may exclude proportionality evidence, it violates the Eighth Amendment to preclude counsel from making any reference to it whatsoever, as the trial court did here.

Nor was it justifiable for the court to have precluded all reference to "any of the future possible impact prison may have on a person." (28 RT 5613-5614.) As

---

[222] *People v. Jones*, 15 Cal.4th at page 180.

we have pointed out, appellant was only 19 to 20 years old at the time of the offenses of which he was convicted. An individual of that age remains more susceptible to immature and irresponsible behavior than an older person with a more fully formed character, and thus a jury could well conclude that prison would indeed have a favorable impact upon appellant, that his character deficiencies would be reformed in prison, so that it was not necessary nor appropriate to sentence him to death. Yet, the trial court precluded counsel from arguing the matter.

These rulings by the trial court were erroneous. They each violated appellant's Sixth, Eighth, and Fourteenth Amendment rights to the effective assistance of counsel, to the due process of law, to present a defense, to freedom from cruel and unusual punishment, and to a reliable, non-arbitrary penalty determination. Moreover, they also violated appellant's well-established constitutional right to have counsel present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862.)

The final question here is whether the prosecution can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, 386 U.S. at p. 24.) Given the mitigating factors discussed in the preceding argument (AOB § IX.1.D, pp. 402 et seq.), the answer to this question is, "no." Respondent cannot establish to the requisite degree of confidence that the death verdict would have been returned if trial counsel had been allowed to bring any or all of these mitigating themes to the jury's attention. A reversal is called for.

3. CONFLICTING INSTRUCTIONS WERE GIVEN WITH RESPECT TO THE NEWLY INSTALLED ALTERNATES' ABILITY TO CONSIDER LINGERING DOUBT

This Court has made clear that, at the penalty phase of a capital trial, a jury may consider lingering doubt as to the guilt of the accused. (*People v. Terry* (1964) 61 Cal.2d 137, 145-147; *People v. Cox* (1991) 53 Cal.3d 618, 677-678.) "[G]uilt may be conclusively presumed as a matter of law and yet as a moral question the penalty phase jurors could personally retain some lingering doubt about whether defendant in fact killed [the victims]." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.) Indeed, this Court has noted not only that California is one of those jurisdictions that "have recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial" (*People v. Gay* (2008) 42 Cal.4th 1195 at p. 1221), but also that lingering doubt may often be the best defense: "As other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.'" (*Id.* at p. 1227, citations omitted.)

At the beginning of appellant's penalty trial, before any aggravating and mitigating evidence was presented, two alternate jurors were substituted into the jury. (28 RT 5588.) Thereafter, at the conclusion of the penalty phase, the jury was instructed that after full consideration of the evidence presented at the guilt phase, it could consider lingering doubt in making its penalty determination. (30 RT 5846:9-16.) But the instructions elsewhere focused on the newly installed alternates, telling them that in their penalty deliberations, they "must accept the guilt phase verdicts and findings during deliberations on the appropriate penalty." (30 RT 5845:22-24.)

There is at least a reasonable likelihood that the former alternate jurors would have seen these two instructions as inconsistent. For one thing, the distinction between a reasonable doubt and a lingering doubt is a subtle and sophisticated one, unfamiliar and unintuitive to lay persons. And whatever chance

the alternates at appellant's penalty trial might have had of grasping this distinction was lost because of the instruction that singled out the former alternates and told them that they "must accept the guilt phase verdicts and findings." For, in trying to make coherent sense of the unaccustomed instructions, the former alternates would naturally try to figure out why the instruction to "accept the guilt-phase verdicts" distinguished between the former alternates and the jurors who had sat at the guilt phase. After all, it was not just alternates who were required to "accept the guilt phase verdicts and findings during deliberations on the appropriate penalty." All jurors were so required, even those who had returned those verdicts and findings. By imposing the limitation solely on the former alternates, the instructions communicated that the alternates were under a limitation that the rest of the jurors were not, and in trying to harmonize the instructions, the former alternates would likely have concluded that their duty to "accept the guilt phase verdicts" meant they did not have the same right as other jurors to consider lingering doubt.

The situation in the present case may, on the surface, seem quite similar to that confronting this Court in *People v. Cain* (1995) 10 Cal.4th 1, where no error was found, but actually there are crucial differences. In *Cain*, as in the present case, an alternate juror seated during the penalty phase was told that she "must accept the verdicts and findings rendered by the jury in the guilt phase of the trial," and an instruction was given on lingering doubt. (*Id.* at pp. 64-65.) But unlike the situation in the present case, the instructions in *Cain* did not stop there. As emphasized in the Court's decision, the *Cain* instructions also (1) stated that the alternate juror was to "'participate[] fully in the deliberations, *including such review as may be necessary of the evidence presented in the guilt phase of the trial*'" and (2) directed "the original jurors . . . to 'set aside and disregard' any earlier deliberations and to begin their deliberations anew, with the substituted juror, '*with respect to the evidence presented in the guilt phase of the trial.*'" (*Id.* at pp. 66-67, all emphases in original.) Thus, the *Cain* instructions "made clear not

only that lingering doubts as to guilt could be considered in mitigation, but also that the penalty phase jury was to deliberate on this question as an integrated whole, to set aside any previous discussion on the question, and to review in its common deliberations any relevant guilt phase evidence." (*Id.* at p. 67.) Those instructions "command[ed] the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, *including any review they conducted of the guilt phase evidence*." (*Ibid.*, original emphases.) Unless this Court were now to find that the language it emphasized in *Cain* was actually unimportant to the decision, the *Cain* decision shows that error occurred here in appellant Nguyen's case.

The error is of both state and federal constitutional law. For while the Constitution may not directly require penalty juries to consider lingering doubt (*Franklin v. Lynaugh* (1988) 487 U.S. 164), it does require that a state's death penalty be applied in a rational, even-handed, non-arbitrary manner that results in a reliable determination that death is the appropriate penalty, and the instructional error that occurred here violated those requirements. Moreover, having recognized as a matter of state law the existence of a lingering doubt defense, the state, as a matter of constitutional imperative, must ensure that its relevance is effectively conveyed to the sentencing jury. (*Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"]; *U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"].) Thus, the error should be assessed under the federal *Chapman* standard. (*Chapman v. California*, 386 U.S. at p. 24.) But it does not matter what test is used, because reversal is required under this state's

standard. For here, given the importance of lingering doubt to the penalty determination, there is at least "a reasonable possibility" that a different outcome would have occurred in the absence of the instructional error. (*People v. Jones*, 29 Cal.4th at p. 1264, fn. 11. See also *People v. Brown*, 46 Cal.3d at p. 448, *People v. Ochoa*, 19 Cal.4th at p. 479.)

4. THE JUDGMENT AGAINST APPELLANT VIOLATES THE FEDERAL CONSTITUTION BECAUSE APPELLANT'S CAPITAL TRIAL WAS CONDUCTED, AND/OR HIS APPEAL IS BEING CONDUCTED, BEFORE JUDICIAL OFFICERS WHO EITHER HAD TO WIN, OR STILL HAVE TO WIN, A VOTE OF THE POPULACE IN ORDER TO STAY IN OFFICE AND WHO THUS HAD OR HAVE A MOTIVE, INCENTIVE, AND TEMPTATION TO RULE AGAINST HIM

It has long been settled that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (*Tumey v. Ohio* (1927) 273 U.S. 510, 532.) This basic tenet of constitutional law was and is violated in appellant's case. (See also, e.g., *Caperton v. A.T. Massey Coal Co.* (2009) 129 S. Ct. 2252, 2259 ["A fair trial in a fair tribunal is a basic requirement of due process."], citations omitted.)

In California, superior court judges and the justices of this Court are subject to periodic voter approval, in either contested elections or in approval or retention elections. Thus, they face the possibility of removal if they make a controversial and unpopular decision. Decisions and rulings in death penalty cases can become highly political and controversial, jeopardizing the judge's or justice's continued tenure in office. But only one kind of decision in a death-penalty case puts the judge or justice at risk: a decision in favor of a capital defendant or appellant. Whereas cases are common where a judicial officer lost an election because of voting in favor of a capital defendant, no judge or justice ever lost his or her job by being "tough" on capital defendants. The result is a tilted system that violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process and a fair proceeding before a fair tribunal, to the effective assistance of counsel, to a reliable and non-arbitrary determination that death is the appropriate penalty, and to freedom from cruel and unusual punishment.

A. Historical Context

At the time of the adoption of the United States Constitution, which is the benchmark for the protection afforded by the due process clause (see, e.g., *Medina v. California* (1992) 505 U.S. 437, 445-46), it was firmly established that English judges qualified to preside in capital cases had tenure during good behavior. More than 75 years earlier, in 1701, a provision requiring that "Judges' Commissions be made *quamdiu se bene gesserint* [during good behavior]" was considered sufficiently important to be included in the Act of Settlement (see W. Stubbs, *Select Charters* 531 (5th ed. 1884)); and in 1760, a statute ensured judges' tenure despite the death of the sovereign, which had formerly voided their commissions. (See W. Holdsworth, *History of English Law* (7th ed., A. Goodhart and H. Hanbury rev. 1956) at p. 195.) Blackstone quoted the view of King George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown." (Blackstone, *Commentaries on the Laws of England* (1765) *258.)

The Framers of the Constitution, who included in Article III of the Constitution the protection of tenure during good behavior for federal judges, would not likely have taken a looser view of the importance of this due process requirement than King George III. In fact, the Framers used the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" to partly justify the Revolution. (Declaration of Independence (1776) ¶ 11; see Smith, An Independent Judiciary: The Colonial Background (1976) 124 U. Pa. L. Rev. 1104, 1112-1152). Our founding fathers were well-aware that "there is no liberty" without a truly "independent judiciary." *(The Federalist No. 78* [Alexander Hamilton], at p. 523, citing Montesquieu, *Spirit* of *the Laws*.) Such independence ensures that courts serve as a "citadel of the public justice and the public security." *(Id.* at p. 524.) The genius of the system is that the basic rights of

the unpopular and powerless are to be protected by the Constitution from the will of the majority. (See *Griswold v. Connecticut* (1965) 381 U.S. 479, *Brown v. Board of Education* (1955) 349 U.S. 1083.)

At the time of the Constitution's adoption, none of the states permitted judicial elections. (*Smith, id.* at pp. 1153-1155.)

B. California History

Unlike the federal Constitution, the California Constitution of 1849 provided for direct election of judges by the citizenry. This system is inherently problematic because the resulting lack of independence of judges from political pressures has raised the specter of over-politicization of the often emotionally charged capital review system. Or, put another way, a primary "reason for the reluctance to reverse in criminal case — even in the face of serious procedural error — is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticized for affirming convictions, only for reversing them." (Mathieson and Gross, Review for Error (2003) 2 Law, Probability & Risk 259, 267.)

In this state, the most famous examples of politicization involve the justices of this Court, starting with the successful 1986 campaign to remove Chief Justice Rose Elizabeth Bird and two associate justices, which was "a classic example" of the politicization of the process of judicial review. (*Ibid.* fn. 30.) That campaign was successful primarily because of the Court's reversal rate in death penalty cases. (See Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California* (1990) 23 U.C. Davis L. Rev. 160, 209 [hereafter "Poulos"]; *People* v. *Cox* (1991) 53 Cal.3d 618, 696 [the ousted justices were "the objects of a strenuous and well publicized campaign to unseat them at the impending retention election. It coalesced around the high percentage of death penalty reversals"].)

Recognizing the dangers, the current Chief Justice has made ongoing and commendable efforts to "protect the neutrality of judges and minimize politicization of the judicial branch" by proposing amendments to Article VI of the California Constitution, including increasing judges' terms from six to ten years. (See McCarthy, *Bench, Bar Mull Overhaul of State Court System* (April 2005) California Bar Journal, at pp. 1, 7.) Though these efforts are both praise-worthy and appropriate, they also represent persuasive acknowledgment that politics can easily affect California's judiciary.

There has been no subtlety in the attacks on justices who have ruled in favor capital defendants. In the successful campaign against the three justices in 1986, then-Governor George Deukmejian "served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election." (*Geary v. Renne* (9th Cir. 1990) 911 F.2d 280, 290 fn.8 (conc. opn. of Reinhardt & Kozinski, JJ.).) He not only targeted Chief Justice Bird but openly threatened to oppose Justices Reynoso and Grodin unless they voted to uphold more death sentences, and then he carried out his threat when they failed to live up to his standards. (Bright and Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases* (1995) 75 Boston Univ. L. Rev. 759, 760-761; Grodin, *Judicial Elections: The California Experience* (1987) 70 Judicature 365, 367.) Less than two years later, Governor Deukmejian announced that he had "now had an opportunity to appoint five new justices to the state supreme court," proclaiming that whereas "Chief Justice Rose Bird upheld only four death sentences in nine years[,] [i]n just the last year and a half, the new supreme court, under the leadership of Chief Justice Malcolm Lucas has affirmed 43 cases." (*Poulos, op cit. supra*, at p. 220, fn. 336 [quoting from transcript of radio broadcast].)

The 1986 election outcome "remains fresh in the minds of jurists who want to avoid being seen as stepping into controversies too willingly." (Amar,

Adventures in Direct Democracy: The Top Ten Constitutional Lessons From the California Recall Experience (2004) 92 Cal. L. Rev. 927, 939.) As well it should, since making menacing noises about the handling of death penalty cases has become almost routine for politicians. Thus, for example, Governor Gray Davis declared that "[a]ny judge I appoint will understand my strong support for public safety, long-standing commitment to the death penalty . . . ." (Weinstein, *Sparring for Best Crime-Fighting Honors,* Los Angeles Times (Oct. 12, 1998) Part A, p. 3.) "The Governor [made] no secret of the fact that he strongly supports the death penalty, and he thinks it's important that those he appoints understand where he's coming from on that issue." (Off-Beat, *Judicial Litmus*, LA Weekly (July 9, 1999), citing Gov. Davis' press secretary Michael Bustamante.)

It is not surprising, then, that the current Chief Justice found it necessary to pointedly distinguish himself from former Chief Justice Bird during his retention election in 1998:

> "Hoping to win the Republican Party endorsement in September, the George campaign is trying to fend off conservative opposition by portraying the incumbent as an ideological opposite of Bird, who was ousted by voters twelve years ago because of her liberal opinions. One of George's brochures heralds his 'conservative record' and refers critically to Bird or the court she led no fewer than eight times. The brochure says the George court 'has restored common sense and individual responsibility to our civil justice system by overturning numerous Rose Bird-era precedents. George's campaign also wants to *remind voters of Bird's penchant for overturning death sentences, while playing up the George Court's 90 percent rate for upholding capital convictions* . . . ."

(Egelko, *George Goes Bird Hunting,* California Lawyer (June 1998), p. 17.)

Such campaign tactics caused Santa Clara law professor Gerald Uelmen to describe the Chief Justice as a "thoughtful judge who has risen above politics" but who, by "waving an anti-Bird banner, . . . allow[ed] [himself] to be perceived as a jurist who is 'willing to compromise his independence to win an election.'" (*Ibid.*)

This Court's affirmance rate in automatic appeals reinforces the concern, for of the last 200 such decisions (going back to January 2000), the Court has reversed the guilt-phase judgment in just two cases (1%), the special-circumstance judgment in one case (0.5%), and the penalty-phase judgment in ten cases (5%), leading to an overall affirmance rate of 93 percent.

Meaningful appellate review with non-arbitrary and non-capricious decision-making is a constitutional requirement for every capital sentencing jurisdiction, including California. The Supreme Court has regularly looked at the affirmance rates of the state court. For example, in the seminal decision of *Gregg v. Georgia* (1976) 428 U.S. 153, the lead opinion noted that "[i]t is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously" and recited various principles that the state court regularly relied upon as a basis for scrutinizing, and occasionally invalidating, death sentences. (*Id.* at pp. 205-206, opn. of Stewart, Powell, and Stevens, JJ.) In *Profitt v. Florida* (1976) 428 US. 242, the lead opinion observed that the Florida Supreme Court, "like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date." (*Id.* at p. 253 (opn. of Stewart, Powell, and Stevens, JJ.).) And similarly, in *Jurek v. Texas* (1976) 428 U.S. 262, the lead opinion observed that Texas "has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law." (*Id.* at p. 270 (opn. of Stewart, Powell, and Stevens, JJ.).)

Subsequently, in *Pulley v. Harris* (1984) 465 U.S. 37, the High Court was confronted with California's appellate review process and held that intercase proportionality review is not constitutionally required. (*Id.* at pp. 43, 45.) The Court did not overlook, however, that this Court's opinions included "many reversals in capital cases." (*Id.*, at p. 42, fn. 5.) In fact, the Court felt it significant

to observe that it was "aware of only one case besides this one in which the [state] court affirmed a death sentence." (*Ibid.*)

And in *Barclay v. Florida* (1983) 463 U.S. 939, Justices Stevens and Powell expressly cast their concurring votes because the Florida Supreme Court's reversal record refuted the contention that the state court failed to provide meaningful appellate review. Justice Stevens explained:

> "[Tlhe question is whether, in its regular practice, the Florida Supreme Court has become a stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence."

(*Id.* at p. 973 (conc. opn.).)

As the affirmance statistics make clear, however, California can no longer show such meaningful review of capital sentences. (See also Brace & Boyea, *State Public Opinion, the Death Penalty and the Practice of Electing Judges* (2009) 52 American Journal of Political Sciences, pp. 360-371 [showing that capital review systems such as the one used in California are prone to improper influences inconsistent with proper principles of due process].)

C. Further Corroboration

Arbitrariness and susceptibility to political influence have been identified as "disturbing" aspects of the imposition of the death penalty in not just California but throughout much of the United States. (International Commission of Justice, *Administration of the Death Penalty in the United States,* issued June 1, 1996.) Focusing on the influence of electoral politics on judges and district attorneys, the ICJ report found that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Specifically, the ICJ found that "among elected judges,

those who covet higher office — or those who merely wish to retain their status as judges — must constantly proclaim their fealty to the death penalty" and that "prospects of a fair hearing for capital offenders cannot . . . be assured." *(Ibid.)*

These concerns have been echoed in the highest court in the nation. For example, in her dispositive concurring opinion in *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, former Justice Sandra Day O'Connor wrote,

> "We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L.Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is '"like ignoring a crocodile in your bathtub"'); Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L.Rev. 759, 793-794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."

(*Id.* at pp. 788-789.)

And in his dissenting opinion in *Harris v. Alabama* (1995) 513 U.S. 504, former Justice John Paul Stevens addressed the political reality for judges and justices who handle capital cases and thereafter face the electorate, saying

> "The Framers of our Constitution 'knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority.' . . . . The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political

> climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III."

(*Id.* at pp. 519-520, quoting *Duncan v. Louisiana* (1968) 391 U.S. 145, 156, citation omitted.)

Scholars, too, have identified the due process problems of having elected judges preside over capital trials. "Judges ignore public attitudes in their political supporters at the peril of losing their position in the next election." (Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights* (2000) 78 Tex. L.Rev. 1805, 1832.) Another scholar has reported that a survey of ten states in which judges periodically face retention elections had found that a "high percentage of judges [] acknowledge that retention elections exert a major influence on their behavior." (Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, *supra*, 65 U. Colo. L.Rev, 739.) In fact, 27.6 percent stated that facing election made them "more sensitive to public opinion," and 15.4 percent conceded that facing election "prompts them to 'avoid controversial cases and rulings.'" (*Ibid.*) "[T]he survey suggests," Eule wrote, "that fear of losing plays a role even when losing is highly unlikely." (*Ibid.*)

In Texas, the Republican Party decided to take over the courts by running pro-death penalty campaigns after the Texas Court of Criminal Appeals reversed the death penalty in a particularly notorious case. (Bright & Keenan, *op cit. supra*, at pp. 761-762.) Similarly two justices were voted off the Mississippi Supreme Court for being soft on the death penalty as a result of ruling that the death penalty was not permitted in the case of a rape that did not result in the loss of life. Neither the voters nor the opponents of the judges were appeased by the fact that the United States Supreme Court had declared the death penalty unconstitutional in

such cases over ten years earlier, thus forcing the action of the Mississippi court. (*Id.* at pp. 763-765.)

In 1996, Tennessee Supreme Court Justice Penny White stood for a retention vote. A few months before the election, she had concurred in a decision that affirmed the conviction of Richard Odom but reversed his death sentence. In fact, the court was unanimous that the sentence had to be set aside, though the justices did not entirely agree upon on the reason. (*State v. Odom* (Tenn 1996) 928 S.W.2d 18.). At the time, Justice White was the newest member of the Court and the only one facing a retention vote. She was attacked for the decision, which she did not write, and that campaign lead to her removal from the Court. (See Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary* (1998) 14 Ga. State L. Rev. 817, 847-848.)

Thereafter, the same groups that successfully attacked Justice White went after United States District Court Judge John Nixon, successfully obtaining a vote in the Tennessee Senate urging Congress to begin impeachment proceedings against him and a resolution in the Tennessee House of Representatives urging that Nixon not be permitted to hear any more death penalty cases. (*Id.* at pp. 854-855.) These actions came despite the facts that neither body had any jurisdiction over Judge Nixon or the federal courts and that the United States Court of Appeals for the Sixth Circuit had upheld the very decisions for which Judge Nixon was being berated. (See also Bright & Keenan, *op. cit. supra* [other examples of judges losing their seats because of rulings in favor of capital defendants].)

Nevada, too, has a system of elected judges, and as one justice there wrote, "[i]f recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability." (*Beets v. State* (1991) 107 Nev. 957, 976, 821 P.2d 1044, 1057-58 (1991) (Young, J., dissenting). As another Nevada justice had noted, the lesson of an election campaign focusing

on the allegation that a justice of Supreme Court "wanted to give relief to a murderer and rapist" was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'" (Remarks of Rose, J., reported in Nevada Legislative Comm'n Subcomm. to Study the Death Penalty and Related DNA Testing Tr. (Feb. 21, 2002).)

What is particularly important about the turbulent seas faced by judges who make defense-favorable rulings in capital cases is that those decisions are necessarily compelled by the facts and by legal precedent, yet these niceties are irrelevant to those who attempt to remove the judges who have ruled in favor of capital defendants. The history of the electoral defeat of judges who make defense-favorable decisions in death penalty cases offers strong justification for the position of the American Bar Association that judges, given their role in our constitutional system of checks and balances, should not stand for election. (See *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence 96* (1997) ["The American Bar Association strongly endorses the merit selection of judges, as opposed to their election . . . . Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected . . . to work for the adoption of merit selection and retention"].)

As we have pointed out, the law is settled that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law" and is structural error. (*Tumey v. Ohio*, 273 U.S. at p. 532.) For a judge or justice subject to voter approval, there is an inherent conflict between the obligation to follow the law in a capital case and the desire for career self-preservation, and that conflict cannot pass constitutional muster.

5. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Appellant Nguyen has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[223] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

---

[223] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 108 Cal.Rptr.3d 87 at pages 169-170 and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379. See also, e.g., *People v. Collins* (2010) 2010 WL 2104766 at *60; *People v. Thompson* (2010) 2010 WL 2025540, at *45-*46; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills* (2010) 48 Cal.4th 158, 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

1. Factor (a): Section 190.3, subdivision (a) — which permits a jury to sentence a defendant to death based on the "circumstances of the crime" — is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (30 RT 5840.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[224] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Mills*, 48 Cal.4th at p. 213-214 ; *People v. Martinez*, 47 Cal.4th at p. 967 ; *People v. Ervine*, 47 Cal.4th at p. 810 ; *People v. McWhorter*, 47 Cal.4th at p. 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, 37 Cal.4th at pp. 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (30 RT 5841.) Evidence supporting this instruction had been admitted at the guilt phase, and the jury was authorized to consider such acts at the penalty phase pursuant to section 190.3, subdivision (b). The jurors were not told that they could rely on this factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth

---

[224] *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. D'Arcy*, 48 Cal.4th at p. 308 ; *People v. Martinez*, 47 Cal.4th at p. 967 ; *People v. Martinez*, 47 Cal.4th at p. 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (c): During the penalty phase, the state introduced evidence that appellant had had a prior felony conviction. (29 RT 5651-5652.) This evidence was admitted pursuant to section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (30 RT 5846-5847.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL

2104766 at *60; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170 ; *People v. Martinez*, 47 Cal.4th at p. 967; *People v. Schmeck*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Factors (b) and (c): At the penalty phase, the prosecution introduced evidence that appellant had a 1992 conviction for assault. (29 RT 5651-5652.) Testimony was also elicited at the guilt phase as to the underlying facts of this assault. At the penalty phase, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (30 RT 5841.) The introduction of the facts on which the 1992 was premised put defendant in jeopardy a second time for that offense in violation of the Double Jeopardy clause of the federal Constitution. This Court has rejected this argument. (See, e.g., *People v. Bacigalupo*, 1 Cal.4th at pp. 134-135.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (30 RT 5842.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, 48 Cal.4th at p. 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (30 RT 5840-5842.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. (30 RT 5840-5842.) These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-

arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, 48 Cal.4th at p. 308; *People v. Mills*, 48 Cal.4th at p. 214 ; *People v. Martinez*, 47 Cal.4th at p. 968; *People v. Schmeck*, 37 Cal.4th at pp. 304-305; *People v. Ray*, 13 Cal.4th at pp. 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

7. Failure to Narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, 48 Cal.4th at p. 308; *People v. Mills*, 48 Cal.4th at p. 213 ; *People v. Martinez*, 47 Cal.4th at p. 967; *People v. Schmeck*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 169; *People v. D'Arcy*, 48

Cal.4th at p. 308; *People v. Mills*, 48 Cal.4th at p. 213 ; *People v. Martinez*, 47 Cal.4th at p. 967 ; *People v. Ervine*, 47 Cal.4th at pp. 810-811 ; *People v. McWhorter*, 47 Cal.4th at p. 379; *People v. Schmeck*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

9. Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, 48 Cal.4th at p. 308; *People v. Mills*, 48 Cal.4th at p. 213 ; *People v. Martinez*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

10. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, 47 Cal.4th at p. 379; *People v. Carrington*, 47 Cal.4th at p. 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

11. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (30 RT 5853) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence,

and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, 47 Cal.4th at p. 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza*, 24 Cal.4th at p. 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, 48 Cal.4th at p. 308; *People v. D'Arcy*, 48 Cal.4th at p. 308-309; *People v. Mills*, 48 Cal.4th at p. 214 ; *People v. Martinez*, 47 Cal.4th at p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

13. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Mills*, 48 Cal.4th at p. 214 ; *People v. Martinez*, 47 Cal.4th at p. 968 ; *People v. Ervine*, 47 Cal.4th at p. 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

14. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights —

and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 2010 WL 2104766 at *60; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, 48 Cal.4th at p. 308; *People v. Mills*, 48 Cal.4th at p. 213 ; *People v. Martinez*, 47 Cal.4th at p. 968; *People v. Carrington*, 47 Cal.4th at pp. 198-199; *People v. Schmeck*, 37 Cal.4th at p. 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

15. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at p. 170 ; *People v. McWhorter*, 47 Cal.4th at p. 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

16. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

6. SHOULD APPELLANT BE DEEMED TO HAVE FORFEITED ANY ARGUMENTS OR ISSUES SET FORTH IN PART SIX OF THIS BRIEF AS A RESULT OF ACTS OR OMISSIONS BY HIS TRIAL COUNSEL, THEN APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The reasons why this Court must reverse the penalty judgment have been set forth in Section IX, pp. 352 et seq., *ante*, and in the preceding sections of Section X. However, if this Court were to conclude the appellant's trial counsel failed to preserve any of appellant's arguments or issues, or if it were to conclude that one or more of the objections or arguments by counsel was insufficient to allow the claim(s) or argument(s) to be raised on appeal, then appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington*, 466 U.S. 668.)

As we have pointed out earlier, although an ineffective assistance claim should normally be raised in a habeas petition, an appellate claim is appropriate when there simply can be no satisfactory explanation for the challenged inactions. (*People v. Pope*, 23 Cal.3d at p. 426). That would be the situation here. There clearly was no tactical reason for counsel to have failed to object or to have failed to make adequate objections. Nor could there be any satisfactory explanation for counsel's inactions. Under these circumstances, any failure by trial counsel to object or to object adequately would amount to the ineffective assistance of counsel. (See *People v. Lewis*, 50 Cal.3d at p. 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton*, 205 Cal.App.3d at p. 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].)

Moreover, the constitutional issues raised in this appeal are not waived by inadequate objection. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 117-118, 132; *People v. Coddington, supra*, 23 Cal.4th at p. 632.)

7. CUMULATIVE PREJUDICE FROM THE PENALTY PHASE ERRORS AND THE ERRORS FROM THE GUILT PHASE

Each of the errors described in Sections IX and X requires a new penalty trial for the reasons discussed. However, even the Court were to conclude otherwise, surely the cumulation of those errors was prejudicial under federal constitutional law, and this conclusion is even more unavoidable when the penalty-phase impact of the many guilt-phase errors is added to the prejudice calculation. The seriousness and number of errors compel the conclusion that appellant's penalty trial violated federal due process, deprived appellant of his Eighth and Fourteenth Amendment right to a reliable penalty determination, rendered the trial fundamentally unfair, and contributed to the verdict. (See *Chapman v. California*, 386 U.S. 18; *Estelle v. McGuire*, 502 U.S. 62; *Payne v. Tennessee*, 501 U.S. 808.)[225]

The same result would obtain even if the errors were all viewed purely as matters of state law and the inquiry were whether there is a reasonable possibility that a different outcome would have occurred in the absence of the errors. (*People v. Jones*, 29 Cal.4th at p. 1264, fn. 11, *People v. Ochoa*, 19 Cal.4th at p. 479, *People v. Brown*, 46 Cal.3d at p. 448; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; see *United States v. McAlister* (9th Cir. 1979) 608 F.2d 785.)

---

[225] When errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams, supra, 22* Cal.App.3d at pp. 58-59; see also *In re Rodriguez, supra,* 119 Cal.App.3d at pp. 469-470.)

CONCLUSION

For all of the reasons discussed in this brief, the guilt- and penalty-phase verdicts against appellant Lam Nguyen must be set aside, and the case remanded for dismissal of the verdicts for which there is constitutionally insufficient evidence and a new and fair trial as to the remaining counts.

DATED: June 20, 2010

Richard C. Neuhoff
Attorney for Appellant
Lam T. Nguyen

CERTIFICATE OF WORD COUNT

I, Richard C. Neuhoff, appellate counsel for appellant Lam T. Nguyen in the current case, hereby certify that the Appellant's Opening Brief was produced on a computer and that the brief contains 121,731 words, according to the word count of the computer program used to prepare the petition.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on June 20, 2010, at New Britain, CT.

RICHARD C. NEUHOFF

List of Witnesses by Count/Subject

Counts 2 & 3 re shooting of Tony Nguyen on July 21, 1994

Dam, Tinh Minh ("Little Elvis") (prelim. hrg. testimony admitted)
Davis, Golden Gate Police Officer Bruce E.
Fischer, Golden Gate Police Officer James
Lac, Vinh Kevin ("Doughboy")
Melancon, Gene (defense witness)
Mihalik, Golden Gate Police Officer Danny
Nguyen, Nen Thi (defense witness) (appellant's sister)
Nguyen, Phuong (defense witness) (appellant's sister)
Nguyen, Tony ("Chubby Cheeks")
Nye, Westminster Police Detective Mark D.
Sentman, Orange County Deputy Probation Officer Steven
Villanueva, Floriberto (defense witness)
Vu, Linda Thi (defense witness)
Vu, Thoa Thi ("Chynna")
Wilkerson, Tessa
Stipulations: Tinh Minh Dam deceased
Tony Nguyen's injuries, treatment, physical state

Counts 4 & 5 re shooting of Huy ("Peewee") Nguyen on November 24, 1994

Bui, Hoan Ngoc
Campbell, Golden Gate Police Officer Robert
Choeun, Chamroeun ("Shannon")
Davis, Golden Gate Police Officer Bruce E.
Kim, Me Young (defense witness)
Le, Phung ("Jimmy") (defense witness)
Lu, Phue Minh
Nguyen, Huy ("Peewee")
Nguyen, Khanh Troung ("Andy Ja") (defense witness)
Nguyen, Nen Thi (defense witness) (appellant's sister)
Nguyen, Phuong (defense witness) (appellant's sister)
Pham, Hung Van ("Mexican Andy") (defense witness)
Pin, Channtai ("Cindy" or "Chris")
Sentman, Orange County Deputy Probation Officer Steven
Tran, Joseph-Vu Song
Truong, Anh Huynh
Wilkerson, Tessa
Stipulation: Huy "Peewee" Nguyen's hospitalization and injuries

Counts 6 & 7 re death of Sang Nguyen on February 5, 1995

Clay, Grand Prairie, TX, Police Officer Dennis
Green, former Westminster Police Detective Thomas Michael
Hall, Charles Martin
Huynh, Khoi
Nguyen, Trieu Binh ("Temper")
Nguyen, Trieu Hai (defense witness)
Nye, Westminster Police Detective Mark D.
Pech, Malay Amy (defense witness)
Santaella, former Westminster Police Detective Louis J.
Selinski, Westminster Police Detective Terry J.
Singhania, Dr. Aruna
To, Bich Ngoc ("Michelle") (defense witness)
Vu, Linda Thi
Stipulation: re gang membership of Sang Nguyen's brother

Counts 9 & 10 re shooting of Khoi Huynh on March 11, 1995

Arnold, David Vincent
Bagstad, Michelle (defense witness)
Donahue, Golden Gate Police Officer Robert M.
Fujinaka, Warren (defense witness)
Huynh, Khoi Hoang
Lenart, Jeremy
McLaughlin, Orange County District Attorney Investigator Jeff
Nye, Westminster Police Detective Mark D.
Phan, Tin Duc ("Lucky") (defense witness)
Proctor, former Detective Michael Glen (defense witness)
Raygoza, Ignacio
Raygoza, Staci Murray
Strong, Orange County Sheriff Investigator Janet V.
Villalobos, Orange County Sheriff Deputy Felipe
Watkins, Daniel Bruce (defense witness)

Counts 11 & 12 re death of Duy Vu on May 3, 1995 (found not guilty)

Benigno, Sarah (defense witness)
Dalton, Scott Francis
Gammoh, Johnny (defense witness)
Hernandez, Juan
Katsuyama, Dr. David Masamichi
Mandy, Jeannette
Martina, Mary Grace
Nguyen, Van Thuy (defense witness)
Nye, Westminster Police Detective Mark D.
Proctor, former Detective Michael Glen (defense witness)
Selinski, Westminster Police Detective Terry J.
Tran, Hang Thi ("Monica")
Watkins, Daniel Bruce (defense witness)
White, Sally (testimony by stipulation)
White, Susan (defense witness)
Stipulations: prior statements and prior felony conviction of Jeanette Mandy

Counts 13 & 14 re death of Tuan Pham on May 6, 1995

Burchell, Shawn Denise
Choi, Jae S.
Cowan, Golden Gate Police Crime Scene Investigator Denise
Crutchfield, Orange County Sheriff Criminalist Laurie
Dinh, Dr. Dinh Van
Donahue, Golden Gate Police Officer Robert M.
Duong, Thiep Vinh (testimony by stipulation)
Feher, Golden Gate Police Investigator Michael Richard, Sr.
Finley, Westminster Police Officer Tom
Fischer, Golden Gate Police Officer James
Halka, Dr. Joseph J.
Martin, Golden Gate Police Officer Michael L.
Murray, Robert Wayne
Nguyen, Hoang
Nguyen, Hoang Viet
Nguyen, Tam
Nye, Westminster Police Detective Mark D.
On, Golden Gate Police Officer Vincent
Proctor, former Detective Michael Glen (defense witness)
Scalise, Golden Gate Police Officer Mike
Smith, Golden Gate Police OfficerMike
Turner, Orange County Sheriff Criminalist Jimmy Ernest

Vi, Golden Gate Police Officer Peter
Stipulations: Huu Tran owned Buick Regal, was in custody on 5/6/95
Minh Vo's fingerprints were on Buick Regal & on pistol at scene
Shawn Burchell chose Minh Vo's photo as man running from scene
gun seized from Huy Pham's car not connected to any charged crime
Tuan Pham's body had no shotgun pellets

Police Witnesses re gang charges and allegations
Frank, Westminster Police Detective Marcus
Nye, Westminster Police Detective Mark D.

Misc. Prosecution Guilt-Phase Witnesses
Ward, I.N.S. Inspector Gregory

Defense Guilt-Phase Witnesses re multiple counts
Nguyen, Lam Thanh (appellant)
Nguyen, Minh Tam
Pedzek, Dr. Kathy
Watkins, Daniel Bruce
Stipulation: brown jacket was seized from Amarillo Street residence

Prosecution Witnesses at Penalty Phase
Tran, Cai Thi

Defense Witnesses at Penalty Phase
Crinella, Francis Michael
Nguyen, Nen Thi (appellant's sister)